a) **Methodological Issues in Law and History**

Legal sources (cases and statutes) and method narrowly drawn to serve the practical purposes of dispute resolution.

They shed little light on:
- origins of criminal laws and why they change,
- policies and institutional developments around the administration of criminal law,
- how criminal law is experienced.

Historical approaches allow for systematic access to and wider range of sources and wider scholarly inquiry. There are nonetheless limitations:
- Fragmentary historical records
- Surviving records reflect mostly official perspectives. Those that do not tend to reflect privileged outlooks (eg., low literacy rates before 19th c.)
- The challenges of filling the "gaps" in evidence to come up with an coherent narrative and explanation of events.

Theory is an attempt to reflect on these problems of interpretation and to make interpreter's assumptions explicit.

An objective account of the past is therefore elusive. A range of interpretations is possible, some of which may be found to be more rigorous and compelling, but none can claim to have final authority.
The different historical interpretations on a particular topic= "historiography."

The historiography of criminal law can be broken down into two broad camps:
- "whiggish interpretions: changes the result of gradual improvement and progress by consensus, emphasizing the inter tewchnical reasons for change;
- "new" legal history interpretations: greater stress on theory, drwing upon various theoretical influences and on the external social, economic and political forces that shape the criminal law.

b) The Emergence of English Criminal Law

Before the Norman Conquest of 1066:
Bloodfeud, Outlawry, Bots, Determinate Punishments

Whiggish legal historians tend to discount the significance of medieval developments in criminal law after 1066 whereas new legal historians link them to poltical forces around the consolidation of authority and a new central state.

Important medieval advances in the administration of criminal law:

a) The concept of the King's Peace:
   - Harmful acts involve more than the victim and the peace of the local community—an ambitious assertion of national public interests

b) Doctrine:
   - 12th-13th c. –violations of the King's Peace include treasons and felonies. Other harmful actions are considered private "trespasses" or ecclesiastical offences.
   - 14th-15th c. –violations of the King's Peace extended to a new category of offence called misdemeanours (ecclesiastical authority reduces and those trespasses not converted into offences could be pursued as tort actions in the civil courts).

c) Institutions:
   - Royal Courts of Justice administered by crown appointed Justices of the Peace throughout the country to enforce the King's Peace
   - Serious offences (felonies and treasons) tried at "assizes" by judges on circuit from London; minor offences (misdemeanours) tried by JP as magistrate at "quarter sessions."
   - Involvement of propertied local subjects in processes of royal justice through grand and trial juries.

LAWS / HIST 3305 A **Lecture 3** **Professor Barry Wright**

1. Late 17th c. libertarian developments in criminal law:

   - Habeas Corpus Act, 1679 - no indefinite detention
   - Glorious Revolution, 1689 - all persons charged entitled to jury of peers. Crown prerogatives to be exercised circumspectly.
   - Treason Act, 1696 - right to defence counsel and advance look at Crown evidence. Prosecution must have two witnesses to offence.
   - Act of Settlement, 1701 -security of judicial tenure: Judges cannot be removed at Crown's pleasure, only upon resolution of both houses of Parliament.

2. 18th c. patterns based on extensive surviving records:

   - Objective increase in crime (industrial revolution/urbanization/criminal opportunities.
   - Redefinition of offences (felonies increase from less than 50 to more than 200 from 1680-1800).
   - Execution rates stable. Increase in felony convictions handled through conditional pardons (transportation).
   - Pressure on system because of numbers. Reforms proposed but resistance to change until end of the century.

3. Hay

   Reinforcing existing structure of authority and relations of power one of the important purposes of 18th c English criminal law.
   - Resistance to reform because ruling elites valued discretion exercised in trial over lives of subjects.
   - Economic interests served by new offences disguised/Through the characteristics of "majesty, justice and mercy" the law and its purposes were legitimated.

   The administration of criminal law thus served an ideological function by shaping the climate of popular thought.

4. Langbein
   18th c. criminal law irrelevant to political power or economic interests. It protected rich and poor alike from a marginal criminal subclass that has always existed.

   Old Bailey sessions:

   - accused not working class warriors,
   - prosecutors and jurors closer to accused in class status than to "ruling class."

LAWS / HIST 3305 A **Lecture 4** **Professor Barry Wright**

1. The “great reforms” to the administration of English criminal law c.1780’s-1830’s:
   - Law enforcement transformed by rise of professional policing and public prosecutions.
   - The trial transformed by ‘colonization’ of proceedings by lawyers.
   - Punishment transformed by the rise of the penitentiary for convicted serious offenders.

