

Exposing the Myth of the Peaceable Kingdom: Trends and Themes in Recent Canadian Legal History

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Volume 41, Number 1, Winter/Spring 2012

URI: https://id.erudit.org/iderudit/acad41_1re02

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Publisher(s)

The Department of History at the University of New Brunswick

ISSN

0044-5851 (print)

1712-7432 (digital)

[Explore this journal](#)

Cite this article

Chambers, L. (2012). Exposing the Myth of the Peaceable Kingdom.: Trends and Themes in Recent Canadian Legal History. *Acadiensis*, 41(1), 247–256.

Exposing the Myth of the Peaceable Kingdom: Trends and Themes in Recent Canadian Legal History

CANADIAN LEGAL HISTORY IS NO LONGER IN ITS INFANCY, or even its adolescence, and has emerged as a cutting-edge sub-genre of the study of Canada's past. Legal history tells us important things about the development of Canadian national identity and the experiences of a wide variety of Canadian citizens. Law encodes social values that enforce hierarchies and particular ideas of who we are and how we should interact. The law is also a site for the contestation of these very hierarchies and ideas. The history of these tensions – law as mechanism of control and law as source of social challenge – provides insight into wider themes in Canadian history. Recent Canadian works in legal history, using a wide range of sources and exploring diverse themes, suggest the centrality of comparative and critical legal studies to a variety of subjects in Canadian legal history: 1) judges – John McLaren's *Dewigged, Bothered and Bewildered: British Colonial Judges on Trial, 1800-1900* (University of Toronto Press and the Osgoode Society for Canadian Legal History, 2011); 2) juries – R. Blake Brown's *A Trying Question: The Jury in Nineteenth-Century Canada* (University of Toronto Press and the Osgoode Society for Canadian Legal History, 2009); 3) individual lawyers – Philip Girard's *Lawyers and Legal Culture in British North America: Beamish Murdoch of Halifax* (University of Toronto Press and the Osgoode Society for Canadian Legal History, 2011); 4) individual cases – Robert Sharpe's *The Lazier Murder: Prince Edward County, 1884* (Toronto: University of Toronto Press and the Osgoode Society for Canadian Legal History, 2011); 5) racism and national identity – Barrington Walker's *Race on Trial: Black Defendants in Ontario's Criminal Courts, 1858-1958* (Toronto: University of Toronto Press and the Osgoode Society for Canadian Legal History, 2010); 6) the myth of the peaceful west – Lesley Erickson's *Westward Bound: Sex, Violence, the Law and the Making of a Settler Society* (Vancouver: University of British Columbia Press and the Osgoode Society for Canadian Legal History, 2011); 7) the Toronto Women's Court – Amanda Glasbeek's *Feminized Justice: The Toronto Women's Court, 1913-1934* (Vancouver: University of British Columbia Press, 2009); and 8) the law of sexual assault – Constance Backhouse's *Carnal Crimes: Sexual Assault Law in Canada, 1900-1975* (Toronto: Irwin Law and the Osgoode Society for Canadian Legal History, 2008). All of these works are not only concerned with the law and its historical impact – the ways in which law shapes the day-to-day interactions within a given society – but also with the ways in which the legal values encoded in past practices and decisions continue to have relevance in the present.¹ Although only some of these works deal directly with Atlantic Canada, all of them consider the legal worlds – imperial and Canadian – from which Atlantic Canada is inseparable and are therefore of interest to readers of *Acadiensis*.

1 See Brian Young, "Law 'in the round'," *Acadiensis* XVI, no. 1 (1986): 155-64; Greg Marquis, "Law, Society and History: Whose Frontier?" *Acadiensis* XXI, no. 2 (1992): 162-74; and R. Blake Brown, "A Taxonomy of Methodological Approaches in Recent Canadian Legal History," *Acadiensis* XXXIV, no. 1 (2004): 145-55.

Lori Chambers, "Exposing the Myth of the Peaceable Kingdom: Trends and Themes in Recent Canadian Legal History," *Acadiensis* XLI, no. 1 (Winter/Spring 2012): 247-256.

