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Criminal Justice History in Canada: Some Thoughts on Future Developments¹

Donald Fyson

Assiduous readers of *Crime, Histoire & Sociétés* over the last two decades may be forgiven for thinking that Canada, and especially Canada outside of Quebec, is a bit of a backwater for research on crime and criminal justice history. After all, among 200 or so full articles published in the journal, only four have concerned Canada, mostly on Quebec; and of something over 300 books reviewed, only seven address crime and criminal justice in Canada, all essentially on Quebec. In fact, crime and criminal justice history is alive and well in Canada as a whole, just as it was in 1996 when Jim Phillips published what is still the most recent general historiographical overview of the field². Since Phillips' overview, there have been well over a thousand scholarly monographs, articles, theses, and so on produced, covering all of Canada's regions, in English and in French³. Or from another perspective, in a survey of four of Canada's main history journals since 1996, a little under a tenth of articles dealt wholly or in significant part with crime and criminal justice⁴. Russell Smandych and Bryan Hogeveen's observation in 1999 that Canadian criminal justice history was "conspicuously underdeveloped", "conspicuously marginalized", and not "accepted into the mainstream of Canadian historiography" thus now seems to be less evident⁵, even though the extent of work on Canada still evidently pales in comparison with that on larger societies such as the United States, Great Britain, or France. Furthermore, as any reader of this historiography can appreciate, Canadian scholars of criminal justice history have much to offer not only to Canadian history itself, but also to the international history of crime and criminal justice.

My intent in this brief article is not to provide a historiographical analysis of

¹ My thanks to Jim Phillips, Carolyn Strange and Blaine Baker for their helpful comments.

² Phillips (1996, p.163-199). There have been a few more narrowly focused historiographical overviews, including English (2005, p.19-38) and Bumsted (2005, p.39-45); G. Blaine Baker (2013, p.3-95) and Donald Fyson (2014, p.412-432).

³ This figure is no doubt largely underestimated, as it is based on my own research using standard bibliographical tools; masters' theses and book chapters are likely areas of weakness. Note that in the limited examples given below, I have largely limited myself to published monographs, leaving aside articles, books chapters and unpublished theses.

⁴ *Canadian Historical Review, Histoire sociale/Social History, Revue d'histoire de l'Amérique française* and *Labour/Le Travail*. In all, about 8 percent of the 1100 or so articles surveyed concerned crime and criminal justice.

⁵ Smandych and Hogeveen (1999, p.191 and 199). As one indicator, in a sample of a little over 200 theses in Canadian crime and criminal justice history since 1996, constituted from a systematic search in ProQuest Dissertations & Theses, a little under two thirds had been done within history programs, as compared to about 15% in criminology, 10% in law and 5% in sociology. Among doctoral theses alone, the contribution of history programs was slightly higher, at about two thirds.

this production, as Phillips did in 1996. Instead, concentrating on publications since then, I will try to identify which areas seem particularly strong and of interest to Canadian and international scholars, and suggest a few which might warrant further development. My overview has no pretensions whatsoever of being comprehensive, nor in any way offering an overall prospectus for future development of the field; at best, I hope to stimulate reflection and discussion.

SYNTHESIS AND SURVEY

One issue that makes this sort of exercise particularly difficult in Canada, in comparison with the United States, Great Britain, or France, is that there is still a dearth of substantial historical syntheses in the field, both general syntheses of the history of crime and criminal justice, and regional or broad thematic surveys. There is as yet no satisfying general, long-term survey of the history of crime and criminal justice in Canada or in any of its major regions⁶, although a survey of Canadian legal history currently being completed by Jim Phillips, Phillip Girard and Blake Brown will go a long way to filling the gap. Nor are there many studies of long-term trends in criminalization, in part because positivist criminologists in Canada have tended not to extend their quantitative analyses back before the advent of the current Canadian system of crime reporting in the 1960s, but also because many historians have focussed more on case studies than on broad quantitative analyses⁷. As for the few recent broad thematic surveys, the best to date is the recent book by Greg Marquis on the history of policing in Canada, to which one might add Marcel Martel's overview of the history of a selection of vices in Canada⁸. Other broad thematic syntheses tend to be limited to narrower periods⁹. While authors embarking on such enterprises inevitably open themselves to criticism from area specialists, they are of great use both to students and to criminal justice scholars less well-versed in Canadian history. We very much need a general history of women, crime and criminal justice in Canada; of Indigenous peoples' conceptions of and relationship to crime and criminal law; of violence and violent crime; of prisons and imprisonment; all areas which have been extensively explored in more focussed studies. These sorts of syntheses also encourage the sorts of big-picture conclusions which are of particular interest to an international readership.

