NEGOTIATING RESPONSIBILITY: REPRESENTATIONS OF CRIMINALITY AND MIND-STATE IN CANADIAN LAW, MEDICINE AND SOCIETY, 1920-1950

BY

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Negotiating Responsibility: Representations of Criminality and Mind-State in Canadian Law, Medicine and Society, 1920-1952

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Abstract

Through a qualitative analysis of 66 capital case files, this dissertation seeks to understand the social-cultural, medical and legal processes that shaped the meaning of criminal responsibility in Canada from 1920 to 1950, an era preoccupied with ideas about social descent, national identity and human degeneracy. By examining concurrent and interdependent discourses on the subjects of criminality, human agency and mind-state, this research brings to light the underlying assumptions and prejudices that structured the policies and practices of law and forensic psychiatry in the Canadian context, and provided the language to articulate varying concepts of responsibility and mental capacity in cases of murder. This study also directs particular attention to the constitution of psychiatric "expertise" during this period and the disputatious role of the expert witness in Canadian criminal law.

In revealing how systems of language and knowledge were produced through social institutions, interactions and ideas, I show how medical-legal standards for defining responsibility and modes of determining mental capacity were ordered and negotiated according to assumptions about gender, race, conjugality and citizenship, which acquired particular meanings in the context of each case. The cases of women and men convicted for murder reveal quite vividly the social tensions and interests which constituted "common sense" and defined the parameters of criminal responsibility, as

well as deep systemic biases in the processes of legal decision-making and medical diagnosis.

The objective of the project is to begin the process of documenting the historical diversity of responsibility discourse that remains largely unexamined in medical-legal and social history scholarship. If criminal responsibility has generally not been the subject of intensive social-historical inquiry, then an historical understanding of the nature and meaning of criminal responsibility in *Canada* – as distinct from the British or American experience – has been virtually non-existent. This dissertation will help fill a substantial void in Canadian medical-legal historiography, highlight the value of qualitative approaches, and provide a critical point of reference to evaluate current legal practices and initiatives in criminal law reform.

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INTRODUCTION

On December 17, 1935, Elizabeth Tilford was the first woman to be hanged in Ontario in 62 years. Her trial, conviction and death sentence for the poisoning of her husband struck the attention of thousands, who had quite different ideas about the nature of her behaviour and the degree to which she should be held criminally responsible. According to the police inspector in charge of the investigation, the Tilfords were poor, lived "loosely" and in "sordid conditions." Mr. Tilford was described in the police report as an "ignorant type" with little ambition,[1] and there was no doubt among the community that Mrs. Tilford was guilty of the crime. In fact, the inspector claimed, "it would be hard to find a more "cunningly conceived" way of getting rid of someone.[2] He concluded that Mrs. Tilford wanted "free rein" and killed her husband because she was, "we imagine … a person overly sexed" and he had "proven to be quite useless for her."

Elizabeth Tilford pleaded not guilty and maintained to the end that she did not kill her husband. Nevertheless, she was not able to muster much support on claims of her innocence. Most observers seemed to support the idea that she was guilty of the crime of murder. However, they were divided as to the precise cause of her behaviour and how responsible she was under the circumstances. Local women wrote letters to the Minister of Justice arguing that the execution of a "Christian" woman and "mother" would bring a

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[1] Tilford (1935), National Archives of Canada (NAC); See report by "Ontario Provincial Police Criminal Investigation Branch" dated October 28, 1935, 1-2.

[2] *Ibid*., 1

particular brand of "dishonour" to Canada.[3] Others insisted the sheer nature of her crime indicated some form of "sickness" or mental abnormality, which they attributed to a range of internal and external factors including menopause, poverty, feminine nature and domestic disharmony.[4]

Several commentators were concerned with the social damage that the execution of a woman would cause in the midst of a national economic Depression, and clearly recognized the powerful social role of law in such circumstances. As Mr. and Mrs. Keill wrote:

> In these days of depression such executions tend to further sadden and embitter the people while, on the other hand, a show of mercy raises the spirits of those enduring great trials. Nothing can be gained by this woman's death. Considerable can be gained by clemency at this time.

Still others argued that the practice of capital punishment was barbaric in times of "enlightenment" and "scientific attainments"[5] and called for 'expert' intervention and treatment for the "troublesome" woman. In a newspaper editorial entitled "Mrs. Tilford Should Not Be Hanged," the author extolled the modern advances of science and psychiatry during the early-1900s on the nature of criminality and called into question the fundamental principles of punishment itself:

> It seems to me therefore that instead of the short and simple but sometimes hideously unsatisfactory method of getting troublesome people off our

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[3] *Ibid*., see letters from Miss E. S. Warner of New York; Mrs. Margaret Sim of Hamilton, Ont.; Mr. and Mrs. Keill of Fort William, Ont.; and newspaper articles titled "Letter From Student on Executions" and "Capital Punishment" (sources unknown).

[4] *Ibid*., see letters from Mrs. M. A. Nicklin of Guelph, Ont.; Mrs. C. Fraser of Montreal, Que.; Countess S. Fontaine of New York; and a newspaper article from *The Observer* entitled "Mrs. Tilford Should Not Be Hanged" (nd).

[5] *Ibid*. Letter from Mrs. Margaret Sim of Hamilton, Ont.

> hands justice demands that the highest psychiatric skill and experience should be utilized to determine what treatment society should mete out to so extraordinary an individual in the interest of social protection and her own possible redemption. It seems a most deplorable thing that the more unnatural and shocking a crime is the stronger is the demand for swift and passionate vengeance, when the very nature of the crime should moderate the instinctive wrath by suggesting the more powerfully that the wrong-doer is less of a devil and more of a victim of an abnormal temperament.[6]

While the formal guilty verdict and decision to execute Elizabeth Tilford without a recommendation to mercy clearly represented judgements made within the doctrines of Canadian criminal law, and through the application of legal rules, assessments of her precise level of responsibility were articulated in a variety of way and in different contexts. Documentary evidence compiled in Tilford's case file, and the case files of others convicted for murder, reveal the numerous representations of criminality and mind-state that came together to produce particular meanings of a single event, and suggest the need for a closer analysis of the processes through which responsibility has been articulated and understood in Canadian law, science and society.

This dissertation seeks to understand the social-cultural, medical and legal processes that shaped the meanings of criminal responsibility in Canada from 1920-1950, an era preoccupied with ideas about social descent, national identity and human degeneracy. Through the examination of concurrent and interdependent discourses on the subjects of criminality, human agency and mind-state, this research brings to light the underlying assumptions and prejudices that structured the policies and practices of law and forensic psychiatry in the Canadian context, and provided the language to articulate

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[6] *Ibid*. "Mrs. Tilford Should Not Be Hanged," *The Observer* (nd).

varying concepts of criminal responsibility and mental capacity in cases of murder. Drawing from a range of document sources – including letters and newspapers, government documents, trial transcripts and professional publications – my analysis directs particular attention to the constitution of psychiatric "expertise" during this period and the disputatious role of the expert witness in Canadian criminal law.

While I will be addressing a number of issues related to the application and adjudication of insanity law, and interpretations of the nature of insanity in particular cases, this is not a strict legal analysis of the insanity defence. For instance, I also consider the way in which insanity, and mental capacity more generally, was articulated in cases where a formal insanity plea was *not* raised. Of the 66 capital cases analyzed in this study, 19 included a formal plea of insanity. However, the question of a defendant's mental capacity was also raised as a primary issue in 32 non-insanity cases. Therefore, this analysis, while incorporating specific discourses of insanity, should be read more broadly as a social-historical study of ways in which criminal responsibility was raised, debated, contested, evaluated and articulated in Canadian capital cases.

Considering each defendant in this study was ultimately found guilty and sentenced to death, it is particularly interesting that so many shades of responsibility emerged during the judicial process. In Canadian murder cases, a formal *guilty* verdict actually tells us little about the underlying forces that came together during the adjudication process to help define the boundaries of criminal *responsibility*.[7] Many defendants found guilty of murder, including Elizabeth Tilford, were, nevertheless,

[7] Before 1962, there were no degrees of murder in Canada. Therefore, a jury could only find a defendant guilty of murder, not guilty, or not guilty because insane.

understood by decision-makers and the public alike to be less than fully responsible for his/her actions.

The contradiction between the explicit legal finding of "guilty" and the implicit understanding of responsibility in certain cases, suggests the legal criteria for criminal responsibility was so well-defined that it did not accommodate subtler social-cultural shadings. However, in reading beneath the surface of the guilty verdict, we see that interpretations of law, and the meanings of particular legal categories of mind-state, were determined on a case-by-case basis. I argue throughout this dissertation that unlike the strict requirements for establishing legal guilt – supposedly resolved in the absence of information about life circumstances, ancestry and disposition – decisions about criminal responsibility (inherent in the notion of guilt) required the judicial consideration of these very factors in addressing questions of mind-state, or *mens rea*. Therefore, criminal responsibility/guilt was not a well-fixed concept in Canadian law; rather, it was (re)negotiated according to the terms and circumstances of each murder, the decided *character* of each accused, and at different stages of the criminal justice process. While this conflict between the legal policy and legal practice in findings of guilt is an important observation on its own, I am especially concerned here with the systemic and individual effects this process had on the adjudication of capital cases where the decided outcome meant life or death for the accused.

The epistemological[8] questions I address in this thesis, regarding the ways in which ideas about responsibility were socially and culturally ordered, came largely from my effort to locate Canada's medical-legal history within the growing body of social history scholarship of the past 20 years. The experience of trying to make sense of the rich archival materials collected in the case files of individuals convicted for murder in Canada, brought a growing awareness that what I was observing, and the narratives which began to emerge, did not fit neatly with contemporary social-historical literature on forensic psychiatry in particular. Nor could my findings be adequately explained by the now widely accepted medicalization model, which proposes that medical 'experts' and discourses of 'expertise' became increasingly influential in social, political and legal spheres during the early-20th century.

While my research does confirm a deep paradigmatic shift from late-19th to early-20th centuries in the conceptualization of criminality, with the rise of scientific knowledge and language about human determinism, the general argument made by theorists and historians (most notably, Foucault, Scull, Crawford, Clark, Goldstein, Dowbiggin and Menzies) that psychiatric experts wielded considerable power through the professional mobilization of scientific 'truths' is not apparent in the context of Canadian murder cases. This is not to suggest that evidence of medicalization – which establishes psychiatric discourses on criminality came to include an increasing number of human behaviours and conditions under the rubric of "illness" or "disorder" – should be discarded. Instead, I

[8] In the introduction of *The Order of Things: An Archaeology of the Human Sciences* (1994), Michel Foucault illustrates how systems of categorization are historically specific and contingent on particular cultural assumptions, or epistemes. This idea is taken from the Greek branch of philosophy, epistemology, which investigates the grounds upon which we base our knowledge.

suggest it should be refined to account for the many inconsistencies in the use, authority and substance of psychiatric expertise seen in the adjudication of murder cases in Canada. I further suggest we need to recognize the importance of exploring and exposing the uneven character of medical-legal history more generally.

In Chapter Two, I will address the medical-legal historiography on the role of the psychiatric expert in the West, and Canada in particular. Social-historians, such as Ruth Harris, have shown how individual murder cases provide the quintessential portal through which to glimpse the influence of social-cultural attitudes on processes of legal decision-making. And as Tilford's case indicates, Canadian murder trials during this period were very much public affairs.[9] Newspapers routinely reported on the spectacle of overflowing courtrooms and the keen interest of community members in trial outcomes. Legal officials, too, gauged the public's view toward mercy in each case to determine the subsequent message their decision to execute or commute would send. Individuals and groups from across Canadian society made their sentiments on a particular case known by writing to newspaper editors and legal/government officials in the form of organized petitions, eloquent letters drafted on business letterhead and personalized stationary, near-illiterate scribbles on scraps of paper, or through the pen of a third party who would write for those who could not. The murder trial was an intensely social and political process that brought together (physically and conceptually) a cross-section of ideas, institutions and individuals with the common goal of trying to make sense of, and determine 'just'

[9] For studies in the symbolic nature of British law and the social role of the rule of law, see works by Douglas Hay. In particular *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London 1975). For Canadian examples, see generally works by Carolyn Strange, Jim Phillips and Tina Loo.

responses to, acts of murder. However, concepts of justice and what counted as legitimate responses to murder were also shaped by a deep tradition and understanding of the social role of the rule of law (Hay 1975).

While I am primarily interested in detailing the discriminatory nature of social-cultural systems of classification which shaped the meaning of criminal responsibility in individual cases, on a larger scale, this dissertation is also about the history of ideas[10]; ideas about criminality, ideas about degeneracy, ideas about expertise, and ideas about responsibility. Through the interrogation of how systems of language and knowledge were produced through social institutions, interactions and ideas, I will show how medical-legal standards for defining responsibility and modes of determining mental capacity were ordered and negotiated according to assumptions about gender, race, conjugality and citizenship, which acquired particular meanings in the context of each case. However, it will also be seen that as ideas about criminality and responsibility were formed, the meanings of those ideas were subsequently/simultaneously transformed.

For example, the emergence of an anthropological/scientific language about "race" origin and difference in the 19th century, provided early-20th century Anglo-Canadians who were concerned with the identity, quality and security of the Anglo race, a system of knowledge or logic in which to interpret, order, articulate and respond to criminality. The articulation of classifications of race in and through criminological discourses, further led to the ideological and scientific formation of criminal *classes*,

[10] Ian Hacking describes an "idea" as a shorthand for making distinctions among a host of items said to be socially constructed: 'I do not mean anything curiously mental by "idea." Ideas (as we ordinarily use the word) are usually out there in public. They can be proposed, criticized, entertained, rejected.' See, *The Social Construction of What?* (Cambridge 1999), 10.

types or *kinds* based on assumptions about natural race difference. So when the defence lawyer for Louis Jones, a black man convicted for the murder of his wife (also black) in 1927, implored the Minister of Justice to consider the "expected" level of violence and vulgarity among people of his client's "class,"[11] or when the constable who arrested George Dvernichuk, a Ukrainian immigrant, for the murder of his neighbours in1930, described his behaviour as "typically foreign,"[12] there was already in place a set of ideas about types and kinds of people that acquired their particular meaning through the processes of fact-finding and legal advocacy, and according to the presumed character of each defendant.

A similar process can be seen with the emergence of strong social ideals and legal sanctions around conjugality during this period. James Snell (1991, 21) observed, for instance, that at the beginning of the 20th century the "ideal of the conjugal family" was immensely popular in Canada and supported by rigid divorce laws. According to Snell, the common understanding of conjugality "incorporated virtually all the principles and ideals valued by Canadian society" and were "shared by Canadians of almost all ethnic and religious origins and engaged in almost any sort of occupation."[13]

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[11] Louis Jones (1927), NAC; see letter from Jones and Mahoney, 3.

[12] George Dvernichuk (1930), NAC; see report of the Alberta Provincial Police signed by Detective R.C. Rathbone.

[13] Snell shows that the twentieth century ideal of the conjugal family replaced the nineteenth century ideal which reinforced a strict hierarchy of male authority. The "conjugal" ideal, on the other hand, while not displacing entirely notions of hierarchy, placed greater emphasis on 'respectable' domestic relations between husbands and wives. A husband's infidelity, for example, was no longer widely tolerated. Marriage, according to Snell, became the foundation of a "civilized" Canadian society. "Sustained by the state, the churches, and public opinion, marriage was the bulwark of the social order" (1990, 21-22). Gleason (1999, 4-5), on the other hand, argues that the construct of "the family" was exclusionary in that immigrant, working-class and Native families were not part of the ideal.

The language of domesticity and ideas about conjugality provided a conceptual and illustrative framework for the public, as well as psychiatric experts and legal decision-makers, to make sense of murder committed between wives and husbands. However, where Snell argues the "ideal of the conjugal family" was uniformly shared among Canadians, this study shows that the meanings of conjugality (like race), and the expressed implications of the conjugal ideal in decisions about criminal responsibility, were not universal but, according to general principles of law, negotiated on a case-by-case basis and against the broader social context in which the murder took place. Therefore, in order to decipher the legal standards used to interpret facts and render formal decisions, and to appreciate the general and specific effects of this process, it is necessary from a research perspective to read and analyze the cases in the same way.

I chose to look at cases of individuals *convicted* for murder for reasons both practical and analytical. Since I was interested to conduct a national, as opposed to local, study, it was most convenient to look to the collection of capital case files kept at the National Archives of Canada (NAC) in Ottawa, Ontario. While it would have been ideal also to look at cases where the accused was released, or for other reasons, not convicted on murder charges, to do so would have required extensive time spent in the archives of each province. It is my future plan, however, to embark on a large scale study of this nature.

The NAC collection includes every case in which a death sentence was pronounced (although not necessarily carried out) from Confederation to 1976, when

capital punishment was abolished in Canada.[14] During this period, every capital case file was sent to the federal Minister of Justice in Ottawa for review in council. While seldom deviating from the recommendations of the trial judge and the Chief Remissions Officer, who wrote a summary of the case for the minister, it was the minister who decided whether or not a death sentence would be carried out or commuted to life in prison. In addition to the convenience of having case files from across the country in one local collection, the files themselves provide a bountiful source of rich archival material.

The cases of women and men convicted for murder reveal quite vividly the social tensions and interests which defined the parameters of criminal responsibility, as well as deep systemic biases in the processes of legal decision-making and medical diagnosis. In these cases we can see what James Walker describes as "the operation of common sense on the perception of problems and consequences, and on the choice of solution." (1997, 6) We can see, in historical evidence, the links between law and society. And we can catch glimpses of the more subtle discourses of criminal responsibility that were not

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[14] With the exception of Louis Riel's conviction for high treason in 1885, all capital convictions during this period were for murder. Rape remained a capital offence until 1954, although no one was executed for rape after Confederation unless the victim was also murdered. And in 1948, infanticide was removed from the general laws for murder and established as a separate gender-specific defence/offence which could excuse a women who killed her infant from full responsibility on the grounds that she had not recovered the effects of childbirth and lactation, and therefore, her mind was "disturbed." However, infanticide was kept entirely separate from the Rules for insanity proper. For work on the history of infanticide law in Canada and a thorough discussion of maternal responsibility, see Kirsten Johnson Kramar,[…] For explorations in the general history and trends of capital punishment in Canada see, Carolyn Strange, 'The Politics of Punishment: The Death Penalty in Canada, 1867-1976,' University of Manitoba (1992) and 'The Lottery of Death: Capital Punishment in Canada, 1867-1976,' *Manitoba Law Journal* 23:2 (1995); also see David Chandler, *Capital Punishment in Canada*, (Toronto 1976); C.H.S. Jayewardene, *The Penalty of Death: The Canadian Experiment* (Lexington, Mass. 1977); and Kenneth Avio, 'The Quality of Mercy: Exercise of the Royal Prerogative in Canada,' *Canadian Public Policy* 13 (1987), and 'Capital Punishment: Statistical Evidence and Constitution Issues,' *Canadian Journal of Criminology* 30:3 (1988).

always explicitly represented in the doctrines of law and medicine; in particular, hegemonic and normative understandings of women, racial/ethnic minorities and the lower classes.

In Chapter One, I provide a full discussion and description of the case files and other text materials used in this study. Here I further outline my approach to collecting and reading the case files and address the limitations of this work and the sources I engage. I then consider those themes of criminological thought that most influenced the interpretations and adjudication of murder cases, and shaped the content and meaning of case file texts. As several Canadian historians have established, this period was marked by a number of events which shaped the way Canadians came to understand and respond to criminality. In particular, a substantive change in criminological thinking occurred with the emergence of "germ theory" and "degeneration" toward the end of the 19th century. In the decades that followed, medical, legal and popular knowledge about degeneration and criminality adapted to accommodate the experiences of, and ideas about, the effects of particular social conditions, such as war and economic hardship, on the Canadian citizenry and the individual.

Chapter One, therefore, provides the methodological, historical and ideological frameworks for the more substantive analyses I develop in later chapters by establishing how historical events and social practices shaped the cultural space in which criminality was defined and criminal responsibility was decided. In a politically-charged and scientifically-minded context, discursive relationships between criminality, mental degeneracy and responsibility were forged across public, professional and institutional sectors of society and echoed in the case files of those on trial for murder.

In Chapters Two and Three, I examine the practices and policies of forensic psychiatry and law as social institutions and consider their role in the production of ideas about criminal responsibility. For instance, in Chapter Two, I engage the works of several critical legal and social history scholars, in particular Ruth Harris and Joel Eigen, who have described power relations between law and society; law and psychiatry; and psychiatry and society. Collectively this literature provides a wealth of historical evidence to show the discriminatory practices of those with economic, professional, racial and/or sexual power. Few, however, have recognized the enormous influence of "common sense"[15] knowledge in defining the discursive boundaries of criminal responsibility and the limits of psychiatric expertise. I argue in Chapter Two that expert knowledge and common knowledge were not distinct, but rather, overlapped to form part of a larger discourse about criminal responsibility. In my analysis of the relationship between expertise and common sense I illustrate how certain medical witnesses were legally qualified as "experts" and the selective way in which certain aspects of expert evidence (which resonated with common sense wisdom) were taken up as legal fact while others were simultaneously rejected.[16] This chapter also establishes that while

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[15] I interpret references to "public opinion," "popular opinion," "general knowledge," "common knowledge" and "common sense" to essentially mean the same thing. However, some authors, such as Douglas Walton, differentiates between "public" and "popular" opinion. See Douglas Walton, *Appeal to Popular Opinion* (Pennsylvania 1999).

[16] My analysis of the relationship between expert knowledge and common sense is in keeping with Antonio Gramsci's (1891-1937) analysis of power and ideology in contemporary society. In particular his argument that "intellectuals occupy a privileged position in uniting thought with action." However, according to Gramsci, intellectuals functioned primarily as "educators" who nurtured shared ethical norms, but did not impose or invent them. See James Martin, *Gramsci's Political Analysis* (New York 1989), 52-3; see also, Anne Showstack Sassoon, *Gramsci's Politics* (Great Britain 1987) and *Gramsci and Contemporary Politics: Beyond Pessimism of the Intellectual* (New York 2000).

professional status was often important in getting a doctor's opinion legally qualified as "expert opinion," as part of the advocacy process that determined what and who was *heard* in court, it did not guarantee his[17] testimony would be considered valuable or even relevant to decision about responsibility. In fact, at the trial level, expert witness testimony in this period was often sharply criticized by the judge or cast out entirely in his directions to the jury.

In Chapter Three, I go on to look at the various points in the judicial process where negotiations of responsibility and mind-state typically took place. The aim of this chapter is to demonstrate that beyond the limited interpretative boundaries of medical and legal doctrine, within the broader social-cultural context, a diversified understanding of insanity, mental capacity and criminal responsibility existed. I examine insanity defence law as well as those legal spaces beyond the insanity defence where responsibility was also negotiated. This evidence affirms that judgements about a defendant's "character" strongly influenced the nature of the defence (i.e. if an insanity plea would be formally entered at trial), as well as the outcome of the case.

Case file evidence also suggests that when a defendant's mind-state was raised as an issue by the defence, either during the trial or at the post-conviction stage, the interpretation of the law and the nature of evidence admitted to establish mental deficiency fluctuated according to the characteristics of each case and each defendant. The routine, and somewhat less formal, negotiations of criminal responsibility through other legally recognized states of mind, such as provocation and passion, which embodied pre-set notions about certain character *types*, provided medical and judicial

[17] Only men served as expert witnesses in the cases I analyzed

decision-makers an opportunity to theorize about the deeper nature of criminality without having to adhere to the restrictive language of insanity law. This chapter illustrates the tremendous amount of overlap between expertise and common sense and between insanity discourse and other legal/non-legal categories introduced to establish mental deficiency during the trial and commutation stages.

In Chapters Four and Five, I further explore the relevance and meaning of "character" by examining the various ways in which assumptions about race difference and the conjugal ideal informed interpretations of criminal responsibility and formed the subtext of particular trial outcomes. Chapter Four, entitled "The Racialization of Responsibility," reveals how psychiatric theories about natural standards of mental capacity linked racial inferiority to a range of behavioural tendencies and pre-dispositions. For instance, "Indians" and "Half-Breeds" were characterized as naturally violent and lacking in moral discretion; it was 'common knowledge' that the "Coloured" had a loose character and an affinity for vile language; Southern-European immigrants were 'known' for their "communistic" ways and drinking habits; and non-Anglo women (as well as Anglo women who kept bad company) were often seen as sexually perverse. Despite the claims of law and psychiatry during this modern era of objectivity and neutrality, measures of mind-state and criminal responsibility in fact hinged on ideas about racial identity forged by a strong common sense understanding of British authority, white supremacy, and the role of the rule of law.

Similarly, in the fifth, and final, chapter, I show the influence and dynamics of dominant ideology on interpretations of mind-state and responsibility through an examination of social, legal and psychiatric representations of gender, domesticity and

conjugality that are reflected in cases involving murder between “wives” and “husbands.” Domestic murder cases reinforce many of the themes developed in earlier chapters and further demonstrate the textured, and context specific, nature of criminological discourses during this period. They illuminate, for instance, the way in which common sense defined the limits and substance of expertise; the importance of “character” in interpretations of criminal events and criminal behaviour; the recognition of social-structural conditions in understanding the nature/meaning of murder; and how race, class and gender divisions were reinforced through medical, legal and social articulations of criminality, mind-state and responsibility.

My study ends, appropriately, at a point just before the launch of the 1953 *Royal Commission On The Law Of Insanity As A Defence In Criminal Cases*. Evidence presented throughout this dissertation establishes a building and ongoing concern regarding the legal role and authority of the psychiatric expert, the nature of insanity, and the boundaries of criminal responsibility during the first half of the 20th century. These public and institutional debates, which culminated during the time period covered in this analysis, were formally addressed in 1953, when the Minister of Justice determined that the *Criminal Code* provisions on the defence of insanity were so complex that a public inquiry should be held to determine whether or not the law should be amended in any respect and, if so, in what manner and to what extent. The commission addressed questions regarding the scope and language of insanity law, the burden of proof, the proposed addition of standards for “diminished” responsibility, and several key factors

relating to the legal role and authority of psychiatric experts. [18] The initiation of the *Royal Commission On The Law Of Insanity*, therefore, marked an important point in Canadian legal history and helps define the significance and meaning of the period covered in this analysis.

By organizing the chapters of my dissertation thematically, through discussions of context, expertise, common-sense, race and domesticity, my objective is to begin the process of documenting the historical diversity of responsibility discourse that remains largely unexamined in medical-legal and social history scholarship. If criminal responsibility has generally not been the subject of intensive social-historical inquiry, then an historical understanding of the nature and meaning of criminal responsibility in *Canada* – as distinct from the British or American experience – has been virtually non-existent. This dissertation will help fill a substantial void in Canadian medical-legal historiography and provide a critical point of reference to evaluate current legal practices and initiatives in criminal law reform which continue to (re)define responsibility through (re)interpretations of criminality and mind-state.

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[18] These issues subsequently became the focus of heated debate during the public hearings of the commission which were held in all provincial capitals as well as Montreal, Ottawa and Vancouver from March 29, 1954 to April 12, 1955. *Royal Commission On The Law Of Insanity As A Defence In Criminal Cases*, Department of Justice, Canada, Final Report (October 25, 1956).

Chapter One

CAPITAL CASE FILES AND CRIMINOLOGICAL THINKING IN EARLY-20TH CENTURY CANADA

In this first chapter I discuss in detail the documentary materials contained in the capital case files I engage throughout this study and describe my interdisciplinary approach to "reading" the files as historical "texts."[19] In doing so, I address the challenges of textual analysis which include difficulties in relating the text to the intentions of its author, relating meanings of the text to different audiences, and relating the text to the larger social-cultural and institutional processes that shaped the original form and content of the document. In recounting my approach to reading the case file documents, I will also demonstrate the particular ways in which social-cultural ideas about criminality in early-20th century Canada helped give meaning to specific courtroom activities, trial outcomes, community responses and commutation decisions.

Murder trials were both a part, and an expression, of Canada's social-cultural matrix,[20] a complex of ideas, institutions, individuals, events and movements. Within this "cultural package" (Walker 1997, 8), there existed a conventional wisdom, or common sense thinking, about criminality that was, in part, characterized by a lack of consensus on the precise causes and nature of criminal behaviour. While the notion of "common

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[19] Carolyn Strange, in Iacovetta and Mitchinson (1998, 27), states "the capital case file can be approached as a textual artefact of *competing* truths – multiple, discordant interpretations of condemned persons' lives."

sense" is often constructed as distinct from expert knowledge, I employ the concept here to represent more than the collective of lay opinion. The documentary sources in murder case files indicate that criminological thinking in Canada embodied a network of popular assumptions and ideas about criminal behaviour that also became deeply entrenched in the expert/professional doctrines of law, science and politics. As well, the sources establish that contrasting views on the subject of criminality existed simultaneously between and within different social audiences.

Evidence revealed in later chapters will show, for instance, that urbanites typically viewed violent crime differently than rural folks, judges interpreted criminal responsibility differently than psychiatrists, and women viewed certain criminal acts differently than men. Assessing these variations in observation, and observations from various standpoints, can tell us something more about the observer as well as the historical context in which the event took place. It is necessary, therefore, to pay attention to the different meanings observers – official and otherwise – attributed to individual murder cases; to recognize that these meanings were produced, and limited, by the ideological boundaries of Canada's social matrix; and to be aware of the assumptions and frameworks I bring to the table when (re)constructing past events, concepts and meanings. In other words, "texts must be studied as socially situated products" (Scott 1990, 34).

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[20] Ian Hacking (1999, 34) describes the social context in which an idea or a concept is formed as a "matrix." In his redress to the over-use of "constructionism" and "social construction talk" in contemporary sociological research, Hacking points out that when a writer refers to something as being socially constructed, "they are likely talking about the idea, the individuals falling under the idea, the interaction between the idea and the people, and the manifold of social practices and institutions that these interactions involve: the matrix, in short."

An exclusive and systematic analysis of the individual processes, institutions and events which constituted early-20th century Canadian society is ontologically impossible. However, it is possible to identify in a general way the predominant social and institutional conditions which helped produce these particular historical texts, and to relate the individual concepts or ideologies about criminality and mind-state that the texts elucidate back to this broader context. I will show, for instance, the historical and legal significance of a deep paradigmatic shift, from the late-1800s to early-1900s, in the conceptualization of criminality that occurred with the rise and popularity of a scientific knowledge and language about determinism and human degeneracy. The notion that human behaviour is biologically "caused" was far-reaching in Canada, and epitomized in the eugenics movement that gained momentum during the 1910-20s. However, propositions of the specific causes, effects and resolutions in individual cases varied from one audience to another, and over time.

For instance, during the inter-war period attention turned to the social, moral and individual effects of a nation-wide economic Depression and determinist language began to include ideas about the effects of adverse environmental conditions, such as poverty, war and unemployment, on an individual's mental capacity. The wide-spread incorporation of external factors related to economic hardship and domestic security into determinist ideology, profoundly influenced medical, legal and lay interpretations of criminal responsibility. Later, during World War II and the post-war period, a number of social panics ignited over the moral and biological 'health' of the family and the *quality* of Canadian citizenship. The quality of Canadian "stock" had been a concern among British-Anglo citizens during the late 19th century, but the depletion of 'healthy' men

during the war, combined with a growing immigrant population and increased crime rates, particularly in urban centres, prompted the development of new efforts and new technologies to identify and explain the nation's most dangerous citizen, the "feebleminded" criminal.

I wish to stress that this chapter is not an attempt at a comprehensive social history of the 20s, 30s and 40s. There were many historical factors (such as the rise of the labour movement, social welfare, suffrage and early-feminist movements) which I do not address specifically but certainly are part of the backdrop against which the case files were compiled and read. What I do offer is a concise consideration of the prevailing criminological discourses that systemically shaped the meaning and content of the texts located in the capital case files. This chapter begins the work of piecing together an account of how ideas about criminality influenced the 'meanings' of criminal responsibility and mind-state – the different ways criminal responsibility came to be defined, understood and adjudicated through notions of mental capacity and defect – and how we might learn something about our past and present by attending to those meanings.

THE CASE FILES

This study draws from an analysis of 66 of the 601[21] capital case files compiled by the Canadian Department of Justice between 1920 and 1950 inclusive. In this section,

[21] Tabulated from the record of capital cases listed by year in the National Archives volume of *Persons Sentenced to Death in Canada, 1867-1976: An Inventory of Capital Case Files in the Records of the Department of Justice (RG 13),* (1992).

I will describe my selection of the 66 case files and the demographic characteristics of my collection to show their general representativeness. I examine the legal processes which structured the production of capital case files and the range of documentary sources contained in the files. In particular, I explore to what extent the texts were shaped by the legal process of documenting each case. I will then describe my approach to textual analysis and the methodological challenges of ascertaining the meanings of documentary texts.

Selection & Profile of the Cases

According to Canadian records of *Criminal Statistics*, approximately 1440 people were charged with murder between 1920-1950.[22] Of those charged, 12% were reported as detained for "lunacy" and did not go to trial. Another 49% were "acquitted" of murder charges and released, or else charged with a lesser offense. The remaining 39% of those charged with murder were reportedly convicted. My research is limited to this last cohort

[22] See, *Criminal Statistics*, Minister of Trade and Commerce (Ottawa: 1912-1925); later became, *Statistics of Criminal and Other Offences*, Dominion Borough of Canada (Ottawa: 1926-1950). This tally is only intended to suggest the general trend in conviction rates and does not include statistics for the year 1950. Cross reference with other sources suggests the data in these records may be incomplete. For instance, there is a discrepancy between the number of case files recorded in the *Inventory of Capital Case Files* and the number of capital convictions reported in the record of *Criminal Statistics*. From 1920-1949, the National Archives has record of 583 capital case files, but there are only 559 murder convictions reported in the *Criminal Statistics* for the same years. This may be explained by the fact that methods of record-keeping for provincial and national criminal statistics was not consistent and systems of gathering and reporting information changed often over the years. So while *Criminal Statistics* is useful for understanding general trends in rates of conviction and acquittal, it should not necessarily be considered a precise measurement. The record of *Criminal Statistics* shows that of the 1440 people charged between 1920-50, 180 were detained for lunacy, 139 men and 41 women; 704 were acquitted, 580 men and 124 women; and 559 were convicted and sentenced to death, 537 women and 22 women.

of murder cases – all of the accused represented here were found fit to stand trial, convicted and sentenced to death for murder. Due to the relatively few cases of women sentenced to death for murder during this period (4%), I intended to include them all in my collection; however, three of the 26 cases files of women convicted for murder were unavailable for viewing during the time of my research. The cases of men were selected from the *Inventory of Capital Case Files in the Records of the Department of Justice* (RG 13 series) organized by the Government Archives Division of the National Archives of Canada. Each case in the series is assigned a catalogue number and classified by year. From the catalogue numbers, I randomly selected two cases per year for the years 1920-1950, for a total of 60 cases.[23] Eight of the 60 selected cases were cases of women already included in my sample. Of the remaining 52 cases of men, six were subsequently dropped because they were incomplete or poorly documented[24] and three were unavailable during the time of my research. My final collection, therefore, includes the complete, or near-complete, case files of 23 women and 43 men sentenced to death for murder. None of the cases was chosen according to previous knowledge of the contents of the files, and each of the 30 years covered in this study is represented by at least one case.

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[23] The two cases for each year were selected by first drawing a number between 1-10. I drew the number 6. I then selected the 6th case in from the beginning of the list of cases for each year, as well as the 6th case in from the end of the list for each year.

[24] Incompleteness was determined if a large portion of a file was declared "missing", or "closed" to public review by personnel in charge of access to records at the National Archives. However, it is difficult to evaluate with certainty the "completeness" of any file since I do not know what may have been weeded out of the files over the years or discarded by officials to conserve space or other administrative purposes.

I first surveyed each file in order to establish a profile of the contents as a whole and to provide a brief summary of the key characteristics of each case. Besides the essential demographic factors, including gender, age, racial identification, occupation, and year and location of the trial, I also documented information which would later allow me to formulate more specific research questions about the adjudication of criminal responsibility and the role of the expert witness. For instance, in each case where the information was available, I identified the victim offender relationship; the method used by the defendant; the alleged motive; the official legal defence; whether or not the defendant's state of mind was raised as a mitigating factor; whether or not expert evidence was admitted; any recommendations to mercy; as well as the final outcome of each case. *Appendix A* provides the details of this survey and the breakdown of the identified characteristics of each case. I do not present these results, however, as statistically meaningful in any way, nor do I wish to suggest a correlative relationship between factors based on these crude summary statistics. I provide this evidence only to establish the general representativeness of the case files and to support my claim that a more qualitative approach to reading the case file documents is necessary even to begin to decipher the dynamics of each case and to understand the historical meanings of each factor summarized in *Appendix A.*

The demographic make-up of the individuals represented in this collection of case files, and the nature of the documents contained in the case files, appear representative of capital case files compiled during this period and consistent with statistical information gathered by Kenneth Avio and others in terms of the frequency of commutation and

recommendations to mercy.[25] While my collection as a whole is skewed significantly by the overrepresentation of women, it is safe to say that the cases of women, taken on their own, are representative of all cases of women convicted for murder during this period, and likewise, that the cases of convicted men are representative of cases of men convicted for murder during this period. The individuals represented in this collection, both women and men, were typically lower-working class, lived mostly in the Central and Western provinces and were predominantly non-Anglo – with 35% identified by court records as originating from South-central and Eastern European countries. They were most likely to be between the ages of 20 and 39 and most often killed a member of their family or someone they knew.

Each case file is the documentary product of the legal case built around an individual found guilty of murder and sentenced to death. And while it is useful for descriptive purposes to make general observations about capital cases in Canada, a qualitative reading of the case file texts reveals far more inconsistencies than similarities among them. Each murder, and murder trial, took place under different circumstances, with its own participants, audiences and interpreters. Quantitative approaches do not capture the more subtle nuances and contradictions that tell the story of how criminal responsibility was understood and adjudicated.

For instance, summary tabulations show that a number of defendants were convicted and hanged despite evidence of insanity, which could technically have led to a legal determination of "not guilty by reason of insanity." Insanity was raised (unsuccessfully) as the official defense in 29% (19) of the cases I analyzed, and of these,

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[25] Kenneth Avio (1987 and 1988).

37% (7) resulted in execution. While there was no law in place to prevent the execution of a mentally disordered offender, historical evidence presented throughout this study shows that there existed a common presumption among men of law and medicine, as well as ordinary folks, that the insane, even those considered mildly insane, should not be executed. My research, however, suggests that evidence of impaired mind-state was not enough to stop an execution, and that perhaps it was the judicial evaluation and influence of other extra-legal factors that determined its value and meaning in each case.

