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Archival Research in the History of the Law: A User's Perspective

by DOUGLAS HAY*

Legal history and the social history of law have become very active fields of research in Britain, the United States, and Canada in the past ten years. Moreover, they have begun to affect each other, so that social historians are now much more sensitive to doctrinal changes, shifts in legal rules, and legal concepts, while legal historians increasingly appreciate that explaining legal change — or the lack of it — may require extensive research outside the law library. In short, lawyers and historians are beginning to meet not only in law libraries, but also in archives. And, like all users, they are asking the impossible.

From law librarians, they want every variant edition of every obscure and outdated procedural manual, every ancient set of reports, every printed trial extant for earlier centuries. Fortunately, large international microfilming projects are increasingly making it possible for librarians to supply all of these, and even extensive manuscript collections of legal materials. But historians of law make more outrageous demands on archivists: retain everything; prepare finding aids for everything; manage your collections with us, above all others, in mind. I am told that the professional duties of archivists include measuring such demands by the tests of budgets, conservation imperatives, the interests of other users, the finite dimension of the working year, available storage space, and a healthy instinct for preservation of self as well as collections. But since I am a user, not an archivist, I shall innocently describe utopia, and say little about how to get there. My only excuse for doing so is that legal records, like all records, present specific problems, problems that are not particularly evident without close familiarity with the recent large research literature, much of it still in dissertation form, on the legal and social history of the law. A review of some of its themes may help archivists, lawyers, and historians to discuss some of the hard decisions about retention. One of my conclusions is that lawyers and historians may in fact have rather different professional imperatives, even conflicting ones, and that the historically and legally informed archivist will necessarily play a critical role in adjudicating between them.

* I am grateful for the opportunity I had to raise some of these issues at the Annual Meeting of the Ontario Association of Archivists, and for comments by the editor of *Archivaria* and by Jean Tener. An earlier version of this paper was presented at the Annual Meeting of the Ontario Association of Archivists in Barrie, Ontario, May 1985. See also articles by Schaeffer and by Shepard in this issue.

Court Records and Related Series

Archivists and legal historians have recognized the intrinsic interest of certain sources for some time: court records, papers of lawyers and judges, legal material in ministry files. I say for some time, but not for a long time: as recently as the period immediately after the Second World War the newly formed county record offices in England were preparing to throw out most of their quarter session records, now the most used series of documents in many of their reading rooms.¹ The fact that it is the present generation of archivists who have ensured the survival of what remains of Canadian court records of the eighteenth and nineteenth centuries is equally telling.² Those records are sure to become intrinsic sources not only for legal history, but for studies of all kinds, and the reason lies in the changes in the ways in which they are now exploited.³ Historians of the recent (as opposed to the medieval) past until a very few years ago used court records for illustrative anecdotes, or as confirmatory sources for events — largely political — about which they knew from other work. The vast bulk of what were apparently highly repetitive record series deterred almost everyone from doing anything else. Two new and very different approaches now make exhaustive use of the record of past cases.⁴ One is in serial studies, almost always quantitative, through the medium of the computer; the second is the immensely detailed reconstruction of a few highly significant cases. Both approaches yield results that illuminate not only technical changes in the law, but also aspects of social change hardly studied before.

Computerized studies of legal record series in the United States, England, and Canada, to cite the areas with which I am at least somewhat familiar, are becoming sufficiently numerous that significant comparative work is beginning to emerge.⁵ Most of the early work was on the administration of criminal law, and in the case of England, where most of it has been done, it has illuminated the incidence of prosecution, the relationship of theft to social and economic facts such as changes in price levels and the demobilization of soldiers after wars, the social composition and patterned decisions of juries, and changes in the incidence of the death penalty ordained by governments or by judges responding to

1 Information from Mr. Malcolm Thomas, Librarian and Archivist of Friends' House Library, London, England.

2 See the articles by Ms Cathy Shepard, one of those most responsible for this work in Ontario, and by Mr. Roy Schaeffer, who supervised the Law Society of Upper Canada's survey of law firm papers.

