Punishment, Imprisonment and Reform in Canada, from New France to the Present

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Translated by Eileen Reardon

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THE AUTHOR

André Cellard is an historian in training and a full professor in the Department of Criminology at the University of Ottawa. His area of research is the portrayal of, and social reaction to, mental deviance in Quebec in the 18th and 19th centuries. He is also working on a general history of incarceration in Canada, as well as a history of the Criminal Code of Canada. He is the noted author of *l'Histoire de la folie au Québec, 1600-1850*, for which he received the Michel Brunet Award from the *Institut d'histoire de l'Amérique française* and the Jean-Charles Falardeau Award from the Humanities and Social Sciences Federation of Canada.
PUNISHMENT, IMPRISONMENT AND REFORM IN CANADA, FROM NEW FRANCE TO THE PRESENT

Introduction

Understanding the reaction of social groups or communities to activities deemed unacceptable — crimes — as we would say today, is not always easy. What is the purpose of punishment? The various motives of those who inflict punishment can be simple or complex, at times clear, at times contradictory. We seek either to take revenge, to redress or compensate a wrong. The threat of punishment in the form of pain can also serve to dissuade the offender from re-offending, or others from committing crimes in the first instance. Punishment may also be a means to transform the individual, so that he will not feel the compulsion or desire to offend again. Another goal of punishment is to ensure public order. The severity of the punishment or the social reaction will vary depending on how serious the act of transgression in question is viewed at the time. In part, the expected goals will govern its form; the pattern of punishment will change over time, based on the outlook and attitudes of the social groups who deal with the crimes. The form of power and social organization in place in a community determine who pursues punishment for a crime — either judicial authority or the victim — as well as the procedures leading to the punishment to which the offender is subjected.

This study will explain how Canadian authorities, from the 17th century to the present, have dealt with individuals found guilty of breaking the law. We will see how the punishments inflicted on these individuals evolved so that, over several centuries, corporal punishment was replaced by the deprivation of freedom and by psychological cure.
PENAL JUSTICE UNDER FRENCH RULE, 1608-1760: PUNISHMENT AS EXAMPLE

The first Europeans who settled in North America in the 17th century came into contact with peoples whose definitions and resolution of conflict — justice — essentially differed very little from what they themselves had practised a few centuries earlier. Among Aboriginal peoples, the absence of legal systems, tribunals, judges, officers of the court, and prisons stemmed from the power structure, which was adapted to their way of life. In many Aboriginal societies, the chief was often appointed by consensus, through more or less formal mechanisms. Once appointed, the chief did not have the capacity to compel others to act according to his wishes but, rather, played the role of mediator when a conflict broke out with another clan, tribe or nation. Rather than resort to private vengeance which could lead to endless vendettas, the custom was to compensate the injured party. The desire for compensation was present even in the case of murder when the victim’s family was offered presents or a prisoner. The offender could also, voluntarily, offer himself as a slave.

In Europe, between the 12th and 18th centuries, the appearance of nation-states occurred in parallel with the progressive centralization of public authorities around the person of the King. In order to ensure respect for public order and to exercise a certain control over his subjects, the King assumed the right to decree what was permissible and what was not, while taking upon himself the means to have his wishes respected. This evolution led to an attempt to standardize the practice of justice in given territories, by establishing institutions such as criminal law, tribunals and prisons, by the appearance of officers of the court (judges, prosecutors, police officers, executioners) and by the imposition of fines and public punishments, all of which came from the central authority personified by the monarch. Action was taken as if the monarch were, symbolically, the victim of the crime committed. Moreover, it was in the monarch’s name that the accused was arrested, judged and punished. The real victim was removed from the settlement of the conflict, as if the whole affair no longer concerned him. In this regard, the law was very clear: “Vengeance,” someone wrote, “is prohibited for men and it is only the King who can exercise it through his officers by virtue of the authority that he holds from God.”

New France, during most of the history of the colony, applied the same penal law as was in use in France. Starting in 1670, a royal ordinance determined the procedure followed to determine an individual’s guilt and his subsequent punishment. Grafted on to this “Great” ordinance over the years, were laws and edicts of the King, relating to prohibited acts and their corresponding punishments.
At first, governors were responsible for trying crimes. After 1651, a tribunal known as the seneschal’s court took responsibility. After 1663, it was the lieutenant general, civil and criminal, who presided over the tribunals under royal jurisdiction, where most of the criminal cases were tried. There were three such tribunals in the colony: one at Montréal, one at Trois-Rivières and one at Québec (known here as provostship). The Conseil supérieur, which served as the appeal court for the tribunals in the royal jurisdiction, also tried crimes of Lèse-majesté, treason and duelling.

The lieutenant general, who was responsible for the inquiry and for trying the defendants, was assisted in his tasks by the King’s prosecutor, the provost and his bowmen, who carried out the arrest of the accused, and by the executioner. Although the executioner was the lowest ranking of the officers of justice, he was feared and inspired horror in the population. Candidates for the position were rare, so this task was at times turned over to a prisoner condemned to death, whose sentence was then commuted. And, because the executioner could not readily find a wife, a special clemency was reserved for a woman sentenced to death who agreed to marry him. One can appreciate how these customs might give rise to unusual events in the history of penal justice in Canada. In 1653, for example, an individual found guilty of attempted murder agreed to become an executioner, but was then immediately forced to execute his accomplice. More romantic is the story of Jean Corolère who, following a duel in 1751, was locked up in the prison at Québec. Imprisoned near his cell was Françoise Laurent, awaiting execution for having stolen some of her employer’s clothes. When the two condemned prisoners fell in love with each other, Corolère escaped his sentence by accepting the job of executioner. He then rushed to ask for the hand of Françoise Laurent who later married him.