The point is, we cannot infer from frequency estimates precisely *how* evidence of mind-state was taken up in each case and *how* these processes may have differed from case to case. There were a number of underlying processes involved in the adjudication of murder cases that are not easily quantified, including the evaluation of expert evidence and determinations of criminal responsibility. Statistical evidence can help shape particular research questions or suggest how we might go about further evaluating these processes, but to understand the attribution of *meanings*, a range of analytical tools are required to effectively excavate this bountiful historical site.

Documentary Sources

Recognizing that all accounts of social history are distorted to some extent, through discretionary and interpretive processes, the validity and reliability of the documentary sources used in this study can be established by evaluating both the procedures through which capital case files were compiled and kept, and the various interests that may have influenced the production of individual documents within each file.

For every murder conviction handed down in Canada, a file containing the essential trial information was sent from the original location of the trial to the federal Department of Justice where it was received by the remissions branch and passed on to the Minister of Justice for his review and final decision regarding clemency.[26] According to Justice Department regulations, the governor-general-in-council required at minimum a copy of the trial transcript along with the ruling judge's report and impressions of the case. Also included in the file was a summary report prepared by the Chief Remissions Officer regarding the nature of the offence, the facts of the case, key trial evidence taken from the trial transcripts, along with supplementary documents such as medical/psychiatric assessments. Each remissions report concluded with the officer's recommendation for how the case should proceed.

The recommendation of the Chief Remissions Officer was almost always followed, and in some cases, prevailed over the recommendations of the trial judge and jury. From 1924 until 1953, the Chief Remissions Officer was Michael F. Gallagher, who, during his long reign at the post, had considerable influence over the routine administration and interpretation of capital cases.[27] According to Gallagher's own description of his responsibilities as Chief Officer, his duties relating to "Capital Case Work" included summarizing and reporting the facts and legal points of each case, as well as making more interpretive assessments of public sentiment and the offender's state-of-mind. Among the "most important" duties of his office, Gallagher included;

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[26] For a full discussion of official capital case procedure, see Carolyn Strange, 'Capital Case Procedure Manual,' *Criminal Law Quarterly* 14 (1998), 184.

[27] *Ibid*., 190-191.

> investigating alleged impaired mentality; appointing alienists to report, instructing them and considering their findings; collecting data bearing upon character, embracing elements of general reputation, individual disposition and personal temperament and considering all material obtained or submitted bearing upon the innocence of the accused, improbability of guilt, community sentiment, mitigating circumstances of case or redeeming features deemed proper ground for commuting death sentence.[28]

Therefore, once a death sentence was handed down and the trial information reached the Department of Justice, the Chief Remissions Officer became the principal author of the capital case file.

Each case file served as a repository for all official documents produced on the case from the time an accused was arrested, until the report of their execution or release from prison. Official documents – such as verbatim trial transcripts, judges' reports, summary reports, police reports, medical assessments, jail records, coroners reports, military records and death certificates – were produced as a requirement of the official position of the author and with varying degrees of discretion. Texts produced through a standardized format or procedure, such as trial transcripts, jail records, arrest sheets and death certificates, allowed for seemingly little discretion in the way the documents were constructed. This is not to say, however, that these records were not biased. Even a verbatim trial transcript, intended to record exactly what was said at trial, is shaped by the highly selective way in which legal discourse represents 'reality' – by the interests and editorialized versions of events presented in court by judges, lawyers, experts, lay witnesses and the accused.

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[28] Quoted in *Ibid*, 193.

Much of the official documentation contained in the case files, however, allowed the author a considerable amount of discretion. For example, the report of the Chief Remissions Officer included a summary report, an edited version of the full trial transcripts. The selective process through which this text was produced can be traced in the documents of the files by observing which passages of the transcripts were marked with coloured pencil by the Remissions Officer to be included in his summary. Trial transcripts could run into thousands of pages, but the remissions report was typically a document of less than 15 pages.

Judges' reports, while produced in the official capacity of the author, are also highly discretionary and value-laden texts. Judges' evaluations of the cases and individuals tried in their courts consistently extended beyond strict discussions of law to include personal reflections on the event, the trial and the convicted murderer. For example, in his report on the case of Florence Lassandro (1922), a woman connected to the murder of a police officer, the trial judge wrote to the Minister of Justice that the only reason the convicted woman should escape execution and be held less responsible than her male co-conspiritor, was that she was a woman – and for "no other reason."[29] Nonetheless, the fact that the accused was a woman was not enough for the executive to grant mercy in this case. Gallagher pointed out to the Minister that Lassandro's co-accused made an "immense fortune in bootlegging" and was able to delay the process by securing reprieves – "granted as of course" – and taking the case to the highest Court. He concluded, however, that these matters of due process "can hardly be considered as

[29] Florence Lassandro (1922), NAC; judge's report, 9.

entitling the appellants to escape the death penalty."[30] Both were executed. This suggests, therefore, that assessments of criminal responsibility and mitigation bias varied, even among official actors.

The case files also contain a array of unofficial documents such as, informal letters of correspondence between official personal and from the public, telegrams, memos, petitions, and newspaper editorials. These documents were produced by a variety of authors with a variety of material interests in the case. Since the issue of self-interest always exists – that there is some practical advantage gained by the author from the production of the text – caution must be taken in assessing the representations made in the text itself. For instance, the way a psychiatric expert constructed his diagnosis of a defendant, and his opinion on a question of legal insanity, may have been influenced by his interest in promoting himself as an "expert" witness. Likewise, newspaper editorials and letters written by members of the public quite often reveal the underlying interests, or position, of the author. Reading the case file documents, therefore, requires a mindful approach in recognizing the prejudices in the positions authors take and in the "representations" the texts convey, but also provides a valuable opportunity for deep analysis. As John Scott points out:

> While the researcher may regard a document as being technically inaccurate with respect to the events in question, it *may* nevertheless be regarded as a credible (because sincere) account of the author's perceptions and experiences; and such a document may provide essential evidence of the attitudes and experiences of those who share his or her situation. (1990:24)

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[30] *Ibid*., see remissions report re: "The King vs Emilio Piccariello & Florence Lassandra" [sic], 2.

Reading the Case Files

While bringing to light the underlying selective points of view from which documents were produced, it is impossible to escape the influences of my own positioning in the production of this historical account, seen in the way I structure my research questions, select my sources and make sense of the texts I read. Textual analysis is a particularly useful approach for evaluating the historical documents contained in this collection of case files produced for the purpose of legally and politically resolving murder convictions. By paying attention to the perspectives and interests of the authors and audiences represented in these documentary sources, my analytical approach is interpretive and tentative rather than formalistic or resolute. My approach is not objective and there are no steadfast conclusions that can come from qualitative analysis of these texts. However, the texts do open the possibility for provisional judgments about their meanings, which will inevitably change as new evidence emerges, new questions are asked, and new interpretations are offered.

Textual analysis is defined as the "mediation between the frames of reference of the researcher and those who produced the text". (Scott, p. 31) The interpretation of a text's "meaning" advances from an intuitive judgement about what "makes sense" given the understanding of the authors' situation and intentions, and of the larger context in which the text was produced. This approach to reading textual material developed primarily from Saussure's theory of structural linguistics, and which Barthes further developed. Barthes argued that the message, or meaning, of a text cannot be found in the

words of the text itself, but is embodied in the system of codes that structured the text.[31] "Semiotics" is the analytical process of uncovering those codes and employing them as a way to access the meaning of a given text.[32]

One of the methodological challenges of engaging in textual analysis is defending the integrity or *validity* of qualitative findings based essentially on interpretation. The interpretation of a particular concept or idea as historically/contextually 'meaningful' goes beyond counting the number of times it appears in texts from a particular period/context. For instance, in the early-20th century there were increasing references to the concept of "feeblemindedness" in medical, legal and popular texts. However, this quantitative observation does not tell us anything about the social-cultural significance of the idea of feeblemindedness or the "feebleminded" during that period. To understand the processes at work, we need to consider *how* meanings were organized through language and systems of knowledge, and how language and knowledge is represented through text.

In his book, *A Matter of Record*, John Scott argues that we must consider the complex of social and inter-personal factors which intervene between the author, text, and audience to transform the messages found in the text. He suggests that to interpret the meaning of a text we must recognize key moments in the "movement of the text from

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[31] In particular see, Roland Barthes, *Elements of Semiology* (trans. A. Lavers and C. Smith), (Boston 1964).

[32] The methodological/theoretical components of textual analysis and semiotics used throughout this dissertation can be discerned generally, although in quite different forms, in the critical works of Althusser, Foucault and Derrida.See also, David McNally, *Bodies of Meaning* (New York 2001); Floyd Merrell, *Sign, Textuality, World* (Indiana 1992); Andrew McKenna, *Violence and Difference: Girard, Derrida and Deconstruction* (Illinois 1992); Dorothy E. Smith, *The Conceptual Practices of Power: A Feminist Sociology of Knowledge* (Boston 1990) and *Writing the Social: Critique, Theory and Investigation* (Toronto 1999). Applied examples of this approach can be seen in Robert Menzies, *Survival of the Sanest* (Toronto 1989); Ruth Harris, *Murders and Madness* (Oxford 1989); and Alison Young, *Imagining Crime* (Great Britain 1986).

author to audience." (p. 34) Therefore, the first task in evaluating the meaning of a text is to account for its *intended* meaning – what the author intended the text to convey. The second task is to recognize its *received* meaning, or the different meanings constructed by different audiences of the text. It is this movement between the intended and received meanings, the "transient and ephemeral *internal meaning*," which textual analysis helps to identify. However, as Scott observes, the internal meaning if a text cannot be known independent of its reception by an audience; and the moment we approach a text to interpret its meaning, we become part of that audience.

The *validity* of a particular interpretation, or reading, of a text, is therefore established through the analytical process of simultaneously taking account of the interests of the text's author and its various audiences; and by taking account of the fact that an author's intentions, and a text's "meanings," are shaped by the social and institutional contexts in which they were produced.

By recognizing the legal structuring and organization of the documents, we can learn much about the institutional processes which influenced and limited legal articulations and decisions about criminal responsibility. But in reading the files as historical "texts," we can also learn about the social-cultural meanings of those legal decisions and how criminality was more generally understood and articulated in the Canadian context. For instance, from these texts we can discern how narratives of "degeneracy" and "feeblemindedness" widely informed criminological thinking; how certain environmental conditions such as poverty and domestic disharmony were seen to facilitate abnormal and criminal behaviour during the Depression; and how political

preoccupations with national identity and the quality of Canadian "citizenship" perpetuated racist ideology and legitimized legal action.

MEANING & CONTEXT: CRIMINOLOGICAL THINKING IN EARLY CANADA

In this section I examine the relationship between meaning and context by considering how ideas of "degeneracy" and "feeblemindedness" metamorphosed during the inter-war and post-war periods in Canada to include competing accounts of the perceived social and psychiatric effects of the conditions of war and economic hardship. I also interrogate how individuals classified as "degenerate," "defective," or "feebleminded" were subsequently identified as the primary contaminants of Canada's social, moral, and biological health. The (re)constitution of external events as embodying an inherent degenerative quality, provided subtext and meaning to the medical, legal and popular interpretations of criminal responsibility found in the documentary texts of capital case files in this period. Using a few typical cases as examples, I will elucidate the reciprocal process whereby particular social-historical conditions shaped the intended and received meanings of texts, and how the reading of these texts can, in turn, tell us something more about the historical context in which they were produced.

Degeneracy & Feeblemindedness

Before the 19th century, the relationship between insanity and criminality was not highly contested among medical professionals; it was generally thought, to varying

degrees, that criminality was a form of insanity. However, toward the mid-19th century, doctors began writing on the legal and psychological issues of motivation and intent, and medical texts soon differentiated between acts committed *with* and *without* criminal intent. According to medical experts, the former constituted a crime, to be dealt with by the law, while the latter characterized "the antisocial act of the insane man" and came under the jurisdiction of psychiatry. [33] In English law, however, motive and intent were distinct; motive usually understood as a symptom of guilt, and intent as a condition of guilt. (Tebbit 2000, 140) To put it another way, motive, from a legal standpoint, has to do with *why* an individual committed a crime, while the question of intent is concerned with whether or not an individual *meant* to commit a crime.

Although this distinction may seem clear enough, motive and intent were often conflated in legal evaluations of mind-state, or *mens rea*, as well as psychiatric determinations about mental capacity. However, the underlying assumption in both legal and psychiatric interpretations of intent was that those who acted freely were guilty and punishable, and those who acted without intent were not legally/morally responsible and therefore excusable. Trial evidence presented throughout this dissertation indicates that it was within the context of the legal notion of "excuse" – which was inherently a recognition of human weakness – that theories of degeneracy were more easily taken up. But as scientific knowledge about human nature and feeblemindedness proliferated to

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[33] See particularly works by the American physician, Isaac Ray (1807-1881), who was medical superintendent of the State Hospital for the Insane at Augusta and later, in 1845, at the Butler Hospital at Providence, Rhode Island. His most noteworthy book was *A Treatise on the Medical Jurisprudence of Insanity*, published in 1838 and went through six editions. Dr. Ray reportedly published over one hundred articles and books on mental illness in his career. His work is summarized in Arthur Fink, *Causes of Crime: Biological Theories in the United States 1800 – 1915* (New York 1938).

include an increasing number of personal qualities thought to interfere with one's ability to act freely, legal understandings and evaluations of intent became unstable. In particular, debates seemed to focus on what to do with those individuals who were not found legally or medically "insane," yet were still considered – by medical, legal, and/or social standards – to be mentally "weak."

Although the idea of "degeneracy" was born in agricultural science, not psychiatry or criminology (McLaren, 1990), it was ambitiously adopted into these disciplines as a way of explaining the social repercussions of criminality and the "nature" of the newly-identified "feebleminded" criminal. In a paper entitled the '"Nature of Feeble-Mindedness," Dr. Abraham Myerson, a American specialist on the "inheritance of mental diseases," defined "feeble-mindedness" as "heterogeneous group of conditions which are only unified by one of many symptoms, viz., that they present an intelligence so low that it is declared pathological." In his report, Dr. Myerson divided the feebleminded into sub-classes including cretins, "Mongolians," spastic types, idiots and microcephalics (having a small head). However, of particular social concern, were those he identified as "unclassified," meaning experts at the time had "no hint as to causation" beyond general assumptions about heredity. The doctor explained:

> Individuals of this group present a varied aspect. In many instances they show gross anomalies of appearance; in others no anomalies of any importance are present. They represent the group most commonly remaining in the community… In a general way they approach more nearly the diversity and the characteristics of the normal population, and they represent the most difficult social problem.[34]

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[34] Abraham Myerson, 'Nature of Feeble-Mindedness,' *American Journal of Psychiatry* (May, 1933), 1205-6. Also see Dr. Myerson's book, *Inheritance of Mental Diseases* (1925).

This more insidious class of unspecified feeblemindedness posed a particular challenge to medicine, law and society because they were difficult to detect and manage. According to Dr. Myerson, the more obvious classes of feeblemindedness presented "no special difficulties." Particularly once institutionalized, they presented little social or genetic threat. However, he cautioned;

> among the unclassified … we find persons who carry on in the community and who have access, so to speak, to copulation and reproduction; who pass amongst the mass as relatively normal. This unclassified group then probably represents our greatest problem and it is concerning this group that we have the least definite knowledge.[35]

The evaluation and detection of feeblemindedness in this period continued to rely on crude observations of "physical inferiority" including blindness, deafness, bad posture, shortness, tallness, bad teeth, heart defect, strabismus and skeletal or cranial deformity, to name a few.[36] But the real fear was generated around those feebleminded individuals who remained undetected and had unregulated "access" to reproduction. And about whom, scientific knowledge was lacking.

In Canada, theories of determinism and degeneracy were widely linked to crime, insanity, immorality, social and sexual descent, and racial inferiority. These interconnectedness of these ideas can be seen in a 1920 report published in the *Canadian Journal of Mental Hygiene*, which surveyed the rising prevalence of feeblemindedness in Manitoba, a province that received a disproportionate percentage of non-Anglo immigrants during the early-20th century. According to the author;

> The feeble-minded, insane and psychopathic … were recruited out of all reasonable proportions from the immigrant class, and it was found that

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[35] *Ibid*., 1206-7.

[36] *Ibid*., 1211.

> these individuals were playing a major role in such conditions as crime, juvenile delinquency, prostitution, pauperism, certain phases of industrial unrest, and primary school inefficiency.[37]

Assisted by the new quantitative technologies of scientific observation, measurement and classification, "detecting" and "identifying" feeblemindedness in its many subversive forms became a key concern among socially and politically-minded Canadians; including several psychiatrists who claimed to have the needed skills and expert knowledge to sift the defective from the healthy, the evil from the ill, and the sane from the insane.

While the law did not *officially* respond to advances and new classifications of mental defectiveness in social-psychiatric theory by altering the legal definition or requirements of the insanity defence, continuing to rely on the language of the *M'Naghten* Rules, subsequent chapters reveal that the *interpretation* of the Rules expanded and contracted to accommodate the social circumstances of the time and characteristics of each case, as well as emerging psychiatric knowledge about mental deficiency.[38] Throughout this period a professional and ideological tension existed between law and science. However, the essential image of the "degenerate" as the physical and conceptual representation of social malady, pervaded common sensibilities and was inculcated in a range of initiatives intended to truncate the growing problem of criminality and feeblemindedness in Canada.

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[37] Quoted in McLaren, *Our Own Master Race* (1990), 60.

[38] Gerry Johnstone also makes the argument that "while it may be true that psychiatric thinking has made little impact upon the substantive law of crime, it has had a considerable influence upon the 'operational principles' of criminal justice." See "From Experts in Responsibility to Advisers on Punishment: The Role of Psychiatrists in Penal Matters" in Peter Rush, Shaun McVeign and Alison Young (eds.), *Criminal Legal Doctrine* (Great Britain 1997), 85.

By the 1920s, psychiatric texts confidently reported the basic causes of insanity to be heredity, vice, syphilis and head trauma.[39] Disorders of perception, personality and judgment fell under the heading of "General Psychiatry," while classifications of feeblemindedness, mania, alcoholism and dementia were considered the domain of "Special Psychiatry." Most classes of organic disorders (including tumors, old age, and physical abnormalities), which during the 19th century were considered the fundamentals of general psychiatry, were by the early-20th century, part of the miscellaneous group of disorders.[40]

During the early decades of the 20th century, the symptomatology of insanity and the classification of mental disorders underwent substantial clinical refinement. For instance, "monomania," a well-recognized class of insanity during the 19th century that served as a catch-all category for various forms of occasional and unspecified psychoses, including criminality, slowly fell out of fashion. Around the same time, a new genre of paranoid and delusional types identified as "dementia praecox" (the precursor to schizophrenia) emerged. The subject of criminality, and its clinical relation to insanity, seemed to receive comparatively little attention in early-20th century psychiatry texts.

However, the emerging interdisciplinary study of criminology filled this intellectual space. Some psychiatrists made criminology the focus of their careers, as did psychologists, sociologists, anthropologist, social workers, legal experts and political activists. Publications that grappled with the specific issues of criminal behaviour and

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[39] For examples of standard medical school texts, see Aaron Rosanoff, ed., *Manual of Psychiatry*, Fifth Edition (New York 1920); and the text by Dr. E. Mendel, *Text-Book of Psychiatry: A Psychological Study of Insanity for Practitioners and Students* (trans. by Dr William C. Krauss), (Philadelphia 1907).

criminal responsibility became increasingly popular.[41] Where earlier medical-social discourses typically identified criminality *as* a form of insanity, by the 1900s, the expression of, or tendency toward, criminal behaviour, appeared in medical and criminology texts as a *symptom* of certain types of insanity or feeblemindedness, which were classified as manifestations of biological, moral and/or mental *degeneracy*.

The perceived danger of the degenerate, particularly in the context of a vulnerable young country, was in the nature of degeneracy itself. An essential feature of degeneracy theory was that the undesirable, and often undetected, traits of "defective" individuals would be inherited by their children, in whom, symptoms were expected to manifest in an in an exagerated form.[42] The future deterioration of the Canadian citizenry was as much a concern as the individuals who posed an immediate risk to the health of society. The significance and meaning of "degeneracy" and "feeblemindedness" went beyond science and law to also influence the way lay observers interpreted murders and murderers during this period.

While certain psychiatric experts, in particular Dr. Charles Kirk Clarke, were certainly in the foreground of social and political initiatives aimed at regulating criminal

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[40] *Ibid*.

[41] See particularly works by Dr. Charles Mercier, including *Criminal Responsibility* (New York 1931). Mercier was considered the leading authority in North America on criminal insanity. Also see Arthur Fink, *Causes of Crime* (New York 1938) written for "students of criminology."

[42] For a uncritical discussion of the "discovery" of biological determinism and degeneracy as a scientific/psychiatric concept see Edward Shorter, *A History of Psychiatry: From the Era of the Asylum to the Age of Prozac* (Toronto 1997); for more critical accounts of the sociological and ideological notion of "degeneracy" in different contexts see, Frank Barrett, *Disease and Geography The History of an Idea* (Toronto 2000); Elizabeth Lunbeck, *The Psychiatric Persuasion: Knowledge, Gender and Power In Modern America* (New Jersey 1994); Angus McLaren, *Our Own Master Race* (Toronto 1990); and Ruth Harris, *Murders and Madness* (Oxford 1989).

activity and the feebleminded in Canada, they were not great inventors of *new* ideas. Social movements turned toward strengthening mental fitness, moral reform, racial purity and social hygiene were fundamentally social movements that psychiatrists professionally endorsed through claims of expertise and objectivity. And as I show in Chapter Two, the *idea* of expertise was perhaps more powerful than the individual expert himself. The notion that experts could offer insights and solutions to social problems beyond the abilities of common folks is well represented in professional and popular writings of the day. However, a close read of capital case files suggests that psychiatric expertise did not seriously challenge common sense thinking. Rather, expertise illuminated that which everyone already knew – including the idea that certain *types* of people were constitutionally inferior/superior to other *types* of people.

Psychiatrists in Canada, therefore, did not obtain great public, professional or legal power by simply claiming to *know* the criminal. While they did appropriate genetic theory and apply scientific language to offer a new way of articulating what the public already knew, it was largely through the appeal to common sense that certain psychiatrists were able to secure a limited amount of professional status as "experts." In addressing the Court and the Minister of Justice, psychiatric experts called by lawyers to persuade decision-makers consistently invoked the language of law and of 'common men' to make their opinions heard and accepted.

Capital case file evidence shows that there were in fact many theories circulating throughout professional and lay communities in Canada about the precise nature and causes of degeneracy, feeblemindedness and insanity, but the general concept of "degeneracy" seemed to be understood by everyone and was rarely contested – at least

when it came to assessing those charged with murder. In reading the case files, it becomes clear that standards of criminal responsibility were not strictly set according to legal criteria or psychiatric theories, but on the popular consensus that people were qualitatively different, and that differences were meaningful and measurable.

The documents contained in the case files reflect how several discourses about criminality and human nature were brought together in the effort to resolve the question of guilt, establish criminal responsibility, and determine an appropriate sentence. Various social and professional institutions including; religion, academia, medicine, law and the family, produced complex theories about human nature and social idealism that both supported and challenged one another. Mothers who wrote letters to the Minister of Justice, pleading him to spare the life of another mother sentenced to death, interpreted the meaning of the trial's outcome differently than politicians who expressed their discomfort with the idea of executing a woman, or psychiatrists who testified the defendant was not of sound mind, and therefore, not criminally responsible.

It is necessary, therefore, to consider the many articulations of criminality and responsibility that informed the meaning of a single event, and to recognize the position of the audience in understanding the representation of a particular text. It is also important to recognize how specific historical contexts shape the way a concept, such as degeneracy, was constructed and applied. As Alison Young (1997) points out, interpretations of *facts* have an effect upon the interpretation of legal rules, and "it is the

interpretation and reconstruction of the events as facts that ultimately determines the outcome of the case, delivers the judgment."[43]

Different meanings of criminal responsibility were produced simultaneously in different social and institutional contexts, which generally represent what Canadians thought about criminality during this period. Although there is a great deal of variation from case to case, there were certain narratives of criminality that repeatedly surfaced in case file texts and seemed to provide the social-cultural subtext for official decisions about responsibility and mind-state: typically represented were the social and individual effects of war and poverty, and concern about Canada's national identity and quality of citizenship.

'Unhealthy' Environments: War & Poverty

While the law itself can be seen as the institutionalization of popular opinion, letters, petitions, official reports and newspaper commentaries written about specific cases offer a particularly valuable insight into common sense thinking on matters such as criminality, criminal responsibility and capital punishment in general. These historical documents also show the influence of broader social/political concerns on an author's interpretation of a case. For instance, participants and observers of cases during the 1930s and early-1940s, frequently cited the effects of the Depression and economic hardship on an accused mental stability and, therefore, level of criminal responsibility. While information regarding the impoverished conditions of an accused's life was not expressly

[43] See Alison Young, 'Femininity as Marginalia: Conjugal Homicide and the Conjugation of Sexual Difference,' in Rush, McVeigh and Young (eds.) (1997).

offered in court as a legal fact to be considered in decisions about guilt, such information was frequently received through the opinion evidence of medical witnesses and the testimonies of lay witnesses in assessments of mind-state, motive and intent. The material circumstances of an accused's life were also significant in the way the public interpreted and responded to individual cases of murder.

For example, when Dina Dranchuk was convicted for the murder of her husband in 1934, members of "The Women's Auxiliary To The Unemployed Men's Association" wrote to the Minister of Justice in protest of the scheduled execution of the Edmonton woman. The secretary of the Calgary branch explained:

> We do not hold with murder by any means, but as a body of women who understand women's problems, especially in these days of meager relief quotas, we do not think that the extenuating circumstances which drove the woman to commit such a rash act were fully taken into consideration at the time of the trial.[44]

In the same case, the author of a petition sent to represent the views of the Canadian Labour Party argued that there was ample evidence submitted to the Court to show that Mrs. Dranchuk's reasoning ability had been negatively affected by her husband's "brutal treatment," which, when "combined with abject poverty," produced "an abnormal condition of mind."[45]

Ideas linking economic hardship to mental capacity were rampant in the language used by lay observers to make sense of murders committed during this period, and also reflected in the language and sentiment evoked in medical and legal assessments of

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[44] Dina Dranchuk (1934), NAC; see letter dated October 16, 1934, addressed to Hon. Hugh Guthrie, Minister of Justice, signed, E. Whitman – Secretary of the "Women's Auxiliary to U. M. M. A.", Calgary, Alberta.

[45] *Ibid*.

criminal responsibility. In Dranchuk's case, her lawyer, E. C. Darling, followed up a recommendation to mercy from the judge and jury by writing the Minister of Justice to offer his "representations" of the case. He argued the accused suffered from "a belief of injustice" and that her adverse circumstances "culminated in a period of frenzy which induced the act resulting in the death of her husband." He went on to point out that medical experts who testified on behalf of both the Crown and the accused "supported this viewpoint, although, possibly or even certainly, not going to the extent of that degree of insanity which could justify an accquittal [sic] of the accused."[46] Nevertheless, in light of his client's dire circumstances, Mr. Darling urged the Minister that this was not a case in which "the extreme penalty of death should be exacted."[47]

As evidence presented in forthcoming chapters will attest, public opinion was extremely important in clemency decisions. This is implied by the sheer volume (or absence) of letters, petitions and newspaper reports gathered in the files along with official documentation for the Justice Minister's consideration. But the importance of public opinion was also made explicit in reports of the Chief Remissions Officer which routinely opened or concluded with his general impression of the public's attitude toward a particular case and/or individual. The will of some members of the public appeared influential in Dranchuk's case, since her death sentence was commuted to life in prison.[48]

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[46] *Ibid*.

[47] See letter dated October 5, 1994, from "E. Clare Darling, Barrister, Solicitor, Notary" in Dranchuk (1934).

[48] This was not the trend of executive clemency decisions during the 1930s, which actually saw the highest execution rate in post-Confederation history.

Although there were variations in the way Dranchuk's case was interpreted by different audiences and in the precise language used to articulate different views, no one seemed to dispute the fact that living in impoverished conditions caused, at least temporarily, a dysfunction of her mind. However, the intended meaning of the relationship between criminality and "abject poverty" varied according to each author. Some texts were written from the perspective of personal experiences of economic hardship, while others expressed a more general political concern for the state of the nation. These different perspectives collectively reflect the way the Canadian public came to think about criminality, its causes, and its resolutions in times of economic Depression. Ideas about the effects of environmental conditions were integrated into general theories about why certain people behaved as they did.

The assumption that one's nature and "character" could be weakened by exposure to an 'unhealthy' environment was also generally understood. This can be seen, for instance, in a letter written in support of clemency for Annie Rubeletz (1940), a 19 year old "girl" convicted for the murder of her infant. Following the trial, a local teacher who knew the accused for many years described Rubeletz as the "unhappy product of a very bad environment." [49] Rather than showing "criminal tendencies," the teacher argued, she displayed the behaviour of someone with "weak character." In his letter, he explained that Annie Rubeletz's "home was of the poorest and her parents of a low moral and mental caliber … She is one of a family of not less than fifteen children, none of whom was at any time, so far as I knew them, properly fed or clothed." Letters written in

[49] Annie Rubeletz (1940), NAC; Also spelled "Rubelietz." See letter to the Minister of Justice, Oct. 19, 1940, signed Percy Farebrother.

support of Rubeletz reinforced the sentiment that otherwise healthy individuals could become defective when exposed to unhealthy environments, and also that morally defective individuals produced unhealthy conditions and threatened society as a whole.

The author of a newspaper editorial in the *Prairie Citizen*, entitled "British Justice in Canada," expressed similar concerns about the link between crime and the country's dire economic conditions:

> It is quite easy to see that the majority of crime is caused by our economic conditions, which for the majority of our people means starvation in the midst of plenty. If more of our natural wealth that we produce each year was put to better use, such as more homes for these unfortunate girls and free education, we would in a very large measure reduce our crime record.[50]

Regarding the case of Annie Rubeletz in particular, the writer made a strong appeal to "every right-thinking citizen," including "social and welfare workers and church members and church organizations" who believed in "practical christianity" [sic], to "rise up" against "barbarism" and demand an investigation into her case. During war time, it was important, the author claimed, to show not only Canadians, but "the world at large that we are fighting barbarism in the war and in our everyday lives…'Justice with mercy' should be our slogan if we are to make the British Empire a thing to be proud of."[51]

However, there were other interpretations of the Rubeletz case which proposed harsh treatment and warned of the dangers of "coddling criminals." While some viewed Rubeletz as a victim of her circumstances and in need of protection, others viewed her as 'tainted' and a danger to the health of society. A Mrs. E. Eaton, from Regina Saskatchewan, criticized "sob sisters" and the many other "hysterical writers" who

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[50] See article in *Ibid*., (date unknown).

blamed the men/fathers in cases like Rubeletz. She suggests the blame be put on real problem – prostitution:

> Prostitution is rife in small towns in Sask, [sic] as young girls are seen soliciting men on the streets. In the case of Annie Rubelietz sterilization would be an answer, as according to the paper she had given birth to an illegitimate child in Regina before … We must let justice triumph throughout Canada and forget this sob sister stuff.[52]

Different texts project different interpretations of the precise relationship between environmental conditions that derive their particular meanings from the context in which they were produced. However, the general assumption that material conditions were relevant to understanding and explaining criminality was consistent.

The notion that unhealthy environments caused criminality pertained not only to the condition of domestic spaces, but to the state of the nation as well. As the *Prairie Citizen* writer pointed out, fighting the "barbarism" of poverty and crime was necessary, particularly during times of war, to uphold the authority and perceived superiority of the British Empire and British law. In this case, therefore, the appropriate role of the rule of law was seen as tempering "justice with mercy."

The social conditions created by war and the experiences of individuals in that social context, shaped the meaning of particular responses to particular events. For Annie Rubeletz, cries for mercy from the public were predominantly presented through narratives that accounted for the circumstances of wartime. In a letter to a newspaper

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[51] *Ibid.*

[52] *Ibid*., see letter addressed to "Hon Earnest Lapointe, Minister of Justice," dated Oct. 24, 1940.

editor signed "Another Mother," one concerned citizen sustained, "there is enough bloodshed going on in the world now, without any hangings of girls."[53]

In cases involving men identified as "soldiers," it was standard practice to include their military records as part of the documentary information passed on to the Minister of Justice. A soldier's behaviour during service was typically entered as evidence of "characer," and in the case of William Hainen (1945), the point was raised that the accused was "in uniform" at the time he beat a woman to death with a piece of wood. Hainen's defence at trial was insanity and drunkenness, both brought on by his war experience. However, despite expert testimony and recommendations to mercy from the trial judge and jury, Hainen was executed.

The significance of environmental conditions (domestic, social and economic) in interpretations of criminality, along with the relevance of the specific characteristics of each case and the position of the author, is discernable in a letter written by Mary L. Kennedy to the Minister of Justice in support of clemency for Frances Harrop (1940), convicted for the murder of her husband:

> Men have no idea what that woman's life was: trying to be the best kind of mother to her five sons; trying to manage and to work for their welfare against terrific odds; to hold the home together. Mr. Minister, surely Canada can afford to give this woman her freedom for the sake of those five young men, sons whom she has given to her country and ours. They need her: she has had a life of punishment, notwithstanding all her well-doing. So many valuable lives are hourly going out of the world in this war time; numberless homes being devastated. Her life is specially valuable. Let us build up this home for the sake of these young men, who

[53] *Ibid*., see letter to the Editor in the *Leader-Post*, "Calls for Mercy," signed "Another Mother," Oct. 18, 1940.

> will make all the better Canadians in gratitude for governmental leniency.[54]

Evaluations of an individual's home life and the state of the country's social environment influenced the way murder was understood and provided much of the subtext to legal, medical and lay decisions about criminal responsibility and the meaning of criminality during this period. However, discourses of the *nature* of criminality itself generally reflected a preoccupation with issues involving the constitution of individuals, and the constitution of the Canadian citizenry.

Citizenship & National Identity

A politics of national identity, brings together the concerns of the state – state power and state security – with "the *salience* of experiences of selfhood, tradition, language, and place at the most intimate level." (Angus 1997, 21) The notion of British citizenship, and the obligations and privileges that came with being a British citizen in Canada, was constituted, therefore, through the selective processes of national identification, as well as through the selective practices employed by social actors to identify themselves in the context of their social world.

By the 1920s, British Anglo-Canadians were beginning to fully embrace the task of identifying the morally weak and feebleminded, while at the same time, identifying themselves as healthy "Canadians." Technologies of genetic theory had, by this time, been redirected from agriculture to human reproduction and presented to the public as a

[54] Frances Harrop (1940); see letter to Hon. Minister of Justice, stamped with the date June 15, 1940, signed Miss Mary L. Kennedy, 2.

legitimate solution to a range of social 'disorders.' In his 1919 article "Genetics – The Science of Breeding," W. L. Lockhead, a Canadian Botanist, reported on the Eugenists' proposed "measures for improvement of the race." They included: "More stringent marriage laws; sexual segregation of defectives; stricter control of immigration; and measures of sterilization of dangerous defectives."[55] Perhaps not surprisingly, "dangerous defectives" were identified by reformers as products of the poor, uneducated, and non-Anglo immigrant classes who represented the bulk of prison and asylum populations. Soon after, the United Farmers of Alberta called on the government to draft legislation "providing for the segregation for life of the feeble-mined and to study the feasibility of implementing a sterilization program." (McLaren 1990, 99) Then, in 1924, under the flag, "democracy was never intended for degenerates," the United Farm Women of Alberta pushed the campaign into high gear and put the Alberta Sterilization Act into action.[56] British Colombia followed in 1933 – the same year Nazi Germany launched its own campaign for racial hygiene – with legislation sanctioning the sterilization of defectives and the mentally ill.[57]

Following the First World War, organizations such as the Dominion Council of Health, the Canadian Council of Child Welfare, the National Council of Women and the Canadian Social Hygiene Council ambitiously distributed the message across Canada that

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[55] W. L. Lockhead, 'Genetics – The Science of Breeding' *Canadian Bookman* (July, 1919) 66. Quoted in McLaren (1990), 13.

[56] See also, Terry Chapman, 'The Early Eugenics Movement in Western Canada,' *Alberta History* 25 (1977), 14.

[57] *Statutes of the Province of British Colombia*, 'An Act Respecting Sexual Sterilization,' ch. 59 (April 7, 1933). See also, Mclaren (1990) 90-91.

the quality of the Canada's citizenry was in danger.[58] Between 1920 and 1950, 'respectable' Canadian citizens were concerned about the social and private lives of the 'dangerous' classes and the perceived threats they posed to the health of Canada. Dominant ideals of British-Canadian citizenship regularly emerge in the case file texts and were articulated according to the particular characteristics of each case.

A common feature in capital case file texts during this period was the claim that hanging, at least in some instances, represented a blow to "Canadian civility."[59] Others argued, however, that capital punishment was a necessary evil in place to protect "Canadians" from dangerous "foreign elements." For example, in response to the case of Harry Rudka (1922), an unemployed Romanian immigrant convicted for killing two men in a brawl, several newspaper articles made reference to the threat of "foreigners." A report in the *St. Catherines Star* claimed "human life is of no consequence" to "foreigners who at every turn smash Canadian law" and are able to get away with murder.[60]

Even Rudka's lawyer made reference to the "rather bad foreign element in this Country [sic], particularly in Thorold, Niagara Falls and Welland," in his post-trial letter to the Justice Minister. The notions of "civility" and "Christianity" seemed to constitute the essence of what Anglo citizens counted as Canadian identity. It therefore made sense that criminality was commonly articulated, although in different ways, as the manifestation of an evil or uncivilized nature.

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[58] See Mariana Valverde, *The Age of Light, Soap, and Water: Moral Reform in English Canada, 1885-1925* (Toronto 1991); also, McLaren (1990).

[59] See generally the file of Annie Rubeletz (1940) for many opinions regarding the "uncivilized" and "unchristian" practice of executing women.

[60] Harry Rudka (1922), NAC.