3 By court and related records I mean (using the criminal law as an example) not only such series as indictments, recognizances, court calendars, minute and order books, but also registers of prisons, jails and houses of correction, and financial accounts of fees, fines, costs, estreats, and expenditures on the maintenance of the fabric of the court, as well as all records generated by the police.

Related records of equal importance for the history of the criminal law are those of the law officers making administrative decisions within Canada's distinctive systems of public prosecution, cabinet files dealing with executive clemency, and correspondence dealing with statutory changes. These, however, do not present the distinctive problems of court records, and are likely to be retained on other grounds in any case.

4 Much ongoing research in English material is described in Clinton W. Francis and Sue Sheridan Walker, eds., *Checklist of Research in British Legal Manuscripts, Volume III* (Chicago, 1984).

5 For surveys and bibliographies of recent work in Britain and the United States, see the historical articles in *Crime and Justice: An Annual Review of Research*; the *Newsletter* of the American Society for Legal History; the annual bibliographies in the *Cambrian Law Journal*; work noticed in the *Newsletter* of the International Association for the History of Crime and Criminal Justice; and work reviewed in journals such as *Law and History Review*, *Journal of Legal History*, *American Journal of Legal History*, and *Criminal Justice History*.

administrative crises, perceptions of crime, or political pressure.⁶ Work in Canada, not as advanced, nonetheless promises equally important findings.⁷

This work on criminal law is now being paralleled by work on the civil courts in a number of countries. In England, analysis of cases before the central courts at Westminster between 1660 and 1840 is revealing what kinds of people were using the courts and to what ends, and has shown that the judges changed procedural rules to meet the interests of creditors and in part to enhance their own financial interests and those of the lawyers practising before them.⁸ An American scholar is working on thousands of cases instigated by railroads, banks, and coal mining concerns in the United States with a view to understanding their use of the law.⁹ And work on civil litigation in Canada will undoubtedly do much to explain the shape of nineteenth-century Canadian business practices as well as political relations and social conflict.¹⁰ For as well as a source for the history of the courts and of the law, court records are a window on patronage, kin, and ethnic relations. They provide systematic evidence on such issues when we ask who acts for whom as a surety, or as a witness, or as counsel; who is summoned for jury service and who is excluded; what classes of plaintiffs succeed or are non-suited; what cases are withheld from juries, or receive only nominal damages from them.

Two points should be made about this work. The first is that it is very laborious in its early stages, but once the material is in the computer it can become immensely useful to all future users of the archives. Most of the computer files constructed by historians generate full name, place, and offence indices. Depending on the scope of the study, the name index alone may include all accused persons, victims, witnesses, sureties, grand and petty jurors, constables and justices, bailiffs and clerks, lawyers and judges. In my experience, such indices, or indeed the computer files themselves, are rarely available to subsequent users of the archives, and the shortcomings of historians in this respect should be met by reasonable but firm demands from archivists that at least indices should be deposited in

6 Published English work using criminal court records of the eighteenth and nineteenth centuries systematically and quantitatively includes J.M. Beattie, *Crime and the Courts in England 1660-1800* (Oxford, 1985); D. Hay, "War, Dearth and Theft in England: the Record of the English Courts," *Past & Present* 95 (May 1982); Peter King, "Decision-makers and decision-making in the English Common Law," *Historical Journal (Cambridge)* (1984); and David Philips, *Crime and Authority in Victorian England* (London, 1977). At least a dozen doctoral theses, many of them soon to be published, provide the basis for regional and chronological comparisons.

7 Examples of published studies resting on systematic quantitative work are: Jean-Marie Fecteau, "Régulation et répression de la déviance au Bas-Canada au tournant du dix-neuvième siècle (1791-1815)," *Revue d'histoire de l'Amérique française* 38, no. 4 (Printemps 1985), pp. 499-521; Douglas Hay, "The Meaning of the Criminal Law in Quebec, 1764-1774," L.A. Knafla, ed., *Crime and Criminal Justice in Europe and Canada* (Waterloo, 1981), pp. 77-110; André Lachance, *Crimes et criminels en Nouvelle-France* (Montréal, 1984); and R.C.B. Risk, "'This Nuisance of Litigation': The Origins of Workers' Compensation in Ontario" in David H. Flaherty, ed., *Essays in the History of Canadian Law* (Toronto, 1983), pp. 418-91.