2. Why?:

   - Logistical pressures, old system could not accommodate the sheer numbers coming before the system because of socio-economic impact of the Industrial Revolution.
   - Intellectual factors, ideas of utilitarian and humanitarian reformers.
   - Political factors, sense of impending revolutionary crisis, rise of capitalist and decline of aristocratic influence.

   Whiggish and new legal historical accounts of the “great reforms” weigh the above factors differently (the former stress persons and ideas, the latter political , social and economic forces).

4. Jeremy Bentham and utilitarian reform:

   Common law must be replaced by an efficient and rational system based on deterrence:
   - Codification.
   - Professional police and public prosecutions to more certainly enforce the criminal law, thereby enhancing crime prevention.
   - Scientific principles for evidence.
   - Penitentiary to ensure certainty and proportionality in punishment.

5. Marxist class accounts suggest reforms an attempt by capitalist interests to assert more effective social control:

   - The police to subject working class to surveillance, regulation and wider law enforcement.
   - The penitentiary to process greater numbers and to discipline inmates into becoming compliant labourers.

   McGowan:

   - Interpretations stressing reform ideas or class interests too general.
   - Complex events best understood by a careful look at Parliamentary debates (changes created by legislation) which suggest some combination of ideas, class interests and other forces.

English criminal law and institutions, the basis for Canada's system, were not adopted in a vacuum but were imposed over pre-existing Aboriginal and French systems.

Informal Reception (re: Calvin's case, 1608):
- Local British authority has discretion to implement English law as reasonably applicable to circumstances in the territory.
- British subjects entitled to benefits of English law where feasible; toleration for indigenous populations pursuing customary ways.
- co-existence of systems.

Formal Reception:
- European settlement reaches sufficient numbers and there are demands for local representative legislatures and courts to regularly administer the law.
- English law becomes hegemonic
- All English criminal law (legislation and common law) in effect at the date of reception (when a colonial legislature is first convened) becomes the foundation of that colony's criminal law.

The processes of reception were played out in different ways and at different times throughout British North America:

<u>Native Peoples</u>
- Royal Proclamation, 1763—the British Crown receives title in return for the promise to protect native rights (land use, self-government) and limits to western settlement.
- Native rights to land could only be extinguished through subsidiary local treaties.
- Colonial legislatures and courts (and post-Confederation Canadian governments and courts) ignored these promises and the Crown was negligent in trusteeship of native rights.
- Native peoples came under the jurisdiction of local criminal courts.

<u>Quebec</u>
- 1759-64, civilians tried by British military courts martial.
- 1764-74, English style assize and quarter session courts, proceedings in English, presided over by anglophone judges and magistrates.
- Also objections to English private prosecutions and demands for return to French law.
- 1774, restoration of French law for private matters in civil courts and other cultural protections but English criminal law to prevail (with right to proceedings in French or English, appointment of francophone judges and magistrates, and public prosecutions/limits on private prosecutions).

The Canadian Criminal Code:

The new federal government assumes jurisdiction over criminal law when the Dominion of Canada formed in 1867.

Codification had been advocated by British Utilitarian reformers but further impetus here from challenges of consolidating colonial laws (all based on English criminal law but with different amendments in each province re: formal reception).

- 1869 Dominion of Canada Consolidations of BNA criminal laws based on Greaves 1861 English Consolidation,
- 1880 Stephen' 'narrow' English code bill presented to UK parliament and fails to pass.
- This bill combined with consolidated Canadian laws form the basis of the 1892 Canadian Criminal Code.

LAWS / HIST 3305 A **Lecture 6** **Professor Barry Wright**

Law Enforcement/Prosecutions-England:

1. Statute of Winchester, 1285:
   - Justice of Peace authorized to issue writs and warrants to help collect evidence,
   - JP assisted by parish constables who enforced writs & warrants and sheriffs who enforced judgments,
   - citizen' responsibilities of participation in community watch and 'hue and cry.'

2. 18th c patchwork reforms to parochial system:
   - inadequacy of watch and hue and cry, and victims reluctant to press cases,
   - statutory and private rewards as incentives/subsidy,
   - Jonathan Wild thief-taker,
   - Henry Fielding and the Bow St. Runners,
   - libertarian resistance to professional police and eroding of parochial authority v. utilitarian reform.

3. Metropolitan London Police, 1829:

   Peel's principles include detachment system, separate investigation and uniformed branches, with emphasis on crime prevention and 'winning the confidence of community' by regular visible presence.

4. Crown prerogatives on prosecutions:

   Ex Officio Information –cases of particular public interest;
   Nolle Prosequi -stay of private prosecutions.
   - Libertarian resistance to public prosecutions erodes, as police increasingly handle cases over the course of the 19th c. Department of Public Prosecutions created in 1879.

Law Enforcement/Prosecutions-Canada:

1. Routine public prosecutions develop earlier in British North America than in England, and before professional police emerge here.
   - Crown prerogatives over prosecutions (see above) exercised as a 'monopoly' from the time of the Quebec Act, 1774 onwards.
   - This Crown monopoly over prosecutions upheld by subsequent legislation and cases, most recently Dowson (SCC, 1979).

2. Police models:
   a) The 'blue' (Peel's Metropolitan London Police)--municipal and provincial forces.

   b) The 'brown' (Peel's post 1798 rebellion paramilitary, mounted and armed Royal Irish Constabulary)--the Mounties (NWMP, 1873) instrumental in securing the Canadian north-west).
      - Amalgamation of RNWMP and Dominion Police in 1919 results in RCMP, which also does municipal and provincial policing through contracting out between federal and provincial governments.
      - American "emergency response" influence in 1930's & 50's results in some departure but some return to Peel's principles with community-based initiatives.

LAWS / HIST 3305 A **Lecture 7: The Criminal Trial** **Professor Barry Wright**

1. Lawyers
   - Imbalance in trial as victims increasingly retain lawyers to prosecute in the mid 18th c. (re: rewards)
   - Prohibition on defence counsel in felony cases relaxed and they are permitted as a matter of judicial discretion.
   - Defence role limited until the statutory right to counsel (Prisoner's Counsel Act, 1836)
   - Other factors include:
     - development of more sophisticated conceptions of causality and proof
     - changes to the structure of the legal profession.
     - rights for accused in the Treason Act, 1696

   Impact: Trials slow down, more elaborate rules of procedure and evidence to regulate the new motor force of the criminal trial/more rights (eg. articulation of the burden of proof).

2. The Jury
   - Libertarian argument:
     Jurors a democratic presence and a check on state oppression through criminal law.

   - Utilitarian argument:
     Jurors lack expertise, make trials inefficient, and compromise consistent justice (rule of law).
     Historical importance and continuing importance of 'verdict according to conscience' (nullification):
     Bushell's case, 1670-Morgentaler (SCC, 1988)

3. Judges
   Hagiography of judges projects assumptions of modern neutral, non partisan judiciary.
   Coke v. Bacon

   Formal protections of independence:

   a) Security of tenure (Act of Settlement, 1701 and BNA Act, 1867)
   b) Separation of powers (1803 UK, 1849 responsible cabinet government in Canadas)

LAWS / HIST 3305 A **Lecture 8: Punishment** **Professor Barry Wright**

Pre 17th century:

- Treasons and felonies –capital punishment
- misdemeanours- corporal punishment, fines

17th & 18th centuries:

Punishments remain the same but rationalized (death by hanging) and elaborated for misdemeanours (eg., addition of houses of correction);

New systems of mitigation for developed for felony convictions to lend some flexibility to the automatic sentence of death eg., partial verdicts, benefit of clergy and the conditional pardon (mitigating circumstances to warrant carrying out automatic sentence, considered for royal mercy).

The secondary punishment of transportation becomes the primary condition on such pardons and allows for the growth of conditional pardon and expansion of felony offences in the 18th c.

Banishment usually substituted for transportation in British North America (but Australian penal colonies used after the 1837-8 rebellions in Upper and Lower Canada)

- 19th century to present:

  England -The penitentiary first established in 1779 as one response to American revolutionary crisis (older penal colonies closed).

  By 1830's over 70% convicts face imprisonment and capital offences reduced from over 200 to a dozen.

Canada-The Kingston Penitentiary:

- 1826 Thompson Committee reflects utilitarian and humanitarian reform ideas.
- Colonial government resists recommendation for penitentiary initially (no crime problem and wishes to preserve 'Tory image of justice' re: McGowan).
- 1833 legislation passed reducing capital offences to a dozen and authorizing construction of the Kingston Pen. (moral panic about immigration, hold over power)
- Late 19th c: -classification
  - religious instruction replaced by secular and skills programs
  - ticket of leave transition (parole)