

Law and Society in Canada in Historical Perspective,
D. J. Bercuson and L. A. Knafla, eds., Calgary: University of Calgary,
1979. Pp. iii, 171. \$15.00 (paperback).

Legal ideas have no immaculate conception. They are not self-evident truths which spring divinely inspired and self-executing from the breast of the judiciary. The Common Law is an expression of social forces acting upon judges who, in turn, impose on society their conception of what the law ought to be. To decide whether a company director is to be held to the standard of a trustee, or whether a tribunal has addressed its "jurisdictional" threshold question, or whether the doctrine of constructive trust will be invoked when co-habitation ceases, is to make a political choice about how society should evolve, albeit a choice obscured by the incantations of the legal liturgy. That our system rests at base upon the shifting sands of personal belief is neither desirable nor undesirable; no better can be done.

In Great Britain study of the interrelationship of the law, ideas, and society has long been part of the scholarly mainstream, achieving its highest level of integration in the historiography of the Middle Ages. In the United States legal history is also a considerable field of scholarship; and in the brilliant work of Morton Horwitz we see the law assume its rightful place in the general study of the American nineteenth century.¹

In Canada the situation is otherwise. There is, to be sure, a long line of work on certain facets of the judicial system itself — sensational crimes, eminent jurists, and evolving court jurisdictions, for example; and some of this work is of high quality. (In the Maritime context one thinks of J. W. Lawrence's *Judges of New Brunswick*² and John Willis' *History of Dalhousie Law School*³.) But such work represents only one approach to legal history — the system as viewed from within. Of the variety of historiography which examines the impact of social and economic forces on the law and of the law on society Canada has produced a mere handful of competent examples.⁴ A review of the steadily increasing number of titles under the Legal History heading of the *Index to Canadian Legal Periodical Literature* indicates that while

¹Symbolic of the emergence of legal history into the mainstream of U.S. historiography is the fact that Horwitz's *The Transformation of American Law, 1780-1860* (Cambridge: Harvard U.P., 1977) was awarded the Bancroft Prize in American History.

²(Saint John, 1907).

³Willis, J., *History of Dalhousie Law School*, Toronto: University of Toronto Press, 1979.

⁴One thinks of Weiler, Paul, *In the Last Resort* (Toronto: Carswell, 1974) and the essays of Risk, R. C. B.: "The Golden Age. The Law about the Market in Nineteenth-Century Ontario", (1976) 26 *U. Toronto L.J.* 307-346; "The Last Golden Age: Property and the Allocation of Losses in Ontario in the Nineteenth Century", (1977) 27 *U. Toronto L.J.* 199-239; "The Law and the Economy in Mid-Nineteenth Century Ontario: A Perspective", (1977) 27 *U. Toronto L.J.* 403-438.

developments within the confines of the justice system itself continue to receive much attention there are very few writers prepared to approach the law from the broader perspective of its social context.

One illustration of the generally uninspiring landscape of Canadian legal historiography is the volume under review. Published to preserve the contributions to a colloquium held some years ago at the University of Calgary the work consists of seven essays and bibliographical compilation.⁵ That such a collection should appear at all is a hopeful sign for Canadian legal historians, but it must be said that the quality of the work reproduced here is disappointing. Five of the seven essays should not have been published, either because they are not historical (Fraser) or because they are insubstantial or unscholarly (Patenaude, Thorner, Chapman, Jamieson).

J. C. Levy's commentary on the early Upper Canadian poor law makes some insightful observations on that colony's decision to reject the English model of relief system. The documentation is slender but the approach is at least thoughtful. Michael Cross' study of law and disorder in early nineteenth century Ottawa is the only adequate historical essay in the volume. His analysis of recreational violence on a lumber frontier has suggestive implications for other areas of British North America⁷, although his treatment might have greatly profited from an examination of actual court records.

Most of the writers represented in this volume are apparently trained in disciplines other than the law. While this can be no excuse for the dismal level of most of their contributions it does suggest what is probably a basic truth of legal historiography — that the landmark contributions are likely to be made by those whose background combines advanced study in history with a training in the law. It is one of the happy consequences of the economic downturn of the 1970's that increasing numbers of history graduates have sought refuge in the law schools. Out of this group must come those who will lead the historical study of Canadian law out of its infancy.

DAVID G. BELL*

⁵The contributions are: Cross, M. S., "Violence and Authority: The Case of Bytown", 5-22; Levy, J. C., "The Poor laws in Early Upper Canada", 23-44; Patenaude, Pierre, "The Evolution of the Right of Privacy in Quebec", 45-51; Thorner, Thomas, "The Incidence of Crime in Southern Alberta, 1878-1905", 53-88; Chapman, T. L., "The Anti-Drug Crusade in Western Canada, 1885-1925", 89-115; Fraser, F. M., "Child Abuse in Nova Scotia", 117-140; Jamieson, Stuart, "Some Reflections on Violence and the Law in Industrial Relations", 141-155; Knafly, L. A., "Crime, Criminal Law and Justice in Canadian History: A Select Bibliography, Origins to 1940", 157-171.

⁶In an attempt to give his analysis an artificially broad sweep, Cross is led to make the following curious statement about a celebrated New Brunswick event of July 12, 1847: "At Woodstock, rioting began when Catholics attacked an Orange procession". "It lasted for three days, until suppressed by a detachment from the 33rd Regiment and left three dead and most of the town destroyed by fire." (p. 8)

In fact the riot itself could not have lasted much more than an hour, it was not suppressed by the military, there were no known fatalities, and there was no fire.

*B.A., M.A. (Queen's), LL.B. (U.N.B.), LL.M. candidate, Harvard University.