8 Clinton W. Francis, "Practice, strategy, and institution: debt collection in the English common law courts 1740-1840," *Northwestern University Law Review*, 80 (Winter 1986), and forthcoming work.

9 Frank W. Munger, Jr., "Commercial Litigation in West Virginia State and Federal Courts 1870-1940," *American Journal of Legal History*, 30 (October 1986), pp. 322-49. See also L.M. Friedman and R.V. Percival, "A Tale of Two Courts: Litigation in Alameda and San Benito Counties," *Law and Society Review* 10 (1976), p. 267f.; and R. Lempert, "More Tales of Two Courts: Exploring Changes in the 'dispute settlement function' of the Trial Courts," *Law and Society Review* 13 (1978), p. 91f.

10 William Wylie in Ontario and Evelyn Kolish in Quebec have done most work to date on the records of the civil courts in those jurisdictions (forthcoming; for an earlier period, see J.A. Dickinson, *Justice et justiciables: La procédure civile à la prévôté de Québec, 1667-1759* (Québec, 1982).

reading rooms as soon as possible. Historians will be coy about making available the whole data base until they have exhausted it themselves — or are exhausted by it. It is imperative, nonetheless, that archivists seek to acquire and preserve the data base in an easily accessible machine readable form, preferably in the same archive as the original records. Without retention and public accessibility, the assumptions and errors built into such data bases are often concealed, the research resulting from them cannot be replicated or tested easily, and quantitative work on the same records will needlessly continue to be as laborious as it was the first time. The argument for keeping at least one copy of the data base in the archive of deposit is that users and archivists, in the course of exploiting the computer file for other purposes, will both benefit from the file as a finding aid, and gradually correct the many errors of transcription that such large files inevitably contain.

The second point to be made about court records is that — like most others, they are very diverse in their original arrangement and subsequent survival, and that for serial quantitative use it is highly desirable not to weed them at all. Since this counsel of perfection is clearly impossible — at least for records of the twentieth and any following centuries humanity may enjoy — it is important to review the particular problems presented by court records and some other legal materials.

Giving precedence to some series of documents (say, minute books) over others, or preserving only random or systematic samples, threatens to vitiate much serious quantitative work. For the eighteenth and nineteenth centuries it is frequently necessary to use all surviving document series to get a barely adequate data base. Even those records which appear to be almost entirely copies of others have often proved, in recent research, to be crucial. The reason, briefly, is that the legal and administrative conventions governing the creation of different series — say, indictments and recognizances — are only now beginning to be fully understood by historians, after several decades of work. Occupational designations, for example, differ subtly in two kinds of documents, but in patterned ways, and the way in which they vary, and vary with changes in other court series, can tell us much about the use of the courts by different classes of people as well as about the history of the law. In short, the still ill-understood complexity of eighteenth and nineteenth-century clerical practice, procedural doctrine, and even substantive criminal law, makes total retention imperative. Random or systematic sampling in court records can also produce problems when highly important but very infrequently prosecuted crimes are the subject of study: rape is an example. A sample will simply not preserve enough cases to allow accurate tracking of changes in cases, and the ways in which they were handled, over time.

Sampling can also wreak havoc with the second major way in which eighteenth and nineteenth-century court records are now being used by legal and social historians. In these studies, rather than quantitative analysis of the whole corpus of cases, or of one type found in it, the emphasis has been on the exhaustive study of one, or a few, specific trials. Sometimes this is because the case had great political significance at the time it occurred: these cases are likely to be retained under any criteria. Of increasing importance, however, are studies of leading cases in the legal sense: those that raised, or resolved, important points of law. Older work usually did no more than fit the published reports of such cases into a chronology intelligible to lawyers. Legal historians are now looking much more critically at such cases, in their full historical contexts, in order to understand how judges and litigants covertly made new law behind the facade of legal continuity. Explanations are sought in the biographies of the leading actors, in the minutiae of judges' bench books,