PLACE AND TIME

One reason for the lack of synthesis is that Canadian history as a whole is a highly fragmented field, both by region and by time period, a reflection of the country's origins in a series of disparate French and English colonies and Indigenous lands forcibly

⁶ There are some limited to specific, usually earlier, periods; for example, Jerry Bannister (2003).

⁷ One exception is Fyson (2005, p.85-119). There have also been more focussed studies of specific crimes, such as Gartner (1995, p.186-222). For a critical view of the usefulness of such analyses, see Backhouse (2008, p.7-8).

⁸ See Marquis (2016) and Martel (2014).

⁹ See Boritch (1997) and Strange and Loo (1997).

welded together in an only partially successful exercise in nation-building. It is thus no surprise that the same holds for Canadian crime and criminal justice history, with the bulk of scholarly endeavour focussed on particular regions, provinces or cities, although there are also many pan-Canadian studies, and with far more production on more populated regions such as central Canada or British Columbia than on the Atlantic region or the North. This fragmentation makes the field particularly difficult to grasp by those without a good knowledge of the particularities of Canada's internal socio-political configuration.

The most obvious example of the effects of this fragmentation is Quebec. Most Quebec scholars, including myself, define their "national" space as Quebec, and work on Quebec; almost none work on Canada outside of Quebec, and there are few comparative studies of crime and criminal justice in Quebec and elsewhere in Canada¹⁰. Furthermore, the international networks of Quebec criminal justice historians tend to be far more with francophone countries such as France and Belgium, meaning that much of the comparative work concerning Quebec tends to be with these countries. This is partly due to language issues (francophone Quebec scholars are often more comfortable in their own language; some English-Canadian scholars seem to ignore work in French) and to the internal structuring of academic work (Quebec academics have their own scholarly societies, journals, and so on). It is also reflected in the fact that while there are indeed a number of pan-Canadian studies of phenomena such as political policing, gambling, or drug offences, which include Quebec in their discussions¹¹, others explicitly or implicitly limit themselves to "English" Canada (i.e., Canada outside of Quebec)¹². While a bit of a bromide in Canadian historiography, it bears repeating that explicit comparisons between Quebec and other Canadian provinces or regions can only enrich the historiographies of both. At any rate, even among pan-Canadian studies, only a few place comparison between Canada's different regions at the heart of their analysis¹³. This despite the analytical potential of such an approach, given Canada's federal nature (criminal law being a federal responsibility, but criminal justice administration falling to the provinces) and diverse social composition. With this relative lack of explicit internal comparison, it is not surprising that international comparison and transnational approaches also remain limited, beyond the usual comparative contextualization that most historians do; one promising avenue is the growing body of work on crime and criminal justice in the Canada-US borderlands¹⁴.

Again as in Canadian history as a whole, "place" in Canada has also often tended to mean large urban centers. With the exception of work on Western Canada and on Indigenous peoples, investigation into crime and criminal justice in rural Canada is seriously underdeveloped. For example, in Quebec, most studies of crime and criminal justice history after the 1830s have concentrated on Montreal, and to a lesser extent, Quebec City; there are a few studies of smaller towns such as Trois-Rivières

¹⁰ This is also the case for contemporary criminology: see Dupont (2011, p.31-54).

¹¹ Hewitt (2002); Morton (2003); Martel (2006).

¹² Sangster (2002).

¹³ Brown (2009).

¹⁴ For explicitly comparative history: Niget (2009) and Graybill (2007). On the Canada-US borderlands: Miller (2016) and Moore (2014).

or Sherbrooke; but almost nothing on rural areas. Since the majority of Canadians lived in rural areas or small towns well into the twentieth century, this means that the historiographical representation of crime and criminal justice in Canada reflects the experiences of a minority of the population¹⁵.

As for chronological coverage, Phillips noted in 1996 that research on crime and criminal justice history in Canada had concentrated on two specific periods, the French régime up to the middle of the eighteenth century and Canada from the mid-nineteenth to the early twentieth centuries¹⁶. The period from the 1960s onwards had also been extensively explored by criminologists, although often without much of a historical perspective. Since then, most of these gaps have been covered at least in part. We now know a great deal more about the period from the mid-eighteenth to the mid-nineteenth centuries, with substantial work on most of the major pre-Confederation colonies¹⁷. The twentieth century up to and including World War II has also been increasingly explored, and work on the period after the war is being filled in. Historians still however seem to be reluctant to take on crime in the post-1960 era, although there are excellent studies of specific themes¹⁸.