When an accused person was arrested, he was taken to prison. In New France, prisons appeared only during the last quarter of the 17th century. Originally built of wood, they were reconstructed in stone in the towns of Québec, Montréal and Trois-Rivières, between 1716 and 1726. The prison at Québec, located at the Intendant’s palace, consisted of an interrogation room, a basement for the jailer and four dungeons (the prisons at Trois-Rivières and Montréal had two and three, respectively). We might be astonished today at the modest dimensions of these prisons, but at the time they did not occupy the place they would come to have in our penal system, imprisonment not yet being among the range of punishments applied to those coming before the courts. Rather, prison constituted a relatively secure place to interrogate and to hold the accused until justice was done. Punishment was generally carried out the same day a sentence was pronounced.
In French criminal law, the accused was considered guilty until he proved his innocence. He was interrogated while seated on a small bench. The witnesses made their depositions one by one, secretly, before being confronted by the accused, who had no right to a lawyer. Obtaining a confession, la preuve suprême, was very important to the judicial process of the period. There was, therefore, no hesitation about using torture to wrest a confession from the accused when the crime of which he was suspected was subject to the death penalty. In Canada, the method known as "boot" torture was used about thirty times. It consisted of tightly encasing the legs of the accused, from knees to ankles, with wooden planks that were knocked together by progressively inserting eight wedges of wood into them with hammer blows. This torture was very painful and could even break the knees or ankles.

The process leading to a defendant's punishment was carried out in a somewhat secret manner. By contrast, the actual punishment was a public spectacle that caught the people's attention and was designed to inspire horror. During this period, several types of punishment could be applied singly or in combination, depending on the gravity of the crime. The judges enjoyed an important discretionary power in the choice of punishments; their form and severity were therefore often modified, depending on the origin or social class of the accused. For example, careful to protect their relations with Aboriginal peoples, the French authorities rarely imposed their penal justice on those among them who were found guilty of crimes.

The punitive arsenal included seven main punishments: capital punishment, the galleys, banishment, branding, flogging, amende honorable and exposure. Thanks to the painstaking work of historian André Lachance, we are very familiar with the details of the punishments carried out in New France. We know, for example, that during the 17th and 18th centuries, a number of acts could result in the death penalty, as was the case for murder, duelling, theft, arson, abortion, rape, indecent assault, desertion, treason, forgery, homosexuality and bestiality. In New France, more than 80 persons were executed, of whom 69 were hanged. The condemned was generally marched through the town, flogged at the main intersection, then hanged in the public square in an elevated place so that he could be well seen by everyone; it was for this reason that the executioner was nicknamed "executor of high works." Without doubt, the most horrible application of capital punishment was the wheel torture. This punishment was inflicted six times, most notably to Jean-Baptiste Goyer who, having killed his neighbour and his wife, was condemned in 1752 "to have his arms, legs, thighs and back broken while alive on a scaffold." The torture victim was hit with 11 blows by an iron bar to break the bones of his appendages and spinal column. (As a measure of clemency, the condemned person was often secretly strangled before the
torture.) He was then attached to and exposed "on a wheel, face turned toward the sky, to end his days."

Other means were also used to put an end to the life of those sentenced to death. Three people, for example, were sentenced to be shot, another to have his head crushed and an Iroquois was burned alive. In 1734, a Black slave, Angélique, was sentenced to be burned alive for the crime of arson in Montréal. She was, however, strangled before her body could be burned. Nobles condemned to death evidently were not to be hanged like ordinary mortals; instead, they were decapitated. In New France, three were sentenced to decapitation. Curiously, they all succeeded in fleeing from the colony before the sentences could be carried out.

The galley slave also suffered a sad fate; he could be sentenced to carry out his punishment for a period of three, five or nine years, or in perpetuity in the case of theft, recidivism, a sexual crime, usury or forgery. Chained day and night to a bench with his unfortunate companions, nude to the waist in all weather, he had to row under constant threat of the whip. It was only by luck that the galley slave survived his punishment.

A person sentenced to banishment could, as well, be deprived of all his civil rights in a given place, for a fixed period or in perpetuity, simply by being expelled from the place of banishment. The punishment of "branding" consisted of using a red-hot iron to print a mark on the shoulder (or sometimes on the cheek) of the offender. Generally, the V sign was used for voleur (thief), W for récidiviste ("double V" for recidivist) and GAL for galley slave; in Canada, the offender was identified by a fleur de lys. The branding was usually accompanied by a flogging, a punishment generally reserved for petty criminals of a low status. For a public flogging, the offender was first tied behind a cart, then led by the executioner to the town’s main intersection where he was stripped to the waist, fastened to a wheel of the cart, finally to be beaten with one to a dozen blows with a verge (a whip-like instrument), or until blood appeared, if the judge had not specified the number of blows. A criminal could also be sentenced to the amende honorable: dressed only in a shirt, kneeling in a public place or at the tribunal with a rope around his neck and a burning torch in his hand, the offender had to publicly admit his crimes and ask for pardon. This ignominious punishment was generally used for those who caused public scandals such as defamation, adultery, public drunkenness or witchcraft. The amende honorable often accompanied the death penalty. Finally, exposure was usually reserved for those who had committed lesser crimes, such as selling alcohol to Aboriginal people, blasphemy, not fasting or pilfering. The offender was first secured in the public square by means of a carcan (an iron collar attached to a pole) and with a sign hung
around his neck describing his crime. He remained exposed to jeers and public condemnation for a period ranging from a half-hour to four consecutive hours, for one, two or three days. This was the fate reserved for Charles Grosbon who, having robbed the innkeeper Jean Milot, was sentenced in 1673 to be “led to the door of the parish church in Montréal, on a Sunday at the end of High Mass, to remain exposed to the view of the people, with a sign on his front and on his back on which will be written in large letters: ACCOMPLICE IN THE MILOT THEFT.”