in the history of preceding cases or public events which must have been in the minds of counsel and judges even if never referred to in judgements.¹¹ Weeding of court records can make such studies difficult or impossible in two ways. One is that the decisive cases in many areas of Canadian law have not yet been identified, because the history of Canadian legal doctrine is still in its infancy. Weeding can therefore remove the archival record essential to understanding significant changes in the law. Second, even were it possible to agree once and for all on *the* important cases, one of the most important of contexts to understanding any given case is those preceding cases unreported in the published reports, raising a problem in legal doctrine or in social policy, which eventually force judges to invent reasons, chop logic, or ignore one line of precedent and favour another in creating new law to meet it. In other words, the whole record of litigation is important not only for serial quantitative studies, but also for the illumination of the historic single case.

The implications of these remarks for the retention of modern records are problematic. It may be possible for archivists to ensure, through close consultation with lawyers and historians, that major distinctions disguised as legal technicalities, illuminating when studied quantitatively, are not lost through retention decisions. (The archivist will also discover that what the social historian considers crucial is often simply ignored by the lawyer, and vice versa: neither should be the privileged advisor.) It may be that the much greater bulk of modern court records allows for informed but relatively harsh sampling without destroying the possibility for significant quantitative analysis of those records alone. But the problem appears more troubling when we consider that the best quantitative studies on the period before 1900 have relied on extensive linkage of legal records with other record series (tax rolls, membership lists, nominative censuses, welfare payments, insurance policies, business accounts) that themselves are likely in the future to be sampled, or preserved only in part. For the historian of the law, or of the social significance of law, the weeding of the main public record of legal proceedings is therefore particularly alarming: we cannot be sure what else will survive, what series will prove to be especially important for linkage, hence the desire to retain as much as possible of the court records themselves.

The implications of retention decisions for the other kind of study, the in-depth consideration of a leading case, are also unclear. What is clear is that decisions made in ignorance of the doctrinal history of the law, the chronology of leading cases at the heart of common law jurisprudence, might well destroy any chance of future historians ever reconstructing that history. The crucial cases are so few in any area of the law that a moderate sampling programme could eliminate most of the significant records. Here again, legal advice may be helpful, and perhaps even a policy of attempting to ensure that the original papers of all reported cases (those judgements important enough to appear in the series of law reports) be retained. But equally important will be the judgements of historians as to the significance of cases which are never referred to in legal argument, but

11 Examples of studies of single cases include A.W.B. Simpson, *Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which it Gave Rise* (Chicago, 1984) on the rule in *Regina v Dudley and Stephens*; the same author on "Legal liability for bursting reservoirs: the historical context of *Rylands v Fletcher*," *Journal of Legal Studies* 13 (1984), p. 209; Richard Morand, *Knowing Right from Wrong: The Insanity Defence of Daniel McNaughton* (New York, 1981) on the political origins of the famous rules for the defence of insanity; Richard Danzig, "Hadley v. Baxendale: a study in the industrialization of the law," *Journal of Legal Studies* 4 (1975), a pioneering study on an important case in the remoteness of damages; and (in Canada) David Greenwood, "The trial of David M'Lane," an as yet unpublished account of a crucial Quebec treason trial of the 1790s.

which they know to have been critical in recent social, economic, or political developments.

Papers of Lawyers and Judges

Both the confidentiality problem and the deplorable enthusiasm that efficient lawyers have for throwing things out are discussed elsewhere in this issue of *Archivaria*. My only point here is to emphasize the great interest such papers have for general as well as legal historians. Compared to politicians of the second rank, or even sometimes the first, lawyers with successful practices are likely to generate much more interesting papers. More to the point, so many Canadian politicians were lawyers, and continued in private practice after election, that a proper political history of many periods in Canada's past can only be written when the nature of those practices — their connections, obligations, investment opportunities, perspectives on economic development, and sources of income — are much more fully understood. The papers of the legal careers of public figures, often slighted by general historians in the past, will enable future historians to generate much fuller accounts of individuals and of the events in which they were involved. For the historian interested in the law itself, whether the history of the bar, the evolution of procedure, or the origins and outcomes of leading cases, such collections are of course an invaluable source.