John McLaren's *Dewigged, Bothered and Bewildered: British Colonial Judges on Trial, 1800-1900*, for instance, makes important contributions to comparative history within the British Empire. Using the stories of judges "who suffered or were threatened with discipline during the nineteenth century" (4), McLaren explores issues of judicial tenure, accountability, and independence and how the politics of empire in diverse settler, slave, strategic, and penal colonies had significant impact on the careers of judges who were expected not only to administer justice but also to play political roles in the colonies in which they served. McLaren begins with a historical introduction to the struggle for judicial independence in England and the *Act of Settlement* of 1701, which established tenure "during good behaviour." He then explores the early colonial history of the years before the American Revolution, and the "imperial government's resistance to colonial attempts to extend local power" in the judicial context (7). Before considering the stories of colonial judges in trouble, McLaren describes the supervisory context of the colonial judiciary and their qualifications, selection process, and working conditions. Focusing on the British North American colonies, he then contrasts the experiences of colonial judges who advocated reformist politics in the period before responsible government with those who were overly conservative and thereby incited anger in colonies moving towards reform. Both sets of stories illustrate "how colonial judges became enmeshed in tensions over the adoption of English law and procedures and the retention of existing legal or customary systems that local interests strongly supported as better suiting domestic circumstances" (121).

He also explores these tensions and themes through stories of battles between governors and judges in New South Wales and over the doctrine of repugnancy – the question as to whether or not "the superior court judges in the colony had the power to determine whether or not local law was repugnant to the law of England" in Van Diemen's Land (Tasmania), New South Wales, and South Australia (191). Finally, he turns to "the perilous nature of judicial service in Britain's West Indian colonies" – where judges had to respond to extreme "social and economic inequalities and racial tensions" (8). Constraints were imposed on judicial independence in these colonies because of fear of rebellion, even as settler colonies were achieving a measure of independence. McLaren's work is wide-ranging and highly detailed, and illustrates the challenges inherent in governing a diverse and dispersed empire. This work is of importance to legal historians and those interested in the wider history of the British Empire. It also has much to tell us about the on-going challenges of "navigating the line between law and politics" in the judicial context (302).

Blake Brown focuses on juries instead of judges, and limits his comparison to Nova Scotia and Ontario. But his findings are nonetheless important for other jurisdictions. His work examines the contradiction between the jury's "cherished place in the legal imagination of many Canadians" (3) and the fact that modern juries try only a minority of cases. With painstaking attention to detail, *A Trying Question: The Jury in Nineteenth-Century Canada* traces the reasons for the decline of the jury. Brown asserts that the jury came to British North America "as a key plank of English legal culture," the ordinary man's protection against the strong arm of the state (7, 17). However, in both colonies "practical difficulties stemming from geography, climate, topography, work responsibilities and transportation systems made juries inconvenient" (17). In Nova Scotia these problems led to acts that

reduced the frequency of jury service, but in Upper Canada reformers advocated “paying jurors for their service” (42-3). When jurors were ultimately paid, however, the cost of the jury system became a reason for calls for the reduced use of juries. Juries also, as Brown illustrates, fell into disrepute. In Nova Scotia, high profile libel cases, fundamentally about freedom of the press in a period before responsible government, led to accusations of jury packing. And after the rebellions in Upper Canada in 1837, citizens decried “the willingness of Tories to make the jury a tool of oppression” (80). In both colonies, significant reforms to jury service and selection were implemented to help avoid jury packing; nonetheless, the achievement of responsible government undermined support for juries as citizens believed they had less reason to fear despotic government (99).

After 1867, with the development of a strong legal profession, juries were criticized as “irrational” and lacking in the knowledge necessary for the uniform interpretation of the law. Moreover, jurors showed a marked tendency to decide against large corporations; opponents of the jury came to decry the possibility that juries, with their insistence on corporate accountability, would “prevent economic growth” (201). Despite the steady decline of the jury during the 19th century, the right to trial by jury in criminal cases was included in the 1982 Charter of Rights and Freedoms – reflecting on-going fear of the potential for state coercion. While Brown does not explore the 20th century history of the jury, clearly there is a need for such a study.

