
Quebec Legal Historiography, 1760-1900

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Introduction

With the recent multiplication of scholarly works on the history of Quebec law, the need arises to survey what has been achieved to date.¹ This article therefore proposes to provide a relatively extensive bibliography of Quebec legal historiography and to highlight noteworthy attempts at a historical understanding of Quebec law.²

The discussion focuses on studies dealing with aspects of Quebec law in the period from the British Conquest of 1760 to 1900. This historical period witnessed fundamental transformations in Quebec society — the transition to a capitalist economy — and in Quebec law — the codification of civil law and procedure and the reception of English criminal law. Recent studies of law in New France, especially those treating criminal and seigniorial law, are included on the basis of their comparative and methodological importance. Representative literature from elsewhere in North

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¹Useful bibliographies of this material include A. Morel, *Canada français* (Bruxelles: Institut de sociologie, 1963); P.D. Maddaugh, *A Bibliography of Canadian Legal History* (Toronto: York University Law Library, 1972); H.W. Arthurs & B.D. Bucknall, *Bibliographies on the Legal Professions and Legal Education in Canada* (Toronto: York University Law Library, 1968).

²Discussions of Canadian legal historiography include R.C.B. Risk, "A Prospectus for Canadian Legal History" (1973) 1 *Dalhousie L.J.* 227; G. Parker, "The Masochism of the Legal Historian" (1974) 24 *U.T.L.J.* 279; D.H. Flaherty, "Writing Canadian Legal History: An Introduction" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: University of Toronto Press, 1981) 3; A. Morel, "Canadian Legal History — Retrospect and Prospect" (1983) 21 *Osgoode Hall L.J.* 159; D. Hay, Book Review of *Essays in the History of Canadian Law* (1983) 64 *Can. Hist. Rev.* 583; D. Kettler, "The Question of 'Legal Conservatism' in Canada: A Review of *Essays in the History of Canadian Law*, vol. 1" (August 1983) 18 *J. Can. Stud.* 136; D. Kettler, Book Review of *Essays in the History of Canadian Law*, vol. 2 (December 1984) 19 *J. Can. Stud.* 150; 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 *Osgoode Hall L.J.* 349; B. Young, "Law 'in the round'" (1986) 11 *Acadiensis* 155.

America and Western Europe is listed in the notes.³ To facilitate the discussion, the literature surveyed has been classified under broad areas of the law. These classifications reflect a mixture of elements commonly understood to comprise the law (judicial structures, constitutional and administrative law, private law and criminal law) and material society (family, economy, sexual divisions and the State).

Because of the jurisdictional boundaries of Quebec's legal system, this survey will also include works dealing with the functioning and application of pan-Canadian law within Quebec.

I. Constitution and Government

The history of the various constitutions of the British North American colony which became the Province of Quebec and the doctrinal interpretation of constitutional law have been a traditional concern of Canadian legal scholars. Formal analysis (which focuses on structures and procedures at the expense of contextual examinations of the functioning of these structures) and whiggish reasoning (which focuses on progress and treats reform as a series of improvements) characterize this field of research. Notable examples are the work of such political scientists as James Mallory and Robert Dawson.⁴ More recently, constitutionalists have begun to take account of the political context of the establishment of constitutions, but legal formalism still dominates the analysis of judicial interpretation of consti-

³Surveys of modern American and English legal historiography include R.W. Gordon, "Critical Legal Histories" (1984) 36 Stan. L. Rev. 57; D. Sugarman & G.R. Rubin, "Towards a New History of Law and Material Society in England, 1750-1914" in D. Sugarman & G.R. Rubin, eds, *Law, Economy and Society, 1750-1914: Essays in the History of English Law* (Abingdon, U.K.: Professional Books, 1984) 1; S.N. Katz, "The Problem of a Colonial Legal History" in J.P. Green & J.R. Pole, eds, *Colonial British America: Essays in the New History of the Early Modern Era* (Baltimore: John Hopkins University Press, 1984) 457. Collections of English Canadian legal historiography include L. Knafla, ed., *Law and Justice in a New Land: Essays in Western Canadian Legal History* (Calgary: Carswell, 1986); D.G. Bell, *Manners, Morals and Mayhem: A Look at the First 200 Years of Law and Society in New Brunswick* (Fredericton, N.B.: Public Legal Information Services, 1985); P. Waite, S. Oxner & T. Barnes, eds, *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: Carswell, 1984); D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vols 1, 2 (Toronto: University of Toronto Press, 1981-83).

⁴See J.R. Mallory, *The Structure of Canadian Government*, rev'd ed. (Toronto: Gage, 1984); R.M. Dawson, *The Government of Canada*, 5th ed., rev'd by N. Ward (Toronto: University of Toronto Press, 1970). The "reception" of English laws from a constitutional point of view is considered in J.E. Coté, "The Reception of English Law" (1977) 15 Alta L. Rev. 29; E.G. Brown, "British Statutes in the Emergent Nations of North America: 1606-1949" (1963) 7 Am. J. Legal Hist. 95.

tutional law.⁵ A few historians, notably Hilda Neatby, Alfred Burt, Pierre Tousignant and Fernand Ouellet, have looked at the origins of the various constitutional statutes, mainly from a historical and political point of view. They have focused on colonial policy and conflicts opposing various interest groups in England and the colony.⁶ Tousignant's study of *The Constitutional Act of 1791*,⁷ for example, challenged the view often advanced by earlier historians that British authorities "generously" gave political rights to Canadians. He argued that the British wanted a colonial government broadly based on the English model, but one in which power would be retained by England through the Governor-General.

Another aspect of constitutional history is the role of judicial review by the Judicial Committee of the Privy Council and the Supreme Court of Canada.⁸ One modern critic of the scholarship of judicial review, Patrick

⁵G. Rémillard, *Le fédéralisme canadien*, 2d ed., vols 1, 2 (Montréal: Québec/Amérique, 1983), which includes an excellent bibliography. For a critique of the doctrinal interpretation of Canadian federalism, see P.J. Monahan, "A Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 U.T.L.J. 47.

⁶H.M. Neatby, *The Quebec Act: Protest and Policy* (Scarborough, Ont.: Prentice-Hall, 1972); by the same author, *Quebec: The Revolutionary Age, 1760-1791* (Toronto: McClelland and Stewart, 1966); A.L. Burt, *The Old Province of Quebec* (Toronto: Ryerson Press, 1933); P. Tousignant, "Problématique pour une nouvelle approche de la constitution de 1791" (1973) 27 Rev. d'hist. de l'Amérique française 181; F. Ouellet, *Le Bas-Canada, 1791-1840: Changements structureaux et crise* (Ottawa: Université d'Ottawa, 1976). See also G. Bernier & D. Salée, "Social Relations and Exercise of State Power in Lower Canada (1791-1840): Elements for an Analysis" [Spring 1987] *Studies in Political Economy* 101; G.F.G. Stanley, *A Short History of the Canadian Constitution* (Toronto: Ryerson Press, 1969). A good comparative study is J.M. Ward, *Colonial Self-Government: The British Experience, 1759-1856* (Toronto: University of Toronto Press, 1976). On Confederation, see J.C. Bonenfant, *La naissance de la confédération* (Montréal: Leméac, 1969); P.B. Waite, *The Life and Times of Confederation 1864-1867: Politics, Newspapers and the Union of British North America* (Toronto: University of Toronto Press, 1962); W.L. Morton, *The Critical Years: The Union of British North America, 1857-1873* (Toronto: McClelland & Stewart, 1964). See also A.I. Silver, *The French-Canadian Idea of Confederation, 1864-1900* (Toronto: University of Toronto Press, 1982).

⁷(U.K.), 31 Geo. 3, c. 31.

⁸On the Supreme Court, see F.H. Underhill, "Edward Blake, the Supreme Court Act, and the Appeal to the Privy Council, 1875-76" (1938) 19 Can. Hist. Rev. 245; F. MacKinnon, "The Establishment of the Supreme Court of Canada" (1946) 27 Can. Hist. Rev. 258; F. Vaughan, "Civil Code Influences on the Supreme Court of Canada, 1875-1980: Particularly in Contract and Negligence" (1986) 20 L. Soc. Gaz. 48; P.H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Queen's Printer, 1969); J.G. Snell & F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985). On the Privy Council, see P.A. Howell, *The Judicial Committee of the Privy Council, 1833-1876: Its Origins, Structure and Development* (Cambridge: Cambridge University Press, 1979); R. Stevens, "The Final Appeal: Reform of the House of Lords and Privy Council, 1867-1876" (1964) 80 Law Q. Rev. 343; F.M. Greenwood, "Lord Watson, Institutional Self-Interest and the Decentralization of Canadian Federalism in the 1890s" (1974) 9 U.B.C. L. Rev. 244; S. Wexler, "The Urge to Idealize: Viscount Haldane and the Constitution of Canada" (1984) 29 McGill L.J. 608. On judicial review, see J. Smith, "The Origins of Judicial Review in Canada" (1983) 16 Can. J. Pol. Sci. 115, which reviews the literature.