If, today, such punishments appear cruel, sadistic or vengeful, we should be aware that they correspond to a punitive philosophy closely related to the social organization of the period. Punishments were intended for reparation or to eradicate the ill generated by the illegal action, but these ritual punishments were also imposed as examples, a basic concept of penal justice in the Ancien Régime. The suffering and shame of the guilty were offered as examples to the population, with a view to stigmatize the condemned and to dissuade people from committing crimes by using fear, pain or the threat of infamy. As a judge who sentenced a thief to be hanged in 1670 said so eloquently, he acted thus “so that by this dreadful example, the bad were intimidated and forbidden to commit greater thefts and other crimes.” It was also important to keep the offender from becoming a recidivist. In 1666, two accomplices, Lavallée and Jouchon, were found guilty of escaping from the King’s service and of bartering brandy with the Native people. Because he was a repeat offender, Lavallée was hanged. Jouchon had to attend the hanging at the foot of the gallows, a rope around his neck. This would be his fate, should he re-offend!

Expeditious and not very onerous, exemplary justice appeared all the more appropriate because the public authorities had limited means for social regulation and repression of deviance. Because criminals were rarely caught, it was believed that one had to make the most of punishment so that its severity and violence would make its mark on the imagination. For this reason, the punishment for a convicted criminal was announced in advance, the offender was marched through the town and executed openly and publicly, in an elevated place in the public square. In the small towns of New France, which in the 17th century consisted of a few hundred inhabitants compared to a few thousand at the end of the French regime, everyone essentially knew everyone else, which contributed to reinforcing the dramatic or sensational character of a public punishment. This also explains why in New France, as in France and elsewhere in Europe, there were accounts of executions in the public square using effigies or cadavers if the offender could not be found. Thus, suicide being considered a most serious crime, the body of a suicide victim was taken to prison, judged, dragged on its face through the streets of the town, hung by its feet and then thrown on the dump.
Dissuasion may have represented the cornerstone of this punitive philosophy, but disgracing the offender was no less important a dimension of the punishment. Punished before his peers, having to admit his crimes in public or be exposed in the marketplace, the offender was aware of the dishonour that would follow him all his life. Because honour often constituted an individual’s sole worth, we can readily understand that punishment did more than bruise the flesh of the offender; it tarnished him socially. For the person marked with the red-hot poker, the permanent scar followed him throughout his life; wherever he went, his “record” would accompany him.
The Transition to British Justice

When the British conquered New France in 1760, they implanted their own penal justice system just as they had done in New England in the 17th century and in Nova Scotia in the middle of the following century. Although the British idea of punishment resembled its French counterpart, the principles and certain elements of the procedure differed fundamentally, leading some to believe that the British system was more humanitarian.

English Common Law did indeed introduce a few principles which protected the rights of the accused. Thanks to *habeas corpus*, for example, an accused person had the right to ask a judge to verify the legality of his detention. The trial was public and the defendant could, especially when his life was at stake, be judged by a jury of his peers. Another important principle which would become ingrained during the course of the 19th century, was the presumption of the defendant’s innocence until he was proven guilty, thereby eliminating the possibility of using torture as a means of obtaining confessions. While the procedure in New France and on the European continent was said to be inquisitorial, with the judge partly responsible for investigation of the crime and for determining the truth, the British procedure was said to be accusatorial; that is, it was up to the King’s representative, the Crown prosecutor, aided by police if he could find any, to prove the defendant’s guilt. The accused could be defended by a representative, his lawyer, whose duty was to show his innocence.

Towards the end of the 18th century, the tribunal system in place in most districts in the Maritimes and Upper and Lower Canada consisted, first of all, of the Court of the King’s Bench, which alone was responsible for pronouncing a sentence of death. Quarterly court sessions were held to judge all crimes not leading to a death penalty. Finally, weekly court sessions carried out summary justice for petty crimes.

The process may have been stamped with the seal of a certain humanism, but the penal arsenal to which British justice had recourse was remarkable for its severity; punishment was corporal and exemplary. Like French punishment, British justice exhibited a severity which led British penal law to be labelled the “Bloody Code.” The range of punishment used by the English justice system was quite similar to that of the French. The whip was used frequently and severely. In order to imitate the passion of Christ who had been lashed 39 times, the offender was flogged the same number of times with a
whip called the cat o’ nine tails, consisting of nine leather thongs. In 1790, in Upper Canada, Frederik Peper, who had committed a minor theft, was sentenced to receive 39 lashes publicly, to be incarcerated for a month and to be exposed in the pillory one day a week for a month with a sign carrying the inscription “thief” around his neck. In the military, flogging was carried out with even greater severity; on occasion, soldiers were sentenced to 1,000 lashes from the cat o’ nine tails.

The British penal laws deserved the epithet “Bloody Code” because of the readiness to invoke hanging: the number of crimes leading to hanging went from about 50 in the 17th century to more than 200 by the end of the 18th century. In England, as here, for that matter, the death penalty was applied somewhat erratically. Simple infringements of conduct such as the theft of turnips, stealing a shilling or damaging a fish pond could lead directly to hanging. In 1751, two men were hanged in Halifax, shortly after its founding, simply for breaking and entering. In 1792, an identical fate was reserved for J. Cuton in Upper Canada for the theft of a few articles from a merchant and, in 1815, for two Blacks on Prince Edward Island for stealing a loaf of bread from a house. In Lower Canada, in 1813, a child of 13 was put to death for the theft of a cow and, in 1829, three men were hanged for stealing an ox.