PROCESSES OF CRIMINALIZATION

In recent decades, crime and criminal justice history in Canada has largely been the work of historians and other scholars with research agendas driven by critical and politically progressive perspectives, intent on uncovering and denouncing the power imbalances and injustices that have underlain Canadian society¹⁹. As a result, there has been extensive and excellent work on the criminalization of what might be termed “minority groups” very evidently targeted or mistreated by the law, including women, Indigenous peoples, other racialized minorities, and those who deviate from the sexual “norm” such as homosexuals. This was already the case in 1996 for work on women and criminal justice, with multiple studies of issues such as prostitution, abortion, and sexual assault, and a robust use of feminist theory; this work continues, with gender being perhaps the most commonly used category of analysis in the field²⁰. The last two decades have also seen detailed critical scholarship on Indigenous peoples and European criminal law, often flowing from current political struggles for the recognition of Indigenous rights. This has been one of the most innovative fields in Canadian criminal justice history, with its mix of traditional knowledge, oral history, post-colonial and critical legal theory, and so on, and may be particularly useful for international scholars²¹. There has also been quite a bit of work on the criminalization of Blacks and some on that of Asians, which has powerfully

¹⁵ A recent exception is Craven (2014).

¹⁶ In an earlier 1991 historiographical piece, Phillips chose not to discuss the period after 1920 at all, since “too little work has been done on more recent decades”. Phillips (1991, p.68).

¹⁷ For example, Bannister (2003); Fyson (2006); Murray (2002); Gibson (2015).

¹⁸ Whitaker *et al.* (2012).

¹⁹ As is also the case for Canadian criminology: see Martel, Hogeveen and Woolford (2006, p.633-646).

²⁰ Recent examples include Glasbeek (2014) and Poutanen (2015).

²¹ Wicken (2012).

underscored the very evidently racist past of Canada's criminal law and criminal justice system; along with the work on Indigenous peoples, these studies have made it impossible to ignore race as a fundamental category of analysis in Canadian criminal justice history²². However, there has been less work on the relationship of European immigrant groups to crime and criminal justice, with the exception of a considerable body of scholarship on political policing and on the internment and deportation of "undesirable" aliens²³. Thus, there have been scattered studies on the criminalization of the Irish in the nineteenth century, but with a few exceptions, little on twentieth-century immigrant groups such as Italians or Jews. Furthermore, although francophone Canadians constituted the most numerous "minority" group in Canada, they are not problematized as such within Quebec (in part because of the relative isolation and internal focus of Quebec scholarship), while outside of Quebec, they have often been ignored. Finally, while the criminalized population was predominately male, there are only a few studies of crime and criminal justice that explicitly place masculinity at the heart of the analysis, an approach that would greatly benefit studies of crime, policing, judging, and punishing and also help link Canadian criminal justice history to international trends²⁴.

CRIME

Given the concentration of Canadian crime and criminal justice historians on progressive issues, it is unsurprising that reading the recent historiography, one might think that historically, Canadian crime consisted largely of a relatively limited subset of criminalized behaviours, including prostitution, sexual assault, homosexuality, riot, abortion, alcohol and drug consumption, spousal and family violence, vagrancy, political radicalism, and so on. Far less attention has been paid to criminalized behaviours which do not so easily fit into this mould. Hence, most types of ordinary violence, including homicides as a whole, are little studied, except specific types such as violence against women, or specific individual cases. Similarly, property crime of all types, from theft and robbery to fraud, has been the object of only a scant handful of studies, despite both its prevalence and its impact on respectable notions of security²⁵. This relative lack of attention also applies to white collar crime in general, which has the unfortunate effect of understating the criminality of the middle classes, who in the historiography come across as those who enforce the laws, not those who break them. In a similar vein, Canadian scholars have largely neglected the study of regulatory offences, such as infractions of municipal bylaws and provincial statutes, with the most telling example being traffic offences such as speeding and parking. As elsewhere in the West, these increasingly dominated penal offences in Canada in the twentieth century, attracting expanding policing and judicial resources, and more importantly, fundamentally altering the relationship of "law-abiding"

²² Walker (2010) and Mawani (2009).