When William Schmidt (1944) was charged along with three other men for torturing a woman who refused to hand over her money, the judge told the Court: "It is almost unbelievable that this act of savages could be committed in this year 1944 in a Christian country."[61] But at the same time, the fact that Schmidt was a "Canadian citizen born in Canada" was also seen as relevant to his defence. In a letter to the Chief Remissions Officer following the trial, Schmidt's lawyer made the status of accused citizenship known, and established Schmidt's sense of nationalism in noting that prior to the unfortunate incident, he made five attempts to enlist for service overseas.[62]

While a deeper exploration of the racialized processes that influenced decisions about criminal responsibility will be taken up in Chapter Four, I wish to make the general point here that the way in which social actors during this period identified themselves as *Canadian* and as Canadian *citizens*, strongly influenced the way they understood particular cases and articulated their views about criminality and responsibility. This was done by taking stock of the constitutional make-up of Canadian citizenry, and also by keeping one eye on what was going on in the rest of the world. For instance, there were many references during the 30s and 40s to Nazism as the embodiment of evil. In 1941, when Frank Patrick was sentenced to death after strong evidence of insanity, one observer made the point that "only Nazis make a practice of killing the insane."[63]

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[61] William Schimidt (1944), NAC. The judges statement was reported in the *Ottawa Journal*, "Four Sentenced to Hang in Torture Murder of Woman," Sept. 13, 1944.

[62] *Ibid*., see letter to M. F. Gallagher, Esq., for the Deputy Minister of Justice, signed C.R. Fitch, dated Nov. 30, 1944, 1.

[63] Frank Patrick (1941), NAC; see letter to Minister of Justice, signed John Haddad, dated Jan. 11, 1942.

Another drew a comparison between Nazism and what it meant to be Canadian by claiming that "Hitler might do this and never flinch - but surely not Canadian."[64]

The examination of a single letter in Frank Patrick's file can serve to reveal the intricate way in which ideas about racial and national identity combined with theories about human nature and environmental conditions to forge a meaningful account of his case, and about criminality in general. Following the conviction of Patrick, a 40 year old Ukrainian, Rev. Jules Pirot wrote the Minister of Justice to offer his impressions of the case. He began by reminding the Minister that the jury had access to newspapers during the trial and would surely have been aware that the victim was the wife of a "soldier" overseas. Knowing this, the Reverend surmised, "it could be presumed that they were prejudiced against the accused."[65] He then pointed out that the accused lived in "one of the wildest parts of Saskatchewan" where there were "a few settlers, all poor, without a church, without a school."[66]

As a lay witness called to testify during the trial about Patrick's state of mind, the Reverend claimed, as a child, the accused was always "abnormal, insane and violent" and "unable to understand any distinction between right and wrong in the moral field." He added that the psychiatrist who testified Patrick was legally "sane" later "seemed to be distressed" about his testimony and regretted his conclusion before the jury.[67] While the wish of the Reverend was for the Minister to see his way to ordering a new trial, he

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[64] *Ibid.*, see letter to Minister of Justice, signed Muriel D. Beatty, dated Jan. 12, 1942.

[65] *Ibid.*, see letter to Minister of Justice, signed Rev. Jules Pirot, parish priest, Esterhazy, Saskatcheway, dated, December 26, 1941, 1.

[66] *Ibid.*

[67] *Ibid.*, 2.

hoped that Patrick would at least be treated with mercy so it could not be said "in Canada we hang insane persons." His plea for mercy was not just for the accused, but also for "his many children and relations, all of them nice people and respectable citizens of Canada."[68] In concluding, the Reverend implored:

> Honorable Sir, for thirty seven years I have worked in the West among foreigners, trying my best to make them good Christians and good citizens under the protection of our laws. I hope the decision you are going to take [sic] will confirm them in the tenets of my teachings.[69]

On a recommendation from Gallagher that mercy was perhaps warranted in this case, Frank Patrick's death sentence was commuted to life in prison.

CONCLUSION

The purpose of this chapter has been to examine, in a general way, some of the criminological themes that regularly surface in capital case file texts between 1920-1950. The notion of "degeneracy," in its many forms, was by far the most pervasive theme and came to be understood as much more that a mere psychiatric classification. The 'idea' of degeneracy provided a conceptual framework for articulations of criminal responsibility and mind-state which fluctuated to reflect the concerns of the day and the position of each observer. Degeneracy was concurrently expressed as the affliction of certain 'types' or 'classes' of individuals, as well as a foreboding condition of society as a whole. In some cases, and according to some audiences, defective individuals and/or abject social conditions warranted mercy, and for others, it called for harsh punishment. But decisions

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[68] *Ibid.*

[69] *Ibid.,* 3.

regarding the appropriate role of law were not a matter of policy, rather, they were articulated on a case-by-case basis and within a shifting social-cultural context.

The texts also show that certain segments of the Canadian public embraced scientific theory and language in formulating their ideas about crime, but as I argue in the next chapter, expert and institutional discourses about responsibility and criminality were essentially formalized, rhetorical expressions of common sense; reproducing the sorts of ideas that lay witnesses, neighbours and family members expressed at trial, in letters or in newspaper editorials. Therefore, the social acceptance of scientific discourses in Canada served to confirm rather than challenge the substance of popular opinion. Since judicial officials and psychiatric experts were well-attuned, and indeed contributed to, popular opinion, to tap the tenor of common-sense-thinking about criminality during this period also goes to the heart medical-legal discourse about mind-state and criminal responsibility which I explore in later chapters.

Within Canada's social matrix, a number of ideas about mental and moral degeneracy coexisted and informed lay, legal as well as expert interpretations about criminality and criminal 'types' which can be observed in the case files of those sentenced to death for murder. Analyzing the context and meaning of different interpretations formed in response to single cases requires a continuous recognition of the ideological and institutional frameworks that were in place and helped provide shape and content to the language represented in documentary texts. A careful reading the case file texts can, in turn, shed light on the underlying social, political and institutional forces that constituted the very context in which knowledge about criminality was formed and the texts were produced.

Chapter Two

THE EXPERT WITNESS & 'COMMON SENSE'

Foucault (1978) argued that crime came to be an important issue for psychiatrists because it provided a "modality of power to be secured and justified."[70] He describes, for instance, the "fictitious" creation of "homicidal monomania" as an "insanity which is nothing but crime." According to Foucault, legal authorities willingly adopted the medical diagnosis of monomania in order to explain and understand the nature of what otherwise appeared to be motiveless criminal behaviour. The assumption here is that power was achieved through the production and legitimation of expert knowledge, and that those without power – including women, the poor, and non-white individuals – were regulated through the production of knowledge and by the knowledged. The concepts of medicalization and psychiatrization, which emerged from Foucault's interpretation of the history of French psychiatry, have been accepted by contemporary social historians, for the most part, as historical fact. However, Canadian trial evidence suggests an uncertainty about the power of expertise, the role of the expert and the legal constitution of criminal responsibility through the negotiation of mind-state.

In this chapter, I bring together a selection of relevant historical literature that offer different perspectives on the role of the expert witness and the constitution of

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[70] Michel Foucault, 'About the Concept of the Dangerous Individual in Nineteenth Century Legal Psychiatry,' *International Journal of Law and Psychiatry* 1 (1978), 6. This is a very simplistic interpretation of a complex paradigm developed throughout Foucault's work (see particularly *The Birth of the Clinic*, 1973), which he later expands to consider more subtle forms of self-regulation. However, most applications of Foucault's approach in medical-legal literature tends to reconstruct a unidirectional, top-down model in which the powerful regulate the powerless.

expertise in criminal courts in order to locate my analysis of the Canadian experience within a broader historical and intellectual context. I make special effort to draw a distinction between the presumed role and/or authority of expertise and trial evidence that challenges prevailing theories about medicalization. I then examine the relationship between expertise and common sense in the Canadian context by considering how the finding of legal 'facts,' the qualification of expertise, and the adjudication of expert opinion evidence in the courtroom relied heavily on notions of common sense. I argue that in Canadian law, medicine and society, an artificial dichotomy existed between 'expertise' and 'common sense' that pervades historical (and contemporary) accounts of medical-legal processes and relations. The case of Frances Harrop (1940) in particular, will demonstrate a merging of common knowledge and expert knowledge through the judicial process of selecting and omitting certain aspects of expert witness testimony as legal 'fact.'

LOCATING THE 'EXPERT' IN MEDICAL-LEGAL HISTORIOGRAPHY

In her explorations of the uncertain state of 18th-century medical knowledge, Catherine Crawford (1987, 1994) shows that average courtroom medical witnesses comprised a cross-section of surgeons, physicians, midwives and apothecaries that included a healthy representation of younger, less-educated practitioners from the lower end of the social and professional scale. However, whether or not a medical witness was considered a medical "expert," depended on the social status, ambition, ability, and education of the individual practitioner. According to Crawford, "[p]ersonal skill was supposed to compensate for the deceptiveness of medical evidence and the gaps in

medical knowledge," meaning, professionalism took over where rickety theory left off. Her evidence suggests medical knowledge had little value on its own without a knowledged subject to convey it, and a "therapeutic problem" to validate it.

Crawford therefore constructs the expert witness as a crafty technician who facilitated medical-legal knowledge, but whose authority as an expert was not necessarily facilitated by the adversarial nature of the criminal trial process. More generally, she argues, in a collection edited with Michael Clark (1994, 4), that we tend to underestimate the constructive role medical men played in the development of medical-legal practice. While I agree with this last argument, we certainly have underestimated the role of medical men and the emergence of the "expert" in the development of medical-legal practice, Canadian evidence does not accurately reflect Crawford's image of the status of the expert – at least not without qualification.

Conflicting historical evidence regarding medical-legal affiliations suggests we cannot generalize about how law and psychiatry interacted in different social/cultural contexts. Several scholars, including Clark and Crawford, point to the importance of historical setting to the development of medical-legal knowledge and practices. However, even within a particular historical context, or site of investigation, researches present contradictory evidence and competing arguments/interpretations. For instance, Joel Eigen and Ruth Harris describe instances of cooperation between psychiatric experts and legal authorities in England and France, while others compare it to a bad marriage, or an ambitious battle for professional and social power. Roger Smith, for instance, suggests

medical men were faced with contempt in English courts.[71] There is not necessarily a right or wrong answer here; rather, such inconsistencies indicate the inherent complexity and specificity of medical-legal knowledge and the variable role of the expert witness.

Legal historians show that before the 1800s, law and medicine in most Western countries had little interaction outside the occasional medical witness being called to give testimony as to the cause of death in a murder trial. For instance, Crawford (1994, 292) suggests that in 18th-century England, common law had little need for medical evidence and there was no pressure to improve the "quality" of medical testimony by excluding inexperienced medical experts. For the same reasons, she argues, "the epistemological problems encountered in applying medical knowledge to legal questions were rarely a focus of attention or concern in eighteenth-century trials. … Medico-legal questions simply had no perceived relevance to the art of healing."[72]

Descriptions of the 1700s are unlike those of the Victorian era, which depict medical experts practically chomping at the bit to get on the witness stand. Crawford (1994, 90-91, 107) again argues that before the 1800s, French medical experts actually held "disobliging attitudes" towards the idea of having to testify in court.[73] However, for most medical-legal historians, the formative years of forensic psychiatry, whether it was

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[71] See generally; Joel Peter Eigen (1995), Ruth Harris (1989), and Roger Smith (1981).

[72] Also see Goldstein (1978, 1987, 1984); Harris (1989); Crawford (1987); Clark (1982, 1994); Grob (1983); Jack (1981); Short (1981); and Scull (1981, 1989).

[73] Catherine Crawford, 'Legalizing Medicine: Early Modern Legal Systems and the Growth of Medico-Legal Knowledge,' in Clark and Crawford (eds.) *Legal Medicine in Histroy* (Cambridge 1994). Ian Dowbiggin also suggests Canadian psychiatrists resented going into the courtroom in 'Keeping this Young Country Sane: C. K. Clarke, Immigration Restriction, and Canadain Psychiatry, 1880-1925,' *The Canadian Historical Review* LXXVI (1995), 598; and *Keeping America Sane: Psychiatry and Eugenics in the United States and Canada, 1880-1940* (Ithica, NY 1997).

the early 1800s in France and England, or the late 1800s in the U.S. and Canada, show considerable ideological conflict and animosity between law and psychiatry when it came to making official decisions about insanity and criminal responsibility. While caution must be taken to not over-generalize, it seems the emergence of an ideological conflict was quite common in the developing years of psychiatry regardless of time and place. I should note, however, that my point regarding the variable periodization of the rise of forensic psychiatry is quite different from what other historians report. Goldstein (1987, 5) for instance, claims that psychiatry as a profession emerged "almost simultaneously in France, Britain, America and the German lands" although with "distinct national traditions." Here, "America" refers only to the United States. In Canada, psychiatry, as a distinct medical specialization, did not really begin to gain a professional foothold until the late-1800s, and psychiatric expert witnesses did not *routinely* appear in criminal trials until the turn of the 20th century.

Historians draw different conclusions regarding the influence each profession had on the way the other was practices depending on how they interpret the relationship between law and medicine, and between medical knowledge and legal processes. In her book *Madness and Reason* (1985), Jennifer Radden argues that medical discourse came to have an increasingly powerful influence at both a theoretical level as well as a procedural level of Western law on the issue of insanity. Her investigation into the philosophy of insanity discourse generalizes across the U.S. and Britain and suggests a "passing of responsibility" from the authority of legal decisions to a heavy reliance on expert opinions. Radden's evidence is not empirically driven: Rather, she focuses primarily on the philosophical shifts in the notion of madness and the continuous desire

of populations to "excuse" the insane. She defines "madness" in her analysis strictly within the conceptual notion of "unreason" but unfortunately does not consider how "reason" was socially, medically and/or legally constituted.

This idea of "excusing" the insane that Radden puts forward is, at very least, simplistic, and perhaps erroneous in light of Walter Bromberg's book *Psychiatry Between the Wars* (1982). Here Bromberg shows how American psychiatrists only participated in "celebrated" trials since most offenders were not afforded, or could not afford, the luxury of a "mental study." He also demonstrates that the American public was not generally receptive to the inclusion of psychiatric testimony in criminal trials and actually resisted the idea of "excusing" criminals on the basis of mental incapacity.

Joel Eigen (1994) also refers to the "privileged voice given to medical opinion in [English] court,"[74] while Andrew Scull (1981, 26) argues criminal law in the United States and Britain was essentially unaffected by medical discourse. My analysis of Canadian archival sources qualifies Scull's argument somewhat by suggesting that although the law was not necessarily affected on a doctrinal level, medical discourse, which was infused with common sense discourse, had a profound effect on the way criminality and responsibility came to be interpreted in murder cases.

In contrast to historians who suggest a respected professional hierarchy, or a cooperative working relationship, Janet Tighe (1986) compared the relationship between American law and psychiatry in late-19th century to a "marriage on the rocks"; a relationship between two "volatile partners" that managed to coexist in order to maintain

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[74] Joel Peter Eigen, 'I Answer as a Physician,' in Clark and Crawford (eds.) (1994). See also, 'From Mad-Doctor to Forensic Witness: The Evolution of Early English Court Psychiatry,' *International Journal of Law and Psychiatry* 9 (1986).

their professional interests.[75] She argues each provided the other with an appearance of legitimacy through organized and public attempts to reconcile theoretical differences. However, the sort of equal playing field that Tighe describes – suggesting that each profession gave the other a leg up – is quite different from what Goldstein observed in the French context, and what Smith observed in the English context. Although Goldstein recognizes the judicial "need" for medical witnesses, she concludes legal discourse on responsibility and mind-state had far more impact on medical discourse, than medical discourse had on criminal legal proceedings. Although the degree of "impact" one historical discourse may have had on another is in many ways immeasurable, it is possible to discern, as Goldstein and Tighe do, how certain medical men gained status and legitimacy through their associations with the law and through the application of medical knowledge to social problems.

Likewise, Roger Smith (1981, 3-5) describes the idea of treating the insane as a "potent symbol" for society's ability to "regulate its affairs." The apparent surge in the number of citizens labelled insane and irresponsible, which included certain poor, the old and petty criminal *types*, moved the psychiatric expert to the foreground in efforts to come to terms with the problems of criminality and insanity. Smith does not suggest, however, that experts gained social/legal authority, or that they vaulted to the top of the medical profession; rather, he shows how medical men who chose to deal with the insane and criminal often faced derision from the press, the legal profession, as well as other medical practitioners. Although stigmatized by their association with defending "insane

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[75] Janet Tighe, 'The New York Medico-Legal Society: Legitimating the Union of Law and Psychiatry,' *International Journal of Law and Psychiatry* 9 (1986), 231 and 241.

paupers," insanity and the insanity defence, according to Smith, "became" an important mobilizing problem for some psychiatrists, both signaling and aiding their struggle for professional legitimacy.

Overall, there is very little consensus among historians as to how law and psychiatry interfaced in any given temporal, geographical, cultural or institutional context. To better evaluate the judicial role of the psychiatric expert, it is important to consider not only the larger context(s) in which medical-legal expertise on mind-state developed, but also the specific location in which it was constituted – the courtroom. There are few medical-legal historians who trace the emergence of psychiatric expertise through the trial process, and of those who do, there is a tendency to overgeneralize observations regarding the nature of psychiatric expertise and the adjudication of expert opinion evidence.

The role of the expert and expertise in Canadian murder trials was not fixed, and on a case-by-case basis we can observe various aspects of what different historians report in their analyses. For instance, medical/psychiatric texts, written by well-regarded insanity specialists, were occasionally cited by less experienced expert witnesses to legitimize their opinions. Lawyers, as standard practice in examining expert witnesses, also occasionally cited insanity texts directly and asked expert witnesses to form an opinion on the relevance of a certain psychiatric classification to understanding the behaviour of a particular individual on trial for murder. However, judges and juries were generally reluctant to accept the testimonial evidence of individual expert witnesses at face value. Even when a medical witness was granted expert status by the trial judge, his opinion was not privileged over the opinions of lay witnesses on the basis that he is an

"expert." The relative lack of authority attributed expert opinion evidence in Canadian courts does not necessarily mean what experts were saying did not influence the decision-making process, or that the medicalization/professionalization model adopted by Scull, Dowbiggin, Menzies and others is inappropriate for understanding the Canadian experience. But as a mode of analysis, the medicalization argument does not account for the intricate and often highly-contested nature of early medical-legal relations in the courtroom, the overwhelming appeal to common sense knowledge over expert knowledge, and evidence which establishes there was little difference between the two.

While there are exceptions, most social historians writing during the past twenty years about early medical-legal relations in the West suggest psychiatrists were eager to get into the courtroom because they recognized the potential career benefits of gaining legal affiliation. The questions of status and legitimacy come up repeatedly throughout medical-legal historiographies regardless of the particular place or period an historian is describing. Most historians consider status to be the ultimate motive for psychiatrists who got involved in the study and regulation of criminal behaviour. The argument that a psychiatrist's expertise and professional worth was constituted and legitimized through law has been the focus the works of Jones, Goldstein, Nye and Scull, who, in varying degrees and levels of sophistication, construct the expert as a careerist and power-monger.[76] Although the argument is provocative, there really isn't much evidence to show *how* this all occurred, or rather, how their participation in the criminal trial process

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[76] Robert Nye applies this characterization to legal authorities, suggesting the law was more powerful as the principle 'user' of medical knowledge for social/political purposes. He claims that doctors confined their "actions" to the private sphere until the late 1800s when the rise in public concern regarding deviance came to provide a more important state function for experts. See *Crime, Madness and Politics in Modern France* (Princeton 1984), 48-49, 335.

aided their ambitions. I suggest that to address the question of *how* legal and medical authorities/knowledge converged, we need to look at *where* they converged.

The only historian to devote an entire book to exploring the role of the psychiatric expert witness in a purely historical context is Joel Eigen. In *Witnessing Insanity* (1995), Eigen examines the participation of the expert medical witness in the courtroom drama of English insanity trials, as well as the social-cultural context of England during the Victorian era. He shows how the terms "madness" and "insanity" were deployed in popular and medical discourses to represent the same image, in which madmen became "objects of derangement." (p. 4)

He reports "the evolving specialization in forensic witnessing in England seemed to have been consumer-driven, fragmentary, and perhaps even more court-inspired than professionally generated." Eigen rejects the Foucaultian notion, as I do in my own analysis, that the rise of medical expertise was strictly a product of the social construction of insanity. It is also necessary to consider the role of professional devices and desires in proffering an exclusively medical conception of madness. Eigen argues;

> The keepers and the kept were very much part of their culture, and the images and metaphors employed by *all* parties to make sense of severe mental torment needs to be placed in the context of contemporary concerns and anxieties. (p. 5)

Eigen therefore takes an approach similar to Roger Smith, who also argues that our interpretation of medical-legal relations need not be an either-or propositiion: either medical discourse and the categorization of responsibility/criminality was socially constructed, or, as positivist-thinking historians such as Edward Shorter and Erwin

Ackerknecht seem to suggest, that it emerged from objective scientific discovery.[77] This more balanced interpretation, proposed by Eigen and Smith (as well as Harris), I think best captures the situation in Canada. It is evident from primary professional literature that some psychiatrists pined for power over insanity discourse, yet, at the same time, courtroom evidence strongly suggests "expertise" was interpreted and (re)negotiated according to the particular circumstances of each trial in ways that sometimes eroded and disregarded expert assessments of mind-state.

Eigen shows how the language of expert testimony was "freighted with the imagery of a specific scientific tradition" and that it did not reflect the traditional assumption that the sole aim of the expert was to achieve the "professional colonization of the witness box." In contrast, for instance, to Nigel Walker's (1968) image of the expert as a professional marketer, evidence in Eigen's analysis suggests that assertions about the degree of a particular witness's expertise were initiated and expressed by lawyers in attempting to secure an acquittal. Claims of skill, according to Eigen, usually appeared during cross-examination and "rarely used to legitimize testimony at the onset." (p. 6) This is quite different from what I have found in Canadian trials which establish there usually was some form of preparatory, or legitimation, work as part of the adversarial process to persuade the judge and jury to *hear* a medical witness and to establish his medical and legal qualifications as an "expert."

Here, the legal qualification of a particular medical witness as a psychiatric expert was not necessarily determined by his medical qualifications and experience. Many

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[77] See, Edward Shorter, *A History of Psychiatry: From the Era of the Asylum to the Age of Prozac* (Toronto 1997); and Erwin Ackerknecht, *A Short History of Medicine*. (Baltimore and London 1982).

general practitioners, prison doctors, coroners, and even non-medical witnesses, were able to fit the legal definition of "expert witness." An expert witness during this period was defined as a "specially skilled" witness with knowledge of questions of science beyond the understanding of the common man.[78] However, as I show later in this chapter, and particularly in the next chapter on the negotiation of criminal responsibility, the preliminary set-up of doctors as expert witnesses did not follow with a direct and automatic privileging of their opinions on the issues of mind-state and responsibility.

Eigen further argues, that when the question of expertise did arise in insanity trials, it was usually in effort to establish how cognitive experience was understood in "the mad business." In Canada, the goal of lawyers, and some witnesses, at insanity trials was usually to find a way of fitting medical theory into already established legal requirements for the insanity defense. More thorough considerations of cognition and mental deficiency routinely took place outside the insanity defence through discussions of other mind-states such as provocation, passion, intoxication and self-defence which could reduce a charge from murder to manslaughter or lead to a full acquittal.

In both insanity and non-insanity murder cases, the professional status of an expert was not as important as what he said. Expert opinion was more likely to be taken as 'fact' in Canadian courts if it met the legal requirements of insanity law, and if it did not challenge the sensibilities of the common man on the jury. While subtle, these important differences between the way medical and legal knowledges converged in Canada and England, suggests that although Canada officially adopted British common

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[78] Sir James Fitzjames Stephen, *A Digest of the Law of Evidence* (twelfth edition) (London 1936), 67-69.

law, it operated according to the distinct social and political climate of the Canadian context.

Despite his intention to underplay the expert witness as one motivated by professionalism, Eigen does acknowledge the importance of the trial as a particularly effective forum for psychiatrists to tout theories of determinism. He observes that “the conjoining of crime and madness [in the courtroom] produced something rather more combustible than the sum of its two volatile parts”. (p. 5) With evidence that elite Londoners were able to utilize the courts to protect their capital interests, Eigen argues that the evolving role of the medical expert witness was heavily “bound up” in the changes of that process. In Eigen’s words;

> The evolving role of the medical witness coincided with a fundamental reconceptualization of the relation between criminal responsibility and madness. Insanity “became” something very different … but the role contributed by any one courtroom participant in this critical transformation is bound up with the changing dynamics of the criminal trial itself and ultimately with larger cultural questions concerning human agency. Lawyers and jurors, prisoners and prosecutors complemented, contradicted, and contextualized the testimony of medical experts on a trial-by-trial basis. (p. 6)

In some of his smaller-scale works, Eigen better demonstrates the richness of trial evidence and provides further insight into precisely *how* medical experts used the law to propel themselves out of asylum medicine to a position of judicial necessity. For instance in both "From Mad-Doctor to Forensic Witness" (1986) and "I Answer as a Physician" (1994), he examines how doctors' testimonies were received in the courtroom. In both papers, Eigen argues that it became increasingly important for the court to establish the

legitimacy of a medical witness's testimony by questioning their credentials and background with special a emphasis on "experience."[79]

The idea that the perceived authority of expertise was contingent on the changing dynamics of the criminal trial, as well as the larger social concerns, is well substantiated by early-20th century Canadian case file evidence. However, I suggest that while "experience" was specified as important in qualifying a witness as an expert in the law of evidence, Canadian judges did not consistently uphold any particular standard of experience or specialized skill in deciding to hear opinion evidence in Canadian murder cases. Decisions on this matter seemed to be influenced more by the circumstances of the case and the nature of the opinion evidence.

Eigen further suggests that through the process of legal examination, medical witnesses learned to frame their answers in such a way as to present themselves as valuable commodities to the court, and protect themselves from ridicule (something early Canadian psychiatrists never managed to do). For instance, when experts presented vague descriptions of "strange" behaviour as evidence of insanity, resembling the testimonies of lay-witnesses, they were heavily interrogated by the court. Therefore, over time, experts "attempted to transcend conventional ways of seeing madness by suggesting a level of insight which penetrated the mask of reason." (Eigen 1994)

This is reminiscent of Goldstein's argument that the vagueness of "monomania" discourse in France opened the door for experts to claim themselves as the only ones able to detect the hidden and mysterious symptoms of the condition. In professional and

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[79] Joel Peter Eigen, 'I Answer as a Physician' in, Clark and Crawford (eds.) (1994), 174. This is very similar to what Martin Friedland's evidence shows in his examination of *The Trial of Valentine Shortis* (Toronto 1994).

academic journals, texts and speeches, certain Canadian psychiatrists avidly claimed to be the only ones able to detect and diagnose the insane and defective among the criminal classes, and the general Canadian public. But this claim was typically not taken up seriously by legal decision-makers. In fact, it was quite the opposite in cases throughout the early-20th century. As I show in the next section of this chapter, experts' opinions which most reflected the testimonies of lay-witnesses, or popular opinion, were more likely to be taken up than those which evoked highly-specialized language or transcended conventional ways of seeing madness.

Although Canadian psychiatrists tried to position their specialized knowledge above common knowledge both in and out of the courtroom, Canadian judges and juries were reluctant to entertain any opinion which did not comply with common sense. This is similar to what Ruth Harris found in her study of French murder trials. Unlike Eigen and Goldstein, Harris shows how psychiatrists' use of "common" language was an effective way to work within the legal system and appeal to sensibilities of juries. Expert testimonies rarely deviated in essence from popular sensibilities about human nature in Canadian trials, and as my later analysis reveals, the legal process of accepting some medical theories as more viable or legitimate than others, both reflected and reinforced common sense interpretations.

In *Murders and Madness* (1989), Ruth Harris does not explicitly focus much on the expert witness. However, she does, like Eigen, expose the complexity of the legal processes involved in the construction of early medical-legal discourse, which included expressions of power, compliance and resistance. Harris also contributes something new to the literature by recognizing the role of the defendant in the creation of responsibility

discourse. For instance, she explores how defendants' narratives of themselves and their experiences, as expressed through letters, diaries and other personal documents, were crucial in the initial evaluations made by the court as to whether or not a medical examination was necessary. (p. 11) These self-reports, or "self-characterizations," were often quite detailed and became the basis of both legal and medical determinations of responsibility and motive. (p. 130, 151 and 266)

There are some practical limitations, however, to using this approach to investigate Canadian cases. First, our criminal justice system did not rely on, or request, detailed self-reports by defendants. Although there are occasionally letters of confession and statements of remorse included in the files, they appear, by their language and hand, to be extremely filtered and are often written by a third party. Second, these documents, along with the spoken testimonies of defendants, were not given much weight in trial proceedings. Defendants of questionable character were seen as particularly untrustworthy and their “stories” were often rejected in favour of alternative narritives espoused by witnesses or abstracted from factual evidence by judges themselves.

In some French murder cases, Harris argues, the self-characterization of the defendant hardly differed from that of the psychiatrist. During courtroom questioning, experts often reiterated defendants’ own statements regarding the cause(s) of their behaviour and mind-state in their professional diagnoses and opinions. Harris argues that in most cases, both judges and doctors were "eager to ferret out physical and mental signs of disorder." (p. 264) However, there were also exceptions. In fewer cases, Harris shows that when psychiatrists digressed from their usual use of lay-language to assert their diagnostic authority by offering a strict scientific description of the defendant, they were

faced with resistance. By providing detailed information about family histories and personal illnesses, Harris shows how defendants actively participated in the creation of their psychological and physiological difference - whether or not the expert agreed with their self-characterization.

Canadian trial transcripts also show that in certain cases, the overt psychiatrization of a defendants' behaviour was met with resistance. For instance, a defendant's family history was considered factual evidence only if the psychiatrist's report was substantiated by other family members. Otherwise, psychiatrists' reports of a defendants' past behaviour were viewed as dubious. For example in the case of Mary Smith, charged with killing her husband in 1935, there was concern that she shammed insanity in order to escape hanging. The judge reproved the psychiatric witness for failing to back up his assessment of Smith's family history by interviewing family members:

> Q. Isn't it the established rule of alienists when they are examining a person to whether they are insane or not to find out something from their family history, not from themselves, but from their families?
>
> A. ...[T]he first thing for a psychiatrist to do is to get the family history from outside, but I am telling you I have hundreds of patients were it cannot be done.
>
> Q. But if it can be done, isn't that the correct procedure?
> A. It is a good procedure if you can get it.
>
> Q. And it could have been done in this case if you had taken the time. It could have been done?...
>
> A. If the Agent of the Attorney-General had instructed me to do that and given me my expenses I would have done it.[80]

[80] Mary Smith (1935), NAC; trial transcripts.

There seemed to be a general reluctance on the part of Canadian Courts, as well as psychiatrists, to trust defendants' narratives to the same extent French authorities did. If an expert made his diagnosis based on the defendant's account alone, his testimony was likely to face heavy scrutiny from lawyers in the courtroom and from the judges is his charge to the jury. This process was one way in which common sense (and fiscal means) shaped the boundaries and content of expert knowledge.

The important courtroom details drawn out by Harris have particular historical and theoretical relevance because she situates her analysis within the specific context of the French murder trial. Her range of analysis, which takes in the landscape of French culture as well as the details of courtroom procedure, provides a new depth to our historical read of the “expert” and “expertise.” Her conclusions are not especially grand, in that she does not claim to tell the definitive social history of crime and madness or provide the ultimate story of legal medicine. What Harris does, and what I aspire to do in this thesis, is trace the intricate links between social discourse, medical theory, legal practice and human agency at a particular point in history.

This critical look at a few select, and particularly revealing, examples of medical-legal literature shows how scholarly interpretations of the role of the psychiatric expert witness in the West vary. I suggest interpretive variations reflect not only the ways in which scholars locate and read historical evidence, but also the nature of medical-legal discourse around expertise. Therefore, locating the Canadian experience within these conflicting historical accounts is not a precise exercise. Nevertheless, my goal for the rest of this chapter is to further enrich the history of legal-medicine through the process of

highlighting the many contradictions that existed around the subject of the expert witness in Canada.

CONSTITUTING THE 'EXPERT' IN CANADIAN CRIMINAL LAW

According to Sheila Jasanoff (1995), both law and science theoretically aspire to be "wholly rational" in their search for, and judgement of, truthful data. To this end, she argues, experts are tempted to give "definitive rather than qualified answers, to deemphasize the existence of other schools of thought, and to exaggerate the significance of their own inferences." Moreover, Jasanoff suggests the legal process of truth-finding;

> offers no hard-and-fast rules for separating facts from scientific opinions, opinions from mere speculation, or speculation from legal conclusion. The borderline between value decisions that should be the prerogative of judges and the factual matters that are properly reserved for experts is itself a construct, negotiated anew from expert to expert and from case to case.[81]

Adding to the historical diversity of medical-legal discourses, and varying accounts of judicial role of the expert witness from one country (and historian) to the next, my research suggests that in Canada, the expert witness and the legal concept of *expertise* was/is primarily a social construct that acquired different meanings and a limited amount of legitimacy through legal interaction.

By the 1910s, the psychiatric expert witness was a common actor in the Canadian murder trial. The growing presence of psychiatrists in the courtroom perhaps suggests they came to hold an important role in trial proceedings and that their opinions were increasingly valued by legal fact-finders. This notion, if accurate, would fit nicely with

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[81] Sheila Jasanoff, *Science at the Bar* (Cambridge 1995), 47-48.

the medicalization thesis. Although there is some variation within the literature, social historians typically describe medicalization as the infiltration of medical or psychiatric knowledge into social, political and legal practices; the assumption being a centralized institution of medical knowledge wielded a certain amount of power which was exercised in an oppressive manner and further strengthened through legal affiliations. Works by Ian Dowbiggin, Robert Menzies, John McLaren and others certainly provide a wealth of evidence of the medicalization process in Canadian social and political spheres.[82] However, a close read of trial evidence suggests this analytical model does not adequately account for the often highly-contested nature and status of the psychiatric expert and expert knowledge in Canadian courtrooms. Being an actor in the trial process did not necessarily mean being the star. In fact, experts often played only bit parts.

In this section, I explore the laws of expert evidence in relation to trial evidence where expert testimony was engaged for the purpose of helping the jury decide on the facts of a case. I am interested specifically in the legal qualification of doctors as "experts" at the trial and post-trial stages, as well as the adjudication of expert opinion evidence in the construction of legal fact. This analysis reveals a number of professional issues concerning the ideological split between law and psychiatry, the unstable authority of expertise, the influence of expert knowledge on legal determinations of mind-state and criminal responsibility, and the nature of expert knowledge and its relation to common knowledge. As evidence will show, these issues are not easily separated and therefore

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[82] For good examples see, Micheal Clark and Catherine Crawford (eds.) (1994); Jan Goldstein, *Console and Classify* (1987); G.N. Grob, *Mental Illness and American Society* (1983); Robert Menzies, *Survival of the Sanest* (1989); Andrew Scull, *Social Order/Mental* (1989); and Roger Smith, *Trial by Medicine* (1981).

cannot be understood in isolation. Rather, they are tied-up with, and in, each other. The intimate connection between expertise and common sense, for instance, strongly influenced the way in which expert testimony was legally taken up and the mind state of a defendant was established. Likewise, the ideological/professional split between law and psychiatry established the boundaries of expertise, shaped the nature of expert opinion and contributed to common sense discourses about criminality and criminal responsibility.

The Laws of Opinion Evidence and The Expert Witness

The origin of rules for determining whether a witness's testimony could be legally received as expert evidence are both judicial and statutory. In establishing the M'Naghten Rules, the judges were asked to state their position regarding the role of the expert witness in legal decisions about insanity. They proposed;

> the medical man … cannot in strictness be asked his opinion in the terms above stated [regarding the definition of insanity], because each of those questions involves the determination of the truth of facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.[83]

This response from the judges suggests that during the mid-19th century, when *M'Naghten* (1943) was decided, insanity was far from a mere question of science. However, by the early-20th century, there seemed to be more recognition, at least in legal

[83] *R v. M'Naghten* (1843) 10 C. and F. 200; 8E.R. 718.

texts, that insanity did fall under the specialized knowledge psychiatric experts. Yet, the crafting of the law continued to protect the authority of judges to decide the parameters of expert opinion and juries to decide the factual relevance of opinion evidence.

According to British law, an "expert" was a "specially skilled" witness who offered his opinions and knowledge on legal questions of science.[84] In a Canadian text written for the purpose of helping doctors understand, and prepare for, interactions with the law, Kenneth Gray, A lecturer in medical jurisprudence at the University of Toronto and medical-legal adviser to the Department of Health and Hospitals in Ontario, explained:

> Any duly qualified medical practitioner (that is, any medical doctor licensed to practice) is accepted as an expert witness for all matters pertaining to the science or art of medicine. The Court will permit any licensed practitioner to give an expert opinion on any relevant medical subject, whether he be a specialist in the subject or not … That is not to say that the Court will give the same weight to his evidence, as it may give to evidence of some other medical witness with greater experience and qualification, but for what it is worth, his opinion will be received.[85]

Trial evidence suggests, however, that not just "any duly qualified medical practitioner" was accepted as an expert witness and the opinions of those with "greater experience and (medical) qualification" were not necessarily given more weight. Gray went on to say in some cases;

> [a]n individual may be qualified as an expert witness in respect of some phases of medicine, even though he is not a licensed medical practitioner.

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[84] For general primary texts on the law of evidence see; Sir James Fitzjames Stephen, *A Digest of the Law of Evidence* (twelfth edition) (London 1936); Sidney L. Phipson, *The Law of Evidence* (eight edition) (Toronto 1930); and K.G. Gray, *Law and the Practice of Medicine*. (Toronto 1947).

[85] Gray (1947), 15

> It is for the judge to decide whether the study and experience of a particular person are sufficient to qualify him as an expert.[86]

This process is quite evident from trial evidence, although it was not a practice which was explicitly recognized by legal officials. Lay witnesses were in fact permitted to testify regarding evidence of a defendant's stated of mind, and their testimonies were given considerable weight, but they were not, as Gray claims, openly "qualified as an expert witness." What distinguished expert witnesses from ordinary witnesses was the provision that "ordinary" opinions, inferences or beliefs were legally inadmissible, while the opinions of "expert" witnesses were admissible as evidence regarding the facts of a case.

> To justify the admission of expert testimony, two elements were required:
>
> (1) The Subject matter of inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge.
> (2) The witness offering expert evidence must have gained his special knowledge by a course of study or previous habit which secures his habitual familiarity with the matter in hand.[87]

However, on the issue of insanity, or mind-state more generally, the question persisted in Canadian murder cases whether a medical expert was actually a better judge of human nature than the ordinary man.

The law of evidence intended to limit the role of the expert to determining if the "symptoms exhibited by A *commonly* show unsoundness of mind, and whether such unsoundness of mind *usually* renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law."[88]

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[86] *Ibid*.

[87] Phipson, quoted in Gray (1947), 14.

[88] Stephen (1936), 69. My italics.

Yet, the general nature and evidence of these legal issues, according to some judges and lawyers, were facts which any reasonable jury could decide. There were indeed legal standards for the qualification of expert witnesses and for deciding when expert opinion was required/permitted. However, these standards, like the standards for criminal responsibility to be explored in Chapter Three, were, as Jasanoff argues, "negotiated anew from expert to expert and from case to case."

The Qualification of Expertise and the Judicial Appeal to Common Sense

In Canadian murder trials, common sense interpretations of events, and evaluations of criminal responsibility, often included versions of psychiatric knowledge. "Common sense," according to Tony Ward, is the "knowledge which fact finders apply in deciding whether a narrative is plausible or not."[89] Legal determinations of criminal responsibility in Canadian trials depended on the judicial selection of certain narratives as more truthful, and therefore, factual, than others. This process, observes Mariana Valverde, permits Canadian courts to actively engage in the generation of the very facts they adjudicate.[90] The trials of women and men convicted of murder before 1950 suggest the opinions of *medically* qualified psychiatric experts were not always given judicial privilege in the courtroom, and show how judges routinely solicited and *legally* qualified the psychiatric opinions of coroners, general practitioners and lay witnesses

[89] Tony Ward, 'Law, Common Sense and the Authority of Science: Expert Witnesses and Criminal Insanity in England, CA. 1840-1940,' *Social and Legal Studies*, 6:3 (1997).

[90] This idea is explored in a contemporary context by Mariana Valverde in 'Social Facticity and the Law: A Social Expert's Account of Law,' *Social & Legal Studies*, 5:2, 1996.

inexperienced in dealing with insanity, for the purpose of determining facts around the defendant's state of mind.

However, during the post-conviction stage, when the legal question moved from that of guilt, to whether or not to commute the death sentence, experts seemed to be given more credence and authority in their assessments of defendants. Although it is difficult to know exactly how this decision-making process took place - given the closed-door policy of commutation proceedings - this analysis of the judicial construction of fact and the medical witness as "expert," reveals some of the historical, practical and theoretical implications of legally engaging psychiatric expert knowledge, as well as a melding of expert and common sense discourses in the generation and interpretation of state-of-mind evidence. By way of example, I will consider the murder trial of Frances Harrop (1940) to explore the interconnectedness of this matrix.

Early one April morning, Mrs. Harrop shot her husband in the head and killed him while he slept. During the trial, her lawyer established through the testimonies of numerous friends and neighbours that she had been physically abused for many years and that her husband often made threats to kill her. Defense counsel raised three defences: provocation, self-defence and insanity.[91] The accused made the statement to police, and again at trial, that it "was a case of his life or mine; he would kill me or I would kill him."[92] The Crown called two medically qualified psychiatric experts to help the court understand what appeared a sudden decision to end her husband's life, as well as her

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[91] Technically the defences of provocation and self-defence would negate a defence of insanity: since both assume intent, while insanity assumes a lack of intent.

[92] *Ibid*., trial transcripts,102.

observed "calm" and "frank" demeanor following the murder.[93] However, the Crown coroner, Dr. Harry Speechly, originally called to testify as to the cause of death and nature of the victim's wounds, was also invited in defense counsel's cross-examination to give his opinion on the mental state of the accused at the time of the crime.

The legal practice of asking general practitioners to make psychiatric assessments was common in Canadian trials. Such assessments were often followed by a courtroom discussion as to whether or not the witness could legally be considered an "expert." Debates of this sort were, for the most part, procedural and had little to do with whether or not their testimonies would eventually be incorporated into legal decisions about fact and/or responsibility. The boundaries of expertise were therefore quite porous and the understanding was that a witness did not need to be a medically qualified psychiatric expert to have a general knowledge about insanity and human nature. Even though some aspects of human behavour, including insanity, were legally classified as beyond common knowledge, many lawyers and judges insisted general knowledge and common sense was in fact the best way to evaluate the actions of an accused, and were likely the best way to influence the jury. Lay witnesses were therefore routinely invited to testify and offer opinion evidence about psychiatric theory, the history of insanity in a defendant's family or the nature of a defendant's disposition and past behaviour.

In cross-examination, defence counsel urged Dr. Speechly, who firmly stated while on the witness stand that he was "not an expert," to giving his opinion of the defendant's mental and physical condition. The Crown did not object to the coroner

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[93] *Ibid*., 16-17.

testifying on the matter while the judge established in the courtroom that a witness did not need to be an "expert" in order to give his opinion on insanity:

> Q. I take it from the fact that your have been practicing for 50 years, and the fact of your medical knowledge gained in this period of time, that your are conversant with the state of a woman's mind?
>
> A. Naturally so. I am not an expert. I am a general practitioner. But a general practitioner who has practiced for 50 years must be rather a fool if he can't give an opinion on a thing.
>
> Q. It is something that one gets in general knowledge and one needn't be an expert?
>
> A. Yes, my Lord. I don't pose as an expert.[94]

While the law did not require Dr. Speechly to be an expert in mental diseases to testify, the idea that one could "pose as an expert," and the doctor's desire to position himself not as such, suggests that there was some meaningful understanding about what constituted an "expert." Once the coroner's medical qualifications were legally established, which did not include specialized knowledge or experience in psychiatry, defense counsel read a passage from a medical text regarding a female-specific form of mental illness referred to as "Climacteric Insanity" and asked the witness to comment on its viability in explaining this case. According to the source, climacteric insanity occurred at a particular point in a woman's natural life when,

> [i]nstead of passing from the earlier years of married life to the years of a matron's duties, ... the patient becomes exacting and querulous, expends her energies in a passion of jealousy, and destroys the home which she has built up with fond care. These unfortunate first steps require a world of patience and most considerate treatment. They indicate a self-consciousness and a loss of control which, unchecked, pass to easily recognisable forms of mental aberration.[95]

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[94] *Ibid.*

[95] *Ibid.*, 17.

Harrop's disconcerting calmness after she killed her husband was diagnosed by Dr. Speechly as a symptom of this particular type of insanity characterized by broad swings of mania and melancholia with underlying features of delusion and depression.

Although Dr. Speechly did not wish to confirm "climacteric insanity," or a psychotic form of menopause, as the precise condition under which the defendant suffered, he was more confident in his general knowledge as a medical man that:

> It is the experience, I think, of every practitioner, that there are times in a woman's life when she feels, sometimes, that she doesn't know what she might do, whether to commit suicide or to commit murder. And they are puzzling, sometimes, those cases – hard to approach. That is, exhausted with the climacteric or the change of life, which is the simpler way of putting it.[96]

In a segment of his earlier testimony as the coroner, Dr. Speechly downplayed the relevance of the "private circumstances of these people," but then went on to describe their situation like a "domestic volcano which may erupt at any moment … the result depending on which of the parties has the most intense mental obsession." He explained to the court that "[p]eople like that have what the French call 'a fixed idea'." Medical experts often incorporated numerous sociological explanations into their opinions and assessments of defendants. In deciding this case, the economic conditions of the Harrop family were considered important in understanding the events leading up the murder as well as the inferred mental instability of the defendant. Common sense seemed to dictate in this and other cases that exposure to long-term domestic stress and poverty would naturally alter one's reasoning ability. Popular understandings about domestic life and conjugal obligation, in turn, influenced the doctor's professional interpretation of

psychiatric doctrine in a way that was specific to the circumstances of Harrop's case, and indeed, to the determined character of Harrop herself. The process of interpreting responsibility and mind-state through discourses of gender, class and domesticity will be revisited in more detail in Chapter Five, but it also serves here as an excellent example of the happy marriage between expert and common knowledge.

The trial judge pressed the issue of insanity further and asked the medical witness if the "peak" of this climacteric condition could be considered a "disease of the mind." In cases where insanity was raised formally as the defense, courts typically asked witnesses to (re)phrase, (re)enter and (re)constitute psychiatric evidence into a form of legally recognized language. In this case, "disease of the mind" was a term that would satisfy the legal definition of insanity, where "Climacteric Insanity" was not officially recognized terminology. Dr. Speechly confirmed that only if the state caused mental deterioration, which it "very often" did, would a person be compelled "to do a thing that was totally insane."[97]

The common-sense-inspired medical theory that a woman's behaviour is intimately linked to her reproductive biology was evident in this menopausal explanation for what appeared to be an irrational act of violence. Other psycho-sexual explanations offered at trial suggested that her "insane" behaviour was the result of her refusal to have sexual relations with her husband, therefore disturbing her "mental balance." Counsel for the defence added that the emotional stress caused by irregular menstrual periods and fear

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[96] *Ibid*., 18

[97] *Ibid*., 21.

of pregnancy could also induce a mental break, however, he was unable to verify his theory with "medical evidence."

In rebuttal, the Crown called two doctors who were medically qualified, and legally accepted, as psychiatric experts. Both psychiatrists found Frances Harrop sane based on their evaluations of her life history and "hereditary facts." Dr. Pincock interpreted her unusual calmness to be a lack of empathy rather than evidence of insanity. Her decision to kill her husband was interpreted by this witness as a calculated act. Although she had described to the doctor times of heightened "irritation" he testified she was "comparatively cool over the whole situation" and "showed no evidence of manneristic or any conduct behaviour ... which appeared to me at all abnormal."[98] Dr. Mathers also found Frances Harrop legally and medically sane.[99] His opinion echoed Dr. Speechly's general characterization, claiming, she may very well be a "hot-tempered woman" with the potential to "explode," however, she was also a woman of "refined type" and "fair education" and did not suffer from "disease of the mind." According to Dr. Mathers, her chosen response to her "domestic problem" was truly inappropriate, but concluded he "wouldn't call it a disease."[100]

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[98] *Ibid*., 114-120. One procedural difficulty that emerged repeatedly with expert testimony during this period was the fact that much of their evidence was based on hearsay. To get around this legal technicality, a witness was not permitted to report directly on what the accused or others said to him. He was, however, permitted to give his opinions, which were, of course, based primarily on the very interviews he could not report on.

[99]Dr. Mathers suggested there were basically three possible responses to extended periods of "exasperation and torment"; one can either accept the situation and live an unhappy life, explode under the pressure in a degenerative rage of violence, or, accept a "fatalistic attitude" and resolve the problem no matter what the consequences. The latter response, according to Dr. Mathers, best explained the accused's actions. See. *Ibid*., 128-129.

[100] *Ibid*.

In the judge's charge to the jury, the supposed authority of expert opinion expressed in the law of evidence, was undercut by his instruction to "[w]eigh the witnesses according to your own standards of experience in life." As juries at this time were always made up of middle-class Anglo men,[101] it was their impressions of gender identity, domesticity and class that constituted "common experience." Frances Harrop's low social position was highlighted throughout the trial and presented to the jury as evidence worth considering in their deciding of the facts and determining guilt. The judge reminded the jury that the Harrop family lived an impoverished life with both parents and five grown sons all residing in a small dwelling:

> The husband did not work, had not worked for years. They were all crowded together in close quarters, he sitting around the home most of the time. Had he been out working every day the situation may have been different. The situation, as it is pictured here, must have been one of dreadful living -- quarrelling, bickering all the time, apparently. The husband baiting the wife on. She was irritable, quick tempered, harassed by want of money and other things of that sort.[102]

In his summary of the events leading up to the murder, the judge validated Dr. Speechly's common sense and medical opinion that theirs was a domestic situation that "might lead to an explosion."

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[101] In the case of Albert LeBeaux (1921) for example, the trial judge commented in his report to the Minister of Justice that the jury was "composed entirely of English speaking Protestants." Also, in their book, *Uncertain Justice* (2000, 126-132), Greenwood and Boissery show that before the 1950s the only provinces to theoretically qualify women for jury duty were British Columbia (in 1922) and Nova Scotia (in 1929). Although women were not actually called to jury duty in Nova Scotia until 1951. There were no examples of women jurors in the cases analyzed for this thesis.

[102] *Supra*., 135.

Collectively, the medical witnesses attributed Harrop's behavioural motivation and weakened state of mind to both her biological make-up and her socio-economic condition. However, the judge surmised in closing his directions to the jury:

> The state of mind of a human being is a very difficult thing to appreciate, ... [j]ust how far this woman was, by her brooding over the difficulties she lived under, and so forth, how far she was drawn off her balance, I don't know.[103]

For all official purposes, the judge completely discarded the psychiatric evidence intended to establish the accused, while sane, did experience a "loss of control." But he did not discard the *premise* of the expert medical evidence. Through the adjudication of expert opinion evidence, common sensibilities about the nature of women and domesticity were reaffirmed.

The clash between legal and psychiatric doctrine surfaced in Canadian criminal trial proceedings throughout this period as judges routinely reminded juries that the law is not interested in, or obligated to entertain, psychiatric theories of criminality or insanity. Although the doctors in Harrop's case were permitted to testify at great length as to whether or not she was in control of her mind, her emotions and her behaviour, their evidence was found irrelevant to the case because this did not legally constitute a "disease of the mind." Not only did legal and medical authorities disagree on the particulars of insanity, as the next chapter will further establish, they disagreed on the role experts played in criminal courts.

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[103] *Ibid*. This again was largely due to the limitations of legal language to directly incorporate psychiatric dogma into law. Frances Harrop's material conditions were readily entered as factual evidence, however evidence pertaining to her past state of mind was somehow less discernible

In the opinion of legal scholars, professional arguments generally reflected the feeling that the use and presentation of medical expert testimony in criminal cases was "not only imperfect," but also burdened by the "serious evils which tend to bring the medical profession into disrepute." [104] Some legal men seemed frustrated by the vary nature of adversarial process that permitted experts to testify in the first place; the fact that courts allowed the selection of experts by counsel to be made "without regard to their qualifications or standing, usually the only requirement being that the expert so selected is willing to give an opinion in favor of that side of the case."[105]

Medical men disagreed, however. Their position on this matter was that experts provided a particular, and much needed, objectivity and clarity to the legal process. According to one expert:

> ...[W]hen a psychiatrist becomes [an] expert in criminal courts, he assumes a clearly definite part and one of high responsibility before society. He is selected with the utmost confidence, to throw light on a difficult, ambiguous and obscure case. [106]

From this perspective, therefore, the "mission" of the expert witness was to "instruct the judges, the jurors and the lawyers and to import to them the special learning which is wanted, in order to decide on a problem and to render a definite and final judgment."[107] While the debate regarding the role of the medical/psychiatric expert in court has never been theoretically or doctrinally rectified, in practice, psychiatric expert witnesses did,

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[104] Carlos F. MacDonald, 'The Ethical Aspects of Expert Testimony in Relation to the Plea of Insanity as a Defense to an Indictment for Crime,' *The American Journal of Insanity* LXVII (1910-1911).

[105] *Ibid.*

[106] D. Plouffe, 'The Attitude of the Psychiatrists as Experts in Criminal Courts,' *Ontario Journal of Neuropsychiatry* 12 (1937), 27-32.

although often indirectly, play an integral role in shaping legal decisions about criminal responsibility and mind-state in Canada.

Frances Harrop was found legally responsible for murdering her husband. The official explanations for her behaviour were deeply rooted in middle-class, Anglo-Christian assumptions about married life, gender roles and feminine nature introduced as evidence through the opinions of legally qualified medical experts. Common sense interpretations of psychiatric evidence in the courtroom – by witnesses, lawyers, judges and jury men – allowed certain theories, or parts of theories, about a defendant's behaviour to be taken up more readily as legal *fact* than as alternative narratives; including those of the defendants themselves. This is quite different from what Ruth Harris observed in French courts where the testimonies and confessions of those charges with murder were easily incorporated into psychiatric and legal accounts of the facts of a particular case. The judicial appeal to common sense often frustrated Canadian medical men who consistently positioned themselves, and their profession, above the rudimentary impressions of ordinary folks.

As early law on expert evidence suggested, and as experts themselves claimed, the presumption behind legally engaging specialized knowledge and experience on the subject of mental capacity was that expert knowledge constituted a more informed truth and somehow transcended common knowledge. Psychiatrists, therefore, saw themselves battling popular opinion as well as the law for the right to decide the issue of criminal responsibility.

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[107] *Ibid.*

C. K. Clarke was particularly confident about his ability as an expert, and the ability of psychiatry generally, to see above and beyond the limited realms of law and common sense when it came to determining mental capacity. He espoused:

> Any one who takes the trouble to study practical psychology in a Canadian penitentiary, will be astounded at the want of regard for the subject of responsibility shown by our law, law founded on what is speciously termed good common sense, when uncommon sense was really required in its proper development. [108]

However, because Dr. Clarke was also well aware of the law's appeal to popular opinion, he was careful to not distance himself or his profession too far from the hearts of "average men." In a strong urge for law and medicine to "bury the hatchet" and work toward a more productive relationship, Clarke defended his professional brethren as elite thinkers, yet, with their feet still firmly planted in common sense:

> Many people assert that asylum physicians are faddists and theorists, but it can safely be asserted that the man who does best work in a Hospital for the insane is not the so called heaven born genius or theorist, but a broad minded practical man of common sense so dearly beloved by the average Briton. [109]

He further suggested, however, that if common sense was to be the "requirement in forming an opinion of responsibility in cases of mental defect," it was reasonable to assume – "in the interests of humanity"– that common sense "backed by long experience and special education is likely to give more satisfactory results."[110]

The importance of common sense to legal decisions was, therefore, recognized by Canadian psychiatrists and influenced their expert evaluations of defendants charged with

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[108] C. K. Clarke, 'Canadian Law in Regard to Responsibility,' C.K. Clarke Archives (CKCA), Clarke Institute of Psychiatry (n.d.), 274-75.

[109] *Ibid*., 286.

[110] *Ibid.*

murder. As Eigen points out in his analysis of British cases, the trial process introduced a "range of innovative ways of conceiving the mind that challenged, directly and indirectly, the fundamental notions of legal intentionality and self-control." Accordingly, Eigen suggests, "medical theorizing about madness shifted, too, often keeping legal considerations of accountability very much within its sights."(1995, 94) The emergence of a distinct criminological discourse in Canadian law and psychiatry during the early-20th century, reflects a continuation of the trend Eigen observed during the 18th and 19th centuries.

While medical men were supposedly called to offer their specialized knowledge on matters of science deemed beyond the understanding of "ordinary men," the final assessments of legal facts, and the subsequent validity of a particular witness's testimony, were established according to the common sense experiences of jury men and not according to claims of a particular witnesses expertise. Both medical and lay opinions and theories regarding criminal behaviour which fell outside the common experience of fact-finders, or the wording of the law, were omitted from legal consideration or found inadmissible. However, as Harrop's case demonstrates, through this process of simultaneously selecting and omitting certain aspects of what experts were saying, a salient fusion of common knowledge and expert knowledge emerged.

The judicial appeal to common sense, or popular opinion, on the issue of responsibility was the proposed stumbling block for experts who continually protested the lack of weight given to their testimonies in court. The resolution of the supposed conflict between what experts said and what courts were inclined to accept as being true, would, according to Douglas Walton (1999, 107), depend on the prior acceptance of the

source of expert knowledge by all parties involved in the decision-making process, as well as a general agreement regarding the weight of evidence accorded to the source.[111] This seems logical enough, given the doctrinal recognition of the value of expert opinion evidence, particularly in insanity cases. It may have been, as so many historians report, that it was not the nature of the law itself, but professional bravado that accounted for the battle regarding the boundaries and authority of expert testimony. But on a dialectical level, there was much more going on than simply professional or political claims over the right to regulate insanity.

The general concern among legal officials was that relinquishing decision-making power over mind-state, and hence responsibility, to experts would challenge not only the law's commitment to common sense, but the essential role of the jury and the authority of British law in Canada. So why allow expert testimony in the first place? What legal purpose did experts serve? And what difference did their testimony make in cases where mind-state was raised as an issue? Looking to the more subtle nuances of trial deliberations in Harrop's case, and in cases to be examined in upcoming chapters, suggests that although underlying professional tensions provided the bedrock for rules outlining the use of expert testimony, the routine practice of engaging psychiatric discourse (itself a construct of the social context in which it emerged and was practiced) actually (re)affirmed, rather than challenged, popular opinion.

Experts frequently articulated their opinions and observations through scientific language, but the essence of what they were saying about the nature of women and men, their classifications of 'character' or criminal 'types,' and the influence of social-

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[111] Douglas Walton, *Appeal to Popular Opinion* (1999).

economic circumstances on an individuals ability to reason, were hardly the sole property of psychiatric discovery – as the case of Frances Harrop demonstrates, it was commons sense for those living in Canada at that time.

During a scientific age, when objectivity constituted legal truth, and experts claimed to be objective, the legal appropriation of certain kinds of expertise outwardly cast the law as also objective, while not disturbing underlying Anglo-Christian sensibilities. Through the judicial process of decision-making, certain kinds of arguments or forms of inferences were abstracted from expert evidence which justified and supported a legal outcome as being based on factual evidence. Here, the (re)constitution of expert opinion evidence as legal fact gave the impression that common men sometimes accepted expert opinion, when in fact, experts were, for the most part, (re)inventing popular opinion.

The artificial divide between expert and common knowledge is implied in Ward's suggestion that the "challenges of experts to legal and common-sense assumptions sometimes constitute an advance towards a more adequate understanding of the issues at stake in a trial" by bringing in sociological factors that successfully combated "orthodox medical and legal individualism." (1997) He cites, for example, the introduction of "shell-shock," used by doctors to describe the mental effects of trench warfare during the First World War, as an example of how some psychiatric discourses were able to offer a more "coherent explanation of psychosomatic symptoms than competing medical and military discourses" – resulting in the rescue of several alleged "cowards" and "deserters" from the firing squad. This argument supports Norrie's position in *Crime, Reason and History* (1993) that "some forms of sociology or social psychology offer a better – more complete, less distorted – understanding of human agency than the 'decontextualization

of madness' effected both by law and by orthodox psychiatry."[112] Adding to this point, I suggest the appeal to common knowledge, *through* expert knowledge, effectively served to contextualize, and give meaning to, the concept of criminal responsibility without challenging Anglo ideologies about class, gender and race difference; in fact, it upheld them.

CONCLUSION

This analysis of the relationship between expertise and common sense in Canadian law and psychiatry does not dispute the basic concept of medicalization, rather, it points to the importance of context in evaluating the authority of expertise, and the nature of medical-legal discourses on criminal responsibility. Psychiatric theory clearly worked its way into, and was influenced by, the legal process; but not through the straightforward doctrinal approach of engaging expert opinion to help judges and juries understand issues deemed beyond the common experiences of ordinary men. The legal qualification of certain medical witnesses as experts and the selective taking up of expert opinion evidence was determined within the specific common sense and circumstantial context of each trial; not on the presumption that experts possessed a privileged knowledge status. While professional status was often important in getting a doctor's opinion legally qualified as expert opinion in court, it did not guarantee his testimony would be considered valuable or even relevant to decisions about responsibility.

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[112] Cited in Ward (1997), 357.

In the following chapters, I will consider more closely the legal aspects of criminal responsibility and how discourses of race, gender identity and domesticity influenced case outcomes and definitions of mind-state. It will become apparent that through standard legal procedures, much of what might be considered psychiatric evidence actually came through the testimonies of non-expert witnesses; neighbours who testified about spells and odd behaviour, police officers who described psychotic episodes, lawyers who introduced medical concepts, and relatives who testified about other relatives locked away in mental institutions. It appears, therefore, that *what* was said, and the way in which it was expressed, was usually far more important than *who* said it.

The relationship between law and psychiatry, experts and ordinary men, expertise and common sense, has been the subject of scholarly investigation for centuries.[113] Contemporary medical-legal scholars, such as Joel Eigen, Janet Tighe and Ruth Harris, describe instances of cooperation between psychiatric experts and legal authorities in England, the U.S. and France respectively, while others, such as Andrew Scull and Roger Smith, describe the relationship as an ongoing battle of ideas and egos founded in a longstanding contest of professional one-upmanship. Further still, Nigel Walker (1968) argues that medical men dreaded the thought of entering the legal process. He characterizes the expert witness as a reluctant participant rather than an opportunist; like a "wrestler who is compelled to box" competing in a "contest... for which he is not trained."

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[113] For abstracts and excerpts from primary literature dating back to the 16th century see, Hunter and Macalpine (eds.), *Three Hundred Years of Psychiatry* (1963).

In trying to locate the Canadian expert witness within these larger scholarly and historical debates, the most that can be said is that it depended on the particular case at hand, as Frances Harrop's trial and conviction illustrate. Canadian murder trials individually provide evidence which both supports and contests most of the general claims historians make about the role of the expert and the nature of medical-legal discourse. But collectively, they show how social explanations intermingled with scientific reasoning to produce complex courtroom narratives about responsibility, which then influenced the legal process in many different and contradictory ways. While the official laws of insanity and definitions of criminal responsibility were not seriously challenged by expert narratives of mental deficiency, the *interpretation* of insanity law, and the *meanings* of responsibility in Canada were quite permeable and open to a range factors not always specified by law.

Chapter Three

DEFINING RESPONSIBILITY IN CANADIAN MURDER CASES

In this chapter, I continue my exploration of the contingent nature of criminal responsibility and legal notions of mind-state by looking more closely at the judicial processes involved in early 20th century murder cases. The trial and post-trial commutation stages of the criminal justice process brought together a range of discourses on criminality and criminal responsibility that differed in content and meaning.[114] The culmination of competing discourses produced a strange "battle among discourses" fought through discourse. (Foucault 1975) Case file evidence shows that the Canadian murder trial did not simply represent a single battle between the Crown and the defence, but exposed a nexus of several professional and ideological battles fought and negotiated simultaneously. As I demonstrated in the previous chapter, medical witnesses variably battled with lawyers, judges, juries, defendants, and each other. Likewise, lawyers battled the evidence of competing medical witnesses, alternative narratives of motive and their own professional interests. And members of the community battled to make sense of horrific events that took place in their midst. As Ruth Harris (1989, 3) explains, and this research confirms, murder trials were the sites where important discussions and decisions around social pathology took place and where the "key anxieties of the era" were unfurled.

Each defendant in this study was ultimately found guilty and sentenced to death, yet, many shades of responsibility emerged during the judicial process. We need to distinguish, therefore, between a *guilty* verdict – which represents the formal application of the rules of law – and the underlying discourses that came together during the adjudication process to help define the boundaries of criminal *responsibility*. In reading beneath the surface of the guilty verdict, intended to be seen as objective and neutral, we see that interpretations of law, and the meanings of particular legal categories of mind-state, were determined on a case-by-case basis.

In this chapter, I interrogate the ways in which criminal responsibility was (re)negotiated according to the terms and circumstances of each murder, the decided *character* of each accused, and at different stages of the criminal justice process. For example, in 1920, the remissions report on the trial of Marie Anne Houde (Gagnon) opened colourfully as follows:

> The Accused is a French-Canadian, thirty years of age, and was charged with the murder of her step-daughter, Aurore Gagnon, ten years old. The very nature of the crime – Aurore was ill-treated, beaten and tortured by her step-mother, from August 1919 until 10th February 1920, when she died as a result of the wounds inflicted upon her – aroused great indignation, and public feeling, especially in Quebec, ran very high. …[D]efence [counsel] … admitted that Aurore died as a result of the wounds inflicted upon her by the accused … and repeatedly qualified the behaviour of the prisoner as atrocious and monstrous, and entered a plea of insanity.[115]

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[114] Foucault described the trial as "an event that provided the intersection of discourses that differed in origin, form, organization, and function" in *I pierre Revière, having slaughtered my mohter, my sister , and my brother… A Case of Paricide in the 19th Century* (Lincoln, NB, 1975), x-xi.

[115] Marie Anne Houde (Gagnon) (1920), NAC.

Transcripts from Houde's trial indicate, of the three expert witnesses who testified for the defence, only one supported the official defence of insanity. Meanwhile, seven experts (including one of the original defence witnesses) testified for the Crown, each of whom claimed Houde was sane during the months she tortured her step-daughter. In the eyes of medical and legal authorities, Houde was officially sane and guilty of murder. However, on the basis of her gender and supporting theories about the negative mental effects of consecutive pregnancies, there were several ongoing debates, both in and out of the courtroom, regarding her precise level of criminal responsibility.

The official verdicts of "guilty" and "sane" brought by legal authorities and a pack of medical experts in Houde's case, did not displace the strong public opinion, given the decided "horrific" nature of her crime, that she "must have suffered some form of insanity." In the eyes of the public, Houde was an "abhorrent and loathsome freak." [116] Her actions, one citizen reported, were either that of "a depraved female beast in human form, or a human imbecile."[117] The idea that she acted intentionally with a "normal mind" was simply beyond the public's comprehension.[118] In the end, government officials agreed the condemned woman must have been in an abnormal state of mind to commit such a crime and her death sentence was commuted to life in prison. The mitigating factors of gender and pregnancy were not seen as relevant to the issue of guilt

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[116] *Ibid*., see news clipping stamped Sept. 28, 1920, tilted "The Gagnon Woman" (source unknown).

[117] *Ibid*.

[118] See letter from the Canadian Prisoners' Welfare Association, dated September 17, 1920. The CPWA organized a substantial petition signing campaign which they claimed represented "all classes of society and, though mostly from this province [Que.], include some signatures from further afield. Clergymen, prominent commercial men, medical men, lawyers and industrial workers are among the signatories."

at trial, but were seriously considered when it came to understanding her level of criminal responsibility and the final decision to grant mercy.

Houde's case typifies the way in which responsibility was (re)negotiated at different stages of the judicial process and simultaneously articulated through a number of legal and non-legal classifications of mind-state. The insanity defence was perhaps the most obvious, or direct, legal realm for debating a defendant's state of mind. However, other legally recognized states of mind, such as provocation and passion, also provided a discursive space in which standards of criminal responsibility and mental capacity were reasoned, ordered and understood. The mobilization of defences other than insanity in murder cases often borrowed much of the same language evoked in a formal insanity plea, but the arguments of lawyers and testimonies of witnesses were not bound by the strict doctrinal requirements of insanity law. Therefore, the specific legal context in which a defendant's mind-state was addressed (meaning the stage of the judicial process and/or the defence introduced at trial), to some extent defined the boundaries of responsibility discourse as well as *who* had decision-making power – experts, juries or legal officials.[119]

Although psychiatric discourses during this period linked crime to degeneracy and mental deficiency, case file evidence suggests that just because there was psychiatric knowledge on criminality and responsibility, and a few psychiatrists who ambitiously campaigned to hold positions of privilege in criminal law, we should not assume that

[119] The question of who had the right to decide matters of mind-state and criminal responsibility would later become a central issue in the 1953 *Royal Commission On The Law Of Insanity*, and again it the *Mental Disorder Project: Criminal Law Review Final Report*, Department of Justice, Canada (1985).

experts were granted a significant degree of decision-making authority. In fact, for a range of complicated reasons, the role of the psychiatric expert and the value of psychiatric expertise, made a vary shaky start in Canada. In examining the legal processes through which criminal responsibility was perpetually (re)negotiated, I also highlight in this chapter a number of the conceptual and ideological conflicts that fueled the professional discord between legal men and medical men. In each case where the defendant's mental state was in question (whether or not a formal insanity plea was entered), an underlying tension between law and psychiatry – rooted in a fundamental disagreement about professional decision-rights over criminal responsibility, the definitional parameters of mental capacity, and the intense need to appease public opinion – formed the infrastructure of the negotiation process. However, as my analysis will show, the nature of courtroom conflicts, and the intensity of professional rivalries fluctuated according to the substance and desired outcome of each trial.

I begin with an overview of the formal defence of insanity and then consider other, less rigid, legal defences and classifications of mind-state, such as provocation and passion, in order to show the unstable nature of responsibility discourse. I demonstrate that while provocation was a formal legal defence that could reduce a charge from murder to manslaughter, legal interpretations of the emotional and cognitive nature of provocation and the expected (in)ability of a particular defendant to control his/her passions, were based on determinist notions class, race and gender. Also, despite the fact that Canadian law did not recognize "diminished responsibility" or "temporary insanity" as a formal defence, evidence to establish provocation and loss of control evoked the

language of insanity discourse and was legally understood as a form of temporary insanity.

I then conclude this chapter with a discussion of how representations of "character" determined how law was interpreted and applied by legal officials, and how the behaviours of women and men charged with murder were more broadly understood. The natural "disposition" of women and men charged with murder was consistently measured according to the masculine, British-Anglo ideal of what it meant to be a man of respectable class, citizenship and character. Representations of character subsumed assumptions about race, gender and class and were tremendously important to the adjudication of criminal responsibility. This chapter further sets the stage for the next two chapters, which address the particular importance of race, gender identity and class to medical, legal and social-cultural constitutions of character and mental capacity.

POINTS OF NEGOTIATION: TO INSANITY AND BEYOND

> According to s.201(a) of the *Criminal Code of Canada* (1955):[120]
>
> Culpable homicide is murder
> (a) where the person who causes the death of a human being
> (i) means to cause his death, or
> (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
> (b) where a perosn, meaning to cause death to a human being or meaning to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or
> (c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a

[120] Formerly s.259. It was s.277 in the Code of 1892, and s.147 of the English Draft Code.

> human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

To summarize, a "murder" occurred only if the person who caused the death of another person(s) *intended* to cause death. Every legal defence/category which sought to establish or diminish criminal responsibility, therefore, spoke to the larger issue of intent and the question of *mens rea*, or a guilty mind. The exception being self-defence, which was/is understood as intentional but justified. In *R v. Tolson* (1889) 23 Q.B.D. 168, Judge J. Stephen raised the following concerns with respect to the different legal meanings of *mens rea*:

> 'Mens rea' means in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal.

Judge Stephen argued in his decision that it was "confusing" and "misleading" to classify so many states of mind under one name, cautioning that to an "unlegal mind it suggests that by the law of England no act is a crime which is done from laudable motives, in other words, that immorality is essential to crime." [121]

Through self-referential logic, an individual could not form rational intent without *mens rea*, where *mens rea* was evidenced by rational intent, foresight or knowledge.[122] In order to be held criminally responsible for murder, or have their actions "justified," a defendant was legally required to be in a rational mental state at the time of the crime.

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[121] *R v. Tolson* (1889) 23 Q.B.D. 168, quoted in Martin Friedland (ed.), *Cases and Materials on Criminal Law and Procedure* (fifth edition) (Toronto 1978), 404.

[122] Benjamin Andoh, 'The M'Naghten Rules – The Story so Far,' *Medical-Legal Journal* 61:2 (Spring 1993), 98.

But as Jonathan Glover surmised, “how far from the truth is any view that merely identifies responsibility with some mental state from whose absence one may suffer.” (1970, 3)

According to Glover, disagreement among decision-makers regarding the meaning of criminal responsibility, and the determination of an individual’s mind-state, reflected conflicting moral attitudes and responses toward the circumstances of a particular criminal act or actor; and “different views about how men should be treated in various situations.” He suggests, however, that the disagreement, particularly between law and psychiatry, is not necessarily about the “concept” of responsibility, rather, it is about the competing ideas about punishment which flow from different interpretations of responsibility. As Glover put it:

> Our attitudes towards people and what they do are influenced by our knowledge of them and their situation. But we are not forced by any facts, even the truth of determinism, to modify our attitudes. It is up to us to choose which considerations to accept as excuses or mitigation. (1970, 20)

However, in cases of murder, the opposite is also seen; different interpretations of responsibility shaped the way in which guilt was legally established through decisions about the facts of a case, as well as produced different ideas about the appropriate outcome/punishment in individual cases.

Despite official claims of judicial autonomy, fairness and objectivity, particularly around findings of guilt, capital case file evidence presented throughout this dissertation strongly supports Glover’s observation (excluding his statement about the “truth” of determinism). The practice of criminal law in Canada, and the negotiation of criminal responsibility, was, and remains, a human process propelled by the routine, creative exercise of moral judgement and situational (re)evaluation. The general argument that the

law does not practice what it sets out in theory has long been the incantation of critical legal scholarship, including critical feminism, critical race theory, Marxist and left realist perspectives. What has been missing from this critical discussion, however, is a detailed analysis of precisely *how*, through the adjudication of mind-state, disparate standards of responsibility were produced and legitimized.

While there were set laws for establishing mind-state and guilt, other judicial factors – such as the use of expert testimony, the selective interpretation and application of the law by the judge and jury, the definitional boundaries of criminal responsibility, the influence of moral decisions about the character and the circumstances of each case – consistently served to reinforce deep social biases. However, the precise ways in which assumptions about character, gender, class and/or race *types* influenced the determination and meaning of criminal responsibility differed from one case to the next.

The Insanity Defence

According to early legal texts, there were three basic points during the judicial process when a plea of insanity could be formally raised. However, if we also include the point at which the charge was laid by police, there were/are technically four stages where the question of insanity could be introduced. Although, this preliminary stage of the criminal justice process was not the focus of concern in legal or medical discussions about insanity and criminal responsibility during this period, case documentation clearly indicates that the impressions of the arresting and investigating officers were considered in pre-trial, trial and post-trial decisions about mental capacity. During the pre-trial stage the legal question was whether or not an accused was mentally fit to stand trial. If the

accused was found fit, the question moved to whether or not s/he was insane at the time of the crime to a degree and nature that would establish a lack of guilty intent, or *mens rea*. If an accused was found guilty and legally responsible at trial, the Appeal Court could still overrule a guilty verdict and substitute a verdict of "not guilty because insane."[123]

According to medical-legal literature published before 1950, insanity was not often raised in criminal cases, and if it was, it was usually reserved for murder cases where a guilty verdict meant a mandatory death sentence. (Spaulding 1933) Unfortunately, the Canadian record of *Criminal Statistics* gathered between 1920-1950 does not show how often insanity was raised in cases of murder, nor does the official record show how often a verdict of "not guilty because insane" was rendered at trial. Court statistics gathered on murder charges during this period included a category titled "detained for lunacy" which likely included individuals found unfit to stand trial as well as those fund not guilty because insane at trial. Although there were no distinct statistical categories for pre-trial detainment and post-trial detainment for lunacy, the record does indicate that of the 1400 individuals charged with murder between 1920-1950, 180 (12%) were "detained for lunacy."

The final point of the criminal justice process when mind-state was again considered was during the commutation stage. If a guilty verdict was not appealed, or if it was upheld on appeal, the focus during post-trial deliberations moved from the question of guilt (guilt being proved at trial) to whether or not there was sufficient evidence of

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[123] In England, the verdict would read "guilty but insane," and in the U.S. it was "not guilty by reason of insanity." In Canada, we have since adopted the U.S. wording.

insanity or mental deficiency raised before, during or after the trail to warrant commuting the mandatory death sentence to life in prison. Further on in this chapter I will show how (re)negotiations of criminal responsibility during the post-conviction stage often reintroduced, or incorporated new, expert opinion evidence along with lay opinion on the mind-state of condemned individuals. Historical evidence suggests that following guilty verdicts, the executive did privilege psychiatric expertise to some degree when not bound by the rules of expert opinion evidence imposed, albeit loosely, in the courtroom.[124]

Since 1843, the legal test for insanity in Canada has been defined by the M'Naghten Rules, set out following the British case of *R v. M'Naghten* and adopted in s.19 of the *Criminal Code of Canada*.[125] According to the Rules:

> 19. No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under *natural imbecility*, or *disease of the mind*, to such an extent as to render him incapable of appreciating the *nature and quality* of the act or omission, and of *knowing* that such an act or omission was *wrong*.
> (2) A person labouring under specific *delusions*, but in other respects sane, shall not be acquitted on the grounds of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.
> (3) Every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved. (italics added)

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[124] This supports Gerry Johnston's findings in his examination of the role of psychiatry in early-English criminal cases. According to Johnston: "There is a widespread perception, which some psychiatrists have re-enforced, that psychiatry seeks to undermine notions of moral responsibility, that it seeks a relaxation of law and ethics. The courts, no doubt recognized that the notion of moral responsibility is indispensable to the functioning of modern society, have therefore been reluctant to recognize psychiatric doctrines *in the courtroom*. Once the criminal and the crime have been censured, however, the objection to psychiatry becomes less noticeable." (1997, 101)

[125] In 1948-49, s.16 became what is now s.19 of the *Criminal Code*. For a good overview of the history of the *M'Naghten Rules* along with a breakdown of the main criticisms and reform proposals, see Benjamin Andoh (1993), 93-103.

From the moment of their induction, the Rules have been the subject of much criticism; primarily regarding the vagueness of terms such as "wrong," "nature and quality," "appreciation" and "knowing." During the early-20th century, medical experts strongly voiced their frustration over the narrow legal definition of insanity as a disorder of reason. (Andoh 1993, 96-97) A number of psychiatrists in Canada and the United States wanted the definition revised to reflect the more 'progressive' medical model, but more importantly, they wanted medical experts – not legal officials – to author any revisions to the law.[126] Some doctors proposed even more drastic legal action, namely, the total abolition of insanity as a legal defence in criminal cases.

Those who pushed for new insanity laws argued a more precise medical definition would go a long way to eliminate the ambiguity of insanity law as well as prevent the embarrassment many medical witnesses experienced in court at the hands of lawyers who manipulated their testimonies to fit an outdated, and, in their view, unsophisticated understanding of the scope and nature of insanity. The more skeptical of critics, however, did not see how any sanctioned definition of insanity, no matter who devised it, would eliminate the inevitable courtroom battle psychiatric experts were repeatedly lead into. They proposed, instead, that the issue of insanity or mental deficiency should not be introduced during trial deliberations on the question of guilt at all, but be reserved for discussion after the trial as a mitigating factor in sentencing decisions. In other words, they felt the jury should have nothing to do with deciding on defendant's state of mind,

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[126] See for example; Carlos MacDonald, 'Should the Plea of Insanity as a Defence to an Indictment for Crime be Abolished?' *American Journal of Psychiatry* (January, 1920), 295-302; and Joseph Moore, 'Insanity as a Defense for Crime,' *American Journal of Psychiatry* (September, 1928), 263-67.

instead focussing only on the question of guilt.[127] However, as the law stood, determining "guilt" required establishing both *actus reus* (did the individual commit the act) and *mens rea* (did the individual mean to commit the act).

This underlying professional and ideological tension between law and psychiatry shaped the processes through which responsibility was decided in cases where an individuals state of mind was questioned. The role of the jury, and the ability of jury men, to decide on matters related to mind-state using "common sense" was frequently the subject of dispute and a concern to both legal men and psychiatrists. As I demonstrated in Chapter Two, the official function of the jury was to decide on facts bought out in evidence, where expert opinion was considered evidence toward fact.[128] While the jury was typically composed of middle-class Anglo men, experts, lawyers and laymen were concerned class and race status of the jury was not enough to insure intelligent decisions. In addressing the "many complaints raised against the jury system," legal expert L.B. Spaulding argued:

> [T]he faults of the jury system are not so much inherent in the system itself as in the law with regard to jurors, which excludes from liability to service on juries the more intelligent and better trained members of the community. [129]

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[127] *Ibid.*

[128] The law regarding opinion evidence and the admittance of expert testimony is outlined in Kenneth Gray, *Law and the Practice of Medicine* (1947), 14. According to this text: "The general rule is that a witness is not permitted to testify as to his opinion or beliefs…One exception to this rule prevails in the case of a qualified expert witness, who may give an opinion upon the facts, even in a case with which he has had no association except as a witness. The opinions of skilled witnesses are admissible whenever the subject is one upon which competency to form an opinion can only be acquired by a course of special study or experience."

[129] Spaulding's paper, 'Insanity and Criminal Responsibility from the Legal Point of View,' was originally read at the Toronto Psychiatric Hospital Seminar in Toronto on January 28, 1933, and later published in *The Ontario Journal of Neuropsychiatry* (March 1933), 12-13.

While the question of *who* was qualified to make decisions about the fact of a defendant's mental capacity was always an issue, it became more or less urgent according to the circumstances of a particular case, the nature of the legal defence put forward and/or the stage of the trial process where the subject of mind-state was raised.

The law specified three mind-states which could formally constitute insanity; "imbecility," a "disease of the mind" and "delusion." Clear, observable cases of mental "disease" or "idiocy" seemed to be easily agreed upon by medical and legal authorities. However, the qualities and definition of categories such as imbecility and delusion were points of contention. Imbecility was a particularly ambiguous diagnoses and legal classification intended to describe individuals who were deemed "defective," rather than diseased. (Spaulding, p. 17) In law, the term "defective" was typically applied to those considered to be born without proper reasoning faculties and who would never recover; whereas someone suffering under a "disease" of the mind, might recover their reason at some point in the future. In an article entitled "Canadian Criminal Law in Regard to Insanity," Dr. C.K. Clarke concurred:

> No one doubts the irresponsibility of idiots, but when it comes to the question of imbecility we are on a battleground where law and medicine are widely at variance, simply because Canadian law is hampered by the stern sense of what is called, in our determination to be loyal to Imperial interests in everything, British justice … In the absence of a standard man with whom to make comparisons, abstract definitions prove difficult to manage. [130]

[130] C. K. Clarke, 'Canadian Law in Regard to Responsibility,' *Queen's Quarterly* (nd), 274-278; (CKCA), vol., II f.13.

Clarke, who seemed to imply psychiatry ought to function independent of Imperial interest, called for the law to fix the standard of criminal responsibility. However, he did not trust politically-motivated Canadian law -makers or ignorant jurymen to the task.

Clarke agreed with the general legal argument that it was not necessarily the jury system, but the "common sense" of common jury men, that obstructed justice in cases involving the insane, and voiced his frustration about the persistent old-fashioned ideas of the "uneducated classes" who failed to recognize that "Jack is not as good as his Master, in forming an estimate of a person's mental condition or measuring his responsibility." Clarke also lamented about the reluctance of Canadian law to acknowledge the skill required to determine responsibility. He argued it was an assignment "too complex" for "twelve excellent jurymen who are chosen, not so much for their intelligence and ability to grapple psychological problems, as for their inherited Anglo-Saxon quality called common sense." Clarke explained to the legal community that "if it is a difficult thing for physicians who are dealing every day with imbeciles, to form a just estimate of their responsibility," then " how absurd it is to suppose that a judge, lawyer and jury can settle the question in a few hours."

In his other writings and public addresses during the early-20th century, Clarke repeatedly ranked the insights of the psychiatric "expert," and the "expertise" of psychiatry, well above the common sense of "ordinary men." Yet, as I illustrated in the previous chapter, documentary sources found in capital case files suggest a dialectical and ideological relationship between "expert" and "common" knowledge whereby the routine legal engagement with psychiatric discourses actually helped structure and reinforce, rather than challenge, the judicial use of common sense.

The imbedded paradox in medical-legal discourse about the role of expert knowledge and the strong judicial appeal to common sense can be observed in different forms. For instance, although psychiatrists frequently bewailed that the insanity defence was both ambiguous and inappropriate, jurists argued it was precisely the definitional ambiguity of the Rules which allowed decision-makers considerable breadth when it came to interpreting and applying the law – allowing experts to testify in court in the first place. The notion that "the law never stands still" was understood by Canadian jurists and legal writers, who, while aware of the problems with insanity law, did not view stricter legislation on insanity as a desirable solution. Some argued the openness of the insanity defence served to ensure the law would be able to "develop in accordance with the requirements of the times," which included keeping up with advancements in psychiatric medicine.[131]

Legal officials were well aware that a great deal of discretion was exercised when it came to interpreting the applicability and boundaries of insanity law in order to appease the pleasure of popular opinion. And the structure and substance of legal proceedings was strongly influenced by the moral value legal decision -makers (the executive, judges, lawyers and jury men) placed on various circumstances surrounding the crime and/or the decided "character" of a defendant; as well as how they perceived the nature and value of expert witness testimony in individual cases. Moral judgement (read, common sense) was understood to be an essential characteristic of Canadian law and not something to be reined in.

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[131] See Theobold, quoted in Spaulding (1933), 12.

For example, Spaulding (1933, 22) outlined the development of the British and Canadian law in accordance to public opinion and moral sentiment. In supporting the view of legal expert Sir James Stephen, the social function of the rule of criminal law was to support and sanction popular morality. Spaulding argued; "the close alliance between criminal law and moral sentiment is in all ways healthy and advantageous to the community." On the specific subject of insanity in relation to criminal responsibility, Spaulding told his audience that while the law was very "gradual" in development, it "almost always follows public opinion." Therefore, he concluded:

> It is safe to say that the public generally feels that the satisfaction and gratification, which so many people receive from the rigorous and at times harsh punishment of criminals, is a legitimate satisfaction which the law should provide. Until these feelings have changed we can hope for very little advance in the criminal law, and I think there is very little doubt that the only thing that will change public opinion is greater knowledge of the subject more widely held.[132]

As the institutional representation of popular opinion, the practices and policies of Canadian criminal law can not be separated from the moral climate in which it developed and operated. It follows, therefore, that judicial interpretations of legal mind-states intended to negate, mitigate or establish intent and criminal responsibility, both reflected and validated common sense understandings of mental deficiency and human nature. However, the long conflict between law and psychiatry on the subject of human nature, which underpinned the adjudication of criminal responsibility, was not driven solely by professionalism; it was also driven, and defined, by a perceived alienation between expert and common knowledge. However, legal authorities were able to appeal to the common

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[132] *Ibid.*

sense of the jury and the public *through* a dialectical engagement with psychiatric expert discourse.

Looking across capital cases, lawyers' decisions to use the insanity defence appear unpredictable, but certainly not haphazard. Of the 66 cases analyzed in this study, 19 (29%) included a formal plea of insanity.[133] Without knowing how many individuals charged with murder were able to successfully plead insanity – success meaning the accused was found not guilty because insane – or what factors constituted a successful defendant/defence, I am unable to draw conclusions regarding the general nature and practice of the insanity defence. However, within this small sample of unsuccessful insanity trials, interesting trends emerge which do provide some insight into the legal interpretation of insanity law and the broader meaning of responsibility in the context of Canadian law and society.

For example, insanity was most often the official defence in cases where the defendant's motive for a murder was unclear or questionable. When a motive appeared obvious to the court – such as want of money, lust, or heated emotion – efforts seemed to go toward establishing evidence to mitigate responsibility through alternative legal defences such as provocation. However, this did not always lead to a commuted sentence or reduced charge. As I show in Chapter Five, women who killed their husbands for money and/or to take up with another man, were often treated more harshly than women who appeared to kill in the heat of a domestic quarrel. The method used to kill the

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[133] Forty-two per cent of defendants who pleaded insanity received recommendations to mercy from the judge/jury and 63% were commuted or ordered new trials. Therefore, evidence of insanity resulted in only slightly better odds than the larger sample of convicted murderers which received recommendations to mercy in 42% of cases where information was available, and escaped execution 55% of the time.

victim(s) was also important. If the method to murder appeared excessive or particularly violent to trial participants and observers, it was often interpreted as of a loss of control or reason and therefore evidence of mental abnormality, while less physically violent methods, such as poisoning, were seen as methodical or cowardly. Documentary evidence suggests that motive and method were very much tied up with each other, and support the claim by Ruth Harris (1988) that interpretations of motivation "coincided exactly with the moral outlook of law and psychiatry."

Evidence considered during the commutation stage of Houde's trial (the woman who tortured her ten-year-old step-daughter) included a wide range of information and opinion to help the Minister of Justice make his final decision to commute her death sentence. Petitions and letters from the public, the defendant and the defendant's relatives were sent to the Minister alongside psychiatric evaluations, police reports, newspaper reports and unofficial accounts written by the trial judge and lawyers. Collectively, these documents told several stories which simultaneously cast Houde as a degenerate female monster and confused mother.[134]

The Canadian Prisoners' Welfare Association, for instance, submitted to the Minister that "[a]ny woman who has gone through the process of maternity under such circumstances has some special claim to leniency, whatever her crime."[135] No one writing to the Minister in support of clemency suggested the guilty verdict was unwarranted, or that she should not be duly punished, only that she should not be hanged.

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[134] For a similar analysis of the competing and simultaneous characterizations of a condemned Canadian women, see Franka Iacovetta and Karen Dubinsky, 'Murder, Womanly Virtue, and Motherhood: The Case of Angelina Napolitano, 1911-1922,' *Canadian Historical Review* LXXII: 4 (1991), 505.

But still, not everyone agreed with the portrayal of Houde as a mother in need of sympathy. One newspaper editorial reported:

> The argument of the Prisoners' Welfare Association that 'there is no thought of allowing the woman to go unpunished' is illogical, inconsistent and ridiculous because she is either deserving of the full penalty of our law or no punishment at all, and the evidence supported by competent scientists states she was in full possession of her normal senses when she committed the hideous and infernal brutalities she did.[136]

In a another letter, Thomas Vieu, a member of the House of Commons, further argued: "It is true that four Crown expert witnesses declared that in their opinion she was compos mentis, … it is very hard to believe that a woman compos mentis would commit such abominable acts." Vieu further reminded the Minister that the defendant "was pregnant a number of times; as a matter of fact, she was almost constantly in a state of pregnancy, and that alone is sufficient to unsettle the nervous condition of a woman."[137] Although the issue of insanity was legally decided at trial and a guilty verdict delivered, the question of Houde's mind-state and level of criminal responsibility remained a point of negotiation through to the post-conviction stage. It was often within these more flexible judicial spaces, outside the courtroom and beyond the insanity defence, where conflicting discourse about responsibility and mind-state were synthesized.

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[135] Houde (1920); see letter titled "Is a Woman to Hang?" dated August 7, 1920.

[136] *Ibid*., see newspaper clipping dated Sep. 18, 1920 (source unknown).

[137] *Ibid*., see letter addressed to Hon. J.C. Doherty, Minister of Justice, dated Sept. 16, 1920, signed Thomas Vieu.

Beyond the Insanity Defence

Although it makes sense for historians interested in the nature of insanity discourse to look to insanity defence cases in order to document the legal construction of mental deficiency and criminal responsibility, the question of an accused's impaired mental capacity was also relevant to the outcome of cases where insanity was not the formal defence. Canadian judges did not require counsel to officially plead insanity in order to argue mental deficiency was the cause of a defendant's behaviour. In fact, the majority of courtroom discussions regarding mind-state took place outside the insanity defence where judges, lawyers and witnesses were able to debate and evaluate mental deficiency without having to adhere to the legal language of insanity law. Although the interpretation of insanity law was quite flexible, the language that could be used, and the theories that were recognized as valid articulations of mind-state were doctrinally bound. However, beyond the insanity defence, through the process of adjudicating other legal defences and during the post-conviction stage, limitations on language were relaxed to some degree and alternative representations of mind-state that did not satisfy a proper insanity defence were open for consideration. As the cases examined later in this chapter, and upcoming chapters, will attest, there emerged a legal discourse around responsibility, which, despite an official verdict of "guilty" in each case, established certain *types* of individuals as inherently less or more guilty, and therefore responsible, than others.

Legal-history literature on insanity draws primarily from legal doctrine and/or reported cases where insanity was the formal plea. While this approach is very useful for documenting official decisions and applications of the law, it misses the more subtle processes that drove insanity discourse in Canada and underlined the larger social-

cultural meaning of criminal responsibility. I suggest, therefore, we also need to look at the more routine judicial dealings with the subject of mind-state in cases where insanity was not the official defence. While only 29% of the cases in this study included formal plea of insanity, the defendant's mental capacity was raised as an issue either at trial or during commutation in 79% of cases. Furthermore, negotiations of mind-state and criminal responsibility seen in non-insanity cases shows particularly well the way in which legal responses were culturally and contextually determined.

In the absence of a formal insanity plea, lawyers frequently introduced evidence about the mental capacity of an accused which incorporated theories of mental deficiency into legal arguments to establish *diminished* responsibility. Here, various psychiatric explanations, formally excluded from the definitional language of the M'Naghten Rules, were solicited from medical and lay witnesses before the Court, and reinforced through judges' interpretations of the laws of evidence and expert testimony. Concepts such as moral imbecility, partial insanity, temporary insanity and uncontrollable impulses were regularly incorporated into trial proceedings despite the fact they were not formally recognized defences in Canadian law; and *diminished responsibility* was not a formal classification. This is supported by the 1987 edition of *Criminal Pleading and Practice in Canada*, where E.G. Ewaschuk comments that although there is no formal defence of diminished responsibility in Canada;

> an unarticulated form of diminished responsibility existed in Canada in the sense that evidence of mental disorder short of legal insanity is considered in determining specific intent together with other relevant factors.[138]

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[138] Quoted in Judith Ablett Kerr QC, 'A Licence ot Kill or an Overdue Remorm?: The Case of Diminished Responsibility,' *Otago Law Review* 9:1 (1997), 3.

Capital case file evidence shows that despite legal standards for admitting evidence, the trial process provided an open forum for evaluations of human nature and responsibility. The presumption that responsibility could be, and was, diminished by certain states of mind was sanctioned through the adjudication of evidence regarding the specific effects of passion, provocation, fear and/or "natural" reasoning deficiencies. Interestingly, these discussions about mind-state shared much the same language as medical-legal discussions about insanity proper – evoking terms such as "delusional," "insane jealousy," "blind madness," "moral imbecility," "loss of control," "mental spells," and "stupor"– yet, typically did not constitute the grounds for a legal defence of insanity.

Therefore, a defendant's criminal responsibility could be mitigated due to low intelligence, congenital imbecility, degeneracy, irrational past behaviour, or any number of medically/socially recognized signs of mental defectiveness, without the legal plea of insanity ever being raised. Invoking the language of insanity law, lawyers often called psychiatrists to testify as expert witnesses in non-insanity cases in order to help draw the boundary between legal insanity and alternative forms of mental deficiency – the Crown using experts to discount theories of mental deficiency, the defence to show that although a defendant may have had knowledge of her actions as wrong in the legal sense, there was enough evidence to suggest she was not in complete charge of her mental faculties. Even if mind-state evidence did not satisfy the laws of insanity and render a verdict of not guilty at trial, it could prompt a recommendation to mercy from the judge and jury and keep the subject open for (re)negotiated during the post-conviction stage.

The ascribed standards of criminal responsibility in each case were not clearly represented in official decisions about *guilt*. Instead, determinations about responsibility were articulated through, and represented by, judicial recommendations to mercy, the partiality of public petitions, newspaper reports, unofficial letters between court officials, medical reports and post-trial conversations about the appropriateness of the death sentence. Popular, legal and/or medical evaluations of criminal responsibility and mind-state were never totally unified in the courtroom, where, as Roger Smith (1981) points out, "the reaching of verdict was a question of deciding which discourse to use." However, beyond the insanity defence, and beyond the courtroom, competing discourses often came together to produce a larger, albeit stratified, interpretation of insanity which derived specific meanings from various narratives operating simultaneously within that immediate social context.

The conceptual boundaries between full responsibility, diminished responsibility and irresponsibility were therefore temporary and artificial in that they were drawn, erased, and re-drawn according to the symbolic value placed on the characteristics of each case and at different stages of the trial process. For example, when Ann Tilford was charged with poisoning her husband in 1935, defense counsel called no witnesses to counter the 33 witnesses presented by the Crown, but argued without medical evidence that the defendant's state of mind was affected by town gossip over her "unduly friendly" behaviours with another man. However, the judge seemed partial to the Crown's argument that Tilford was just the "type" of woman who would maliciously kill her husband for his life insurance. He stressed in his final charge to the jury that it was important to decide which interpretation of the events and the defendant they would use

to render a verdict. He reminded the jury that "she was the wife of this man" and the decision had to be made whether she was in fact a "wronged woman" or was she "a diabolical creature" who only pretended to have affections for her husband. The judge stated the urgency of a clear decision regarding Mrs. Tilford's character:

> There is no half-way house, gentlemen – no half-way place you can rest. You have to make up your minds which type that woman was on all the evidence. Was she, as counsel for the defence says, a very much wronged woman, injured by the scandal, gossip and talk of the town; or was she the type of woman who would stop at nothing to gain her own ends, and the life of her husband be of no matter so far as she was concerned if it served her purpose to get rid of him? You have to take your choice. She is either one or the other. If she is a Doctor Jeckyll and Mr. Hyde, there is no half-way house that I can see. Which category does the accused stand in?[139]

The jury found Tilford guilty and, without a recommendation for mercy, she was hanged. Tilford's case also shows a systemic disadvantage for those who could not afford adequate legal representation.[140]

As the first women to be hanged in Ontario in 62 years, there was an intense public sadness about the whole affair. On December, 18, 1935, a report in the *A.M. Journal* titled "Killer of Husband is Hanged Today," described the somber tone of the day:

> …A small crowd of curious citizens gathered outside the high walls of the courtyard shortly before the lights went on inside. It was broken up by several policemen who kept citizens on the move. An hour before the execution, the 56-year-old woman, thrice widowed and mother of nine children, four of whom are living, was in a state of collapse in her cell.

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[139] Tilford (1935); trial transcripts, 1024.

[140] For a more thorough examination of the history of legal aid in Canada see John Honsberger, 'The Ontario Legal Aid Plan,' *McGill Law Journal* 15:3, 436; and Dieter Hoehne, *Legal Aid in Canada* (Queenston 1989).

> She was able, however, to walk to the scaffold. Snow was falling as she slowly entered the courtyard.

Judicial negotiations of mind-state and criminal responsibility systemically legitimized and reaffirmed popular theories about mental deficiency and human nature. Medical men, legal officials and lay witnesses offered opinions about numerous borderline states of mind which were clearly classified as psychiatric disorders, but fell shy of fully negating responsibility. Consider for instance, the case of William Monchuk (1938), charged with murdering his three neighbours with an axe. Separate trials were held for the three victims; Mr. Seabright, who had been in constant dispute with the defendant over property boundaries, Mrs. Seabright and their daughter. The defence in each case was provocation.

At the trial for the murder of Mrs. Seabright, the judge did not permit defence counsel to introduce evidence regarding the specific mental effects of provocation on Monchuk's ability to form intent because it was technically Mr. Seabright, and not his wife, who presumably provoked the defendant. The judge claimed "that arguing the defendant was in a state of provocation in Mrs. Seabright's case would legally constitute a defence of insanity.[141] However, the judge did permit defence counsel, in the absence of the jury, to submit "for the purpose of the record" that all three murders were committed while the defendant was in a state of provocation. He further suggested, perhaps in anticipation of an appeal, that it should be for the jury to decide "whether an ordinary, reasonable man would, in their opinion, regain his power of self-control" after killing his antagonist, Mr. Seabright, in order to from the intent to kill the wife and

[141] Monchuk (1938), NAC; judge's charge to the jury, 321.

daughter. The trial judge agreed that perhaps Monchuk was not in a reasoning state of mind at the time he "lost total control" and began wielding his axe, but stuck by his direction to the jury that the proposed defence of provocation in the cases of Mrs. Seabright and the daughter was not legally sound. The strict application of the law of provocation seen in this case is was not typical of other cases where provocation was entered as a defence. For instance, in Chapter Five, I show that in cases of domestic murder, the application of provocation law was quite liberal, where unhealthy domestic situations were seen as generally and logically provoking.

In Monchuk's case, the question of mind-state related to provocation was never seriously considered at the trail level and he was found guilty on all three charges of murder. However, the point made by defence counsel, "for the record," regarding the nature of provocation subsequently became the primary line of inquiry and the driving issue of the appeal process. After the trial, the Attorney General independently requested the defendant's "mental background" be assessed. Monchuk's mental capacity was subsequently diagnosed as generally "unbalanced" and the doctors' reports included term such as "loss of control," "bad temperament" and "uncontrolled passions." None of the medical men who examined Monchuk would verify he was legally insane, but acknowledged the relevance of the mental effects of being provoked in their assessments of criminal responsibility.

If Monchuk's trial had taken place after 1962, when degrees of murder were introduced in Canada, his charge likely would have been classified as non-capital murder, which did not carry a mandatory death sentence. Also, as the appeal decision in this case indicates, a better argument regarding provocation and a reduced charge to manslaughter

would have been made. Since there was no doubt as to whether or not Monchuk caused the death of his three neighbours, and insanity was not considered a viable defence, the jury's decision on all three charges was guilty. However, the Supreme Court, on a series of appeals, reversed the three murder convictions and ordered Monchuk retried on three charges of manslaughter. His new defence counsel for the appeal process, J. C. McRuer, a prominent Toronto lawyer at that time, argued the defendant did indeed suffered a significant mental breakdown as a result of being provoked by Mr. Seabright to the extent that all three murders were caused by the same mental break.[142] Following the Court's decision to reduce the three murder charges to manslaughter, McRuer made the following statement to the press:

> This man Manchuk [sic] has undergone the agony of three murder trials … He has been months in the death cell. All arise from the same outburst of mind. We can't allow the process of criminal law to be a tortuous process that outrages our sense of humanity.[143]

While McRuer presented the defendant as an unfortunate victim of external forces and the judicial system, other accounts of Monchuk's behaviour linked evidence of situational provocation to his natural tendency as a "high strung character" to be easily provoked. For example, in a letter to the Chief Remissions Officer, Monchuk's original

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[142] According to s. 261 of the *Criminal Code*, the defence of provocation could justify a reduction of a charge from murder to manslaughter, but only if the victim was the one who caused the provocation. The provocation defence was easily accepted by the appeal court, and the public, for the killing of Mr. John Seabright, Monchuk's rival neighbour. However, it was debated whether or not he was so provoked by his dispute with Mr. Seabright that it also justified a manslaughter charge for the killing of Seabright's wife and daughter.

[143] Monchuk (1938); McRuer's comments appeared in an unpublished article entitled 'Conclude Hearing Death Appeal' dated June 15, 1938. Note also that there were various spellings of Monchuk's name, including Manchuck and Munchuk. The most frequent spelling appears to be "Monchuk."

defence lawyer, who also worked with Mr. McRuer on the appeal, explained his client's "illogical" and "unbalanced" state of mind:

> [M]y experience with Monchuk has been that he is completely irresponsible in any discussion of this case … I do feel that he is completely irrational on this topic and I am so impressed with that view that I would be concerned about accepting instructions from him without some such examination by a qualified psychiatrist…Monchuk is, of course normally a very high strung character and the long course of the dispute over the line fence can readily be understood to have stuck a highly responsive cord in his sentimental make-up.[144]

Just as insanity law reflected an Anglo interpretation of mental disease, other mind-states such as provocation, intended to diminish individual responsibility, were also strongly influence by culture and class biases. In the cases of Tilford and Monchuk, we can also see that without the formal structure of insanity law in place, a wider range of interpretations was possible, and there were fewer restrictions on the nature of evidence that could be introduced.

The link between human nature and human behaviour was constantly (re)negotiated and (re)inforced by legal officials who routinely articulated their arguments, opinions and judgements regarding the state of a defendant's mind using popular versions of scientific/psychiatric concepts. The legal promotion of psychiatric discourse throughout capital case deliberations is particularly interesting since legal authorities rarely took the courtroom testimony of a psychiatric witness at face value. Cases examined in this chapter further support the argument I made in Chapter Two, that although judges often formally rejected the opinions of experts, they indirectly absorbed

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[144] *Ibid*. See letter addressed to M. F. Gallagher, dated May 14, 1938, signed J.J. Bench, K. C.

and reiterated the *premise* of what experts said about human nature in their interpretations of a case and in their interpretations of the law.

Evaluations of criminal responsibility at various stages of the judicial process, and beyond the insanity defence, in turn, shaped the way in which lawyers, judges and juries interpreted the specific meanings of concepts such as "disease of the mind" and "imbecility" in the Rules of insanity. In the next section of this chapter, I examine this reciprocal process by considering how decisions about a defendant's "character" influenced official evaluations about mind-state, intent and the applicability of the insanity defence.

"MAD-MEN" AND THE "IDEALS OF BRITISH CITIZENSHIP": THE MAKING OF CRIMINAL TYPES AND CHARACTERS

According to legal doctrine, a defendant's "character" was not relevant in the trying of a criminal case. The 1936 edition of *A Digest of the Law of Evidence* by Sir James Fitzjames Stephen, a standard legal text in England, the United States and Canada, stipulated that "generally," an individual's "character is deemed to be irrelevant" in courts of law. However, in a chapter entitled, "Character, When deemed to be Relevant and when Not," Article 57 provided an escape from the "general" rule regarding character by restating its relevance as follows:

> In criminal cases, the fact that the person accused has a *good* character is deemed to be relevant; but the fact that he has a *bad* character is deemed to be irrelevant, *unless it is itself a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible.* (Italics added)[145]

[145] James Fitzjames Stephen, *A Digest of the Law of Evidence* (1936), Article 56.

Therefore, evidence regarding the character of a defendant was, in practice, legally relevant and admissible so long as defence counsel raised the issue – which they usually did in cases of murder.

"Character" was defined in British common law as an individual's "reputation," *not* "disposition." However, the fictitious distinction between disposition, an inborn characteristic, and reputation, a socially perceived characteristic, was contradicted in the doctrinal requirement that evidence regarding character could not be given "of particular acts by which reputation *or* disposition is shown."[146] In practice, the legal guidelines set out for dealing with the issue of "character" provided no real evidentiary limitations in the courtroom or during commutation decisions. Given the extraordinary attention paid to character assessments in capital cases, the rules seem rarely to have been followed. In Canadian murder trials, "disposition" was not distinct from "reputation" and evidence of "bad character" was rarely stifled or legally restricted in any meaningful way.

A male or female defendant's reputation and disposition was consistently measured according to the masculine, British-Anglo ideal of what it meant to be a good citizen. British "character" was central to the adjudication of responsibility in Canada; symbolizing the optimum standard against which women and men before the law were held, as well as the social positions judges, juries and experts supposedly represented. Although psychiatrists, and even lawyers, often complained about the quality of jurors, judges routinely appealed to jury members, as men of a respectable class and character, to apply their common wisdom and reasoning power to their duties as fact-finders and

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[146] *Ibid*., Article 59 on the "Meaning of Character," 77.

decision-makers. For instance, at the close of James McGrath's trial in 1931, the judge empathized with the jury in their difficult task to decide the fate of a fellow British man, who was charged with stabbing his wife 25 times:

> No doubt, gentlemen, you are full of sympathy for this unfortunate man. We all are. There is no question about it. We sympathize with him in the fact that he got himself into this position. But we cannot be governed – we must not be governed by sympathy … You may return to the jury box with a verdict of "Guilty" with tears running down your cheeks, your hearts filled with pity, but you have sworn to do your duty … Do not again I say, be influenced by sympathy. That element is strong in every breast, but the jury box is no place for it. With pity in our hearts and our souls filled with anguish we can elate our manhood by doing a duty imposed upon us by our ideals of British citizenship.[147]

The ideals of British citizenship, and masculine Anglo character, formed the essence of responsibility discourses in Canada and helped give meaning to the language of both law and science on the subject of criminality.

Of the seven British-Anglo men in my sample of convicted offenders, six entered a formal plea of insanity, as well as three of the four defendants (two men, one women) classified as "Indian." However, as I will discuss in Chapter Four, there was a qualitative difference between the arguments/evidence for insanity/mental deficiency in the trials of British-Anglo defendants and the trials of defendants deemed racially inferior. For example, in cases of Aboriginal men, an insanity plea was often introduced by legal counsel, not as a *defence*, but as a judicious means of explaining, and confirming, the presumed 'natural' violent tendencies of "Indians." Conversely, in trials of British men, insanity was argued by counsel more in the traditional style one would expect of a legal defence. Even though their insanity defences failed in the legal sense, British men who

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[147] James McGrath (1931), NAC; charge to jury, 10-11.

pleaded insanity to a charge of murder were not seen as manifesting an innate wildness which *resembled* the Anglo-Christian image of madness; rather, they tended to be constructed in and out of the courtroom as *real* "mad-men."

The over-representation of convicted British-Anglo and Aboriginal defendants who formally pleaded insanity, contrasts with the relatively few number of formal insanity defences in cases involving European defendants – only four of the 24 represented in this sample. Similarly, only one of nine condemned French Canadians entered a defense of insanity. However, since nearly all individuals sentenced to death for murder in Canada were poor, most simply could not afford the cost on effective representation in an insanity trial. These general trends in the desperate representation of the insanity defence among convicted offenders may not prove to be statistically meaningful, but reflect a number of complex racialized processes which were inculcated in medical/legal evaluations of responsibility, mental deficiency and character.

The artificial tying-up of racial inferiority/superiority with mental capacity had serious implications when it came to interpreting insanity law. Although the M'Naghten Rules included provisions for circumstances where a defendant suffered "natural imbecility" as well as a "disease of the mind,"[148] the medical-legal concept of *disease*, as an anomalous state, was often neutralized during the trial process by presumptions about *natural* mental degeneracy. Trial transcripts suggest a formal insanity defence was likely to be entered if the defendant's violent behaviour was deemed *unnatural* for their

[148] *Criminal Code of Canada* (1955); S. 16 (2), previously S. 19 (1) … a person is insane when he is in a state of natural imbecility or has a disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that the act was wrong."

prescribed class and character type; and irrational violence was not considered by legal authorities to be a natural trait of British men of good class and character.

British-Anglo assumptions about class, race and gender shaped interpretations of human nature and criminality in quite obvious ways, but also shaped the more subtle ways in which responsibility was negotiated. During the trial of Sarah Jackson (1920), a thirty-five-year-old woman charged with shooting her husband, Dr. Loggie, a prominent psychiatrist, testified that Jackson was,

> a woman of low moral type, of distinctly animal nature, a woman of uncontrolled passions and sexual nature … as well … she had animal instincts, and I would deduce … that she might be a woman who in stress of circumstances … might be governed by unreasoning fear of an animal kind. [149]

While the expert's blatantly sexist testimony may have appeared scientific and therefore objective to the jury, the subtext of his diagnosis, which was revealed in letters written after the trial, was that her weak-minded proclivities developed from living in the "North Country," while her husband was off hunting for weeks at a time leaving her alone in the company, and under the influence, of local "half-breeds." The presumption here was that the degenerative effects of "race" were not just inherited through blood, but also through association. Social and political preoccupations with racial borders and blood purity in Canada during this period were cultivated through the practices of law and psychiatry and further nurtured through efforts to maintain the racial quality and dominance of British citizenship.

The representation of Sarah Jackson as a white woman who associated with "half-breeds," or William Monchuk as a "high strung" man who lost control and killed his

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[149] Sarah Jackson (1920), NAC; Dr. Loggie's testimony in the trial transcripts, 216-218.

neighbours, show how "character" was legally constituted according to a number of interrelated factors which then influenced the way responsibility and mind-state was understood. The legal constitution of character *types* according to the variable significance placed on nationality, gender, occupation, race, sexual and domestic practices, reputation or predisposition for drinking/vices/swearing, temperament, appearance, religion and/or political affiliation (to list a few), provided flexibility in the way responsibility was evaluated and defined from one case to the next.

For instance, terms such as "passion" and "control" incited particular meanings in the characterizations of particular "types" of defendants. Returning for a moment to the case of James McGrath (1935), the man charged with stabbing his wife 25 times, the trial judge in this case flatly rejected the formal insanity defense entered by the defendant's counsel and advised the jury to do the same. The judge did not, however, entirely discard the psychiatric expert's opinion that the accused was over-taken by "extreme passion" to the point where his behaviour was like that of a wild animal. In his charge to the jury, he explained that "extreme passion" did not constitute insanity in this case, because "men must control their passions."[150]

The idea of losing control of one's passions was a predominant theme of the Canadian murder trial during this period. Passion, if unchecked, could lead to all sorts of nasty and socially undesirable consequences. Deeply rooted in Anglo-Christian philosophy, passion was seen as a dangerous impetus for unreason and madness. Joel Eigen (1995, 77) shows in his analysis of British medical-legal history, that when reason was "dethroned" and "the will no longer restrained by judgment," the sufferer was

[150] James McGrath (1931); judge's charge.

considered in a "common sense philosophy" to be "driven mad by his or her passions." Passion, Eigen explains, "clearly had autonomous power to produce madness."[151] However, the precise dangers and nature of passion, and its relationship to madness, were interpreted largely through narratives of character. Not all men were expected to be in control of their passions – but respectable white men were – while women, by-and-large, were presumed to be naturally passionate and unreasonable to some extent. Recall, for example, the expert witness at Sarah Jackson's trial who testified the defendant was "a woman of uncontrolled passions" and "governed by unreasoning fear of an animal kind."[152] "Wild animal" imagery continued to be fairly common in early-20th century theories of insanity even though the "wild beast" test had long been put aside in the mid-19th century as an unsophisticated and out-dated legal measure of criminal responsibility. However, the symbol of unbridled wildness was often introduced during the trial process and variably infused with culturally/politically generated sexism and racism.

During the trial of George Dvernichuk,[153] a Ukrainian immigrant charged with killing his sister-in-law's family of five in 1930, two asylum doctors reported, after observing the defendant in custody, that the apparent lack of motive for Dvernichuk's extreme behaviour indicated some form of mental derangement. The medical experts described his clinical symptoms of sudden "frenzy" and "hysteria," while legal officials highlighted the defendant's questionable character and racial predisposition for bad "temperament" and social dissent. The police report, for example, noted the accused,

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[151] See also, M. Foucault, *Madness and Civilization*.

[152] *Supra.*

[153] George Dvernichuk (1930).

"like all members of his race" demonstrated communistic tendencies and, as a "typical foreigner," maintained a poor work ethic. Unlike in the case of James McGrath, extreme "passion" and unreason in Dvernichuk's case was not interpreted as behaviour necessarily out of character or unnatural. He was perceived as an unreasoning "kind" rather than simply one who behaved unreasonably; similar to Sarah Jackson or William Monchuk. So while there were superficial similarities between the trials of McGrath and Dvernichuk – insanity was rejected as a viable defense and both were hanged – the legal understanding of the particular mental effects of an extreme emotional break was quite different in each. McGrath's state of passion, or loss of control, was interpreted as his failure to uphold the standards of Anglo manhood, while Dvernichuk's loss of control (re)confirmed elitist presumptions about the naturally crude behaviour of South-European immigrants. Both were deemed bad characters, but of quite different *types*. Such differences in the way particular crimes and individuals have been historically represented, strongly attests to the importance of qualitative approaches to case analysis.

CONCLUSION

Early Canadian murder trials provide an important analytical site where we can decipher the ways in which competing criminological discourses intersected, merged and synthesized to define the responsible subject. Therefore, judicial discussions about insanity extended well beyond the doctrinal requirements of the insanity defence and incorporated fundamental concerns about madness, character, morality and British justice. During the 1920s, 30s and 40s,"insanity" was a plastic concept with contingent meanings and applications. As a formal medical-legal category, insanity was used to

defend certain behaviours and certain types of individuals (where the legal acknowledgement of mental deficiency did not necessarily mitigate criminal responsibility, ensure psychiatric treatment or prevent an execution). As a social idea, insanity was used to *explain* and order social disorder, which, in the realm of common sense and everyday experience, defied reason. In the courtroom, ideas about insanity mixed to indeed produce, what Eigen described as "something rather more combustible that the sum of its two volatile parts." (1995, 6)

A tremendous amount of cross-over existed between insanity defence discourse and other legal and non-legal categories introduced to established mental deficiency, and between common sense and expertise. In cases where mind-state was raised as an issue, the interpretation of the law, and the nature of evidence admitted to establish mental deficiency, fluctuated according to the decided characteristics of each case and each defendant. The routine, and somewhat less restricted, negotiations of criminal responsibility through more flexible legal categories, such as passion and provocation (and as we'll see in the next chapters, self-defence), embodied a strict Anglo perspective on human difference, which in turn, provided the language to articulate the meanings of criminal responsibility in each case.

In the broader social-cultural context, understandings of mental capacity and criminal responsibility stretched still further beyond the limited interpretive boundaries of law and science. "Insanity" was more than a legal category or a medical diagnosis; it was also a common sense discourse through which "monstrous" acts and "dangerous" citizens

were explained, and medical-legal discourse was constituted. In much the same way the legal qualification of ‘the expert’ and the value of his ‘expertise’ was determined on a trial by trial basis, the boundaries of mental capacity and criminal responsibility were (re)negotiated and defined within the particular circumstances of each case and at each stage of the judicial process.

Theoretically, the law’s only concern regarding insanity was whether or not a disease of the mind caused the defendant to commit a criminal act. Nevertheless, evidence to establish insanity or diminished capacity was consumed with just those sorts of how and why questions. Lawyers and judges regularly probed psychiatric witnesses to elaborate on scientific findings and psychiatric theories about the inner workings of human motive and the criminal mind. Despite underlying tensions between medical and legal models of responsibility, and fact that judges often challenged and rejected the authority and validity of expert opinion evidence, it appears they certainly wanted to hear what doctors had to say. I explore this process in the next two chapters where I consider how medical-legal representations of responsibility were articulated through discourses of race, class and gender hierarchies.

Chapter Four

THE RACIALIZATION OF CRIMINAL RESPONSIBILITY

> There is in the world a hierarchy of races … [Some] will direct and rule the others, and the lower work of the world will tend in the long run to be done by the lower breeds of men. This much we of the ruling colour will no doubt accept as obvious.[154]

I have shown at various points throughout this dissertation so far, the general preoccupation in early 20th century Canada with maintaining British authority and securing national and biological health through techniques aimed at identifying the weak and defective classes. In this chapter I consider specifically the ways in which common sense ideas about race difference were systematically incorporated into the language of legal and psychiatric assessments of mental capacity, character and criminal responsibility. Expert and common sense discourses about racial degeneracy are well-represented in the documentary texts of Canadian capital case files. While Canadian legal historians have demonstrated that the meanings of "race" and representations of "racism" fluctuated over time and within specific social and institutional contexts (Walker 1997; Backhouse 1999), case file evidence shows, nevertheless, that racialized constructs of character, class and gender behaviour were consistently deployed to socially, legally and medically designate individuals on trial for murder.

As the Capital Case File Summary in *Appendix A* indicates, 86.5% of the defendants represented in this analysis were assigned an identification of race, ethnicity and/or nationality by court officials. Legal references to "ethnicity" "nationality" and

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[154] Expressed in 1900 by Gilbert Murray, a prominent English scholar; as quoted in James Walker, *"Race," Rights and the Law in the Supreme Court of Canada* (Waterloo 1997), 12.

"origin" seemed to infer the same hierarchical meanings as more explicit racial classifications such as "Coloured" and "Indian." Each capital murder case file contains a standard Department of Justice document which provided the Chief Remissions Officer and the Minister of Justice summary information about the case and the accused. It was the responsibility of jail officials to fill out the Department forms which included a list of questions regarding the defendant's age, place of birth, nationality of mother and father, religion, literacy and occupation. As *Table 1* shows, overwhelmingly represented in this collection of individuals convicted for murder were people of South-central and Eastern European descent – particularly from the Ukraine.

%	Official Racial Identification
35.0	South-Central/Eastern European (Galician, Russian, Ukrainian, Italian, Polish and German)
13.5	Great Britain (English, Irish, Scottish)
13.5	French Canadian
7.5	Black ("Coloured" "Negro" "American Negro")
7.5	American
6.0	Aboriginal ("Indian" "Half-Breed")
4.5	Canadian
1.5	Chinese
13.5	Unspecified

Table 1: Racial identification of individuals convicted for murder assigned by police and/or court officials. Some individuals received more than one designation.

Several non-Anglo defendants were legally classified by the determined race or nationality of their parents even if they themselves were born in Canada. As Avio (1988,

340) has shown, and my sample confirms, racial/ethnic identification seemed to generally influence the likelihood of execution,[155] but according to several different logics.

The question I address in this chapter is not whether race was a issue in the deliberation of capital cases; clearly it was. Several Canadian scholars – including, Robert Menzies, Sarah Carter, Elizabeth Vibert, Tina Loo, Carolyn Strange, Renisa Mawani, John McLaren, James Walker and Constance Backhouse – have provided historical evidence of the interconnectedness of nation-building, racism and criminal law practices. I will examine, instead, how processes of racialization differed from one case to the next, and how race did, and did not, come into play in efforts to establish criminal responsibility. In the same way interpretations of degeneracy, mental fitness and expertise were determined according to the context in which they were understood, the meanings of "race," and racial designations, also differed from case to case.

In the previous chapters, I demonstrated how introducing evidence of mental defects and aberrations without entering a formal insanity plea, effectively broadened the range of evidence admitted at the trial and post-trial stages of the judicial process, which often included expert and lay opinion evidence on the relationship between race, criminality and degeneracy, or feeblemindedness. The racialization of criminological discourses provided particular meanings to the legal concept of free will – some people's wills being freer than others – and provided the language to articulate perceived natural standards of criminal responsibility in Canadian murder cases. Common sense-cum-expert theories about racial difference and hierarchy were inherent in the ideas of mental

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[155] For instance, Avio shows that being Native Canadian increased the odds of execution by a factor of 6.1 over the rate found for Anglo-Canadians. See *Table 1*, "Execution Risk Disparities" in 'Capital Punishment in Canada: Statistical Evidence and Constitutional Issues,' (1988), 340.

deficiency and, in turn, (re)affirmed through legal procedures of establishing criminal responsibility. "Race" was not simply a *factor* in legal decisions about a defendant's mind-state, rather, racist ideology helped *define* legal, popular and psychiatric representations of normalcy and degeneracy.

In his book, *"Race," Rights and the Law in the Supreme Court of Canada*, James Walker (1997) describes changes in the "common sense" meaning of "race" in Canada up to the 1950s. Walker explains that the concept of race, as a measurable natural/scientific quality which justified discrimination and white domination during the 1920s and 30s, lost its "scientific validity" by the 1940s and 50s. In a word, it became unfashionable to be overtly racist. "Racism," according to Walker, came to be understood as a cultivated attitude rather than a natural occurrence, and in the view of the populous, the character of the mind was no longer determined by biology/race. (p. 19-21) But, as Constance Backhouse points out, and this research to some extent confirms, changes in the "new thinking" about race and racism during this period were "more semantic than substantive." (1999, 6-12)

Capital case file evidence clearly shows that racism did not disappear from legal discourse. Similarly, medical discourse on standards of mental capacity certainly continued throughout the first half of the 20th-century to draw scientific validity from 'known' theories about racial difference. However, there also occurred a discernable shift in what counted as knowledge about race during this period. In particular, during the 1940s, language around citizenship, national identity and mental hygiene tended to repackaged essentialist ideas about race in a way that only appeared "new."

The meaning of race, and its relationship to the meanings of mental capacity, degeneracy and responsibility is not easily subject to general historical description. Racial designations were not evenly applied, nor were they placidly accepted; just as theories of human nature and mental illness were continually (re)defined and contested. Racism was more than the social/cultural product of a specific time, place and space, which interacted with other contextual constructs such as gender, sexuality or responsibility. These discursive concepts were interdependent and cannot be separated from each other or the larger cultural and political processes by which they were formed and informed. By examining the cases of racialized defendants against the broader systems of racism in Canada, this analysis attempts to show how common sense thinking about race was articulated in law, and again, to show how single historical events can provide meaning to historical contexts. In particular, how knowledge, or what counted as knowledge about race, shifted to reflect emerging national concerns about war and social purity.

DIFFERENTIAL MEANINGS OF "RACE" IN LEGAL DECISION-MAKING

Within a general climate of social, political and economic insecurity – fueled by dominant ideas of eugenics, mental moral hygiene and "eurocentric xenophobia" (Menzies, forthcoming) – the origin, nationality and/or racial identity of individuals on trial for murder was deemed meaningful. The specific social, political and economic "problem" of feeblemindedness in early Canada was outlined in a 1936 report titled "A Brief for Sterilization of the Feeble-Minded." The report was prepared by Dr. William Hutton, Medical Officer of Health in Brantford, Ontario, for the Association of Ontario

Mayors Annual Conference. In his analysis of the situation, Dr. Hutton characterized the feebleminded as;

> … people with the capacity and abilities of children … [T]hey appear to the casual observer to be persons of usual capacity, but they require supervision, for they suffer from arrested development of the mind, and they are incapable of competing on equal terms with their fellows … In times of economic crisis they are among the first to require public assistance. They often live in conditions of extreme squalor. Indeed, persistent unsanitary surroundings are an evidence of the presence of the feeble-minded … We misunderstand them to our own undoing, and fail to recognize that it is to their benefit as much as to our own for the intelligent electorate to control their reproduction.

Although "race" was not mentioned in Dr. Hutton's report, it did not take much imagination in the minds of Canada's "intelligent electorate" to associate the identification of the weaker "classes" with the presumed characteristics of the weaker "races" in order to justify regulatory initiatives in the name of " imperial responsibility." (Walker 1997, 30) In the following three sections, I chronicle the variable meanings of "race" in representations of criminality and mind-state through an analysis of three racialized categories; the "Indian," the "Coloured," and the "Immigrant." In each case, race played out differently. However, through the adjudication of mental capacity and criminal responsibility in each case, white, male supremacy was routinely affirmed.

"Indian Hanged"

In Chapter One, I began the process of uncovering the way in which theories about degeneracy and feeblemindedness were infused with conjectures of race, citizenship and civility. Terms used to characterize the presumed "savagery" of Aboriginal peoples and their way of life - as uncivilized, immature, ignorant, illiterate,

unclean and unsettled - were also recognized signs of degeneration and mental deficiency. Those identified as "Indian" or "Half-breed" were viewed in and out of the criminal justice system not as individuals, but as representatives of a racial collective. Anglo Judges, lawyers and juries had a common sense notion about what it meant to be "Indian" and understood certain behaviours to be stock characteristics or "customs" of the "Indian race."[156] This can be seen the trial of Albert LeBeaux (1921), an "Esclave Indian" charged for the murder of his wife and infant son on a reserve in Fort Providence, North West Territories.

While trying to establish the limits of normal behaviour between married couples, defence counsel asked Crown witness Reverend Father Le Guen, a priest working at a nearby Mission, if it was generally "an uncommon thing for a husband to beat his wife?" The witness declared it was "rather unusual" and only "sometimes seen."[157] LeBeaux's lawyer hoped to show that past episodes of domestic violence were therefore the result of an abnormal mind. However, in his re-examination of the same witness, the Crown began his line of questioning with a brief and legally unsubstantiated reference to "[t]he habit of the Esclave Indians to beat their wives…"[158] This casual observation by the Crown regarding the domestic life of Indian couples had nothing to do with the actual question

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[156] For a thorough examination of the construction of "Indian" identity in early Canadian society, see generally works by Tina Loo; particularly 'Dan Cranmer's Potlatch: Law as Coersion, Symbol, and Rhetoric in British Columbia, 1884-1951,' *Canadian Historical Review* LXXIII: 2, 1992; 'The Road from Bute Inlet: Crime and Colonial Identity in British Columbia' in Girard and Phillips (eds.), *Essays in the History of Canadian Law* (Toronto 1990); 'Native Culture and the Modification of Capital Punishment in Nineteenth-Century British Columbia' in Strange (ed.)., *Qualities of Mercy* (Toronto 1997); see also works by Sarah Carter, in particular *Aboriginal People and Colonizers of Western Canada to 1900* (Toronto 1999).

[157] Albert LeBeaux (1921); see trial transcript, 12.

[158] *Ibid*., 15.

posed to the witness, which was to establish how long he had lived in the area and how long he had known the defendant.

There was no evidence offered to substantiate the Crown's spontaneous claim regarding the nature of conjugal relationships among the Esclave; and the 'fact' was never contested. The practice of wife-beating was easily taken up as "uncommon" within civilized communities, yet "customary" within native Indian communities. Similarly, when defense counsel suggested it was LeBeaux's wife who killed their baby and then committing suicide, two witnesses, the Reverend Father, and the doctor who examined the bodies, were asked by the Crown if they "ever heard of Indians, either male or female, committing suicide?" Both witness assured the court that to their knowledge suicide was not a known Indian custom. [159]

The "low mentality" and "uncontrolled passions" of native Indians were rarely issues for lengthy legal debate – these were understood by Canadian legal officials to be natural characteristics. For instance, in his report to the Secretary of State, the trial judge recommended mercy solely on the grounds of LeBeaux's naturally diminished mental capacity. He concluded:

> Considering the low mentality of the Accused, (an ignorant Esclave Indian), who, except for violent fits of temper at different times, has otherwise shewn good behaviour, I think that his sentence should be commuted to life in prison [sic].[160]

Case file evidence suggests the standard of responsibility for Indian defendants was consistently low, and not something that needed to be determined legally because it was determined by nature. There was no direct discussion regarding LeBeaux's presumed

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[159] *Ibid*., 15 and 43.

diminished mental capacity during the trial; it was simply introduced by the judge in his final report as a matter of fact and common sense. This sentiment was further supported in a letter to the Minister of Justice from a local bishop, who, from his "own personal knowledge," was convinced LeBeaux should not be hanged because he obviously suffered from a "violent passion" which caused him to lose control.[161] The Remissions Officer, who first received the letter, disagreed with the bishop, however, and directed the Minister in his summary report that since the judge's recommendation for mercy was not "supported by any sufficient reason," the law should be allowed to take its course.[162]

Following the trial, the focus in LeBeaux's case shifted from the issue of individual responsibility, to an intense concern for the public and political impression that would result if an Indian from a particularly contentious region of Western Canada was hanged at that moment. For example, in response to allegations that the murdered infant was actually the child of a missionary who seduced LeBeaux's wife, the jury prepared and read a statement in court before the delivery of their guilty verdict:

> We as a Jury wish to express our condemnation of immorality among the White men and Indians and are desirous of seeing the Indians given to understand that any such cases will be investigated by the Crown. This comes from a desire to see a high standard of morals maintained in opening this new country.[163]

After the trial, Crown counsel also expressed in a letter to the Minister the undesirable political impression a commuted sentence would leave in the Northern community.

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[160] *Ibid*., see judges report, 5.

[161] *Ibid*., see the summary report, 9.

[162] *Ibid*., 10.

[163] *Ibid*., 6,

Reaffirming the authority and role of British law and the privilege of white men in Western Canada, he reported:

> The two Mounted Police Officers and all the white-men I have talked to think it will have a bad effect, both among the Indians and Whites, if this murderer is not executed … I cannot conceive of a case less deserving of commutation of sentence than the present one – and I am convinced that a very bad impression of Canadian law and justice in this far-north country would result if the law is not allowed to take its course.[164]

In the end, despite recommendations for mercy from both the judge and jury, the law was allowed to take its course and Albert LeBeaux was executed. Surely an impression was made.

The meaning of race and racial designation was so pervasive during this period that one only needed to be associated with a member of an undesirable "breed" in order to be affected/infected by their degenerative nature. When Sarah Jackson pleaded self-defence following the shooting of her husband in 1920, the trial judge put aside evidence of previous domestic violence as well as expert testimony about her "uncontrolled passions, sexual nature, animal instincts and low moral type," and urged the jury to consider the more likely motive that Jackson, a white woman, simply wished to get rid of her husband, also white, "in order to be free to live with her paramour, an Indian."[165] Common knowledge regarding the psychological affects of Jackson's illicit association with an "Indian" were expressed in various letters from the public in support of commutation. In one letter requesting "great leniency," Mr. H. C. Reynolds, Esq., expressed his outrage at Jackson's husband for subjecting his white wife to such dangerous and wild living conditions. The concerned citizen theorized that;

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[164] *Ibid*., 9.

> … [l]eaving her alone surrounded by Halfbreeds without the necessities of life her mental condition deterriated [sic] and she no doubt became helpless prey to any person and no doubt was largely influenced by them… Here she was surrounded by men of low moral type, in the wilds of the West far removed from human civilization threatened by an immoral Husband. What human life could endure such a strain no less a nervous woman impelled and swayed [by] any isolated suggestion which might arise from any quarter…"[166]

The image of the "wild" North and the degenerative influence of the "wilderness" has been a popular narrative in Canadian history and story-telling culture, and persisted well beyond the period covered by this study. For instance, a novelette entitled "In the Wilderness" published in a popular magazine in 1962, told of the trials and peril of a "devastatingly pretty" young, white school teacher working at a government school on a Indian reservation in the Canadian "North Country."[167] Although the teacher found pleasure in the shy, simple nature of the Indian children (feeling compelled to feed and clean them), she lived in constant fear and unrest in the foreboding wild. An element of danger loomed when the local Indian Agent warned her to lock her door and rumors began to stir about a stranger on the reservation. Then, one stormy night, when she forgot to lock the door, the stranger found her:

> The man stepped briskly into the room. I had to step back quickly to avoid his bumping into me… "You don't ask me in, I come anyway," he said softly. I was confused and terrified. I could see clearly, now, that he was an Indian. He was handsome, taller than most Indians. His hair was dark and crisply curling, unlike the straight hair of the Indian. His skin was deeply tanned and the cheek-bones were high but not markedly so. His eyes were a brilliant, burning blue! A blue-eyed Indian! But he was Indian; I'd lived here long enough to recognize the characteristics. Then I said what proved to be a very stupid thing. "You're Indian!" He stood

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[165] Sarah Jackson (1920); see remissions report, 2 and 12.

[166] *Ibid*., see letter from H.C. Reynolds, Esq.

[167] The story appeared in *True Romance* 74:1 (March, 1962), 36.

> staring at me for what seemed an eternity. He said solemnly, "My father white man, French-Canadian! My mother Indian!" His eyes burned into mine. I had made him angry![168]

Further into the story, we are told that the stranger is a half-breed named Pierre who had just been released from the Provincial Hospital for the insane where he was being treated for his "psychopathic tendencies" and " delusions about being a white man." On that frightful night, Pierre terrorized the teacher by asking her to dance and telling her that she was to be his. The young teacher fainted at the threatening prospect and Pierre ran off, soon to be recaptured and returned to the hospital.

Meanwhile, as the story goes, word got back to her fiancé, Jess, a law student, about her encounter with the strange Indian. Jess wrote his wife-to-be to express his deep disappointment over the fact that her "purity" had been soiled and to explain that they obviously could no longer be married:

> Our love had been so beautiful so pure. Jess wrote, a priceless thing! This awful thing that happened to me, and he was sure it had happened, was horrible, tragic! I'd been entirely blameless, he knew, but our love could never be the same again. Surely, I would understand? It was hard for him, too, he went on. He'd been working so hard to make a future for us and now this! [169]

While this fictitious tale is told in a fanciful and idealized way, it echoes the earlier stories from the archives and shows the resilience of popular knowledge regarding what supposedly happened to women, particularly white women, who lived in the wilderness, and in close proximity to "half-breeds."

The fact that Sarah Jackson lived and associated with "uncivilized men" of "low moral type" put her own character into disrepute and provided a platform for theories

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[168] *Ibid*., 84.

about her acquired degenerative state. Nellie McClung, suffragist and pro-sterilization activist in Alberta,[170] also wrote to the Minister about Sarah Jackson, whom she described as "a woman from the North country." McClung did not see Jackson's condition as a lost cause, however, arguing that despite her "low grade of intelligence" and "undeveloped mentality," it was possible, if her sentence was commuted, "that under proper discipline and influence she may repent of her evil deed and develop into a better citizen."[171]

Theories about racial inferiority and diminished responsibility were common knowledge among white officials, but so too was the symbolic affect judicial decisions had on Indian communities. The complexity of race discourse, simultaneously constituted as scientific, political and common sense, is well demonstrated in the 1944 case of Paul Abraham, a 24 year old "Half-breed" charged with the murder of his wife in Cherhill, Alberta.

In a scathing letter from the Secretary of Indian Affairs, written at the request of the Chief Remissions Officer, the circumstances of Abraham's crime and the question of his state of mind at the time were subsumed in a nationalistic account of the unstable, and uncivilized, "Indian situation" in Alberta. The Secretary wrote:

> [P]eople of mixed blood in northern Albert have predominately Indian characteristics, both physiologically and psychologically, and usually live the Indian mode of life … The murdered woman was the daughter of … the chief of a tribe of Chippewa Indians, numbering about 250, … who are of a primitive type and who present a special problem to this department.

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[169] *Ibid*., 86.

[170] See Nellie McClung, *The Stream Runs Fast: My Own Story* (Toronto 1945).

[171] Sarah Jackson (1920), see letter from Nellie L. McClung to C.J Doherty, Minister of Justice, Nov. 3, 1920.

> They are, in fact, the only group of Indians in Alberta who are not in treaty with the Government and who have no reserve …[172]

He went on to explain, from his experience in the untempered North-West parts of Alberta, that "Indians, perhaps more than others, are prone to repeat crimes of violence." He further drew the Remissions Officer's attention to a particularly important feature of the case; "the fact that the murdered woman was the wife of the accused." The Secretary reported that "out of 65 cases of homicide by Indians since 1928 recorded by this branch, the victim in 20 cases was the wife or common-law wife of the accused." He attributed this phenomenon of spousal murder to the "old aboriginal idea that the husband has power of life and death over his wife and can exercise it at his caprice." The Secretary claimed there was a need for "stern law enforcement" in order to "disabuse Indians, and those of Indian blood, of this vicious predilection."[173]

The fact that the Remissions Officer solicited a report from the Secretary of Indian Affairs is noteworthy, particularly since the information provided was then included in the remission report and used to shape the representation of Abraham's case to the Minister of Justice. While evidence does not suggest the soliciting of such reports was typical in capital cases, it shows the general authority of the Remissions Officer's 'expertise' through the process of selecting and omitting information put forward to adjudicate each case. The observations made in the Secretary's letter, and subsequently restated in the official summary report, were further supported by a report filed by the

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[172] Paul Abraham (1944); see letter dated Oct. 27, 1944, to Mr. Gallagher, signed T. R. L. MacInnes, Secretary.

[173] *Ibid.*

Commissioner of the RCMP. By the Commissioner's account, Abraham was "an illiterate" and "subject to violent moods." He deduced "from the evidence available" that;

> Abraham committed the murder during a violent fit of temper caused by what might be termed ordinary domestic friction. His illiteracy would no doubt have some bearing on the matter plus the mode of life followed by these people, it being not uncommon for Indians and half-breeds to beat their wives.[174]

Abraham's violent temper was recounted by several witnesses during and after the trial. Defence counsel called Dr. Randall McLean, Superintendent of the Provincial Mental Hospital at Ponoka, Alberta, to testify about evidence heard at trial and offer his opinion on Abraham's mental condition. Although Dr. McLean had not personally examined the defendant, he was confident, from expert evaluation of the lay evidence, there was "good reason" to believe Abraham suffered "mental abnormalities."[175] The medical expert described a number of possibilities, including, epilepsy, palsy, amnesia and delusion, which could account for the defendant's "impaired judgement." However, he was unwilling to support a full defence of insanity by testifying that at the time of the crime, Abraham did not appreciate what he was doing or know it was wrong – only that "epileptics are likely to be very bad tempered and have poor control of their tempers."[176] This shows again how definitions of mental abnormality echoed racial descriptives – since "Indians" were also presumed to have poor control over their tempers.

The scientific account of the defendant's behaviour was not seriously considered by fact-finders at any point during Abraham's trial. The doctor's testimony was not

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[174] *Ibid*., see letter dated Oct. 19, 1944, addressed to the Minister of Justice, signed by S. T. Wood, Commissioner.

[175] *Ibid*., see trial transcripts, Dr. McLean's testimony, 143.

[176] *Ibid*., 42.

revisited in the final charge to the jury where the trial judge dismissed insanity as a viable defence in this case. The Remissions Officer pushed the issue a little further, however, and requested that Dr. Harvey Clare, "who has acted as a psychiatrist for this Department for a great number of years,"[177] examine Abraham following his conviction. Dr. Clare subsequently reported that Abraham was "definitely not suffering from any mental impairment, and that it would be unreasonable to presume that his mind was not functioning normally when he committed the crime for which he now stands convicted."[178]

However, the most valued 'expert' on Paul Abraham's state of mind appeared to be his father who told authorities his son's mental state was normal and there was never anything wrong with his mind. In his letter, the Secretary of Indian Affairs illustrates the importance of this kind of lay knowledge in assessing certain standards of responsibility and interpreting violent behaviour when he conferred:

> There is nothing in our records to show that there was anything in the conduct of the murdered woman that could extenuate her husband's crime. On the other hand it appears that he was the aggressor in their quarrels and had threatened her on many occasions. His excuse, as reported by the police, that he was influenced by Indian medicine, was discounted by the Indian interpreter, and from my own knowledge I would say that there was nothing to it; his further excuse that he was of feeble mind was discounted by his own father.[179]

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[177] *Ibid*., see "MEMORANDUM FOR THE MINISTER: re: Paul Abraham – capital case – regarding choice of psychiatrist to examine and report," dated December 2, 1944.

[178] *Ibid*., see "MEMORANDUM FOR THE MINISTER: re: Paul Abraham," dated December 12, 1944, signed Dr. Harvey Clare. Harvey Clare provided post-trial reports for several cases in this study including, Debartoli (1925), Pasquale (1926), Carrier (1929), Johnston (1942), and Kisielewski (1943). In every case he reported the offender was legally sane.

[179] *Ibid*., see letter dated Oct. 27, 1944, to Mr. Gallagher, signed T. R. L. MacInnes, Secretary, p. 1-2.

The Remissions Officer, in his "Condensed Summary" of the case, did not offer a direct opinion on whether or not Abraham should be executed. However, the manner in which he organized and presented trial and post-trial evidence regarding mind-state in his report to the Minister, clearly suggested he did not object to the law taking its course in this case.

The use of the insanity defence in cases involving "Indian" and "Half-breed" defendants was often precarious. Evidence brought forward to establish past episodes of violence or irrational behaviour was frequently, and easily, countered with arguments suggesting such behaviours were not abnormal, but typical "Indian characteristics." Also, the issue of individual responsibility which pervaded the majority of capital cases, was, in cases involving Aboriginal defendants, often overshadowed by efforts to appease racial tensions and sedate political unrest. However, the strong political interest in using judicial actions to send the correct message to the correct people did not seem to penetrate the general public to quite the same degree. The news coverage of "Indian" trials was scarce in relation to the coverage of trials of other defendants. Perhaps this was because little needed to be said. When Paul Abraham was put to death, a tiny newspaper notice in small type briefly and poignantly announced, "Indian Hanged."[180]

The shift in common sense thinking about race described by Walker (1997) and his argument that by the 1940s, it became "unfassionable to be overtly racist," is not substantiated by historical evidence found in the cases files of those convicted for murder. The use of racial designations to justify British rule and white supremacy

[180] The full news clip reads; "Indian Hanged: Edmonton, Dec. 20. Paul Abraham, 28-year old. White Court, Alta, Indian, was hanged at Fort Saskatchewan Jail at 11:37 am today. He was convicted of the murder of his wife at Cherhill last July 18" (source unknown).

persisted well into the war and post-war periods where the scientific validation of racism continued to pervade the language and meaning of criminological knowledge. Although "race" did not exist as a legal category, and despite the law's militant efforts to perpetuate its image as non-discriminatory and objective, *race did matter* in the deliberation of capital murder cases.

When Mary Smith, a "Half-breed," was charged in 1935 with killing her husband, a British soldier, the judge pointed out the couple's racial differences on the first page of his report to the Minister of Justice. The deceased, he reported, "was a returned soldier and an Englishman by birth. The accused, *on the other hand*, was a native of the prairies and was what is known as a half-breed, having both Indian and French blood in her veins."[181] Likewise, in the case of Joseph Proulx, charged with the murder of a 15 year old girl in 1945, the Remissions Officer opened his summary report for the Minister by identifying "the prisoner" as a "French half-breed, 17 years of age" He added that Proulx was one of fourteen children and that "none of his family appears to be bright and their standard of education is described as poor."[182]

Racial designations and characterizations were typically placed within the first few lines of the remissions report, and set a powerful image against which the facts of the case were to be considered. In the case of Mary Smith, the Remissions Officer's identification of the defendant as a "Half-bread" and her husband as an "Englishman" was meaningful – it warned of the dangers and consequences of mixing blood in birth

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[181] Mary Smith (1935); see "Special Report of Chief Justice Brown for the Minister of Justice," 1 (emphasis added).

[182] Joseph Proulx (1945), NAC; see Condensed Summary, 1.

and in marriage. And in the case of Joseph Proulx, it reaffirmed the perceived natural relationship between racial and intellectual degeneracy.

"Unsuitable Examples"

The processes of racialization which characterized the adjudication of "Indian" cases, are quite different from those which emerge in cases of other racialized defendants. For instance, in cases where the defendant was simply identified as "Coloured" or "Negro," there did not seem to be the same concern for political avowal, or even for a precise identification of origin/nationality. For instance, Benito Pasquale (1926), was reported in three different court documents as "Costa Rican," "Porto Rican [sic]," and "a colored man from Jamaica." [183] However, he was officially identified in the remissions report, "from his appearance," as Costa Rican with a mix of "Indian and Negro blood, with the Negro strain predominating."[184] Despite Pasquale's ambiguous racial classification, the colour of his skin dictated a particular view of his behaviour and had a strong impact on the medical and legal assessment of his mind-state and natural culpability.

Pasquale was convicted in 1926 for the murder of a white nurse who tended him while in a B.C. hospital for rheumatism. He believed she had given him a poison pill that made him crazy, and when she came in to check on him, he slashed her throat from ear to ear with a razor. During the trial, three expert witnesses testified regarding the question of insanity; one found Pasquale sane, one found him insane, and one concluded he may or

[183] Benito Pasquale (1926), NAC.

may not be insane. Due to the indecisive nature of the medical evidence at trial, Dr. Harvey Clare was asked by the Minister of Justice to examine Pasquale following the trial.

Dr. Clare visited Pasquale on three occasions at the jail and found him, physically, to be "a very poor specimen of a human being." Besides having bad social manners, Dr. Clare reported the prisoner was:

> The lowest type of human being that I have ever examined for mental disease. Insanity is a change from the normal but I think this man is in his normal mental condition. It is very far removed from the normal of a native of our country but I think that he is a normal citizen in the place where he was born [Jamaica]. These people are ignorant, superstitious, childish, uneducated, revengeful and very impulsive … I do not think this man is insane at the present time and do not think we have any proof that he was really the victim of delusions or hallucinations when he committed the act.[185]

While medicine and law were one tools authorities used to manage those perceived to be socially "dangerous," legal officials did not seem to view the execution or commutation of a Black accused as a suitable example for *lessons* of the law in the same way Aboriginal accused were. For instance, when Louis Jones was convicted for the murder of his estranged wife in 1927, his lawyer wrote the following testimonial to the Chief Remissions Officer regarding Jones's character:

> I want you to take into consideration the general character of the half white.... they are usually people of very strong passions and feelings, possessing a good deal of the white mans vanity and pride, without the mental qualities to offset them. [186]

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[184] *Ibid*, see particularly police report, the summary report of the remissions officer, and the letter from Dr. Harvey Clare to the Remissions Branch dated June 11, 1926.

[185] *Ibid*., see letter from Dr. Clare, 1-2.

[186] Louis Jones (1927), NAC; see letter dated November 25, 1927, from A. W. Jones, K. C. and John F. Mahoney, M. P. P, titled "In re Louis Jones," 3-4.

And to establish the relative social and political insignificance of Jone's case, the lawyer further pointed out;

> There is no great public principle involved in this cases … at the moment there is hardly anybody in Halifax who would bother noticing the fact if the sentence were commuted to life imprisonment. So far as the public is concerned 'this is just another nigger'... to extend clemency to this man will have no effect on the public one way or anther; and if he is hanged it is all the same. He is not regarded as a suitable example at all.[187]

The racist ideology that the mixing of blood caused degenerative effects had long been the subject of scientific research programs in Canada and the United States. In an article titled, "Psychological Traits of the Southern Negro with Observations as to Some of his Psychoses," published in a prominent North American psychiatric journal, Dr. W. M. Bevis discussed his findings on the "the insidious addition of white blood to the negro race" and its effects on the latter. According to the doctor;

> [I]f the original white parent were always even an average representative of his race, mentally and morally, the hereditary effect upon the more or less mulatto offspring would naturally be that of improvement of the traits and mentality of the colored race, but unfortunately the white mane by whom this fusion of blood starts is most often feeble-minded, criminal, or both … [T]he race may have gained in an intellectual way but not in a moral.[188]

Bevis further described "all negros" as naturally lacking initiative, uninterested in education, and too interested in sexual matters, crime and vice. Women were described as "promiscuous" from a "remarkably early age" with a low moral sense toward gratifying "their natural instincts and appetites."[189]

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[187] *Ibid.*

[188] W.M. Bevis, 'Psychological traits of the Southern Negro with Observations as to Some of his Psychosis,' *American Journal of Psychiatry* 1 (July, 1921), 69.

[189] *Ibid*.

Essential socio-cultural differences were interpreted by Bevis as evidence of psychosis and metal deficiency. For instance, he cited their irrational "fear of darkness," obvious "cowardice" and "constant reiteration of stories of the ante-bellum system of patrol of the plantations, of ghosts and the impressive nocturnal performances of the Ku-Klux-Klan," as evidence of "noctiphobia" perpetuated by the delusional effects of their unhealthy preoccupation with "superstition." Evidence of racial inferiority and naturally diminished mental and moral capacity was further confounded, according to the doctor, by the deep "conscious or unconscious wish of every negro to be white" – not unlike Pierre, the "insane Half-breed" from the popular fiction story. Signs of natural excitability of the "Negro race" were documented from observations of their worshiping practices, which were depicted as the "occasional grunt, groan, or exclamation … with the continuous motion of the congregation, increasing in volume as the service progresses until a point is reached where their emotional fervor reaches its climax in wild disorder." This wild disorder, reported Dr. Bevis, was "only a step away from the manic phase of a manic-depressive psychosis or a catatonic excitement."[190]

While there are clearly similarities in the medicalized language used to characterize both "Indian" and "Coloured" defendants as overly passionate and mentally stunted, the legal, political and cultural meanings ascribed to each racialized group, as well as each defendant, differed significantly and contrast the different histories of slavery and colonization.

Returning to the case of Louis Jones, we can observe the way in which cultural beliefs around race mixed with concerns about sexuality and social order to produce a

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[190] *Ibid*., 70-72.

particular interpretations of responsibility, criminality and mental deficiency. According to official records, Jones and his wife separated because she had been unfaithful in their marriage. When she left their home and moved to another city, he followed her claiming he had forgiven her and was prepared to "take her back." She refused to return and angrily informed him she was having a sexual relationship with someone she considered his "better." Almost immediately after his wife's confession, he stabbed and killed her. Jones's defence was not guilty on the grounds of extreme provocation causing him to have no recollection of the actual killing. According to his counsel, "the words which this woman uttered to this man ... were of such a character" that any "reasonable man" would be so provoked to "lose control of himself and commit this act..."[191]

An insanity plea was never officially raised and when Dr. William Forrest, the gaol physician, attempted to answer a question from the Crown about Jones's mental condition, defence counsel entered into a lengthy debate with the judge regarding the ability of any doctor to comment on such a thing. He argued "no man is an expert" on another man's "conscious recollection" and it was for a jury to decide whether or not "those words were so provocative" they had an effect on his mind.[192]

In assessing the viability of the defendant's claim that he was provoked, the trial judge, in his final charge to the jury, cited the nature of the victim's language as evidence of her bad character. The judge considered the description of her words so vile that he questioned the defendant's account of the events leading to the murder, doubting any "woman ever used language like that." After the trial, Jones's lawyer responded to the

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[191] Louis Jones (1927); trial transcript, 102.

[192] *Ibid*.

judge's presumption that *all* women were incapable of such language in a letter to the Minister of Justice. He argued; "[i]t is evident that [the judge] has no acquaintance with the coloured race. I have found this language very popular among this class of people..."[193]

The lawyer further pointed to the relevance of certain conjugal prerogatives, racial tendencies and the general insignificance of the crime:

> No matter what the man's record was, this woman was his wife. They had had their troubles it is true, but what else are we to expect between people of this class. ... Jones was exceedingly jealous of a woman who was his own property and was regarded as handsome and something to be desired. There is no great public principle involved in this case such as the case of shooting an officer. It is a row between husband and wife.[194]

The central importance of race in judicial deliberations, and the power of the law to reinforce racial difference as a social fact, is well demonstrated here. In defence counsel's letter to the Remissions Officer, he cautioned; "this colored fellow may have had a fair trial, but for the reasons I have given he has not had what is popularly called a fair show."[195]

Once the trial was over, the jury foreman disclosed that he "disliked niggers because they are niggers." The lawyer expressed to the Remissions Officer that the juryman's "decided feeling towards all niggers" was a reflection of the sentiment of "most whites here."[196] Despite the jury's racial prejudices, they recommended mercy for Jones; but their decision was based primarily on the questionable character of the victim.

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[193] *Ibid*., letter from Jones and Mahoney, 3.

[194] *Ibid*., 4.

[195] *Ibid*., 3.

The judge did not support the jury's recommendation, nor did the Remissions Officer, and Jones was executed with no report of public hue and cry.

The process of legitimizing racial subordination through medical-legal practice and discourse was, and arguably continues to be, an integral part of Canada's social-cultural matrix. While these cases show Aboriginal peoples, and other peoples of colour, had quite divergent experiences, there was commonality in the language used to medicalize cultural and physical differences as evidence of unreason, which, in the process, defined what it meant to be a reasonable White man. However, the artificial construct of the moral superiority and mental hygiene of the English-speaking Anglo race did not hinge solely on skin colour, or the presumed natural inferiority of "other races;" it was also deeply rooted in a fear of the gradual degeneration of their own "pure" stock.

"Defective Immigrants" and "Diseased Classes"

Case file evidence suggests the testimonies of psychiatric experts were not necessarily privileged in criminal courts. However, some asylum doctors became increasingly influential in the medical and public sectors during the early 1900s. Political and popular speculation about the devastating effects of unregulated immigration encouraged, and was supported by, scientific programs of eugenics, social deprivation, and the proliferation of feeblemindedness and criminality in Canada. In 1916, Dr. C. K. Clarke, published an article in the Canadian *Public Heath Journal* titled "The Defective Immigrant," to warn of the future burden society would assume if the government continued to permit the "Old World" to dump their "defective and diseased classes on

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[196] *Ibid*.

Canadian soil."[197] Dr. Clarke was not interested in identifying particular types of mental illness for clinical purposes – advancing psychiatric treatment within asylums – rather, his ambition to "build a great nation" using only the "best materials" appear to be primarily economic and political. To advance his agenda, Dr. Clarke proposed "the inspection of immigrants should be lifted out of the slough of practical politics and placed in the hands of scientific men."[198]

Later, in 1933, Dr. H. A. Bruce, then the lieutenant-governor of Ontario, reported the Canadian population had doubled between 1871 and 1931, yet the prevalence of mentally illness had increased six-fold.[199] The blame for the estimated near-crisis level of mental illness in Canada was placed squarely on the influx of "defective" and "feeble-minded" immigrants Dr. Clarke had warned about.

According to Angus McLaren (1990), the desirability of a particular immigrant group depended on their perceived closeness to the white Anglo-Saxon ideal and their ability to be "Canadianized." He recounts, "British and Americans were viewed as the most desirable, next northern and western Europeans (including the Jews), and last of all the Asians and blacks."(p. 47) McLaren describes the predominant characterization of Galicians as "mentally slow," "addicted to drunken sprees and animalized." The Italians, he continues, were perceived as naturally "devoid of shame; the Turks, Armenians, and Syrians as undesirable; the Greeks, Macedonians, and Bulgarians as liars; the Chinese as

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[197] C. K. Clarke, 'The Defective Immigrant,' *The Public Health Journal* VII: 11 (November, 1916), 462.

[198] *Ibid*., 465

[199]Cited in Angus McLaren, 'The Creation of a Haven for "Human Thoroughbreds": The Sterilization of the Feeble-Minded and Mentally Ill in British Columbia,' *Canadian Historical Review* LXVII: 2 (1986), 127.

addicted to opium and gambling; and the arrival of Jews and Negroes as entirely unsolicited."[200]

Racial categories which grew out of scientific discourse, and what Ian Dowbiggin (1995, 661) refers to as "a visceral suspicion of foreigners," worked their way into the courtroom through the testimonies of psychiatric, cum social, experts, such as Drs. Clarke and Bruce, as well as through common sense understandings of the country's well-publicized immigration and mental hygiene problem. Foreign-born whites, and those of foreign-born parentage, particularly from Southern and Eastern European countries, were routinely classified as weak-minded or socially degenerate. If they did not speak English clearly, were unemployed, or if they exhibited any reluctance to fully "Canadianize" themselves, immigrants were frequently evaluated to be illiterate, ignorant and mentally underdeveloped. The reputations of some immigrant populations for drunkenness and violence often proceeded them, and in court, evidence toward mental competence tended to (re)affirm perceived defects in racial character rather than indicate mental "disease."

When George Dvernichuk (1930), a Ukrainian immigrant, shot his sister-in-law's family of five at close range, the detective at the scene of the crime made note in his report of the defendant's particular brand of "bad temperament." According to the police report:

> He had shown, like all members of his race, a leaning towards a socialistic or communistic order of society, despite his being a resident of Canada for over 30 years ... He was typically foreign and disliked hard work. Only working when there was substantial material gain. He was very clean about his person, but smoked and drank considerably. [201]

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[200] Arthur Doughty, Adam Shortt and James S. Woodsworth; quoted in McLaren (1990, 47)

[201] George Dvernichuk (1930); see report of the Alberta Provincial Police, dated December 23, 1930, signed R. C. Rathbone, Detective, 1.

The detective opined, "[a]lthough Dvernichuk often suffered violent fits of temper … he was fully aware of what he was doing." His impulsive, "morose," and "selfish" behaviour was not interpreted as necessarily out of character in any way; and the casual mention of his "reputation of being cruel to dumb animals,"[202] a classic indication of mental derangement in psychiatric literature, was, in this case, further evidence that he typified his "race."

No psychiatric experts testified at Dvernichuk's trial regarding his state of mind at the time of the shooting, although he spent three weeks under observation at the Mental Hospital at Ponoka, Saskatchewan. While under observation at the hospital, Dr. E. H. Cooke, the Medical Superintendent, documented that Dvernichuk was "a man of quick, irritable, uncontrolled temper, and such symptoms as he has exhibited during observation in this hospital, in our opinion, are of a definitely hysterical nature and not dependent on any discoverable organic disease." As a footnote, Dr. Cooke added to his report that one of Dvernichuk's sisters had been a patient at the hospital since 1919, diagnosed with dementia preacox, and that his "father and two brothers drank very heavily."[203] A formal plea of insanity was not introduced during the evidentiary proceedings, however, based on characterizations of his poor work ethic, his draw toward communism, violent fits of anger (described as bordering on "hysteria"), his apparent inability to assimilate – along with reports of headaches, epilepsy and a glass eye – defence counsel argued in his

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[202] For example, it was reported "on good authority" that Dvernichuk "thought nothing of throwing a live cat into a burning furnace." *Ibid.*, 1-2.

closing statement to the jury that the defendant was indeed mentally defective and therefore not fully responsible.[204]

Also at issue, both during and after the trial, was the defendant's apparent lack of motive, a factor which often inspired an insanity defense in cases of murder. However, the judge determined in Dvernichuk's case, that there were, in fact, two possible motives; revenge and money. Lay witnesses testified at trial that his sister-in-law was inherited a substantial sum of money when her father died. The judge theorized that Dvernichuk was angry and likely beleived the inheritance should have gone to his wife (the diseased sister) instead.[205]

Through processes similar to those seen in the trials of "Coloured" and "Indian" defendants, racial descriptives were consistently reiterated as evidence of mental fitness and used as guidelines to either establish or mitigate criminal responsibility. White men, considered to be of questionable character, were also subject to similar processes of racialization, although the language and underlying meanings were somewhat different. As I will show more thoroughly in the next chapter, evidence of uncontrolled passions, fits of anger, unemployment, drinking and wife-beating was also used in cases of white men to establish a deviation from "normal" behaviour. The difference however, is that evidence of such behaviour among white defendants was far more likely to be legally and medically individualized and interpreted as "real" insanity, rather then confirmation of a

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[203] *Ibid*., see letter from the Provincial Mental Hospital to the Deputy Attorney General, Edmonton, dated November 22, 1930, and signed by E. H. Cooke. See also the report of his sister, Katie Eremko, signed by Dr. D. L. McCullough, Acting Medical Superintendent.

[204] *Ibid*., see judge's report, 6-7.

[205] *Ibid*., 2.

naturally lower standard of heredity and civility. Also, as I also demonstrate in the next chapter, degrees of 'whiteness' and qualities of 'character' were defined largely through discourses of class, gender and region.

While George Dvernichuk was still under psychiatric observation following his trial, a tiny memo, scribbled on Department of Justice stationary, was passed from the Deputy Attorney General to the Minister of Justice which simply stated: "Public opinion would be outraged if death sentence were commuted."[206] Under considerable political pressure, and due to the decided absence of "medical evidence given one way or the other as to sanity or insanity,"[207] Dvernichuk was found fully responsible and hanged.

Public opinion also weighed strongly in the deliberation of Catherine Tratch's case (1924); but this time it was in support of commutation. Women convicted for murder, regardless of racial designation, were typically characterized as infantile and weak-minded. The exception being, as Chapter Five will show, women who killed their "good" husbands for illicit love or money. However, this characterization evoked a different meaning in cases of racialized women in a way that further reduced them from full citizenship. Like immigrant men, the standards for responsibility and normality for immigrant women were low and therefore more easily met. Gendered language also helped structure the meaning of racist discourse about criminality and responsibility.

Tratch, a 38 year old "Galician"[208] woman, poisoned her husband by putting strychnine in his whisky. According to J.H. Currie, a local notary public and insurance

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[206] *Ibid*., see handwritten memorandum titled "re Dvernichuk," dated February 3, 1931, signed by the Deputy Attorney General.

[207] *Ibid*., see judge's report, 5.

[208] Catherine Tratch (1924), NAC; Tratch was also identified in various documents as Ruthenian

agent who claimed to know Tratch, and "the Ruthenian people," quite well the idea to kill her husband came from "her big strong neighbor, a leader in the community" who showed her "attention which she [could not] resist." Her accomplice, Mr. Currie surmised, artfully gained control of her "untrained mind" and convince her to do away with her husband. In her "almost childish mind," she had fallen in love with the scoundrel and merely "followed out [his] instructions."[209] There was public outcry when her conspirator, considered to be the brains behind the crime, was acquitted, while Tratch, a mother of eight, stood alone convicted for murder.

Defence counsel offered a variety of sociological and cultural explanations for Tratch's behaviour in a letter written following her trial, while at the same time affirming his own position as a full citizen and member of the dominant "race." From his personal observation of the defendant, J. Harvey Hearne determined Mrs. Tratch was not insane exactly, but did not have "the regard for the husband that is usual among people of our race." Hearne further explained the defendant was a victim of her "greatly undeveloped mind and by reason of her being uneducated and by reason of her marriage at so young an age" (14 years), and was "really not a woman who would act upon her own initiative."[210]

However, the trial judge was much less convinced by evidence of the defendant's weak mind and urged government authorities to ignore the considerable public pressure to commute the death sentence which he felt was "based on ignorance of the

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[209] *Ibid*., see letter to the Minister of Justice from The Currie Company Limited, signed by J.H. Currie, 2.

[210] *Ibid*., see letter addressed to Wallace Stewart, Esq., M.P., dated April 25th, 1924, signed J. Harvey Hearne, 1-2.

evidence."[211] According to the judge, Tratch acted in accordance to the cold-blooded nature of her race:

> the murder was deliberate and cowardly, and in its results brutal. There is not one redeeming circumstance … So far as I can see, the only things in her favour are (1) that she is a woman; (2) that she is a Galician, and that her environment has created in her, as among many belonging to this race, an indifference to the value of human life.[212]

The general importance of public opinion and racial positioning in the deliberation of capital cases is clearly reflected in a letter from C.W. Stewart, M.P for the Humboldt district, which was written to the Chief Remissions Officer following Tratch's conviction. In his letter, Mr. Stewart included an excerpt from another letter written by an unidentified resident of Rosthern, Saskatchewan, where the crime took place, to the local Secretary-Treasurer of Council. According to the unidentified writer, Tratch, although "physically a fully developed woman," was by nature,

> mentally … a child that could be easily influenced and led astray … The public was greatly surprised and the general feeling among those interested in the case is very high. Taking the above into consideration I would ask you to make a vigorous representation to the Minister of Justice on behalf of this unfortunate and weak-minded woman.[213]

In Mr. Stewart's effort to "throw more light upon the attitude of the community affected,"[214] he determined in another letter sent directly to the Minister of Justice, that although there was no evidence of a miscarriage of justice in the Tratch case, "nor was there evidence of insantiy," he was "personally convinced" that the defendant was "not

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[211] *Ibid*., see letter addressed to The Honourable Secretary of State for Canada, dated February 18, 1924, signed J.F.L. Embury, 2.

[212] *Ibid*.

[213] *Ibid*., see letter dated May 12, 1924, addressed to Mr. M.F. Gallagher, signed, C.W. Stewart.

[214] *Ibid*.

wholly responsible for her action."[215] Mr. Stewart's message appeared effective since the same excerpts from the unidentified writer's description of the defendant which first appeared in his letter, also appeared in the final remissions report. The Remissions Officer began his summary of the case with the following declaration:

> Your attention may be drawn at the outset to the claim that the accused 'mentally is a child who could be easily influenced and led astray'. The under-signed is inclined to the opinion that there is very much in the material on record to support such a view. According to the information obtained from reliable sources and considering the petitions so numerously signed on behalf of this condemned woman it appears that the community sentiment is favourable to the exercise of clemency.[216]

He then proceeded to outlined the facts of the case highlighting the importance of the "popular verdict" where her accomplice was concerned, and the unfairness of trial judge in not recommending mercy for the "unfortunate woman." The concerns of the Remissions Officer, and the public, were apparently heard when the Minister and his council commuted Catherine Tratch's sentence to life in prison. She was released after 14 years.

Understanding the intimate relationship between constructs of racial order, social purity and sexuality is crucial to understanding the meaning of "race" within a particular case. Women of various racial/cultural backgrounds were racialized in ways different from men and from each other. But overall, most women were rendered less responsible than their male counterparts. Although there are a few exceptions. For example, in 1934, when Tommasina Teolis, a forty-five-year-old Italian woman, conspired with two men,

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[215] *Ibid*., see letter dated May 12, 1924, addressed to Hon. E. Lapointe, Minister of Justice, signed C.W. Stewart.

[216] *Ibid*., see remissions summary report, 1-2.

also Italian, to kill her husband for insurance money, she was considered by the judge to be *more* responsible for the crime than men who actually committed the deed. Her state of mind was never raised as an issue and she was executed along with one of her accomplices. In this case, the character of her husband, " a poor old man" who "worked all his life to save a few pennies for his family," was very important. While race and gender were not explicit issues in the deliberation of her case, it was clear from the interpretation of evidence and the events leading up to the crime, including speculation of her affair with one of the accomplices and her negligence as a mother and wife, that Teolis threatened the Anglo-Christian ideal of domestic life and natural gender roles.[217]

I further examine this case, and legal representations of gender and domesticity in Chaper Five, but here it is important to recognize that racialized women were overwhelmingly constructed, both in and out of the courtroom, as ignorant, child-like and weak-minded, yet rarely found legally insane. Social/political concerns for racial purity and domestic order mixed variably with ascribed characteristics of race, sexuality and gender to help inform and define legal interpretations of responsibility. The case of Catherine Tratch, we shall see, reflects particularly well the way in which simultaneous discourses of gender, race, mind-state and criminal responsibility came together in the deliberation of a single case, to form competing characterizations of a single woman's behaviour.

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[217] Tommasina Teolis (1935); particularly the judge's charge.

CONCLUSION

Case file evidence suggests that while insanity law stayed firm during the first half of the 20th century, the understandings of criminal responsibility, mental defectiveness and human deficiency were quite flexible and derived their particular meaning from concurrent discourses as well as from the immediate circumstances of each case. Racism was deeply encoded in the language and meanings of criminal responsibility and cannot be fully understood in general terms or within a single theoretical framework. To sift out the complexity of these processes, requires coming at the issue from different angles, and analyzing it within different contexts. The Canadian murder trial is simply one site of interrogation, but is particularly illuminating because, as I've shown in this chapter, different cases produced differential meanings of "race" in medical-legal decisions about criminal responsibility.

The Canadian criminal justice system, through the indoctrination of racially-neutral language and the selective appropriation of 'expertise,' presented itself as objective; and perpetuating the cultural "myth" that race was not a factor in legal decisions. As Backhouse (1999, 13) observed, "['r]ace' does not appear as a recognizable legal category of classification between 1900 and 1950." However, various legal categories, including insanity, self-defense and provocation, along with non-legal classifications, such as ignorance, immaturity, drunkenness and loss of control, were deployed by judges, lawyers and medical witnesses in capital cases to help mitigate responsibility, lend meaning to violent behaviour, and establish the inherent character of defendants. Standards of mental capacity were subsumed in socio-medical theories which linked racial inferiority to a range of behavioural tendencies and pre-dispositions. Here I

have shown how, for instance, “Indians” and “Half-breeds” were characterized as naturally violent and predisposed to moral indiscretion. Violence between native Indian women and men was interpreted as evidence of “savage” character or simply as a ritual of “Indian custom.” Respectable white men, and to a lesser extent, women, were, on the other hand, expected to know better. From their positions of privilege, white judges, juries, police officers, doctors and government officials, took as common knowledge the vile language and character of Blacks, the habits of drunkenness and “communistic” leaning among Southern-European immigrants, and the natural sexual perversities of all non-Anglo women (as well Anglo women who kept company with men of questionable character).

Despite the law’s apolitical claim of neutrality and equality, therefore, legal measures of state of mind and criminal responsibility hinged on constructs of racial difference forged by a strong common sense understanding of British authority, national identity and white supremacy. In the next chapter, I focus on cases of murder between “wives” and “husbands” and continue to explore how the *ideas* of degeneracy, eugenics and moral/mental purity became inherent in the definitions and meanings of various social and individual descriptives that made articulations of, and decisions about, criminal responsibility possible.

Chapter Five

MURDER BETWEEN "WIVES" & "HUSBANDS"

The language of early-20th century courtrooms, supporting legal records, letters and newspaper reports promoted a culturally-informed, and primarily middle-class, understanding about the inherent nature of certain *types* of people. The cases analyzed thus far provide many examples of routine references to the "well known" and "typical" characteristics of certain "classes"; the duty of jury men to "impose the ideals of British citizenship"[218]; and the perpetual (re)casting of idealized masculine and feminine roles in formal and informal interpretations of responsibility in murder cases. In the previous chapter I demonstrated the way in which conscious associations between social-medical theories of racial inferiority and mental deficiency helped define and establish legal criteria for evaluating criminal responsibility; and how "race" acquired different meanings within the specific context of each case. As the trial and post-trial analyses of individual capital cases, such as LeBeaux, Abraham, Jackson, Smith, Jones, Tratch and Teolis has shown, one of the most powerful constructs in a murder case was the relationship between the victim and offender.

In this final chapter, I examine the particular dynamics of murder committed in domestic situations to show how those who killed their spouses were consistently measured against, and interpreted through, an idealized notion of Anglo-Christian domestic life. In cases of spousal murder, criminal responsibility and evaluations of mind-state – including when it would and would no be seen as relevant – were negotiated

through a series of moral judgements about the conjugal obligations of "the husband" and "the wife" and the willingness/ability of both the defendant and victim to meet the determined standards of their sex, class and/or race. Also, specific representations of an accused, as a particular *type* of wife or husband, were determined on a case-by-case basis, but according to unsound standards of acceptable/disreputable domestic life.

The cases examined in this chapter include those in which murder was committed between married, common-law or co-habitating heterosexual partners. Excluded from this grouping were cases where the victim or offender was identified as a "girlfriend" or "boyfriend," or where the couple did not occupy the same domestic space. Spousal murders make up a significant portion of my sample of capital case files. Of the 23 cases involving women, 14 (61%) killed their husbands or common-law spouses. And from my sample of 43 men, 11 (26%) killed their wives or common-law spouses.

My objective here is not to compare generally cases in which husbands killed their wives with those in which wives killed their husbands, although some noteworthy differences will be discussed. Instead, I will show specifically how Anglo-Christian ideologies, which informed the prevailing common sense wisdom about the rules of domesticity and conjugality, provided legal, expert and lay observers with the language and conceptual framework to make sense of murder committed within domestic spaces; and how this common sense wisdom reinforced particular expectations and classifications of "wives" and "husbands." Given that every spousal murder case in my sample involved poor and lower-class couples, and given the privileged status of those in positions of

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[218] From the judge's charge in the trial of James McGrath (1931), 3.

judicial authority, this analysis of murder between wives and husbands also chronicles the distinctly class-based nature of judgements about conjugal discord.

Representations of Conjugality and the Domestic Space

In her book, *Normalizing the Ideal*, Mona Gleason (1999) examines the role of the social sciences and expert knowledge in shaping the experiences of "ordinary Canadians." Her project traces the promotion and construction of what "normal family life" came to mean in postwar society and how psychological discourses endorsed and naturalized the "dominance of Anglo/Celtic (as opposed to 'ethnic'), middle-class, heterosexual, and patriarchal values." Gleason argues that this "normalized ideal" defined through expert evaluations of "normalcy," was intended to "collapse and consolidate the diversity of family life." Therefore, those who fell outside the domestic ideal, including working-class, non-Anglo, and decidedly non-Christian families, were, according to Gleason, excluded, classified and pathologized, as "abnormal" and "poorly adjusted." (p. 4-5)

Although Gleason does not make clear distinctions between psychology and psychiatry, which emerged from quite different starting points, her analysis illustrates the influence of a wide-spread social science movement on representations of conjugality in mid-20th century Canada. In the same way I demonstrated in Chapters One and Two, that expert discourses about criminality formalized common sense thinking about crime and human nature, my analysis in this chapter further establishes that a range of institutions and individuals interested in promoting the Anglo-Christian notion of conjugality, helped shape and reinforce a utilitarian 'expertise' about normal/natural domestic behaviour.

Psychiatrists interested in the social dangers of criminality were particularly well represented among those social science experts concerned with domestic practices during the pre and post war periods in Canada. However, other professionals, including clergymen, politicians, police officers, immigration officials, prison/reformatory officials, school officials, lawyers and judges also participated in the regulation of domesticity. Several non-professional groups and individuals, such as church organizations, women's leagues and middle-class urbanites, also played an important role in the social-cultural constitution of obligatory domestic roles in Canada.[219] The "cult of domesticity" (Chunn, 1988) was, therefore, an ubiquitous concept in essentialist representations of middle-class, Anglo-Christian character, and deeply imbedded in the policies and practices of Canadian law and psychiatry.

Feminist historians have demonstrated the many ways in which law "defined" marital relations through pervasive assessments of gender (Gölz, 1995; Harris, 1988, 1989; Sangster, 1993; Strange, 2000). However, my research suggests that we need to be cautious in making generalizations about the meaning of legal outcomes in cases involving domestic violence or murder. Chapman (1988) for instance, argues that in early-20th century Alberta, it was rare for a woman to be found "not guilty" for killing her abusive husband; and men who abused and killed their wives were typically treated leniently by judges who assumed a certain amount of violence was generally "expected"

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[219] For further explorations in moral, gender and/or sexual regulation in early Canadian society see, Mariana Valverde, *The Age of Light, Soap, and Water* (Toronto 1991); Carolyn Strange, *Toronto's Girl Problem: The Perils and Pleasures of the City, 1880-1930* (Toronto 1995); Cecilia Morgan, *Public Men and Virtuous Women: The Gendered Languages of Religion and Politics in Upper Canada, 1791-1850* (Toronto 1996); and Angus McLaren, *The Trials of Masculinity: Policing Sexual Boundaries, 1870-1930* (Chicago 1997).

in a marriage. [220] Historical evidence presented in this chapter suggests that Chapman's findings were not necessarily typical, and, therefore, we must evaluate the different representations and meanings of particular outcomes in individual spousal murder cases.

As I argued in Chapter Three, decisions about legal guilt do not adequately reflect judicial, psychiatric or popular understandings about criminal *responsibility*. Most women found guilty for the murder of their husbands received recommendations to mercy and, in many cases, their sentences were commuted *because* they had been badly treated. Also, criminal justice records show that most men found guilty of murdering their wives (and there were many) were eventually executed. In particular, post-trial documentation shows that decisions regarding mercy and clemency were not simply based on the legal facts which led juries to find certain defendants guilty, but on common sense and expert assessments of heterosexual conjugal norms. This further supports my central argument that we need to look beyond trial outcomes to appreciate the more neuanced and conflicting discourses about criminality, responsibility and human nature

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[220] For studies showing the propensity towards leniency in cases of intimate heterosexual violence and murder see, Terry L. Chapman, '"Til Death do us Part": Wife Beating in Alberta, 1905-1920,' *Alberta History* 36: 4 (1988), 13-22; Annalee E Gölz, '"If a Man's Wife Does Not Obey Him, What Can He Do?" Marital Breakdown and Wife Abuse in Late Nineteenth-Century Ontario,' in Knafla and Binnie (eds.), *Law, Society and the State: Essays in Modern Legal History* (Toronto 1995); Karen Dubinsky, *Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880-1929* (Chicago 1993); Ruth Harris, 'Melodrama, Hysteria and Feminine Crimes of Passion in the Fin-de-Siècle,' *History Workshop Journal* 25 (Spring 1988), 30, and *Murders and Madness* (Oxford 1989). For furhter studies in the history of domestic and family violence see also, Linda Gordon, *Heroes of their Own Lives: The Politics and History of Family Violence* (New York 1988); Elizabeth Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present* (New York 1987); Katherine Harvey, 'To Love, Honour and Obey: Wife-Battering in Working-class Montreal 1869-1879,' *Urban History Review* 19: 2 (Oct. 1990), 128; James. S. Snell, *In the Shadow of the Law: Divorce in Canada 1900-1939* (Toronto 1991); and Dorothy Chunn, 'Rehabilitating Deviant Families through Family Courts: The Birth of "Socialized" Justice in Ontario, 1920-1940,' *International Journal of the Sociology of Law* 16 (1988), 137.

which helped provide meaning to particular historical events; not only in terms of formal doctrines of law and application of rules, but through representations of conjugality and gender identity. (Young 1997, 128)

For example, this analysis of spousal murder cases shows that domestic hardship and violence was interpreted among middle-class observers as a problem of the "ignorant classes." The adjudication of spousal murder cases, therefore served to draw class divisions in Canadian society by publicizing that "civilized" and mentally-stable husbands did not abuse or kill their wives. However, even those men who were considered prone to abuse their wives, such as Aboriginal men and men seen as lacking a moral education, were likely to be held accountable if they went so far as to commit murder. In this sample, five of the 11 men (45%) convicted for the murder of their wives received recommendations to mercy from the judge or jury[221], however, only three (27%) were saved from execution. In each of these three cases, where the death sentence was either commuted or reduced on appeal, there was evidence brought forward to suggest the condemned men were essentially 'good' men who had been provoked by the betrayal or "indiscretions" of their wives.

For instance, the trial judge recommended mercy in John Boyko's (1947) case based on the defendant's age (52 years), evidence of his peaceful disposition, and the "possibility" that he had been reasonably provoked by his common law spouse who

[221] This is higher than the 28% (9/32) rate of recommendations to mercy in non-spousal murders committed by men.

threatened to leave him for a younger man.[222] Since adultery was the worst 'crime' a married women could commit (Sangster, 1993), the narrative of the disloyal wife and the devoted, hard-working husband, was a powerful one that could, in some cases, lead to a lighter sentence. However, this was not a general trend. There are several examples where the character of the murdered wife was scrutinized and found in bad repute, yet, the husband, for several possible reasons, was executed.[223]

Conversely, women convicted for killing their husbands were typically commuted, acquitted or given reduced sentences on appeal. Like all murder cases, the outcome of women's cases depended very much on decisions about motivation and evidence of character – their own as well as the victims'. In the few cases were women were executed for the murder of their husbands, the question of mind-state was not raised during the trial and there appeared to be no history of past domestic violence. I consider these cases to show how ideals of domesticity and conjugality helped form the representations of these women as "traitorous" wives who killed in "cold-blood" for their own self-interest. The public response to the trial of Marie (Viau) Beaulne, for instance, demonstrates the integration of common sense notions about marriage, with dominant scientific knowledge about feminine and masculine nature in decisions about responsibility.

I also consider cases of women and men who killed their spouses in what courts described as a "domestic quarrel." Spousal murders interpreted as acts of revenge,

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[222] Byoko's original death sentence was commuted, however, he later killed a man in prison, and after being tried and sentenced to death again by the same judge, he was hanged. See also cases of Jacob Weid (1948) and James Fosbraey (1950).

[223] See cases of Louis Jones (1920), Frank Dolan (1937) and R.A. Wright (1939).

passion, self-defence, provocation and/or drunkenness – as opposed to the calculated, "cold blooded" variety – also show the pervasive assessment and (re)inforcement of class and gender status, but through somewhat different language. Women's violent responses to "domestic stress" were pathologized as "abnormal" while the violent responses of men were interpreted as evidence of masculine "weakness." Therefore, men were likely to be executed, rather than pathologized. Competing interpretations in the adjudication of spousal murder cases reveal a great deal about gender relations during this period, and show the ways in which race/ethnicity, age, sexuality and class designations helped determine what *type* of man/husband or woman/wife a defendant was. Such characterizations, in turn, determined the boundaries of conjugality, decisions about motivation, and judgements about criminal responsibility.

"Traitors" and "Cold Blooded" Killers: The worst Sorts of wives

Of the 14 woman in this study convicted for the murder of their husbands, four (29%) were executed. While this seems to support evidence of the general trend in Canada to commute women's death sentences, a closer look at cases where mercy was *not* granted explicates the nature of hegemonic gender discourse in such legal decisions. In every case but one, where a woman was found guilty and hanged for the murder of her husband, the motive was decidedly money and/or in the interest of pursuing an a relationship with another man. And in three of the four cases that led to execution, there was a male "conspirator" also charged in the murder.[224] The nature of the relationship between the "wife" and her conspirator, and the character of the conspirator, had a strong

influence on expert and legal perceptions of the crime and on attributions of responsibility.

Dina Dranchuk's case (1934) was one exception in which the motive was considered to be money and the defendant was granted clemency. However, the circumstances of Dranchuk's case are in keeping with the arguments put forward in this chapter. Case documentation shows a history of "quarrelling" between the husband and wife and evidence that she "believed she was maltreated." There was psychiatric evidence regarding "hysteria" and the judge determined she was a "very ignorant" woman and worthy of the jury's recommendation to mercy. [225]

In Tommasina Teolis's case (1934), two male conspirators were convicted and hanged along with her for the beating death of her husband. She was known to be on "intimate" terms with one of these men. Although Teolis did not kill her husband by her own hand, she was considered by the judge and jury to be just as responsible for his death as the two men she hired to carry out the deed in return for a share of the life insurance that she thought would come to her. A general disdain among observers emerged towards the woman/wife who would conspire and coldly kill for what was perceived to be a small amount of money; about two thousand dollars. In his charge to the jury the judge expressed his perturbation that such a "brutal" murder could be committed for mere money:

> Gentlemen, one can understand that a man can kill for love, jealousy, anger, but to kill in cold blood … and all this for a modest sum of money,

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[224] In two cases, Beaulne (1929) and Teolis (1934), the male conspirators were also hanged.

[225] Dina Dranchuk (1934); see judge's report, 1 and 4-5.

> this is unbelievable, and any person with a heart is revolted by such a crime and refuses any sympathy to its perpetrator.[226]

The judge reminded the jury (whom he assumed would not see $2,000 as sum of money to justify murder) in attributing the responsibility due each of the three charged in this case, that society was also "outrageously violated" by the crime committed; threatened by the idea that a wife would plot the death of her good, hard-working husband for his money. He implored the jury, as "serious men desirous of rendering justice," that it was their duty as enlightened Christian men to deliver justice to the culprits as well as God and society:

> I have no doubt that you will fulfil your duty even though it may be painful. Bear in mind that human justice, like divine justice, punishes always regretfully. It is not revenge that society demands, but simply justice and the reparation of wrongs. … For this purpose gentlemen, you must elevate your mind and during your deliberation keep in mind only justice to be rendered, the evidence to be studied and your conscious to be satisfied, and may Heaven enlighten you.[227]

Mental capacity was not raised as an issue in the case of Teolis, nor was it raised directly in the cases of the other three women hanged for the murder of their husbands during this period. As I demonstrated in Chapter One, the assumption that one's mind-state could be affected by economic hardship was typically reflected in cases during the 1930s. However, the meaning of poverty was offset in this case by the strong evidence of premeditation and calculation, and since there were two co-accused, she was not considered to be under the influence of a paramour. As well, the fact that all three

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[226] Teolis (1934); see judge's charge, 30.

[227] *Ibid.*, 31-32.

accused were Italian, and naturally hot-tempered, seemed to diminish the relevance of state-of-mind.

The representations of conjugal and criminal responsibility in women's cases resulting in execution are quite different from those seen in cases of women who were commuted or acquitted for killing their spouses. In these cases, suggestions from the Crown or witnesses regarding a motive of extra-marital affair or want of money, were typically overshadowed by evidence of mental or constitutional weakness. Recall for instance the case of Catherine Tratch (1924), introduced in Chapter Four, who fell in love with, and under the influence of, her charismatic neighbour, a wealthy and well connected member of the community, who had shown her "attention which she [could not] resist." Evidence offered during and after the trial showed that Tratch poisoned her husband with strychnine in the hope of winning the affections of her co-conspirator. However, the prevailing narrative in this case, and ultimately the mantra of an aggressive commutation campaign, was that she was a "weak-minded woman" who was unwittingly led astray from her marriage by her conniving suitor, who was also arrested but released shortly after. As I discuss further on, different assessments of a women's criminality – as the conspiring wife or the degenerate woman – were sometimes seen operating simultaneously in a single case and reflected the social positions of different observers.

An important factor in decisions to commute or execute convicted husband killers was the perceived character of the murdered husband. Women who killed upstanding men and husbands were likely to be hanged. For instance, when it was discovered that Marie (Viau) Beaulne (1929), a Quebec housewife, had conspired with her male lover to poison her husband, collect his life insurance and quickly re-marry, an Ottawa newspaper

reporter recounted the judge's strong words of support for the jury's decision to convict the pair without a recommendation to mercy:

> The Justice severely condemned the faithless wife, for acting as she did, while her husband, a man in full strength and health, even if he was 60 years of age, was away at the shanties, toiling that he might support her. It was on January 19 that [Mr.] Viau walked 15 miles to his Montpellier home, to return to the comforts his hard work had assisted in acquiring. "What a welcome!" exclaimed the judge.[228]

It was meaningful in this case that the husband was a considered to be a "good" husband. He was a hard-working man who, even in his senior years, supported his wife (considerably younger at 38 years) and provided her with a comfortable home. Several cases, including Dvernichuk (1930) and Harrop (1940), make reference men's work ethic as relevant to the establishment of "character." This notion is supported by Angus McLaren (1998, 168) who also makes the point that a man's character was largely determined by his attitude toward "work." [229]

According to the Ottawa journalist, the judge in Beaulne's case was visibly affected by the task of administering his first death sentence in 15 years in what he described to courtroom observers as the most "traitorous" case he had ever tried. As the judge commenced with sentencing Beaulne, he contrasted the 'character' of her husband with that of her illicit lover:

> You have been found guilty of murder. You have broken your solemn vow to duty to your husband, the man whom you swore fidelity. You loved another man who was not worthy of your husband. You now see what this has done for you. I sincerely pity you and I hope that in the few days that

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[228] *Ibid*. "Two Must Hang For Poisoning at Montpellier," *The Citizen* (June 13, 1929), 1 and 19.

[229] Angus Mclaren, 'Males, Migrants, and Murder in British Columbia, 1900-1923' in Iacovetta and Mitchinson (eds.), *On the Case: Explorations in Social History* (Toronto 1998), 168.

> Providence grants you, you will realize the gravity of your crime and seek to repair it in the sight of God.[230]

One might consider which "crime" the judge was referring to here: murder or adultry. After hearing the judge's solemn words, the report continued, "the woman paled perceptibly and her lips trembled visibly."[231]

Beaulne's accomplice, Philibert Lefebvre, was not only implicated in the death of her husband, but also in the "traitorous" crime of domestic interference. After sentencing Beaulne, and as "the courtroom crowded to the doors," the judge proceeded to address Lefebvre. He placed the weight of responsibility for the death of Mr. Viau on to Lefebvre, whom he believed "furnished this woman with the means of committing this crime." As for the motive, the judge surmised, "[y]ou wanted to get rid of this man Viau and then marry the woman, his wife." The judge told Lefebvre that justice had not been adequately served in this case because, while he had killed Viau by poisoning him over two or three days, he would have nearly two months in which to make "peace with God."[232]

The legal portrayal of Beaulne as the "faithless wife," added another layer to the story, which evolved from one of murder to one of conjugal betrayal. Beaulne and Lefebvre surely broke the law and committed murder, but perhaps more importantly, they betrayed the sanctity of Christian marriage which formed the moral sensibilities of both law observers and official decision-makers.

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[230] *Supra.,* 19

[231] *Ibid.*

[232] *Ibid.*

Certain citizens of Quebec and neighbouring Ontario seemed to agree with the judge's characterization of the Beaulne/Lefebvre case. One commentator wrote to *The Ottawa Journal* that there seemed to be no extenuating circumstances for the "vicious crime of this couple" – after all, they freely confessed to the crime and no defence had been offered during the trial, "not even insanity." According to the writer, the two plotted, in "cold-blooded deliberation" to end the life of the one man who stood between them. He contemplated that there "might have been some excuse for a crime of passion committed in the heat of a fury, but not for such a sinister, calculated, deliberate, traitorous killing." He further warned those who might be "eager to urge clemency for this couple," or who might romanticize the drama of their story, that it would be "useless to pretend that they are the stuff of which popular fancy can create heroes and heroines".[233]

In fact, there were those, particularly from the community of Hull where the double execution was to take place, who urged clemency for the couple. Middle-upper class Hull citizens in favour of commutation organized a petition-signing campaign and offered a different telling of the event that included a survey of the circumstances they felt mitigated criminal responsibility. On August 13, 1929, an article entitled, "Are Opposed to Hanging in Hull: Prominent Citizens Against Double Execution and Readily Sign Petitions," appeared in *The Ottawa Evening Citizen* voicing the opinion of Hull's elite community, which fumed at the prospect of a sordid double execution taking place in their district.

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[233] *Ibid*., see "The Penalty of Murder," *The Ottawa Journal* (June 14, 1929).

In the article, Mr. Aime Guertin, a Hull County official, argued that capital punishment "should only be exercised in extreme cases where the crime had been premeditated." Mr. Guertin reasoned the full force of the law should not be applied in this case because it appeared, "apart form the findings of the court, that Lefebvre and Viau [Beaulne] are of the ignorant class, without moral sense of the enormity of their crime." At the very least, he continued, "if these unfortunate people must be hanged, the wheels of justice should be turned at Bordeaux jail, instead of Hull."[234]

Although the question of mind-state was not formally raised, in the minds of privileged citizens, anyone in full control of their senses would never display such blatant disregard for civility and the vows of Christian marriage; nor would they succumb to such base motivations because they would naturally understand the consequences of their actions. The efforts of Hull citizens to explain the criminal behaviour of Beaulne and Lefebvre as the manifestation of an inferior "class" is represented in another article that appeared in the same newspaper two weeks prior. The report provided readers with a list of 17 reasons for clemency that were forwarded to the Minister of Justice in the form of a petition.

Except for a brief reference to the general ineffectiveness of the defence counsel, and concern that the desired symbolic effect of a double execution would be lost on the backward community of Montpellier, "ignorance" and "class" (of the uncivilized, rural kind) were the principal reasons Quebec urbanites cited for clemency in this case. Listed, for instance, was the fact that they were "raised in the wilds," in a district "scarcely

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[234] *Ibid*., see "Are Opposed to Hanging in Hull: Prominent Citizens Against Double Execution and Readily Sign Petitions," *The Ottawa Evening Citizen* (August 13, 1929).

touched by civilization" and where "education is as yet in its infancy." There was also concern the two had not received "religious instruction" and had not been "given the chance to develop their intellectual faculties" in order learn to "subvert their brutal passions" and "natural desires." The lay observer also informed readers that "there are different degrees of responsibility in committing this crime" and suggested there was no evidence to establish the accused knew the "consequences" or "penalties for their act."

Aside from general characterizations of the accused as ignorant, rural types, the report also stipulated special consideration be given to the facts that Mrs. Viau (Beaulne) had four young children and "is now in a delicate condition" (later proved untrue), and that Lefebvre had "risked his life for four years at the front" and "contributed his share with 'glory and merit' to the winning of the war." Finally, in pointing out the appropriate social role of the rule of law in this case, the author again cited that ignorance was so prevalent in the rural district from which the couple hailed, that "the hanging of this pair would not be an example or a deterrent to others who might contemplate similar crimes." Therefore, life in prison was a much more "suitable" penalty in this case.[235] Supporters of clemency positioned the condemned couple at a safe distance – socially and naturally – from themselves, yet also seemed to pull them under a protective wing in suggesting that even in their wild and untrained states, this "brute" and this "wife" managed to contribute to society in the only ways they knew; him by going to war, and her by bearing children.

References to "the husband" and "the wife" in newspapers and case files carried with them a battery of implied meanings which writers did explain, so obvious did they

appear. In the common sense wisdom of 'respectable' Christian Canadians, there were duties that came with each role, and certain boundaries in place to protect the domestic space. Two of the most important *rules* of the domesticity dictated that husbands were to provide for their wives, and wives were not to betray their husbands. Legal responses to the trial of Marie Beaulne and her lover for the murder of her husband was generally one of outrage, which was shared by respectable citizens generally. Beaulne was pitied as an ignorant and intellectually underdeveloped woman, while at the same time, demonized as a traitor and cold-blooded killer. But it was through these conflicting characterizations of the defendant, as a woman who was "faithless" by nature, that she emerges as the most dangerous sort of wife imaginable.

"Domestic Quarrels" and Dead Bodies

Murders committed in the heat of a "domestic quarrel" were viewed differently from those that appeared calculated and without reasonable provocation. In this section I will examine cases where a "quarrel," or other form of domestic stress, was cited by legal officials as the circumstantial or emotional context in which the murder of a spouse took place. Here the defendant's state of mind was almost certainly raised as an issue either during trial or during the commutation stage, although psychiatric experts were consulted in only about half of such cases. A formal defence of insanity was raised in 7 spousal murder cases, and each time, domestic stress was considered a precipitating factor.

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[235] *Ibid.*, see "17 Reasons Are Advanced With Clemency Plea: Petition in Behalf of Condemned Couple From Montpellier Being Presented This Week," *The Ottawa Evening Citizen* (Wednesday, July 31), 29.

Accused wife-killers who appeared to lack a healthy work ethic, drank habitually or beat their wives were considered to be weak in their character and constitution (Chunn, 1988; Harris, 1989; McLaren, 1997; Dubinsky and Iacovetta, 1991). They were seen as untrustworthy and ignorant and not good "husband" material. The women who married them were, therefore, also considered to be of an undiscerning sort with equally questionable characters. They were "brooding" and "hysterical" women who found themselves living in impoverished conditions and in a perpetual state of domestic disharmony.[236] The idea that living in an 'unhealthy' domestic environment could cause mental instability and abnormal violent behaviour was commonly understood and reflected in case file texts. The nature of the domestic space in which the accused and victim lived was relevant at every stage of the criminal justice process and informed assessments of guilty state of mind and criminal responsibility.

Evidence at the trial of Dina Dranchuk (1934) showed that the domestic life she shared with her husband was "not a happy one." According to the judge, the couple's daily quarrelling was caused by the "failure of the husband to supply his wife with what she considered necessary money. She complained that he did not supply her with the money to buy warm clothing."[237] Two psychiatrists testified that Mrs. Dranchuk, while perhaps not legally insane, did present symptoms of mental abnormality and "hysteria." Dr. Taylor, for the defence, told the court she was "not normal, mentally," that she "brooded over her obsessions of illness" and "believed she was maltreated" by her husband.

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[236] See generally the case files of Dranchuk (1934) and Harrop (1940).

According to the medical witness, she struck out at her husband and killed him with an axe without realizing the consequences of her act: "she followed a blind impulse, expressing herself in a blind hysteria."[238] Dr. Baragar testified for the Crown that "she may be suffering from hysteria, but only in a marked degree is this condition treated as insanity." The judge reported to the Minister of Justice following the trial, Mrs. Dranchuk, "apparently a very ignorant woman," was "oblivious to all that was going on around her; not once during the trial did she look up or show any sign of appreciating the nature of the proceedings." This is not too difficult to explain considering, by the judge's own account, "the wife was unable to speak or understand English."[239]

Representations of spousal murders committed within the domestic space combined social-economic explanations with positivist ideas about criminality in a way that naturalized poverty and violence in lower-class, immigrant foreigners' marriages. However, it was understood that even people of strong constitution could turn mad, if for a brief period, in the face of domestic contrariety.[240] Recall the case of John Boyko (1947), the hard-working man of good character and "peaceful disposition," but also a "foreigner," who killed his common-law wife with a hammer. The Court in this case did not take seriously the defendant's claim that he acted in self-defence. It made more sense to the judge that Boyko was provoked to the point of losing control by threats from his

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[237] Dranchuk (1934), see judge's report, 1.

[238] *Ibid*., 4.

[239] *Ibid*., 5 and 1.

[240] For example, Joel Eigen examined the trends in lay testimony with regard to madness in 18th – 19th century England and found that witnesses blamed madness on everything from "bad falls to bad husbands." "Family distress" was the second most frequent emotional cause of insanity cited by lay witnesses. See*; Witnessing Insanity* (1995), 100-101.

wife to leave him and marry a younger man. Based on the "possibility" of reasonable provocation, the judge (but not the jury) recommended mercy and his death sentence was commuted.

The use of a provocation defence in spousal murder cases also set up a framework that could reduce estimations of criminal responsibility by jurors, judges, Remissions Branch officials and the Minister of Justice. (Harris, 1989; Gölz, 1995; White-Mair, 2000; Strange, 2000).[241] The emotional state produced by provocation was known to cause, in certain circumstances, a loss of control, insanity and other forms of mental breakdown.[242] Provocation could function as a defence as well as a motive and was usually considered in conjunction with other emotional states such as revenge, passion, anger or jealousy. As I discussed in Chapter Three, provocation was one way in which a defendant's mind-state could be raised without formally entering an insanity plea, and this proved to be a particularly prevalent discourse in the adjudication of murder between wives and husbands.

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[241] Prior to 1948, s. 54 of the *Criminal Code of Canada* read: "Everyone who has without justification assaulted another, or has provoked an assault from that other, may nevertheless justify force subsequent to such assault, if he uses such force under reasonable apprehension of death or grievous bodily harm from the violence of the person first assaulted or provoked, and in the belief, on reasonable grounds, that it is necessary for his own preservation from death or grievous bodily harm, if he did not commence the assault with intent to kill or do grievous bodily harm, and did not endeavour, at any time before the necessity for preserving himself arose, to kill or do grievous and bodily harm, and if before such necessity arose, he declined further conflict, and quitted or retreated from it as far as was practicable. (2) Provocation, within the meaning of this section may be given by blows, words or gestures."

[242] Recall the judges words to the jury in the Teolis case (1934): "Gentlemen, one can understand that a man can kill for love, jealousy, anger, but to kill in cold blood…" The same argument was put to the jury in Beaulne's case (1929); "There might have been some excuse for a crime of passion committed in the heat of a fury, but not for such a sinister, calculated, deliberate, traitorous killing."

The legal requirements for provocation were stretched, and even redefined, in cases of spousal murder where the desertion of a husband or a wife from their conjugal and domestic responsibilities counted as reasonable provocation. Reasonable provocation could include an array of behaviours and failures, such as repeated drunkenness or sexual promiscuity; failing to provide or keep a proper home; or failure to protect the privacy and sanctity of the domestic space.[243] These actions, or failures, do not easily fit within the legal criteria of reasonable provocation as "blows, words or gestures," (see endnote 24) but within the domestic space, were meaningful to medical, legal and social interpretations of mind-state and responsibility.

Although provocation was regularly raised in domestic cases, the meaning of conjugality and the parameters of domestic duty varied for different *types* of heterosexual couples. This translated, therefore, into different medical and legal interpretations of provocation based on hegemonic concepts of race, class and gender. Recall, for instance, the case of Louis Jones, the "Coloured" man hanged for the murder of his run-away-wife in Halifax. In his case, a defence of provocation was argued and the seriousness of the crime was diminished in the defence lawyer's account of the event as simply a "row between husband and wife." The case, according to the lawyer, did not inspire concern from the public and, furthermore, he told the Minister of Justice in a letter, this extreme act of violence was not uncharacteristic between married people of Jones's "class" where

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[243] Mary Smith (1935); for example, was threatened with violence for telling a neighbour how cheaply she could run her household. Her husband, owing money to several people in their small town of Duck Lake, Saskatchewan, shook his finger at his wife when she asked if he meant to beat her up again, answering, "Yes, and when I do you will not have so much to say." See "Statement made by accused," pp. 1.

"the wife" was regarded as his "property" and something to be "desired."[244] The boundaries of conjugality and criminal responsibility, as well as the social meaning of the event, were defined in each cases according to the perceived position and constitution of the victim and accused. This was also evident in the trial of Albert LeBeaux (1920), during which it was suggested that while "wife-beating" was uncommon in civilized society, it was a matter of "custom" among Indians.

Similarly, when Paul Abraham (1944), a "half-breed," was arrested for killing his wife in a "fury," the reporting constable made reference to "the mode of life followed by these people" where it was considered "not uncommon for Indians and half-breeds to beat their wives." During Abraham's trial, his defence counsel, W.J. Beaumont, cross-examined the victim's father, who was also the Chief of Abraham's tribe, regarding the marital 'status' of the Indian couple, and in doing so, drew a line between legitimate/respectable and illegitimate/unrespectable unions:

> Q Your daughter, she is legally married to Abraham?
>
> A The old style of the Indian; that is the way they were married.
>
> Q And how many times can the Indians get married that way? …Could the woman get married more than once according to your custom? According to the custom of your tribe, of which you are chief, can a woman get married a second time while her first husband is still alive?
>
> A As long as the husband is living they can live but if the husband dies she can get another husband.
>
> Q But not unless he dies?
>
> A Because we get along good.

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[244] Louis Jones (1927); also see the case of R.A. Wright (1939), an "American Negro" who killed his common law wife because he feared she would leave him. There was discussion in both cases about the 'status' of the couples' relationship and the presumed "loose character" of the victims.

> Q Your daughters [first] husband is still alive isn't he? …
>
> A No. He is dead. …
>
> Mr. Beaumont: You are swearing that your daughter only has two husbands – Jasper Paul and Paul Abraham? Is that correct?
>
> A Yes, that is it. … She was gone with a fellow and I would not allow her to get married with this fellow and she did not want to get married with him.
>
> Q Well she never has been *properly* married to anybody, has she?[245]

This shows that legal interpretations of spousal murder were not bases solely on class-divisions, but also according to Christian values regarding marriage. The impression defence counsel wished to make in Abraham's cases was that if the marriage itself was not a "proper" marriage - by not taking place in a church before God - then the couple could not be held to the same rules a proper Christian marriage would dictate.

Mr. T. R. L MacInnes, the Secretary of Indian Affairs, was also interested in the impression the Abraham case would make on the remote Alberta community. He proposed to the Minister of Justice that the case should be used to "disabuse" the "old aboriginal idea that the husband has power of life and death over his wife, and can exercise it at his caprice."[246] The elitist assumption that domestic violence was both a product and symptom of presumed ignorant and weaker-classes/races was legitimized and strengthened through medical, judicial and lay interrogations of the quality and status of the domestic lives of lower-working class and non-Anglo defendants on trial for

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[245] Paul Abraham (1944); see trial transcripts, 48-50. Italics added.

[246] *Ibid.* See Condensed Summary, 3.

spousal murder. In the same way that constructs of class and race could set the boundaries of "normal" behaviour between wives and husbands, interpretations of defendants' states of mind turned on assessments of the circumstances leading to domestic quarrels. The culpability of accused murderers depended very much on who killed who, and, more importantly, why. "Domestic stress" and "provocation" were not gender-neutral concepts, as the trials of James McGrath, Mary Smith, Dina Dranchuk and Frances Harrop attest to. Accounts of responsibility in these cases incorprated common sense ideas about what naturally provoked women, and what naturally provoked men.

James McGrath's act of repeatedly stabbing his wife was decided by the trial judge to be the actions of a "mad-man" but not of an insane man. He told the jury in his charge that McGrath was "simply giving up on an extreme passion, the act almost of a wild animal."[247] However, unlike the cases of most women, or non-Anglo men whose "passions" were often articulated in biological terms, the judge in this case determined the husband's "difficulty... was that he was unable to support the wife and child and was dependent upon the mother to support them all."[248] McGrath's failure to control his passion was interpreted as a constitutive failure of his Anglo manhood. However, explanations of the *circumstances* which gave rise to McGrath's explosive behaviour were based on the married couple's deviation from the domestic ideal.

Much of the theorizing about McGrath's "loss of control" came from lay witnesses. For example, in a report written by the constable in charge of the investigation, the defendant's "mental strain" was attributed to the fact that his wife insisted on leaving

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[247] James McGrath (1931); see judge's report, 3.

him and taking away their infant son. This emotional strain, according to the constable, was exacerbated by his financial situation which prevented him from following her. The constable reported the defendant's "highly emotional" and "hysterical" state was "no doubt" also affected by the fact that "he had not had sexual relations with his wife for the past eighteen months."[249]

McGrath's mental state was also commented on at the trial by the coroner, Dr. Arnold Smith. To establish prior instances of abnormal behaviour, the doctor was asked by the Crown in cross-examination to report on an incident in which the accused lost control because his wife "disappeared." The Crown inquired:

> Q. You think that is the reason for his difficulty at that time. There was no doubt in your mind at that time that he suffered from some kind of mental anguish?
>
> A. I would say it was extreme mental anguish, yes.
>
> Q. And I suppose that condition would naturally weaken an man's will power or a man's ability to throw off, would it not?

Dr. Smith stressed to the court that he was "not an expert psychiatrist" but nevertheless went on to confirm that "there is a tendency to wear down a man's mental resistance by upsets of that kind."[250]

The relevance of a healthy domestic life was reinforced by the common sense wisdom that a man's mental resistance could be worn down "in such and event as a wife leaving a husband." McGrath's "emotional" disturbance was conidered by the judge to represent a weakness in his masculinity – his failed "power of resistance" – brought on

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[248] *Ibid.*, 4.

[249] *Ibid.* See police report, 4.

by his inability to assume his proper duties and pleasures as a husband. Although James McGrath was found legally sane, the understanding that he was not in a "right state of mind" when he killed his wife was freely acknowledged by the judge as both a matter of legal fact and common sense. The language evoked in the judicial representation of McGrath's character and state of mind certainly borrowed freely from psychiatric discourse, yet the Court rejected the idea that the case required the specialized knowledge and diagnostic skills of an "expert." According to the judge, it made sense that anyone who committed such an act "would certainly be in the wrong state of mind," and furthermore, he stated, "I don't think it would take a doctor to tell us that."[251]

Mary Smith, identified in court records as a "Half-breed," shot her husband, a returned soldier and "Englishman," following a heated "domestic quarrel."[252] Although an insanity plea was not formally entered at trial, the basis of her defence was that she suffered under a profound mental deficiency. Smith testified on her own behalf that on the night of the murder her husband threatened to beat her as he had many times in the past. On the witness stand she claimed her husband came after her with a gun, they struggled, she got the gun away from him and shot him in self-defense. However, her account of what happened was not seriously considered by the judge or the witnesses as a viable explanation for her actions. The Judge decided instead, that the "inspiration and motive for the crime" was that her husband threatened to sell their property, take the proceeds and leave her "penniless." He deduced,

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[250] *Ibid.* See trial transcripts, 200-205.

[251] *Ibid.*

[252] Mary Smith (1935); see judge's report, 1.

> the prospect of him doing this so upset the accused that she took this terrible method to prevent such a thing happening. In any event, under all the circumstances, it appeared that the accused was terribly upset, and was not without considerable amount of provocation.[253]

In his report to the Minister of Justice, the judge drew attention to the fact that the defendant did not shoot her husband while in the heat of an argument or in response to an immediate treat of death, but rather, following the argument while her husband was asleep. According to the judge, Smith "had taken advantage of the fact that he was asleep so as to make sure that the shot would be effective and that their troubles apparently would be over."[254]

Smith's testimony in court was lucid and articulate. According to the judge, she was "the most intelligent witness he had ever seen." However, revealing the significant gap between medical and legal assessments of mind-state and responsibility that often occurred in capital cases, Dr. MacNiel, a psychiatric expert, testified for the defence that she was a "congenital mental defective" and did not posses the intelligence to appreciate the nature of her act.[255] Defense counsel asked the doctor about an "hallucination" the defendant reportedly experienced of a "hairy man coming to her bed and choking her." Smith testified the image was a representation of her fear of her husband, but defense counsel insisted it was either a "condition of hysteria" or "epilepsy."[256] The doctor did not import these two diagnoses in his own evaluation of the defendant, but when defense

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[253] *Ibid.*, 5-6.

[254] *Ibid.*, 4.

[255] *Ibid.* See trial transcripts, Dr. MacNiel's testimony , 95. Dr. MacNiel was the Superintendent in charge of the Mental Hospital at Battleford of 23 years at the time of Smith's trial and was clearly medically qualified to give expert evidence on the issue of mental defectiveness.

[256] *Ibid.*, 96-98.

counsel asked which he thought was most likely in Smith's case, concluded; "her reaction to fear for her life would be that of an abnormal person." The cause could be either "hysteria or epilepsy brought on by her mental defectiveness." There was no consideration of the violent context in which the defendant lived prior to the murder, nor was there an attempt to dispute it as a fact. Instead, it was her psychological and emotional *reaction* to her situation which was under scrutiny and deemed to be "abnormal."

The interpretation of Smith's state of mind and loss of control which led her to kill her husband is quite different than the masculinized version of McGrath's loss of control. While not legally excusable, McGrath's actions were, nevertheless, seen as reasonable. It was common knowledge that any man under such stressful domestic circumstances would be provoked to violence. His perceived weakness was in his inability as a man to control his passions in such trying times. However, Smith's reaction to her domestic circumstances which could also be seen as reasonably provoking – fear of physical danger – was medically constructed as "abnormal" and, therefore, excusable.[257]

Dr. MacNiel's medically-established expert status, however, did not ensure his testimony a position of privilege in the courtroom. The judge was most reluctant to accept the expert's opinion that Smith was mentally defective and not criminally responsible for her husband's death; even though his testimony maintained the common sense idea that women who killed were mentally abnormal. In his report to the Minister of Justice the judge downplayed the viability of Dr. MacNiel's testimony and reinforced

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[257] Smith received a recommendation to mercy from the jury and judge, she was ordered a new trial on appeal and her sentence was reduced.

the authority of culturally constituted attitudes regarding marriage, conjugality and domesticity in legal decisions regarding responsibility in spousal murder cases:

> There was expert medical evidence to the effect that the accused had a mental capacity of a child of the age of eight and a half years. This expert evidence, however, was largely discounted by the ability and mental capacity of the accused, displayed as a witness in the witness box. She showed herself to be a woman of more than ordinary intelligence, and proved herself to be one of the most intelligent witnesses who gave evidence at the trial. It appeared clear, therefore, that she had either fooled the doctors when they were giving her the test examination, or that their examination was not sufficient on which to base a real expert opinion.[258]

When the judge asked the doctor at trial if it was possible Smith tricked him into thinking she was insane, he defensively replied;

> I don't think so. I have examined a good many people in jails. I have been examining for the Attorney-General's Department for twenty odd years, and I think I have now had enough experience so that I know whether this woman was fooling me.[259]

In the end, the judge recommended mercy despite his reservations regarding the defendant's character because he perceived the threat to her personal economic stability, particularly during the Depression, a legitimate cause to provocation. Her husband's threat to desert her, therefore, was taken up as more of a concern than his threat to beat her.

The idea that domestic deprivation could drive women to madness and murder coincided with the moral outlook of medical and legal men and their decisions about motivation and responsibility (Harris, 1988). However, the plight of impoverished wives was also a concern taken up by the middle-class public. After the news of Dina

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[258] Mary Smith (1935); see judge's report, 4-5.

[259] *Ibid.*, see trial transcript, 102.

Dranchuk's death sentence, a Mr. Matt O'Reilly urged the women of Alberta to write the Minister of Justice in support of her clemency:

> I have no fault to find with judge or jury, but I have with the women of this province if they do not ask Hon. Hugh Guthrie to reduce the sentence to life imprisonment.

Mr. O'Reilly went on to state that it was the obligation of women in Alberta to stand up for other women and families hard-hit by the Depression; living in dire straits and staring down madness:

> Knowing the conditions as I do of the north country, where women are on the verge of insanity from looking down empty flour barrels, no clothes, and other necessary things, even to being sick, places me in a position to show that she did not bring out the distress she was labouring under to show what drove her to the rash act. It is common property, and anyone knows that the way relief is pinched out to some, that it discourages a man to ask for it, but the women must do the suffering constantly looking at the poverty that surrounds her. Personally I would not want this woman to hang because of the neglect of others.[260]

It was well understood, according to Mr. O'Reilly, that women were affected by poverty differently than men; women were driven insane and suffered emotionally and psychologically, while men suffer damage to their masculine pride.

However, not everyone was sympathetic to the plight of women during this period, nor toward women's death sentences being commuted in Canada. For instance, in a stinging letter to the editor of *The Albertan* signed, "A MERE MAN," the writer voiced his frustration about the leniency extended to women who kill their husbands. He exclaimed that "dozens of murders have been committed by women in the last 20 years" and "in several cases husbands had their heads hacked off or battered by their wives

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[260] Dina Dranchuk (1934); Matt O'Reilly, "Anxious To Have Sentence Commuted," *The Herald* (n.d).

while they slept, yet hardly one woman has paid the penalty." He was particularly concerned about the extreme bias he had been witnessing in the adjudication of domestic murder cases in Canada and the United States based on the misguided "assumption that a woman, and especially a wife and mother, can do no wrong." Therefore, he continuted;

> if a man murders his wife, … he is a brute and must be hanged, but if she murders him, no matter how atrociously, oh, well, he is a brute anyway and brought it on all himself, while she is a downtrodden saint and must be let off. This assumption is totally unwarranted. There are many men whose lives are made miserable by their wives, but if one of them solves the problem as Mrs. Fusty and Mrs Dranchuk did, he soon finds himself dangling on the end of a rope.[261]

While some men claimed "discrimination" on the part of justices, women overwhelmingly came out in strong support of other women who were required to take such drastic actions to end their domestic ordeals. Recall, for example, the case of Frances Harrop from Chapter Two. In this case the judge cited the "dreadful" living conditions of the Harrop family as the primary cause of her "brooding" and eventual loss of control. The psychiatrist, Dr. Speechly, diagnosed Mrs. Harrop with a menopausal condition referred to as "climacteric insanity" which caused her to react in an abnormal and extreme way to her domestic situation. However, the public, particularly middle-class women, felt the "conditions" under which Mrs. Harrop lived and the failures of her husband to provide for her served as ample cause for provocation.

One women described Mrs. Harrop's husband as "a man lacking in all the attributes which go to make marriage what it should be," claiming [p]rovocation of the

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[261] *Ibid*. "Letters to the Editor: Women and the Law," *The Albertan* (October 25, 1935).

extremest kind" existed in Harrops's case.[262] A letter to the Minister from the Home Welfare Association in Winnipeg, supported the public's sentiment that Harrop deserved clemency and based their argument on the following grounds:

> (1) The crime was committed under great provocation,
> (2) The woman had been brooding so long that she had become obsessed with the idea that her husband's death was the only way out of all her troubles,
> (3) The sympathy of a very large majority of Winnipeg women towards Mrs Harrop is very much in evidence.[263]

The interpretations of spousal murders which took place in the circumstantial or emotional context of domestic strife varied from case to case, but the notion that domestic stress could drive men and women to lose control of their passions – though not necessarily to the point of legal insanity where they could be found not criminally responsible – was constant. Several competing characterizations emerged in the case of Frances Harrop; as neglected by a failed husband, as the insane menopausal housewife, and as a woman provoked by want of money and domestic instability. Competing explanations attest to the complexity of responsibility discourse in cases of spousal murder (and capital cases in general), but they also reveal the many different ways in which the "cult of domesticity" was constituted and perpetuated through routine medical, legal and popular assessments of gender, class and race.

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[262] Frances Harrop (1940); see letter signed Mrs. Mary Healey, Secretary, Florence Nightingale Rebekah Lodge #21. Also see a letter from Miss Mary L. Kennedy.

[263] *Ibid*.

Conclusion

Spousal murder cases offer insight into the state of gender relations during this period and show the way in which factors such as race/ethnicity, age, sexuality and class designation helped determine what *type* of man/husband or woman/wife a defendant was. Judicial, medical and popular judgements about a defendant's character, in turn, shaped the discursive and practical boundaries conjugality, motivation, and criminal responsibility.

The specific meanings of conjugality and the domestic space in spousal murder cases was central to the legal task of (re)constructing the events/circumstances leading to murder and ultimately in establishing the culpability of the murderer. Particularly in cases were the precipitating events leading to murder between husband and wife was described as a "domestic quarrel" or the result of an unfortunate "domestic situation." However, even when evidence of a domestic quarrel was not brought to the foreground, as in the case of Marie Beaulne, lawyers, witnesses, and public observers still offered some commentary on the quality/status/characteristics of the domestic life shared by the victim and offender.

Just as non-Anglo defendants were judged and classified as particular *types* of people, spousal homicides were interpreted as a special type of murder case. In both instances, evidence of reputation and character was particularly important, but perhaps more so, was the relationship between the victim and the perpetrator, and the obligations bound by that relationship. Representations of criminality and mind-state in cases of spousal murder reflected the context in which the event took place, and the

social/professional position of observers. And while there were variations from case-by-case, and within each case, standards of criminal responsibility were always measured against, and articulated through, idealized notions of heterosexual conjugality and domestic life.

CONCLUSION

The purpose of this dissertation has been to trace the intricate links between social ideas, medical theories and legal practices on the issues of criminality and criminal responsibility in early-20th century Canada. The process of unearthing the historical meanings of criminal responsibility in Canadian medical-legal discourse immediately brings to the surface the sensibilities and concerns of the observer; those who reported, diagnosed, adjudicated, administrated and simply wrote about individual cases. The personal narratives of those on trial for murder – how they explained their own motivations and actions – were systemically subdued or rearranged through the discursive processes of truth-finding and story-telling. While it is surely important to be attuned to the ways in which offenders' self-representations contributed to, or resisted, medical and legal assessments of their behaviour, this analysis reveals the importance of also heightening our attention to the discursive processes inculcated in medial-legal discourse that privileged middle-class, Anglo-Christian ideals: in other words, to attend to the ways in which legal officials, psychiatrists and the concerned public made sense of a particular murder case.

Through an analysis of the different texts collected in capital case files, I began this dissertation by piecing together an historical account of how certain *ideas* about criminality produced particular meanings and articulations of responsibility and mind-state. Aware of the perspectives and interests of the authors and audiences represented in documentary sources, and my own reading and presentation of the material, this is not definitive social history of criminal responsibility in Canada. However, analysis of these

texts do provide a valuable opportunity to explore past social, legal and medical practices, offer tentative insights, and perhaps, an opportunity to better understand our current practices and ideologies.

To demonstrate the deep relationship between context and meaning, I examined how ideas of "degeneracy" and "feeblemindedness" metamorphosed during the inter-war and post-war periods in Canada to include competing accounts of the perceived social and psychiatric effects of the 'conditions' of war and economic hardship. I also considered how "undesirable" immigrants, "Indians"/"Half-Breeds", and the poor more generally, were identified as "degenerate," "defective," or "feebleminded" and singled-out as the primary 'contaminants' of Canada's social, moral, and biological health. The (re)constitution of external events as embodying and perpetuating an inherent degenerative quality, provided subtext and meaning to the medical, legal and popular interpretations of criminal responsibility found in the documentary texts of capital case files from this period.

The cases of Dina Dranchuk (1934) and Frank Patrick (1941), for instance, show this reciprocal process whereby particular social-historical conditions, such as poverty and war, shaped the intended and received meanings of texts, and how the reading of these texts can, in turn, reveal the social-cultural tensions and nuances of the historical context in which they were produced. Documentary sources located in the case files of Dranchuk, Patrick and others, show how evaluations of an individual's home life and the state of the country's social/economic well-being influenced the way murder was understood, and how these factors provided much of the subtext to legal, medical and lay representations of criminality and mind-state during the 1930s and 40s.

Historical evidence presented in this dissertation suggests that there were in fact many theories circulating throughout professional and lay communities in Canada about the precise *nature* and *cause* of degeneracy and feeblemindedness, but the general idea that "degeneracy," in its many forms, could mitigate criminal responsibility was rarely contested in assessments of murder cases. In reading the case files, therefore, it is clear that standards of criminal responsibility were not strictly set according to legal criteria or psychiatric theories, but on the popular consensus that certain *types* of people were qualitatively different, and that differences were meaningful and measurable.

Analyzing the context and meaning of different articulations of culpability and mind-state formed in response to single cases requires a continuous recognition of the ideological and institutional frameworks that were in place and helped provide shape and content to the language represented in documentary texts. For instance, I examined the artificial divide between 'expert' and 'common sense' knowledge to show how expert knowledge served to reinforce common sense, and how judicial appeals to common knowledge, *through* expert knowledge, served to contextualize, and give meaning to, the concept of criminal responsibility without challenging Anglo ideologies about class, gender and race difference. Therefore, although medical/expert knowledge did not affect the law on a doctrinal level, scientific discourses – which were infused with common sense discourses – did have a profound effect on the way responsibility was legally understood.

My research also establishes that a formal *guilty* verdict actually tells us little about the underlying discourses that came together during the adjudication process to help define the boundaries of criminal *responsibility*. Responsibility, I have argued, was

instead (re)negotiated on a case-by-case basis and at different stages of the criminal justice process. The legal context in which a defendant's mind-state was addressed (meaning the stage of the judicial process and/or the defence introduced at trial), helped define the boundaries of responsibility discourse as well as determine *who* had decision-making power – experts, juries or legal officials. The question of who had the right to decide matters of mind-state and criminal responsibility was always an issue in capital cases, and would later become a central issue in the 1953 *Royal Commission On The Law Of Insanity As A Defence in Criminal Cases,* which marks the end of the period covered in this study.

Historical evidence suggests that legal officials were aware that much discretion was exercised when it came to interpreting the applicability and boundaries of particular defences such as insanity, provocation and self-defence, where the structure and substance of legal proceedings was strongly influenced by the moral value legal decision -makers (the executive, judges, lawyers and jury men) placed on various circumstances surrounding the crime and/or the decided "character" of a defendant; as well as how they perceived the nature and value of expert witness testimony in individual cases.

Character was another flexible concept, like responsibility, which subsumed ideas about natural race, class and gender hegemony. Racial designations and characterizations, for instance, were typically placed within the first few lines of the remissions report, and set a powerful image against which the facts of the case were to be considered. Recall the case of Mary Smith, for example, in which the Remissions Officer identified defendant as a "Half-bread" and her husband as an "Englishman" in the first lines of his report to register the dangers and consequences of mixing blood in birth and in marriage. Evidence

presented throughout this dissertation also showed how standard signs of degeneracy or mental incapacity, such as uncontrolled passions, fits of anger, unemployment, drinking and wife-beating, were also used in different ways to describe the natural tendencies of particular race and class *types*. Post-trial documentation shows particularly well how decisions regarding mercy and clemency were not simply based on the legal facts that led juries to find certain defendants guilty, but on common sense and expert assessments of gender, race and class norms.

The often subtle nature of these processes lend credence to my claim that we need to look beyond trial outcomes to appreciate the more elaborate and contingent discourses about criminality, responsibility and human nature that helped provide meanings to particular historical events. For example, representations of spousal murders committed within the domestic space combined social-economic explanations with positivist ideas about criminality in a way that naturalized poverty and violence in lower-class marriages. However, as the case of Frances Harrop (1940) demonstrates, it was also understood that even people of the strongest constitution could turn mad, if for a brief period, in the face of domestic dissention.

The ascribed standards of criminal responsibility in each case, therefore, were not clearly represented in official decisions about guilt. Instead, determinations about responsibility were articulated through, and represented by, judicial recommendations for mercy, the partiality of public petitions, newspaper reports, unofficial letters between court officials, medical reports and post-trial conversations about the appropriateness of the death sentence. Popular, legal and/or medical evaluations of criminal responsibility

and mind-state were never totally unified in the courtroom, where, as Roger Smith (1981) points out, “the reaching of verdict was a question of deciding which discourse to use.”

The narratives that emerge from Canadian capital case files do not always fit neatly with generalized accounts of Western medical-legal history. The nature and development of forensic psychiatry in Canada, and the professional relationship between law and psychiatry more specifically, do share many of the same characteristics described by historians in France, England and the United States. However, as my research establishes, there were also some important differences, such as the often contentious role of the expert witness and the unstable authority of psychiatric expertise in Canadian Courtrooms. It is necessary, therefore, to expand the medicalization thesis to account for the variances and inconsistencies in the use, authority and substance of psychiatric expertise in different historical contexts, as well as from one case to the next.

Appendix A

Alphabetical list of Capital Cases with Archival references

Name & Date	RG 13 reference volumes
Abraham, Paul (1944)	Vol. 1641
Antonowicz, W. (1933)	Vol. 1581
Beaulne, Adrien (1948)	Vol. 1671, 1672
Beaulne (Viau), Marie (1929)	Vol. 1555
Beregovenko, Jack (1932)	Vol. 1577
Boyko, John (1947)	Vol. 1664
Brown, Kenneth (1936)	Vol. 1603, 1604
Cambell, Thomas (1931)	Vol. 1572
Carrier, Frank (1929)	Vol. 1417
Chapdelaine,Beatrice (1934)	Vol. 1579, 1580
Childs, Dale (1949)	Vol. 1684
Chong, Leung (1928)	Vol. 1547
Coutier,Marie-Louise (1938)	Vol. 1616, 1617
Crawley, Samuel (1933)	Vol. 1581
Dagenais, Alfred (1924)	Vol. 1529
Debartoli, Alex (1925)	Vol. 1539
Demeutes, Marie-Louise (1946)	Vol. 1659
Dick, Evelyn (1964)	Vol. 1661
Dolan, Frank (1937)	Vol. 1612
Dranchuk, Dina (1934)	Vol. 1592, 1593
Dube, Leonidas (1950)	Vol. 1689
Dvernichuk, George (1930)	Vol. 1564
Farmer, Everett (1937)	Vol. 1611
Fosbraey, James (1950)	Vol. 1690, 1691

Name & Date	RG 13 reference volumes
Gaetano, Pepitone (1928)	Vol. 1548
Gunning, William (1938)	Vol. 1618
Hainen, William (1945)	Vol. 1650
Harrop, Frances (1940)	Vol. 1625
Houde, Marie-Ann (1920)	Vol. 1507
Jackson, Sarah (1920)	Vol. 1509
Joe, Katy (1923)	Vol. 1526
Johnston, Chester (1942)	Vol. 1637
Jones, Louis (1927)	Vol. 1545
Kisielewski, Bruno (1943)	Vol. 1640
Kolesar, Edward (1942)	Vol. 1638
Lassandro, Florence (1922)	Vol. 1523, 1524
Le Beaux, Albert (1921)	Vol. 1513
Martin, Charles (1947)	Vol. 1667
McDonald, Doris (1927)	Vol. 1546, 1547
McGrath, James (1931)	Vol. 1572
McGuffin, James (1941)	Vol. 1631
McLean, Elizabeth (1946)	Vol. 1661, 1662
Monchuk, William (1938)	Vol. 1607, 1614
Muskey, John (1921)	Vol. 1512
Pasquale, Benito (1926)	Vol. 1538
Patenaude, Gervin (1950)	Vol. 1690
Patrick, Frank (1941)	Vol. 1633
Poliquin, Antonio (1930)	Vol. 1564
Pogmore, Christine (1936)	Vol. 1607
Proulx, Joseph (1945)	Vol. 1651
Rubletz, Annie (1940)	Vol. 1627
Rudka, Harry (1922)	Vol. 1520
Schmidt, Valentine (1927)	Vol. 1544

Name & Date	**RG 13 reference volumes**
Schmidt, William (1945)	Vol. 1645
Smith, Mary (1935)	Vol. 1599
Sowash, Harry (1925)	Vol. 1536, 1537
Sprague, Emily (1926)	Vol. 1540, 1541
St. Onge, Wilfred (1923)	Vol. 1524, 1525
Stasiuk, Rose (1942)	Vol. 1637
Taylor, Jessie (1939)	Vol. 1622
Tilford,Ann Elizabeth (1935)	Vol. 1598, 1599
Teolis, Tommasina (1934)	Vol. 1592, 1593
Tratch, Catherine (1924)	Vol. 1528
Weid, Jacob (1948)	Vol. 1676
Wright, R.A. (1939)	Vol. 1621
Zadorozny, Samuel (1943)	Vol. 1641

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International Journal of Psychoanalysis (1920-)
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