Monahan, concludes that "Canadian constitutional law and theory lingers at the dusk of legal formalism."⁹ Monahan notes that whereas legal formalism has been criticized by Canadian scholars for a number of years, it still predominates analyses of judicial review. For Monahan, constitutional law and interpretation must be seen as a political discourse, which can be analyzed in terms of the political and intellectual climate of the times in which it was produced. Significant advances in this field of research could be modeled after the investigations conducted by John Pocock, with a view to producing more sophisticated analyses of the history of intellectual interpretations of constitutional statutes.¹⁰ Another approach would be to probe more deeply into the political and social repercussions of specific constitutional statutes and decisions.

More recently, several Quebec scholars initiated research into the nineteenth-century legal foundations of urban and local governmental and administrative structures.¹¹ In a review of some of this work, Jean-Guy Belley notes that analyses of the elite discourse surrounding the enactment of legislation have been produced at the expense of a "sociologie historique de l'État québécois" which would investigate the local consequences of those laws.¹²

In his work on the first parliamentary institutions in Lower Canada, between 1791 and 1838, Henri Brun looks at the dynamic interaction between the various levels of colonial government and examines the actual operation of formal structures.¹³ His dominant theme is the struggle of the local Francophone elite for increased political rights. Another area of State

⁹See Monahan, *supra*, note 5 at 47. He discusses judicial review at pp. 51-69.

¹⁰See J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (New York: Norton, 1967). See also Monahan, *ibid.* An example of an intellectual history approach applied to a case in Quebec that reached the Supreme Court is R. Knopff, "Quebec's 'Holy War' as 'Regime' Politics: Reflections on the Guibord Case" (1979) 12 Can. J. Pol. Sci. 315.

¹¹See, e.g., J. L'Heureux, "Les premières institutions municipales au Québec ou 'machines à taxer'" (1979) 20 C. de D. 331; J. Léveillé & M.-O. Trépanier, "Évolution de la législation relative à l'espace urbain au Québec" (1981-82) 16 R.J.T. 19; A. Tremblay & D. Turp, "L'incidence des politiques urbaines sur l'exercice des compétences fédérales et provinciales en matière de gouvernement local" (1981-82) 16 R.J.T. 281; J.I. Little, "Colonization and Municipal Reform in Canada East" (1981) 14 Soc. Hist. 93; L.J. Ste Croix, *The First Incorporation of the City of Montreal, 1826-36* (M.A. Thesis, McGill University, 1971) [unpublished].

¹²"Du juridique et du politique en sociologie de droit: À propos de la recherche 'Droit et société urbaine au Québec'" (1982-83) 17 R.J.T. 445.

¹³H. Brun, *La formation des institutions parlementaires québécoises, 1791-1838* (Québec: Presses de l'Université Laval, 1970). On the politics of the period, see Ouellet, *supra*, note 6; H.T. Manning, *The Revolt of French Canada, 1800-35: A Chapter in the History of the British Commonwealth* (Toronto: Macmillan, 1962).

organization which legal historians are beginning to study is the school system.¹⁴ J.E. Hodgetts and James Gow have published administrative histories of the bureaucratic structures of the United Canadas and the province of Quebec, but still to be investigated are the particular roles of the law and lawyers in administrative processes.¹⁵

II. The Civil Law System

In view of the unique legal-political processes which led to the amalgamation of French, English and American sources, and to the codification of Quebec's private law, it is not surprising that several legal educators have, beginning in the middle of the nineteenth century, combined a historical presentation with the usual doctrinal approach to legal scholarship. In the latter part of the nineteenth century, a few French-Canadian law teachers, most notably Edmond Lareau, published general historical texts on the provincial legal system.¹⁶ These works emphasized legislation and depended heavily on quotations from documentary sources. This approach continues at the law schools of Université Laval and Université de Montréal in the

¹⁴See, e.g., P. Carignan, "La place faite à la religion dans les écoles publiques par la loi scolaire de 1841" (1982-83) 17 R.J.T. 9. An older work is O. Gagnon, *Cultural Developments in the Province of Quebec: Minorities' Rights and Privileges under the Educational System* (Toronto: University of Toronto Press, 1952). See also L.-P. Audet, *Histoire du Conseil de l'instruction publique de la province de Québec, 1856-1964* (Montréal: Leméac, 1964); L.-P. Audet, *Histoire de l'enseignement au Québec* (Montréal: Holt, Rinehart & Winston, 1971).

¹⁵See J.I. Gow, *Histoire de l'administration publique québécoise 1867-1970* (Montréal: Presses de l'Université de Montréal, 1986); J.E. Hodgetts, *Pioneer Public Service: An Administrative History of the United Canadas, 1841-1867* (Toronto: University of Toronto Press, 1956). See also G. Paquet & J.-P. Wallot, *Patronage et pouvoir politique dans le Bas-Canada (1794-1812): Un essai d'économie historique* (Montréal: Presses de l'Université du Québec, 1973); Bernier & Salée, *supra*, note 6.

¹⁶B.A.T. de Montigny, *Histoire de droit canadien* (Montréal: E. Sénécal, 1869); G. Doure & E. Lareau, *Le droit civil canadien suivant l'ordre établi par les codes, précédé d'une histoire générale de droit canadien* (Montréal: A. Doure, 1872); E. Lareau, *Histoire du droit canadien depuis les origines de la colonie jusqu'à nos jours*, vols 1, 2 (Montréal: A. Périard, 1888-89); R. Lemieux, *Les origines du droit franco-canadien* (Montréal: C. Théoret, 1901). For a biographical article of Lareau, see S. Gagnon, "Lareau, Edmond" in *Dictionary of Canadian Biography*, vol. 11 (Toronto: University of Toronto Press, 1982) 488. See also F.P. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* [1907] (Toronto: Butterworths, 1980); W.J. White, *The Sources and Development of the Law of the Province of Quebec* (Montreal: Gazette, 1903). Articles on late nineteenth-century legal scholarship in Quebec and Ontario include S. Normand, "Une analyse quantitative de la doctrine en droit civil québécois" (1982) 23 C. de D. 1009; G.B. Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 Law and Hist. Rev. 219. See also A. Morel, *supra*, note 2.

historical introductions to Quebec law which the faculties prepare for their classes.¹⁷

The work of several historians, especially Hilda Neatby and Evelyn Kolish, who have investigated the establishment and evolution of the civil law system since 1763, stands on a different methodological footing.¹⁸ Much of their work stresses conflicts between interest groups and attempts by specific groups to reform both substantive law and the court system. Prominent in this regard, for example, were the perennial battles initiated by merchants to obtain the application of British private law in Quebec. Evelyn Kolish attempts to interpret the attitudes and reactions of Canadians to changes in the civil law of Quebec/Lower Canada between 1760 and 1840. She examines the administration of civil justice, the judiciary and the magistracy, and such facets of substantive civil law as bankruptcy, inheritance, land tenure regimes and the registration of hypothecs. She finds that the opinions of contemporaries reflected primarily their ethnic background, though sometimes they were modified by class or economic interests. The explanation offered for this ethnic conflict over private law is that Anglophone and Francophone groups alike saw the law as a powerful instrument of their socio-ethnic goals, including economic pursuits, political and institutional power, and ethnic survival.

¹⁷See, e.g., J.C. Bonenfant, H. Brun & C. Vachon, *Histoire des institutions juridiques (textes): Histoire du droit privé* (Québec: Faculté de droit, Université Laval, 1969); A. Morel, *Histoire du droit*, 6th ed. (Montréal: Librairie de l'Université de Montréal, 1980-81).