²³ Whitaker *et al.* (2012); Kordan (2002); Molinaro (2017).

²⁴ The most extensive work in this regard has been by those studying youth justice; see for example Hogeveen (2005, p.37-69) and Myers (2005, p.383-414).

²⁵ Bisha (2015, p.571-581).

Canadians to the police and the courts as well as providing ample scope for police and judicial corruption. Nevertheless, this phenomenon is almost completely ignored in the Canadian historiography²⁶. While it is essential to continue the study of those behaviours which have thus far mainly attracted the attention of researchers, these other areas also deserve more study.

LAW AND JUSTICE

As with criminalized behaviours, there is also considerable imbalance in the aspects of the criminal law and the criminal justice system that have been studied, leaving large gaps that warrant being filled. Phillips noted in 1996 that the history of criminal law itself had been little studied in any comprehensive fashion. Since then, there have been a number of studies of changes to the Canadian Criminal Code following its adoption in 1892²⁷. However, there has been only scattered attention paid to criminal law change in the half-century or so preceding the Criminal Code, a period when the criminal law was in theory moving from colonial plurality to national uniformity. As well, the Criminal Code constitutes only one part of Canada's penal law; as noted above, relatively little has been done on low law, such as provincial statutes and local bylaws, other than piecemeal studies within focused analyses of issues such as prostitution, alcohol regulation or game laws.

The study of criminal justice institutions themselves has also remained a secondary field. Just as in 1996, police history remains under-developed, apart from the large body of work on the Royal Canadian Mounted Police. For instance, although we now have scattered studies of policing in most of Canada's larger cities, there are few studies of rural and small-town policing; and there is little on the involvement of minority groups such as Indigenous peoples in policing²⁸. While the broad contours of Canada's criminal courts are well-known, and they have been relatively well examined up to the beginning of the twentieth century, our knowledge of their operation and personnel (judges and court officials) in the twentieth century remains very patchy, apart from youth justice²⁹. The role of women in the criminal justice system might be further explored: not just as judges, policewomen and attorneys, but also in subordinated but essential roles such as stenographers or jailer's wives. The criminal practice of lawyers is also virtually unknown, nor has there been much written on the teaching of criminal law in law schools. Finally, studies of prisons remain focussed in large part on the penitentiary system, to which has been added a considerable body of work on youth incarceration facilities such as reform and industrial schools. Both of these fields are key to understanding the carceral phenomenon in Canada, and the literature is usually firmly anchored in the broader international context. There is

²⁶ This is reflected in Marquis' survey of police history in Canada, which acknowledges that "Traffic and other bylaw infractions [...] came to dominate police formal interactions with the public" but devotes only a single paragraph to them. See Marquis (2016).

²⁷ Cellard and Pelletier (1998, p.261-303); Kimmel and Robinson (2001, p.147-166).

²⁸ Swainger (2003, p.198-223); Sawaya (2012).

²⁹ Myers (2006).

however only scattered work on the local jails where most prisoners ended up³⁰, and even less on imprisonment in the police lock-up cells that proliferated from the late nineteenth century onwards.

CONCLUSION

These are only a few limited observations on the state of crime and criminal justice history in Canada and potential areas for development. There are many others. For example, analyses of punishment and violence tend to be informed very largely by Foucauldian approaches, with relatively little attention paid to Norbert Elias' theories of the "civilizing process"; as some scholars have pointed out, these might bring a useful alternate perspective to the analysis, and also bring Canadian scholarship more in line with international trends³¹. Or again, recent work on the representation of crime and justice in literature and in film points to a very largely underdeveloped field of inquiry; the visual imagery of crime and criminal justice in particular has received little attention³². Finally, while some professional Canadian historians have set themselves to the informed popularization of crime and criminal justice history in Canada³³, this space is largely left to others, and as a result there is a strong sensationalist and largely uncritical bent in many popularizing endeavours, as a recent study of prison museums in Canada has shown³⁴. One can only hope that in another twenty years' time, many of the gaps noted in this text will have been filled in, and that Canadian criminal justice history will have moved beyond its current, largely national boundaries.

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³⁰ Oliver (1998); Fyson (2016 p.15-103).

³¹ Strange (2001, p.343-385).

³² Strange and Loo (2004); Gagnon (2016); Kohm *et al.* (2017).

³³ For example, the *Great Unsolved Mysteries in Canadian History* website <http://canadianmysteries.ca>.

³⁴ Walby and Piché (2015, p.475-502).

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