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# Canada's Legal Pasts: Looking Forward, Looking Back

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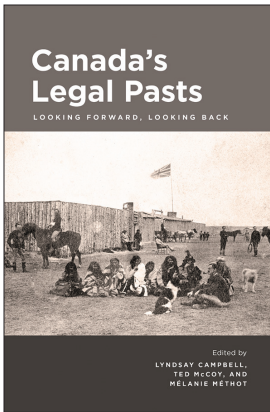
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**CANADA'S LEGAL PASTS:  
Looking Forward, Looking Back**  
Edited by Lyndsay Campbell, Ted McCoy, and  
Mélanie Méthot

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## Writing Penitentiary History

*Ted McCoy*

In 2013, Kingston Penitentiary shut down as a maximum security federal prison after 178 years of operation. The prison is now a historical site and has become part of the heritage industry celebrating old Upper Canadian attractions. Aside from touring the structures of the penitentiary, legal researchers will find a vast archive of historical material connected to the first century of penitentiary history in Canada.<sup>1</sup> It is not an easy repository of records to navigate or understand, which may speak in part to the relative scarcity of legal history that incorporates the historical penitentiary into its narrative. But the records connected to Canada's penitentiaries represent a relatively untapped resource for legal historians to understand criminal justice, in addition to intersecting histories of poverty, class formation, gender, and race. New researchers will also want to confront questions about what they hope to uncover in penitentiary records. What is visible and obscured in records created by institutions like penitentiaries? Can we see prisoners as well as prisons?

A brief note on historiography will add to an exploration of penitentiary sources in Canada. Scholars should locate two fundamental sources as a shortcut through the maze of primary material stemming from Canadian penitentiary history. The first is J.M. Beattie's *Attitudes Towards Crime and Punishment in Upper Canada, 1830–1850*.<sup>2</sup> This is a documentary study published in 1977 by the Centre of Criminology at the University of Toronto. In this extraordinary working paper, Beattie not

only writes one of the clearest explanations for the rise of the Canadian penitentiary, but he also provides future scholars with a roadmap to the essential documents for understanding his narrative. This includes excerpts from legislative reports that detail the ongoing debates over incarceration in Upper Canada between 1835 and 1845. Beattie offers samples of some records from the penitentiary itself, so that scholars can get a sense of what is important in the massive volume of records connected to Kingston Penitentiary. These include wardens' reports, penitentiary regulations, and the essential documents connected to the 1849 Brown Commission that brought an end to the first brutal years of Kingston Penitentiary.

The second key historical work is Peter Oliver's 1998 *"Terror to Evil-Doers": Prisons and Punishment in Nineteenth-Century Ontario*.<sup>3</sup> If Beattie's documentary study is an elementary overview of the available source material, Oliver's book is a master's class on navigating the archive of prison records, and the depth of his research into the workings of Kingston Penitentiary history is invaluable. One of Oliver's great talents was working out the precise mechanisms by which power and influence operated in the penitentiary and tracking these through the archival record. Beattie and Oliver together provide a rich resource for any study of punishment in Canada.

New prison historians will want to sort out some methodological questions as they embark on this research. What kind of prison history do you want to write? Government records about the penitentiary—in the form of the *Sessional Papers of the Dominion of Canada* (a source Shelley Gavigan also relies on in her essay in this volume), Department of Justice annual reports, Royal Commission reports, and legislation—are abundant and easy to access. These will help you to reconstruct an "official" history of the penitentiary, the institution as it was seen by its political masters and makers. Of course, there are analytical possibilities in the scores of pages written about penitentiaries in Canada by these figures, and they reveal much about how officialdom viewed this institution in its formative stages. But the official record is imperfect when it comes to understanding the experience of imprisonment. Who lived and breathed in penal spaces, as wardens, guards, and prisoners? To delve deeper into this story, records that are closer to the penitentiary itself are essential and can be found in the archival collections connected to the Department of Justice in Canada.

Until recently, these records were only accessible on reels housed at Library and Archives Canada (LAC), necessitating long hours in the dark scanning barely legible microfiche reproductions of the original records. The LAC is Canada's national repository of historical documents. It is located in Ottawa and houses original documents and reproductions connected to most activities of the federal government of Canada, including penitentiaries. It is the historian's lab—the spot where new discoveries are made and new interpretations initiated. Fortunately for prison researchers, the entire collection of penitentiary reels is now digitized and available online, which should allow for researchers to make both more extensive and more careful examinations of this tremendous resource.<sup>4</sup> The collection contains a fairly complete record of the operation of Kingston Penitentiary between 1835 and 1900. The reels include inmate history description ledgers, wardens' letter books and daily journals, inspectors' minute books and letter books, punishment ledgers, and medical registers. Researchers should also note that the Kingston Penitentiary reels are not the sum total of penitentiary records held at LAC. Record Group 73 (Penitentiaries) is a repository with a vast number of penitentiary files related to penitentiary governance in Canada. Finally, a strange archival anomaly is that records for other federal penitentiaries from the nineteenth and early-twentieth century are spread across the country and housed in various federal records centres. These are more difficult to access. Some records centres have no public reading rooms or staff resources to provide archival services. Still, researchers who can trek to Winnipeg or Burnaby will find their way to viewing original records from Manitoba Penitentiary and the New Westminster Penitentiary, both dating to the 1880s. Some of these records are mundane papers, and some are remarkable relics of the nineteenth century. For example, the Federal Record Centre in Winnipeg holds original registry, punishment, and medical books from Manitoba Penitentiary. To view these enormous registers is to physically trace the pencil and pen strokes of the subjects of your research. These marks record the rhythms of prison life. They are recorded in ways that will convey to researchers the numbing routines that characterized these institutions as well as the punctuation of violence, tragedy, and pain.

Some brief examples will illustrate the value of seeing these records in their original form. In 1849 Liberal newspaper publisher George Brown

investigated abuse and misconduct occurring at Kingston Penitentiary under its original warden, Henry Smith. One of the central issues revolved around the excessive use of corporal punishment. Under investigation, Warden Smith claimed that he routinely “ordered” punishment but subsequently “cancelled” such punishments. Several staff members corroborated this practice, while other members of the staff testified to the punishments taking place. How were investigators to know whether punishments were ever truly delivered? How can legal historians work out their own version of the truth? Commissioners in 1849 carefully examined Warden Smith’s punishment registers and determined that he falsified the records by “cancelling” the punishments after they had already taken place. This they concluded on the basis of the style of writing and the fact that the punishments were ordered in pen and cancelled in pencil. Researchers can support this finding by examining the same records and noting the different styles of handwriting. Similar notes of emphasis are possible for legal historians to locate throughout different historical prison records, illustrating that the historical data itself can live and breathe in the same way that the past did.

On questions of tragedy, pain, living, and breathing, researchers will want to get closer still. How can we understand the men and women who are not prominently featured in archival records, and yet are still inexorably the *subject* of much that they record? Seeing prisoners is a difficult task for the legal historian who will be confronted with two extremes. At one end are those prisoners who make a very large mark in the archival record. These are the offenders who stood out for the wrong reasons. Some crimes were extreme and resulted in notoriety which persisted behind prison walls. The best example of this visibility is found in the case of Grace Marks, the convicted murderer imprisoned in 1843 who became the subject of Margaret Atwood’s *Alias Grace*. Atwood brought Grace Marks to life, but she first constructed a skeleton of her real prison life by researching her years at Kingston Penitentiary in records at LAC.<sup>5</sup> At the other end, some prisoners stood out for their notoriety or involvement in extreme political turmoil. In the aftermath of the North-West Rebellion in 1885, Canada incarcerated forty-four First Nations men at Manitoba Penitentiary. Among them were Cree Chiefs Poundmaker and Big Bear. Their incarceration was the source of political debate in the penitentiary, the Department of Justice,

and the Parliament of Canada. Researchers will find documents detailing these men's imprisonment that reveal the sensitive political negotiations that underlay these prison sentences as well as the chiefs' eventual release. As with many Indigenous prisoners, pardon did not signal victory as both Cree leaders would die of tuberculosis shortly after their release.

Other prisoners appear disproportionately in prison records for failing to conform to the demands of prison life. They were punished more often and their behaviour generated disciplinary reports and commentary. Such examples give researchers an opportunity to understand penal responses to incorrigibility and nonconformity, and also ideas about criminality and moral reform as they operated in penitentiaries and prison reform debates. The ways the penitentiary responded to some prisoners will also force legal researchers to stretch beyond the legal realm if they are to understand the totality of the prison experience. Within prison walls a complex network of power and class relations unfolded on terrains of moral regulation, evangelical and educational reform, and medicine. This requires a different reading of archival records that are explicitly non-legal, yet necessary to understanding the larger question of punishment.

The disproportionate examples can also distort. Many prisoners experienced the penitentiary in ways that generated nothing beyond the barest biographical or administrative detail. Their stories are more difficult to tell and require a legal history that seeks answers from areas of absence or obscurity. For example, the long history of women's incarceration in Canada remains relatively unexplored, particularly in the realm of federal penitentiaries. For more than a century after 1835, women were incarcerated alongside men in federal prisons but remained marginal figures within those institutions. A deep and palpable silence about how women lived is evident in official records, their experiences often obscured by euphemisms or endless optimism. Similar absences characterize records about people of colour or Indigenous prisoners: they both experienced imprisonment in different ways than the predominantly white, male, working-class population of inmates. The answer to the original question of this short essay is that researchers can certainly see prisoners, but some are harder to see than others. Thus, to counter the marginalization of the penitentiary some experienced, researchers can employ methods that combine legal history with distinctly non-legal approaches such as microhistory or biography.

Both raise the possibility that understanding one life, or a small group of prisoners, can help speak to the composite whole. In those cases where an individual appears in the mist of obscurity—for instance, one woman who appears far more prominently in records than others—the example can speak to larger structural or social elements that might constrain many prisoners who cannot be seen.<sup>6</sup>

Finally, the penitentiary provides an opportunity for a research subject with great intersectional potential. Researchers approaching it from the perspective of legal history can look forward to using the broad canvas of penitentiary history to talk to multiple analytical concerns about the nineteenth and twentieth centuries. The penitentiary is a legal institution, but it also touches on multiple areas of Canadian society. It links local histories of crime and poverty together with federal justice policies and bears the influence of international currents of ideological reform, republicanism, and liberalism. The potential for writing compelling history based in penitentiary research is vast, yet ultimately accessible to the newest legal history researcher.

## NOTES

- 1 While this piece discusses penitentiaries, researchers should note that this is just one of a vast network of nineteenth- and twentieth-century institutions used to incarcerate individuals. Penitentiaries were operated by the government of Canada (and its colonial antecedents) from 1835 onwards. Alongside these institutions were: local gaols, for pre-trial detention and short sentences; provincial prisons, such as the Mercer Reformatory in Toronto and the Fort Gary Jail in Manitoba; and later, youth-prisons or reformatories. There was also a connected network of non-legal institutions including insane asylums, orphanages, and emigrant asylums.
- 2 J.M. Beattie, *Attitudes Towards Crime and Punishment in Upper Canada, 1830–1850: A Documentary Study* (Toronto: University of Toronto Centre of Criminology, 1977).
- 3 Peter Oliver, *“Terror to Evil-Doers”: Prisons and Punishment in Nineteenth-Century Ontario* (Toronto: University of Toronto Press, 1998).
- 4 See Kingston Penitentiary records, Héritage website, [http://heritage.canadiana.ca/view/oocihm.lac\\_mikan\\_134807](http://heritage.canadiana.ca/view/oocihm.lac_mikan_134807).
- 5 Atwood discusses her research process in Margaret Atwood, “In Search of Alias Grace: On Writing Canadian Historical Fiction,” *American Historical Review* 103, no. 5 (December 1998): 1503–16.
- 6 This approach is drawn from the notion of the “exceptional typical” introduced by Italian historian Edoardo Grendi, “Micro-analisi e storia sociale,” *Quaderni storici* 35 (1977): 506–20.