Not only could capital punishment be summary and pitiless, but at times there was an attempt to increase the intensity, as if a public death did not have the expected dissuasive effect on a population, perhaps somewhat desensitized. An example is the execution of David McLane, tortured at Québec in 1797 for treason. His sentence reads as follows:

You, David McLane, [will be] led to the place from whence you came, and from there will be taken to the place of execution where you shall be hanged by the neck, but not until death; for you should be still alive, and your bowels will be removed and burned before your eyes; then your head will be separated from your body which must be divided into four parts; and your head as well as your members will be at the disposition of the King.

In fact, there was often so much brutality associated with capital punishment that jurors hesitated to recognize the guilt of individuals against whom there was overwhelming proof. The situation which prevailed in the colonies of British North America echoed that in England where, it seemed, children aged seven to nine were executed and where deportations to the colonies, such as Australia, became ever more numerous (135,000 people between 1775 and 1838). If the penalties were cruel and the recourse to deportation frequent, it is doubtless because the traditional penal institutions had not adapted to the
evolution and the changes that had taken place in the West, particularly in England, during previous centuries. These changes would, in fact, pave the way at the beginning of the 19th century for a revolution in the philosophy, goals and practice of punishment; from that time on, incarceration supplanted exemplary punishment.

**Enlightenment and Penal Reform**

Since at least the 17th century, economic development has led to great changes in Western societies. Thus, the increase in commercial trade, the appearance of manufacturing and, later, the first industries, drew more and more people from the country to the cities. The sudden jolts of the capitalist economy in its evolutionary period pushed entire families into the street, and forced the unemployed, the insane and homeless youth into begging, thievery and prostitution, causing the city’s well-to-do to fear all kinds of disorder. France responded to these fears by creating general hospitals, and England by establishing workhouses, almshouses and bridewells, prison-like institutions designed to contain the flood of the poor and petty criminals proliferating in urban areas. The first urban agglomerations in Canada were provided with similar institutions, but on a much more modest scale. Montréal and Québec founded general hospitals in 1692 and 1693, respectively, while, in 1758, Halifax opened a bridewell, intended to house the idle and disorderly, as well as drunks, vagabonds and rebellious children.

This type of preventive incarceration was not always sufficient for efficient control of urban crime. The thinkers of the Age of Enlightenment, strongly moved by the frequency, violence and especially the iniquity of exemplary punishments, formulated strong criticisms of the traditional types of punishment. They proposed a reform of the penal apparatus which took in the criminality of adults and of youth, as well as the housing of the mentally ill and other destitute people in society. The most articulate criticisms and propositions for changes to the application of punishment came from Cesare Beccaria (1738-1794) in a work entitled *On Crimes and Punishments*, published in 1764. In his view, punishment should be the least arbitrary possible; that is, proportional to the crime. He also proposed a corresponding punishment for each crime. Beccaria was opposed to the death penalty, and held that the punishment should be useful and permit a criminal to mend his ways.

Other thinkers imagined institutions in which the punishments would be designed to reform the individual, to make him better. John Howard (1726-1790) one of the best known of these reformers, travelled throughout England and Europe in the 1770s and, in 1777, published *The State of Prisons in England and Wales*, a work which inspired a widespread movement of
reflection on prisons. Howard proposed the separation of men, women and children in places of incarceration. He also insisted that the cells be clean and recommended communal work and silence during the day, and solitary confinement at night in order to promote repentance. In Howard’s eyes, prison should become a place of penitence, learning, self-discipline, meditation and repentance. It fell to Jeremy Bentham (1748-1832) to produce a model penitentiary which met Howard’s aspirations. His model — a building constructed in the form of a ring with a central tower, called the Panoptic — would influence penitentiary architecture of the 19th century. At the beginning of the 1790s, the American reformer Benjamin Rush (1745-1813) and the Philadelphia Society for Alleviating the Miseries of Public Prisons (later known as the Pennsylvania Prison Society), tried to put Howard’s ideas into practice at the Walnut Street prison. Men were seperated from women, and the prisoners put to work.

**Kingston and Penitentiary Reform in Canada**

As a new country subjected to the influences of both the Europeans and the Americans, Canada also participated in Western penitentiary reform. Between the end of the 18th century and the first quarter of the 19th century, the colonies of British North America constructed prisons known as “common gaols,” at Windsor (1799), York (1800), Niagara (1817), Montréal (1808), Québec (1814), and Halifax (1818). To differing degrees, these cities tried to put into practice some of John Howard’s ideas. It was only with the construction of the Kingston Penitentiary in the 1830s, however, that Canada put itself truly in tune with the penitentiary revolution that was taking hold in Britain and the United States.

The Kingston Penitentiary was an imposing building which, for a time, inspired praise for its architecture and internal organization. It was influenced by the penitentiaries at Cherry Hill and Auburn, two American penal institutions which strongly characterized the development of similar institutions in Europe and America during the 19th and 20th centuries. Opened in 1821, Auburn Penitentiary began a system in 1824 which later became known as the “Auburn System.” The inmates worked communally and in silence during the day, and were isolated at night in tiny cells of about one metre by two metres. The two intentions behind this practice were to avoid exchanges between inmates that might transform the penitentiaries into schools of crime, and to promote solitary meditation. Cherry Hill Penitentiary, usually associated with the beginnings of the “Pennsylvania System,” opened its doors in 1827. It consisted of a building in the form of a star, containing seven wings which housed 250 inmates, opening on to a rotunda. In this system, the inmate was isolated in an individual cell and did not emerge, except when ill, until his sentence was served. It was the reign of absolute
solitude; the inmate ate and worked alone inside a locked room two and a half metres by four metres.

