

**ATTITUDES TOWARDS CRIME AND  
PUNISHMENT IN UPPER CANADA, 1830-50:**

**A Documentary Study, by J.M. Beattie, University of Toronto  
Centre of Criminology, 1977, 174 pp.**

**THE NORTH-WEST MOUNTED POLICE AND  
LAW ENFORCEMENT, 1873-1905,**

**by R.C. Macleod, University of Toronto Press, 1976, 218 pp.**

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Canadian Lawyers show little interest in the history of their profession or in the background of the legal institutions with which they come into daily contact. We seem to have forgotten why it is important to remember the past, and our prolonged disregard for history may eventually result in our even forgetting how to remember.

Why? How did it come about that those who practise a calling so deeply rooted in the past are today so indifferent as to its origins?

One reason is the dearth of historical offerings in Canadian law school curricula. Until relatively recently most law schools in Canada operated with meagre budgets and skeletal staffs. Students facing concurrent articling obligations had only limited study time available. Understandably, law schools and students alike concentrated their efforts on bread and butter subjects rather than on luxuries like legal history. Even where history courses were provided, they almost always dealt exclusively with English developments. The suggestion that a course in Canadian legal history be offered would have been regarded by most curriculum planners as hilarious.

Another reason for our ignorance of Canadian legal history is the lack of reliable writing on the subject. A Canadian lawyer who wishes to explore his professional roots will find very little reading material to assist him (apart from occasional collections of after-dinner anecdotes, which often bear striking resemblance to English legal folklore). It could be argued that this scarcity of writing stems from the lack of an interested readership. This is no doubt true, in part, but the problem is of a chicken and egg variety. I am inclined to believe that if satisfactory reading material were available it would find an eager audience.

But who is to create this literature? Certainly not the Canadian law teaching profession as presently constituted. It is

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true that the revolution in legal education during the past 10 or 15 years, has permitted the development of new and improved history programs (even some with Canadian content) in a few law schools. A trickle of academic writing has begun as well. However, at the present rate of development it will be a very long time before Canadian law schools have built a sufficiently large, expert and well-motivated scholarly cadre to produce a significant body of historical research and writing.

Happily, academics outside the law teaching profession are being attracted to the field. Some good writing about Canadian legal history is beginning to flow from the pens of general historians. The studies under review are both of that variety.

The Beattie monograph examines a broad and interesting theme — society's views about crime and punishment in the mid 19th century — by focusing on a narrow, though equally interesting, particular topic — the establishment and early operation of the Kingston Penitentiary. The study takes the form of a 174 page booklet, printed by photo-offset, of which the first 35 pages constitute an introductory overview by the author, and the remainder are made up of extracts from various contemporary documents, ranging from newspaper editorials to grand jury charges, prison regulations and Royal Commission reports. The book provides a small but tantalizing window on the past.

An important change in public opinion about the nature and purpose of criminal punishment occurred during the early years of the 19th century. It had previously been accepted widely that the primary purpose of punishment was to instruct and deter the general public, and that the best punishments were dramatic and horrible ones, such as execution and mutilation, which were thought to strike terror into the hearts of potential wrongdoers. In the late 18th century, reformers began to argue that the goal of punishment should rather be the reformation of the individual criminal. Gradual acceptance of this approach led to a reduction of the number of crimes for which capital and corporal punishment were imposed, and the substitution of imprisonment, which had hitherto been chiefly used for temporary custody of accused persons before trial. New "scientific" prisons were developed, of which Kingston was Canada's first.

Constructed along "modern" lines after a study of several new institutions in the U.S., the Kingston penitentiary was intended when opened in 1835 to be a model of enlightened and humane penology. However, the present-day reader may find it difficult to associate words like "humane" and "enlightened" with the methods employed at Kingston during the first ten or fifteen years of its operation.

It was widely accepted at the time that penitentiary inmates should engage in absolutely no social intercourse with other prisoners or, indeed, with the prison staff. It was a punishable offence to exchange a word, a nod, or even a glance with anyone else in the institution, except in the case of essential communications between prisoners and staff. Absolute silence prevailed at all times, and the prisoners were expected to keep their eyes averted from everyone around them. In some American prisons this principle was applied in so extreme a form that every prisoner was kept in absolute isolation from every other one. The Kingston institution was regarded as being rather more "liberal" in that it permitted prisoners to work and eat together, albeit in stony silence and with downcast gaze.

It is not surprising that prison officials found this regime of silence difficult to enforce. At Kingston, whose first warden was a sadistically inclined individual, minor breaches of rules of silence were met with incredibly brutal corporal punishment.

After a series of disagreements between the warden and various members of his staff, some of the barbarous practices taking place within the institution began to come to light. A commission of enquiry was finally established, under the direction of the formidable George Brown, editor of the *Toronto Globe*. Brown's two reports in 1849 strongly condemned some of the practices followed by the prison authorities, and recommended a number of important reforms, most of which were subsequently implemented.

The study ends at this point. For me, this is very frustrating. Did the Brown reforms improve conditions within the penitentiary? Although they mitigated the harshness of many of the punishments, Brown's recommendations did not end the regime of silence and social isolation. How long did that approach to penology continue? And with what results? There is so much more to be told.

It would not be fair to criticize the author for leaving us with so many unanswered questions, however. He has performed his chosen task effectively.

Professor Macleod's book on the North-West Mounted Police is considerably more substantial, and is likely to appeal to a much wider audience. Compact, attractively produced, well researched, and lucidly written, it deserves to be read by everyone with an interest in the legal, or general, history of the Canadian prairies. The story has been told before — often at greater length and in more lurid style — but Professor Macleod's scholarly and highly readable contribution is uniquely

valuable.

Every historian faces an initial dilemma — whether to organize his material chronologically or thematically. Professor Macleod solves the problem neatly by dividing his study into two parts. In the first he surveys the major developments during the entire period under review — from the creation of the force in 1873 to the birth of the provinces Alberta and Saskatchewan in 1905. In the second part he develops separately a number of important themes, such as class consciousness in the force, its military traditions, its treatment of Indians and other minority groups, the effectiveness of its law enforcement, the role of political patronage, and so on. The interplay between the general and specific parts is so skillfully handled that the total impact of the book seems greater than the sum of its parts.

Some readers may find the author's assessment of the force unduly favourable. He is clearly of the view that it operated commendably during most of the period under study, and he offers surprisingly few criticisms. Yet, he does not hesitate to criticize when he feels it is merited, and he leaves the impression of having weighed the evidence carefully and objectively before arriving at his conclusions.

My chief disappointment with this book, as with the previous one, concerns what it omits rather than what it covers. For many years the Mounted Police were forced by the scarcity of legally trained inhabitants in the prairies to combine the roles of investigator, prosecutor and judge. Officers regularly sat in judgment on cases investigated and prosecuted by members of their own staff. To lawyers educated in the British tradition, such an arrangement would seem to involve a very serious risk to the principle of impartial adjudication. Did the risk materialize? If not, how was it avoided? How, if at all, did the arrangement influence popular perceptions about the law in Western Canada? Did the scarcity of legally-trained personnel make much difference? Lawyers and others who regard these and related questions as significant will not find answers to them in Professor Macleod's book.

This is not the author's fault, of course; he has written well on the theme that seemed most important from his vantage point. The problem is that, not being a lawyer, he overlooked certain themes that a lawyer would have regarded as important. Until the legal profession (and law teachers in particular) resolve to undertake the exploration of their own history, rather than abdicating the responsibility to others, these unfortunate lacunae will remain unfilled.