¹⁸H.M. Neatby, *The Administration of Justice under the Quebec Act* (London: Oxford University Press, 1937), which, though concerned primarily with the administration of justice, gives ample consideration to disputes surrounding points of substantive law; E. Kolish, *Changement dans le droit privé au Québec et au Bas-Canada, entre 1760 et 1840: Attitudes et réactions des contemporains* (Doctoral dissertation in legal history, Université de Montréal, 1980) [unpublished]. See also Neatby, *supra*, note 6; A.L. Burt, *supra*, note 6. These are general texts which give substantial consideration to legal matters. See also, on the same and later periods, W.R. Riddell, "The First British Courts in Canada" (1923-24) 33 *Yale L.J.* 571; W. Smith, "The Struggle over the Laws of Canada, 1763-1783" (1920) 1 *Can. Hist. Rev.* 166; F.H. Soward, "The Struggle over the Laws of Canada, 1783-1791" (1924) 5 *Can. Hist. Rev.* 314; L. Pelland, "Aperçu historique de notre organisation judiciaire depuis 1760" (1933-34) 12 *R. du D.* 14; A. Morel, "Les réactions des Canadiens devant l'administration de la justice de 1764 à 1774: Une forme de résistance passive" (1960) 20 *R. du B.* 53; J.-P. Wallot, "Plaintes contre l'administration de la justice (1807)" (1966) 19 *Rev. d'hist. de l'Amérique française* 551, (1970) 20 *Rev. d'hist. de l'Amérique française* 28, 281, and 366; J. L'Heureux, "L'organisation judiciaire au Québec de 1764 à 1774" (1970) 1 *R.G.D.* 266; L. Renaud, "La Cour d'appel à l'aube de l'Union (1839-49)" (1973) 8 *R.J.T.* 465. See also J.-M. Fecteau, "Prolégomènes à une étude historique des rapports entre l'État et le droit dans la société québécoise, de la fin du XVIIIe siècle à la crise de 1929" (1986) 18 *Sociologies et sociétés* 129.

The daily workings of some civil courts, especially those active during the French regime, have been the subject of quantitative analyses.¹⁹ It is to be hoped that the recent reorganization of the archives of the Judicial District of Montreal, which contain the records of the Sessions of the Peace and the Court of King's Bench, will enable and encourage scholars to undertake similar research on the civil courts of the British regime. The work and role of court officers has been neglected, though a recent study by Pierre Audet on the offices of clerk of the court and prothonotary demonstrates the importance of these functionaries.²⁰ Several fundamental legal concepts relevant to the civil justice system, including the responsibility of judges, the injunction remedy and the authority of precedents in appellate courts, have been examined recently, but typically from a formal perspective.²¹

The greatest institutional achievement in Quebec civil law, the *Civil Code of Lower Canada* (1866), has been a central concern of legal scholars since its enactment. Research into the chronology of the establishment and reform of the *Civil Code*, and into its doctrinal sources, has recently been combined with more traditional studies of the internal coherence of the body of law that was codified. Significant contributions to research in this field include a detailed study of the work of the codification commission by John Brierley, an examination by Marian Karpacz of appellate decisions

¹⁹A valuable study is J.A. Dickinson, *Justice et justiciables: La procédure civile à la Prévôté de Québec, 1667-1759* (Québec: Presses de l'Université Laval, 1982). A small-scale work on rural civil courts is S. Normand, "Justice civile et communauté rurale au Québec, 1880-1920" (1984) 25 C. de D. 579. Each of these studies attempts to determine how representative the *justiciables* were of society at large. For an enlightening epistemological discussion of this approach, see J.-G. Belley, "Vers une sociologie historique de la justice québécoise: Réflexion en marge d'un ouvrage récent sur la justice civile sous le régime français" (1983) 24 C. de D. 409. Other studies of the courts of New France include A. Morel, "L'imposition et le contrôle des peines au Bailliage de Montréal (1666-1693)" in *Études juridiques en hommage à M. le juge Bernard Bissonnette* (Montréal: Presses de l'Université de Montréal, 1963) 411; J. Mathieu, "Les causes devant la Prévôté de Québec en 1667" (1969) 3 Soc. Hist. 101; J.R. Thompson, "An Evaluation of Judicial Fees in Cases brought before the Sovereign Council, 1663-1690" (1969) 3 Revue du centre d'études de Québec 9; J.A. Dickinson, "La justice seigneuriale en Nouvelle-France: Le cas de Notre-Dame-des-Anges" (1974) 28 Rev. d'hist. de l'Amérique française 323; and, by the same author, "Court Costs in France and New France in the Eighteenth Century" [1977] Can. Hist. Assoc. Hist. Papers 49. A valuable introduction to the society of New France and the place of law within it is Louise Dechêne, *Habitants et marchands de Montréal au XVIIe siècle* (Montréal: Plon, 1974).

²⁰*Les officiers de justice: Des origines de la colonie jusqu'à nos jours* (Montréal: Wilson et Lafleur, 1986).

²¹See N. Bernier, "L'autorité de précédent judiciaire à la Cour d'appel du Québec" (1971) 6 R.J.T. 535; A. Prujiner, "Origines historiques de l'injonction en droit québécois" (1979) 20 C. de D. 249; H.P. Glenn, "La responsabilité des juges" (1983) 28 McGill L.J. 228.

as a source of law for the codifiers, and the 1981 historical and critical edition of the *Civil Code*.²² In a study of public opinion in the period leading up to codification and the period following the *Civil Code's* enactment, André Morel found surprisingly little public debate on the matter.²³ Historical treatment of the 1867 *Code of Civil Procedure* has been neglected, but a monographic study by Jean-Marie Brisson of the evolution of civil procedure in Quebec from 1774 to codification is now available.²⁴ A broader historical perspective which would place the adoption of both codes in the context of state-building at the time of Confederation has yet to be attempted.

III. Criminal Justice

The quality and scope of legal-historical research in criminal justice surpasses that on other aspects of Quebec law. This state of affairs is probably related to the greater availability of criminal records, especially for the French regime, and, more importantly, to the example provided by a number of social historians who have been concerned for some time with how criminal justice and the penal system have conditioned relations between social classes.²⁵

²²J.E.C. Brierley, "Quebec's Civil Law Codification Viewed and Reviewed" (1968) 14 McGill L.J. 521; M. Karpacz, "La Cour d'appel et la rédaction du Code civil" (1971) 6 R.J.T. 513; P.-A. Crépeau & J.E.C. Brierley, eds, *Code civil, 1866-1980: Édition historique et critique* (Montréal: Société québécoise d'information juridique, 1981). See also J.W. Cairns, *The 1808 Digest of Orleans and 1866 Civil Code of Lower Canada: An historical study of Legal Change*, vols 1, 2 (Doctoral dissertation in legal history, University of Edinburgh, 1981) [unpublished]; J.P. Richert & E.S. Riebert, "The Impact of the Civil Code of Louisiana upon the Civil Code of Quebec of 1866" (1973) 8 R.J.T. 501.

²³"La codification devant l'opinion publique de l'époque" in J. Boucher & A. Morel, eds, *Le droit dans la vie familiale*, vol. 1, Livre du centenaire du droit civil (Montréal: Presses de l'Université de Montréal, 1970) 27.

²⁴See J.-M. Brisson, *La formation d'un droit mixte: L'évolution de la procédure civile de 1774 à 1867* (Montréal: Thémis, 1986).

²⁵For comparative studies, see D. Hay, "Crime and Justice in Eighteenth and Nineteenth-Century England" in Morris & Tonry, eds, *Crime and Justice: An Annual Review of Research* (Chicago: University of Chicago Press, 1980) 45; D. Hay, "The Criminal Prosecution in England and its Historians" (1984) 47 Mod. L. Rev. 1; R. Lane, "Crime and the Industrial Revolution: British and American Views" (1974) 7 J. Soc. Hist. 287; and M. Ignatieff, "State, Civil Society and Total Institution: A Critique of Recent Social Histories of Punishment" in D. Sugarman, ed., *Legality, Ideology and the State* (London: Academic Press, 1983) 183. Influential monographs include D. Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Penguin Books, 1975); E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Harmondsworth, U.K.: Penguin Books, 1977); M. Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850* (New York: Pantheon Books, 1978); M. Foucault, *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan (New York: Vintage Books, 1979); D. Melossi & M. D'Avanini, *The Prison and the Factory: Origins of the Penitentiary System* (London: Macmillan, 1981). Information about Canadian research

The study of the origins of various Canadian criminal statutes has been a favoured activity of legal historians.²⁶ Most of the scholarship on Canadian criminal legislation from 1760 to 1900 emphasizes the legislators' lack of originality and their supposed dependence on English models.²⁷ However, the work of other historians identifies significant differences between the Canadian and English criminal justice systems. For example, Douglas Hay points out that, unlike the British law of the nineteenth-century, Canadian criminal law of that time permitted the Crown to appeal acquittals by lower courts. Similarly, whereas private prosecution was prevalent in Great Britain, it was of limited relevance to Canadian residents.²⁸ Legal historians disagree over the extent to which the *Criminal Code* of 1892 modified Canadian criminal law.²⁹

Important articles on the insanity defence and its judicial interpretation have been published by Simon Verdun-Jones. This work is significant for its willingness to analyze the law within the context of broader social ideo-

can be obtained by consulting J.G. Woods, "Criminal Justice History in Canada: A Brief Survey of Work in Progress" (1983) 4 *Crim. Just. Hist.* 119, which includes researchers, their addresses and their topics of research; L.A. Knafla, "Crime, Criminal Law and Justice in Canadian History: A Select Bibliography, Origins to 1940" in D.J. Bercuson & L.A. Knafla, eds, *Law and Society in Canada in Historical Perspective* (Calgary: University of Calgary Studies in History, 1979) 157; K.L. Mayer, *Canadian Criminology Annotated Bibliography: Crime and the Administration of Criminal Justice in Canada* (Ottawa: Solicitor General of Canada, 1977); and the bibliography in R.A. Silverman & J.J. Teevan, eds, *Crime in Canadian Society*, 2d ed. (Toronto: Butterworths, 1980).