In 1834, at the instigation of H.C. Thompson, a Kingston publisher and businessman, and with the support of the Conservative Ontario élite, the Upper Canada legislature passed an Act authorizing the construction of a modern penitentiary in Kingston. One wing had hardly been completed in 1835 when the institution was already receiving its first inmates. Inspired primarily by the Auburn example from which it borrowed its internal regimen, the main building of Kingston’s penitentiary complex united a cruciform shape with a dome in the middle. Three of the wings of the cruciform each contained 270 cells measuring less than one metre by two and a half metres. The other wing was used for the infirmary, the dining hall and the chapel. The complex was to include a number of workshops, including a forge, a carpentry shop, a shoemaker’s shop and a rope factory, as well as an institution for the criminally insane, and a prison for women.

It took a very long time, however, before the Canadian penitentiary system built an independent institution for women. Because so few women were incarcerated in the 19th and 20th centuries, their treatment did not always conform to the goals that penitentiaries were meant to exemplify. In Kingston, where there were never more than a dozen at a time, they annoyed the administrators more than anything else. Starting in the 1830s, women were confined in the infirmary, then in the dining hall, finally to be locked in insalubrious quarters infested with vermin. Moreover, to avoid having them mix with the men, female inmates could not take advantage of some of the resources, such as rehabilitation programs and the chapel. Elizabeth Fry (1780-1845), one of the most active American prison reformists at the beginning of the 19th century, did much for the cause of incarcerated women, notably by advocating the installation of schools and workshops especially reserved for them.

Discipline was very strict in the penitentiary. Woken at dawn, the inmates worked hard until evening in exchange for food of poor quality. Those who did not respect the rule of silence, who did not put enough enthusiasm into their work, or who laughed or stared at someone were punished with great severity; they were flogged with the cat o’ nine tails or a blackjack, or they were locked up, with only bread and water, in a dark cell.

After the Act of Union, Kingston Penitentiary began to receive inmates from Lower Canada but, from 1843 on, there was a stipulation that only those sentenced to more than two years were incarcerated there. The numerous small prison establishments built since the beginning of the century, known as common gaols, would from then on receive individuals sentenced to less than
two years, as well as drunkards, beggars and other petty criminals. In 1841, Saint John, New Brunswick established the House of Correction which later became the Provincial Penitentiary; Halifax did the same in 1844. Both institutions were modelled on the penitentiaries at Kingston and Auburn: communal work by day and solitary confinement by night.

The reform movement soon took on the very young. Until the 1850s, children aged seven years and older shared the same fate as the most hardened criminals, in both the penitentiaries and the communal prisons. The impossibility of children being rehabilitated in such surroundings led the legislative assemblies of Canada East and West, in 1857, to enact the establishment of reform schools designed for youths under 16. The following year, about 40 young boys were put in the first school of this kind in Penetanguishene, in the Georgian Bay area of Ontario.

While penitentiary reform continued to pursue twin goals of punishment and deterrence, it now included the objectives of discipline and rehabilitation for the offender. The penitentiary system also allowed for the classification and organization of the poor, the transient and the criminal. Each type of deviance was assigned a treatment in the appropriate institution: serious criminals went to the penitentiaries (partitioning of men and women), petty criminals to the common gaols, the insane to asylums and the youngest to reform schools. Reform was perceived as a miracle solution to the problems engendered by urbanization. It’s immediate result was a diminishment in the practice of exemplary punishment, thereby fulfilling the wish expressed by Benjamin Rush, who wrote in 1787: “I cannot help but hope that the time is not far off when gibbets, the pillory, the scaffold, the whip, the wheel will be, in the history of tortures, considered the marks of barbarism of centuries and countries, and like proof of the weak influence of reason and religion on the human mind.” Thus, branding was abolished in Canada in 1835 and the pillory outlawed in 1841. At the beginning of the 1840s, in the United Canadas, no more than three crimes were punishable by death: murder, theft and treason.

As the French philosopher Michel Foucault wrote, the West, with penitentiary reform, went from a model of scenic and public punishment to one that was solitary and secret. It was less a chastisement of the body than a redemption of the soul. All the same, although it is true that obviously cruel punishment was abolished, observers quickly noticed that the newly introduced punishment could be just as terrible. In 1840, Charles Dickens, following a visit to the Cherry Hill Penitentiary, where inmates were sentenced to solitary confinement, wrote: about them, “this slow and daily confrontation with the mysteries of the spirit is infinitely worse than all physical tortures.” The era of confinement had only just begun.
PENAL JUSTICE SINCE CONFEDERATION: THE FAILURE OF THE PRISON AND SOLUTIONS FOR REPLACEMENT

Having sealed the pact of Confederation, Prime Minister John A. Macdonald considered that all parts of the new country should have a uniform penal law. It was therefore decreed that criminal law would be the responsibility of the federal government, but arrests and the operation of the courts, the administration of justice would be the responsibility of the provinces. (The provinces would, however, keep the right to legislate in the matter of infractions of provincial laws while the municipalities would keep the right to punish infractions of municipal regulations.) Most Canadian provinces opted for a system of courts of justice with two or three levels: a lower level often called the provincial court, designed for the execution of summary justice, a superior court capable of treating more serious crimes, and an appeal court. For all the provinces, the federal government established a final appeal court, the Supreme Court of Canada. The judicial process itself remained faithful to British principles and was only modified in 1892 with the appearance of the Canadian Criminal Code. Its most important principles, such as habeas corpus and the presumption of innocence, were even recently confirmed through the adoption in 1982 of the Canadian Charter of Rights and Freedoms.

