

Book Reviews

Essays in the History of Canadian Law, Volume V: Crime and Criminal Justice. JIM PHILLIPS, TINA LOO, and SUSAN LEWTHWAITE, eds. Toronto: University of Toronto Press, 1994. 583p. ISBN 0-8020-0633-7 (cloth) and 0-8020-7587-8 (paper).

Crime and criminal justice have recently become topics of serious consideration for social historians. Normally the preserve of criminologists and lawyers, criminal justice history is now receiving the attention it deserves from historians. The publication of the fifth volume in the series *Essays in the History of Canadian Law*, compiled under the auspices of the Osgoode Society for Canadian Legal History, marks the solidification of this field in Canadian historiography. Indeed, the release of this volume is in many ways long overdue. The previous four instalments in this series, while examining numerous facets of the law, failed, with the exception of the third volume on Nova Scotia, to discuss crime and criminal justice to any great extent. This oversight is even more perplexing given the fact that crime is an integral component of the law and society generally. Therefore *Crime and Criminal Justice* does more than merely fill in a scholarly gap; it makes a significant contribution to our understanding of the operation of the criminal justice system.

One of the reasons for the emergence of criminal justice history is historians' discovery of legal documents. While some scholars have employed case files and statutes, they have done so only to explain the intricacies of the law or have integrated them as part of a larger biographical work. The contributors to this volume, however, have utilized a plethora of archival sources to explore the incidence of crime along with the theory *and* practice of the criminal law. The Capital Case Files, the Criminal Indictment Case Files, and files from the Nova Scotia Supreme Court are among some of the primary records used by the authors. Housed in the National Archives of Canada as well as provincial archives across the country, these documents reveal not only the criminal justice system in action, but the socio-economic context in which crime and the law thrived.

The essays in *Crime and Criminal Justice* are divided into four sections. Each section grapples with specific themes in the history of criminal justice in Canada from the eighteenth to the twentieth century. Most importantly, they underscore how the criminal law could detrimentally affect the lives of the socially marginalized, while being a limited source of empowerment for others. "Native Peoples and the Criminal Law" sheds new light on the consequences of European contact with this country's First Nations. The British and the French tried to impose their systems of

formal law upon their reluctant hosts. They soon discovered, however, that their law, much like their customs and culture, did not always suit the travails of daily life in fur trade society. As John Dickinson aptly demonstrates, the French realized that if they hoped to retain their native alliances they would have to recognize the Iroquois, Algonquin, and Abenaki communities as “republics” independent of French authority. This gave these tribes a degree of relative immunity before French law.

Yet Europeans did not always defer to the natives. According to Tina Loo, the Rule of Law and procedural justice were central to the colonial identity of European British Columbia. As such, officials from the Hudson’s Bay Company strove relentlessly to entrench “British justice” throughout their settlements. In British Columbia at least, this often led to the construction, in the eyes of the law, of natives as “other” and thus unworthy of equal treatment from the courts. Hamar Foster also addresses this double standard of the law. While the behaviour of the Hudson’s Bay Company and other fur traders was influenced by “Aboriginal legal norms as well as common law ones,” natives only received equality before the law when the issue of punishment, not civil rights, emerged (p. 60). By delving into the Jesuit Relations and Colonial Office correspondence for commentary on the reception given to European criminal law, these authors have added another dimension to the notion of native-white cultural interaction in the contact period.

In “Women, Crime, and Criminal Justice” the dual nature of criminal law also surfaces. The law has regulated the legal and social activities of women for much of this country’s history. Long considered “persons with no legal capacity,” women have fought a protracted and often losing battle for judicial equality. Whether seeking recourse from spousal abuse or sexual assault, as shown by André Lachance, Sylvie Savoie, and Carolyn Strange, women faced a male-dominated justice system which usually displayed little sympathy for their plight. Nevertheless, women have tried to use the law to their own advantage. In New France wives sought legal separations from their abusive husbands, while in late nineteenth-century York County a few rape victims prosecuted their attackers. In both instances though, the fact that these women chose this course of action only as a last resort highlights their general mistrust of the criminal justice system.

This section also conveys the fact that women could and did break the law. Female crime, while not as ubiquitous as male crime, still caused concern among criminal justice authorities. Women, in the eyes of contemporaries, were not prone to commit crimes, but those who did, many felt, should be dealt with harshly. In either late eighteenth-century Halifax, or early twentieth-century Canada, as outlined by Jim Phillips and Constance Backhouse respectively, some female offenders felt the full force of the criminal law. Moreover, in Backhouse’s study of prosecutions for abortion, the law victimized women twice, once by outlawing access to therapeutic abortions and again by incarcerating the women who sought out this procedure and those who provided it. Through newspaper accounts of trials, law reports, court documents, and files from the Attorney General’s office, each article uncovers these women’s lives and explains how gender conditioned the response of the criminal justice system to female law breakers.

The state has been a central figure in the function of the criminal law. In “Criminal Justice Institutions and State Authority,” Jean-Marie Fecteau, Paul Romney, Susan

Lewthwaite, and Helen Boritch underline how the state exerted its authority through the justice system. Although the Rule of Law commanded public respect, these articles note that this respect did not trickle down to every segment of society. Jean-Marie Fecteau maintains that post-conquest Québec “witnessed a boycott of the criminal justice system by its pre-conquest inhabitants” (p. 297). In rural Upper Canada a similar situation occurred, Susan Lewthwaite suggests, as local residents pursued their own interests and thwarted the efforts of magistrates to monitor their activities. The formal mechanisms of the law and its administration, Lewthwaite concludes, tended to be rather weak in remote places. Using the Quarter Session papers from various counties in Ontario to gain access to the duties of the Justice of the Peace, reports from the Provincial Secretary, and the *Gazette de Québec*, each author asserts that what constituted the “law” and “crime” for legal officials did not always translate into the same meaning for members of the community. Crime and criminal justice thus remained caught up in the complex interplay of social values and structures.

Prisons and reformatories represented a constant reminder of the institutional presence of the state. “Canadian Prisons in the Nineteenth Century” considers the government’s initiatives to reform male and female prisoners and hence prevent crime. The St. John Penitentiary in New Brunswick, along with the Central Prison and the Mercer Reformatory in Ontario, comprise the case studies in this section. Relying on the annual reports of prison inspectors, wardens’ diaries, and royal commissions, Rainer Baehre, Joseph Gondor Berkovits, and Peter Oliver insist that in spite of the rhetoric proclaiming their ability to turn inmates into productive members of society, these institutions failed to solve the problem of crime and rehabilitation. Poor living conditions, menial jobs, and a lack of educational facilities meant that prisoners often returned to society un-reformed and still a threat to law and order. In the nineteenth century, punishment transcended rehabilitation in the treatment of convicted offenders.

As much as *Crime and Criminal Justice* breaks new ground for the study of criminal justice history in Canada, it also retraces some familiar territory from earlier works. The bulk of the articles emphasize the nineteenth century at the expense of the eighteenth and twentieth centuries. As well, ethnic minorities and Atlantic Canada are still under-represented. What is most striking about this volume is the absence of crime. Several of the authors focus more on the criminal justice system itself and use the actual crimes as backdrops to their narratives. More research is needed into the causes and consequences of crime to illuminate the criminal law and the contours of social relations. A shift forward into the early part of the twentieth century, coupled with a more regionally-balanced perspective, will allow historians to chart change and continuity in the composition of crime and the workings of the criminal justice system. In embarking upon this course, *Crime and Criminal Justice* will serve as the standard upon which future studies must be based and subsequently measured.

Michael Boudreau
Saint Mary’s University