A special category is judges' papers. These include bench books, which can help us to understand such important points as how a contentious or innovative legal decision was arrived at, how procedural rules evolved, and (sometimes) the attitude of a judge to particular litigants or arguments. Interest in such questions has led to the preparation of edited editions of bench books (some of Lord Mansfield's will be published shortly under the auspices of the American Society for Legal History) and they are beginning to be used in Canadian legal biography.¹² They may also be of crucial importance in evaluating the reliability of another source: thus the history of the evolution of the criminal trial (which took its modern form only in the last two centuries) has been greatly aided by comparisons between judges' notes and printed trial accounts.¹³ Unfortunately, not all the judges in all jurisdictions have been persuaded that the bench notes of their predecessors should be in the public domain, in part because it is a lawyerly trait to give a very limited interpretation of what is properly of public interest (a point to which I shall return).

To an even greater extent, private papers of judges — diaries, family correspondence — can be of crucial help. Recent studies of the evolution of contract law in the last two centuries have emphasized how unaware judges as a group may be of the fact that they absorb unconsciously, and express in their judgements, particular views of the world. In the first half of the nineteenth century a vulgarized notion of laissez-faire economics was perhaps of crucial importance in modern law. But because judges, by instinct and training, concealed such reasons (at least in the English tradition) behind technical legal reasoning,

12 Some of Mansfield's bench notes are being edited by James C. Oldham, Professor of Law at Georgetown University Law Center, who is also using them to study both doctrinal shifts and judicial practice. Patrick Brode's *Sir John Beverley Robinson: Bone and Sinew of the Compact* (Toronto, 1984) makes some use of the Upper Canadian bench books, although not for those purposes.

13 John Langbein, "Shaping the eighteenth-century criminal trial: a view from the Ryder sources" *University of Chicago Law Review* 50 (1983), pp. 1-36.

it is to less public sources that the historian must turn to understand the cases.¹⁴ All such sources are crucial to reconstructing what judges thought they were about, as well as what they were about that they did not themselves consciously realize. We cannot assume, as did traditional legal scholarship, that the cases speak for themselves. Judges are a deviant group: in social class, education, and public role. As individuals they may nonetheless differ remarkably in their understanding of what is good law. Illuminating those differences is central to the new legal history.

One kind of judge on whom a great deal of work is now centred in common law jurisdictions is the lay justice of the peace. Partly this is because of his crucial importance in low-level criminal (and sometimes civil) litigation, in his summary jurisdiction. Partly it is because of his equal importance in determining the very important pre-trial handling of cases on indictment. It is also because the justice was commonly the figure most sensitive to local political exigency, the man who made the daily operation of the law part of the texture of political and economic power in most communities.¹⁵ Sheriffs and under-sheriffs had similar importance. The very great discretion afforded such men by legislation and by the difficulty of challenging their decisions in higher courts means they merit very close study. And without an understanding of their routine handling of cases in the first instance, the nature of policing, and prosecution, will be lost to us. Only with a full study of JPs, whose notes are often unremarked in larger collections of family or legal papers, will the court records themselves become fully useful.¹⁶

Other Sources and the Social Meanings of Law

Court records and the papers of lawyers and judges, although focused directly on the legal process in a society, may nonetheless give us a very inadequate understanding of what the law meant to that society. One reason is that law has usually been, in most times and places, expensive and difficult of access for most people. Litigation has been a minoritarian pursuit, and criminal prosecutions have touched directly (as complainants or defendants) only a few people. At the same time the law has held large significance: as an entertainment or instructive presence in the form of public trials; as the creator of distinctive social roles for ordinary people (jurors, for example); and perhaps especially as an immense reservoir of symbols of social order or disorder. I want to discuss these points briefly in terms of a few of the many sources an historian of the law may find useful.

One consequence of the expense or remoteness of state law has always been the existence of a more or less dense network of informal (or at least extra-legal) arbitration,

14 Two of the most important such attempts are Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979), who tries to reconstruct the intellectual climate for the crystallization of classical contract doctrine from the cases, judicial writings, and general intellectual history; another account of private law, emphasizing the class and economic interests involved in nineteenth-century American capitalism, is Morton Horwitz, *The Transformation of American Law* (Harvard, 1977). As general accounts, both invite (and are beginning to receive) intensive testing through particular case studies of the kind I describe. Both emphasize the opacity of judicial writing, Atiyah attributing it largely to a technical style and the desire to avoid political controversy, Horwitz emphasizing a desire to effect (covertly) economic change that lacked a popular mandate.