The hope that the advent of the penitentiary would put an end to corporal punishment did not prevent Canada from letting another century go by before abolishing the death penalty. A topic of discussion since the 1920s, total abolition of the death penalty obtained only a weak majority when put to a vote by Parliament in 1976. Capital punishment was replaced by imprisonment with no parole for 25 years. From 1867 to 1976, more than 1,500 persons were sentenced to death in Canada, and nearly 800 of them were executed by hanging; the other 700 had their penalty commuted to life imprisonment.

During the first half of the 19th century, many people believed the penitentiary was the keystone of an institutional system which would eradicate urban disorderliness dreaded by many. It should be noted that, in the period when the democracies of the United States and Canada were born, it was the penitentiaries at Cherry Hill and Kingston, and not parliaments or the offices of elected officials, which constituted the most costly public buildings. Yet, the promoters of the penitentiary would soon become disillusioned. The impossibility of reconciling reparation and rehabilitation with vengeance and dissuasion created conditions of confinement so punitive that it quickly became illusory to think about readapting an individual in such a milieu. In 1849, only a few years after the opening of Kingston Penitentiary, the Brown Commission was charged with inquiring into the inhuman treatment to which the inmates
were subjected. The Commission showed that, in 1847 alone, the few hundred inmates received more than 6,000 punishments ranging from the group flogging of 30 to 40 inmates in front of the others, to the correction of children aged eight to ten, whipped for having laughed or stared at someone else. Such conditions, it goes without saying, did nothing to help prisoners to rehabilitate or to reintegrate into society.

In spite of the problems revealed by the Brown Commission, the federal government established a network of penitentiaries across Canada. In addition to the penitentiaries at Kingston, Saint John and Halifax, there were soon Saint-Vincent-de-Paul in Quebec (1873), Stoney Mountain in Manitoba (1876), and New Westminster in British Columbia (1878). Dorchester in the Maritimes (1881) replaced the first penitentiaries in Saint John and Halifax. Finally, penitentiaries were added in Alberta (1906) and in Saskatchewan (1911).

Prison conditions were generally very difficult but varied from one institution to another. At the time, the question asked was: Why should an inmate benefit from living conditions superior to those of honest workers who were living in almost total destitution? Life in prison was dismal, repetitive, full of suffering and daily vexations which undermined the morale and the health of the inmates. Here, for example, is the daily schedule of an inmate in the Manitoba Penitentiary in 1879:

<table>
<thead>
<tr>
<th>Time</th>
<th>Activity</th>
</tr>
</thead>
<tbody>
<tr>
<td>05:50</td>
<td>waking bell, rise, make bed</td>
</tr>
<tr>
<td>06:00</td>
<td>cleaning, sweeping, collection of liquid waste, etc.</td>
</tr>
<tr>
<td>07:30</td>
<td>bell, breakfast</td>
</tr>
<tr>
<td>07:40</td>
<td>bell, end of breakfast, return to cell</td>
</tr>
<tr>
<td>08:30</td>
<td>bell, go to work</td>
</tr>
<tr>
<td>12:15</td>
<td>bell, return to cell</td>
</tr>
<tr>
<td>12:20</td>
<td>bell, dinner</td>
</tr>
<tr>
<td>12:45</td>
<td>bell, return to cell</td>
</tr>
<tr>
<td>13:30</td>
<td>bell, return to work</td>
</tr>
<tr>
<td>17:50</td>
<td>return to cell, supper served in cell</td>
</tr>
<tr>
<td>18:00</td>
<td>tidy clothing, cell search</td>
</tr>
<tr>
<td>21:00</td>
<td>lights out</td>
</tr>
</tbody>
</table>

The inmates were fed a scanty meal of potatoes, bread and a little meat, all of bad quality. The inmate spent his time in a cramped cell, scarcely heated, furnished with a straw mattress and a bucket which served as a toilet. Because it was feared that the products made by the inmates would be in competition with those produced by labourers, their work was soon limited to breaking
rocks. Reduced to silence inside, and constantly punished for transgressing this rule, the inmate was almost completely cut off from the outside world. In such a context, it is not surprising to learn that, at the time of the First World War, most inmates were hardly aware that Canada was at war. The inmates were, in fact, in total submission to the arbitrary authority of the prison authorities. At the turn of the century, the prison officials at Saint-Vincent-de-Paul decided to deprive prisoners of mail. In the 1930s, in British Columbia and other jurisdictions, prison authorities distributed tobacco to inmates but without the paper to roll it. Because prison managers had lost hope of treating and rehabilitating the inmates, they concentrated on guarding and punishing them. Conditions were scarcely more enlightened in the provincial jails. With the exception of a few experiments, such as the jail in Toronto in 1874 where laudable efforts were made to teach inmates a trade, the majority of jails scattered throughout the provinces generally served only to cram in vagabonds, drunks and other petty criminals until they completed their sentences. In 1869, an inspector with the government of Quebec wrote with disillusion that “the faults of these jails [the common gaols] are many and, although they differ in degree, it is no less true that none of these establishments answers to the triple goal that was proposed when they were formed, that is: to punish, to contain, to make reparation....”

A number of riots in federal penitentiaries at the beginning of the 20th century added to a sudden increase in the number of inmates (66 per cent), while the economic crisis of the 1930s, once more accompanied by a series of riots, forced authorities to make small improvements to the conditions of detention and to ease the regulations. In 1934, the federal government launched a Royal Commission of inquiry, the Archambault Commission, with the aim of shedding some light on the situation which prevailed in Canadian penitentiaries. Tabled in 1938, the Commission’s report recommended the improvement of conditions of detention and the rejection of the Auburn model. It also stipulated that henceforth the focus should be placed on the readaptation of the inmates, with the hiring of specialists, the creation of education programs and more adequate professional training.