²⁶See, e.g., A.W. Mewett, "The Criminal Law, 1867-1967" (1967) 45 *Can. B. Rev.* 726; A. Morel, "La réception du droit criminel anglais au Québec (1760-1892)" (1978) 13 *R.J.T.* 449; J.J. Edwards, "The Advent of English (Not French) Criminal Law and Procedure into Canada — A Close Call in 1774" (1984) 26 *Crim. L.Q.* 464; G. Parker, "The Origins of the Canadian Criminal Code" in Flaherty, ed., *supra*, note 1, 249; R.C. MacLeod, "The Shaping of Canadian Criminal Law, 1892 to 1902" [1978] *Can. Hist. Assoc. Hist. Papers* 64; C. Désaulniers, "La peine de mort dans la législation criminelle de 1760 à 1892" (1977) 8 *R.G.D.* 141; V.M. Del Buono, "The Right to Appeal in Indictable Cases; a Legislative History" (1978) 16 *Alta L. Rev.* 446.

²⁷See Parker, Mewett, Del Buono and Désaulniers, *ibid.*

²⁸Hay made these remarks in an address to the annual congress of the Institut d'histoire de l'Amérique française in October 1985, "Droit, État et société aux 18e et 19e siècles" [unpublished]. See also his "Controlling the English Prosecutor" (1983) 21 *Osgoode Hall L.J.* 165. To compare with prosecution in Ontario, see P.M. Romney, *Mr. Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature 1791-1899* (Toronto: University of Toronto Press, 1986). Two interesting discussions of the criminal justice system of Lower Canada are L.A. Knafla & T.L. Chapman, "Criminal Justice in Canada: A Comparative Study of the Maritimes and Lower Canada, 1760-1812" (1983) 21 *Osgoode Hall L.J.* 245; J.-M. Fecteau, *La pauvreté, le crime, l'état: Essai sur l'économie politique du contrôle social au Québec, 1791-1840* (Doctoral dissertation in history, Université de Paris VII, 1983) [unpublished].

²⁹See Parker, Mewett, and MacLeod, *supra*, note 26.

logies.³⁰ Constance Backhouse adopts a similar approach in her studies of such aspects of nineteenth-century criminal law affecting women as infanticide, abortion, rape and prostitution.³¹ Significant research into the social meaning of criminal law has been attempted by André Morel and Douglas Hay.³² Morel investigates the attitudes of both the elite and lower classes towards criminal legislation from 1760 to 1892, and their reactions to the types of punishment meted out by criminal courts. To obtain a richer perspective on popular mentality, the legal historian needs to broaden his research to include such sources as court records which can provide direct evidence from the testimony of the lower classes. The analysis of the cultural products of the lower classes such as folk songs may also yield interesting results. Hay's article is more suggestive of popular attitudes towards criminal justice in the critical first years of the British regime. He also tries to identify the values of the elite which were internalized in the criminal law. Another significant contribution is Jean-Marie Fecteau's doctoral thesis which analyzes the discourse surrounding the adoption of criminal legislation between 1791 and 1840 as compared with similar debates in England.³³

André Lachance has investigated criminal court records for part of the French regime. A similar systematic study of any period after the Conquest

³⁰"The Evolution of the Defences of Insanity and Automatism in Canada from 1843 to 1979: A Saga of Judicial Reluctance to Sever the Umbilical Cord to the Mother Country?" (1979) 14 U.B.C. L. Rev. 1; and "Not Guilty by Reason of Insanity": The Historical Roots of the Canadian Insanity Defence, 1843-1920" in L.A. Knafla, ed., *Crime and Criminal Justice in Europe and Canada* (Waterloo, Ont.: Wilfrid Laurier University Press, 1981) 179. See also M.L. Friedland, *The Case of Valentine Shortis: A True Story of Crime and Politics in Canada* (Toronto: University of Toronto Press, 1986).

³¹See "Nineteenth-Century Canadian Rape Law, 1800-92" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2, (Toronto: University of Toronto Press, 1983), 200; "Involuntary Motherhood: Abortion, Birth Control, and the Law in Nineteenth Century Canada" (1983) 3 Windsor Y.B. Access Just. 61; "Desperate Women and Compassionate Courts: Infanticide in Nineteenth-Century Canada" (1984) 34 U.T.L.J. 447; and "Nineteenth-Century Canadian Prostitution Law: Reflection of a Discriminating Society" (1986) 18 Soc. Hist. 387.

³²See Morel, *supra*, note 26; A. Morel, "Les crimes et les peines: Évolution des mentalités au Québec au XIX^e siècle" (1978) 8 R.D.U.S. 384. Morel's methodological conservatism prevents him from gaining a better understanding of popular mentality towards criminal law, since his sources cannot tell him much about the lower classes' perceptions. See also D. Hay, "The Meanings of the Criminal Law in Quebec, 1764-74" in L.A. Knafla, *supra*, note 30, 77. Compare J.M. Beattie, *Attitudes towards Crime and Punishment in Upper Canada, 1830-1850: A Documentary Study* (Toronto: Centre of Criminology, 1977). On the sources and methodological problems in the history of mentalities and ideologies, see G. Duby, "Histoire des mentalités" in C. Samaran, ed., *L'histoire et ses méthodes* (Paris: Gallimard, 1961) 937; M. Vovelle, *Idéologies et mentalités* (Paris: Maspéro, 1982).

³³*Supra*, note 28.

has not yet been attempted.³⁴ Noteworthy analyses of criminal punishment have been undertaken by Jean-Marie Fecteau and Pierre Tremblay.³⁵ Tremblay's method is statistically more sophisticated. He is chiefly concerned with the "amount" and "intensity" (or "average length") of imprisonment in Montreal between 1845 and 1913. Tremblay's findings suggest that the penal system may have been a homeostatic or self-regulating system, since the yearly "amount" of punishment over the period studied (the total number of hours of imprisonment imposed over all individuals), remained relatively constant, while the "intensity" of individual punishment did change at various times in that period. A complementary conjunctural investigation of the variations that occurred in the length of imprisonment at different times between 1845 and 1913 would probably yield interesting results.

On the other hand, Fecteau situates the history of the criminal justice system in the broader context of social regulation in Lower Canada between 1791 and 1840. He analyzes the social background of the accused and the types of criminal charges and punishments. He finds that criminal offenders were not representative of Lower Canadian society (urban dwellers and people on the margins of economic production, such as soldiers, were over-represented). Fecteau therefore hypothesizes that the criminal justice system played a minimal role within the logic of Lower Canadian social regulation, which was mainly based on relations of authority such as those involving seigneurs and the peasantry, merchants and clerks, and master craftsmen and indentured servants. The Lower Canadian state is said to have played a role complementary to that of pre-capitalist, socio-economic relations of authority. The coercive apparatuses of the State, of which the criminal justice

³⁴A. Lachance, *La justice criminelle du Roi au Canada au XVIIIe siècle: Tribunaux et officiers* (Québec: Presses de l'Université Laval, 1978); and *Crimes et criminels en Nouvelle-France* (Montréal: Boréal Express, 1984). Both of these works contain excellent bibliographies. Recent articles on the criminal law of the French regime include A. Morel, "Réflexions sur la justice criminelle canadienne, au 18e siècle" (1975) 29 *Rev. d'hist. de l'Amérique française* 241; A. Lachance, "Women and Crime in Canada in the Early Eighteenth Century, 1712-1759" in Knafla, *supra*, note 29, 157; J.-F. Leclerc, "Justice et infra-justice en Nouvelle-France: Les voies de fait à Montréal entre 1700 et 1760" (1985) 18(1) *Criminologie* 25.

³⁵See J.-M. Fecteau, *supra*, note 27; J.-M. Fecteau, "Régulation sociale et répression de la déviance au Bas-Canada au tournant du 19e siècle (1791-1815)" (1985) 38 *Rev. d'hist. de l'Amérique française* 499; P. Tremblay et G. Therriault, "La punition commune du crime: La prison et l'amende à Montréal de 1845 à 1913" (1985) 18(1) *Criminologie* 43; P. Tremblay, "L'évolution de l'emprisonnement pénitentiaire, de son intensité, de sa fermeté et de sa portée: Le cas de Montréal de 1845 à 1913" (1986) 28 *Can. J. Crim.* 47. See also J.A. Edmison, "Some Aspects of Nineteenth-Century Canadian Prisons" in W.T. McGrath, ed., *Crime and its Treatment in Canada*, 2d ed. (Toronto: Macmillan, 1976) 347; J.D. Borthwick, *History of the Montreal Prison from A.D. 1784 to A.D. 1886* (Montreal: A. Périard, 1886); and, on the exceptional case of the confinement of the criminally insane, S.N. Verdun-Jones & R. Smandych, "Catch-22 in the Nineteenth-Century: The Evolution of Therapeutic Confinement for the Criminally Insane in Canada, 1840-1900" (1981) 2 *Crim. Just. Hist.* 85.

system was a part, filled the gaps and dealt with the major crises in the social system.

A subject that has yet to be researched by historians is the nineteenth-century organization of Quebec's municipal and rural police systems.³⁶

IV. Political Protest and Military Law

With its weak police and criminal justice system, the military was an essential force for the "keeping of the peace" in Lower Canada. Despite the well-known use of military forces "as an aid to civil power" in nineteenth and twentieth-century Canada, the legal processes behind these interventions have not been a major concern of historians. A study of the British military garrison at Montreal between 1832 and 1854 by Elinor Kyte Senior, despite its apologetic tone, clearly shows the role of the garrison as a coercive apparatus upon which the imperial and colonial authorities depended to defend their authority against the rising power of the new local elite, which was backed by segments of the popular classes.³⁷ The evidence presented by Senior points to the vagueness of the military law which enabled the use of the military by the civil powers. The substitution of martial law for the civil administration of justice following the 1837 Rebellion is a recent interest of legal historians.³⁸

³⁶But see J. Turmel, *Police de Montréal, historique du service: Premières structures et évolution de la police de Montréal, 1796-1971*, vols 1, 2 (Montréal: Service de la police de la C.U.M., 1971-74); C.D. Shearing, F.J. Lynch & C.J. Matthews, *Policing in Canada: A Bibliography* (Ottawa: Ministry of the Solicitor General of Canada, 1979). For comparative materials, see W.R. Miller, *Cops and Bobbies: Police Authority in New York and London, 1830-1870* (Chicago: University of Chicago Press, 1977); E.H. Monkkonen, *Police in Urban America, 1860-1920* (New York: Cambridge University Press, 1981); J.J. Tobias, *Crime and Police in England, 1700-1900* (London: Gill & Macmillan, 1979).

³⁷E.K. Senior, *British Regulars in Montreal: An Imperial Garrison, 1832-1854* (Montreal: McGill-Queen's University Press, 1981), see especially parts I and II. See also R.A. McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law" (1985) 1 J.A.G. Journal 1. See also D. Morton, "Aid to the Civil Power: The Canadian Militia in Support of Social Order, 1867-1914" (1970) 51 Can. Hist. Rev. 407; J.J.B. Pariseau, *Disorders, Strikes and Disasters: Military Aid to the Civil Power in Canada, 1867-1933* (Ottawa, 1973).

³⁸See G. Rudé, *Protest and Punishment: The Story of the Social and Political Protesters Transported to Australia, 1788-1868* (Oxford: Oxford University Press, 1978); F.M. Greenwood, "L'insurrection appréhendée et l'administration de la justice au Canada: Le point de vue d'un historien" (1980) 34 Rev. d'hist. de l'Amérique française 57; and, by the same author, "The Chartrand Murder Trial: Rebellion and Repression in Lower Canada, 1837-1839" (1984) 5 Crim. Just. Hist. 129. See also, on the repression of popular protest more generally, M.S. Cross, "The Laws Are Like Cobwebs: Popular Resistance to Authority in Mid-Nineteenth Century British North America" in Waite, Oxner & Barnes, *supra*, note 3 at 103. For a comparative study, see G. Rudé, *The Crowd in History: A Study of Popular Disturbances in France and England, 1730-1848*, rev'd ed., (London: Lawrence and Wishart, 1981); R.C. Cobb, *The Police and the People: French Popular Protest, 1789-1820* (Oxford: Clarendon Press, 1970), which contains an excellent discussion of the problems raised by the use of state (police) records in the study of the history of popular protests at 3-48.

V. The Legal Professions, the Judiciary and Legal Education

Professional groups traditionally look back on their own history to reinforce their professional and social identity. The studies which result often take the form of biographies of "great legal men" (more rarely of women) or histories of institutions such as the Bar. This literature is characterized by hagiographical and anecdotal approaches.

Although there are numerous biographies of individual judges, lawyers and notaries, there are no prosopographical biographies of these professional groups.³⁹ The social origins of judges could, for example, be probed in terms of class and ethnicity. The hypothesis that the selection of judges in the nineteenth century was a function of political patronage could also be tested. And the particular role of justices of the peace in Lower Canadian society, who sat on the lower courts and were responsible for local government before municipal structures were established, has yet to be investigated. A study of lawyers and notaries as distinct groups would permit the identification of the salient characteristics of the social classes from which these corporate professional entities emerged. Investigations of the daily activities of lawyers or notaries, and of the firms that they established, would also be valuable.⁴⁰ The study of notaries in particular is fundamental because the documents they produced mediated numerous economic relations (notably employ-

³⁹On the methods of prosopography, see L. Stone, "Prosopography" in L. Stone, *The Past and the Present* (Boston: Routledge & Kegan Paul, 1981) 45. On the problems raised in this section generally, see the discussion in Sugarman & Rubin, *supra*, note 3 at 84ff. For collections of short biographies on Quebec judges, see I.J. Deslauriers, *La Cour supérieure du Québec et ses juges: 1849— 1er janvier 1980* (Québec: Deslauriers, 1980); F.-J. Audet, *Les juges en chef de la province de Québec, 1764-1924* (Québec: Action Sociale, 1927); P.-G. Roy, *Les juges de la province de Québec* (Québec: Redempti Paradis, 1933). Individual biographies include A.L. Burt, "The Tragedy of Chief Justice Livius" (1924) 5 *Can. Hist. Rev.* 196; H. Neatby, "Chief Justice William Smith: An Eighteenth-Century Whig Imperialist" (1947) 28 *Can. Hist. Rev.* 44; G. Malchelosse, "Les Blackstone" (1936) 1 *Cahiers des dix* 213; F.-J. Audet, "Les Mondelet" (1938) 3 *Cahiers des dix* 191; J.-J. Lefebvre, "Sir Louis-Hippolyte LaFontaine Bar't (1864), ses ascendants et ses alliances dans les professions du droit" (1964) 1 *Proc. & Trans. Royal Soc'y Can.* (4th) Section I 69; D.R. Barry, "An Eminent Quebec Lawyer of the Last Century" (1912) 32 *Can. L.T.* 427; L. Hart, "Joseph-François Perrault, 1753-1844 and Admissibility to the Bar" (1962) 8 *McGill L.J.* 270; B.J. Young, *George-Étienne Cartier: Montréal Bourgeois* (Kingston, Ont.: McGill-Queen's University Press, 1981); G. Parizeau, *La vie studieuse et obstinée de Denis-Benjamin Viger* (Montreal: Fides, 1980); L.F.S. Upton, *The Loyal Whig: William Smith of New York and Québec* (Toronto: University of Toronto Press, 1969). The *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1966-1985), and G. Palmer, *Biographical Sketches of Loyalists of the American Revolution* (Westport, Conn.: Meckler, 1984), contain numerous biographies of Quebec judges, lawyers, notaries and legal educators. Also useful are older biographical dictionaries, such as G.M. Rose, *A Cyclopaedia of Canadian Biography Being Chiefly Men of the Time* (Toronto: Rose Publishing, 1886-88).

⁴⁰There is one law-firm history: D.H. Tees, *Chronicles of Ogilvy, Renault 1879-1979* (Montreal: Ogilvy, Montgomery, Renault, 1979).

ment, sale, credit and inheritance) and therefore provide a crucial source for a nuanced, micro-analytic view of the economy of the French regime and of the first century of the British regime.⁴¹ Another possibility for useful research would be the study of the daily activities of attorneys, advocates, solicitors and barristers, in order to understand the functions comprehended by these different professional titles.

Much of the work on the Bar and the *notariat* is now dated and needs revision in light of such contemporary concerns as the role professional associations played as centres of political recruitment.⁴² Another aspect of Quebec legal history that has been neglected is legal education.⁴³ To date, writers on this subject have reminded their readers of the dates at which

⁴¹On the importance of notarial documents for the socio-economic history of Quebec, see R. Sweeny, *Internal Dynamics and the International Cycle: Questions of the Transition in Montreal, 1821-1828* (Doctoral dissertation in history, McGill University, 1986) c. 3 [unpublished]; L. Lavallée, "Les archives notariales et l'histoire sociale de la Nouvelle-France" (1974) 28 *Rev. d'hist. de l'Amérique française* 385; G. Paquet & J.-P. Wallot, "Les inventaires après décès à Montréal au tournant du XIXe siècle; préliminaire à une analyse" (1976) 30 *Rev. d'hist. de l'Amérique française* 163; G. Bervin, "Les sources archivistiques: leur utilisation dans l'étude de la bourgeoisie marchande bas-canadienne (1800-1830)" (1984) 38 *Rev. d'hist. de l'Amérique française* 203; and Y.A. Morin, "La représentativité de l'inventaire après décès — l'étude d'un cas: Québec au début du XIXe siècle" (1981) 34 *Rev. d'hist. de l'Amérique française* 515.

⁴²See J.-E. Roy, *L'ancien barreau au Canada: Conférence donnée devant le barreau de Québec en la salle de la Cour d'assises au mois de février 1897* (Montréal: C. Théoret, 1897); A.W.G. MacAlister, *The Bench and Bar of the Provinces of Quebec, Nova Scotia and New Brunswick* (Montreal: Lovell, 1907); A.W.P. Buchanan, *The Bench and Bar of Lower Canada Down to 1850* (Montreal: Burton, 1925); F.-J. Audet, "Les débuts du barreau de la province de Québec" (1937) 2 *Cahiers des dix* 207; F.-J. Audet, "Le barreau et la révolte de 1837" (1937) 31 *Proc. & Trans. Royal Soc'y Can.* (3d) Section I 85; M. Nantel, "Les avocats à Montréal" (1942) 7 *Cahiers des dix* 185; M. Nantel, "La communauté des avocats" (1945) 10 *Cahiers des dix* 263; J. Boucher, ed., *Le barreau à 125 ans: Son passé, son avenir* (Montréal: Barreau du Québec, 1974). On the notariat, see J.J. Lefebvre, "Les premiers notaires de Montréal sous le régime anglais, 1760-1800" (1943) 45 *R. du N.* 293; J.-E. Roy, *Histoire du notariat au Canada depuis la fondation de la colonie jusqu'à nos jours*, vols 1-4 (Lévis, Qué.: Revue du notariat, 1899-1902); and A. Vachon, *Histoire du notariat canadien, 1621-1960* (Québec: Presses de l'Université Laval, 1962).

⁴³But see, M. Nantel, "L'étude du droit et le barreau" (1949) 14 *Cahiers des dix* 11; A. Morel, "Maximilien Bibaud, fondateur de l'École de droit" (1951) 2 *Thémis* 9; G. Lahaise, "Centenaire de la première école de droit établie au Canada, Collège Sainte-Marie, 1851-67" (1951) 2 *Thémis* 17; R. St J. Macdonald, "An Historical Introduction to the Teaching of International Law in Canada" (1974) 12 *Can. Y.B. Int'l L.* 67; L. Lortie, "The Early Teaching of Law in French Canada" (1975) 2 *Dalhousie L.J.* 521; E.-F. Surveyer, "Une école de droit à Montréal avant le Code civil" [1920] *Revue Trimestrielle Canadienne* 140; Y. Pratte, "The Faculty of Law at Laval University" (1965) 16 *U.T.L.J.* 175; J. Héту, *Album souvenir 1878-1978: Centenaire de la Faculté de droit de l'Université de Montréal* (Montréal: Yvon Blais, 1978); S.B. Frost, "The Early Days of Law Teaching at McGill" (1984) 9 *Dalhousie L.J.* 150; S.B. Frost, *McGill University: For the Advancement of Learning*, vol. 1 (Montreal: McGill-Queen's University Press, 1980). Compare G.B. Baker, "Legal Education in Upper Canada 1785-1889: The Law Society as Educator" in Flaherty, ed., *supra*, note 31, 49.

various law schools opened. Is it necessary to point out that institutions like the Bar, the *Notariat* and law schools were at the center of the formation and cohesion of professional groups? Yet nearly nothing is known about the mechanisms of formation, selection and cohesion of the legal professions.

VI. Law and Economic activity

The persistence of a feudal land tenure regime in Quebec, the seigneurial system, and its co-existence with freehold tenure during the British regime has attracted the attention of historians and legal scholars. Debates among historians about the relative importance of the seigneurial system have developed because of a basic misunderstanding of seigneurial law. Adopting the social history approach of the *Annales* school, Louise Dechêne has studied the seventeenth and eighteenth-century society and economy of the Island of Montreal. Dechêne's work confronts seigneurial law with the actual practices of peasants and seigneurs in their social and economic relations. Her study of the interaction between legal norms and social practice leads to a better understanding of both elements of a unique reality and goes beyond earlier debates on seigneurial land tenure.⁴⁴

A recent study of the notion of property (urban and rural), and its transformation in the middle of the nineteenth century, is Brian Young's investigation of the Seminary of Montreal "as a business institution".⁴⁵ Young looks at the transformation, under the pressure of the emerging industrial bourgeoisie, of Lower Canada's largest seigneur into a capitalist proprietor. The law of property is shown to be a crucial element of this transition, and the changing definition of "property" within this evolving socio-economic context is demonstrated.

⁴⁴The "Annales school" characterizes a group of French social and economic historians who contribute to the journal *Annales — Économies, Sociétés, Civilisations*, and the particular methodologies employed by these historians. See Dechêne, *supra*, note 19; and L. Dechêne, "L'évolution du régime seigneurial au Canada: Le cas de Montréal aux XVIIe et XVIIIe siècles" (1971) 12 *Recherches sociographiques* 143. See also R.C. Harris, *The Seigneurial System in Early Canada: A Geographical Study*, 2d ed. (Kingston, Ont.: McGill-Queen's University Press, 1984).

⁴⁵B.J. Young, *In its Corporate Capacity: The Seminary of Montreal as a Business Institution, 1816-1876* (Kingston, Ont.: McGill-Queen's University Press, 1986), c. 3-4. See also, G.-E. Giguère, "Les biens de Saint-Sulpice et 'Attorney General Stuart's Opinion Respecting the Seminary of Montreal (10 Décembre 1828)' — essais critiques" (1970) 24 *Rev. d'hist. de l'Amérique française* 45. On the "abolition" of the seigneurial system, see F. Ouellet, "L'abolition du régime seigneurial et l'idée de propriété" in *Éléments d'histoire sociale du Bas-Canada* (Montréal: Hurtubise H.M.H., 1972) 297; J.-P. Wallot, "Le régime seigneurial et son abolition au Canada" in *Un Québec qui bougeait: Trame socio-politique du Québec au tournant du XIXe siècle* (Trois-Rivières: Boréal Express, 1973) 225.

John Brierley has examined the evolution of the legal institution of freehold tenure, and Evelyn Kolish has analyzed public debates on the issue of land tenure systems.⁴⁶ Other noteworthy studies by Robert Armstrong and Pierre Paquette treat public and private property in natural resources.⁴⁷ There are also works on trusts, nuisance law, patents and general property rights.⁴⁸

One aspect of property law which has attracted much attention is the law of successions. André Morel, in a longstanding study, combined a search for the historical evolution of inheritance law with a contemporary interest in law reform. Other historians have concentrated on inheritance practices in Quebec society. There seems to be a consensus that the adoption of elements of English succession law did not significantly affect popular practices among French-Canadians which, until the latter part of the nineteenth century, generally conformed to the rules on succession contained in the Custom of Paris.⁴⁹

⁴⁶J.E.C. Brierley, "The Co-Existence of Legal Systems in Quebec: 'Free and Common Socage' in Canada's 'pays de droit civil'" (1979) 20 C. de D. 277; Kolish, *supra*, note 18; P. Phillips, "Land Tenure and Economic Development: A Comparison of Upper and Lower Canada" (May 1974) 9 J. Can. Stud. 35; G.F. McGuigan, *Land Policy and Land Disposal under Tenure of Free and Common Socage, Quebec and Lower Canada, 1763-1809* (Doctoral dissertation in legal history, Université Laval, 1962) [unpublished]. On registration of hypothecs, see also E. Kolish, "Le Conseil législatif et les bureaux d'enregistrement (1836)" (1981) 35 Rev. d'hist. de l'Amérique française 217; J. Martineau, "Comparaison et efficacité des diverses formes de documents susceptibles d'enregistrement" (1979) 82 R. du N. 31. On bankruptcy, see also E. Kolish, "L'introduction de la faillite au Bas-Canada: Conflit social ou national?" (1986) 40 Rev. d'hist. de l'Amérique française 215.

⁴⁷See the valuable work of H.V. Nelles, *The Politics of Development: Forests, Mines and Hydro-Electric Power in Ontario, 1849-1941* (Toronto: Macmillan, 1974). See also R. Armstrong, "Le développement des droits miniers au Québec à la fin du XIXe siècle" (1983) 59 L'Actualité économique 576; P. Paquette, *L'extraction de matières premières et la politique minière de l'État: Une analyse de leur évolution et de leur contribution au développement économique du Québec, 1867-1975* (Doctoral dissertation in law, McGill University, 1982).

⁴⁸R. Demers, "From the *Bubble Act* to the Pre-Incorporation Trust: Investor Protection in Quebec Law" (1977) 18 C. de D. 335; M. Pourcelet, "L'évolution de droit de propriété depuis 1866" in J. Boucher & A. Morel, eds, *Le droit dans la vie économique-sociale*, vol. 2, Livre du centenaire du Code civil (Montréal: Presses de l'Université de Montréal, 1970) 3; T.R. Naylor, *Industrial Development*, vol. 2, *The History of Canadian Business, 1867-1914* (Toronto: Lorimer, 1975) at 38ff.; J. Nedelsky, "Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law 1880-1930" in Flaherty, *supra*, note 3, vol. 1, 281.

⁴⁹See A. Morel, *Les limites de la liberté testamentaire dans le droit civil de la Province de Québec* (Paris: L.G.D.J., 1960); by the same author, "Un exemple de contact entre deux systèmes juridiques: Le droit successoral au Québec" (1963) 4 *Annales de l'Université de Poitiers* (n.s.) 1; and "L'apparition de la succession testamentaire: Réflexions sur le rôle de la jurisprudence au regard des codificateurs" (1966) 26 R. du B. 499. See also Kolish, *supra*, note 18 at 322-38; and Y.F. Zoltvany, "Esquisse de la Coutume de Paris" (1971) 25 Rev. d'hist. de l'Amérique française 365. On inheritance practices, see C. Champagne, *La pratique testamentaire à Montréal, 1777-1825* (Masters thesis in law, Université de Montréal, 1972) [unpublished]; P. Des-

Company law and the laws defining financial instruments and institutions were intimately tied to the emerging role of the nineteenth-century State as an economic regulator. Yet the existing legal-historical literature emphasizes the nature of relevant legislation or the debates surrounding its adoption rather than the economic repercussions of such enactments.⁵⁰ Legal definitions of credit instruments in the early nineteenth century, for example, may have helped determine business decision-making processes in the selection of types of credit instruments.⁵¹ Further research could test the extent to which legal rules contributed in shaping economic behaviour and in legitimating opportunities for economic choices.⁵²

jardins, "La Coutume de Paris et la transmission des terres — le rang de la Beauce à Calixa-Lavallée de 1730 à 1975" (1980) 34 *Rev. d'hist. de l'Amérique française* 331; G. Bouchard, "Les systèmes de transmissions des avoirs familiaux et le cycle de la société rurale au Québec, du XVIIe au XXe siècle" (1983) 16 *Soc. Hist.* 35. On succession in Europe, see J.R. Goody, J. Thirsk & E.P. Thompson, eds, *Family and Inheritance: Rural Society in Western Europe, 1200-1800* (Cambridge: Cambridge University Press, 1976).

⁵⁰On state regulation of the economy, see M. Priest and A. Wohl, "The Growth of Federal and Provincial Regulation of Economic Activity, 1867-1978" in W.T. Stanbury, ed., *Government Regulation: Scope, Growth, Process* (Montreal: Institute for Research on Public Policy, 1980) 69. A monographic study showing the interplay of state and economy is G.N. Tucker's *The Canadian Commercial Revolution, 1845-1851* (Toronto: McClelland and Stewart, 1964). On partnerships, firms and corporations, see A.W. Currie, "The First Dominion Companies Act" (1962) 28 *Can. J. Econ. & Pol. Sci.* 387; G.F. McGuigan, "The Emergence of the Unincorporated Company in Canada" (1964) 2 *U.B.C.L. Rev.* 31; Demers, *supra*, note 48; F.E. Labrie & E.E. Palmer, "The Pre-Confederation History of Corporations in Canada" in J.S. Ziegel, ed., *Studies in Canadian Company Law* (Toronto: Butterworths, 1967) 33; and J. Smith & Y. Renaud, *Droit québécois des corporations commerciales* (Montréal: Judico, 1974) 5.

⁵¹An important discussion of early nineteenth-century credit instruments can be found in Sweeny, *supra*, note 41, c. 3, 5 and 6. See also G. Bervin, "Aperçu sur le commerce et le crédit à Québec, 1820-30" (1983) 36 *Rev. d'hist. de l'Amérique française* 527 and G. Paquet & J.-P. Wallot, "Le système financier bas-canadien au tournant du XIXe siècle" (1983) 59 *L'Actualité économique* 456. For a useful general introduction, see E.P. Neufeld's historical treatment of banks and other financial institutions in *The Financial System of Canada: Its Growth and Development* (Toronto: Macmillan, 1972). Other works include: R.M. Breckenridge, *The Canadian Banking System, 1817-1890* (New York: Macmillan, 1895); R.M. Breckenridge, *The History of Banking in Canada* (Washington, D.C.: G.P.O., 1910); R.C. McIvor, *Canadian Monetary, Banking and Fiscal Development* (Toronto: Macmillan, 1958); T. Naylor, *The Banks and Finance Capital*, vol. 1, *The History of Canadian Business 1867-1914* (Toronto: Lorimer, 1975); R. Rudin, *Banking en français: The French Banks of Quebec 1835-1925* (Toronto: University of Toronto Press, 1985); and E.P. Neufeld's collection, *Money and Banking in Canada: Historical Documents and Commentary* (Toronto: McClelland & Stewart, 1964). See Kolish's discussion of bankruptcy, *supra*, note 18 at 43-56, 519-33 and 624-38; and her "L'introduction de la faillite au Bas-Canada: Conflit Social ou National", *supra*, note 46. See also an interesting discussion of law and economy in Sugarman & Rubin, *supra*, note 3; R.C.B. Risk, "The Law and the Economy in Mid-Nineteenth-Century Ontario: A Perspective" in Flaherty, ed., *supra*, note 3, 88.

⁵²See Sugarman & Rubin, *supra*, note 3 at 9ff.

The legal history of labour in Quebec involves many aspects of the law: property (slavery), contract (hiring of labour power), and specific labour legislation (master and servant laws, the right to organize a trade union and the right to strike). Marcel Trudel's book on slavery discusses law only incidentally, as do works on artisanship and apprenticeship by Pierre Audet, David-Thiery Ruddel, Jean-Pierre Hardy and Mary Poutanen. These historians of artisanship have studied in great detail the clauses of hiring contracts (journeymen's and apprentices' indentures) but have dealt less thoroughly with legal questions. While inadequate attention has been paid to the emergence of the capitalist labour contract, some research has been conducted on workers' collective rights. John Dickinson's recent article on Quebec labour legislation at the turn of the twentieth century (1894-1914) is noteworthy for its analysis of the extent to which this legislation was useful to workers. Dickinson goes beyond the usual study of the origins of legislation to analyse the inspectors' reports on working conditions that were mandated by the new legislation.⁵³

VII. Women and the Law

While feminism has directed attention towards the history of women and their present legal condition, there has been inadequate research on the historical roots of the present legal situation of Quebec women. Much of the work published is general and concentrates on legislation. There is no study of Quebec property law comparable to Lee Holcombe's research on

⁵³On slavery and artisanship, see M. Trudel, *L'esclavage au Canada français: Histoire et conditions de l'esclavage* (Québec: Presses de l'Université Laval, 1960); P.H. Audet, *Apprenticeship in Early Nineteenth-Century Montreal, 1790-1812* (Masters thesis in history, Concordia University, 1975); J.-P. Hardy & D.-T. Ruddel, *Les apprentis artisans à Québec, 1660-1815* (Montréal: Presses de l'Université du Québec, 1977); M.A. Poutanen, *For the Benefit of the Master: The Montreal Needle Trades During the Transition 1820-1842* (Masters thesis in history, McGill University, 1985); and P.N. Moogk, "Apprenticeship Indentures: A Key to Artisan Life in New France" [1971] *Can. Hist. Assoc. Hist. Papers* 65. See also Sweeny, *supra*, note 41, c. 4. The important work by H.C. Pentland, *Labour and Capital in Canada 1650-1860* (Toronto: James Lorimer, 1981), does not examine labour law even though it is organized around the evolution of diverse labour regimes. On particular labour legislation, see J. de Bonville, *Jean-Baptiste Gagnepetit: Les travailleurs montréalais à la fin du XIXe siècle* (Montréal: L'Aurore, 1975) 204-15; R. Tremblay, "Un aspect de la consolidation du pouvoir d'État de la bourgeoisie colomiale: La législation anti-ouvrière dans le Bas-Canada, 1800-1850" (1981-82) 8-9 *Labour* 243; C. D'Aoust & F. Delorme, "The Origin of the Freedom of Association and of the Right to Strike in Canada: An Historical Perspective" (1981) 36 *Relations industrielles* 894; M. Chartrand, "The First Canadian Trade Union Legislation: An Historical Perspective" (1984) 16 *Ottawa L. Rev.* 267; and J. Dickinson, "La législation et les travailleurs québécois 1894-1914" (1986) 41 *Relations industrielles* 357. A study which examines the legal context of a pre-Confederation strike is R. Tremblay, "La grève des ouvriers de la construction navale à Québec (1840)" (1983) 37 *Rev. d'hist. de l'Amérique française* 227.

the nineteenth-century English property regime of married women.⁵⁴ As in other areas of legal-historical research, the earliest studies have established chronological bench-marks for later detailed investigations of the legal condition of women.⁵⁵ One exception is the important work by Constance Backhouse on nineteenth-century law regarding women. Her treatment of criminal laws affecting women has been noted above. She has also published studies dealing with such aspects of the civil law as marriage and custody. Her approach stresses the ideology or *mentalité* underlying nineteenth-century judicial interpretation and legislation.⁵⁶

A good survey of the problem, which is also suggestive of possibilities for further research is provided by the "Collectif Clio" 's *L'histoire des femmes au Québec depuis quatre siècles*.⁵⁷

Conclusion

This survey illustrates that there is no unified field of research on Quebec legal history. Instead, there is a multiplicity of legal histories, each defined by the problems they pose and their methodology.

Traditional legal scholars have instrumentalized the most venerable historical methods, chronology and source criticism, in a positivist quest for the sources of law. The identification of the origins of particular laws has typically been combined with doctrinal interpretation of sources such as cases, commentaries, codes and legislation. The most noteworthy work of this genre in Quebec is Brierley's study of the codification commission and Brisson's work on the evolution of nineteenth-century civil procedure.

⁵⁴*Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (Toronto: University of Toronto Press, 1983).

⁵⁵See A. Morel, "La libération de la femme au Canada: Deux itinéraires" (1970) 5 R.J.T. 399; J. Boucher, "L'histoire de la condition juridique de la femme au Canada français" in Boucher & Morel, *supra*, note 23, 155; J. Douglas, "The Status of Women in New England and New France" (1912) 19 Queen's Q. 359; W.R. Riddell, "Woman Franchise in Quebec, A Century Ago" (1928) 22 Proc. & Trans. Royal Soc'y Can. (3d) Section II, 85; M. Jean, "L'État et les communautés religieuses féminines au Québec — 1639-1840" (1972) 6 Stud. Canon. 163; and S. Altshul & C. Carron, "Chronology of Some Legal Landmarks in the History of Canadian Women" (1975) 21 McGill L.J. 476. A rare study from a historical perspective is M.D. Castelli, "Le douaire en droit coutumier ou la déviation d'une institution" (1979) 20 C. de D. 315.

⁵⁶Backhouse's articles on criminal law are cited *supra*, note 31. See also her "Shifting Patterns in Nineteenth-Century Canadian Custody Law" in Flaherty, ed., *supra*, note 3, 212; "Pure Patriarchy: Nineteenth-Century Canadian Marriage" (1986) 31 McGill L.J. 264; "The Tort of Seduction: Fathers and Daughters in Nineteenth-Century Canada" (1986) 10 Dalhousie L.J. 45; and "To Open the Way for Others of my Sex": Clara Brett Martin's Career as Canada's First Woman Lawyer" (1985) 1 Can. J. Women & L. 1.

⁵⁷J. Stoddart et al., *L'histoire des femmes au Québec depuis quatre siècles* (Montréal: Quinze, 1982).

But doctrinal interpretation implies that the meaning of law lies exclusively in legal texts. It implies that law is a self-contained language. The existence of law is a "given", and only the meaning of particular laws, their origins and the chronology of their reforms are in question. This positivist and doctrinal approach leaves unanswered questions for legal scholars and historians. Most of these questions concern the place of law within societies. Nevertheless, the doctrinal approach undoubtedly still serves as a stepping-stone for social histories of the law.

The combination of doctrinal knowledge with modern historical methods, which are often adapted from other social science disciplines, could result in social histories of law. One major trend in Quebec and Canadian legal history is the investigation of the ideology or *mentalité* of the law. Prominent examples are the studies of André Morel, Douglas Hay, Evelyn Kolish and Jean-Marie Fecteau. This approach is often combined with a concern for the social interests that particular intellectual positions support. A more ambitious approach in the social history of law is to study the material context and consequences of law. This has been attempted in studies of the activities of courts in New France by John Dickinson and André Lachance. Another study which relates law directly to its material context is Louise Dechêne's investigation of seigneurial tenure on the Island of Montreal. Jean-Marie Fecteau's work attempts to link the criminal justice system to the modes of social regulation of Lower Canadian society.

Numerous problems can arise in the course of attempting social histories of law. The role of law in shaping social behaviour can be exaggerated, or the influence of social factors on law can be overemphasized. A more serious problem is that some legal historians apply a socio-historical analysis without using the necessary conceptual and methodological tools to support their arguments.

Law is both an intellectual and a material phenomenon.⁵⁸ It is at once a series of discourses and a series of institutions. Law-as-discourse could be studied through the methods of intellectual history and semiotics, especially linguistics, as used in literary criticism.⁵⁹ For example, the language of sub-

⁵⁸An interesting discussion, although about intellectual phenomena generally, is M. Godelier, "The Ideal in the Real" in R. Samuel & G.S. Jones, eds, *Culture, Ideology and Politics: Essays for Eric Hobsbawm* (London: Routledge & Kegan Paul, 1982) 12.

⁵⁹For a discussion of intellectual history, see J.G.A. Pocock, "Introduction: The State of the Art" in J.G.A. Pocock, ed., *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge: Cambridge University Press, 1985) 1; K.S. Abraham, "Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair" (1979) 32 Rutgers L.R. 676; S. Fish, "Working on the Chain Gang: Interpretation in Law and Literature" (1982) 60 Texas L.R. 739; Gordon, *supra*, note 3; and Monahan, *supra*, note 5.

stantive law, doctrinal commentary and judicial interpretation could be analysed for its underlying conceptual elements and hidden assumptions. Legal rituals and norms could also be studied for their symbolic and ideological content.⁶⁰ But law also participates in the material relations that help to constitute society. Law-as-institution could be investigated from such diverse sociological perspectives as structuralism, functionalism and Marxism.⁶¹ In short, we need more ambitious research, which asks pertinent and precise questions about the place of law within society, and which develops useful research methods and conceptual tools in an interdisciplinary fashion.

⁶⁰An example of such an approach is D. Hay, "Property, Authority and the Criminal Law" in Hay *et al.*, *supra*, note 25, 17.

⁶¹For a variety of viewpoints, see P. Vilar, "Histoire du droit, histoire totale" in *Une histoire en construction: Approches marxistes et problématiques conjoncturelles* (Paris: Gallimard, 1982) 265; D. Sugarman, "Theory and Practice in Law and History: A Prologue to the Study of the Relationship between Law and Economy from a Socio-Historical Perspective" in B. Fryer, *et al.*, eds, *Law, State and Society* (London: Croom Helm, 1981) 70; W.E. Forbath, H. Hartog & M. Minow, "Introduction: Legal Histories From Below" [1985] *Wisc. L. Rev.* 759.