15 For some illuminating instances, see the early chapters of Paul Romney, *Mr Attorney: The Attorney-General for Ontario in Court, Cabinet, and Legislature 1791-1899* (Toronto, 1986).

16 Recent editions of English eighteenth-century JPs' notebooks have made possible much fuller investigation of pre-trial procedures: see, for example, Elizabeth Silverthorne, ed., *Deposition Book of Richard Wyatt, JP, 1767-1776*, Surrey Record Society, volume xxx (Guildford, 1978).

dispute settlement, and punishment. “Bargaining in the shadow of the law” has a long and important history, and the fact that such systems exist alongside state law helps to shape state law itself, if only by withdrawing a wide range of cases that otherwise would be in the courts. Sometimes the adjudicators have been local notables (sometimes, even, justices of the peace). In other times and places clergymen, or even organized church bodies, have provided “law,” sometimes with the express intention of keeping the faithful out of the courts of the state. Labour organizations (such as the Knights of Labor) have sometimes done the same. And informal criminal sanctions in the form of ritualized coercion by communities, occupational groups, and ethnic enclaves — so-called rough music or shivarees — have been an important part of our past.¹⁷ The relationship between such folk law and state law is currently of great interest to many historians. It is not a simple relationship: nineteenth-century Upper Canadian magistrates, for example, sometimes encouraged charivarees against prostitutes on the grounds that the law was impotent; folk justice, conversely, often mimics in its forms and ceremonies that of the state. It is unnecessary to say that sources for such studies are scattered, fragmentary, and difficult to find. But the historian’s task is helped immensely by the archivist who is sensitive to such issues, and knows where they may be found in the collections.

Many other matters concerning the law not found in more traditional legal histories are the subjects of research: the demography of the bench and the bar and its impact on the law itself, oral histories of elderly criminals as well as of judges.¹⁸ But I shall illustrate briefly only one of the newer concerns of historians and other social scientists: the issue of the symbolic nature of law. One place where we look for it is in the courtroom itself. For courts, in different times and places, differ remarkably with respect to what we may call tone: respect for the bench, the behaviour of the jury, the place of the defendant and the decorum of the public. Here is Cobbett on the courts of Pennsylvania in the early decades of the nineteenth century:

I must forget the court-house at Harrisburg, and the judge with a twisted silk handkerchief around his neck, and a quid of tobacco in his cheek. I must forget the dirty-faced and unshaven jury, sitting with their hats on, talking over the back of the box to the parties or their friends, and having glasses of grog handed to them to drink in the box; I must forget all these things, and a great many others, before I can begin to think that kings and lords are the worst people in the world.¹⁹

In spite of its polemical purpose, we can set this testimony against that of a Pennsylvania lawyer, writing of the same period, looking at British justice in Lower Canada. He too saw a contrast with American courtrooms:

I was struck ... with the dignity & distance observed by the Bench & the deference & respect which the Judges received from the Bar & all the officers of the court; so different from our own.

17 For Canada, and references to the leading European and English work, see Bryan Palmer, “Discordant Music: charivaris and whitecapping in 19th century North America,” *Labour/Le travailleur* 3 (1978), pp. 5-62.

18 For example, Daniel Duman, *The Judicial Bench in England 1727-1875* (London, 1982) and Duman, *The English and Colonial Bar in the Nineteenth Century* (London, 1983); Raphael Samuel, *Arthur Harding* (London, 1982).

19 William Cobbett, *Autobiography*, ed. William Reitzel (London, 1933), p. 77. I owe this reference to Dr. J.M. Neeson.

Monk is the Chief Justice of the District of Montreal. In his manners he is haughty & imperious. He is said to be pretty well learned in the law; but from his style of expression in the decision of a question, which I heard, I conceived no very favourable opinion of his general education.²⁰

It is likely that Canadian justice, from a distant period, has helped to cultivate more respectful attitudes toward the authority of the law and to judicial power (even of undistinguished judges) than has that of the United States. It is conceivable that such differences have created, as well as reflected, the distinctive differences in political ideologies in the two countries. But until we can amass many more such testimonies, and compare them critically, our assertions about the temper and tone of Canadian courts must be tentative indeed.²¹ Hence travellers' accounts, printed and especially manuscript, become an important source for the history of Canadian law, because it is visitors who remark on the differences which inhabitants cannot discern in their own institutions. Once again, the history of the law becomes dependent upon sources remote from the law itself.

But are such concerns legal history? I think they are, and I think this fact raises the important point that legal history has changed, and that archivists must be attentive to historians in making many of their decisions. More exactly, I shall argue (in an attempt to be provocative) that they should perhaps be less respectful of some of the advice of lawyers.

Lawyers, Historians, Archivists, and the Significance of Law

Elsewhere in this issue Roy Schaeffer and Catherine Shepard discuss the difficulties which legal privilege and confidentiality rules pose for the archivist collecting legal records. Behind that immediate, legal difficulty, however, I believe there lies a much larger problem, and that is the different intellectual commitments of lawyers and of historians. Some of their concerns lie at opposite poles, particularly their concern with what we may loosely call their public duty in respect to the truth.

Behind questions of lawyer-client privilege lie much deeper habitual modes of thought. A lawyer in practice is accustomed above all to shaping a case for public consumption, and in doing so is committed not only to developing some evidence and inferences, but equally committed to suppressing others. The presentation of a legal case for a tribunal, or even the tribunal of public opinion, is to a very large extent an exercise in censorship or public relations. What is censored may be deleted because it is deemed true but prejudicial, or true but not germane to the case. It is a central principle of our legal system that evidentiary rules, many of them less than two centuries old, ensure that very few of the facts, opinions, and inferences surrounding a judicialized event actually reach public view. In short, while the ethical lawyer is not supposed to suppress legally relevant evidence, her or his whole training suggests a very narrow definition of relevance. The professional commitment is to suppress from view an enormous range of material which may be important to an historian in explaining human actions and social structures in other than legal terms. The fact that the lawyer's clients will frequently be paying to be spared embarrassment and public scrutiny gives an added material incentive to make suppression or presenting a case in its best light, rather than explanation, even more a habit of mind.

20 William Rawle, quoted in W.R. Riddell, "A Philadelphia Lawyer and Early Lower Canada Law," *Canadian Historical Review* 9 (1928), p. 40.

21 I am engaged on such a study, and would be most grateful for other examples from manuscript and printed sources.

The historian has different canons of evidence. He or she is professionally committed to the fullest possible explanation of human actions and social structures. No doctrines requiring proof beyond a reasonable doubt or on a narrowly defined balance of probabilities, nor the exclusionary rules designed to protect naive, ignorant, or prejudiced jurors from error, constrain an historian's research. The scholar's working assumptions are that no evidence, however slight, is ruled out from the beginning; that tentative and/or probabilistic judgements will frequently be necessary given the gaps in evidence; that respect for persons does not apply to the dead, nor to the living if they are public figures important to an historical explanation. At bottom, the test for historical evidence is whether it fits: in particular, whether it fits as dense as possible a network of intersecting bits of evidence from different sources. In the omnivorous pursuit of evidence that results, historians look for apparently irrelevant but possibly revealing incident, constantly refer to previous character, and develop the professional expectation that nothing should be hidden from them. Accustomed to reading everything they encounter in archival collections, be it intimate love letters or financial accounts, historians operate with a very different moral view of past records than do lawyers, accustomed to suppressing from view anything that might conceivably ever be used to embarrass, inconvenience, or simply explain their clients. The historian, I hasten to add, has an ethical imperative too: the conviction that history can only be useful to the society in which it is written if it is as full, accurate, and uncensored as possible. Otherwise it is covert propaganda, unsuspected ideology, and dangerous fairy-tale. The historian does not pretend to infallible conclusions; the correction to his or her bias lies in the fact that all historical judgements, unlike legal ones, remain forever open to being reversed by further investigation.

There is perhaps as well a deeper structural basis for a real antipathy between practising lawyers and historians in their view of surviving legal documents. Robert Gordon has argued that professional training in precedential reasoning, and the myths and mores of the profession, lead lawyers to think of the law above all as a logical structure, from which sure conclusions can be drawn provided the right technique is used. A corollary is the belief that the law in its essentials is unchanging, that its principles have ancient roots, and that its intellectual integrity allows it to rise above the passing concerns of political passions, intellectual fads, or class hatreds, and to allow thereby the rule of law rather than the rule of men. Gordon argues that this indeed is a myth, and that in particular it contradicts a central tenet of the historian: that all human institutions are historically contingent. The law, as much recent and older historical research has shown, is in fact shot through with historical contingency, decisions that responded with great particularity to place and time, even when the law declared it was acting wholly in accord with ancient custom or legislative sanction. Doctrine shifts with intellectual fashion, judges are fertile in inventing continuities where they do not exist, and the law (not surprisingly) responds very sensitively, like other social institutions, to the distribution of power and changes in it. But because these findings are anathema to lawyers, or even (literally) unthinkable, Gordon argues that mainstream legal scholarship has refused to recognize the implications of contextual legal history, and has used a whole battery of defensive tactics to pretend that the law is largely ahistorical.²²

22 Among other articles, see especially Gordon, "Historicism in Legal Scholarship," *Yale Law Journal* 90 (1981), pp. 1017-56. Some other differences between lawyers and historians (inevitably flattering to the latter) are suggested in Douglas Hay, "The Criminal Prosecution in England and its Historians," *Modern Law Review* 47 (1984), pp. 1-29, especially 16f.

Although I teach in a law school, I am an historian by training, and in much legal scholarship I think I recognize what Gordon describes. One conclusion of importance to archivists, therefore, is that in taking advice about legal materials — what should be sought, what should be saved, what should be weeded, what should be restricted in access — lawyers and judges will often be the worst of advisors. Their instincts will be for selective secrecy, and their understanding of the possible usefulness of the material will often be limited by their (entirely proper) professional preoccupations. Moreover, when they are interested, as laymen, in history, it is often in the manner of many people who read little history and write less: that is, as antiquarians or as hagiographers. The acquaintance with old cases thrown up by professional research led many lawyers in the past to write books of anecdotes and accounts of curious cases whose social context they did not understand; and the elevated status of the profession, and the profession's esteem for itself, has led many more to support those kinds of history which seemed to ensure that their names would be remembered for evermore, and favourably. They have been much less enthusiastic about professional academic history, the kind that seeks to explain human institutions, including the law and its practitioners, from the point of view of all contemporaries, and without any presuppositions about who, or what, deserves respect.

I mention these things because I think they have implications for archivists. Confidentiality rules and professional privilege present practical problems to archivists, some of which may be met adequately by restrictions. But the archivist must hold to her or his own professional canons. If some of those canons concern respecting the wishes of depositors, others must be closer to those of historians as I have outlined them here. For if collection strategies, access rules, and publishing programmes in legal history are too much influenced by the lawyers, an active archival interest in legal sources may result in deposits which have been very thoroughly pre-sorted, by lawyers acting on lawyerly criteria and on lay conceptions of historical research. The result can only be a thoroughly censored, partial, and deeply misleading view of the Canadian legal past. If that is the risk, it might even be better to leave legal records slumbering in private hands, exposed to mice, fire, flood, or wholesale housecleaning. At least that would make it more likely that the historian two centuries from now (if there is history two centuries from now) will burrow through what judges' diaries, clients' letters, case briefs, and practice accounts that may happen to survive, with a greater chance of finding some of the full, unweeded, unsanitized, private, and therefore invaluable sources that are required for the writing of real history.

I hope that the problems of legal privilege are not so serious. Whether they are or not, one larger conclusion seems to me to be clear. Legal history, and the social history of law, will only be well written in Canada or elsewhere where certain kinds of archivists can be found. They must be knowledgeable about the legal technicalities imbedded in the highly distinctive records generated by the courts, lawyers, and judges. They must be equally knowledgeable about the historical questions posed by law itself for the society whose records they preserve.