Between 1950 and 1979, a series of inquiries and reports, both provincial and federal, followed the Archambault Commission report. Their recommendations testified to a growing feeling of failure with respect to imprisonment. The report of the Fauteux Committee, written in 1956, is without doubt one of the most significant. According to this report, the inmate should be considered an abnormal being, an ill person whose treatment should be left in the hands of specialists and scientists. Fauteux also severely criticized the dilapidation and the overcrowding of the prisons.
If the Archambault and Fauteux reports indicated a certain optimism with regard to the rehabilitation capacities of the prison, the Ouimet Report, published in 1969, showed itself more openly opposed to prisons and their over-use. The process of rehabilitation and social reintegration could not be set in motion, according to Ouimet, by removing an individual from his family and society, and taking away his work and his responsibilities. It was necessary to develop solutions to replace incarceration. In 1976, the report of the Law Reform Commission of Canada defined prison as a place contrary to rehabilitation. One year later, the authors of the McGuigan Report — named for the federal Minister of Justice — declared that prison constituted a failure with respect to its two principal functions of rehabilitation and protection. At over 80 per cent, the high rate of recidivism was, in their eyes, the most telling proof. Prison, it was said, did Canadian society more harm than good.

Despite this acknowledgement of failure, Canada had at the beginning of the 1990s more prisons than ever before. There were 167 administered by the provinces and 58 by the federal government, in which, during 1991 alone, more than 120,000 Canadians were incarcerated. Studies of the issue of incarceration also showed that even more than having generally failed, prison had led to the emergence of a certain inequity with respect to minorities, because of either their “under-representation” inside the prison apparatus in the case of women, or their “over-representation” in the case of Aboriginal people.

The problems inherent with women in the prison milieu have been recurring since the 19th century: women never represent more than three to four per cent of the total number sentenced, making it difficult to find appropriate space for them. They would have to wait until 1934 before the opening, within the prison at Kingston, of a building dedicated specifically for their use. Nicknamed “P4W” (Prison for Women), this building received, until recently, all the women in Canada sentenced to more than two years of imprisonment. That meant that those from farthest away had only limited contact with their relatives during their incarceration. Conversely, Aboriginal people, culturally maladapted to penal law and to the punitive philosophy drawn from European inspiration, are generally over-represented in the Canadian prison system. While they formed only four per cent of the Canadian population in 1979, they constituted at least nine per cent of all federal inmates. Far from improving, this proportion climbed to 11.3 per cent in 1991. In the Prairies, 36.4 per cent of men and 47.2 per cent of women incarcerated in 1991 were Aboriginal.

Since the 19th century, the realization that the prison milieu was more conducive to recidivism than to rehabilitation led to the idea of treating young men and young women in institutions set aside particularly for them, such as the reform schools, trade schools or specialized institutions like the Andrew
Mercer Reformatory for Women in Toronto which, beginning in the 1880s, cared for young women in the province. The government tried to standardize the penal laws regulating the young throughout Canada by adopting, in 1908, the *Juvenile Delinquents Act*. Individuals under 18, or under 16 in the case of some provinces, would henceforth be brought before a court of their own. This Act also made provision for the state to take charge of youth or children whose parents could not assure them an adequate education. The delinquent was, in this case, either placed in the care of a probation officer, or visited at home to check his behaviour, or placed in a group home. In 1982, this Act was replaced by the *Young Offenders Act* which established 18 as the age of penal responsibility for all provinces, and lifted application of the law to children up to age 11. The new Act also fixed three years as the maximum imprisonment for a youth aged 12 to 17 (youths 14 and older could nevertheless be tried as adults depending on certain aggravating circumstances).

**Alternatives to Imprisonment**

Realizing that penitentiary reform was not producing the results expected in terms of rehabilitation, several measures and programs were implemented to develop alternatives to imprisonment that would allow the offender to serve part of his punishment in the community. Probation was one of the first replacement solutions put forward in Canada. Initiated in 1889, it allowed a judge to suspend a lesser sentence of two years of imprisonment when it was the offender’s first offence. In 1921, the Parliament of Canada gave the go-ahead for the probation system that we know today, adding the dimension of surveillance in the community. Probation thus allowed a person in the court system to carry out his penalty in the community, under certain conditions and supervised by an official probation officer. It fell to the provinces to administer its operation, since the probation concerned individuals who would otherwise have been sentenced to less than two years of incarceration. It was in Ontario, in 1922, that the first probation service was born. Although its progress was slow during the 1950s and 1960s, probation gained in popularity when the last illusions about the benefits of incarceration fell away. In the mid-1980s, in Canada, there were nearly 75,000 persons on probation. It is necessary to note, however, as did the members of the Canadian Sentencing Commission in 1987, that the advent of measures like probation led to the “widening of the [penal] net.” From the 1960s on, the proportion of individuals sent to prison stayed the same while the proportion of people sentenced to alternative punishment increased steadily.

The *Ticket of Leave Act*, or conditional release (parole), passed in 1899 by the federal Parliament, allowed a “deserving” inmate, sentenced to a term of imprisonment of more than two years, to complete part of his penalty
under supervision in the community. Updated several times since the 1959 Conditional Release Act, this measure permitted, at the beginning of the 1990s, an annual average of more than 8,000 federal inmates to end their sentences in society. More recently, some regions of Canada have attempted to replace the work of supervision by officers with the wearing of electronic bracelets designed to control the movements of individuals on probation or on conditional release.