In contrast to McLaren and Brown, who look at macro phenomena, Philip Girard uses the story of a single lawyer, Beamish Murdoch, to illustrate the changes in legal culture in Halifax over the course of half a century. His book, *Lawyers and Legal Culture in British North America: Beamish Murdoch of Halifax*, examines in detail the “professional life of a single nineteenth-century lawyer” in order to better understand the “work and role of colonial lawyers.” He asserts, moreover, that Murdoch and lawyers in other jurisdictions “shared a British North American experience” (4). Girard uses detailed records from Murdoch’s practice and his writings to focus on Murdoch as a legal professional, contributor to intellectual and cultural life, and economic actor while eschewing the traditional personal details that inform most biographies.

Girard describes Murdoch’s family antecedents to illustrate that he “did not have a secure place within the colony’s political or social elites” and was thus fortunate to apprentice with a powerful member of the colonial elite (35). He entered the profession during a formative period in which lawyers in Nova Scotia sought to achieve self-regulation, rejecting the British “model of a divided profession” but working cooperatively with legislatures to avoid the dissolution of bar associations that had occurred in the United States (74). However, in their daily practice, the work of men such as Murdoch resembled that of American lawyers who “responded to the non-elite section of the population . . . artisans, proprietors of small businesses, shopkeepers, small landowners, mariners . . . who depended on the law for a whole host of services, but particularly on the law of creditor and debtor” (79). As Murdoch matured and his career was consolidated, he attracted wealthier clients and could live “comfortably, if not opulently” (109). He also set out to engage in the political life of his community and was elected early to the Legislative Assembly as his “lack of influential connections bespoke an

independence from elite control” (111). His concerns about responsible government, however, prevented re-election, and he instead focused on social reform and became recorder of the city of Halifax (132, 134). Murdoch also left his mark on the province through his writings. His *Epitome of the Laws of Nova Scotia* not only catalogued provincial law, but also made the case for its inherent distinctiveness (165). Murdoch retired from his position as recorder, gradually withdrew from the practice of law, and devoted himself to writing “a history of his native province” (174). In the last years of his life, Murdoch, a long-standing advocate of temperance, appears to have succumbed “to the demons of sex and alcohol” (187) – prompting contestation of his final will and testament (188-91). Girard’s book illustrates the importance of the stories of ordinary individuals in understanding the wider impact and workings of the law.

Similarly, in *The Lazier Murder: Prince Edward County, 1884*, Robert Sharpe uses an in-depth case study of a single murder trial to explore community responses to crime and the law as well as the possibility of wrongful conviction. He highlights the importance of ordinary cases that “have faded from modern memory” in helping us to understand the “circumstances of ordinary people” and the “relationship between ordinary people and larger events and issues” (4). When Peter Lazier was murdered by an intruder in the home of his friends it appeared that the intent of the criminals was to rob the homeowners, who had in their possession a significant sum of cash from a recent crop sale. Immediately after the murder, as was the practice at the time, “local constables, coroners and justices of the peace, essentially untrained volunteers” descended upon the house to investigate the crime (5). Multiple individuals attempted to follow the tracks in the snow left by the attackers when they fled, and suspicion quickly settled upon three men – all of whom were poor, rural workingmen, unlike the victim himself who was well-to-do. And one of these workingmen had already been in conflict with an investigating constable (16). Eventually, a professional detective from nearby Belleville was brought in to assess the evidence, but Sharpe contends that even his “methods were open to question” as he was imprecise in his examination of footprint and boot evidence and “resorted to trickery and deceit” in an attempt to find a murder weapon (30-1). The men were arrested and the trial that followed was a public spectacle as “the murder had shaken the community and the crowd . . . was not interested in forensic precision” but in convicting men who were already deemed guilty as charged (73). One of the three, against whom the evidence was limited, was discharged, but, without benefit of a competent and prepared defense, the other two men were found guilty and sentenced to hang (114). Since grounds for appeal were extremely limited at the time, the last hope for the convicted men was the exercise of the prerogative of mercy. The clergy and political elite of the community mounted a campaign for the death sentence to be commuted to life imprisonment, but their pleas were unsuccessful and the men were executed. As Sharpe asserts, the case highlights “the powerful influence that popular opinion can have in a case involving a major crime that threatens a community to its core” (5). The book also illustrates the injustice of the 19th century legal rule that prohibited an accused from speaking at trial in his defense and the problems created by a limited appeal process while opening “a historical window on one of the most troubling and enduring issues in criminal justice, the possibility of wrongful conviction” and wrongful death (6).

Barrington Walker also explores issues with regard to evidence and conviction. His book, *Race on Trial: Black Defendants in Ontario's Criminal Courts, 1858-1958*, presents fascinating and disturbing evidence of the "state of paradox" in which blacks lived in Canada between 1858 and 1958 (3). As a corrective to much African Canadian historiography that "deals with elites," Walker uses criminal case files to explore the experiences of poor, marginalized blacks (7). Using records from criminal assizes and the county judges' criminal courts from Essex and Kent counties as well as death-penalty cases, Walker masterfully interweaves historical constructions of blackness with ideas about masculinity and Canadian nation-building (3).

Walker begins by exploring the history of slavery in Canada until 1833, and argues that "in Canada the law was the primary venue through which the institution was challenged and eventually abolished" (44). Sadly, however, in the immediate post-emancipation era, opportunity for "full citizenship" was thwarted as the law continued to lend "its support to racial segregation" (25). Walker explores several death penalty cases from Ontario involving black men charged with murder and interrogates how "conversations about mercy were related to ideas about White Canadian identity and nationhood" (21). Tropes about the "worrisome body of the Black male criminal" could be invoked, but simultaneously the prerogative of mercy provided an opportunity to demonstrate the supposed superiority of white Canadian justice in comparison to the violent actions of lynch mobs in the United States (45-6). Even mercy cases involving successful black defendants, however, "were often suffused with White condescension and paternalism" and the defendants themselves were infantilized (87). Walker also explores what he refers to as black patriarchy, "an issue given short shrift in African Canadian historiography," and seeks to understand the extent to which black men enjoyed patriarchal power in their families and the degree to which such power was limited and shaped by their subordinate status in the wider community (22, 90).

Ultimately, he argues that black men were deemed both "particularly prone to commit acts of violence" and "unable to control their passions and appreciate the severity of their actions" (114). Walker then explores "cases that exemplify the 'archetype of sexual danger'" – those involving black men charged with the rape of white women (22). These cases, Walker makes clear, were "not statistically significant" (116). Despite their rarity, such cases, much like the Lazier case explored by Sharpe, became "public spectacles" and reveal much about contemporary beliefs about race (116). Walker ably demonstrates that even these cases provided opportunities for the symbolic expression of the supposed superiority of Canadian legal institutions and that mercy or leniency towards a black felon convicted of raping a white woman "provided an opportunity for elites to reinforce or celebrate White Canadian nationhood" (22). Walker asserts that the sexual danger represented by black men was always a "subtext" (141) and that race "over-determined" the fate of black defendants (22). This is particularly evident when compared with the punishment meted out to white men who assaulted black women, most of whom "were treated with a considerable degree of leniency" (141). Although these cases are carefully interrogated with a view to understanding racist white constructions not only of black masculinity but of the meaning of nation itself, Walker does not further explore the meaning of black womanhood and the reasons why violence against their

persons could be so readily ignored or minimized. Overall, however, this book makes important contributions to our understandings of race and the law, illustrating the ongoing power of the “tension between the veneer of the rule of law and biologically and culturally rooted ideas about race in Canada” (184).

These issues are also addressed in Lesley Erickson’s *Westward Bound: Sex, Violence, the Law and the Making of a Settler Society*. She is particularly concerned with issues of gendered, racialized treatment under the law, and she debunks the myth of Canada’s peaceful west. Drawing upon criminal case files, her narratives of sex and violence “sit uncomfortably with mythic images of Canada’s prairie West as a land of opportunity” (12). In a series of thematic chapters, Erickson explores conflict between men and women, Native and newcomer, and capital and labour and interrogates not only constructions of femininity but also “how criminality and violence were related to masculinity” (12).

She begins by exploring the treatment of Aboriginal victims and accused in the context of two types of cases: “sensational rape, incest and murder trials” and more everyday cases involving alcohol and domestic violence (45). Similar to Walker’s findings with regard to black men, Erickson asserts that racist stereotypes about the moral and intellectual inferiority of Aboriginal men could lead to their lenient treatment when “found guilty of committing serious acts of violence” (77); these cases also served a nationalistic purpose and signaled that “justice was being served, by benevolent officials, irrespective of skin colour” (59). Aboriginal women, however, charged with minor crimes under “prostitution, liquor and trespassing laws,” faced increasing surveillance, criminalization, and victimization (77). Erickson also explores the relationship between prostitutes, social reform, and police courts, arguing that the increasing visibility of prostitutes provoked debate and tension. Social reformers sought “to shore up the family and create a stable settler society”; despite this rhetoric of protection, however, the prostitute “became symptom and signifier of the worst excesses of modernity and its perceived threat to the Christian family,” and attention was drawn away from the systemic causes of the trade (113). In exploring the myth of the rural idyll, Erickson examines the overrepresentation of farm hands in rural sexual assault and seduction cases. She argues that while judges and juries were certainly influenced by “a woman’s or girl’s morality and social status,” ideas of masculinity were also determinative and farm hands, landless and threatening, were vulnerable to conviction (140-1).

Erickson then turns to city cases involving consensual and non-consensual sexuality, drug use, and abortion during the 1920s and 1930s, asserting that women were held “to increasingly rigid standards of sexual behaviour” (14, 171). She also asserts that narratives of the “sinful, seductive city” deflected attention away from dangers women faced in “the most private, sacrosanct sphere of the emerging liberal economy – the family” (173). She explores these dangers directly by examining disturbing cases of domestic violence, incest, and wife murder. She demolishes the myth of a rural idyll for women as equal participants in the frontier. No matter how hard they worked, women were excluded from ownership and “instances of wife beating in rural areas were severe and chronic” (199). Within the cities, in contrast, police courts and criminal law amendments gave abused women some options. Importantly, these cases also “provide glimpses of women who resisted their husbands’ abuse” (199). Some women resisted by murdering abusive spouses, and

Erickson finds that women “donned the mantle of wounded womanhood to evade punishment” (227). In parallel with the treatment of Aboriginal and black men, however, this strategy “reaffirmed hegemonic notions of femininity, saving a few individuals at the expense of many” (227). Ultimately, Erickson’s book illustrates the centrality of masculine, property-owning white citizenship as the foundation of national identity. This construction of law and citizenship not only authorized potentially violent male dominance, but also rendered invisible much of the suffering of women, Aboriginal people, immigrants, and the poor. In her powerful conclusion, Erickson asserts that cases involving the marginalized “can tell us as much about nation and community as those things we choose to praise and remember” (238).

Amanda Glasbeek also considers the choices that are made in how we remember and celebrate our past. In *Feminized Justice: The Toronto Women’s Court, 1913-1934*, she examines the operation of the court from a variety of perspectives as a site of the “history of white, middle-class women’s politicization” and as an institution that “routinely punished” poor, marginalized women “for a range of disorderly conducts” and thereby participated in their further social subordination (5). Glasbeek begins by locating the court within its feminist origins through a meticulous history of social reform and a feminist criminal justice critique. Reform women had a “comprehensive political agenda” regarding morality and the law, and “this aspect of their feminism has been undertheorized” (24). As she makes clear, however, while the establishment of the court was itself a feminist victory, the self-interested view of crime inherent in the reform movement predetermined problematic responses to women’s criminality. Moral regulation would be enforced through criminal sanctions and thus historians must look beyond “middle class women’s presentation of the problem of female criminality” (70). To achieve this objective, Glasbeek juxtaposes the crime rates as rendered from the Toronto Women’s Court and jail records with the rhetoric of contemporary reform groups who emphasized the stories of young, single women – women supposedly endangered by the sinful city and who could be saved by the interventions of a maternal justice system. The actual crime statistics belie this image, and Glasbeek emphasizes the significance of repeat offenders (who were often sentenced for short periods with no discussion of the rehabilitation ostensibly central to reformers’ notions of female criminality).

Glasbeek also breaks down women’s routes into and out of the court by offences. Vagrancy and theft, she asserts, “tended to bring in those women who most closely resembled the women envisioned as being in need of a feminized justice venue” (25). Maternal feminists were deeply concerned about the “sexual safety and propriety of their metaphorical daughters,” and actively distinguished between prostitutes and those who “had temporarily lost their moral compass” (116-17). Both, however, could end up incarcerated under the vagrancy provisions. Theft has been “left largely unexplored in the history of women’s crime,” and Glasbeek asserts that young white women could receive a sympathetic response in court (25). But theft had many layered meanings and women alternatively could end up with very harsh sentences, particularly when they stole from employers (117). And although the press and reformers did not speak of bawdy house offences and drunkenness, these cases revealed a community of “confirmed alcoholics and illicit liquor

peddlars” whose “disorderliness was an ongoing challenge to the very legitimacy of a special court for women” – a court that had been based on the idea of women as inherently redeemable (141). Moreover, some of these women not only understood how to negotiate the system but also challenged the authority of the court and “actively resisted . . . intrusive surveillance over their lives” (140). Finally, Glasbeek explores the tenure and experiences of Margaret Patterson, the first, and only, female magistrate in the Toronto Women’s Court, who faced increasing resistance and was ultimately removed from the bench. Glasbeek adds complexity and depth to our understanding of the Toronto Women’s Court; it was not simply a site of altruistic reform nor is it merely an example of middle class meddling. There is, as she argues, “no doubt” that reformers were motivated by “a comprehensive and critical assessment of the law as a masculinist institution that systematically discriminated against women.” It is equally clear, however, that their ideals, once translated “into practical reform,” rendered “feminist critics complicit in the perpetuation of injustices” (180-1).

Although she focuses on the judicial system itself, Constance Backhouse’s *Carnal Crimes: Sexual Assault Law in Canada, 1900-1975* also illustrates the perpetuation of injustices. She uses a case-study approach to explore the myths that informed sexual assault law and argues that while the law should be “of great assistance” in eliminating (and punishing) sexual assault, “so far it has failed abjectly” (296). Through the engaging, detailed, and deeply disturbing stories of victims of sexual assault, Backhouse provides overwhelming evidence of the prejudice that arose within the courts and public opinion if a woman had a sexual history, a lower socio-economic status, a different race, and/or a physical handicap (or was a child). Mary Ann Burton, for instance, defiantly demanded justice in 1907 after her story of rape was dismissed as unworthy of belief. She had been left semi-conscious by her attacker, and several passersby had watched as she “attempted to dislodge a filthy, oversize handkerchief from her throat.” Despite such evidence, her working class status was no match for her attacker’s reputation “as an exemplary specimen of respectable manhood” (48-9). Similarly, in 1917 Yvonne Collin was sexually assaulted in a remote area by two young men. After the assault they took her to a hotel where she adamantly refused to provide sexual services for their friends. The judge, however, blamed her for getting into the car with the accused men, doubted her previous chastity, and acquitted her attackers. As Backhouse asserts: “Young women who had experienced almost any degree of non-marital sex were shut off from legal protection” (77).

Prejudice is also clear in the trial of Ethel Machan, who accused Henry Kissel, a medical student at Dalhousie University, of sexual assault in 1925. The pair had been dating for some time when Machan was raped by Kissel in his apartment. When she cried, he tried to help her with a douche and took her home in a taxi – kissing her goodnight as though he had done nothing wrong. As Backhouse admits, “the evidence was mixed,” but “Ethel Machan’s working class background, her dance-hall affinities, parading about in a slip in a bachelor pad, all made a guilty verdict most unlikely” (100). Likewise, Bernice Tisdale was 24 years old in 1942 when she was sexually assaulted by the husband of a friend. She had gotten into his car on the assumption that she was headed to his home to babysit. Instead, he drove her to a remote area and forced her to have intercourse. Not only was Beatrice’s

chastity questioned in court, but she was harassed and ridiculed. As a deaf person, her “efforts to speak . . . quickly became a topic of pejorative comment” (143). Sexual assault trials, Backhouse argues, were difficult for all women, but challenges “were greatly magnified for victims with disabilities” (164). Marie Tremblay (pseudonym) was five years old when she was raped by her mother’s boyfriend in 1951-1952. Her grandmother had taken her to the doctor because of genital bruising, but the court of appeal dismissed her evidence and gave a “ringing endorsement” of the assertion by psychologist Dr. Barbeau that children had “an instinctive tendency to create myths” (189, 187). This case provides clear evidence of the “misogynistic skepticism” that denied women and children justice in cases of sexual assault (192).

Racism also played a key role in some sexual assault cases. The first woman to be charged with indecent assault upon another woman in Canada was judged harshly, and her victim was assumed to be chaste and innocent. Willimae Moore, an African Canadian woman, moved to Yellowknife in 1953 and quickly became very friendly with Laura White (pseudonym). In 1955 Moore took the bold step of writing a letter to her friend, admitting to her sexual and romantic feelings for her; after receiving the letter White invited Moore to her apartment and there Moore attempted to kiss her. At trial, Moore was convicted as “it was as if it were unthinkable that a woman would consent to a sexual overture from another woman”; this was a sharp contrast to the heterosexual cases in which women’s consent was often presumed (220). Although this verdict was eventually overturned on appeal, Moore’s reputation was damaged. Moreover, a friend with whom she had lived, who defended her in court and was therefore accused of lesbianism herself, lost her job as principal of the local high school (225). Even more disturbing is the story of Rose Marie Roper, a 17-year-old Aboriginal woman, whose body was found nude and battered and “face down on the ice and mud, near a garbage dump on a lonely logging road” in the Cariboo Country region of interior British Columbia in 1967 (227). After an evening of drinking, Rose had gone with three white men in their car. When they made sexual advances, she resisted. At trial the men admitted to hitting her and pushing her out of the car, but claimed that they had returned her clothes and had left her alive (243). However, they had paraded her underwear on their car aerial at a local dance. In a prosecution “infected with racism,” Rose Roper was repeatedly disparaged and accused of prostitution; one of the men was found not guilty and the other two were fined \$200 each (255). An appeal was unsuccessful, which came as no surprise to the local Aboriginal community that “expected betrayal from the white criminal justice system” (260). The most frightening aspect of this case is that the potent combination of racism, classism, and disrespect for sexually active women that condemned Rose Roper not only to death at the hands of white men, but also to mistreatment at the hands of a white court, remains all too powerful almost 35 years after her death. Despite the litany of depressing cases presented in this book, Backhouse concludes that “we owe it to the courageous individuals who tried so valiantly to harness the potential for legal assistance in the past, not to give up hope” that we can hold the law accountable (297).

Holding the law accountable, and tracing the sources of current problems in law, is an implicit, and sometimes explicit, objective of all of the works reviewed here; Walker, Erickson, and Backhouse, in particular, are clear that they wish to use history to encourage further exploration of persistent contemporary inequalities and

to promote legal reform. All these books, however, illustrate the enormous variety of questions and issues that can be examined through the lens, and using the sources, of the law.² The law, these books make clear, imposes important restrictions on our day-to-day actions and provides unequal access to justice based on social hierarchies and engrained prejudice. Paradoxically, the law is also a site, perhaps our most important and effective site, for the contestation of those very hierarchies and prejudices. It is in this context that Backhouse calls on us to study and write legal history, to learn from the past, and “not to give up hope” (297). These books also demonstrate that law is a fickle beast as it is dependent upon the whims and predilections of the individuals – judges, lawyers, defendants, and social commentators – who interpret and comment upon the rule of law. By illustrating the variability and the failures of the law, these books help to dispel the myth that Canada is a peaceable kingdom. The law has never been neutral, and marginalized individuals in Canada have not had legal equality despite myths that were subtly reinforced through judicial discretion and public celebration of white Canadian superiority. We must confront the reality of the exclusion and degradation of women, blacks, Aboriginals, and those who were economically marginal or ethnically or physically different in the historical and legal construction of Canadian national identity. Finally, these books underscore the centrality of a comparative approach to legal history, both within Canada and in the wider common law world. It is, however, symptomatic of the state of “national” legal history in Canada that Quebec makes only brief and limited appearances in any of these studies. It is time for comparative work, in English for an English audience, which also considers the civil law as part of our national heritage. It is unlikely that the Québécois accepted the myth of Canadian law as just and neutral, and the themes evident in the books reviewed here are likely to find considerable resonance in the legal history of Quebec. If law is ever to serve all Canadians equally, we must deconstruct its past. Without understanding the historical limitations of the law, and the myth of neutrality that was perpetuated and celebrated as central to our national identity, we cannot promote legal reform in the present that will be truly transformative.

LORI CHAMBERS

2 It would be irresponsible not to note the importance of the Osgoode Society for Canadian Legal History in the emergence of legal history as a leading field within Canadian history and Canadian studies. Without the Osgoode Society, which funded the publication of seven of these eight books, legal history in Canada would be much diminished.