The realization of prison's failure as a springboard to rehabilitation also incited more than one criminologist to think of other non-prison measures which would allow an individual to reintegrate into society, while making reparation for the damage caused by his behaviour. The imposition of community work, established in different Canadian provinces since the end of the 1970s, for example, allows an offender of a minor crime to serve his sentence in the community, by completing a specified number of hours of public service. Rapidly adopted by the provinces, this new penal avenue is intended to reconcile the offender with society by having the individual make reparation for the damage caused and by submitting him to a positive form of punishment. Not only a recourse for community work, it is now perceived as a solution to the overcrowding in prisons; move over, the supervision it requires is 20 times less costly than imprisonment. The individual, therefore, has the opportunity to become productive for the community, at the same time avoiding the negative consequences of imprisonment.

Finally, since the beginning of the 1980s, several pilot programs of reconciliation, compensation and restitution have been implemented with the goal of permitting the offender to compensate, directly or indirectly, the victim of his wrongdoing. Thanks to mediation, which gives the offender and his victim an active role in the process of regulating the dispute, the offender has another chance to make good his wrongs outside the justice system.
Conclusion

From New France to the present, the goals and the forms of punishment have evolved along with the transformation of public authority and the means to command obedience and respect for order. Public authority, in assuming its power, went from being a mediator with Aboriginal peoples and Europeans a few centuries earlier, to playing a central role in the penal justice system. The offender, who previously had to make reparation for the actual wrong caused to his victim, became, symbolically, the enemy of the King, then of “society,” at the time when governments were elected. These then became the public authorities who made decisions at each step of the penal process. It was to them, the King and governments, that the offender had to pay his debt, which first took the form of exemplary, corporal punishment. It was only when the latter was considered ineffective or too cruel that punishment took the form of imprisonment.

Although the use of the whip or the death penalty has been abolished in Canada relatively recently, the practice of exemplary punishment seems far removed from us. In going from branding to the use of the electronic bracelet, in the span of a few centuries, the application of punishment seems to have undergone a phenomenal evolution. The word evolution, however, is not always synonymous with progress. For although the reform seemed promising at the beginning of the 19th century, we are forced to admit its failure. The problem is still there: how do we dissuade someone from re-offending without making the chastisement unpleasant? How does an individual readapt, if the punishment is too severe or if he is incarcerated in a social milieu that promotes recidivism? With a little hindsight, we can ask ourselves if the most recent “innovations” and the most promising, such as conciliation, compensation and mediation, do not seem strangely like those practised by our Aboriginal and European ancestors, at a time when the offender was an enemy of neither the King, nor of society.
READING LIST

Numerous works have dealt in great or little detail with the many facets of the history of penal justice in Canada. The work of R. Smandyach, C. Mathews and S. Cox, entitled *Canadian Criminal Justice History* (Toronto, University of Toronto Press, 1987), can be consulted for an annotated bibliography of more than 1,000 titles. Just as important to read is the chapter by J. Phillips, entitled "The History of Canadian Criminal Justice 1750-1920," published in *Criminology: A Reader's Guide*, (Toronto, University of Toronto Press, 1991), edited by R. Ericson, J. Gladstone and C. Shearing.

There are not, however, many historical syntheses which cover the evolution of penal justice in Canada, from its origins to the present. O. Carrigan's book, *Crime and Punishment in Canada: A History* (Toronto, McClelland and Stewart, 1991), is without doubt the most important work in this category. It is necessary to highlight the more modest but nonetheless interesting work of Cecilia Blanchfield, *Crimes and Punishments: An Illustrated History* (Ottawa, Correctional Service of Canada, 1985), which presents, in the form of a newspaper, an illustrated history, in six parts, of the evolution of penal justice in Canada.

All the same, there are a few historical syntheses for French Canada, such as that of R. Boyer, *Les crimes et les chatiments au Canada français du XVIIe au XXe siècle* (Ottawa, Le Cercle du livre de France, 1966), as well as that of J. Laplante, *Prison et ordre social au Québec* (Ottawa, University of Ottawa Press, 1989).

Much of the research on the subject relates to specific periods or particular aspects of the evolution of penal justice in Canada; presented here are a few, grouped according to three main periods of Canadian history.

I. New France, 1600-1760

The interest in penal justice in New France followed the general trend of historiography which, starting in the 1980s, had tended to neglect the study of this period. This is the reason why the principal works on this subject, in particular those of André Lachance, are already somewhat dated. Recently, with renewed focus on Aboriginal studies, a few historians have become interested in the subject of criminal justice among the First Nations between
1600 and 1760. The following is a selection taken from the principal works dealing with penal justice in New France:


Lachance, A., Le bourreau au Canada sous le régime français (Québec, Société historique de Québec, 1966).

Lachance, A., La justice criminelle du roi au Canada au XVIIIe siècle (Québec, Presses de l'Université Laval, 1978).

Lachance, A., Crimes et criminels en Nouvelle-France (Montréal, Boréal Express, 1984).


II. The Colonies of British North America, 1760-1867

The study of penal justice in this period was influenced by the popularity of the history of social control beginning in the 1980s. The first half of the 19th century was, in effect, marked by the transition to capitalism, urbanization and the appearance of the first institutions of social regulation, such as the penitentiaries, asylums, reform schools, etc. It is, therefore, a choice period for those who want to study measures designed to assure order in a society experiencing great change. We recommend most particularly the following works:


Baldwin, G., Frontier Justice (Edmonton, University of Alberta Press, 1987).


III. From Confederation to the Present

For the most part, the study of penal justice for the period after Confederation is still left to do. The few works which deal with the subject are devoted mostly to the institutions and the living conditions of the inmates.


Gosselin, L., Prisons in Canada (Montréal, Black and Rose Books, 1982).


In closing, we note the existence of numerous collected works which group interesting articles on various aspects of the history of penal justice in Canada. The Osgoode Society in particular has produced some important works in this regard. See especially:


Also of interest:


