THE SEVENTH CIRCLE OF HELL:

THE SOCIAL RESPONSES TO MURDER IN CANADA

by

Elizabeth M. Elliott

M.S.W., Carleton University, 1986

THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

in the School

of

Criminology

SIMON FRASER UNIVERSITY

April 1996

ISBN 0-612-16872-7

PARTIAL COPYRIGHT LICENSE

I hereby grant to Simon Fraser University the right to lend my thesis, project or extended essay (the title of which is shown below) to users of the Simon Fraser University Library, and to make partial or single copies only for such users or in response to a request from the library of any other university, or other educational institution, on its own behalf or for one of its users. I further agree that permission for multiple copying of this work for scholarly purposes may be granted by me or the Dean of Graduate Studies. It is understood that copying or publication of this work for financial gain shall not be allowed without my written permission.

Title of Thesis/~~Project/Extended Essay~~

The Seventh Circle of Hell: The Social Responses to Murder in Canada

Author: _____
(signature)

_____
(name)

April 17, 1996
(date)

APPROVAL

Name: Elizabeth M. Elliott

Degree: Doctor of Philosophy

Title of Thesis: The Seventh Circle of Hell:
The Social Responses to Murder in Canada

Examining Committee:

Chair: Joan Brockman, LL.M.

Neil Boyd, LL.M.
Senior Supervisor
Professor

Karlene Faith, Ph.D.
Associate Professor

John Lowman, Ph.D.
Professor

Robert Menzies, Ph.D.
Professor

Brian Burtch, Ph.D.
Associate Professor

Dany Lacombe, Ph.D.
Assistant Professor
Internal Examiner

Laureen Snider, Ph.D.
Professor, Sociology Department, Queen's University
External Examiner

Date Approved: April 4 / 96

ABSTRACT

The Seventh Circle of Hell:
A History of the Response to Murder in Canada

This dissertation explores responses to murder in Canada from 1763 to the present. It is a historical study of power in the construction of murder and the murderer, and in struggles to determine suitable punishments. Death is significant both to the crime itself and in ways of conceptualizing and responding to murder. As the thesis examines power in responses to murder, it is a study of a particular politics of death.

In the first part of the study, theoretical and methodological considerations are laid out in three contexts. The first of these contexts is conceptual, in which different ways of thinking about murder are explored. The second context addresses the problem of juridico-discursive power and its relationship to thought on murder. The third deals with methods of studying murder through the analysis of texts, as represented in a random sample of federal archival documents.

The discourses on murder and the murderer expressed in the documents are the subject of concern in the second part of the dissertation. These have been grouped according to three "knowledges" which prevailed in the documents selected: law, medical science, and popular media and literature. Each of these contribute a particular

and the murderer, explored as representations of thought on murder.

The seventh circle of hell is what Dante described in the 14th century as the final punishment for murderers. Punishment, the primary response to murder, is the subject of the last part of the dissertation. The death penalty and life imprisonment are reconsidered in view of death and Foucault's notion of power/knowledge. Finally, this study considers how responses to murder in Canada might rather work towards reducing instances of murder through moral pragmatism.

"Why does my action strike them as so horrible?" he said to himself. "Is it because it was a crime? What is meant by crime? My conscience is at rest. Of course it was a legal crime, of course the letter of the law was broken and blood was shed. Well, punish me for the letter of the law . . . and that's enough. Of course, in that case many of the benefactors of mankind who snatched power for themselves instead of inheriting it ought to have been punished at their first steps. But those men succeeded and so *they were right*, and I didn't, and so I had no right to have taken that step."

It was only in that that he recognised his criminality, only in the fact that he had been unsuccessful and had confessed to it.

(Dostoevsky, **Crime and Punishment,** 1866)

Long before 1933 there was a smell of burning in the air, and people were passionately interested in discovering the locus of the fire and in tracking down the incendiary. And when denser clouds of smoke were seen to gather over Germany, and the burning of the Reichstag gave the signal, then at last there was no mistake where the incendiary, evil in person, dwelt. Terrifying as this discovery was, in time it brought a sense of relief: now we knew for certain where all unrighteousness was to be found, whereas we ourselves were securely entrenched in the opposite camp, among respectable people whose moral indignation could be trusted to rise higher and higher with every fresh sign of guilt on the other side. Even the call for mass executions no longer offended the ears of the righteous, and the saturation bombing of German cities was looked upon as the judgment of God. Hate had found respectable motives and ceased to be a personal idiosyncrasy, indulged in secret. And all the time the esteemed public had not the faintest idea how closely they themselves were living to evil.

One should not imagine for a moment that anybody could escape this play of opposites . . . The sight of evil kindles evil in the soul -- there is no getting away from this fact. The victim is not the only sufferer; everybody in the vicinity of the crime, including the murderer, suffers with him. Something of the abysmal darkness of the world has broken in on us, poisoning the very air we breathe and befouling the pure water with the stale, nauseating taste of blood.

(C. G. Jung, **Collected Works Vol. 10**, orig. 1946)

ACKNOWLEDGEMENTS

Over the duration of the nine years that went into the development of this dissertation, I have become indebted to many people who provided assistance in different ways. At the School of Criminology at Simon Fraser University I was fortunate to have the academic advice of five faculty members -- Neil Boyd, Brian Burtch, Karlene Faith, John Lowman and Bob Menzies -- whose input made the project a rich learning experience to the very end. Neil, Brian and Karlene were also kind enough to provide me with research employment throughout my candidacy in the Ph.D. program. Bob Gaucher of the Department of Criminology at the University of Ottawa, who was particularly helpful in guiding my previous graduate work, continued to be generous with his academic advice throughout this project.

The staff of the National Archives of Canada were consistently helpful over the years in guiding me through complicated indices, suggesting routes to travel through the mass of documents in the archival holdings and quickly accessing the material requested. Their efficiency and conscientiousness made this research project a productive experience.

A number of friends have also been subjected to the arguments presented in this thesis and have offered feedback along the way. Thank you to Petra Accipiter, Carey Christianson, Ron Cooney, Jeannette Cooney, Claire Culhane, Sharon Fraser, George Fraser, Tammy Genesove, Heidi Graw, David Snook and Paul Virtanen. Thanks also to Joseph Kibur, who kindly made himself available for solving my last minute computer problems.

My family has been enormously supportive, throughout the whole project. I owe my initial interest in social justice to my parents and first teachers, Albina Mihelich Elliott and Wallace Elliott, who have also relieved me of my own family responsibilities from time to time so that I could work on this research. My brother Peter Elliott helped me access material from Statistics Canada, in addition to the moral support which he and Colleen Elliott have consistently provided.

In particular, I owe thanks to my partner Milt Gluppe for technical assistance and supporting me in every way throughout this endeavour. Kristofor and Maya were understanding about the frequent inaccessibility of their mother. To Milt, Kris and Maya, thank you for your love of life, and the joy and meaning you bring to mine.

TABLE OF CONTENTS

INTRODUCTION

> Nothing can . . . now suspend the Decision of this Cause, so Interesting by the Atrociousness of the Crime, the uncertainty of the Author of it, the fear of involving the innocent and the Multiplicity of its Objects; This cause has fixed the attention of the Publick, and excited the Curiosity of all Persons . . .
>
> (Transcript of the murder trial of Josephe and Marie Corriveaux, 1763) **(1)**

> Now, I serve time: existing in a white-washed asylum called Prison for Women. Stricken from the records of society are the acts spanning forty-one years. A few short minutes -- an act of uncontrollable rage -- an act which erased another life -- this act; this five minutes now calculates the quality of my time, and imposes the limits of my existence.
>
> (Gayle Horii, **The Journal of Prisoners on Prisons**, 1988/89)

Murder is a social problem which continues to fix public attention and excite our curiousity at the end of the twentieth century, as much as it did in the 1763 Corriveaux case in Lower Canada. Murder is also considered a problem which demands some formal state response. This response is authoritatively legal, although the legal concept of murder has always been susceptible to the influences of extra-legal knowledge and human practice. The legal nature of our "official" definitions of murder confines our response to an administrative tribunal which culminates in a punishment of the guilty person. The person who kills becomes defined by a single tragic act committed in the course of a longer life, acquiring the "master status" of the convicted murderer and thus subject to physical control by the state.

This dissertation is a historical study of power in the processes of defining what the

death called "murder" should be, of constituting the person who causes another person's death and of the struggles to determine suitable punishments for "murderers." The social responses to murder, then, may be considered as a particular politics of death. This particular approach to murder is influenced by my experiences in social and community work with people serving sentences for murder and with victims of violence. Other specific incidents through which death and murder have touched my personal life in the last five years have also been influential, including the accidental death of a friend, witnessing a murder and, in a separate incident, witnessing a suicide attempt.

The last couple of years, particularly in the lower mainland area of British Columbia, have also been eventful years in terms of sensational murder cases. These tragedies included the abduction sex killings of two young girls (one of whom was taken from the inside of her own home by her alleged killer), and a young woman from her place of work. As I currently write, a very unusual murder investigation is underway in a neighbouring community, which is grappling with the violent sexual assault of two teenage girls which left one of them dead. The anonymous assailant with a flair for the dramatic is still at large, making his presence known in taunting calls to the police, defacing and delivering the gravestone of the victim to the parking lot of a local radio station, and threats of further attacks which are frequently and enthusiastically reported in

the local media. Signs of fear were prevalent in the Fraser Valley in the first two months following the murder: fellow drivers checking each other out on the basis of the killer's composite drawing, rumours of killer sightings in neighbouring communities which were buzzing with the latest news on the case, a taxi company offering free service to women after 11:00 p.m., frustrated civilians out conducting their own investigations on the streets which were emptied of pedestrians by mid-evening.

Canada also witnessed another unusual murder case in which jury members and court personnel watched videotaped sexual assaults on two teenage girls, who were later killed by their camera-friendly attackers. In two trials, Paul Bernardo and Karla Homolka were convicted for the sex killings of these girls, sparking great public controversy over media censorship and the plea-bargaining process, and brought the visual expression of victim impact to the fore of criminal justice processes. In all, the times have been ripe for a first-hand observation of the responses to murder in Canada.

This dissertation is an attempt to explore the Canadian responses to murder, by looking historically at how the murderer has been constituted and punished. I chose murder as the subject for analyses for two reasons. First, in terms of legal sanctions, murder has been considered one of the worst offences (2); second, murder involves

violent premature death. A study of the response to criminal transgression, when using the specific example of murder, can be explored at its social/legal (worst crime) and rational/psychological (premature death) limits. These limits refer to those distinctive lines which separate two absolutely opposed extremes, such as murder (crime) versus law-abiding behaviour and death versus life. I draw attention to these obvious notions only in order to direct the analyses of responses to murder toward them.

Murder is largely construed as a black and white issue. The idea that murder is wrong, or bad, or evil seems as obvious as the need for punitive social responses to it. Punishment may be seen as a triumph of good over evil, a symbolic display of righteous power of one entity (the body politic) over another (the murderer). Punishment is also a moral compensation demanded of individuals who breach legal codes or other social customs. What prefaces such punishment, however, is a hatred for the crime itself. What helps to make murder such an emotive issue is our strong aversion to premature violent death. The empirical reality of death helps to reinforce the moral dualism implicit in the responses to murder -- murder is evil, punishment is good; death is bad, life is good.

Analyses of murder tend to be directed toward the act itself and the individual construction of the actor murderer. This dissertation attempts to shift the focus to analyse

the observers/judges of murder and the murderer, as revealed in documents retained in Canadian archival libraries. Murder is considered as a legally defined concept in Canadian society, as opposed to a "natural" crime or a self-evident moral aberration. There are many acts that cause violent premature death which are not criminal, such as the activities of soldiers in warfare, police officers on duty, physicians and surgeons in practice, and corporations sidestepping health and safety laws. This aspect of the definition of murder, while an important one in its own terms, will not be examined in this dissertation. Rather, the use of the term "murder" in the study which follows relates both to its meaning as a crime as contained in political and justice-related documents pertaining to murder and the murderer, and to the "natural" moral connotations of murder in the various discourses.

This dissertation will not address the specific question of why an individual murders, except perhaps in an indirect way by confronting the question of *context* in understanding murder and the murderer. This does not mean that the question of why murder happens and who commits it is entirely eschewed by this analysis, but rather that this question is held in the context of the printed discursive responses of people to murder. Decentering the question of who murders and why also doesn't undermine its relevance, although it does reposition it in the wider context of other questions about murder.

Conceptually, the dissertation is divided into three separate but related parts which frame the discussion. The first is a consideration of *thought* itself, and how the ways that murder may be thought about are the product of epistemological, juridico-discursive and methodological factors. The second part is an empirical analysis of the *talk* on murder, as reflected in three kinds of knowledge about murder. The historical *practices* of punishment as the response to murder are the subject of the last part of the dissertation.

The attention to thought in the analysis of responses to murder sets the direction for this inquiry. In the first chapter, the focus is on ways of knowing murder as an illegal and/or immoral killing and as an unfortunate death. Modern cultures remain grounded in Cartesian epistemologies and, as such, the limits of what can be known are constrained by empirical and rational imperatives. Discursive responses to murder are shaped by reason, rationality and morality, as well as reflecting a Christian rhetoric. Also, Cartesian dualism was influential in the schematic separation of the mind from the body. This separation of the thinking, self-perceiving mind from the mortal organic body is considered with respect to cultural and individual notions of death and its implications in the context of responses to murder.

It is not enough, however, to enhance these particular epistemological considerations

in the written thoughts on murder without addressing power, and *how* particular ways of thinking are reflected in collective political sanctions against murder. The different perspectives on social/political exercises of power provided by liberalism(s), Marxism(s), feminism(s) and Michel Foucault are overviewed in the second chapter with particular reference to law and the state, which authorize particular definitions of murder and specific responses to it in modern Western cultures. Foucault's description of juridico-discursive conceptions of power is used to frame this discussion, in which the role of the individual is considered in the context of power/knowledge.

Having looked at particular limits to thought about murder and how these help to shape what can be said and done about it, in the third chapter I consider a range of methods for studying murder. These methods contribute different and potentially useful information towards pragmatic responses to murder which have nonetheless been largely unsolicited in social policy on murder. Studying the *response* to murder, instead of murder itself, is a way of considering why this is so, by examining what has been said about murder and its punishment historically. This requires the use of archival documents, which in this case were largely retrieved from the National Archives of Canada. In these documents, the words of Canadian men and women speaking about murder from 1763 to the present were viewed as representations of power/knowledge in

the constitution of the individual murderer. These representations were grouped in three areas of "knowledge" which seemed prevalent in the documents: legal, medical/psychiatric and popular conceptions of murder and the murderer.

In the second section of the dissertation, these three areas of discursive knowledge are studied with reference to what was said and how this talk contributed to the construction of murder and the murderer. Chapter Four examines legal discourses, in which murder is conceived as a legally prohibited act according to shifting definitions of, and differentiations within, murder. In this part of the dissertation, I look at the relations of power/knowledge in the legal responses to murder as they emerge in the documents, particularly in the discursive practices of judges and juries. The practice of differentiating murders is also explored on the basis of the particular status of murderers as women or indigenous people. In the legal discourse studied, the act of murder is addressed in the trying of the individual actor, through whom the corresponding punishment is made concrete and visible. However, the power of the law of murder, given the automatic punishment of the death penalty until 1965 for convicted murderers, was resisted in many ways by Canadian judges and juries who were confronted by actual personal cases rather than general abstract law.

The sciences of medicine and psychiatry are another area of particular influence in thought about murder and the way the murderer is constituted as a specific type of person. This is the focus of Chapter Five. First, medicine is relevant because it is through medical biology that the "individual" as a finite subject of inquiry first became possible. In this context, death may be understood as the individual biological mortality of a thinking rational being, an understanding which is made more disturbing by the violent premature death of murder. Second, psychiatry is made possible as a medical specialization by the schematic mind/body split. Psychiatry produced a body of knowledge on the diseases of the mind, which intervened with the law in the 1800s in the concept of monomania. Establishing the state of the murderer's mind became the domain of psychiatry within the uncomfortable limits set by law, and through this the person of the murderer was given more "texture" through the discourses of psychiatry.

Chapter Six examines popular news and entertainment as other sources of talk about murder and the murderer. These sources provide audio-visual and printed accounts of both fictional and actual murders, which are widely disseminated to mass audiences and have been popular historically. But with the advent of film and television came a shift in the form of information presentation, from the text of the printed word to brief and continually changing audio-visual images. The popular constitution of the murderer is

thus also one in which the ways of knowing the murderer are affected by the particular medium relaying the message. Further, popular accounts of murder are influenced by the economic concerns of media business interests, and as such are vulnerable to distortion. Superficiality is another drawback to media news, as Henry David Thoreau observed in the mid-19th century (in DeFleur and Ball-Rokeach, 1975, p. 165): "If we read of one man robbed, or murdered . . . we never need read of another. If you are acquainted with the principle, what do you care for a myriad instances and applications? To a philosopher all news, as it is called, is gossip . . ."

In the last section of the dissertation, I look at the responses to murder in Canada in discourses about and practice of punishment of the convicted murderer. The section begins with a chapter on the death penalty and life imprisonment, the two major methods of punishment employed in response to murder in this country over the last two hunded years. Some rationalities for the punishments for murder are surveyed, and the social meanings of such punishments and the specific techniques of the death penalty and life imprisonment are considered. The death penalty and life imprisonment are then re-examined in the context of previous discussion on epistemology and power/knowledge, and the role of death. The gradual shift from the death penalty to life imprisonment as the punishment for murder is also considered through the rationalities offered in the

documents studied.

In the eighth and final chapter, the punitive rationales and responses to murder are reconsidered in view of murder as a cultural rather than a solely individual phenomenon. Canadian responses to murder have typically focussed on the conceptual space between the act of murder and the actor-murderer, that is, in determining the identity and culpability of the murderer to be punished. In this way, the problem of murder becomes a case which is solved with the conviction of the murderer. Given our repulsion to violent premature death which motivates legal sanctions against murder in the first instance, I argue that the pragmatic goal of reducing the tragedy of murder necessitates its perception as a cultural rather than a wholly individual phenomenon. Stanley Cohen's idea of moral pragmatism (1985, pp. 252-253) is invoked to this discussion, as a means of balancing the immediate safety concerns posed by the few predatory individuals in Canada and the symbolic importance of punishment with the pragmatic problem of how to reduce murder.

This history of our responses to murder is thus descriptive and prescriptive. In examining the thought, talk and practice on murder, historical responses to murder are discerned as relating to the problem of the individual murderer. The problem with this

particular approach to murder is the limitations it presents to other socially pragmatic avenues by which we might hope to respond to the problem of violence in Canada.

ENDNOTES

1. From the Judge Advocate General Courts Martial Proceedings, Papers, 1763. The trial of Josephe Corriveaux for the Murder of his Son in Law Louis Helene Dodier at St.Vallier and Mary Josephe Corriveaux Widow of said Dodier and Daughter of said Corriveaux as Accomplice in the same. MG 13, War Office 71, Volume 137, Reel C-12585. The National Archives of Canada.

2. Murder (and first degree murder specifically after 1976) has been equalled by treason in terms of its perceived seriousness and the legal sanctions (the death penalty until 1976, and a life sentence with no parole possibility for 25 years later) prescribed for these crimes. The charge of treason, however, is rarely invoked, while many first degree murder charges are laid every year.

PART I:

THOUGHT

Chapter 1
THOUGHT, DEATH AND MURDER

> Criminal history is the history of culture. Anyone who investigates the reaction of society to crime will learn surprising things about the collective mind.
>
> (Theodor Reik, 1945) **(1)**

In the fifty years since Reik made this observation, Western culture has undergone changes which he might then not have imagined. The shift from a primarily industrial society to one based on quickly developing technologies has had profound effects on the cultures of Canada and the United States. With the conveniences of technology firmly imbedded in our homes, it would be foolish to deny the benefits of this "progress" accrued in our material standards of living and working, even while acknowledging the darker effects of this technology. But since the Age of Reason (mid 1500s to 1700), our society has capitalized on this notion of progress, and in the late 20th century our culture is generally recognized as the product of a progressive history of linear evolution, the critiques of Marxism(s), feminism(s) and more recently postmodernism(s) notwithstanding. Likewise, institutions of criminal justice as expressions of our reaction to crime are characterized in official discourse as moments in a progressive continuum.

It is also true, however, that we are not now (if ever) satisfied with the results of such

"progress" in the Canadian criminal justice system. The ongoing debates about crime and punishment in modern public discourse testify to this. If criminal trials have become showcases for the forensic possibilities of reason and science in determining the culpability of the accused, there are fewer spotlights on these tools of knowledge at work in our practices of punishing the convicted **(2)**. While new technologies such as DNA matching are heralded as steps towards scientific precision in courtroom evidence and thus towards more "accurate" court judgements of fact, it is more difficult to point to any practices in the prison which could be explained as steps toward scientific precision in punishment, except for the prison sentence itself. How to punish in the manner of reason and science is not the same thing as determining whose hands were on the murder weapon. Punishment, as a social response to crime, is a relative concept with many dimensions (much of which will be reviewed in the latter third of the thesis), and its "truth" is not easily discernible in the epistemologies of reason and science.

Scientific precision in punishment is, however, manifested in the prison sentence meted out by the triers of fact. The convicted criminal is limited by time and space, a prison sentence which is predetermined by the law and measured by the courts. The convict's space is limited to habitation in a closed institution, for a prescribed number of days, months, or years -- and in present day Canada, this is ultimately what punishment *is*.

To be sure, we can and do argue about the standards of these confined accommodations and the effects of tinkering with prison release dates, but the idea of incarceration itself as a response to harmful acts in society is held sacrosanct.

It is difficult to assert our punishment practices on the basis of principles of deductive reason and empirical science as we might with a criminal trial where the technical goal is to identify the author of a crime. Balancing losses of, or injury to, human life and property with years of confinement is like comparing apples with oranges, and in the end there are no precise prison sentences with the power to compensate for crimes in an intrinsically rational and scientific way. Thus the limits of these epistemologies in themselves may be seen as part of the research inquiry into our response to murder.

While scientific epistemology is a significant factor in our responses to murder, a new influence on thought has emerged. In the last half century, the explosion in mass communication has had its own effects on modern ways of knowing. Postman (1984, pp. 16-29) argues that this has had concomitant effects on cultural definitions of truth, especially through the relatively recent medium of broadcast television. Using Northrope Frye's idea that "through resonance a particular statement in a particular context acquires a universal significance" (in Postman, 1987, p 17), Postman claims that every medium of

communication has resonance,

> . . . for resonance is metaphor writ large. Whatever the original and limited context of its use may have been, a medium has the power to fly far beyond that context into new and unexpected ones. Because of the way it directs us to organize our minds and integrate the experience of the world, it imposes itself on our consciousness and social institutions in myriad forms (p. 18).

Postman is concerned with the epistemological interest in definitions of truth and the sources of these definitions in the media. The effects of this in the construction of murder will be developed in chapter six of the thesis.

In this chapter the problem of knowledge is brought to the fore in analysing the Canadian responses to murder. The point is to consider thought itself, in the shifting terms of our ways of knowing. The analysis of ways in which murder has been constructed and the formal responses to it requires an examination of the forms of thought which make these possible.

Ways of Knowing and Thought on Murder

Morris Berman's comparison of two different epistemologies demonstrates the importance of thought to the analysis of Western social problems (1988, pp. 2-3). He writes:

> The view of nature which predominated in the West down to the Eve of the Scientific Revolution was that of an enchanted world. Rocks, trees, rivers, and

> clouds were all seen as wondrous, alive, and human beings felt at home in this environment. The cosmos, in short, was a place of *belonging*. A member of this cosmos was not an alienated observer of it but a direct participant in its drama. His personal destiny was bound up with its destiny, and this relationship gave meaning to his life . . .
>
> The story of the modern epoch, at least on the level of mind, is one of progressive disenchantment. From the sixteenth century on, mind has been progressively expunged from the phenomenal world . . . [The dominant mode of thinking] can best be described as disenchantment, nonparticipation, for it insists on a rigid distinction between observer and observed. Scientific consciousness is alienated consciousness: there is no ecstatic merger with nature, but rather total separation from it. Subject and object are always in opposition to each other . . . The logical end point of this world view is a feeling of total reification: everything is an object, alien, not-me; and I am ultimately an object too, an alienated "thing" in a world of other, equally meaningless things.

An effect of juxtaposing these epistemologies of pre and post scientific reason is to give us a glimpse of what we moderns may have lost in abandoning "enchantment" for the embrace of a scientific consciousness, but the contrast between the schemes of thought is also useful in drawing our attention to Cartesian mind/matter dualism. This dualism, in spite of other expired ideas from Cartesian thought such as the existence of deceiving spirits, is at the heart of most modern theoretical/political perspectives, and thus should be considered in an analysis of thought on murder.

Prado contrasts the work of Rene Descartes (1596-1650) to that of Michel Foucault (1926-1984) in order to discuss epistemology, "philosophy's single most central area of inquiry" (Prado, 1992, p. 5). Prado argues that Descartes's philosophy holds that truth is

objective, and that human reason is capable of discerning objective truth and thus gaining timeless and certain knowledge (1992, p. 6). In the Cartesian sense, then, absolute knowledge is possible. Foucault's work, however, attempted to show that truth is not objective, that it is made and not found, and is the product of relations of power. In his analyses, as in symbolic interactionism and social phenomenology, knowledge is whatever is *accepted* as knowledge in a culture.

The historical contexts of these two philosophies help to explain the difference between Foucault's pessimism and Descartes's optimism about the power of human reason. In Descartes's time, Christian church dogma had the monopoly on authoritative knowledge and in this sense his belief in the superiority of reason over religion was a way of democratizing knowledge, by putting the tools into everyone's hands and not only those of a selected theological elite. This enthusiasm for the power of reason was understandably warranted, given the "finds" of "heretics" such as Galileo Galilei (1564-1642) whose claim that the earth orbited the sun drew the indignation of the theological authorities. Foucault's wariness of this same power of reason, however, was based on over 300 years of history since Descartes and the Age of Reason and, in spite of the beneficial discoveries afforded by the method, the prodigious catalogue of human atrocities calculated and committed as rational acts in this time **(3)** made the idea of

reason more vulnerable to his critique and many others like it.

Descartes's position that there are two fundamentally different substances, mind and matter, set up an epistemology based on a subject/object scheme whereby humans become thinking beings in living bodies. Dualistic thinking differentiates whatever is being thought about into two opposed categories, such as good/bad, normal/abnormal, life/death. A problem with this sort of thinking is that, "although distinctions are usually made in order to choose one over the other, we cannot take one without the other since they are interdependent; in affirming one half of the duality, we maintain the other as well" (Loy, 1988, p. 18). Systems of thought which operate around dualities, of course, pre-dated Descartes. But it is the centering of the human subject, as seen in his assertion "I think, therefore I am," which distinguishes Descartes' dualism for the purposes of this discussion. The implications of this to our ideas of *morality* should not be overlooked; essentially, in order to see ourselves as "good" we need a "bad" to contrast with, as such is an effect of self/other antagonisms **(4)**. Another effect of Cartesian dualism is expressed in our thoughts of *mortality*, that is, that life gains its meaning through juxtaposition with its "evil twin," death.

Modern dualist epistemologies, with their binary traps, are the cradle in which our

current thoughts and actions regarding murder and the murderer are nurtured. As Lesser (1993, p. 23) explains:

> There is something adversarial in the very way we think about [murder] and its effects: The murderer *versus* the victim; innocence *versus* guilt . . . Yet these dichotomies belie the actual complexity of murder, and the courtroom insistence on this kind of binary thinking -- an insistence that has become so pervasive and ingrained as to be, for most of us, an unwitting habit of mind -- makes it very difficult to get at the truth of the matter.

Whether there could be, as Lesser puts it, a "truth" about murder is a contentious issue. However, her point that the experience of murder is positioned uncomfortably into rigid, binary opposing categories in our official responses to murder is a good example of the limits of such dualist epistemologies in our ways of knowing murder. As such, any attempt to study murder from outside of this binary thinking is fraught with methodological difficulties, especially when studying the phenomenon from a sociological perspective and using "official" data.

The notion of crime in the 20th century is by inference sociological, since the idea of crime involves social relationships. This is because crime either implies harm done to another or others, or in the case of contentious victimless crimes there is an implied conflict between the criminal actor and the differing moral views of other people, including legislators, judges and so on. It is because crime *is* a social phenomenon that the capacity of traditional scientific methods to acquire knowledge about crime is limited;

further, the notion of "crime" in and of itself has been formidably challenged by social constructionist, Marxist and feminist criminologies. Human relationships are not easily understood through the "gaze" of scientific reason which, far from its own ideological utopia of pure objectivity, has failed to demonstrate how the act of *choosing* objects of study is objectively driven or how these choices are not subjectively made.

While the weight of the scientific epistemologies in sociology should not be underestimated, the critique of science goes back at least a hundred years. Rorty, a contemporary philosopher, describes science as quite unlike its philosophical self-prophesy and more similar to other areas of culture (1982, p. 42). By 1960 in the U.S. and long before in Europe, sociology turned its head toward its parent (science) and turned this parent into another object of inquiry. This sociology of scientific knowledge, it is claimed, has shown that "none of the traditional philosophical puzzles are of concern to scientists in their daily work," and that routine beliefs of truth and validity are more rooted in the actual context of the research at hand (Fuchs, 1993, p. 24). Thus scientists are governed not necessarily by some anchoring philosophical or historical awareness, but by the immediate influence of their scientific cultures.

Sociological analyses which are epistemologically positivist, therefore, have about as

much claim to knowledge as have other political and sociological perspectives. The problem is that, in spite of this, positivist sociology is privileged because of its tradition and its attempts to relate dialectically to juridical notions of reason. There is a politics in the effects of this privileged status, as Agger (1989, p. 90) describes in his analysis of epistemology as political theory:

> Sociology pastes conceptual photographs of the frozen world ruled by the power of the social directly into its text, suggesting the world's ontological presence, hence unalterability. In reflecting the power of the social sociology adds value to it; this narrative presentation took methodological form in Durkheim's notion of social facts . . . Scientificity is the ability of science narratively to portray the world without narrating it. Discipline exhausts ontological possibilities, silently recommending a world governed by indubitable laws leading people to do what they *already do* -- give in and give up.
>
> . . .While not an advocate of suicide, Durkheim suggests the eternity of a world that makes people want to kill themselves. Discipline hardens social existence into social essence; it demonstrates the eternity of discipline (and hence the unreasonableness of defiance) with reference to the abundant discipline of our history. Only fools and zealots demur.

In the context of crime, and specifically murder, positive knowledge of the phenomenon first assumes the inherent totality, or essential "thingness" of the phenomenon of itself without ever having to really justify its assumptions. For example, in the modern regime, in order for there to be a murder there first need be a body and then a murderer, a person whose specific actions in a specific context are legally calculated as a "thing" we call murder. Our knowledge of the *act* of murder which we sanction against in criminal law is based almost wholly on whom we believe the *murderer*, or *actor*, to be,

sociologically, psychologically or whatever. This particular construct of illegally instigated death, violent though it may be, is not easily and ethically studied by the traditional methods of science. It is not ethical or possible, except for mere happenstance, to study murders as they randomly occur **(5)**.

The politics of many modern ways of knowing are shrouded by the apparent privileging of science. As Chatalian (1991, p. 9) argues, "If philosophy in the Middle Ages was viewed by many as the handmaiden of theology, philosophy and epistemology in the twentieth century have come to be viewed by the analytic philosophers and others as the handmaiden of science and common sense." This analysis of the responses to murder, then, considers the particular epistemologies and ways of knowing which have made the discourses on murder, as found in this sample of official documents, possible.

In Foucault's archaeological approach to knowledge, the "basic cognitive processes of everyday knowledge, science and philosophy" are targets of analysis (Fink-Eitel, 1992, p. 22). If Harris is correct in his observation that scientific thought is a major influence in the shaping of our cultures (1988, p. 136), the focus on the epistemologies of science in Foucault's approach expands an inquiry of the social beyond the parameters of the social phenomena being analysed to the cultural conceptual framework of the analyst

him/herself. It is possible that science is about more than the knowledge it produces, that its *ways* of knowing are tightly interwoven into our own cultural ways of thinking. Foucault's suggestion, then, that "science be analyzed or conceived of as an experience" (1991, p. 63) becomes very relevant to a discussion of murder which is wary of the effects of particular epistemologies in murder discourses **(6)**.

This is not to say, however, that science itself has been successful as a totalizing epistemology, a reflection of the apparent human limitations of the scientist him/herself. It is necessary to reiterate Foucault's position "that epistemologically there is no basis for any theorist to assert a totalizing view since we are each limited by our situated perspectives" (Poster, 1987, p. 104). Quests for the "perfect theory" are as futile as the quest for absolute truth. Scientific epistemology "judges science from a point of view which is, by nature, scientific" (Machado, 1992, p. 3), and on its own terms science as a "total knowledge" is but a particular knowledge with its own imperfections, in spite of its many interesting and useful discoveries.

So when we speak of murder and the murderer, it is useful to note the influences of science in our ways of knowing these things, through the law and its practices, medicine and psychiatry, and the popular media. Imprecision in these areas can and does have

profound effects on individual lives throughout the criminal justice system. But it seems also relevant to observe the effects of the subject/object scheme, as in Berman's description of the modern "disenchanted" epistemology, in our ways of knowing murder and the murderer. The act of murder brings our attention to the murderer who, in this way of thinking, is "other" and wild.

Reason, Rationality and Morality

> Public opinion should be *educated*, not aroused, *led*, not pressed into action; moulded by persuasive and factually sound reasoning . . .We do not want to appear to be do-gooders bent upon pampering the criminal. But we do not want either to forget that our mission is to discover a truly scientific humanitarian solution to the age old problem [of crime], while never forgetting the need to protect the community.
>
> (Justice Roger Ouimet, 1966)

It would be impossible to analyse the social responses to murder without considering, in any fundamental way, the role of reason in our thinking about crime. Reason has long enjoyed the status of an epistemological axiom, coloured by numerous philosophical efforts over a couple of millennia to determine its limits and potential. Reason has been philosophy's answer to the ultimate and most general grounds of Being (Marcuse, 1968, p. 135), authenticated when all "significant antitheses (of subject and object, essence and appearance, thought and being)" are reconciled. In these terms, history is the progress of reason.

For Western Marxists, reason was formed by a history based on class as created by the mode of production (Poster, 1987, p. 10). This argument was later modified by the Frankfurt School, which had become convinced that the working class did not provide a privileged perspective on history **(7)**. However, the concept of reason itself in such critical social theory was still ontologized as authentic reality. This philosophical position remains intact in the work of Habermas and is a significant point of difference between the Frankfurt Marxists and postmodernists (p. 11).

The awareness of the limits of reason, as expressed in social conditions and human experiences, had earlier been raised by Weber who believed that the resulting depersonalization of human life would undercut the "possibility of an ethical conduct of life" (Smart, 1993, p. 86). Weber argued that the idea of reason, conceived as the highest potentiality of humankind and existence, reduced other conceptions of the world such as religion and belief to the "realm of the irrational." These insights are particularly relevant when discussing the social responses to murder, because religion and belief are significant in considering death itself; religions and beliefs may be irrational, but they appear to be an important aspect of the response to death nonetheless.

In responding to murder, morality may be considered as more significant than reason

itself, such that the exercise of law is made possible more by reason of its authority than by the authority of its reason. As Rorty (1993, p. 62) explains:

> it is one thing to challenge a moral consensus and another thing to deprive it of philosophical support . . . [I]f an American intellectual is told that a moral consensus rests upon a questionable philosophical assumption, he is likely to suggest keeping the consensus and skipping the philosophy.

If Rorty is correct, then the role of morality as something separate and different from reason must also be considered in the instrumental responses to murder in Canada.

Rationality is behaviour that satisfies the two conditions of consistency and fulfillment of certain aims. In modern social philosophy, particularly through the work of Weber, the analysis of rationality is conc ·ived as a global process, as through the rationalization of society (Smart, 1988, p. 138). Weber was interested in rationalization as a "master trend of world history" (Collins, 1986, p. 62), but he was careful to note its "most varied character" and the historical differences between rationalizations in various areas of life and culture (Weber, 1958, p. 26). Thus behaviour that would in one perspective seem irrational, might well be considered rational in another perspective. The killing of an estranged wife by her controlling husband, for example, is deemed by law to be irrational. From the perspective of the murdering husband, murder might be considered a rational solution to the problem of his wife's noncompliance.

The rationalization of society, specifically through a "process of scientific specialization and technical differentiation associated with Western culture" (Smart, 1983, p. 123), was for Weber a process which would continue into the future, and with great costs. The Western tendency to try to master nature and culture, by focusing on more "efficient" forms of social organization, results in a kind of totalitarian society governed by instrumental reason expressed in increasingly bureaucratic forms of domination (p. 125). Weber saw the same fate for both capitalist and socialist societies governed by rationalization.

A later critical assessment of the effects of rationalization was offered in the work of Foucault, who eschewed a general focus on the progress of rationalization in favour of the analyses of *specific rationalities* (1983, p. 210). In so doing, he analysed the process of rationalization in different fields, each referring to a fundamental experience such as crime, death, madness and so on, in order to investigate the rationalization of power. As such, Foucault sought to limit the sense of the word rationalization to an instrumental and relative use by observing how specific rationalities became embodied in systems of practices (in Dreyfus and Rabinow, 1983, p. 133).

Foucault's idea of rationality differs from that of Weber's in another important respect,

that is, in the possibilities of action in the face of institutionalized rationality. In the Weberian thesis, the effects of rationalized domination are "irresistible and irreversible," whereas in Foucault's analyses the exercises of power which constitute this domination are always potentially met with practices of resistance (Smart, 1988, p. 139). This is because power, as evidenced by its social and dialectical connotations, is about *relations*. These analyses would then consider discrete rationalities at work in the fundamental modern experience of murder and the murderer, as opposed to engaging in a quest for rationality *per se* in our criminal justice practices. The focus then turns to the exercises of power and the knowledge which authorizes these, instead of the critique of the practices on the basis of their rationality.

Between Weber and Foucault in this matter, Charles Taylor (1990, pp.134-151) is not willing to ignore the *possibility* of a "higher" rationality:

> . . . one culture can surely lay claim to a higher, or fuller, or more effective rationality, if it is in a position to achieve a more perspicuous order than another.
>
> A case in point is the immense technological successes of one particular theoretical culture, our modern scientific one.
>
> . . . [I]t may be that considerations which we in theoretical cultures can no longer appreciate so overweigh the balance in favour of the pre-theoretical ones as to make them offer the overall superior form of life. But even if this were so, it would not invalidate the transcultural comparisons we do make; and in particular the claim to a higher rationality. It would just overweigh these judgements with other more important ones which told in the other direction (pp. 150-151). **(8)**

The phrase "more important ones" would be probiematic in the context of Foucault's

analyses, in which judgements *per se* are seen as products of power/knowledge. And since Foucault's focus is on specific rationalities in and of themselves, he is not immediately interested in the relative superiority between rationalities, preferring instead to examine the shifts in the use of rationalities. Foucault's approach to the study of fundamental experiences reflects this, by changing aesthetic periodization into a periodization of instrumental and relative rationality (Lash, 1990, pp. 128-129).

Historically, belief in the existence of a higher rationality has been tied to the idea of freedom, which is considered as contingent with rational thinking and behaviour. In opposition to this belief, C. Wright Mills argued that "ideas of freedom and of reason have become moot . . . increased rationality may not be assumed to make for increased freedom" (1970, pp. 185-186). Foucault challenged the notion that freedom could be found in universal Reason or Society or any kind of totalizing epistemology, searching rather for freedom "in our capacity to find alternatives to the particular forms of discourse that define us by reference, among other things, to universal humanity" (Rajchman, 1985, p. 60).

Economics is the most recent knowledge to be subjected to a critical gaze, in terms of analyses of rationality. Speaking of government rationality, Burchell (1991, pp. 1-51)

draws specific attention to the relationship between economics and the social:

> Whereas the West Germans propound a government of the social conducted in the name of the economic, the more adventurous among the Americans . . . propose a global redescription of the social as a form of the economic.
>
> This operation works by a progressive enlargement of the territory of economic theory by a series of redefinitions of its object, starting out from the neo-classical formula that economics concerns the study of all behaviours involving the allocation of scarce resources to alternative ends . . .
>
> Economics thus becomes an 'approach' capable in principle of addressing the totality of human behaviour, and, consequently, of envisaging a coherent, purely economic method of programming the totality of government action (pp.42-43).

The claim is that the rationalities of the economic can be used to explain human and governmental behaviours. Of the two perspectives, Foucault saw that of the United Statesian Chicago School as more radically consistent than its West German counterpart in its claims to power/knowledge. Evidently, the more visible flexing of a totalizing economic knowledge is no longer isolated to the societies of the few remaining communist states; it is evident now in a popular democratic discourse peppered with terms such as "deficit-cutting", "downsizing" and "public debt" **(9)**.

It is claimed that the model of economic rationality as a rationality of individuals in a game of private interest is manifested frequently in late eighteenth-century writing. Foucault described, in this rationality, how individuals in their own lives are found in a "doubly involuntary world of dependence and productivity" (Burchell, 1991, p. 133); on the one hand, one's actions depend on accidents and the actions of others, and on the

other hand, one's own actions will affect the social world and the actions of others. This dialectical relationship is a basic assumption of both Marxist and liberal social theories with a basis in economic rationality, a rationality that has recently become a significant measuring stick of government policies and practices in Canada. Thus the science of economics itself has achieved an increasingly powerful political status in public discourse.

An economic view of crime and punishment in Canada yields mixed insights. In one respect, as critical theories **(10)** such as Marxism(s) and feminism(s) have capably demonstrated, law itself can be shown to defer to privileged interests on the basis of economic social relations. The genesis of Canadian drug laws **(11)**, and the history of women and work **(12)** are two examples which illustrate this view. But the rationalities at play in our actual responses to crime, in another respect, do not emerge solely from an economic perspective. When speaking of crime and punishment, especially regarding murder, the idea of morality cannot be assumed to be contingent on an association with economically oriented social relationships. Rather, it might be argued that morality is quite a different basis from which to assess our responses to crime and punishment.

The fundamental distinction of good and evil is at the heart of the idea of morality.

Kant saw morality as an objective requirement of ethics, and defined it as a categorical imperative. Jung argued that, "moral evaluation is always founded upon the apparent certitudes of a moral code which pretends to know precisely what is good and what is evil" (1961, p 329). In a challenge to any notion of embodied "truths" in our moral history, Jung wrote that evil and good, as "ideal extensions and abstractions of doing" (1970, p. 31), were interdependent **(13)** and that humankind, "the only real danger" (in McGuire and Hull, 1977, p. 436), is the source of evil as well as good.

Notwithstanding the relative and human aspects of good and evil described by Jung, whose chief interest was in the human psyche, a strong tendency exists in our culture to provide a *rational* basis for particular moralities. To Nietzsche (1982, p.90), attempts to put a scientifically rational face on a subjective morality were ill-fated and even laughable:

> Philosophers one and all have, with a straight-laced seriousness that provokes laughter, demanded something much higher, more pretentious, more solemn of themselves as soon as they have concerned themselves with morality as a science: they wanted to furnish the *rational ground* of morality -- and every philosopher hitherto has believed he has furnished this rational ground; morality itself, however, was taken as 'given.'

This belief in an axiomatic given morality was confronted by both Jung and Nietzsche and is still an Achilles heel of modern attempts to provide a rational basis for morality. A significant problem is that no one has demonstrated how we can really know for sure that

any moral code is absolute -- indeed, history has shown that moral codes shift and change in time and space. Jung and Nietzsche, in their times, criticized modernism **(14)** on the basis of epistemological flaws.

The difficulty with the idea of a rationally-based morality is well illustrated by Glover's *Causing Death and Saving Lives* (1977), in which he demonstrates how moral views about killing are not always intellectually satisfactory. Objections to killing are grouped into two general types: arguments based on a belief in the direct wrongness of killing (those related solely to the person killed), and those based on the reasons of side-effects (on the living) **(15)**. Glover's conclusion that many of our assumptions underlying particular moralities on killing are not rationally consistent should not be much of a surprise. For many people, the grounds of morality are not found in an epistemology of abstract reason, but in their inscription in religious texts, legal codes and traditional folk wisdom.

A problem lies in the lack of a consistent universal basis for morality. Religious doctrines vary according to their respective epistemologies and histories. For example, in the legal sense the ideal of reason is crucial in gauging the actions of individuals through the standard of the "reasonable man" and what a citizen "ought" to know about causes and

effects; however, the morality of laws in themselves cannot be definitively tied to rational ideals. Traditional folk morality varies cross-culturally; for example, while in Canada murder is considered to be a most serious crime, in one community of Maya Indians, "homicide is considered a *reaction* to crime, not a crime in itself" (Nash, 1967, p. 456). The multi-cultural "mosaic" of a relatively new Canadian society makes cross-cultural differences in morality almost inevitable.

And yet, as Durkheim observed, there appears to be a transcendental quality ascribed to modern moralities, despite the historical shift from dominating religious beliefs to a secular rationalism **(16)**. Garland (1990, p. 55) concurs: "There is good reason to believe that this quality of sacredness -- or something very like it -- does indeed exist in modern societies and forms an important element in the operation of social and legal authority." This sacredness of morality is appropriately examined in light of the specific example of murder and its response, since murder is considered to be perhaps the most extreme violation of western morality. This is based in good measure on the fragility of human life, and the death that murder requires.

Finitude and Death

> . . . happiest beyond all comparison are those excellent Struldbruggs, who being born exempt from that universal calamity of human nature, have their minds free and disengaged, without the weight and depression of spirits caused by the continual apprehension of death. (Jonathan Swift, **Gulliver's Travels**)

> And he turned to his people and said dry your eyes
> We've been blessed and we are thankful
> Raise your voices to the sky
> It is a good day to die.
> (Robbie Robertson, **Music for the Native Americans**)

The subject/object schema, a dominating feature of thought today, is significant in the study of the response to murder in its epistemological focus. For Descartes, a primary distinction is made between mind and body in the second meditation of his "first philosophy" (1960, pp. 23-33), a distinction which is more or less privileged in modern thought. The idea that the mind and body (or matter) are separate is now so fundamental in traditional modern thought that to challenge it is akin to heresy **(17)**. Descartes's axiom "I think, therefore I am" signified a thinking consciousness, as constituent of the mind; the difficulty is that the mind, at least as far as we know by accepted measures of knowledge, requires embodiment.

We know that the body has a limited lifespan, and like the landlord who will not renew a lease, on its death the body must eventually evict the mind "tenant." This creates

an existential dilemma for the conscious person, a paradox that "man is an animal who is conscious of his animal limitation" which Becker (1973, p. 26) called "the condition of individuality within finitude." As he explains (p. 87):

> What does it mean to be a *self-conscious animal*? The idea is ludicrous, if it is not monstrous. It means to know that one is food for worms. This is the terror: to have emerged from nothing, to have a name, consciousness of self, deep inner feelings, an excruciating inner yearning for life and self-expression -- and with all this yet to die.

Reconciling this paradox is no mean feat, since the subject/object schema is both its origin and its conduit to understanding the world. The rational, scientific mind must face the empirical reality of death and the meaning this entails.

The result of an encounter between the (rational) mind and the empirical fact of death is based on how people decide to reconcile their mortality with their thoughts and actions in the modern world. To dissolve the subject/object, and thus the mind/body distinction itself, is one way of accommodating death. Such a task requires a shattering of dualistic thought and its replacement with nonplurality, in which "things" are not distinctly separate **(18)**. If the subject-object split is disturbing, it is because it produces a fear "where everything and everyone out there are regarded as hostile to [man's] self and as a threat to its existence" (Gordon, 1972, p. 90). In an experience of epistemological unification or wholeness, such as that described in the nonduality of Eastern philosophies (Loy, 1988, p. 3), this fear is extinguished. As Loy explains, "Because life and death, like

spring and summer, are not *in* time, they are in themselves timeless. *If there is no one nontemporal who is born and dies*, then there is only birth and death. But if there are only the events of birth and death, with no one "in" them, *then there is no real birth and death*" (1988, p. 222).

One way of addressing the existential paradox created by the subject/object schema is to ignore or deny that it exists. This is demonstrated in a variety of behaviours which at some level deny the inevitability of death, such as seeking meaning in material possessions, in work, or obsessing over the shape of one's body. The difficulty with this approach, as Gordon (1972, p. 16) observes, is that "living by the fiction of immortality creates many of our basic human problems and conflicts." Busyness with plans for the future ties up the present time, and experience of the immediate present is subordinated by thoughts of some time that is yet to come.

Another by-product of dualism is the life/death distinction, a concept which Freud argued was instinctual (Abel, 1989, pp. 41-55). This idea of the instinct itself was fundamental to his explanation of human nature, which he believed to be comprised of elementary instinctual impulses (Freud, 1915, p. 281). On these terms, instinct is also dependent on the more primary mind/body distinction. As Brown (1959, p. 79) explains,

"the Freudian 'instinct' is a borderland concept between the mental and the biological, because Freud is seeking an explanation of man as neurotic or repressed in terms which would relate man's specifically human characteristic (repression) to his animal (bodily) nature."

Freud's hypothesis of repression has served as the basis for many psychological accounts of the fear of death, and the symptomatic manifestation of this fear in a variety of mental illnesses. An evaluation of this hypothesis, however, is beyond the scope of this thesis. The point is that the life/death distinction in Freud's theory of psychoanalysis is derivative of a mind/body dualism that is at the heart of the human paradox, that "man is a worm and food for worms" (Becker, 1973, p. 26). It is noteworthy that this paradox is an epistemological construct, as opposed to the inevitable outcome of a particularly human reality.

The implications of the subject/object schema for an analysis of murder has been expressed in a feminist observation that "what turning persons into objects is all about, in our culture, is, in the final analysis, killing them" (Cameron and Frazer, 1987, p. 176) **(19)**. This is true both of the thoughts of the murderer *and* those who would judge and punish him/her; thus as long as there is "Self and Other," epistemologically, we are all

killers. The us versus them viewpoint, which divides "all of humanity into two camps -- the decent and the villainous," is a social version of this epistemology at work in the area of criminal justice, despite evidence which asserts that such a viewpoint "is at odds with the facts" (Gabor, 1994, pp. 4-5) **(20)**.

Mellor and Shilling (1993) explore the relationship between self-identity and the structuring of death in modernity, and argue that contemporary social analyses of death should link analyses of the self, the body and religion (p. 412). Social sense of self is derived mainly from the body -- indeed, by the standards of rationality, it owes its very embodied existence to it. However, as Bauman noted (in Mellor and Shilling, p. 412) "the ultimate failure of rationality is that . . . it cannot reconcile the "transcending power of *time-binding* mind and the transcience of its *time-bound* fleshy casing." As there is a growing tendency for people to see the body as largely constitutive of the self in high modernity, there may be increasing social angst since death is the end of the self, of identity.

Today, death is mostly a personal, private affair, albeit highly institutionalized and commodified. The privatisation of death appears, however, to be a very recent historical phenomenon, as is shown in Aries's one thousand year history of Western attitudes toward

death and dying (1981, pp. 559-60). He argues that death had been a social phenomenon whereby the death of an individual "was a public event that moved, literally and figuratively, society as a whole. It was not only an individual who was disappearing, but society itself that had been wounded and that had to be healed." As such, grieving was a social, as opposed to a private practice. While Aries is probably correct in his identification of this general shift in the social response to death from that of a communal event to one of privatisation, it is clear that some deaths in current North American societies -- especially violent, "messy" deaths -- elicit an impassioned communal response which may easily overwhelm the privacy of death.

An analysis of the modern response to murder, as exemplary of premature and/or violent death, must then consider the role of death for social theory. It has already been suggested that death acquires its modern significance by virtue of the Cartesian mind/matter dualism, whereby the self is dependent on corporeal embodiment. This modern notion of death was challenged by Foucault and postmodernists, since in these analyses the individual subject is decentered. Thus the significance of the death of the person is also decentered. With respect to social phenomena, it has been thought that since "sociology is the study of the rules and normative behavior that proceed from people's beliefs and not from their bodily chemistry or physiology . . . *society is in our*

minds, not in our bodies" (O'Neill, 1985, p. 18). O'Neill argues that, in this view, our bodies are the servants of our minds and as such are seen as requiring discipline. Theoretically, this requires us to "rethink institutions with our bodies," perhaps more specifically as *living* bodies in which *death* is embodied.

Becker (1975, pp. 123-127) has argued that because there is no secular way to resolve the human paradox of the thinking mind in the decaying body, secular societies are lies. As he explains, "If each historical society is in some ways a lie or a mystification, the study of society becomes *the revelation of the lie*. The comparative study of society becomes *the assessment of how high are the costs of this lie*" (p. 125). Becker sees societies as hero systems based on pretensions to victory over "evil" and death. Indeed, Marcuse has argued that death itself, as a "natural fact" has become a social institution, and as such, "no domination is complete without the threat of death and the recognized right to dispense death" (1965, p. 73).

It can be argued that while historically societies have long used this institutionalized ideology of *death* in threats or acts of authoritative domination **(21)**, in recent times there has been an increasing focus on who should have the power to end whose *life*. Foucault (1980) argues that the biological existence of a population changed the functions of

power over death to power over life (pp. 137-38). Using an example which has resonance in the immediate discussion at hand, he explains: "As soon as power gave itself the function of administering life, its reason for being and the logic of its exercise -- and not the awakening of humanitarian feelings -- made it more and more difficult to apply the death penalty" (p. 138). This would help to explain the current intensities in public debate on other death-related issues such as euthanasia or abortion. The focus is on the limits of the right to "artificially" prolong or end *life*.

The Canadian state was recently confronted by a critical test of the limits of its right to control life in the formal request of the late Sue Rodriguez to end her life with a doctor-assisted suicide. In a videotaped submission to a parliamentary sub-committee investigating euthanasia, Rodriguez got to the heart of the issue, as described in an account of the presentation by a political reporter:

> Rodriguez, her voice slowed by the crippling effects of Lou Gehrig's disease, said death is preferable to the "indignities" when she can no longer breathe unaided, swallow or simply move.
>
> "Whose body is this?" asked the 42-year-old. "Who owns my life?" **(22)**

Rodriguez did not wait for permission from the government of Canada to end her life, and in 1993 she fulfilled her unauthorized desire for a physician-assisted suicide in her home.

Social theory is not sufficiently equipped to address these questions, perhaps because

as Lemert and Gillan (1982, pp. 118-119) note, social theorists have "steadfastly avoided questions of life and death . . . in spite of the fact that we have absolutely no doubt whatsoever that political power controls lives and produces death." Since moral issues are about the power over life and the debatable moral standards by which to guide the exercise of right of power over life, what is at stake is the question of propriety of the body in a mind/body dualism. These issues may never be reconciled, but the point remains the same: "death can threaten the basic assumptions upon which society is organised" (Mellor and Shilling, 1993, p. 421). Social organization connotes order but death does not recognize this order, thus the way of all flesh is randomness **(23)**.

Epistemologically, the question of death in modern societies can be approached differently, from the phenomenon of finitude. Finitude and rationality share an uncomfortable co-existence; thus it is proper to consider the concept of finitude to the rationalities of the social sciences. In his study of the human sciences, Foucault (1973) argues that the positivity of knowledge made the finite category of the human possible (p. 315):

> [I]n the very heart of empiricity, there is indicated the obligation to work backwards – or downwards – to an analytic of finitude, in which man's [sic] being will be able to provide a foundation in their own positivity for all those forms that indicate to him [sic] that he [sic] is not infinite.

When knowledge is based on the human subject, then, finitude becomes

epistemologically significant (Shumway, 1989, p. 86).

Our finitude is constituted by the limits drawn by the "factual," positive character of our existence (Lemert and Gillan, 1982, p. 67), or rather the existence of a live body which is gendered, given a name, schooled, put to work and so on. The human being is finite because our history, the temporality and spatiality of our lives from birth to death, and knowledge about the subject human being are founded on finitude, affording the opening of our subjective consciousness as the source of truth. Foucault described modern thought as an analytic of finitude (1973, pp. 312-318) or the "reflection on the conditions of possibility of human finitude" (Gutting, 1989, p. 200), whereby thought is characterized by socio-historical and constitutional forces.

The concrete existence of the human finds its "determinations" in life, labour and language, positivities of knowledge in which "man's [sic] finitude is heralded" (Foucault, 1973, p. 313). While death is but one form of finitude, it is, as Foucault would state in **The Birth of the Clinic** (1975), "the fullest" (p. 198). Empirical rational thought is limited by the finitude of death through the body, and also in the limits marked by the body which distinguish between a void (death) and material reality (life). This is explained by a fold/unfold metaphor (Deleuze, 1988, p. 129), where modern thought is

said to unfold from birth to the limit of death, at which point it "folds back" onto itself. Knowledge, then, is generated from the points of this limit through different disciplinary microscopes, through lenses which make the subject an object of investigation and manipulation. Indeed, the philosophical problem of knowledge itself "had come to be formulated in terms of man's constitutive finitude" (Rajchman, 1985, p. 109).

Thus we may find that the human sciences are about finitude, and that what we know about human beings is in part limited by the parameters of death. As an object of the empirical sciences, the human is a finite being, limited by environment, the forces of production and language (Gutting, 1989, p. 199). If the subjective consciousness of empirical "Man" is the source of truth, then knowledge of the murderer is one source of truth about murder. The knowledge of murder depends widely on the knowledge of the murderer -- in the discourses on his/her motives, his/her personal history and his/her family and friends; this can be seen in the shift between the classical and positive schools of criminological thought, the focus from the act to the actor in criminal justice.

However, it can be argued that there is a significance to death in discourse *per se*, not just in the discourse on the murderer. Lemert and Gillan (1982, p. 119) mark the connection between discourse and death in expressions of power:

> Discourse . . . is politics practiced against concrete forms of death. Death is concrete because power is tactical knowledge. Foucault has no general philosophy of life and death . . . But he does provide . . . careful descriptions of the play of power as control over life and the production of death. Confinement, morbid anatomy, the analytic of finitude, and sexuality are all articulations of death within theories of life. Critical social theory, for Foucault, is the discourse which transgresses these concrete formulations of death.

Thus a critical study of the discourse on murder must overcome the analytic of finitude and the search for knowledge as only discernible through the history of human beings empiricized through their bodies, social relations, norms and values **(24)**. This will be the subject matter of Chapter Two.

Epistemological Considerations in the Responses to Murder

An analysis of the reaction to crime is a complex enterprise, especially when wider epistemological considerations are taken into account. In this chapter, the point has been to question some of the fundamental assumptions which underlie conventional modern ideas about knowing and knowledge of murder. A number of these ideas were entertained in the ambit of this discussion, particularly those of reason, rationality, morality, finitude and death. These all bear relevance to questions of how we respond to murder, in how these responses to murder (as death) can and cannot be construed as reasonable, rational and moral.

Thus, we show what matters the most to the thinking mind in the decaying body, in the

empirical instance of collective sanctions against murder. The thought of murder is horrible to the rational mind, which would rather not think about death at all, much less a violent, premature death. The manner of death, in murder, is a concern about power over life, and who should have this power to decide when death occurs. Yet murder is also a reminder of the fragility of life, as well as the potential power of individuals to end lives. In this way, murder can be a metaphor for our fear of death and the unknown. As Ian Taylor has argued, "We take homicide and interpersonal violence seriously, in part because of our existential desire to postpone the inevitability of death but also in part because of the way we can fix our fears into the bizarre, psychopathic 'murderer'" (1983, p. 95). Murder is then also a symbol of something that goes beyond the immediate person of the murderer, who serves as the locus of social response to the crime. Control of murder translates into the control of the personification of murder, the murderer. This makes sense in an epistemology where knowledge is produced on the basis of human finitude.

But control of murder conceived in this way can by no means be construed as control over death. It is, however, control of life, at least in the person of the murderer. It is true that the incapacitation of a murderer may occasionally prevent another murder from happening, but it is also true that about 70% of convicted murderers in Canada in 1984

had no previous committments to a federal penitentiary for *any* crime, much less murder **(25)**; less than one percent of murderers murder again. This is not to say that murder should be permitted, but that it is the kind of crime which requires a wider range of strategies than the incarceration of convicted murderers if we are to meaningfully address violence in Canada. The problem is that the symbol of murder appears to have become the thing in itself, and the punishment for murder a symbol of our unmistakable repulsion by these crimes. This repulsion might simply be, as Glover suggests, our defence mechanisms (however "irrational" they may be in the response to murder) sparing us from psychological discomfort, and as such these defences present an obvious reason for respecting them. "But the question remains," he continues, "at what cost in misery and loss of life are we entitled to do so?" (1977, p. 297).

This question has implications for our own actions when considered in the context of how we respond to murder in terms of power/knowledge, rather than on a basis of the relative consistency of our responses with "absolute" moralities and rationalities. An assortment of changes in the discourse on murder and the documented practices of response to murder in Canada between 1763 and the present indicate that rather than proceeding on a continuum of progress, Canadian criminal justice appears to be a reflexive institution composed of different, and often competing, forms of

power/knowledge. Further, the limits of criminal justice practices deal with issues of death; these limits are reflected in the sensitive, personal issues which strike at the heart of the question of the power of the state versus that of the individual. Debates about issues such as abortion, euthanasia, and the death penalty are empirical examples of where questions of power/knowledge and the dualism of life and death can meet **(26)**.

The demarcation between life and death seems almost deeper as we move historically closer to the present, and as such, most Western societies are still "modern" thinking in the Cartesian tradition. And so it seems, our beliefs in good and evil (or bad) are also countenanced by this tradition. But the line between evil and good can become quite blurred when looking at the history of our responses to acts of evil, and, as Cartesian thinkers, we are obligated to consider the ramifications of this.

NOTES

1. Cited from Theodor Reik's **The Unknown Murderer** (1945).

2. A satirical look at what a scientific and rational display of punishment could look like is found in Stanley Kubrick's 1971 film "A Clockwork Orange."

3. The other limits of rationality, its "darker" aspects have been noted also by postmodernists such as Adorno and Lyotard. Carroll (1989, p. 170) notes that "for Adorno and Lyotard, 'after Auschwitz', all discourse is delegitimized, all philosophical and historical claims to rationality are suspect. Auschwitz, a name that has a particular and horrible historical signification and determination, puts the entire

historical genre into question."

4. Morris Berman's history of the self/other dualism marks its sharpest beginning during the Neolithic agricultural revolution (8000-9000 B.C.) when animals were domesticated. But he argues that a self/other distinction can exist without turning into what he terms as "Self/Other opposition": "With the domestication of animals . . . Neolithic people separated the wild (for example, tigers) from the tame (horses, for instance) and created binary thinking. A distinction is made between the Other that is now seen as "me" and the Other that is identified as "not me." The major psychic fallout for human beings is that Self and Other now constitute an antagonism -- not a polarity. Self is tame -- "good"; Other is wild -- "bad" (Cox, 19 , p. 86).

5. Even in the happenstance of a murder researcher witnessing a murder, it is not very likely that any more empirical knowledge about murder could be generated by the researcher than by any of the other lay witnesses to the act. I have experienced this directly, as a witness to a murder in Vancouver in 1991. When a murder begins, the uninvolved bystanders do not necessarily *know* that a murder is in progress, as one would at an organized "murder" party game to which one was invited. When this awareness develops, the subjective concerns of the immediate present supercede any aspirations for objective study.

6. The relevance of Foucault's work to epistemology is explained by Sawicki (1987, p. 162): "Foucault does not question science or technology in terms of traditional epistemology, but in terms of their relations to other practices. In other words, he is not interested in assessing the correctness of scientific representations, but rather in analyzing the social effects of our taking them so seriously."

7. This shift in Marxist thinking occurred after a number of historical "phenomena," such as Stalinism, Hitlerism and the Western welfare state, led some members of the Frankfurt School to the theoretical position that the working class was not capitalism's negation (Poster, 1987, p. 11). As Marcuse describes it (1969, p. 135), "The theory of society is an economic, not a philosophical, system. There are two basic elements linking materialism to correct social theory: concern with human happiness, and the conviction that it can be attained only through a transformation of the material conditions of existence." In this context, reason becomes the rational organization of humankind, a "philosophy" which differs from that of the bourgeois era when "reason took on the form of rational subjectivity" (p. 136).

8. It is interesting to note that Taylor invoked an example of technological superiority

which marked the limits of empirical "truths," that is, death, in his fuller philosophical examination of rationality. He writes: "(T)his particular superiority commands attention in a non-theoretical way as well. We are reminded of the ditty about nineteenth-century British colonial forces in Africa: 'Whatever happens We have got The Gatling gun, And they have not.' But as I have argued . . . technological superiority also commands attention for good intellectual reasons. And it is not only through Gatling guns that theoretical cultures have impressed others in time with their superiority, and hence become diffused" (1990, p. 150). In talking about exercises of power at the limit of death, Taylor doesn't quite step out into a way of knowing which considers these limits themselves as part of the inquiry.

9. In the Canadian federal Auditor-General's Report of 1994, Denis Desautels went far beyond a basic accounting of government expenditures; as one newspaper reporter observed, Desautels "wades much deeper into the realm of politics than any other auditor-general" (Beauchesne, 1994). For example, in the report the auditor-general makes the dubious economic assertion that "Sixty per cent of escapes from Ontario minimum-security prisons could have been prevented if the inmates had been properly classified in the first place." This is an example of how economic knowledges are used as a springboard for social/political analyses.

10. Poster summarizes the definition of critical theory advanced by Max Horkheimer as "attempts to promote the project of emancipation by furthering what it understands as the theoretical effort of the critique of domination begun by the Enlightenment and continued by Karl Marx" (1989, p. 1).

11. See, for examples, Boyd (1991), Alexander (1990) and Solomon and Green (1988).

12. See, for examples, Armstrong and Armstrong (1983), Cohen (1982) and Sangster (1989).

13. The interdependency between good and evil is explained in Jung's observation that, "In the last resort there is no good that cannot produce evil and no evil that cannot produce good" (1970a, p. 31). Since good and evil are not so self-evident, he argues that each represents a *judgement* as opposed to an absolute, and, further, that we "cannot believe that we will always judge rightly" (1961, p. 329).

14. Philosophically, modernism is explained by Lash (1990, p. 13) by way of contrast with postmodernism: "modernism conceives of representations as being problematic, whereas postmodernism problematizes reality."

15. Glover explains the difference between direct objections and objections based on side-effects by posing an imaginary case with no harmful side-effects: "Suppose I am in prison, and have an incurable disease from which I shall very soon die. The man who shares my cell is bound to stay in prison for the rest of his life, as society thinks he is too dangerous to let out. He has no friends, and all his relations are dead. I have a poison that I could put in his food without him knowing it and that would kill him without being detectable. Everyone else would think he died from natural causes.

"In this case, the objections to killing that are based on side-effects collapse. No one will be sad or deprived. The community will not miss his contribution. People will not feel insecure, as no one will know a murder has been committed. And even the possible argument based on one murder possibly weakening my own reluctance to take life in future carries no weight here, since I shall die before having opportunity for further killing. It might even be argued that consideration of side-effects tips the balance positively in favour of killing this man, since the cost of his food and shelter is a net loss to the community.

"Those of us who feel that in this case we cannot accept that killing the man would be either morally right or morally neutral must hold that killing is at least sometimes wrong for reasons independent of side-effects. One version of this view that killing is directly wrong is the doctrine of the sanctity of life. To state this doctrine in an acceptable way is harder than it might at first seem" (1977, pp. 40-41).

16. Durkheim himself denied the possibility of an absolute morality. His belief, rather was that "Morality is the sum total of the inclinations and habits which social life, depending upon the manner in which it is organised, is developed in the conscience of individuals" (1982, p. 169).

17. Because Heidegger and Foucault use similar analytical strategies, particularly the rejection of "the traditional epistemological appeal to a Cartesian subject, their respective critiques of modern culture have been judged groundless. Indeed, both have been charged with nihilism" (Sawicki, 1987, p. 156).

18. Loy explains this in contrast to dualistic thinking (1988, p. 21): "It is due to the superimpositions of dualistic thinking that we experience the world itself dualistically in our second sense: as a collection of discrete objects (none of them being *me*) causally interacting in space and time. The negation of dualistic thinking leads to the negation of this way of experiencing the world. This brings us to the second sense of nonduality: that the world itself is nonplural, because all the things 'in' the world are not really distinct from each other but together constitute some

integral whole."

19. This idea was expressed in the movie "My Dinner With Andre," where the effects of the subject/object schema are connected with the idea of class. The character Andre, in explaining his disillusionment with the world, relates the following experience: "Everyday, several times a day, I walk into my apartment building, the doorman calls *me* Mr. Gregory and I call *him* Jimmy. Now what's the difference between that and the southern plantation owner who's got slaves? You see, I think an act of murder is committed in that moment when I walk into that building. Because here's a dignified intelligent man, a man of my own age, and when I call him Jimmy he becomes a child and I become an adult because I can buy my way into the building."

20. Gabor's thesis is that, far from being an absolute, criminality is a matter of degree, since almost everyone violates criminal or other laws, at least on occasion.

21. The right to kill has historically been included in the authoritative powers of different forms of societies, under different epistemologies. Whether the right has been assumed by kings, the state, religious councils or a "governing collective", the power to order "legitimate" killings, such as executions or lethal military/police actions, has been a power over death.

22. From Peter O'Neil's article, "MPs duck euthanasia issue as B.C. woman's plea backed," **The Vancouver Sun**, Friday, November 27, 1992.

23. This idea was elaborated on by George Will (1993), in his tribute to the renegade American scientist and medical researcher Lewis Thomas.

24. Merquior (1985, pp. 52-52) defines Foucault's interpretation of modern knowledge as depicting the opposite of the Enlightenment ideal: "culture bound instead of universal, epoch-relative instead of cumulative, and eroded, not by healthy doubt, but by the inhuman destructiveness of time."

25. According to the Solicitor General's department, 61.8% of first degree murderers and 78.1% of second degree murderers had no previous commitments to the federal prison system (where sentences of 2 years or more are served). Taken from **Long Term Imprisonment in Canada**, Working Paper No. 1, by the Ministry Committee on Long Term Imprisonment, 1984, p. 29.

26. A major difference between the "pro-choice" and "pro-life" camps of the abortion debates is over who should have the power of control, over the pregnant body or over "life" itself. In euthanasia, the argument is over who should have authority over whose body in the question of deliberate termination of life. Regarding the death penalty, the salient question is one of the limits of authority of the state in punishing its citizens. Positions adopted by different proponents in the debates are informed by their own particular rationalities and moralities, but in practice the struggle is about the negotiation of power and what actions at this limit of death we are willing to tolerate.

Chapter 2
JURIDICO-DISCURSIVE CONCEPTIONS OF POWER

> [I]t is only when the objective world becomes everywhere for man in society the world of man's essential powers -- human reality, and for that reason the reality of his *own* essential powers -- that all *objects* become for him the *objectification of himself*, become objects which confirm and realize his individuality, become *his* objects: that is, *man himself* becomes the object. The manner in which they become *his* depends on the *nature of the objects* and on the nature of the *essential power* corresponding *to it* . . .
>
> (Karl Marx, **Economic & Philosophic Manuscripts of 1844**)

> It is only within a standpoint that privileges objectivity and absolutes that relativism and pluralism present a problem. Plurality does not mean that all truths are equal; it merely uncovers the role of power in defining truth. Once truth has been defined, we are free to argue on behalf of our interpretation, but we cannot use the claim to truth itself as our defense.
>
> (Zillah Eisenstein, **The Female Body and the Law**)

> There can be no possible exercise of power without a certain economy of discourses of truth which operates through and on the basis of this association. We are subjected to the production of truth through power and we cannot exercise power except through the production of truth.
>
> (Michel Foucault, **Power/Knowledge**)

In Chapter One, the analysis of the social response to murder began by exploring different ways of thinking about murder, through reason, rationality, morality, finitude and death. In this chapter, the attempt is to problematize the philosophical thoughts and criticisms of modern Western legal and moral authority, by using the analytical approach of Foucault to focus rather on power relations themselves. Bernauer (1992, p. 138) explains this approach in contrast to juridical conceptions of power:

> Foucault's overview of the history of sexuality . . . indicated that any analytic of power adequate to modernity must dispense with the representation of it within the juridical model of law that has been common in western discussion. This model conceives of power as working only in a negative manner, as prohibiting and limiting desire or action. Power is regarded as manifesting itself in the legislator's articulation of rule and law, and as performing successfully because it threatens punishment. Its mode of operation is perceived as uniform with power relations (for example, parent-child . . .) existing only as variations on the theme of lawgiver on one side and obedient subject on the other. In the end, this model leads to the imagining of power as a monotonous, easily decipherable reality that is fundamentally incapable of inventiveness and craftiness.

According to Foucault, such modern analyses of power generally adhere to one of two opposing juridico-discursive views, the liberal and the Marxist. In his view, positivist theories of law, such as liberalism, assume a simple relationship between the sovereign and the subject whereby the latter is obedient to the former. Power is conceived as a right "which one is able to possess like a commodity," and which can be ceded partially or totally to enable the establishment of political or sovereign power (Foucault, 1980a, p. 88). The Marxist conception of power refers to relations of power which shift with each mode of production and function to maintain certain relations and forces of production. These two perspectives, however, both share what Foucault called an "economic functionality of power" (p. 88-89):

> Broadly speaking, in the [liberal conception] we have a political power whose formal model is discoverable in the process of exchange, the economic circulation of commodities; in the [Marxist conception], the historical *raison d'etre* of political power and the principle of its concrete forms and actual functioning, is located in the economy.

Specifically, Foucault's critique of liberal and Marxist views on power is based on the relationship between "the jurisprudential approach to power and the epistemological approach to discourse" (Cousins & Hussain, 1984, p. 232).

Thus a task of this thesis is not to assess the "correctness" of legal and moral judgements as they pertain to murder, but to reveal the relations of power and knowledge which underlie such judgements. This entails a clarification of the positions taken by both liberal and Marxian analyses of power, particularly in how they relate to law. Also included in this discussion are critiques from feminism(s), which stand(s) both inside the designation of juridico-discursive conceptions of power (as in liberal and Marxist feminisms) and outside of it (as in "postmodern feminisms").

The importance of the focus on epistemology in analyses of power can be seen in Rose's (1984, p. 173) description of Foucault's work, in which "the critical court of knowledge has now become an administrative tribunal" and "the intrinsic but unacknowledged connection in the critique of theoretical reason between technical terms of the law and the conditions of legitimate knowledge is exposed from the perspective of the era of the post-critical tribunal. The internal construction of knowledge changes to conform to the successive epochs of law which it serves." **(1)** The suggestion here is that

law is an instance of "legitimated" knowledge, and that the knowledge which is contained within law and informing it is epistemologically relevant.

In support of the relevance of thought to knowledge of law and society, Foucault argued (1982, p. 33):

> A critique does not consist in saying that things are not good as they are. It consists in seeing what kinds of self-evidences, liberties, acquired and non-reflective modes of thought, the practices we accept rest on.
>
> We've got to avoid the sacralization of the social as the sole instance of the real, and stop treating thought -- this essential thing in human life and human relations -- lightly. Thought exists, well beyond and well within systems and edifices of discourse. It is something which often hides itself, but it always animates everyday behavior.

Simply expressed, a critical analysis of our responses to murder should consider how these responses are possible at all; *how* we think about murder is at least as important as *what* we think about murder. Conceived in this way, thought and talk about murder are "discursive practices", which are "characterized by the delimitation of a field of objects, the definition of a legitimate perspective for the agent of knowledge, and the fixing of norms for the elaboration of concepts and theories" (Foucault, 1977, p. 199).

In this chapter, then, it is argued that the study of power in our responses to murder is enriched by the consideration of knowledge and how the concept of power/knowledge relates to our thinking about law and society. First, however, the juridico-discursive

conceptions of power in liberal and Marxist theory will be reviewed, as well as the different perspectives within feminism. In each case, the respective applications of these juridical discourses to the example of the social response to murder are considered.

Liberal Perspectives on Power

> By means of the idea of rights men have defined the nature of license and of tyranny. Guided by its light, we can each of us be independent without arrogance and obedient without servility. When a man submits to force, that surrender debases him; but when he accepts the right of a fellow mortal to give him orders, there is a sense in which he rises above the giver of the commands.
>
> (Alex de Toqueville, 1848) **(2)**

While it is difficult to define liberalism by any single political theory, since the seventeenth century the term is generally associated with the important value of the individual and his/her rights, and the idea of limited government. In the French Revolution, the American war for independence and the defeat of the French by the British in pre-Canada, ideas of liberalism found a basis for their expression in the notion of the social contract. **(3)** The social contract was a rationale for the systems of political power that emerged in the West towards the end of the eighteenth century.

The seventeenth and eighteenth century ruminations over the social contract by Thomas Hobbes (1588-1679) and Jean-Jacques Rousseau (1712-1778) were extrapolated from hypothetical bases which, in various ways, presumed how people would behave in

certain circumstances. Hobbes's view of "human nature" in **Leviathan** (1964, orig. 1651), undoubtedly influenced to some degree by Christian beliefs of sin, is a bleak one in which "man's" **(4)** behaviour is rooted in "his" fundamental aversions to fear and appetites for security. In its natural state, society would be a "war of all against all," necessitating the social contract for personal security and survival. Rousseau (1968, orig. 1762) believed that "man" is good by nature, but was confined by institutions which negate his individual human powers. In this view, the social contract is not a natural right but one founded on convenants reflecting the idea that "men can be ruled and free if they rule themselves" (p. 29).

For Hobbes, the social contract is imposed upon us by necessity -- we either live in a state of war of all against all, or we relinquish our "natural" rights to the will of the collective. For Rousseau, the social contract is a choice we freely make because it enhances our development as human beings. The social contract is more "efficiently" expressed in the form of democracy, which is a cornerstone of liberalism. The essential problem of social contract philosophy, however, has been how to reconcile the rights of the collective with the rights of the individual.

Perhaps the best recognized philosophical work on which liberalism is founded is that

of John Locke (1632-1704), who denied the possibility of "divine" rights in favour of "natural" rights enabled by constitutional government. Locke's law of nature leaned heavily on the idea of individualism, and was more concerned with individual rights than individual responsibilities to society (1952, orig. 1670, p. xiii). Nonetheless, the balancing of collective and individual rights in the social contract was an issue for Locke, as it was for legislators and philosophers such as Bertrand Russell, who wrestled with reconciling the similar concepts of social control and individual initiative in Western societies (1968, orig. 1949).

The play of thought around this balancing of rights is seen in the notion of self-defence. Baumgold (1993), for example, shows that while Hobbes and Locke had opposing stands on the notion of political resistance, they shared the Grotian **(5)** preoccupation with working out the idea of a nonviolent *pacified society*. Hobbes, who was more inclined to stress state "collective" rights than those of the individual, still recognized an individual right of resistance in the case of self-defence irrespective of the social contract. His idea of self-defence, as differing from the right to kill *per se*, was immediate and corporeal: "no man is oblig'd by any *Contracts* whatsoever not to resist him who shall offer to kill, wound, or any other way hurt his Body" (in Baumgold, 1993, p. 14).

Locke took the pragmatic component of this justification for killing in self-defence (that immediate judicial relief is unavailable at the time of a potentially lethal physical attack) and transferred it to an endorsement of collective political rebellion in the special circumstances of a "state of war" against "tyrannous rulers who have themselves subverted civil society" (Baumgold, p. 18). In other words, when pacified civil society is violated by the tyranny of the state, citizens have a constitutional right to defend their society as well as themselves with violence if need be. **(6)** So while Hobbes and Locke may have differed in their ideas of how far to take the right of self-defence, it is nonetheless clear that the idea of resistance has some currency in liberal political discourse.

The idea of "right" in and of itself appears to be taken for granted in these political works. Later, in the late eighteenth century, Jeremy Bentham (1748-1832) attempted to discern the meaning of "right" in conjunction with *power* (1973, orig. 1789, p. 224):

> Powers, though not a species of rights (for the two sorts of fictitious entities, termed a *power* and a *right* are altogether disparate) are yet so far included under rights, that wherever the word *power* may be employed, the word *right* may also be employed: The reason is, that wherever you may speak of a person as having a power, you may also speak of him as having a right to such power. **(7)**

Bentham's point may be that a right by definition implies an authorized power, manifested in the form of law. It is noteworthy that the conception of power expressed in

Bentham's view of rights is that of power as a "substance," a "something" which one *has* or *hasn't.*

In liberalism, the law is seen as "a unifying force, settling disputes and conflicts through its formal processes" (Burtch, 1992, p. 9). In liberal discourse, this role of law is represented as the outcome of humanistic intentions, as a more civilized approach to conflict resolution and social control than those offered by predecessor traditions. Given the kinds of demands presented by modernism, however, it has been argued that the legal liberalism put into place by colonial powers was justified on the basis that "Western law is a major instrument in furthering the goals of development, such as equality, well-being, rationality, individual freedom and citizen participation" (Gaylord & Galliher, 1994, p. 21). Today, the substantive philosophy in liberal law has become less important than the process by which the law itself operates. As Ledford (1993, p. 171) argues, "Although most observers typically assume that the legitimacy of the legal order derives from substantive norms, in modern systems of formally rational law, the regularity, uniformity, and generality of procedure is the means of legitimation of the entire legal order."

The Marxist critique of liberal philosophy and practices in criminal law denies the existence of a social consensus or a social contract, which are seen instead as

ideologically contrived. Marx's work concentrated on developing a theory of society which set aside such abstract notions and focussed on the material reality of society instead, which could now be interpreted as being largely determined by particular modes of production and their respective distributions of wealth. Systems of law within capitalist societies were thus seen as favouring the interests of the bourgeoisie over those of the proletariat (Burtch, 1992, p. 43).

In capitalist society, material wealth is associated with power, which permeates throughout society and its institutions while remaining within the limits of liberal notions of the "social contract" and the "individual." The Schwendingers (1975), for example, argued that the liberal notion of individuality was so imbedded in criminal law that it was difficult for critical criminologists to advance *social* theories of "criminal behaviour," in spite of the earlier academic controversy initiated by Thorstein Sellin's (1938) declaration that criminology should be independent from legal definitions of crime **(8)**. Since the mid-1970s Marxist critiques of liberalism and the law have created their own space in criminological discourse, as will be demonstrated later in this chapter. Such critiques challenge the notions of equality underpinning bourgeois law by distinguishing formal from substantive equality: "the fact that the law equalizes different individuals only by abstracting them from their real differences, means that formal equality before the law

will always be accompanied by substantive inequality" (Fine, 1986, p. 51). The idea that law "was distilled out of the economic order which gave rise to it" (Lloyd, 1970, p. 206) implies that social equality is more contingent on the particular system of economics than on the hypothetical ideals of democracy and liberal philosophies of the social contract.

Feminist critiques of the liberal stance on law and power assume a variety of forms depending on their theoretical orientation, the breadth of which will be surveyed later in this chapter. What unites these critiques is the focus on gender in relations of power. The differences between them, however, can be traced to deeper divergences in philosophical thought on law and society. In any case, feminist history (or "herstory") would not give much credence to Alexis de Toqueville's version of the emerging democratic state (1969, orig. 1848), which he introduced with the observation that, "No novelty in the United States struck me more vividly during my stay there than the equality of conditions" (p. 9). Since American women didn't have the right to participate in "democracy" until 1920, when their right to vote was finally ratified in the 19th amendment to the U.S. constitution, it is unlikely that Toqueville's admiration for the equality of conditions afforded by democracy was wholly shared by its womenfolk, liberal or Marxist.

Liberal feminism "takes the individual as the proper unit of analysis and measure of the destructiveness of sexism" (MacKinnon, 1989, p. 40). In this analysis the problem of sex inequality is found in gender roles, reinforced by law and custom, which inhibit individual human potential. Socialist feminism uses the idea of class, albeit differently, to explicate the historical struggles of women as a class within capitalist society. In this view the state cannot negotiate the equality of women, as is the belief of liberal feminism, but is part of the problem of women's inequality itself.

The Foucauldian critique of liberal perspectives on law focuses on the conception of power which makes these views possible:

> The liberal view opposes power to freedom. The nature of power is assumed to be potentially absolute and potentially arbitrary. Political and legal institutions are here to limit it and protect the individual members of a political community against the dangers of absoluteness and arbitrariness -- that is, against the danger that one or more individuals might be able to use power for their own ends in an unlimited and unpredictable way. It follows that power is essentially conceived of as exercised by individuals over other individuals (Pizzorno, 1992, p. 204).

In the liberal view, the point of law and the state is to enforce some kind of balance between the individual's responsibility to society and individual rights and freedoms in society, as necessary in the legitimation and operation of the social contract. This focus on the individual, however, has recently "come to dominate all aspects and all sections of [western] culture" (Jones, 1990, p. 81) **(9)**.

In the late 1970s, Foucault questioned the degree "to which liberalism can be posed as a practice or mode of government rather than a distinctive philosophy or world-view" (Dean, 1994, p. 189). The dominance of liberalism in Western industrialized countries is not necessarily due to its superiority as a political doctrine but rather "the capacity for political invention within liberal societies" (p. 189). Liberal notions of limited government and the liberty of the governed (with their respective accountabilities for the uses of power) enable permanent critique **(10)**, whereby the governed supposedly participate in the elaboration and invention of law. As such, law in liberal government is not "reducible to the problem of the legitimation of political sovereignty but is itself a specific and partial instrument or technique of government" (Dean, 1994, p. 191).

This focus on law as technique has a particular resonance in analyses guided by a power/knowledge schema. Liberal debates over the "rule of law" -- bound by the infinite task of balancing ever-changing perceptions of individual rights and responsibilities -- are rooted in the conception of power as a negative force which necessarily requires limits and accountability. In Foucault's view, power is productive, especially in the sphere of knowledge (Bernauer, 1992, p. 132).

Techniques of power employed by the "liberal state" through its social institutions

interested Foucault more than did debates over the balancing of individual and government powers. These techniques are tied to the concept of the individual, which is germane to liberal thought. Modern "man" is an *individual*, a knowable subject born in the fissure of a significant epistemological shift which also made possible political philosophies such as liberalism. As Bernauer explains (1992, p. 132):

> While it might be argued that the conception of man as a unique individual is connected to the social contract model, which confers upon him the status of an abstract juridical figure, Foucault suggests that the view of man as an atom of society owes more to the specific technology of discipline that functioned in the eighteenth century. Individuality is tied to the field of comparison constituted by discipline and within which a hierarchy of abilities is established.

While the abstract individual subject is itself not the product of liberalism, the particular disciplinary techniques of power developed in liberal societies figure prominently in the strategies of governing individuals. Foucault notes (1991, p. 171):

> It is democracy -- or better still, the liberalism that matured in the nineteenth century -- which has developed extremely coercive techniques that in a certain sense have become the counterbalance to a determinate economic and social "freedom." Individuals certainly could not be "liberated" without educating them in a certain way. I don't see why it would be a misunderstanding of the specificity of democracy to say how or why it needs, or needed, a network of techniques of power.

The development of such techniques of power is highlighted by the problem of how to govern disparate territories and populations which now were subsumed into nations called liberal democracies. As Miller and Rose (1993, p. 83) explain the problem, "With

the emergence of such an idea of 'society,' the question became 'How is government possible?'"

Marxist Conceptions of State Power

Situated in the context of a newly realized liberal political philosophy and a Western culture of nation statehood, Marx was able to observe the material effects of the allegedly consensual social contract. While Marx criticized liberalism for its idealism and the social-economic practices afforded by it, he did not dismiss liberalism completely. According to Marx, bourgeois thought on law and the state was, in spite of its ideological and historical limitations, a great advance over the previous natural law doctrines (Fine, 1986, p. 42). He also saw democracy as "a necessary precondition for the full realization of human social life" (Knuttila, 1987, p. 90), although he argued that capitalism destroyed the very possibilities it created by forcing self-development "only in restricted and distorted ways" (Berman, 1982, p. 96).

This side effect of capitalism was not so much a matter of good intentions gone awry as it was a problem of idealism itself. **(11)** Marx believed that "thought is not conformed to the nature of the state, but the state to a ready made system of thought" (1970, p. 19). The "state," like the "crown," is a philosophical and symbolic term -- in material reality,

the state is comprised of individuals who perform specific tasks in the day to day governing of a nation's citizens. And similarly, while the philosophical thought of liberalism promotes the idea of equality for all citizens, the specific form of economy embraced by it, capitalism, produces material inequalities.

The idealist-materialist polarities of liberalism and Marxism can be seen in the example of their respective understanding of class. To the North American liberal intellectual, class ". . . relates primarily to the subjective rank-recognition of an individual's status held by his peers" (Johnson, 1975, p. 142). These class categories -- upper, middle and lower -- are general and relative, and thus very difficult to study in any meaningful way. In contrast, the Marxist understanding of class is more concrete, relating to individuals' "external material relationships centred on those created by the productive process" (Johnson, 1975, p. 143); thus in capitalist society, the three main relationships to the means of production -- the owners of the means of production (bourgeoisie), the independent commodity producers (petit bourgeoisie) and the workers (proletariat) -- are based on observable criteria. This concept of classes *in* themselves is further developed to include the idea of classes as subjective states, as classes *for* themselves, by examining differences in class in terms of human alienation. As Marx explained, "The possessing class and the proletarian class represent one and the same

human self-alienation. But the former feels satisfied and affirmed in this self-alienation, experiences the alienation as a sign *of its own power*, and possesses in it the *appearance* of a human existence. The latter, however, feels destroyed in this alienation, seeing in it its own impotence and the reality of an inhuman existence" (1972, p. 104).

The concept of class was integral to Marx's theory of capitalist society. In this theory, commodities are distinguished from other objects by their use value and exchange value. Since the exchange value of a commodity includes the amount of labour required to produce it, labour power itself is a commodity. The capitalist buys the commodity of labour power from the proletarian, and uses this power to create new commodities to sell for a profit which is not shared with the labourer. This analysis brought Marx to the conclusion that the social relations of production in capitalism caused society to become divided into two broad classes, the bourgeoisie and the proletariat.

As the proletariat facilitate the bourgeoisie's accumulation of private property through a process of exploited labour, they become increasingly dominated by the bourgeoisie. The relationship between the three classes within capitalism is one of contradiction and mutual dependence, as the proletariat must allow its labour power to be appropriated by the bourgeoisie in order to subsist. Thus Marx argued that modern society must be

understood in relation to the revolutionized capacities and social relations of production reflected in alienation, exploitation, and domination (Marx, 1988).

In a Marxist analysis, then, power is noted in political economy. In a social context, the discussion of power is reduced to the conflict between social classes as an inevitable result of the contradictions of capital. There are two key economistic strands of thought on the relationship between class and the state in his work. The first, the instrumentalist position, sees the state and its bureaucracy as class instruments which coordinate a society divided by class in the interests of the ruling class, or bourgeoisie. The second, the structuralist position, sees the state as being relatively autonomous, whereby it constitutes a source of power which is neither directly linked to the interests of the ruling class nor under its clear control, thus retaining a degree of power which is independent of the bourgeoisie (Knuttila, 1987, pp. 103-104).

The instrumentalist position in neo-Marxist state theory has largely been debunked, partly as a result of the Milliband-Poulantzas debate of the late 1960s and early 1970s. **(12)** As Panitch explains, "For the state to act only at the behest of particular segments of the bourgeoisie would be dysfunctional to it managing the common affairs of that class. For it to accomplish this task, it needs a degree of independence from that class, a

'relative autonomy'" (1985, p. 4). In order for the capitalist, democratic state to remain its legitimacy as an authority, it needs to be relatively autonomous from the specific interests of the bourgeoisie. The crude interpretation of Marx's analyses of the state as but a committee of the bourgeoisie **(13)** confuses the separate ideas of the state acting on *behalf* or *behest* of the bourgeoisie (p. 4). Sometimes it may be necessary for the state to act against individual capitalist interests in order to preserve the overall system of capitalism itself.

In Marxist analyses, law is conceived as an institution supporting the dominant mode of production; the relationship is captured in the base-superstructure metaphor. The base is the relations of production which constitute a society's economic structure, and the superstructure the "totality of beliefs, sentiments, morality, illusions, modes of thought, views of life, forms of consciousness, ideals and ideas," including the political, legal and ideological spheres (Milovanovic, 1988, p. 64) **(14)**. According to this framework, Western law supports and is fundamentally influenced by the material and ideological demands of the capitalist mode of production: the impact of capitalist philosophical values of private property in criminal and civil laws is an example of this.

Marxist analyses of state power, whether instrumental or structural, occur in the

context of political economy. Wealth is the manifest form of power. **(15)** Since opposition between the "haves" and the "have-nots" is inevitable, there can be no consensus in a capitalist society. An example of such economically-based conflict is offered in Taylor's (1983, p. 32) assertion that:

> . . . the economic problems of the mass of people in the world at large, including an increasing number of people within the "developed" capitalist world, are those of *unmet social needs.* They are unmet because they cannot be paid for -- *not* because they are not humanely required. The problem here is that the production system of international capitalism does not respond to a demand that cannot pay, because that is a demand which does not yield profit.

In the current Canadian political climate, it would be difficult to dispute this claim. The "national debt crisis," whether real or fictional, has dominated debate on just about every government service including criminal justice. The popular business approach to addressing this debt is to cut costs (especially those which do not yield a profit, like health care or social assistance) without raising taxes (particularly corporate). This translates into public policies which subordinate crime prevention strategies such as job creation, poverty reduction, or programs for women and children in crisis while increasing resources for institutions such as the police and prisons which buttress capitalist authority.

Feminist critiques of Marxism vary according to the theoretical perspectives favoured in analyses of gender relations. Liberal feminism, although critical of the unequal

treatment of men and women in modern capitalist democracies, is supportive of the philosophy and ideals of capitalism *per se*. Liberal feminist critiques of Marxism deal with the specific issue of gender by focussing on the capacities of communism to act as a yoke, curtailing individual choices and expression including those of women. This type of feminism demands both legal and practical equality for all women through the adaptation and accommodation to existing social structures of capitalism (Descarries-Belanger and Roy, 1991, p.9).

Radical feminism(s) recognize patriarchy as "a system of social relations characterized by hierarchical relations between the sexes, rather than as an ideology of the capitalist system" (Descarries-Belanger and Roy, 1991, p. 14). These feminisms see history as reflected in the domination of social groups by one another, rather than in the dominant mode of production. For example, sexual violence or the division of labour exists in the home in socialist or capitalist societies, where "women become as free as men to work outside the home while men remain free from work within it" **(16)**. Radical feminist critiques of Marxism point out its problems for feminism, such as the androcentric basis of economic study per se (Cohen, 1982), or even the idea of political economy itself as the "primary cause" of social inequities of power instead of sexual dominion **(17)**.

A key difference between the analyses of state power advanced by economistic Marxist approaches and by Foucault rests in their respective conceptions of power. Smart (1983, pp. 102-103) explains:

> The most fundamental difference is that within Marxist analysis power always has a precise basis and in the paradigm case of class division and struggle it basically takes the form of exploitation; the location of the respective social classes in the 'various power apparatuses and mechanisms;' and the state apparatus. In contrast, for Foucault, power relations, relations of force, are themselves the very basis, the fibre or network, of the social domain; they are synonymous with sociality.

The implications of these differences may be seen in concepts of truth. In Marxian social theory, ideology is often "construed as thought distorted by oppressive power relations, such that genuine, nonideological knowledge could be attained only in a nonoppressive society" (Hoy, 1987, p. 138). Truth and knowledge in Foucault's analyses, conversely, are not pure and absolute but culturally relative.

The Marxist assumption that power relations are determined by political economy is also problematic for Foucault (1980a, p. 89). While he does not appear to deny the importance of economic relations in the analyses of power, he questions the Marxist presumption "that power relations are homogeneous in all domains and governed by the same pre-given central principle" (Cousins & Hussain, 1984, p. 240). Essentially, it is the totalizing framework of Marxism which is criticized by Foucault (Poster, 1987, p. 90).

Another criticism of Marxist analyses of power in general is their tendency to identify power with the state apparatus (Cousins & Hussain, 1984, p. 240). In Foucauldian analyses, power relations exist outside of state politics as well -- rather, they are integral to the idea of social life itself. These conflicting notions of power also affect the way resistance to power is conceptualized. In Marxism, power is seen as substantive: it is centered in a dominant class, and resisted by an oppressed class (Shumway, 1989, pp. 139-140). For Foucault, power is infused in relations between living bodies, and thus resistances occur between and among people of all classes.

Feminist Conceptions of Power

> In a sense, one could say prison is the archetype of democracy gone mad. It is power in the hands of people ill-equipped to use it wisely. "Dressed," as Shakespeare wrote, "in a little brief authority, most ignorant of what they're most assured."
>
> (Jean Harris, 1988) **(18)**

Feminism has been described as "a politics directed at changing existing power relations between women and men in society" (Weedon, 1987, p. 1), "a political philosophy and movement relating specifically to the rights and just powers of women" (Morgan, 1984, p. xiii), "the history of resistance to male exploitation" (O'Brien, 1982, p. 254) and "resistance to invisibility and silencing" (Faith, 1994, p. 37). Whatever the specific wording, unifying themes in feminism are those of power relationships between women and men. Feminist analyses thus critique the patriarchal structure of society.

Patriarchy refers to "power relations in which women's interests are subordinated to the interests of men" (Weedon, 1987, p. 2).

The difficulty experienced in early attempts to articulate a definitive theory of feminism appears to be derived from the lack of consensus on what is meant by patriarchy. In an examination of this problem, Beechey (1979) canvassed various forms of feminism for their approach to the analysis of patriarchy. The synthesis of these results was expressed in the vague observation that "the theory of patriarchy attempts to penetrate beneath the particular experiences and manifestations of women's oppression to formulate some coherent theory of the basis of subordination which underlies them" (p. 66). A more specific definition of patriarchy was later offered by Eisenstein (1988, pp. 20-21) as:

> . . . the process of differentiating women from men while privileging men. It is the process of transforming (biological) females into women and males into men . . . The term 'patriarchy' connotes the social, historical and economic relations of power in society that create and reflect gendered inequality.

Earlier versions of feminist thought also addressed the issue of power in analyses of sexual "discrimination," but when they did, they borrowed heavily from the liberal conception of power as sovereign. In the early 1800s Mill and Taylor Mill (1970), for example, argued for the democratic inclusion of women into political society on the

grounds of rationality and consistency with liberal thought. Mill, a classic liberal philosopher, argued that "in what concerns the relations of Man with Woman, the law which is to be observed by both should surely be made by both; not, as hitherto, by the stronger only" (pp. 67-68), a thought which in the late twentieth century seems more like benevolent paternalism than feminism. Nonetheless, the influence of his partner Taylor Mill no doubt in the end contributed to what Millett (1971, p. 89) called Mill's "realism of sexual politics."

Over two hundred years later, liberal feminism is no longer a tentative politics but is entrenched in Canadian political life. It also has its critics, which include other types of feminists, arguing the limitations of conceptual democratic equality. MacKinnon (1987, p. 22), for example, has stated that:

> Liberalism defines equality as sameness. It is comparative. To know if you are equal, you have to be equal to somebody who sets the standard you compare yourself with . . . Liberalism has been subversive for us in that it signals that we have the audacity to compare ourselves with men, to measure ourselves by male standards, on male terms.

Similarly, a feminist critique of liberal state power focuses on the privileging of the male standpoint in the relation between law and society, where legislation is wrongly assumed to be neutral (MacKinnon, 1989, p. 163).

Feminist critiques of the alleged neutrality of liberal law are found in the realm of sexuality, and much has been written in this vein on issues such as sexual morality, prostitution and rape. Not only are the laws seen as male-biased -- so also are the judging behaviours of the principal state agents such as judges and lawyers. **(19)** Further, the sexual divisions in law, although playing an "important part in the internalisation of beliefs about the natural in social relationships" (O'Donovan, 1985, p. xi), tell only half the story of gender inequality. As O'Donovan argues (p. x), "it is the split between what is perceived as public (and therefore the law's business) and private (and therefore unregulated) that accounts for the modern legal subordination of women."

More recently, feminist analyses have focused on power itself. As one feminist has argued, "Feminism, among other things, is about the need to reconceptualize power, understand it differently, see the creative potential in power" (Moi, 1993, p. 99). Indeed, MacKinnon (1989, p. 4) sees feminism as a theory of power, its social derivations and maldistribution. Radical feminism in particular is developing a theory of male power "in which powerlessness is a problem but redistribution of power as currently defined is not its ultimate solution" (p. 46).

The power of law has been more recently examined by feminist thought which weaves

Foucauldian analyses of power with the concerns of women. For example, Smart (1989) argues that while law is powerful and should be challenged, "it is law's power to define and disqualify which should become the focus of feminist strategy rather than law reform as such. It is in its ability to redefine the truth of events that feminism offers political gains" (p. 164). *Resistance to law* is seen as a positive force, where the focus of inquiry relates to discourses and knowledges of truth.

The problem of knowledge has been directly addressed by some feminist writers. In sociology, for example, Smith (1987) has challenged the traditional claims of objectivity and argued instead that the subject matter of sociology is from the outset organized from the particular position in society occupied by privileged white men. Women's interests and their ways of knowing them are not necessarily represented by mainstream sociology, thereby provoking wariness of the knowledge claims it advances and undermining its power of "truth."

The pursuit of "women's knowledge" has not in and of itself resulted in a wide-scale "emancipation" of women from patriarchal society. McNeil (1993) argues that the quest for women's knowledge in the much celebrated form of consciousness-raising has been limited to therapeutic models of self-knowledge, becoming an end unto itself rather than

effecting major changes to patriarchal order. Her observation that "the knowledge project of feminism has proliferated and changed, but it has not transformed the world" (p. 169), is an invitation to more closely examine the power/knowledge relationship at the heart of Foucauldian analyses.

Contemporary feminist analyses, until very recently, avoided the complexities of the issue of power by assuming it was a substance, in its crudest sense as something which men had and women didn't. Recently, the question of power has been addressed in more subtle ways (Bartkowski, 1988, p. 55), often borrowing from Foucault's theory that bodies are effects of power yet standing apart from his claim that power is not a group "possession" (Ramazanoglu and Holland, 1993, p. 242). Among feminists, there is no consensus on how to effectively address the problem of power.

A critique of feminisms is their propensity as totalizing theories (see, for example, Smart, 1989, p. 72) which might purport to explain a universal social politics to the subordination or dismissal of others. However, the variety of feminisms advanced in the theoretical literature speak to the tenuousness of this critique, since there is no agreement among feminists themselves as to the extent of its universality and how to best rectify social imbalances based on gender (Tong, 1989; Descarries-Belanger and Roy, 1991).

And since some feminism(s) focus only on the category of women, they do not necessarily speak from the vantage point of groups which do not define their dominant experiences on the basis of gender, such as women of colour.

The idea that feminisms need be wary "of incitements to speak a feminine truth, and to burst across the threshold of 'discourse' to the thunder of public applause" (Morris, 1979, pp. 163-164) is a reflection of the problems of any politics which claim to explain the social reality of a particular group of people. When the group is that of women, how is "woman" herself defined? This problem is aptly summarized by Butler (1987, p. 142):

> . . . any theoretical effort to discover, maintain or articulate an essential femininity must confront the following moral and empirical problem: what happens when individual women do not recognize themselves in the theories that explain their unsurpassable essences to them? When the essential feminine is finally articulated, and what we have been calling "women" cannot see themselves in its terms, what then are we to conclude? That these women are deluded, or that they are not women at all?

These questions point to some of the problems faced by feminist theories which have been addressed by what Descarries-Belanger and Roy (1991, p. 20) call a "feminism of femalinity." Femalinity reflects on "the existence of a feminine territory, knowledge, ethic and power" (p. 20) and seeks "the recognition of difference, of femininity and of the feminine as specific territories of the experience and the power-knowledge of women" (p. 21). In this sense, power relations may be seen *in* the women's movement as well as *outside* of it in its practices of defining and judging.

Foucault's Conceptions of Power

> For millenia, man remained what he was for Aristotle: a living animal with the additional capacity for a political existence; modern man is an animal whose politics places his existence as a living being in question.
>
> (Michel Foucault, 1980, p. 143)

Foucault has had a seminal influence in the recent theoretical analyses of power in Western societies. It has been said that "the main reason for the impact of Foucault seems to lie in the very content of his work. A discourse on power and on the power of discourse" (Merquior, 1985, p. 16). While this description of Foucault's work intimates a singular objective of analysis on his part, Smart (1983, p. 63) prefers to isolate an underlying continuity to his work, a continuity which "takes the form of a concern with the relationship between forms of rationality, the emergence of specific forms of knowledge and forms of domination, the exercise of specific forms of power."

Foucault's analyses of power begin with a critique of what could be called juridico-discursive conceptions of power; in political and social theory, these are recognizable as liberal and Marxist perspectives. In these conceptions the theoretical construction of power as concrete, as a commodity to be possessed, similarly underpins the two opposing perspectives. In liberal juridical theory, power is synonymous with legal rights derived from the social contract, while Marxist conceptions of power deny or challenge the validity of the juridical social contract for various ideological reasons.

Thus conceived, juridico-discursive conceptions of power obey an "economic functionality" (Foucault, 1980a, p. 88), and present an opposition between the legitimate and the illegitimate; Foucault called this the "contract-oppression" schema of power analyses (p. 92). He preferred to cultivate a *non-economic* analysis of power, which he considered necessary "if an unprejudiced understanding of the complex interconnections between politics and the economy is to be achieved" (Smart, 1988, p. 77). His alternative was the "domination-repression or war-repression" **(20)** schema, where the opposition is between struggle and submission in a perpetual relationship of force (Foucault, 1980a, p. 92).

In this analysis, power relations are inextricably linked with forms of knowledge. Foucault explains (1980a, p. 93-94):

> There can be no possible exercise of power without a certain economy of discourses of truth which operates through and on the basis of this association. We are subjected to the production of truth through power and we cannot exercise power except through the production of truth . . . In the end, we are judged, condemned, classified, determined in our undertakings, destined to a certain mode of living or dying, as a function of the true discourses which are the bearers of the specific effects of power.

A study of discourses is thus integral to any analyses of power, where discourse is that which "is constituted by the difference between what one could say correctly at one period (under the rules of grammar and logic) and what is actually said" (Foucault, 1991a, p. 63). **(21)** "True discourses," in this sense, are those which inform institutional

practices. Further, it is the power of these institutions, rather than the truth of discourse itself, which excludes alternative competing discourse (Shumway, 1989, p. 104).

In Foucault's work, power is analysed in terms of forms of knowledge and discourse. Discourse is language practised, an "empirical phenomenon situated in a field of complex social forces and their relations" (Lemert & Gillan, 1982, pp. 129-130). Thus when Foucault refers to power **(22)**, which in his opinion is "the problem that has to be resolved" (1988, p. 104), he is not speaking of "the power of the experts, but of their discourses" (Rajchman, 1985, p. 68).

An important aspect to Foucault's approach to power is that the body is the site of power relations. The body is both an object of knowledge and a "target for the exercise of power" (Smart, 1988, p. 75). Specifically, power/knowledge is exercised on the body in political technologies which reflect "a general mechanism of power of the greatest import for Western society" (Dreyfus & Rabinow, 1982, p. 113). **(23)** Conceived in this manner, power is "bio-power", or power inscribed through living bodies. **(24)**

The idea of power as related through living bodies is an important matter of consideration in the study of the historical responses to murder. This refers to an earlier

discussion in Chapter 1 on finitude and death, and how this might frame our collective and individual emotive and intellectual responses to the idea of murder. Lemert and Gillan (1982, p. 84) explain the theoretical link between power and death (ie. as in the *non-living* body):

> Death is not an experience. It is an absence, a void. There is no reflection that can indirectly or directly discover signs of its plenitude, of its full presence. Without that discovery, death can never be an object of thought. To be face to face with death is not to be confronted with another visage. Death is the exterior space, the dissimulating time, in which subjectivity and the self cannot rejoin themselves in self-consciousness and self-knowledge . . . Death is the absence of totality and plenitude. It is the sign of the failure of subjectivity to justify self-presence as the ground of being.
>
> Power and knowledge are established in a space in which there is no balance of forces. There is no equilibrium in the relations of power and knowledge. The space in which death figures is an asymmetrical space in which the eruption of violence in social relations is the very measure of the imbalance death introduces.

When the living body becomes the locus of power relations, it is inevitable that death -- that old empirical reality -- should figure prominently as a limit. "Death is the final fracturing of the body," write Lemert and Gillan (p. 85), "the transgression of the living, visible body in which the body becomes an object of knowledge and the space for the maneuvers of power."

The imbalance that death introduces to the space of power/knowledge is exemplified in Foucault's analysis of revolution in Iran: "One does not make the law for the person who risks his life before power" (1981, p. 8). As such, the "rightness" of the political

stance one takes is no different from the "rightness" of the politics of the governing state in terms of the analysis of power. Practices of power may remain constant where political ideologies change. As Foucault argues, "There is certainly no disgrace involved in changing one's opinion; but there is no reason to say that one's opinion is changing when one is against the punishments today, when one was against the tortures of the Savak yesterday" (p. 8). Foucault conceives of power without a political theory, and thus introduces "a new kind of political problem and a new kind of political role for philosophy" (Rajchman, 1985, p. 119). Strategies and tools of power relations -- technologies of power (25) -- are the empirical focus of inquiry, as constituent of the thought which make these technologies possible. It is the discursive practices with respect to murder, then, which are of interest in this history of the responses to murder.

Thought, Power and Responses to Murder

In this chapter four different perspectives on power were overviewed. While the overall study of the response to murder in Canada in this dissertation frequently borrows from Foucault's analyses of power relations, the contributions of the competing theories will be invoked wherever they appear to provide a useful dimension to the discussion. The liberal perspective, which is assumed to underpin the official discourse on murder, emerges in questions of contradiction or consonance with governmental practices. In

particular cases, Marxism(s) and feminism(s) may be employed to help understand relations of power. Overall, the discursive practices of power relating to the response to murder will be surveyed on the basis of their strategic utility in defining the murderer and justifying the punishment.

The shifts in political thought in Western societies, recorded in the major writings of the late eighteenth century and onward, appeared to have had an impact on the social response to murder. The centering of the human subject and the focus on the individual as a "unit" of analysis is key to this. As Baker (1994, p. 200) explains: ". . . a universalized conflict of values was symbolically represented and collectively experienced at the level of the individual personality. Good and evil were subjectivized and given an individual human face in the form of violated personal virtue and monstrous personal vice." Based on such beliefs, the collective response to murder through the "contracted" services of the state seems imbued with a dramatic symbolism which acts to emphasize social norms about civil violence and appropriate social behaviour through the character of the "fallen" murderer.

But the concrete discursive practices of state response to murder in the last two hundred years in Canada indicate that the rationalities of social control shift even when

they are unified in the focus on the individual. These shifts appear to be related to discursive influences in the calculation of who the murderer is; the technologies of power which shape the criminal justice response to murder, especially as we move closer to the present, reflect the impact of these discourses in distinct ways. The constructed murderer is the punishable individual. The popular question of discursive debate has been about *how* to punish: rationally, morally, economically and so on.

In an interview on the politics of Soviet crime, Foucault makes this point (1989, pp. 129-130):

> The questions of what to punish and how to punish have been debated for a long time. Now, however, we are beginning to ask ourselves some strange new questions. "Is punishment necessary?" "What do we mean by punishment?" "Why is there a connection -- until now taken for granted -- between crime and punishment?" The idea that crime must be punished is so familiar, so necessary to us, and yet, there is something that makes us doubt.
>
> To suggest an alternative to punishment is to avoid the issue, which is not the judicial context of punishment, not its techniques, but the power structure that punishes . . . It is easy to mock the theoretical contradictions that characterize the Soviet penal system, but these are theories that kill, and blood-stained contradictions. One can also be surprised that they weren't able to come up with new ways of dealing with crime and political opposition; one must be indignant that they adopted the method of the bourgeoisie in its most rigid form, at the beginning of the nineteenth century, and that they pushed it to a degree of meticulousness that is overwhelming.
>
> . . . Between the analysis of power in the bourgeois state and the idea of it withering away, there is a missing term -- the analysis, criticism, destruction, and overthrow of the power mechanism itself . . . [The] task [of socialism] is to invent a way in which power can be exercised without instilling fear. That would be a true innovation.

Liberal juridico-discursive conceptions of power define the murderer as a legal subject, a transgressor whose act offends the sovereign power of the state in breach of the social contract. Murder is a pathological act of the individual acting on the basis of his/her own free will. Power is abstract and responses to murder are symbolic displays of sovereign power. In Marxist analyses the power of the state does not come from the authority of the social contract, but rather the institutions which support the dominant mode of production. Submission to sovereign power is achieved through false consciousness or ideological hegemony. Murder is lubricated by the imbalances of power between different classes, where power is a commodity and violence is a reflection of powerlessness. In both of these perspectives on power, punishment is the legal response to murder in a demonstration of state power over the individual.

While some feminist perspectives would concur with these basic descriptions of power, albeit with a directed focus on the particular position of women within them, more recent feminist analyses recognize the law as a social construct (Faith, 1994, p. 52). These analyses criticize the centering of male perspectives on law, whereby women are situated as the Other to men. In assuming that the legal subject can be reduced to this standard, liberalism denies that "gender is a fundamental factor in power relations -- between men, between women, between men and women," and that "[g]ender is a

primary feature of the constitution of the Self" (p. 61).

In this study, the discourses on murder captured in the documents are confined by liberal juridico-discursive conceptions of power. The focus on the individual murderer is not seen as problematic, nor is the sovereign right to impose punishment. These assumptions guide thought on murder, and shape what can be said about it. Accounts of murder amount to conflicts between the individual and the state, and the negotiations of power between them. As Laster (1994, p. 2) observes, "there is a particular quality about the last words of those who are about to be executed. The perfect truthfulness, universally acknowledged in the utterances of the dying, also holds the ultimate resolution of the battle between the individual and the State."

NOTES

1. Rose ultimately characterizes Foucault's work as administrative nihilism (1984, p. 5). For a variety of (arguable) reasons, she challenges the "radicalism" of post-structuralism.

2. From **Democracy in America** (1969, p. 238).

3. The first ideas of the social contract are attributed to Plato (428-348 BC.)

4. The original use of the term "man" is retained in the discussion of these older works, since these philosophers were men and given that women had a dubious status in these times (see, for example, Rousseau's advice on the education of women in **Emile**) *man* can be read to mean just exactly that: a philosophy by men and about

men in a historical culture of Western patriarchal relations.

5. Hugo Grotius (1583-1645) was a Dutch jurist and philosopher best known for his exposition of modern international law. In the context of this specific discussion, however, Baumgold suggests that "It was Grotius's genius to see behind the constitutional question of resistance rights to the more fundmental problem of private warfare" (1993, p.7).

6. The American debate about gun control is premised, philosophically, on the constitutional right to bear arms and the Lockean provision for civilian defences against the state. Indeed, the right to private ownership of military-style assault weapons is argued on this basis. While this may appear justified in Lockean philosophy, in late 20th century U. S. anyone who shoots an agent of the state for his/her own reasons of self-defence goes to prison or the execution chamber.

7. Bentham argues that "the converse of this proposition does not hold good: there are cases in which, though you may speak of a man as having a right you cannot speak of him as having a power, or in any way make any mention of that word. On various occasions you have a *right*, for instance, to the services of the magistrate: But if you are a private person, you have no *power* over him: all the power is on his side" (p. 224).

8. The Schwendingers use the examples of Sellin, Edwin Sutherland (1945) and Paul Tappan (1947) in the early debates over the definition of crime.

9. Ball acknowledges that individualism "has been a characteristic feature of western culture since the time of the ancient Greeks" (p. 81). His point is that the idea of individualism *saturated* western societies in the last 200 years, and that its recent domination is not necessarily a reflection of progressive development (the liberal view).

10. Hoy comments that, "According to the traditional liberal theory, criticism would have no point unless progress were possible, and progress means liberation" (1987, p. 138).

11. Idealism is the philosophical view that the "external world" is created by the mind. In contrast to materialism, which draws its concepts from the concrete, or "real" world, idealism uses concepts to define reality (Maclean, 1986, p. 6).

12. A sample of this exchange between the two Marxist scholars is reprinted in Blackburn's **Ideology in Social Science** (1973).

13. The crude caricature of instrumental Marxism's understanding of the state as a committee for the bourgeoisie was translated into an image of Canadian politics by Panitch (1985, p. 3) where, "E.P. Taylor, after having eaten two or three babies for breakfast, calls Pierre Trudeau every morning and, amidst satisfied belches, gives the prime minister instructions on what the government should accomplish that day."

14. Douglas Hay (1975) described three ideological aspects of law as majesty, justice and mercy. He used these to explain "the divergence between bloody legislation and declining executions, and the resistance to reform of any kind" (p. 26) in eighteenth century England.

15. Hay (1975, p. 19) suggests that property was deified in the eighteenth century, and once so "it became the measure of all things. Even human life was weighed in the scales of wealth and status: 'the execution of a needy decrepit assassin,' wrote Blackstone, 'is a poor satisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours, and his fortune.'"

16. From Catharine MacKinnon (1989, p. 10).

17. Kate Millett's **Sexual Politics** (1971) is a good example of an early radical feminist work which argued for the historical privileging of sexual politics over existing analyses of political power.

18. From **They Always Call Us Ladies: Stories from Prison**.

19. See, for example, Carol Smart (1985).

20. Repression, in the context of this schema, "no longer occupies the place that oppression occupies in relation to the contract, that is, it is not abuse, but is, on the contrary, the mere effect and continuation of a relation of domination. On this view, repression is none other than the realisation, within the continual warfare of this pseudo-peace, of a perpetual relation of force" (Foucault, 1980a, p. 92).

21. A more developed presentation of Foucault's approach to discourse is more appropriate to a discussion of methodology than an overview of theories of power, and thus will be considered in more depth in Chapter 3.

22. Foucault outlines a number of propositions on power in **The History of Sexuality** (1980, pp. 94-97).

23. Lash (1984, p. 2) points out that in Foucault's work the ways in which discourse works through the body changed in the transition from the classical to the modern periods. "In the Classical period, heralded by Descartes and absolutism, when souls and discourse are separate from bodies, knowledge relates to bodies from the outside, through representation and direct repression. The point of entry to the Modern was provided by the French Revolution, the usher was Sade. We Moderns have witnessed the cementing of souls back onto bodies; the breaking of discourse with representation to enter bodies themselves; its constitution, individuation and normalisation of bodies; its recruiting and drilling of bodies, acting through incarnate souls, in the interests of the reproduction of society."

24. O'Neill (1986) draws the connection between the body and society using a similar idea of bio-power. He argues that in rethinking the body in modern analyses, we must also rethink the body politic. In doing so, he introduces the idea of the bio-text, "the body as a communicative tissue upon which social power is inscribed" (p. 71). He explains: "To the civilized mind, it is a mark of savagery that its people produce very little else than themselves. They do not much alter their natural environment and, as it seems to us, are thereby committed to a minimal existence. We think it is a mark of civilization when the individual is severely marked off from the state and the economy and even from his/her family. In this scheme of things, the individual is characterized by his/her power to negotiate exchanges, to accumulate rights and properties that exercise and consolidate a separate identity. Thus the civilized individual is horrified by the nakedness of the savage man/woman because their condition reveals that they have not acquired the power to separate the public and private realms. The naked savage is a social body, a *socio-text*."

25. Martin O'Brien describes technologies of power as "the particular configuration of power relations immanent in practice and involve the analysis of the tactical deployment of the political, social, economic, and epistemological characteristics peculiar to a particular power-knowledge juncture" (1986, p. 122).

Chapter 3
METHODOLOGICAL CONSIDERATIONS IN THE STUDY OF RESPONSES TO MURDER

> When viewed from one standpoint, "methodology" seems a purely technical concern devoid of ideology; presumably it deals only with methods of extracting reliable information from the world, collecting data, constructing questionnaires, sampling, and analyzing returns. Yet it is always a good deal more than that, for it is commonly infused with ideologically resonant assumptions about what the social world is, who the sociologist is, and what the nature of the relation between them is.
>
> (Alvin W.Gouldner, 1971)

> Perhaps . . . it is to methodology that Foucault makes his most specific contribution. If the epistemological and ontological dichotomies are rejected, then too must be the distinction between methodology and substance. At its worst methodology assumes a privileged logos prior to fact on the basis of which the concreteness of the world is ordered. Against this purification of science, Foucault criticizes the very idea of methodology. Power-knowledge is the specific field of relations that determines the historian no less than workers, prisoners, patients, or kings. History is leveled.
>
> (Charles C. Lemert & Garth Gillan, 1982)

In conventional criminology, a study of murder amounts to a study of the murderer. The murderer is the intersection of several power-knowledge relations. In law, for example, the two degrees of murder are calculated on the basis of a range of motives attributable to the murderer. Through the sciences of the individual (such as psychiatry or psychology), the persona of the murderer shapes and adds texture to the classifications of the law. The contributions of sociology appear to be of lesser importance, at least in recognizable terms of power-knowledge practices.

Sociological research may have contributed socially-derived qualities to the profile of the murderer, such as poverty, unemployment or violent family relations, but by and large reform of murder laws and practices of punishment are focused on the individual. Recent wide-scale reforms in social policy in Canada have focussed their organizational course in the opposite direction to that by which a sociological approach would search for rationally expedient responses to the social problem of murder. It is somehow easier or preferable in Canada to have deep pockets for criminal justice and empty palms for poor children. (1) Responses to murder which address the social policy implications of sociological interpretations of crime are still few and far between.

The apparent impotence of a social response to murder which deals with its *social* aspects in the face of individual-oriented responses cannot be traced to the empirical inadequacies of various sociological explanations of murder. It has not been proven that they are any less valid than the dominating discursive practices of psychology and psychiatry in the response to murder. Knowledge about murder which is derived from study of the individual appears to dominate our responses for reasons other than its demonstrated scientific or rational superiority.

It has already been suggested that the focus on the human subject is characteristic of

modern epistemologies. Using Foucault's idea of power relations, there would also be a strategic utility in the privileging of responses to murder which focus on the individual since the individual is the smallest common denominator of society, one over which dominion is more easily achieved than what would be possible with larger groups or society at large. That the individual is wrenched from his/her context of social relations by scientific discursive practices amplifies the justification of a criminal justice focus on the individual. The modern recurring theme of punishment seems inextricably linked to this notion of the individual -- it is hard to imagine what else the theme might effectively refer to. It is an *individual* we must punish, and it follows that the liberal notions of free will and individual responsibility in the discursive response to murder supercede the few references to social context in the condemnation of the murderer. Foucault's analyses on the emergence of the human sciences support the notion that the focus on the individual murderer is related to far-reaching concerns based on human subjectivity itself. Knowledge of murder is premised on this analytical privileging of the individual at the point of his/her criminal transgression, while subordinating the socio-historical contexts of specific murders in the process.

Thus it is necessary in a study of the social responses to murder in Canada to suspend the *a priori* assumptions about the individual by transgressing the epistemological limits

of the responses themselves. In this thesis, Foucault's tactic of decentering the subject is preferred because it is more useful in an analysis of the responses to murder in which death is a key consideration, both in the phenomenon of murder and in the ways of thinking about murder. A cursory review of different methods -- as presented in positive science, social constructionist approaches, Marxism(s) and particular feminism(s) -- helps to provide a foundation for this assertion. Of these methods, positive science is dominant when the subject matter is murder. In contrast to the scientific method, which upholds the sovereignty of the subject and conceives the history of thought as an uninterrupted continuity, Foucault's history of thought is premised on the decentering of the subject and a focus on the formative rules though which discourse "achieves unity" (Smart, 1985, pp. 37-38). It is a history of discontinuities which displaces the subject in favour of a pronounced focus on discursive practices.

Foucault's genealogies have been criticized for methodological flaws by historians. Castel (1994, p. 237) suggests that one reason for these critiques is Foucault's use of history to account for the present, in his practice of problematizing a current question. Indeed, Foucault described his corpus of work as "a matter of analyzing, not behaviors or ideas, nor societies and their 'ideologies,' but the *problematizations* through which being offers itself to be, necessarily, thought -- and the *practices* on the basis of which these

problematizations are formed" (1986, p. 11). Thus, the research task begins with a problem articulated in the present and considers the history of this problem using the "method" of genealogy: "Genealogy means that I conduct the analysis starting from the present situation" (Foucault in Castel, 1994, p. 238).

Current popular discourses on crime speak loudly of the problem of how to respond appropriately to crimes of violence, especially murder. These discourses reflect the moral and rational views of the people expressing them with respect to how Canadians should respond to murder, but they appear to be marginally informed by sociological studies of the phenomenon of murder itself. In this chapter, different political/theoretical perspectives on how to research social problems generally and the problem of murder specifically are surveyed. These approaches address the problem of the present with a view towards strategies of the future in responding to murder, and the possibilities for such action should not be dismissed.

Thus while Foucault's genealogical approach is appealing because of its focus on problematization, it stops at descriptive analysis. In this thesis, the analysis will document ways in which the response to murder has been problematized historically, and on the basis of this, challenge these responses on the basis that they fail to recognize

murder as a cultural rather an individual problem. The analysis, then, is not motivated so much by a critique of other research approaches as it is by the observation that, in spite of the empirical knowledge we have of murder produced in these approaches, we fail to rationally employ it to the advantage of our overall safety and well-being. The search for understanding about murder itself is limited by our inability to do something about it. Thus, this particular history seeks to gain some insight into why this is so, based on the limits to thought, talk and practice found in the responses to murder.

In addition to epistemological considerations and different conceptions of power, thought on murder may be influenced by the different methods employed to study murder. In this chapter, various methodological approaches are canvassed, with a particular emphasis on Canadian research which recognizes murder as a social phenomenon. This is followed by a description of the data, in this case archival documents, studied in the course of this dissertation with explanations as to how these documents are useful to an understanding of the historical response to murder in Canada. An explanation for the choice of subject matter is also offered, in the context of historical study of the response to crime.

Positivism and the Scientific Method in Criminology

> That trivial and tautological hypotheses have become something of an involuntary trademark of positivist sociological theory may not be the fault of individual authors. Instead, it may reflect an intrinsic inability of positivist formalism to come to grips with an exceedingly complex social reality which can not be changed through further refinements in defining variables and specifying relations between them.
>
> (Bernd Baldus, 1990)

Positivism is based on the premise that all genuine knowledge is found through the systematic study of phenomena and the explanations of laws discovered therein. In general, the role of philosophy in positivism is to explain the scope and methods of science and to explore the implications of science for human life (Flew, 1979, p. 283). A key attribute of positivism in sociology is its "insistence on the unity of the scientific method" (Taylor, et. al., 1973, p. 11). Transferring the foundations and tools of research of the physical world to the study of society, positivists advance methods for the quantification of human behaviour and presume that the scientist is objective. This was the view of one of the first sociologists, Emile Durkheim, who supported the idea that sociology is "objective, specific and methodical" (1982, p. 35). The idea of a positive science of societies, he claimed, would be fruitful if applied to the "appropriate subject matter, namely the totality, without exception, of social facts" (p. 194).

Thus sociology, in its beginnings, has been understood as a science. However, the development of appropriate and competent scientific rules of evidence in sociology had

been problematic, resulting in what Berger (1963, p. 14) described as a "methodological inferiority complex." These problems of methodology in sociology as a positive science may be reduced to the question of how the scientist as a knowing subject can objectively study a society of which she/he is a member. As Gould (1981, p. 23) argued, the choices made by scientists in the process of their endeavours are influenced by their own subjective understandings of reality. While acknowledging the power of science to uncover information which assists in achieving an understanding of many phenomena, he contended that science had demonstrated an incapacity to recognize itself as social enterprise.

The idea that social trends could be quantified is traced to the early part of the seventeenth century in the work of Jeremy Bentham. Borrowing from the British "Bills of Mortality" in 1553 **(2),** Bentham drafted a plan for the collection of "Bills of Delinquency," and by 1680 the method of "political arithmetics" was established in the form of demographic enumeration and census techniques. As quantification achieved ideological acceptance it began contributing to the emerging dominance of positive science. It is believed that, as a result, social science theory rose in prominence by the nineteenth century as quantification became an acceptable means of studying basic theoretical concepts (Salas and Surette, 1984, p. 463).

It was during this time that Quetelet began deriving criminological theories from crime statistics, inspired by his interests in social moral problems. This work, while simplistic in its employment of rudimentary statistics to test hypotheses, was a springboard to the growing use of statistics and the subsequent creation of statistical societies. In its nascence, quantification in the social sciences is claimed to mark the beginning of deterministic positivism. Social behaviour was no longer just explainable by a free will philosophy denoting some imaginary state of nature. Moral statistical analysis sought to state "what is," the actual known crimes in a real social grouping (Radzinowicz, 1966, p. 36).

In the field of criminal justice today, statistics are still widely used and hypostatised. As well, academic literature reflects a variety of studies of this statistical methodology, as in the examples of Binder (1984) and Brown (1989). However, there is also a wide use of qualitative methods in social research. The difference between qualitative and quantitative sociology, according to Schwartz and Jacobs (1979, p. 4),

> can be stated quite simply in terms of the notation systems used to describe the world. Quantitative sociologists assign numbers to qualitative observations . . . Qualitative sociologists, on the other hand, report observations in the natural language at large. They seldom make counts or assign numbers to these observations . . . This simple difference in commitment to notation systems corresponds to vast differences in values, goals, and procedures for doing sociological research.

These two approaches are not mutually exclusive, making different yet valuable contributions to the social sciences. While quantitative methods are the best of the two at making social science more scientific (and thus credible), qualitative methods are the best at developing ways of gaining access to the life world of other individuals (p. 4). In practice, sociological research tends to combine these methods.

Positive approaches to the study of murder in Canada have yielded information which is potentially useful in the pragmatic response to the problem of murder in Canada. Kennedy et. al. (1989), for example, use incident-based analysis in the interpretation of homicide statistics and call for the need for specificity in discerning differences in homicide across regions and demographic groups when creating social policy on murder. Sproule and Kennett (1989) compared the incidence of killings by handguns, other firearms, and nonshooting methods between the United States and Canada in the six years following the Canadian implementation of stringent gun control legislation in 1976. They found strong statistical evidence to support the effectiveness of gun restriction in terms of killing rates between the countries.

Positive approaches to the study of murder in Canada also include a focus on particular demographic groups of people who kill. Doob et al. (1994), for example,

examined the factor of race in Ontario homicides involving aboriginal people, who constituted 2.8% of Canada's population but 22.2% of homicide suspects in 1988. They suggested that factors relating to the overall position of aboriginal people in Canadian society is responsible for their high rates of murders, and that conditions for aboriginals must be changed in order to lower these rates. In a study of Canadian youth who kill, Meloff and Silverman (1992) found that juvenile homicide accounts for 7% of all homicides and that the victims of these crimes are usually relatives or acquaintances. This finding contradicts the popular premise that random youth violence is rising in Canada, and has implications for social policy which may be influenced by this belief.

Social Constructionist Approaches

Qualitative approaches to the study of crime which attempt to suspend the personal subjective biases of the observer and describe phenomena on the basis of the perception and consciousness of the individuals being studied are phenomenological. This method is attributed to the German philosopher Edmund Husserl, who attempted to develop phenomenology as a non-empirical science in the early part of the 20th century. While objects themselves are seen as objective phenomena in this method, "no distinction can be made between what is perceived and the perception of it" (Flew, 1979, p. 157). In the phenomenological approach perception of the world is not limited by our *actual*

experiences, as perceptions can also include thought on *possible* experiences (Quinney, 1975, p. 186). Thus the meaning of objects for the behaviour of the person encountering them is found in her/his relationship and reaction to the objects.

Collins (1985) states that "the basic principle of phenomenology is that it is possible to get to the true essence of things without having to rely on any empirical evidence at all" (p. 207). Because the essence of things exists prior to our experiences of them, scientific methods cannot prove or disprove them. Phenomenology is a method of social inquiry which produces more certain results by studying what can be known, the relationship and reaction of the individual to the object. The determination of essences is made after an inventory of "bracketed" observations is developed and studied for the universal laws revealed in it.

The application of phenomenology to the study of society was introduced by Alfred Schutz, a student of Husserl's whose chief interest was "the structure of the commonsense world of everyday life" (Berger and Luckmann, 1967, p. 16). This particular focus on commonsense knowledge rather than theoretical ideas was later advanced by Berger and Luckmann (1967) in a treatise in the sociology of knowledge. Arguing that a sociology of knowledge must address the social construction of reality, they center the question of how

it is possible that "subjective meanings *become* objective facticities" (p. 18).

While phenomenology examines the process by which we understand the world, social constructionist thought is concerned with the explanation of social life (Quinney, 1975, p. 186). Whether or not there are universal essences to be discovered phenomenologically or otherwise is questionable in social constructionism, which focuses instead on the relationship between "observation and the utility of such observation in understanding our own subjective, multiple worlds" (p. 184). The world that is of interest to social constructionists is that which is created by the social actions of human beings. The social construction of meaning, then, is the product of intersubjectivity.

Two main approaches within this methodological tradition are symbolic interactionism and ethnomethodology. Symbolic interactionism is based on the assumption that human behaviour is self-directed and observable at two distinct levels: the symbolic and the interactional (or behavioural) (Denzin, 1970, p. 6). In this perspective, largely attributed to Mead (1934), society is seen as a large collectivity of people held together by a common culture which is composed of shared symbols. A central focus of symbolic interactionism is the development of self-image, self-concept

and identity, which are the products of long term social interaction during which an individual defines her/his sense of self in response to the perceived reactions of others.

Symbolic interactionism is thus an interpretative paradigm, whereby the importance of "interactional negotiations" are emphasized (Lassman; 1974, pp. 138-139). In the context of criminology, symbolic interactionism is influential in social reaction theories, which emphasize "the nature of social rules and the labels or social reaction aimed at individuals who contravene such rules" (Taylor, et. al., 1973, p. 140). Criminal behaviour is seen as an effect of the criminal label, where the self-identity of the individual is a reflection of what is mirrored back to him/her. The assumption that social control leads to or creates deviance and that there is nothing inherently deviant about any action one takes until some social audience defines the action as deviant, however, ignores the reality that "we do not act in a world free of social meaning" (p. 147).

Ethnomethodology is essentially an analysis of talk: for example, as in the examination of conversation. In more technical terms, Garfinkel (1967, p. 11) defines ethnomethology as "the investigation of the rational properties of indexical expressions and other practical actions as contingent on ongoing accomplishments of organized artful practices of everyday life." Ethnomethodology attempts to uncover the rules of order

which underpin talk and action in specific social groupings, on the basis of the idea that common understandings have operational structures. Indeed, in ethnomethodology it is these tacit understandings, and not "a morality tinged with the sacred", which are the glue holding together the social world (Gouldner, 1971, p. 390).

The ethnomethodological perspective has been criticized for being "crudely empiricist," since the only plane of social reality recognized by it is individual consciousness (Taylor, et. al., 1973, p. 206). The social world, then, becomes an ongoing catalogue of individual consciousnesses which do not refer back to any structured values of a given social system. Further, as Robertson argues (1974, p. 122):

> Ethnomethodologists seek to destroy what they regard as positivistic principles of an *a priori*, constructivist analytic nature. Yet in so doing they diminish the undoubted virtues of their brand of pragmatic empiricism. For in denying the significance of analytical distinctions they foreclose on the very important possibility that they could discover that distinctions of this kind are in the nature of socio-cultural reality.

Social constructionist approaches are useful to this study of the responses to murder, since they focus on commonsense knowledge and the ways in which subjective meanings become objective facts. In this study, both commonsense and disciplinary knowledge factor into the analysis of the responses to murder in the social construction of the murderer.

Marxism and Dialectical Materialism

> Nature is the proof of dialectics, and it must be said for modern science that it has furnished this proof with very rich materials, increasing daily, and thus has shown that, in the last resort, nature works dialectically and not metaphysically; that she does not move in the eternal oneness of a perpetually recurring circle, but goes through a real historical evolution.
>
> (Friedrich Engels, 1959, orig.1892)

Marx's method of social analysis was the study of the interrelationship between change and contradiction, that is, dialectics. Marx was not adverse to science; rather, it has been observed that Marx often used the term "dialectical" as a synonym for "scientific" method (Bottomore, 1983, p. 125). Dialectics is scientific in the sense that it explains contradictions in thought and crises of socio-economic life in terms of the particular and contradictory essential relations which create them, while using the principles of logic employed by scientific argument.

In this method, the laws governing matter are considered to be dialectical rather than mechanistic. Rooted in Hegel's work, the dialectic is a process of argument that proceeds by triads consisting of a thesis, antithesis and synthesis. The thesis is the transformation of quantity into quality, the antithesis a denial of the principle of contradiction, and the synthesis a negation of the negation -- the view that reality is developed through contradiction and its reconciliation, with the latter producing new theses and

contradictions. While Hegel's orientation was idealist, however, Marx and Engels made dialectics scientific by imbedding it in the philosophy of materialism.

In materialism, matter is the primary element and consciousness (thought) is secondary. Thus in reference to the study of society, Marx claimed that "it is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness" (in Tucker,1972, p.4). Marx was materialist in his manner of interpreting phenomena, and dialectical in his manner of apprehending and understanding material phenomena. His method has been referred to as dialectical materialism, a term which connotes Marxist philosophy.

The Marxist science of studying the life of society has been called historical materialism, an approach which addresses the general aspects of the development of society as a whole. It also considers the life of society from a philosophical basis. Historical materialism is described by socialist theorists (Berbeshkina et. al., 1985, p. 13) as the investigation of

> . . . philosophical issues such as the correlation between the material and ideal aspects of social life; the correlation between the spontaneous and the conscious, the objective and the subjective in the historical process; the motive forces of society's evolution; the issue of the essence of man and his place in the world, etc. Historical materialism is therefore a philosophical science about society, part of Marxist-Leninist philosophy.

Thus it appears that Marxist methodology, while based in a different political philosophy than positive methodologies, is nonetheless characterized as a particular kind of social science -- which deals with the general aspects of the development of society as whole rather than an individual aspect of social life.

However, critics of Marxist methods of research question such claims to the status of science, for example, on the basis of empirical testability. In response to these specific criticisms, Lynch (1987) has suggested that the problem of untestable theories in Marxism may be addressed through the use of a "quantitative Marxism." He argued that critics should re-examine the distinction between empiricism (allowing the data to "speak for itself") and quantitative analysis (where the data are applied to a theoretical perspective) with the understanding that Marx's work was not anti-empirical, but anti-empiricist (p. 112).

Beirne (1979), in a broader response to criticisms of Marxist methodologies, charges that such criticism "appears incognizant of the epistemological universe from which it derives its own methodology and discourse" (p. 374). Since positivist epistemologies are predicated on a mutual identification of the objects conceptualized in research, it would be essential for positive critiques to comprehend the objects of Marxist inquiries as they

are conceptually understood by Marxists themselves. For example, the logical structure of Marxism is reciprocal rather than linear, as it is in positivism (p. 378). While Marxist method is deterministic, this determinism differs from the notion of general causality in that it uses a dialectic as opposed to linear conceptualization of cause; it distinguishes specific forms of domination which determine human action (Keat and Urry, 1987, p. 193).

Gutting points out a methodological problem with the Marxist approach to understanding the social world, that in it "there is room for activities that are genuinely scientific -- that is, yield objective knowledge -- even though they are molded by the sort of forces that produce ideologies" (1989, pp. 43-44). Since Marx criticized ideologies as systems of ideas which misunderstood their real connection to reality (Gutting, 1989, p. 43), his acceptance of the scientific method as something apart from ideology may be problematic. Indeed, some feminist analyses have suggested that science is itself a discourse informed by particular ideologies (Benston, 1982; Martin, 1990).

In the context of law and crime, the authors of a text on socialist criminology (Buchholz et. al., 1974) explain the problem of simple causal connections made in positive methodologies:

> The mistake is frequently made of halting the examination of the causes of criminality once the simple direct connection, i.e. the specific causal connection, has been dealt with. In this way, however, one comes to a halt at the *next cause*, the decision to commit the deed and its emergence in the mind of the culprit; one therefore -- deliberately or unwittingly -- stops short of the investigation of further essential inherent connections (p. 61).

The socialist solution to comprehending criminality, then, is to begin with the social determination of social behaviour generally. By way of dialectical and historical materialism the "internal kinetic laws of human society and the dominant social behaviour of its members" are found in the forces and relations of economic production (p. 139). The Marxist method of analyzing criminality thus eshews the positive mechanistic theories in favour of fully social theories (Taylor et. al., 1973, p. 270).

Marxist analyses of crime and criminal justice tend to work particularly well in the explanation of property and white collar/business crimes, given the economic and class variables which figure prominently in these crimes and the state responses to them. Less discussion is devoted to crimes of violence and murder specifically in these analyses; however, there has been some effort to explain murder in capitalist societies. An example of a Marxist interpretation of murder is found in Greenberg's observation of the "ideology of radical individualism" in the competitive phase of capitalism. This ideology makes it as possible for a "hardened" street criminal to kill as it does a Ford Motor Company executive to risk the loss of lives and related liability suits over car recall on

the basis of financial advantages (1993, p. 88). Taylor (1983), further, considers the limitations of a "possessive individualism" which underpins Canadian politics and the ability of governments to "work toward the restoration of a real sense of community or 'common interest'" in understanding and working to prevent violence (p. 109). He challenges the stereotypical definitions of homicide which are the targets of state intervention, suggesting that these definitions of individual actions detract from the significant structural changes in Canadian society which may relate to pathological social interactions.

Feminist Methodologies

> One can easily see that the new feminist analyses unsettle traditional assumptions about knowledge as they challenge familiar beliefs about women, men, and social life. How could it have been otherwise when our ways of knowing are such an important part of our ways of participating in the social world?
>
> (Sandra Harding, 1987)

MacKinnon has described the goals of feminism as a project "to uncover and claim as valid the experience of women, the major content of which is the devalidation of women's experience" (1983, p. 638). A suggestion here is that evidence from the scientific world is not objective but androcentric; consequently, the scientific method can be seen as politically biased towards the experiences of men. This, of course, must have an impact on the issue of methods in feminist analyses.

Eichler (1988, pp. 3-9) identified several types of sexism imbedded in conventional social science research. Of these, four are considered to be primary, that is, that they cannot be reduced one to the other. These include androcentricity, the male perspective of the world; overgeneralization (treating society as one sex but making claims about both) and oversimplicity (eg. sexist language); gender insensitivity; and double standards. She rejects the notion that research is value-free, but paradoxically upraises the ideal of objectivity as "an asymptotically approachable but unreachable goal, with the elimination of sexism in research as a station along the way" (p. 13).

In the realm of academic research, feminist scholars choose qualitative over quantitative approaches in order to correct sexist biases. A study on sociological journal articles (Grant et. al., 1987) indicates that while female scholars have used qualitative methods more often than males, writing about gender increased the likelihood of using quantitative methods for both men and women. This suggests that parley on gender issues, including this particular article, tends to be couched in analytical methods which privilege scientific and androcentric perspectives. Gender, in academic sociology, has traditionally been debated on male terms.

These studies of work in feminist method are reflective of a scientific approach which

attempts to put women in the picture. This "feminizing" of the scientific method is more characteristic of the work of liberal feminists who attempt to equalize the position of women to that of men within the status quo, although often methods of quantification are used by feminists in more ancillary ways to empirically buttress gender analyses. Much of this research has been focused on the study of women as victims of male dominance, the contributions of women to public activities, and the work of women researchers and theorists previously ignored (Harding, 1987, pp. 3-5).

In this context, the scientific method can be seen as useful in the promotion of feminist theories and goals. Jayaratne (1983), for example, sees a primary role for feminism in the resolution of traditional quantitative research shortfalls, and prescribes quantitative empiricism to address sexist research on its own terms. Other feminist critiques and responses have left some to ponder whether there is a conflict between the commitment to feminism and the commitment to science (for example, Keller, 1982), and if so whether such a conflict is politically resolvable.

The imperative of objectivity in the scientific method is seen by many feminists as irreconcilable with the perspective of feminism itself; indeed, this imperative may be seen as part of the problem with androcentric society where women are perceived and

treated as objects both inside and outside of the research "laboratory." "Objectivity," wrote MacKinnon (1983, p. 636), "as the epistemological stance of which objectification is the social process, creates the reality it apprehends by defining as knowledge the reality it creates through its way of apprehending it."

One feminist research method attempts to address the problems associated with objectivity by replacing it with the idea of a deliberate subjectivity. This method, called standpoint epistemology, is based on several premises akin to the Marxist view of consciousness. The first premise is that material life structures and limits one's understanding of life; the second premise is that members of more and less powerful groups have the potential for opposed understandings. The third premise is that the dominant group view is "partial and perverse" because of its inherent interest in maintaining and legitimating the group's dominance regardless of how incomplete this view may be (Hartsock, 1983, pp. 283-310). In this view, women as a socially subordinate group possess a greater understanding of both the perspective of the dominant male group as well as their own perspective in order to survive (Nielsen, 1990, p. 10). As such, the standpoint view is unabashedly subjective and critical of traditional scientific objectivity.

Some recent feminist writing has considered the implications of Foucault's work on feminist methodologies. Cain (1993), for example, has argued that there is compatibility between the genealogical method and a realist feminist (standpoint) approach. This compatibility does not hold, however, when the standpoint is derived from a biologically given woman, since the idea of a biologically determined anything is not recognized in Foucauldian analyses. But feminist analyses directed from a relational standpoint, that is, from a "more or less sharable discourse" which traces feminism to a theory rather than the biological gender of the theorist, is consonant with Foucault's genealogies (pp. 91-94).

Feminism and genealogy is a particularly rich combination when the idea of biological gender becomes the focus of questioning, rather than the orienting standpoint of analyses. Here it is the position of the body which is key to the possibilities of a convergence between feminism and genealogy. Bailey (1993) provides a good summary of the theoretical road travelled by feminism to its intersection with Foucault, at the point in feminist analyses where feminists question the stable identity of "woman" (p. 100). Foucault's genealogy holds strategic possibilities for feminism at this threshold of feminist analysis because "it changes the terms of debate about politics based on identity, sex and bodies" (Bailey, 1993, p. 101). In genealogy, the category of "woman" describes a particular "type" of historically sexualised body; in feminist analyses, the idea that

women are historically constituted as sexualized bodies has wide currency.

The objectification of sexually-embodied women in terms of a male subjectivity has been highlighted in one particular feminist analysis of murder. Cameron and Frazer (1987) critiqued two kinds of discourses on the sexual murderer on the basis of the issue of "how sexual murder is structured by gender" (p. 163). They argue that while the cultural discourse celebrates the sexual murderer as a hero and the scientific discourse constructs him as a deviant, neither of these descriptions acknowledge or explain him as a man who murders the object(s) of his desire. The authors offer an alternative explanation of sexual murder based on the notion of masculine transcendence, whereby murder is used as an act of self-affirmation (p. 166).

This differs not only from cultural and scientific discourses, but also from many feminist explanations of sexual murder which focus on the gender of the victim as opposed to that of the killer. Acknowledging that sexual murder can also involve a victim who is a man, Cameron and Frazer argue that the key theme in these crimes is the "shared construction of masculine sexuality, or even more broadly, masculinity in general" in the sexual killer (p. 167). Male subjectivity is central to Western culture whereas women's subjectivity is tenuous, and as such, transcendence is seen as "the

project of the masculine and the sign of masculinity" (p. 169). Thus the roots of sexual murder are found in the "structures of male power and masculinity" (p. 177).

Radford (1992) argues that the specific phenomenon of the killing of women (femicide) should be located within the broader continuum of sexual violence, where misogynist motivations of the killer may be addressed more clearly. The case of Marc Lepine, who killed 14 female engineering students in Montreal in 1989 because they were "fucking feminists," is used to highlight this issue. She points out that many popular and professional responses to this mass killing of women attributed the atrocity to the singular pathology of the killer as opposed to the broader problem of misogyny in the culture itself (p. 6). In denying the humanity, and more specifically, the masculinity of the killer, the cultural context in which the killer is located eludes problematization.

Foucault's Genealogical Method

> . . . if interpretation is the violent or surreptitious appropriation of a system of rules, which in itself has no essential meaning, in order to impose a direction, to bend it to a new will, to force its participation in a different game, and to subject it to secondary rules, then the development of humanity is a series of interpretations. The role of genealogy is to record its history: the history of morals, ideals, and metaphysical concepts, the history of the concept of liberty or of the ascetic life; as they stand for the emergence of different interpretations, they must be made to appear as events on the stage of historical process.
>
> (Foucault, 1977, pp. 151-152)

Michel Foucault's work began during the intellectual experience of structuralism -- a science or critical method which finds the significance of human things in their structure -- which in the 1960s was seen as "the last attempt at representing the things of the world to consciousness" (Bouchard, in Foucault, 1977, p. 17). Disillusioned by the essentialism of this analytical method, Foucault would claim that history was discontinuous rather than continuous, thereby questioning the notion of a totalizing human progress. Scientific methodologies, of course, fell prey to this same criticism.

In this respect, the influence of Nietzsche is evident in Foucault's work. Nietzsche, too, criticized the dominant analytical method of his time: "Against positivism, which halts at phenomena -- 'There are only facts' -- I would say: No, facts are precisely what there are not, only interpretations" (in Flew, 1979, p. 247). Foucault's genealogies of psychiatry in **Madness and Civilization** (1973a), medicine in **The Birth of the Clinic** (1975), and criminology in **Discipline and Punish** (1979) are histories of interpretations which can lead one to conclude that perhaps we don't "believe it when we see it," but rather see it when we believe it; in overriding the conventional imperatives of empirical, objectively derived evidence, then, the relationship of his work to science is one of critique (Smart, 1985, p. 60).

The impetus for Foucault's use of a genealogical method was derived from Nietzsche, particularly the latter's **On the Genealogy of Morals** (1989) where the ideas of good and evil are explained by way of their utility for the different social groups who advocated them (Shumway, 1989, p. 11). However, as Dean (1994, p. 14) and others have discovered, Foucault himself never articulated a precise methodological statement of genealogy -- Foucault's description of the method in a lecture (1980a, p. 83) as "the union of erudite knowledge and local memories which allows us to establish a historical knowledge of struggles and to make use of this knowledge tactically today," is an example of his wide-angled approach to genealogy.

But in Foucault's early writings, it was not the method of genealogy but that of archaeology which was employed in his analyses. He describes the purpose of this approach in **The Archaeology of Knowledge** (1972, p. 131):

> [Archaeology] does not imply the search for a beginning; it does not relate analysis to geological excavation. It designates the general theme of a description that questions the already-said at the level of its existence: of the enunciative function that operates within it, of the discursive formation, and the general archive system to which it belongs. Archaeology describes discourses as practices specified in the element of the archive.

Stated more technically, the archaeological strategy **(3)** is premised on the claim that "truth is to be understood as a system of ordered procedures for the production, regulation, distribution, circulation, and operation of statements" (Davidson, 1987, p.

221). In practice, then, archaeology suspends the notion of history as progress towards some absolute truth(s) (Dean, 1994, p. 35). Archaeology brackets the scientific belief in direct access to objects and thus truth itself; the addition of genealogy to this enterprise enables a questioning of the historical and political rol· ·, played by knowledge (Dreyfus & Rabinow, 1982, p. 117).

As employed by Foucault, genealogy is a form of descriptive criticism which does not conform to the conventional standards of objectivity. He does not attempt to analyse the nature of rationality, preferring instead to study the histories of different forms of rationalities (Jacques, 1991, p. 326). The function of genealogy is "to entertain the claims to attention of local, discontinuous, disqualified, illegitimate knowledges against the claims of a unitary body of theory which would filter, hierarchise and order them in the name of some true knowledge and some arbitrary idea of what constitutes a science and its objects" (Foucault, 1980a, p. 83). Thus genealogies are, as Foucault describes them, "precisely anti-sciences" (p. 83), whereby knowledge is treated by the genealogist as perspective or interpretation rather than an absolute truth (Shumway, 1992, p. 112).

Foucault's genealogy has been called "a polemical use of the past," an analysis which debunks the historically progressive liberal notion of itself and the values and institutions

through which it is known (Goldstein, 1994, p. 114). In this way, it defies the standards of conventional methods of "doing" history by creating historical analyses which ignore questions of empirical rationality and use, instead, the political and epistemological problems posed in the documentary evidence. In genealogy, the focus is on problems of power and knowledge (Lemert & Gillan, 1982, p. 57). **(4)** But as Dean (1994, p. 133) argues, genealogy is not exactly critique in the sense that it does not recognize the notion of universality with respect to norms or values which makes rational critiques possible. Genealogy, rather, is "a critical and effective form of history concerned with the analysis of the differential regimes of truth and their consequences" (p. 133).

Shumway uses the metaphor of a bush, borrowed from Gould's (1987) explanation of the evolution of the horse, to explain how genealogy also differs from conventional histories on the basis of their contrasting approaches to the past as either discontinuous or progressive. Gould (in Shumway, 1992, p. 110) argues:

> Evolutionary genealogies are copiously branching bushes -- and the history of horses is more lush and labyrinthe then most. To be sure, *Hyracotherium* is the base of the trunk (as now known), and *Equus* [the modern horse] is the surviving twig. We can, therefore, draw a pathway of connection from a common beginning to a lone result. But the lineage of modern horses is a twisted and tortuous excursion from one branch to another . . . Most importantly, the path proceeds not by continuous transformation but by lateral stepping . . . Each lateral step to a new species follows one path among several alternatives. Each extended lineage is a set of decisions at branching points -- only one among hundreds of potential routes through the labyrinthe of the bush. There is no central direction, no preferred exit to this maze --

> just a series of indirect pathways to every twig that ever graced the periphery of the bush.

Using this metaphor, then, the history of the evolution of the horse, like the history of humankind, is not linearally progressive (as a ladder) but dispersed in a bush-like configuration. History, via genealogy, is thus not about tracing the progressive march towards truth, but about exploring the choices and chances apparent at the times when power/knowledge changes its appearances. This genealogical interpretation of history as discontinuous has also been described as *partage* **(5)**.

In Foucault's view, history is distinguished into two types: total history and general history. While total history "develops a network of causality" (Silverman, 1978, p. 167), general history discovers discontinuities and breaks. General history employs the idea of "eventalization," an approach which considers the singularity of a phenomenon, "its radical contingency, the possibility that it could have been otherwise" (Baker, 1994, p. 191). A general history of the Canadian response to murder, then, would approach documental research with an eye for the changes and/or differences in the responses to murder: to analyse contextually how the individual murderer is constituted and reconstituted, and how this figure appears in the particular rationalities connecting the specific event of the crime to the specific punishment of that crime.

Genealogy has also been referred to as the history of the present, or more specifically, it is to consider "the history of a problem in terms of how it is seen at present" (Castel, 1994, p. 238). Procacci (1994, pp. 216-217) argues that because Foucault's history of the present considers effects and practices in specific localizations, it allows problematization. This is explained through the use of Foucault's comparison of two modes of operation in historical research: "One [that of historians] consists of taking an object and trying to resolve the problems it poses. The other consists of treating a problem and, starting there, determining the domain of objects that must be traversed in order to resolve it" (p. 217).

The effects and practices to which Procacci refers are those of power/knowledge. Genealogy, then, is an analytic tool which exposes the relation of history, power and knowledge (Shumway, 1992, p. 108). While Foucault's genealogy is described as "effective history" (as, for example, in Dean, 1994, p. 133), this is not to imply that other historical methods are ineffective, but to make explicit the focus of his genealogies as studies of the effects of power/knowledge through and around a particular problem. Effective history, in Foucault's words, "deals with events in terms of their most unique characteristics, their most acute manifestations" (1977, p. 154).

The specific problem of murder in Canada, analysed historically, accesses its window to history through what remains of the documents of the past. The analysis must avoid, as much as possible, beginning with the assumption that the ideas of murder and the murderer over time are uniform, or have any continuous axiomatic basis. The history of the present begins with a problem in the here and now, which in this specific case is the response to murder. In Canada in the past five years, public discourse across the country reflects a concern about murder. More recently, this has been ignited by several different cases: in the Maritimes, the Westray Mine officials are on trial for the tragic deaths of 28 miners in a gas explosion **(6)**; in central Canada, the closed trial of Karla Homolka spawned months of speculation in public discourse over the plea-bargaining process, especially after her role in the sex-killings of two teenage girls was made public in the subsequent murder trial of her ex-husband Paul Bernardo for the slayings **(7)**; in the Northwest Territories, after a lengthy investigation a striking miner is found guilty in the September, 1992 underground bombing of a gold mine which killed 9 non-union workers during a volatile strike **(8)**; on the west coast, public debate about criminal justice practices has been pronounced in response to a number of recent sex killings of women and children **(9)**.

The problem of murder, then, abounds in present discourse. A genealogy is a "history

of discourse, based on the assumption that discourse is best treated as discursive social practice. It tries to show that this social practice is a function of previous discursive practices, as well as other current practices" (Paden, 1986, p. 34). Further, the discourse itself has no transcendental meaning, nor is it possible to weigh its merits against some absolute truths about murder. It is thus more precise to view the discourse on murder as discursive practices of *response* to a social problem we call murder **(10)**.

It was already argued in Chapter Two that power/knowledge is not substantial but relational; this requires the suspension of particular approaches to knowledge and power -- specifically the belief in difference between objective and subjective knowledge, and the juridical model of power and its repressive functions (Bernauer, 1992, p. 146). The question remains as to how one is to now analyze the power relationship.

Foucault argues that the concrete analysis of power relations requires the establishment of five points (1982, pp. 223-224):

> 1) *The system of differentiations* which permits one to act upon the actions of others: differentiations determined by the law or by traditions of status and privilege; economic differences in the appropriation of riches and goods, shifts in the processes of production, linguistic or cultural differences, differences in know-how and competence, and so forth . . .
>
> 2) *The types of objectives* pursued by those who act upon the actions of others: the maintenance of privileges, the accumulation of profits, the bringing into operation of

statutory authority, the exercise of a function or of a trade.

3) *The means of bringing power relations into being*: according to whether power is exercised by the threat of arms, by the effects of the word, by means of economic disparities, by more or less complex means of control, by systems of surveillance, with or without archives, according to rules which are or are not explicit, fixed or modifiable, with or without the technological means to put all these things into action.

4) *Forms of institutionalization*: these may mix traditional predispositions, legal structures, phenomena relating to custom or to fashion (such as one sees in the institution of the family); they can also take the form of an apparatus closed in upon itself, with its specific *loci*, its own regulations, its hierarchical structures which are carefully defined, a relative autonomy in its functioning (such as scholastic or military institutions); they can also form very complex systems endowed with multiple apparatuses, as in the case of the state, whose function is the taking of everything under its wing, the bringing into being of general surveillance, the principle of regulation and, to a certain extent also, the distribution of all power relations in a given social ensemble.

5) *The degrees of rationalization*: the bringing into play of power relations as action in a field of possibilities may be more or less elaborate in relation to the effectiveness of the instruments and the certainty of the results (greater or lesser technological refinements employed in the exercise of power) or again in proportion to the possible cost (be it the economic cost of the means brought into operation, or the cost in terms of reaction constituted by the resistance which is encountered) . . .

These points, then, will guide the reading and interpretation of the documents selected for the study of the response to murder in Canada. However, this study does not conform wholly to Foucault's genealogical method. It is, rather, part history and part genealogy, or more specifically, a history inspired by genealogical precepts.

Description of Research Material

At the outset, it should be noted that the documents studied were not selected in any

coordinated fashion, save for the researcher's own intuitions and suggestions made by archivists about how to track down discourse on murder in a few mountains of often obsurely categorized documents. This search for primary materials was limited to those retrieved from the National Archives of Canada in Ottawa, over the duration of approximately eight one-week visits executed over 6 years. Most of this time was spent in securing relevant discourse, which was later photocopied by the Archives staff and sent to the researcher for subsequent study.

The problem in the present is a question of how to respond to murder, by looking at how we have done so in the past and at what rationalities and rationalizations have been used in these responses. The research task was to examine the discourse on murder in the documents in order to determine the ways by which the murderer, as the centered subject, has been constructed and how responses to murder have changed in view of this. Beginning from the present and backwards to the confederation of Canada in 1867, this is a reasonably straightforward task. Since murder is an issue of criminal justice, there are obvious springboards to discourse on murder in government ministry, departmental and minister's files such as those of Justice or the Solicitor-General. Private collections of material from particular citizens active in criminal justice issues were also easily accessible.

The breadth of material covering the past 128 years was extraordinarily wide, and needed to be narrowed for purposes of practicality; thus the study is based on a sampling of discourse and is in no measure exhaustive. The case files on persons sentenced to death in Canada alone are held in a collection totalling 1533 -- this task of reading them was expedited by a random selection of one case per year between 1867 and 1962 (the years for which the files were accessible) totalling 96 cases, supplemented by one 1985 murder appeal transcript **(11)**. These files included court transcripts, correspondence between government and justice officials, newsclippings, prison reports, petitions, police reports, prisoners' letters, and coroner's inquests. Capital punishment was abolished de facto in 1962, although legislation abolishing the death penalty was not enacted until 1976. All sentences of death issued between 1962 and 1976 were commuted to life imprisonment, and Cabinet Ministers' files during this time reflect a number of views on the capital punishment debate which ensued with vigour during this time. These opinions, as well as the correspondence of the Ministers themselves, were also considered in this study.

The search for discourse on murder prior to 1867 was more challenging but also productive. The National Archives preserves documents under their original classifications and criminal matters were handled by various pre-Confederation

authorities in different ways, which often made for tortuous searches. Archival holdings which ultimately yielded discourse on murder which was used in this research included the record groups of the Office of the Governor-General, 1774-1984 (RG 7); Records of Parliament, 1828-1984 (RG 14); Records of the R.C.M.P., 1863-1982 (RG 18); and various files from the Manuscript Division, including those of the War Office, the contributions of provincial archives, and the personal papers of a circuit court judge in the early 1800s. Much of this material also came in the form of individual cases of murder.

Other materials which were not explicitly addressed to murder, but pertained to it and its punishment were also included in this study. A specific example is the records of two royal commissions which researched questions relating to the criminally insane and sex offenders, in the Records of Royal Commissions, 1873-1987 (RG 33). Intraministerial memos regarding the various debates on capital punishment were also particularly useful as were Hansard records of the more public debates in the House of Commons.

The oldest document selected from the National Archives was the case of Josephe and Mary Corriveaux in 1763 **(12)**. The historical span of discourse sampled in this research, then, extends from 1763 to the present, with non-archival sources on murder providing

the substantive discourse for study of the last twenty years of response to murder in Canada. These recent sources consist mainly of academic and popular texts on murder, as well as newspaper and magazine articles chosen at random.

Responses to Murder and the Construction of the Murderer

Since discourse on murder deals mainly with the "problem" of the murderer, the next section of the thesis examines how murder and the murderer have been constructed in Canada. To this end, discourse will be viewed through three identifiable and usually overlapping perspectives: law, medicine (particularly psychiatry) and the popular media. This study, again, is by no means meant to be exhaustive; indeed, a book could be written about each of these perspectives in the constitution of murder and the murderer and still not come close to covering the breadth of material. Rather, the research in this section is more tentative and exploratory, juxtaposing some theoretical literature on the perspectives with examples from the documentation. The purpose is to analyze our responses to murder in the context of historical thought on murder and the murderer expressed in the discourses of Canadian criminal justice.

. In part, this approach relates to the problem of examining criminal justice deficiencies on a purely rational basis. The example of criminal justice alternatives to

incarceration is a case in point. Originally posed as a rational solution to the zealous practice of incarcerating individuals for minor, non-violent crimes -- a practice which was unduly harsh for the offender and financially inexpedient for the taxpayer -- alternatives to incarceration in practice were not employed in the cases for which they were originally argued, and served instead to widen the criminal justice net by submitting offenders who were until then discharged or given suspended sentences to the noncustodial control of the "alternatives." In such a way, appeals to rational reconsideration of existing practices of criminal justice have a tendency to be translated into more expansive and elaborate systems of control, rather than a reduction of state interference in the lives of its citizens.

The contributions of positivist, social constructionist, Marxist and feminist analyses to the study of murder present useful insights towards a response to murder which might effectively reduce its incidence. Given the tragedy implied by this crime and our understandable abhorrence to it, it is indeed curious that we have not availed ourselves of this knowledge in order to build a more peaceful society. Rather, we seem caught by the will to punish, such that discussion of the response to murder is constrained by questions of who to punish and how, while arguments falling outside of these parameters of punishment are politically and morally denigrated as the foolish talk of "bleeding-heart liberals." Given that such arguments on the prevention of murder are both rational and

practical, how is it possible that they have been diminished in their importance or cast aside?

In order to explore this question, this study examines the shifting rationalities and technologies of our responses to murder by focusing on power/knowledge relations. In this way, control is not seen as the inevitable byproduct of criminal behaviour but as a social phenomenon in and of itself. The study of the response to murder *per se* in modern Canada appears to mark the parameters of that control, in a play of discursive morality and rationality which is executed at the limit of biological death.

The subject of murder, then, is an advantageous point of analytical entry to the larger question of power because it speaks to the problem of death and individual mortality. The historical attention to murder attests to its cultural significance; as a Canadian columnist suggests, "Shakespeare taught us long ago that murder was more fascinating than anything" (Fotheringham, 1995). As Foucault explains (1982a, pp. 205-206):

> When all is said and done, battles simply stamp the mark of history on nameless slaughters, while narrative makes the stuff of history from mere street brawls. The frontier between the two is perpetually crossed. It is crossed in the case of an event of prime interest - murder. Murder is where history and crime intersect. Murder it is that makes for the warrior's immortality (they kill, they order killings, they themselves accept the risk of death); murder it is that ensures criminals their dark renown (by shedding blood, they have accepted the risk of the scaffold). Murder establishes the ambiguity of the lawful and the unlawful.

> This doubtless accounts for the fact that to the popular memory -- as it was woven from the circulation of these [broad]sheets with their news or their commemorations -- murder is the supreme event. It posits the relation between power and the people, stripped down to essentials: the command to kill, the prohibition against killing; to be killed, to be executed; voluntary sacrifice, punishment inflicted; memory, oblivion. Murder prowls the confines of the law, on one side or the other, above or below it; it frequents power, sometimes against and sometimes with it. The narrative of murder settles into this dangerous area; it provides the communication between interdict and subjection, anonymity and heroism; through it infamy attains immortality.
>
> . . . by their very existence these narratives magnify the two faces of murder; their universal success obviously shows the desire to know and narrate how men have been able to rise against power, transverse the law, and expose themselves to death through death.

ENDNOTES

1. The criminal justice system in Canada costs around three billion dollars annually (Culhane,1991, p. 127), and one in five Canadian children are poor.

2. The Bills of Mortality were summaries of systematic reports of house watchers who were dispatched by the government to report the incidence of plague by recording the causes of all deaths. This information was gathered in order to contain the spread of the plague (Salas and Surette, 1984, p. 458).

3. Paden (1986, p. 31) argues that archaeology is not a method but a strategy: "Foucault's 'archaeology' stands in the same relation to 'anthropology' that Archaeology has historically stood to Anthropology, that is, a method of investigation which uses the truths produced by the self-understanding of man to radically revise that self-knowledge."

4. The problems of epistemology and power/knowledge were addressed in Chapters One and Two.

5. Cook (1987) discusses the notion of partage in Foucault's work. She argues that partage entails the idea of chance or accident (p. 48), and that history is constituted by "an abrupt event or experience" (p. 47).

6. An underground gas explosion in the Westray mine in Plymouth, Nova Scotia killed 26 miners in May, 1992. Charges of manslaughter and criminal negligence causing death have been laid against Gerald Phillips and Roger Parry, two managers of the former coal mine, and the trial is scheduled to begin soon.

7. A well publicized and contested media ban on Homolka's trial in 1993 led to much public speculation about the circumstances of the killings, and the criminal justice procedures employed in the trying of the cases. Homolka pled guilty to manslaughter and is serving a 12 year sentence for her part in the killings in exchange for her testimony against her former husband at his trial in 1995. Bernardo was later convicted of first-degree murder.

8. In January, 1995, after the longest criminal trial in the Northwest Territories (15 weeks), Roger Warren was convicted of 9 counts of second degree murder and given a life sentence with no parole eligibility for 20 years.

9. The abduction/murders of 8 year old Mindy Tran, 16 year old Pamela Cameron and 23 year old Melanie Carpenter by three separate perpetrators from mid 1994 to early 1995 in British Columbia sparked a series of public actions and demonstrations around the issue of an incompetent Canadian criminal justice system. Of the three suspected perpetrators, one is in custody but not yet charged, another is in custody and charged with first degree murder, and the third is dead as a result of suicide.

10. This idea is similar to the argument that so-called crime statistics are, more precisely, accounts of police arresting practices rather than measures of crime *per se*. See, for example, MacLean (1986, pp. 12-15).

11. An important reference tool in the use of the capital case files was "Persons Sentenced to Death in Canada, 1867-1976: An Inventory of Case Files in the Records of the Department of Justice (RG 13)", prepared by Lorraine Gadoury and Antonio Lechasseur, National Archives of Canada, 1992. The 1985 appeal case is that of Yvan Vaillancourt vs. Regina at the Supreme Court of Canada. Cases of people convicted of murder after 1962 are closed, due to privacy legislation.

12. National Archives of Canada, MG 13, War Office 71, Volume 137. Reel C-12585.

PART II:

TALK

Chapter 4
LEGAL DISCOURSES ON MURDER

> [The jury]were compelled to find a Verdict of Guilty, yet they were constrained to recommend the prisoner to the mercy of the Government of Canada; the most highly honored of all the Colonies of our most enlightened and Christian Mother-Country Britain, the boastful though pardonable pride of whose people it is to know that their Earliest and most rigid laws have been made, and are, for the protection of their lives and their liberty.
>
> (Nova Scotia Member of Commons, 1879) **(1)**

> How could one know the law and truly experience it, how could one force it to come into view, to exercise its powers clearly, to speak, without provoking it, without pursuing it into its recesses without resolutely going ever farther into the outside into which it is always receding? How can one see its invisibility unless it has been turned into its opposite, punishment, which, after all, is only the law over-stepped, irritated, beside itself? But if punishment could be provoked merely by the arbitrary actions of those who violate the law, then the law would be in their control: they would be able to touch it and make it appear at will; they would be masters of its shadow and light. . The law is the shadow toward which every gesture necessarily advances; it is itself the shadow of the advancing gesture.
>
> (Michel Foucault, 1987, pp. 34-35)

Talk on murder is produced primarily through legal discourses, which define the act and the punishment of the actor. In this chapter the voices of judges, lawyers, accused persons, witnesses and members of the wider public in Canada figure prominently. The power/knowledge of murder, codified into the edifices of law, shapes not only how these people think of murder but how they may respond to it. The individual murderer is central and axiomatic to the legal response to murder -- it is the individual who transgresses the law prohibiting certain kinds of killing, the individual who is tried for the

transgression, and the individual who is punished for it. The legal discourse on murder, then, is bound to the orienting spotlight on the murderer.

The legal discourse on murder and crime generally also works its way through belaboured analyses of the technicalities of the law itself, in determining how the particular knowledge gained from the trial process may legitimately fit into the classifications and reasonings of law. The problem of punishment, to be discussed in more detail later in the dissertation, is reflected in the discourses of juries. Judges touch on the broader philosophical issues of law, and its perceived importance as a tool of modern civilization. Canadian social history is reflected in the trials and tribulations of the variety of people who find themselves caught in the legal response to murder.

The idea of murder is as old as recorded history. The meaning of murder and the collective response to it, however, vary considerably throughout history. In biblical metaphors, the first man in the world (Adam) is the father of both a murderer (Cain) and a murder victim (Abel). The eventual rise to power of Christianity in England gave the church the ability to impose ecclesiastical laws and punishments based on biblical theology, but Church authority was challenged by the seventeenth century as significant political and economic shifts in western societies afforded the growing dominance of the

rule of secular law.

The role of religion was still very influential in the administration of law in the 1640s, as Baskerville shows in his discussion of blood guilt:

> The shedding of blood by public officials . . . became not simply a matter of avenging or deterring private bloodletting but a means of expiating blood guilt in the eyes of God. 'All that guilty blood that God requires you in justice to shed, and you spare, God will require the blood at your hands', Edmund Calamy told the [British] House of Commons. Acts of public justice then on the part of godly magistrates and judicial authorities became an almost sacramental means to atone for the injustice in the land and appease the wrath of the Almighty. 'God is angry, and he seems to ask . . .Will you execute judgment or will you not?' according to [Thomas] Case. 'I will have the enemies' blood, and yours too if you will not execute vengeance upon delinquents' (1993, pp. 183-184).

The idea that the courts of common law were the conduits of God's will was to continue for most of the eighteenth century. One writer of the time believed that God had invested "the magistrate with the power of life and death, the power of the sword, in a legal way, to punish by death" (McGowen, 1987-88, p. 202). The right of the magistrate to exercise this power appears to have been unquestioned -- "the symbol of the magistrate was the sword, after all, a reminder that human government relied upon force" (Ibid.). The spectre of God also found legal expression in the form of providence, a concept invoked by the judges in their charges to the juries to show how God "sent" witnesses along the way to help the justice system perform its "sacred" duty **(2)**.

In the annals of Western history, however, the response to murder was not always an automatic punishment as the Old Testament of the Bible implies, but has also been previously conceived as a material form of compensation. This is demonstrated by the idea of the *wergeld*, expressed in the earliest English law code of Aethelbert, King of the Kentings about 600 A.D. The code stated that when an alleged murderer has escaped beyond the reach of his kindred and could not be brought to trial, his people were to pay the *wergeld* of the murder victim to the victim's surviving family. The *wergeld* was expressed in monetary terms which were set on the basis of the social status of the victim, thus offering a window to the composition of this particular, stratified society **(3)**. This was a legal mechanism designed to avert any possible feud (Ogilvie, 1982, p. 5).

The Norman conquest of Anglo-Saxon England by 1066 was followed by attempts of William the Conqueror, the newly instated king, to integrate the Norman people with the English. Turbulent social relations between the two peoples made the lives of the Norman settlers particularly vulnerable to hostility at this time, and William attempted to pre-empt the prospect of violence against the newly-relocated Normans by instituting the murder-fine, or *murdrum.* Similar to the *wergeld*, the *murdrum* was a collective responsibility -- not necessarily of the killer's kindred but of the hundred, the small unit of local government within the county where the Norman was killed (Hanbury, 1967, pp.

17-18). Differing from the *wergeld*, a *murdrum* fine was payable only when the victim was a Norman. All victims of murder were presumed to be Norman unless there was a "presentment of Englishry." If the victim was a Saxon, no fine was payable.

In these early years of common law murder was, in principle, killing done in secret, with all other killings classified as simple homicides (Law Reform Commission of Canada (LRCC), 1984, p. 5). The secrecy of the killing in the Middle Ages made the killer more culpable because it made compensating the victim's kin difficult if not impossible, and tarnished the reputation of the victim him/herself. As Aries explains (1981, p. 11):

> The vile and ugly death of the Middle Ages is not only the sudden and absurd death . . . it is also the secret death that is without witness or ceremony: the death of the traveler on the road, or the man who drowns in a river, or the stranger whose body is found at the edge of a field, or even the neighbour who is struck down for no reason. It makes no difference that he was innocent; his sudden death marks him with malediction. This is a very ancient belief.

Secret or sudden death, also known as *mors repentina*, was seen as shameful because it destroyed a world order in which death gave advance warning. When death became an instrument of chance, it was interpreted as the disguised wrath of God (Aries, 1981, p. 10). A consequence of this belief is found in the thirteenth-century practice of collecting a fine from the survivors of all victims murdered by sword, poison or other similar means before allowing a Christian burial. This custom continued to the beginning of the

seventeenth century (Aries, 1981, p. 12). But while the principle of murder as a killing done in secret survived -- at least in the Christian conception -- until the early seventeenth century, the practical distinction of murder as the specific killing of a Norman disappeared with the abolition of Englishry in 1340. The term "murder" is believed to have survived this change "to describe the worst kind of homicide rather than to draw any conceptual distinctions" (LRCC, 1984, p. 5).

Differentiations of Murder in Law

The definition of "the worst kind of homicide" has changed over the years, depending on the relative status of certain kinds of victims and their relationships to their respective killers. Christian morality has played a role in characterizing the worst murderers, based in part on a perceptual difference between offenders and criminals. Herrup (1985, p. 110) describes this difference in seventeenth century England, as that between weakness and evil, in the context of a common law emphasis on intention. Most law-breakers were offenders, "errant brethren" who had lapsed into sin, while criminals were law-breakers who had "abandoned even the quest for self-discipline." This religious subtext was eventually eroded, in part, because of changing economic circumstances in the 1800s during which time the two categories were conflated (p. 120).

In the last 100 years in Canada, the notion of a "worse" kind of murder in the discourse of the legal professionals appears to be related to the brutality of the killing, to the perceived intent of the culprit and the element of criminal premeditation. Homicide law, from 1892 until 1948, discriminated between culpable and non-culpable homicides, by specifying the duties whose omission qualified as culpable homicide (Law Reform Commission of Canada, 1984, pp. 8-9). But within the category of culpable homicides, certain murders were seen as particularly reprehensible. In the 1899 case of Cordelia Viau and her co-accused/lover, tried and convicted for the stabbing murder of her husband in St-Canut, Quebec, the killing is described as "almost without a parallel in the annals of crime, as to premeditation, wickedness and atrocity" **(4)**. The killing of a business associate for financial gain by Abraham Steinberg in Toronto, 1931, is called "one of the most heinous murders that has ever been committed in the City of Toronto, and possibly Canada, the deceased man being shot and his body immediately set fire to" **(5)**. Thus "worse" may be interpreted as through the eye of the beholder, the person who experiences the crime scene personally or witnesses the testimony of trial participants. The aesthetics of brutality may bear more strongly on those who witness, firsthand or by recollection, the events of the murder to the last gory detail and the writers of these "editorials" were positioned to be influenced by such experiences.

It also appears that qualitative interpretations of murder relate, perhaps more significantly, to the politics of specific social relations and the knowledges they involve in the consideration of "intent." Viau's act until 1828 in Canada was considered petit treason, a "worse" kind of killing because of its affront to hierarchies of social power. It was worse for a woman to murder her husband, or a slave to murder his/her master than vice versa; Viau's case 71 years later shows that women were still clearly subordinated to men even if they could no longer be charged with petit treason for killing the men they were married to. Abe Steinberg headed a family described as lacking "a very savoury reputation in the district where they live." Moreover, "[T]wo of Steinberg's sons have been convicted, and Steinberg himself has the reputation of being a worthless citizen and of a very brutal nature" **(6)**, making him a part of the "criminal class" -- a status group seen to undermine the rules of economic, social and contractual relations in Canadian capitalist society.

Notwithstanding the interpretations of certain killings as particularly reprehensible, murderers were punished in the same manner as those convicted of other felonious homicides, usually by execution. By the disappearance of the Englishry distinction, homicide was divided into three categories: justifiable killing, which was no crime at all (such as state executions); killing by misadventure, which was seen as blameworthy to

some extent and required the king's pardon (for example, self-defence); and killing by felony, which was punishable by death, subject to the rules on benefit of clergy (LRCC, 1984, pp. 5-6). These categorizations of homicide appeared in the English Common Law, attributed to Henry II in the twelfth century. He set the procedural foundations of the common law (Ogilvie, 1982, p. 68), whereby the law came from the royal courts and was transmitted throughout the country by the King's itinerant justices, buttressed by sworn juries and the frequent use of royal writs from the King to his officials (Heer, 1963, p. 348).

Later technical change in the law of murder developed by the end of the fourteen century, with the emergence of the concept of manslaughter, a type of homicide. Murder and manslaughter were distinguished from each other on the basis of whether there was "the presence of malice aforethought" (LRCC, 1984, p. 6) in the killing; the presence of malice aforethought classified it as murder, the lack of it meant the killing was a manslaughter. In 1828, the question of malice aforethought is addressed in a post-trial review of the case of Charles French in the town of York (later Toronto) by the presiding justice. In this situation, affadavits swearing to the aggressive approach of the victim towards French were not available at the trial. A later review of the case caused the justice to note that "I rather incline to think under such circumstances that the Jury might

have found French guilty of manslaughter only" **(7)**. Thus the idea of a victim precipitated killing or of provocation, in legal terms, diminishes the possibility of malice aforethought.

The presence of heated passion is also seen as an indication of the absence of malice aforethought. In an 1890 address to the jury in a murder trial it is noted, "The law makes allowance for the frailty of human disposition and temper, and it is clearly established that it is not murder, where, as I have said, sufficient provocation exists, and a sudden blow is struck in the heat of passion which causes death" **(8)**. The idea of sufficient provocation, of course, is a matter which is open to individual interpretation; thus, the problem was generalized to a standard of the "ordinary man." In one case of a man whose reason for killing all of his five children in 1919 was because the eldest child was being noisy, the presiding justice attempted to assess the accused's actions by this standard:

> Is the noise of a boy, while he is running around, making a noise as boys will, sufficient to cause the ordinary man to lose his power of self-control? If it is, I think you will agree with me that there would be very few boys left in the land. It is the nature of a boy about eight years old before he goes to bed to run around and play, and so far as my experience goes he usually makes a noise. **(9)**

The common law definition of manslaughter applied to all culpable homicides other

than murder by the end of the fourteenth century. In 1765, the English jurist Blackstone further categorized manslaughter as either voluntary or involuntary:

> Voluntary manslaughter was culpable homicide falling short of murder on account of provocation. Involuntary manslaughter was culpable homicide falling short of murder on account of the absence of malice aforethought.
>
> Voluntary manslaughter required the existence of provocation. For this existence there were two conditions: (1) the accused had to be actually provoked; and (2) the provocation, whether consisting of words and deeds or deeds alone, had to be such as would have provoked a reasonable man. It was for the judge to instruct the jury whether in law the alleged provocation could provoke a reasonable man (LRCC, 1984, p. 7).

In practice, then, the question became one of what constituted a provocation to a "reasonable man," rather than the "ordinary man." The judge determined the answer in the context of the specific case at hand. This was contingent on the judge's ways of knowing, based on his personal experiences and appreciation for the rule of law itself. The range of possible interpretations of provocation, from different vantage points such as culture and gender, was thus reduced to the vision of a single person imbued with the legal power to define the concept from the vantage point of the reasonable man.

The legal definition of manslaughter in English common law has changed further since Blackstone offered the voluntary/involuntary distinction. A homicide was classified as manslaughter if, without malice, it was a killing resulting from gross negligence or a killing by means of an unlawful act (LRCC, 1984, p. 7). This remained the common law

position in Canada until the enactment of the Canadian Criminal Code in 1892. The 1892 Code was founded on the English Draft Code prepared by the Royal Commission in Great Britain in 1880 (Mewitt, 1967, p. 727).

Prior to the enactment of the first criminal code in Canada, the legal definition of murder as unlawful killing with malice aforethought was found to be problematic. As one justice explained, "there were objections to these definitions because they were inaccurate and malice aforethought was considered to be a common name for certain states of mind . . . Now the commissioners who drafted the Code felt that the law upon the subject of murder ought to be free from the element that had been introduced by the expression malice aforethought" **(10)**. While the term "malice aforethought" was questioned in Canada by the end of the nineteenth century, it apparently posed no major difficulty to the courts of English common law from the end of the fourteenth century until the mid-nineteenth century. Then a more specific definition of malice aforethought was advanced by Stephen on the basis of four "states of mind": the intent to kill or do grievous bodily injury; knowledge that the act done would probably kill or do grievous bodily harm; an intent to commit any felony; or an intent to resist an officer in the execution of his duty (LRCC, 1984, p. 6). In the first Canadian criminal code, the term "malice aforethought" was discarded due to its insufficiency in describing the "properties"

of murder as it was now being understood.

One possible reason for this change of view was the growing influence of the medical profession in the processes of law, which is the focus of Chapter Five of this dissertation. Medicine and law intersected in coroners' reports on causes of death which were typically solicited in murder trials, and intersected again in the idea of malice aforethought. The legal idea is referred to the ideal of the "reasonable man," and the "disease of the mind" experts had gained leverage with juries in casting some doubts as to a murderer's capacity for reasoning. Psychiatry intersected with the law in the entity of monomania, the murder without reason. Psychiatrists were "discovering" different kinds of insanity which had the gradual effect of transforming the focus on a material black/white culpability of the accused to the greyer area of the mind, specifically the grey matter of the accused's mind.

The decision to narrow the idea of malice aforethought to a more encompassing standard of legal responsibility may have been a response of the law to the increasing intervention of psychiatry in murder trials and commutation assessments. Thus, the legal discourse shifted, so that culpable homicide was murder if the offender meant to cause the death of the person killed. An act was also considered murder if the offender meant to cause to the person killed any bodily injury which was known to the offender to be

likely to cause death, and was reckless whether death ensued or not **(11)**. The terminology describing murder became more specifically oriented toward Stephen's "states of the mind" and the introduction of mens rea.

Manslaughter was now a reduction from murder if it could be proven that the person who caused death did so in the "heat of passion caused by sudden provocation." The onus of demonstrating the existence of sufficient provocation to the killing fell on the person accused of the homicide, and the absence of an acceptable reason ensured that the act would be classified as murder. In 1920, Justice Mulock advised in the trial of Alex Martynuk that "Anybody who kills another unlawfully must justify that killing or else he is guilty of the crime. He has got to explain how he came to kill, and he must give a satisfactory explanation in order to exonerate himself" **(12)**. Manslaughter was culpable homicide, but it was mitigated by particular circumstances which were in some way understood by the "reasonable" men who wrote the laws and those who participated in the murder trials.

The heat of passion alone was not sufficient to mitigate a charge of murder. Determining whether the passion resulted from a sudden provocation was the task of the court. This determination was based on the concept of the "reasonable man." As one

judge argued in 1912: "the administration of justice is for the purpose of looking after people who allow their passions, whether of anger or of lust or of covetousness, to run away with them. As reasonable beings we must control our passions, and if we do not -- if we give way to them -- we have to take the consequences." **(13)** The relevance of culture in determining reasonable provocation to murder was also considered, as seen in a 1916 case in which the judge suggested, "To us it [the loss of three dollars] doesn't seem a sufficient reason for committing murder, but the ways of foreigners may be very different from ours and to people of that kind it may be some reason." **(14)**

However, the courts seemed loathe to broaden the interpretation of law to accommodate cultural differences, and were more likely to denigrate foreign cultures as inferior to Canadian standards of conduct in assessing the reasonableness of an accused's actions. In the 1941 case of Frank Patrick, a "Slovak", for example, it is remarked that:

> men who commit murder judged by such standards would all be held irrational, and all these of foreign descent, with their racial traits and instincts, would escape punishment. However, these doctors . . . are thoroughly conversant and experienced with this class of people . . . We have in these Slavic immigrants in Western Canada many of his type, with low moral standards, a bullying cruel type, greatly given to drink, especially of the home brews they concoct. They quarrel and fight and have little regard for consequences. **(15)**

In these examples, the ideas of "excusable" or reasonable passion are narrowed down to a particular interpretation of a murder with mitigating circumstances. The perspectives of

"other" people in the examples are explained as characteristic of their specific ethnic cultures, which are seen as foreign and distasteful. And thereby, it seems, "these" people become the personification of these stereotypical characteristics.

These passages show how the law on murder changed to accommodate the influences which came to bear upon it. Murder became less black and white than the law supposed it to be, and the automatic penalty of death which it summoned seems to have affected the deliberations of juries, as later examples in the chapter show. Jury "behaviour" helped to bend the law and pressure the legal experts to reformulate its calculations of individual culpability. The idea that the law of murder has been intricately interwoven with the punishments it permitted (Statistics Canada, 1977, p. 127; and Chandler, 1976, pp. 14-15, for examples) clearly erupts with the attempts to legally abolish capital punishment in the early 1960s. The period between 1961 and 1976 reflects a number of substantial changes to the law of homicide, with a couple of minor changes occurring between 1976 and 1985. Section 214. (6) of the Criminal Code of Canada, in which the causing of death by a person previously convicted of murder automatically classified the murder as first degree was repealed in 1985. Section 215(d), which addressed the carrying of a weapon during the commission of specific crimes which resulted in murder, was found unconstitutional in its violation of ss.7 and 11(d) of the Charter in 1987.

A focus on the punishments of criminal law became noticeable in 1914 when an abolitionist Member of Parliament, Robert Bickerdike, introduced a Private Members Bill calling for the end of capital punishment. The bill was handily defeated. Subsequent legislative initiatives by Bickerdike in 1915, 1916 and 1917 to abolish capital punishment were also defeated, but as so many citizens' letters from this time on demonstrate, he ultimately succeeded in opening up a Pandora's box by making the subject of capital punishment open to more public debate.

Although capital punishment was not abolished until much later, an attack on its provisions was made in 1948 with the creation of the new category of homicide known as infanticide. Previously categorized as either murder or manslaughter, this new category held a maximum penalty of five years imprisonment. Private Members Bills calling for the complete abolition of the death penalty in 1950 and 1953 failed, but the government decided to study the issue in more depth. A Joint Committee of the House and Senate was struck to perform the task **(16)**. By 1961, the law relating to murder was changed so that murder was divided into capital and non-capital categories, the former to be mandatorily punished by death, the latter by life imprisonment. In 1976 capital punishment was abolished and murder reconstructed as first and second degree murder. Manslaughter and infanticide provisions were not changed.

The law of murder in Canada has been rooted in English common law, a by-product of the British conquest of the indigenous native populations and its victory over the French in pre-Canada history. Prior to the 1763 Treaty of Paris, when France ceded most of its North American possessions to Britain **(17)**, the laws of homicide were carried by the English and the French from their respective native countries and employed in the new land. These laws were closely paralleled, except in the court procedures used to enforce them. Slight variations in the law prevailed in the colonies which now generally submitted to the force of British law. It was not until the British North America Act of 1867 that a uniform approach to homicide in the Crown colonies joined by Confederation was implemented (Statistics Canada, 1977, pp. 125-126). Later, the 1892 Canadian Criminal Code was enacted, with homicide provisions modelled on the English Royal Commission Report and Draft Code which reformed the law relating to murder and other indictable offences (Hooper, 1967, p. 56).

From the enactment of the Criminal Code in Canada until 1961, the only radical change to the homicide law was the creation of the category of infanticide. The emergence of infanticide legislation generally indicated a rupture in the continuity of "faith" in prevailing legal definitions of murder, for possible reasons which will be addressed later in the chapter in the discussion on gender and the legal response to

murder. This rupture marked the attempt of the law to accommodate a changing view about the circumstances of a certain kind of killing. In 1961, the law changed to distinguish between killings on the basis of a certain kind of victim, when murder was classified as either capital or non-capital. Capital murder was the killing of a peace officer or prison employee in the course of his/her duties, and non-capital murder was all murder other than capital murder. The law on murder in Canada prior to 1961 reflected no such distinctions between murders on the basis of the status of the victim. Given the *particular* status of capital murder victims, it is reasonable to suspect that there was a perceived need to reify the authority of state power, since the killing of a law enforcer reflects a more direct attack on the state and its institutions of law and order.

The 1961 change in murder legislation may also be related to the federal government's beginning attempts to limit the use of capital punishment. By the end of the 1950s, commutations of the death penalty occurred more often than did executions, and the government was ready to create law that matched legal practices. The punishment for capital murder was the death penalty, while a conviction for non-capital murder resulted in life imprisonment. This was to only have impact until the end of 1962, when the last executions took place in Toronto's Don Jail. Between 1963 and 1976, all capital cases resulted in commutations of the death sentence.

Judges, Juries and the Law of Murder

As would show in alterations to the murder law from 1961 to 1976, an impetus for change stemmed from the reluctance of juries and senior government officials assessing commutation requests to impose the required punishment on those found guilty of particular crimes. Until 1961 the punishment for murder was a mandatory death sentence unless the penalty was commuted by the Cabinet to life imprisonment. From 1962 to 1976, the punishment for capital murder was theoretically a death sentence, but all death sentences during this time were commuted to sentences of life imprisonment.

The relations between the law and, as Foucault describes it, its corollary -- punishment -- become significant here in the analyses of changes to homicide law. Parker (1977, p. 34) describes this connection between homicide and its required punishment as follows:

> The partial defences and mitigations (such as provocation) which occur on a piecemeal basis often seem to arise because the only punishment for murder is the automatic death penalty. Indeed, much of the confusion in the history of the law of homicide (and other offences) is attributable to the presence of capital punishment as the only available penalty. Rationally inexplicable harshness or leniency in individual cases created a jurisprudence with little system.

Thus the need to sanction murder was not perceived uniformly. Some killings were seen in a "worse" light when compared to others, and not all killings were deserving of a death sentence. This indicates jury discomfort with the structure of the law and its penalties with respect to the wide range of circumstances in which murders were committed. As

an articulation, the death penalty was a viable and legitimate response to murder, but there was a historically ambivalent will to practice it.

This is well demonstrated in the 1833 case of John Wilson, tried in Perth (Ontario) for the murder of Robert Lyon in a duel that was apparently well attended. Wilson and Lyon, both law clerks (lawyers in training), agreed to a duel to settle a dispute based on honour. After the killing, Wilson immediately surrendered and was tried for Lyon's murder. The element of premeditation in the duel qualified the killing as a murder and there were several witnesses before, during and immediately after the event to attest to its precise nature. These factors, with the added effect that Wilson surrendered and pled his own cause, should have made the trial an open-and-shut case. The tension between the determination of guilt by the rules of law and the looming presence of the death penalty was expressed in the trial report of the Chief Justice in the case **(18)**, who wrote:

> In the Duel case I told the Petit Jury that the situation of any Persons at the bar of Justice under a charge of Murder when the evidence tended strongly to establish the crime, was truly awful -- because they could not but feel they were treading as it were upon the brink of eternity. That the situation of Judges and juries as presiding over the lives of their fellow creatures was also awful and that they could not but feel deeply the responsibility under which they laboured, it being upon them that the duty fell to consign the accused to their fate if doomed to an ignominious end. That it was natural to feel sympathy for the unfortunate Prisoner though himself the guilty cause of his suffering, even in aggravated cases -- and still more so in others possessing in their circumstances reducing qualities though falling within the same inflexible rule of law. That these natural dispositions are apt to be followed by emotions which swell our bosoms and render it a painful struggle for us to do our duty. That it became as

> therefore on the threshold of the inquiry to pause and suffer those feelings to subside under ye influence of which we should be perhaps incapable and at least not fully prepared to trace our way to the Goal of Public Justice by the light of truth.

The "this is going to hurt me more than it will hurt you" rationalization for the finding of guilt in this case was offered as a strategy to convince the jurors to perform their duties in the service of justice, against their own discomfort with the consequences of this finding. It is noted, however, that the jury was "but a short time in Consultation," acquitting Wilson who would have otherwise been hanged. Ironically, years later he became a judge. **(19)**

Not all murder trials resulted in such an obvious usurping of the power of law by lay jurors. Reluctant juries were far more likely to find the accused guilty, often returning the verdict to the court with a rider recommending mercy, which the presiding judge would forward to his superiors. In the early part of the nineteenth century, this practice was frowned upon because it could be seen as having the effect of relegating the power of the law to the discretion of lay adjudicators:

> A reference {to the Home Department} except on a doubt with respect to the construction of law, must necessarily raise the hopes of the unfortunate Convict that it becomes hardly possible to direct the execution of the Sentence of Death, after the long interval which must elapse, between the time when the reference is made, and that at which the answer will arrive, and . . . does in effect leave His Majesty's Government no other alternative, than what under other circumstances would be considered a lay execution of the Law. **(20)**

This letter of reprimand or explanation demonstrates how the guardians of law stood to

protect their interests in power when faced by challenges to it, even indirect ones. Nonetheless, in over a third of the 1533 capital cases in the National Archives of Canada between 1867 and 1976 the juries and/or judges recommended mercy on findings of guilt. Ultimately, 618 of the total cases resulted in commutations **(21)**.

The concern that death penalty reprieves might become the *de facto* domain of lay jurors who rendered the guilty verdicts, instead of the higher legal officials, is here explained as an unfortunate outcome of the timing of reprieves. This was an inevitable difficulty in the early 1800s since the Home Office was in England and the trials were held on North American soil. The timing of commutation requests in the early 1900s was still noted as a problem **(22)**, but for somewhat different reasons:

> H.R.H. [The Governor-General]. . . considers that these eleventh-hour methods in capital cases are not only unsound, but positively dangerous.
>
> Hitherto when similar instances have occurred, H.R.H. has, fortunately, always been accessible. Considering the number of occasions when H.R.H. is obliged to be absent from Ottawa, however, it cannot be expected that he can always be found at a moment's notice. If these methods are continued, it will only be a matter of time before a man is hanged as a consequence of them: the results of such an occurrence might be incalculable.

Here the problem is not so much that the legal authorities would be obligated to follow the course set by lay people, but that a person might be executed who would be otherwise reprieved because of a missing signature. The signature was a symbolic gesture required of the Governor-General for final approval, since it was the Cabinet Executive which

made the actual decision and even it, in standard practice, recommended commutation when this was the recommendation of the trial judge **(23)**.

The issue of time as an enemy to "fair play" is similar to both of the authors of these passages (separated by almost a hundred years), although in different ways. In the early 1800s, the problem is created by raising the hopes of a death-sentenced convict in a lengthy referral process. It is therefore recommended that such referrals be confined to strictly legal bases. In the early 1900s, the administrative concern was to not mistakenly execute a convict because of a referral process which was not long enough. On the one hand, there was concern that the punishment be effected as soon after the conviction as possible. After all, the death itself was the punishment and a prolonged period of time between sentencing and execution, in which the condemned would inevitably contemplate his/her doomed fate, could be seen as an "extra" punishment not intended by the law. On the other hand, proceeding with the death penalty required several administrative steps which prolonged the period between sentencing and potential execution. This was necessary to ensure that the life/death decision of commutation was not made in haste. This dilemma, however, also reflected a shifting in the relations between the judiciary and government officials, at least according to a 1900 memorandum to the Minister of Justice:

> The delay in submitting reports in capital cases has always, in my experience, been a source of inconvenience and annoyance. Cases were sometimes not ready for submission to the Governor General until the day preceding that fixed for execution. Shortly after you became Minister of Justice, you moved the Secretary of State to address a circular to the several Chief Justices of the Dominion setting forth that considerable inconvenience had resulted theretofore in the consideration of several capital cases by the Crown owing to the delay in the transmission of the notes of evidence and minutes of trial, and to the short time allowed between the date of the sentence and the day appointed for carrying the sentence into execution; and requesting that in the future, in order to allow ample time for the consideration of the case by the Executive and the signification of the Governor General's pleasure thereon, a sufficient delay should be allowed between the date of the sentence and the day appointed for the execution, and further that the notes of the evidence and minutes of trial &c. [sic], should be forwarded to the Secretary of State forthwith upon the conclusion of the trial, or with as little delay thereafter as might be.
>
> This request has been since for the most part, though not universally, complied with by the Judges, and the objection to a great extent removed.
>
> It is, of course, impossible to compel the Judges to comply with the suggestion, and in at least one instance, as you may remember, it was highly resented. **(24)**

The "inconveniences" created by eleventh-hour legal decisions in the early part of this century are not so much a matter of a "lay execution of law" (as expressed in the early nineteenth century) as they were a matter of administrative efficiency in conflict with the conventional practices and roles of judges. The Governor-General (often referred to as His Royal Highness in the documents) played the concluding role in this chain of criminal justice administration, and the attempts by government officials to override the practices of judges are ignited by "His" displeasure over what is portrayed as a careless method of administration with potentially ill-dignified consequences.

The "lay" people in this process were, of course, the juries who theoretically held the most power in the whole legal process as the triers of facts. The law could be seen as "the people's law," with the power to decide the guilt or innocence of the accused resting with a jury of lay peers as opposed to some sovereign person. But this power was confined by the rule of law itself. Judges frequently make the point that jurors are the judges of the facts of the murder cases at hand, not the judges of the law which binds those facts. The documents show repeatedly that resistant juries were not entirely comfortable with the task of conforming the various aspects of the cases to the strict legal framework on murder, especially when the consequences were death to the convicted person.

In his 1893 charge to the jury in the trial of Anderson Veney for the murder of his wife, Justice Street explains the responsibilities of each juror:

> It is upon you that the law casts responsibility, a responsibility from which you cannot escape, of finding a true verdict according to the best of your judgment upon the sworn evidence given before you. The law has put you there, you have taken the oath to give a true verdict according to the evidence, no matter what the consequences may be to the prisoner at the bar. Having done your duty your responsibility ends, and there will be nothing with which to reproach yourselves afterwards; if you should not perform your duty you may have much to reproach yourselves with afterwards.
>
> The law has laid down certain principles which are to guide juries in cases of this kind, they have been established by our laws for many years, they are the result of the wisdom of many learned men; they are the laws and the principles which must guide you in coming to a conclusion in this case. **(25)**

In 1908 murder trial of William Paul, Judge Anglin puts the jurors' responsibilities in the context of the higher purposes of law:

> While on the one hand it is of supreme moment to the prisoner that he should not be condemned unless the evidence warrants condemnation beyond reasonable doubt, on the other hand it is of equal importance for the safety and for the protection of human life in this community, that though murder be committed at a distant point far from the habitations of men, people should know that whatever the concealment afforded by the occasion . . . the arm of the law is long enough to reach that murder and strong enough to punish it when evidence is presented which brings guilt home to the person accused. **(26)**

Juries responded by fulfilling their duties according to expectation, but seemed moved to temper the consequences of the verdict by frequently recommending mercy. In one case, a juror in the trial of Samuel Zadorozny in 1943 sent his own plea to the Minister of Justice on behalf of the young man he convicted of the strangling murder of his fiancee, stating that "he [the writer] would perhaps be remiss in his duty if he did not at this time draw to your attention that the jury felt very strongly in the matter that Mercy be shown." While it is not possible to know how much influence this plea had on the Cabinet, Zadorozny's sentence was commuted. **(27)** A jury recommendation for mercy in the 1956 trial of Gerald Eaton, convicted for a well-publicized killing of an eight year old girl in Langley, B. C., was so out of line with the merits of the case in the view of the presiding judge that he felt compelled to provide two possible explanations for the recommendation, "one being the aversion to capital punishment, the other a feeling of sympathy because of a mentally disturbed mind, although there was no attempt to show

insanity within the meaning of the Code." **(28)**

A role of the judges was to steward the law, as seen in this charge to the jury in a 1937 murder trial:

> . . . all questions of law, which arise in this case, you are to take the Law from the presiding Judge, that is, you must take the Law from the person that happens to be on the Bench at the present time, and you must take the Law as correct . . . I think there was one suggestion that the Law is a bit different from what it actually is. I am not going to say anything about that otherwise than to remind you that you take the Law from me (And I am not making the Law). You take the Law from the presiding Judge. **(29)**

Judges did not restrict themselves to rote explanations of homicide law in these jury charges. Much time was spent weighing the evidence presented in the trials on the basis of their own opinions, which the juries were theoretically not bound to: "I have incidentally referred to what I suppose to be the facts of this case, but I want you to disregard my observations about the facts if they don't commend themselves to your judgment." **(30)** Such comments were not unusual, and given the authority of the judges in the trial process as well as in the interpretation of the law itself, it would have been difficult for the lay juries -- technically the final judges of the facts of the cases -- to set aside the opinions issued from the bench in their determinations.

Differentiating Women Who Kill

Perhaps the most recognizable differentiation in murder law which relates specifically to women is the now defunct petit treason category. Petit treason was legally defined by the English Treason Act of 1351 as "the killing of a master by his servant, of a husband by his wife, or an ecclesiastical superior by a man in orders" -- the murder being a breach, as Blackstone said, "'both of natural and civil relations,' since such offenders owed their masters faith and obedience" (Beattie, 1986, p. 100). To qualify as such, the murder required the element of malice aforethought and required at least two witnesses for a conviction of the accused.

Petit treason highlights a legal system of differentiation based on a specific hierarchy of power relations -- in the cases at hand, by the measure of gender. The offence implies the particular concept of betrayal of the master (Dolan, 1992, p. 317). The status quo, which favoured a form of power relations whereby men legally and socially dominated the women, appears to have rationalized this particular configuration on the basis of natural law upon which civil law was founded.

Petit treason marks the extreme limit of these relations, when women kill their legal masters, and as such its punishments were usually worse than those of other kinds of

murder. Whereas murderers were generally hanged, women convicted of petit treason in England were sentenced to be burned alive, although in practice the executioners are said to have commonly strangled them to death first with a cord before subjecting them to the open fire (Beattie, 1986, p. 451; Gavigan, 1989-90, p. 360). The punishment for petit treason could also be hanging followed by a hanging of chains, whereby the condemned person's body was suspended in a metal frame to rot in disgrace in a public venue. This was the punishment ordered for Mary Josephe Corriveaux at St. Vallier, Quebec in 1763 when it was eventually discovered, after the conviction of her father for the murder of her husband, that she was the killer **(31)**.

This special offence category was abolished in 1828, perhaps owing to a shift in social relations created by the change from a feudal to a capitalist economy (Gavigan, 1989-90, p. 345). The master-slave distinction, one of the three relations subject to petit treason, was no longer legally relevant and as a consequence the husband/wife murder distinction seems to have lost its legal potency. After about 500 years the distinction of petit treason was abolished, but it is clear that wives who killed their husbands with "malice aforethought" were still seen as particularly reprehensible in the male-conducted courtrooms of late nineteenth century Canada.

The previously mentioned 1899 case of Cordelia Viau is an example of these lingering sentiments about gender relationships. That the murder was seen as "without a parallel in the annals of crime" probably helped to justify an ethically dubious method of gaining the confessions of Viau and her male co-accused. Their admissions of guilt came when each was encouraged to believe that the other had confessed while implicating the absent suspect, but it was the Department of Justice position that "however much one may dislike the methods by which [the admissions] were obtained, they must be accepted as legal under the decision of the Court of Appeals" **(32)**.

This makes it clear that the law was considered to be absolute, above any other reservations expressed about the methods employed in the investigation. Viau's resistance can be seen in her search for alternate avenues to challenge the law's absolutism, in a lobby for a commutation of her sentence. In a letter to the Countess of Minto, Viau presented her case for mercy by appealing to the receiver in numerous references to her status as a woman: "You are a woman, and it is to your heart, as a woman and a mother, that I appeal . . . I am sure that your influence with His Excellency, Lord Minto, is all powerful." Whether or not Lady Minto was at all touched by Viau's plight or held any political sway with her husband in this case, Viau was hanged.

The 1935 murder case of Elizabeth Tilford in Woodstock, Ontario generated much discussion about crime and punishment in which sex/gender was a salient consideration. Tilford was convicted of slowly poisoning her husband to death, having been previously married to a man who died after publicly accusing her of poisoning him. An Ontario Provincial Police inspector speculated on Tilford's motive by noting "it has been our opinion that her husbands have proven to be quite useless for her who we imagine has been a person overly sexed, and she wanted free rein, with perhaps an eye on the farm properties of the man Blake. No other motive appears on the surface." **(33)**

A suggested motive which was significantly different from police speculation that Tilford was oversexed and greedy was offered to the Minister of Justice by an American woman, in a letter encouraging a commutation of the condemned woman's sentence:

> Remember that a Mother of nine children had a great reason, perhaps even a sacred duty in killing a bestial, vile creature. How do you know, but if you knew the true reason, you would have liked to shoot him yourself. Perhaps he abused the children, as well as her, or even attempted to rape his own daughters. There are many vile creatures in human form, not fit to live. Nature gave women a very rotten deal, for they have to suffer the agony of Motherhood, sacrifice their life each time they give birth to a child, while most men are just selfish, bestial creatures, only seeking to inflict cruelty upon women . . .
>
> There are Societies to prevent cruelties to animals, and the Masonic Lodges boast, that the "Mason to be hanged, is yet to be born," but there is no protection for a wife. A wife is utterly at the mercy of the vile, degenerate she marries. **(34)**

While perhaps not specifically relevant to the case of Elizabeth Tilford, the sentiments

expressed in this letter indicate how relations between spouses could be -- indeed, how they *were* in the experiences of the letter's writer -- in a society where the roles of men and women were distinct and where men's dominance was sanctioned. Neither that particular writer nor Tilford was considered very favourably: a note scribbled by a government employee on the letter advised that no acknowledgment was necessary, and Tilford was executed.

Five years later, the case of Frances Harrop in Winnipeg, Manitoba was considered on the basis of just this problem, the limited avenues of recourse to a woman in an abusive marriage. Convicted of killing her husband of many years, Harrop had "feared that her husband would kill her," according to the investigating police department which corroborated this position with the testimony of several family members. A prominent member of the community -- "a very worthy and honest woman [who] doubtless represents the views of many other women in the matter" according to a Supreme Court Justice -- offered the following appraisal of the case:

> She was kept in a state of abject submission, and denied the money, understanding and love, without which no marriage can truly survive. The history of Mrs. Harrop's life with her husband was one of sordidness, constant quarrelling -- absolutely unjustified as far as she was concerned -- and reached its culmination in open rebellion on her part. That rebellion took an awful form and resulted in the murder of her husband. **(35)**

Harrop's case was viewed more favourably in light of the evidence which appeared to

sustain the probable reasons for the murder, the lack of options available to a woman in a life-threatening abusive marital relationship. Like Tilford, Harrop wanted out of her marriage but her motives appeared to be somewhat different -- Tilford's appeared to lean towards financial gain, while Harrop's was a matter of survival. The law was more sympathetic to Harrop's situation, and her death sentence was commuted to life imprisonment.

In the 1990s, Canadian women who killed their abusive spouses for reasons familiar to Frances Harrop in the 1940s have been testing a new defence of "battered wife syndrome" to change the nature of the homicides with which they are charged. Killing in self-defence is generally seen as a less culpable and sometimes lawful homicide. The problem is then to provide an acceptable explanation for the killing of an abusive spouse in a situation which is not immediately threatening, while conforming to the standards of the "reasonable man" (for example, in Castel, 1990). If it is accepted that such acts are those of self-defence, then the law's definition of it will have to change. Indeed, well-publicized cases such as that of Jane Hurshman (36) in Nova Scotia in the early 1980s demonstrate that such change is already taking place with the lay people of the court. Hurshman confessed to the killing and was charged with first degree murder, but the jury acquitted her anyway. The crown's appeal, which resulted in a six month

sentence for manslaughter, was rather unfavourable to the local community which had stood up and applauded the original acquittal in the courtroom when it was announced. By the mid 1990s, a petition supported by the Canadian Association of Elizabeth Fry Societies was presented to the Minister of Justice for an *en bloc* review of all cases where women have killed their abusive spouses.

The other key area of homicide law which is differentiated on the basis of sex is that of infanticide, legislated in Canada in 1948. Today, there is a tenuous connection between infanticide and murder (Osborne, 1987, p. 56), the former offence being defined specifically on the basis of a medically determined state of mind in which a mother kills her infant child. It has been argued, however, that the practice of infanticide historically has been more a matter of fertility control (Backhouse, 1984, p. 447) than the tragic result of a medical illness related to a woman's post-partum period.

The evolution of infanticide laws reflects the struggle to codify certain female actions, and in so doing provides an opportunity to revisit the social and legal expectations of women's behaviour. While infanticide appears to be a worldwide phenomenon and thus hardly unusual, English law generally treated it as murder except if the woman was unmarried. This distinction occurred in 1624 with a statute which declared that if an

unmarried woman tried to conceal the birth of her bastard child, she was the presumed killer if the child died unless she could show that the child had been born dead through the evidence of one other person (Phillips, 1992, p. 105). The 1758 infanticide case of Mary Webb in Nova Scotia, however, shows how the colonial justice system over a hundred years later in Canada was willing to overlook the prerequisite second person evidence on the rationale that "death might have been accidental from the manner of Delivery" (p. 105).

In the same year as the Webb case occurred, Nova Scotia passed a statute which essentially echoed the British legislation. Prince Edward Island passed the same statute in 1792. The legislation on concealing a pregnancy applied only to unmarried women, in theory expecting women pregnant with children out of wedlock to "come out of the closet," an act which in the times could only mean humiliation and lifelong poverty if the child survived. It could have been assumed that married women would have no reason to conceal a pregnancy, and that husbands were a good safeguard against infanticide -- but there is no doubt that married women also had their reasons for committing infanticide (Backhouse, 1984, p. 450).

In the early 1800s New Brunswick, Lower Canada (now Quebec), Prince Edward

Island and Nova Scotia repealed the death penalty as punishment for the concealment offence, substituting a maximum two-year sentence of imprisonment. This was followed by a change in the concealment offence to include all women, married or not, thus widening the net of potential offenders. The change of punishment from execution to a two year sentence of imprisonment enabled lawmakers to effectively make a statement about women's behaviour. The specificity of infanticide in relationship to the sex of the killer was later elaborated upon by the medical experts, who established a connection between the effects of childbirth on infanticide in what became known as depressive post-partum states of mind. The Canadian infanticide legislation of 1948 reflected the power of this rationale, by requiring only that the woman provide evidence that her mind was disturbed by the birth or lactation and not that she was so severely disturbed that she could not recognize what she was doing, or that it was wrong (Osborne, 1987, p. 55).

The gradual change in the legal assessment of infanticide, and its difference in response from other homicides, demonstrate how the status of the offender can affect legal definitions of killing. Backhouse (1984, pp. 477-478) argues that the historical moves towards a diminished response to infanticide are related to the lack of threat the kinds of desperate women who killed their infants posed to the overall balance of power between the sexes. These women were not considered to be revolutionaries, and their

actions did not threaten the social order enough to merit strong symbolic responses. The killing of infants, who posed added burdens to women already faced with impossible demands in nineteenth-century Canada, was "viewed as a rather common feature of daily life" (p. 475). Since the status of these infant victims was not very high in a society with no fertility control, harsh living conditions, high infant mortality rates, and no orphanages, the diminished response to infanticide is not surprising.

Differentiating Indigenous Peoples Who Kill

The conquering settlers in colonial Canada faced curious problems in asserting the British rule of law over the lives of the emerging nation's indigenous peoples. Cultural customs over appropriate responses to social wrongdoing in the various aboriginal communities did not include a practice of confinement, although there appears to have been a use of exclusionary tactics such as banishment (temporary or permanent). In some Inuit communities killing was one communal solution to social problems posed by particular individuals; it was a pragmatic response to other wrongdoings, rather than a crime in and of itself.

The difference between the world views of the Inuit and European settlers is highlighted in Freuchen's report of the murder of a white fur trader by a young Inuit man

called Nuralak in the early part of the twentieth century (Freuchen, 1965, pp. 128-137). Nuralak had been asked by his community to kill the fur trader Janes because of the latter's practice of stealing Inuit furs at gunpoint. The Mounted Police put Nuralak on trial in the north and sentenced him to ten years imprisonment in Ottawa. Freuchen's account of his meeting with Nuralak's father yielded the observation that,

> [h]e was as proud as a Spanish noble because his son had reaped such reward for his heroic deed from the white men; they kept him in a big house at one of their huge settlements and supplied him with food and clothes without any effort or payment in return. To the poor Eskimo, with his existence on the brink of death and starvation, this must indeed have seemed like a paradise. He ascribed the success of his family to the fact that they had adopted the Christian faith, because such things never happened in dark pagan times . . .
>
> As was bound to happen, Nuralak later got tuberculosis in prison. He was released and sent back to his tribe, where he soon died. He was one of the many cases which demonstrated how fruitless and meaningless imprisonment was in dealing with the Eskimos.

In this example, the white and Inuit appraisals of the killing of the fur trader Janes clearly differed, as did their respective ways of understanding the consequences of the killing.

White settlers had already acknowledged a difference between the cultural understandings of themselves and the aboriginal peoples, and this was sometimes taken into account as a mitigating *mens rea* component of a murder. In the 1888 case of a west coast native man named Sinequar, an editorial in the **Nanaimo Free Press** suggested that a commutation of sentence was in order because although this was a murder, it was a

tribal custom and a commutation would demonstrate to the native communities the superiority of white law over aboriginal ways:

> We admit that it is imperative that these old tribal customs which call for innocent victims should be stamped out, but as this is the first case of this character to come before the courts, we believe it is one that a less penalty than death might be judiciously imposed. A lengthened term of imprisonment would show to the Indians that the law of the land will not allow any man to take the life of another except in cases of self-defence. The lighter penalty would in our opinion . . . be a sufficient deterrent. The Indians, who were the first possessors of the country, had and have laws of their own, and it will take some time to make them fully understand that their law must give way to what we call the civilized law. **(37)**

Thus while the new Canadians could recognize cultural differences in aboriginal law, they still saw their law -- "the civilized law" -- as rightfully superior. Sinequor was used to make a different statement, however, as he was ultimately hanged.

From the perspectives of aboriginal peoples, the response of the white settlers to acts of killing must have also seemed very different. The idea that a prison was a nice place to live and a kind of reward, instead of the punishment it was supposed to be, might in a different cultural context confirm a conservative's worst fears, but since the Inuit did not practice imprisonment they could only understand it in the context of their own values and life experiences. Murder, however, was not foreign to the Inuit, although it was not quite recognized as a crime, in the cultural context of the far Canadian north.

The commonality of killing in one particular Inuit community around King William Island was relayed to a visiting explorer in the early part of this century **(38)**. Interviewing the Netchilik women, he found that more than half of the baby girls they had given birth to were killed -- a high rate of infanticide by most standards. This common practice, however, yielded an imbalance in the female-male ratio which apparently resulted in significant violence among the many men who were competing for a shrinking number of women. A discussion with an assembly of 21 Netchilik men about their past experiences revealed that 15 of them had been involved in one or more murders (Freuchen, 1965, pp. 127-128).

The first murder trials of Inuit persons occurred in 1917 when Sinnisiak and Uluksuk of the Coppermine area were tried in Edmonton for the 1913 killings of two Roman Catholic missionary priests at Bloody Falls. The cases drew considerable outside attention, and were used to demonstrate to Inuit and white people alike, the superiority of British legal justice. This is clear in the opening address of the crown counsel at the trial of Sinnisiak (in Moyles, 1989, pp. 38-39):

> I have said that this trial is an important trial. It is important particularly in this. The Indians of the Plains, the Blackfeet, and the Crees, and the Chippeweyans and the Sarcees and the Stoneys have been educated in the ideas of justice. They have been educated to know that justice does not mean merely retribution, and that the justice which is administered in our Courts is not a justice of vengeance; it has got no particle of vengeance in it; it is an impartial justice by which the person who is

> charged with crime is given a fair and impartial trial . . .
>
> These remote savages, really cannibals, the Eskimo of the Arctic regions have got to be taught to recognize the authority of the Crown and the Dominion of Canada . . . It is necessary that they should understand that they are *under the Law* . . . that they must regulate their lives and dealings with their fellow men, of whatever race, white men or Indians, according to, at least, the main outstanding principles of that law, which is part of the law of civilization . . .
>
> This is one of the outstanding ideas of the Government, and the great importance of this trial lies in this: that for the first time in history these people, these Arctic people, pre-historic people, people who are as nearly as possibly living to-day in the Stone Age, will be in contact with and will be taught what is the white man's justice.

In their trials it appears that Sinnisiak and Uluksuk were more bored than awestruck by any insight into British justice the trials were supposed to inspire -- indeed, it is more likely that the experience of city life in Edmonton during the year preceding the trials (p. 34) made a much stronger impact on them, given the contrast to what they were accustomed. They were both found guilty, served two years of imprisonment (which they appeared content to do), and spent the next few years working with the Royal North West Mounted Police as guides in the north (p. 85).

The deterrent effect of this trial apparently had little influence on the actions of other Copper Inuit. A case in point is that of Alikomiak in 1923, who stood trial for the 1922 murders of a Mounted Police officer and a trader at Tree River on the Arctic coast (Price, 1991, pp. 213-236). This time the trial took place in the north on Herschel Island, far from the "magic" of the southern cities which had given Sinnisiak and Uluksuk before him so many interesting experiences to relate on their return to the Arctic, and closer to

the Inuit people to whom the symbolism of Canadian law and justice was directed (Schuh, 1979-80, p. 111). In this case the lessons of British justice were restricted to the trial process itself, as Alikomiak was hanged and thus suffered a penalty of death, a penalty which was already well employed by the Inuit on their own terms and would have hardly taught them anything, except perhaps a new technique of killing. Since killing was a common approach in Inuit communities for getting rid of people who were persistent irritants to others, the idea of killing as murder was a difficult notion to translate. The Inuit themselves had no special word for murder, as killings were seen as either preventative measures or selfish violence (Graburn, 1969, p. 48).

The killing of any person in the community who became crazy was a social/spiritual cleansing practice of another aboriginal group. A belief once common to the Canadian woodland Indians was the concept of the Wendigo, an evil spirit who occupied an individual's body and made that person kill and eat his/her family members and friends. To destroy the spirit, it was necessary to kill the body it occupied, through a ritual slaying (Schuh, 1979-80, p. 76). To the white authorities, Wendigo killings were murder by legal definition, although the sentence served by the Wendigo assailants in two cases at the end of the nineteenth century was only about two months imprisonment **(39)**. White settlers may have been familiar with the purpose of killing "Wendigos," given their own history

of punishments meted out in pre-classical Europe when crime was explained by demonology. The shift from demonology to reason was a significant change in the grounds of knowledge in European thought, and the Wendigo beliefs may have seemed backward and certainly irrational. In this respect, the woodland Indians may have been perceived as more uncivilized than criminal, thus explaining their "lenient" sentences.

Power and the Law of Culpable Homicide

In this chapter, the talk on murder was studied in legal discourses by looking at shifting legal rationales for differentiations of killing, the influence of the roles and practices of juries and judges in murder trials, and the responses to murders as reflected by the social statuses of two particular groups of offenders, women and indigenous peoples. Changes in the homicide laws themselves, based on the legal discourses of this sample, were motivated by the need for law and legal practice to correspond to one another. Disjunctions between law and its practice were strongly related to the punishment for murder, where legal decision-making in individual cases was influenced by the prescribed consequence of the death penalty. In theory, there was large support for the use of the death penalty in responding to murder, but the discursive practices of law demonstrate a discomfort with the use of this punishment in particular cases. The shifts in homicide laws, marked by the creation of the infanticide category and the dividing of

murder into capital and non-capital classifications, included a corresponding reduction in the prescribed uses of capital punishment.

This exercise also suggests that conventional beliefs about the consensus of values embodied in law are fleeting, even in the case of killing. Chambliss and Seidman (1982, p. 173) argue that the idea of moral consensus in law is plagued by the knowledge that "real-life circumstances rarely coincide with abstract statements." While a moral consensus based on the dictum "Thou shalt not kill" may exist in principle, in practice there are many exceptions whereby killing has its legal justifications, such as in self-defence, police killing of suspects, or in the situation of war. The documents studied show that while judges attempted to uphold the absolute power of law in murder trials, the juries were not so comfortable fitting individual cases into the mold of the law of murder, especially given the particular punitive implications of their decisions. Essentially, any consensus which might have existed on the moral imperative that killing is wrong -- notwithstanding the contradictions posed by the legal killing of war or by police in the line of duty -- was strained and fractured in view of the punishment for murder. The emerging roles of the human sciences and prisons in the 19th century helped to complicate the will of juries to produce findings of guilt in murder cases, when the punishment for murder was a death sentence.

The historical reformation of murder laws testifies to the dynamics of the power/knowledge relations which these laws reflected. Such reforms signalled changes in the response to problems which arose in the implementation of the laws, and as such echo Bentham's claim that legal reform necessitates the use of history but that "it is from the folly, not from the wisdom of our ancestors that we have so much to learn" (in Eisenach, 1983, p. 290). While our ancestral judges struggled with confining decision-making to the measure of law in murder trials, Canadian judges today appear to be struck by additional practical problems of legal decision-making, such as how to tell who in court is telling the truth and how this may affect the legal outcome of the trial (Fine, 1994). This concern was not given much credence when raised as an issue in the case of John Davidoff, who was hanged in 1951. In this case the problem of discerning the truth in conflicting witness testimony was seen as a product of ethnic differences, as cited in an appeal for mercy by his lawyer:

> Nearly all the witnesses were Doukhobours, many of them young, people still suffering from a Cossack complex inherited from the original members of their sect.
>
> Further, these Doukhobours are inclined to color their statements in a manner they think pleasing to their interrogators, in the first instance, and can be made, under stiff examination, to admit certain things which the examiner wishes them to admit, due to the fact their English is uncertain and to their wish to escape lengthy questioning. **(40)**

Witness testimonies were key to Davidoff's conviction and in spite of the concerns about the truth of these testimonies the appeal was dismissed, although there was significant

ambiguity as to Davidoff's guilt in this case.

With the abolition of capital punishment in 1976, the classification of murder changed from capital and non-capital murder to first and second degree murder, with the provisions for manslaughter and infanticide remaining substantially unchanged. First degree murder covers three kinds of killings: (1) those which are planned and deliberate (s. 231.2 and s. 231.3); (2) those in which the victim is a peace officer or correctional employee/authorized civilian acting in the course of his/her duties (s. 231.4); and (3) those murders which occur during an attempt to commit or the actual commission of specific Criminal Code offences relating to hijacking an aircraft, different categories of sexual assault, kidnapping and forcible confinement and hostage taking (s. 231.5). Second degree murder is all murder that is not first degree murder (s. 231.7).

The present classifications of murder, while building on previous law, appear to be more precise and elaborate, presumably to cover particular kinds of culpability relating to premeditative states of mind, specific victim statuses and the kind of victim-offender relationships incurred by certain offences. Nevertheless, "the meaning of murder is not self-evident, and . . . both its definition and status relative to other forms of homicide present serious difficulties in criminal law theory" (MacKinnon, 1985, p. 130). This,

according to MacKinnon, is partly related to the problem of *mens rea* where the concept of intention is extended to include foreseen consequences: an act should be known by its author to be likely to cause death (as in section 229 of the C.C.C.). This provision does not easily accommodate the myriad cases to which it applies.

MacKinnon's model of murder law would collapse the distinction between murder and manslaughter and substitute these with a single crime of unlawful homicide (1985, p. 138); the current mandatory penalty of life imprisonment would be changed to a fixed minimum sentence, presumably with a range to a maximum of life imprisonment. This model allows for the variety of different circumstances which characterize murder cases and affords judges and juries more flexibility to match the penalties to the circumstances. Given the historical propensity of juries to "compensate" for penalties deemed excessive in specific cases through recommendations of mercy or the reduction of charges because of the limits of legal definitions, this approach seems to make sense. Indeed, while the murder and manslaughter rates between 1950 and 1966 (the transition period of murder legislation with regard to punishments) varied with the change of punishment (41), when the two categories are collapsed into one, there is virtually no change in the total homicide rate (McDonald, 1979, p. 224). Thus the surface changes in these rates may well have been more a product of the legislation itself, rather than reflecting real fluxes in

the rates of homicide *per se*.

This is in contradiction to earlier views about the connection between crime and punishment. In a 1768 burglary trial, for example, Nova Scotia Supreme Court Chief Justice Jonathan Belcher declared that "[t]he measure of all penalties is not the proportion between crimes and punishments," but rather "the grand end of government is the measure by securing obedience to necessary laws . . . [W]hatever penalties are proper for this end are just and righteous" (in Phillips, 1992, p. 109). This overriding concern with obedience to the law was later reflected in the judge's comments during an infamous 1880 B.C. trial of four young men for the killing of a police constable (in Rothenburger, 1973, p. 143):

> . . . the killing of a constable is at all times a heinous offence. It is especially so in this country where the enforcement of the law depends entirely upon the moral effect which the power of an officer of the law has throughout the country to enforce the law's mandates. If there were not the moral force to rely on for instant and implicit obedience to the law, a whole regiment of constables would be ineffective to produce that result.

Seen in this way, the rationale for imposing specific punishments prior to this century is more tied to broader imperatives of cultivating respect for the rule of law (with perhaps a belief in deterrence) in Canada, than a Beccarian balancing of crimes and their punishments.

The idea that any conception of politics must address conflict is rooted in the assumption that politics is "the shared practice through which members of a group avoid killing one another" (Gobetti, 1992, p. 31). However, in the specific context of the legal response to murder today, the idea of killing itself is not so black and white -- the contrast between the "planned and deliberate" murders of contract killing and euthanasia is a case in point. The politics of the law relating to murder is complicated by its focus on the subjectively-culpable behaviour of the accused and its emphasis on the mental state, and thus moral blameworthiness, of the actor, as well as the harm (death) that the act produces (Grant, et. al., 1994, p. 3-17). While we are expected to not kill one another, this expectation is influenced by competing arguments which provoke and resist the limits of the law which represent attempts to contain a definition of murder.

The law of murder is not visible until it is broken, and there was concern that its power was not demonstrated without following through with the legally determined punishment for murder. The struggle between the judges' and law-makers' vision of law as sovereign and all-powerful, and the lay citizens' concerns with their own views on justice and truth, is manifested in the trials and worked out in the changing of murder laws. Juries who thumbed their noses at the law and acquitted obvious culprits, or who urgently and earnestly recommended commutations after findings of legal guilt,

threatened the power of law itself. The law on murder had to bend, or lose the obedience of the people. **(42)** This appears to be an implication of lay voices, such as that of a Baptist clergyman in reference to the case of Charles Medley in 1868 **(43)**:

> Allow me to say I cannot believe the Truth has been developed in the Trial. (1) I am not against the Death penalty, (2) But I am satisfied that his murder was not deliberate but from sudden provocation at the instant . . . As there is much doubt in the community as to the justice of hanging Medley and more about Bush on the grounds above stated; & as commuting relieves community equally with hanging; and as Law avails itself of doubt & as if anywhere, on the side of Mercy. May it please your Excellency to commute by all means, as safest for the peace of this vicinity. No one can object to commutation, as an abuse of the Pardoning power in Medley's case, & it would relieve community to pardon Bush.
>
> Please pardon this seeming intrusiveness on the ground of responsibility to God and love to Man, & believe me with high regard. Obediently your humble servant . . .

NOTES

1. Letter to the Honorable James McDonald, Minister of Justice from C. (K)aulbach, Member of Commons, Canada, dated at Lunenburg, Nova Scotia on July 10, 1879. In capital case file Joseph Hirtle, RG 13, Volume 1416, the National Archives of Canada.

2. Mention of providence in judges' charges to juries is found in capital case files of Walter McCrea (1906), RG 13, Vol. 1450 and William Paul (1908), RG 13, C 1, Volume1453, the National Archives of Canada.

3. The stratified society reflected in the wergelds was constituted from the top down by the King, *athelings* (male royal family members with some administrative authority), *earls* (the first descendants of the elite warrior-bodyguard of the continental chieftain), *thegns* (the "upwardly mobile nobility of talent" drawn from the freemen, which replaced the earls) and the *ceorls* (the peasant farmers, also known as freemen) (Ogilivie, 1982, p. 6).

4. In the Department of Justice summary of the Viau case, February 23, 1899. Capital case file Cordelia Viau, RG 13, C1, Volume 1435, the National Archives of Canada.

5. Letter to the Commissioner, Royal Canadian Mounted Police, Ottawa with attention to Inspector E. Foster from A. J. Murray, Inspector of Detectives, Police Department of Toronto dated at Toronto, Ontario on March 3, 1931. Capital case file Abraham Steinberg, RG 13, Volume 1566, the National Archives of Canada.

6. See endnote number 5.

7. Letter by Justice L. P. Sherwood, dated at York, October 23, 1828. The case of Charles French, RG 1, E3, Volume 28, Reel C-1192. The National Archives of Canada.

8. Judge's charge to the jury, in the transcript of the murder trial of Henry Smith, in London, Ontario, May 1890 Capital case file Henry Smith, RG 13, Volume 1427, the National Archives of Canada.

9. Judge's charge to the jury in the trial of Walter Bromley in Moose Jaw, Saskatchewan, May 19, 1919. Capital Case file Walter Bromley, RG 13, Volume 1502, the National Archives of Canada.

10. Judge's charge to the jury in the trial of John Buchanan Pirie in Ottawa, Ontario, January 20, 1925. Capital case file J. B. Pirie, RG 13, Volume 1533, the National Archives of Canada.

11. See endnote 10.

12. From the transcript of the trial of Alex Martynuk, January 10, 1920 in Peterboro, Ontario. Capital case file Alex Martynuk, RG 13 C1, Volume 1503, the National Archives of Canada.

13. From the transcript of the trial of John Bateman, October 12, 1912 in Whitby, Ontario. Capital case file John Bateman, RG 13, C 1, Volume 1463, the National Archives of Canada.

14. Mr. Justice Newlands' charge to the jury in the trial of Peter Nimalovich. May 10, 1916 in Battleford, Saskatchewan. Capital case file Peter Nimalovich, RG 13, Volume 1470, the National Archives of Canada.

15. The memorandum for the Right Honourable The Minister of Justice from the Deputy Minister of Justice, dated December 29, 1941, Ottawa. Capital case file Frank Patrick, RG 13, Volume 1633, the National Archives of Canada.

16. A more detailed discussion of this time period is covered Chapter Seven, on the death penalty and life imprisonment.

17. The exceptions were the islands of St. Pierre and Miquelon off Newfoundland, and New Orleans.

18. From MG 24, I 57, file Robert Lyon 1833-1834. Report of the trial before Chief Justice Robinson at Brockville. The National Archives of Canada.

19. A similar case in Nova Scotia in 1819 saw Richard Uniacke, Jr., a lawyer, acquitted of a murder he was clearly guilty of, in another duel situation. Uniacke, like Wilson, would also later become a judge (Jobb, 1988, pp. 1-12).

20. Letter from Earl Bathurst, dated on October 30, 1824 at Downing Street, to Sir Maitland. In RG1, E3, Volume 28 the case of Charles French. Reel C-1192, The National Archives of Canada.

21. This data was calculated from the information provided in **Persons Sentenced to Death in Canada, 1867-1976: An Inventory of Case Files in the Records of the Department of Justice (RG 13)** (Gadoury and Lachasseur, 1992). In the remaining cases there was either no recommendation of mercy or there was no information on such recommendations in the original files.

22. Confidential letter to E. L. Newcombe, Esq., Department of Justice from F. Farquhar, Governor-General's Secretary at Government House, March 1914. In capital case file Frank Davis, RG 13, Volume 1464, the National Archives of Canada.

23. A note to this effect is included in the case summary of the trial of Felix Doyle in 1905 to the Minister of Justice, dated November 17, 1905. RG 13, Volume 1449, the National Archives of Canada.

24. Memorandum for the Hon. David Mills, Minister of Justice dated November 20, 1900. Capital case file Yip Luck, RG 13, Volume 1440, the National Archives of Canada.

25. Charge to the jury by Hon. Mr. Justice Street in the trial of Anderson Veney, 1893, at the Assizes for the County of Essex in the Province of Ontario. Capital case file Anderson Veney, RG 13, Volume 1428, the National Archives of Canada.

26. Charge to the jury by Hon. Mr. Justice Anglin in the trial of William Paul, at Kenora, Ontario in 1908. Capital case file William Paul, RG 13 C1, Volume 1453, the National Archives of Canada.

27. Personal letter to the Hon. Mr. St. Laurent, Minister of Justice from T. L. O'Donnell, dated at Fort William, Ontario on November 13, 1943. Capital case file Samuel Zadorozny, RG 13, Volume 1641, the National Archives of Canada.

28. Letter to the Hon. Minister of Justice from J. O. Wilson, dated on December 18, 1956 at the Law Courts, Vancouver, B.C. Capital case file Gerald Eaton, RG 13, Volume 1759, the National Archives of Canada.

29. Charge to the jury by Mr. Justice Carroll in the trial of Everett Farmer, at Shelburne, Nova Scotia in 1937. Capital case file Everett Farmer, RG 13, Volume 1611, the National Archives of Canada.

30. See endnote 12.

31. The Judge Advocate General Courts Martial Proceedings, Papers, 1763. Held at Quebec the 29th of March, 1763. War Office 71, Volume 137, Reel C-12585. The National Archives of Canada.

32. See endnote 4.

33. Letter to W. W. Watson, Esq., Finger Print Bureau, Criminal Investigation Department, Ottawa, Ontario from E. Hammond, Insp. I. B. dated on October 28th, 1935 at Toronto, Ontario. Capital case file Elizabeth Tilford, RG 13, C 1, Volume 1598, the National Archives of Canada.

34. Letter to Sir E. LaPointe from (Countess) S. Fontaine, Countess of Fontaine-Bleau, dated on December 15, 1935 in New York City, U.S.A. Capital case file Elizabeth Tilford, RG 13, C 1, Volume 1598, the National Archives of Canada.

35. Letter to the Remissions Branch, Department of the Secretary of State from Mrs. Mary Healey, Secretary of the Florence Nightingale Rebekah Lodge #21 dated on

May 23, 1940 at Winnipeg Manitoba. Character reference for Mrs. Healey from a letter to M. F. Gallagher, Esq., Chief of the Remission Branch, the Department of Justice by Mr. Justice Hudson, dated June 15, 1940 at the Judges' Chambers, Supreme Court, Ottawa. In capital case file Frances Harrop, RG 13, Volume 1625, the National Archives of Canada.

36. Hurshman shot her husband in 1982 after several years of torture and abuse. The extreme nature of the case drew national attention to the issue of spousal abuse. Details of her case can be found in her 1986 biography, **Life With Billy,** written by Brian Vallee.

37. "Commutation of Sentence," an editorial in the **Nanaimo Free Press** in British Columbia on Saturday, November 24th, 1888. Capital case file Tsimequor, RG 13, C 1, Volume 1425, the National Archives of Canada.

38. This account is relayed by Freuchen (1965), but refers to the travel and research of another polar explorer, Knud Rasmussen.

39. The cases referred to, as found in Schuh (1979-80, pp. 77-79), are those of Machekequonabe in 1897 and Napaysoosee in 1899.

40. Application for a perogative of mercy by Davidoff's counsel A. Cameron, dated November 27, 1951. In capital case file John Davidoff, RG 13, Volume 1698, the National Archives of Canada.

41. Until 1961, the compulsory punishment for murder was hanging, which may account for the higher rate of manslaughter (with a penalty of life imprisonment) than that which was calculated after 1961. Murder rates went up after 1961, when the death penalty was reserved for capital cases only, which apparently made it easier for juries to conform their decisions to the letter of the law (McDonald, 1979, p. 224).

42. Beattie (1986, pp. 543-544) noted a similar situation in late 18th century England, with respect to the beginnings of a general resistance against the use of execution for people convicted of property crimes. In the borough of Surrey by the mid-19th century, for example, he notes that victims of property crimes were significantly reluctant to press charges that might lead to the execution of the offenders.

43. Letter to the Governor General from Isaac J. Rice, Baptist clergyman, dated at Amherstberg, Ontario on December 9th, 1868. Medley's sentence was commuted. In

capital case file Charles Medley, RG 13, C 1, Vol. 1407, the National Archives of Canada.

Chapter 5
MEDICAL KNOWLEDGE OF THE BODY/MIND AND MURDER DISCOURSE

> The constitution of pathological anatomy at the period when the clinicians were defining their method is no mere coincidence: the balance of experience required that the gaze directed upon the individual and the language of description should rest upon the stable, visible, legible basis of death . . . It is when death became the concrete a priori of medical experience that death could detach itself from counter-nature and become *embodied* in the *living bodies* of individuals.
>
> It will no doubt remain a decisive fact about our culture that its first scientific discourse concerning the individual had to pass through this stage of death.
>
> (Michel Foucault, 1975, pp. 196-197)

> . . . I will assume that Hayvern did kill Salter, by plunging a knife in his breast. It was just such an impulsive act as an insane man with a homicidal tendency, would commit. Had the man been capable of thinking or reasoning for one single moment he must have seen the total impossibility of escaping from the consequences, and such consequences the prospect between hanging or being locked up for life in a lunatic asylum. But, like all insane persons, he did not think, that is to say, he did not think intelligently because he could not. Such men never think.
>
> (Henry Howard, M.D., 1881) **(1)**

In this chapter, the focus is on the talk on murder that reflects the influence of medical knowledges in determining the murderer's state of mind and thus his/her culpability, and the construction of the insane murderer as the child of the marriage of psychiatry and law. Some of the discussion will be directed to specific moments of cross-section between these discourses in the specific case of murder, a common interest which became more complicated by the mandatory sentence of execution in Canada for anyone found guilty of the crime. The issue of legal responsibility and the standard of the "reasonable man" was confronted by the question of how to respond to murders committed by people who

might be considered as afflicted by "unreason" or insanity. The coupling of insanity with violence provoked images of danger, and scientific theories of individual criminality emerged to explain specific causes of dangerous behaviours. In a treatise by Dr. G. H. Stevenson of London, Ontario in the 1950s, this is explained in the following way:

> For every crime on the statute books, with the exception of murder, the trial judge is entrusted with some discriminatory authority as to the penalty he imposes, having due regard to all the circumstances involved. But if the verdict is murder, we, the people, through our elected parliamentary law-makers, refuse to permit the judge to use his judgment. We force him to impose our judgement on the prisoner -- the sentence of execution. Whatever the reasons and the rationalizations for the death penalty in the past, there would seem to be no doubt that it is diametrically opposed to present-day scientific reformative criminology. **(2)**

The description of psychiatry in this chapter also includes an account of its relationship to the idea of madness or mental illness. Characterized by religious morality in the Renaissance, madness was seen as the work of devils; later, the mad in the age of reason came to be regarded as animals, as creatures whose thoughts and actions reflected a state of what Foucault called unreason rather than errant morality (Shumway, 1992, p. 34). In its intersection with medicine, the problem of unreason was also interpreted through the metaphors of biological disease applied to the mind, a psychiatric domain of knowledge. Psychiatry's struggle for a medical treatment of the insane against the forces for the moral treatment of the mad -- a struggle which Scull (1989, p. 19) describes as "a concerted effort on the part of interested medical men to put down the challenge [moral

treatment] posed to their emerging hegemony" -- is an early indication of psychiatry's emergence as a body of knowledge. However, by the beginning of the twentieth century in Canada many alienists and medical superintendents would take up the banner of moral treatment, as seen in the particular example of British Columbia (see Menzies, 1995).

The problem of moral and medical treatment of the insane is clearly expressed in the response to murder. The rationalization of morality in law requires a reasoning mind to interpret and understand specific laws. If it is said that a person accused of murder cannot discern between right and wrong because her/his reasoning capacities are impaired by some psychiatric "disease" of the mind, questions may be raised as to the moral-rational legitimacy of punishing people for acts "caused" by their mental illnesses. In Canada until the 1960s, the fact that the mandatory punishment for murder was execution made such an issue all the more pressing as a matter of life and death in public policy.

The existence of medical psychiatry appears to require a fundamental assumption about the mind, that is, that it exists as an entity that can be known. This chapter begins by exploring this territory by looking at how the body and mind are separated in the knowledge of anatomical/pathological medicine. The philosophical split of mind/matter

offered by Descartes found currency in these new practices of medicine which began with the dissection of human corpses.

The Cartesian relationship of the mind and body is most clearly pronounced at the secular limit of death. The lifeless, and thus mindless, body of a person is the empirical evidence which emphasizes this distinction. The lifeless body is also a resource of information to biological medicine. The problem of the mind and death, however, has not been so easily studied by the same methodological standards and perhaps this is one reason why psychiatrists have long struggled to establish their credibility in the face of enduring skepticism about psychiatric knowledge. Death does not provide psychiatry with a lab specimen to dissect for further understanding, rather, it marks the finitude of the very subject matter of psychiatry. While death broadens the ambit of biological medical research, it closes the possibility of psychiatric inquiry. Thus it is necessary to first consider the role of medical thought in modern understandings of death.

Death and Medicine

The problem of murder can be viewed, in part, on the basis of its lethal and thus misfortunate consequences. It has been argued that the idea of avoidable death as a misfortune is related to the value we put on life: the murder victim, for example, may be

pitied because that person valued life and wanted to live, or the suicide victim because she/he did not value life and thus could not see death as a misfortune (Cigman, 1981, p. 56). The importance of life is also said to be reflected in the desire to transcend death, a common theme in western religious and spiritual teachings which "represents a compelling universal urge to maintain an inner sense of continuous symbolic relationship, over time and space, with the various elements of life" (Lifton, 1975, p. 147). The concept of death is linked to its opposite of life, whereby death is the absence of life. It could be argued that the spectre of death gives life particular meaning, since death is the limit which defines life. In this sense, death specifically refers to biological death, that is the death of the body. Life, however, also relates to the mind, a dominant source of human agency.

The idea of death is germane to Foucault's analyses of modern medicine in **The Birth of the Clinic** (1975). Here it is argued that there was a transformation of the conception of death in medical thought from a limit to empirical knowledge, to a positive analytical vantage point from which to access knowledge about life and disease. This transformation marks the emergence of a medical biology, but this shift in thought was not limited to the field of medical practices. Smart emphasizes, "Foucault has argued that the general experience of individuality in modern Western culture is itself inextricably

associated with finitude, with the idea of death which derives from positive medicine" (1985, p. 31). Thus an analysis of the social response to murder, as a criminal act resulting in death, may be assisted by an inquiry into the contributions of modern medicine to our understanding of death.

Foucault argues that "it is when death became the concrete a priori of medical experience that death could detach itself from counter-nature and become *embodied* in the *living bodies* of individuals" (1975, p. 196). Pathological anatomy began this process, in its early accumulation of biological knowledge made possible by an expanding use of human dissection. This particular technique of observation afforded the medical "gaze" the opportunity to view the human body as a sum of interrelated biological parts, to observe disease as "a possibility installed in life, its contrary" (Lemert & Gillan, 1982, p. 71) by holding the body in subjection to medicine.

In Foucault's analyses the conception of death in medical practices changed from being a relatively sudden event to a "multiple and dispersed process of a piecewise extinction of organs and functions, the separate demise of locomotion, respiration and sensory perceptions" (Cousins & Hussain, 1984, p. 166). This had implications for clinical medicine, as Xavier Bichat explained in 1801 (in Foucault, 1975, p. 146):

> . . . for twenty years, from morning to night, you have taken notes at patients' bedsides on affections of the heart, the lungs, and the gastric viscera, and all is confusion for you in the symptoms which, refusing to yield up their meaning, offer you a succession of incoherent phenomena. Open up a few corpses: you will dissipate at once the darkness that observation alone could not dissipate.

In this analysis clinical medicine shifted from the practice of responding to symptoms of invisible diseases to diagnosing diseases on the basis of palpable biological anatomical knowledge.

More specifically, the visibility of death through pathological anatomy made the definition of the connection between disease and life conceptually clear, whereby disease became "the constant encounter between death and life" (Bernauer, 1992, p. 53). The three concepts are explained in a triangular model of medical perception, where death is positioned at the triangle's apex and serves as the vantage point from which life and disease can be seen (Foucault, 1975, p. 144). Prior to this, Shumway (1992, p. 50) explains, "both life and death had made disease invisible, it being literally concealed by the living body and obscured by the effects of death. That is the technical triangle that the birth of clinical medicine rolls over."

The significant role of pathological anatomy in this shift of medical thought was, of course, dependent on the practice of dissecting corpses. However, this practice was challenged in the late eighteenth century, when the desecration of the bodies of the dead

was seen as an offence to natural rights. This is seen in eighteenth century New York, which was the site of an anti-dissection riot in 1788 by critics of anatomy. These critics noted the sacred quality of burial places around the world where even "savages protect their dead" (Wilf, 1989, p. 510). Since dissection usually required grave-robbing, pathologists who required bodies were seen as immoral and even criminal.

The demand for cadavers by medical researchers was not, however, abated by public revulsion of human dissection **(3)**. The conflict between the opposing interests of pathologists and the anti-dissectionists had intensified to the point of violence, and in the case of New York state political leaders sought a resolution which would appease both sides to the dispute. The compromise was to provide a specific source of cadavers to the physicians, which meant that the practice of grave-robbing by the medical men would no longer be necessary, thus ensuring public peace of mind that the graves of the dead would not be disturbed. This was codified in 1789 in an anatomy act which sanctioned against grave-robbing, but also offered doctors the bodies of executed felons (Wilf, 1989, pp. 514-515).

Dissection, then, was not only a technique of medical observation but a punitive sentence as well. The sentence of dissection was an additional punishment applicable to

the condemned person, implemented at the judge's discretion. It appears that the bodies of executed people came to qualify as anatomical specimens after a suggestion first offered by the Black community in New York, whose dead until then had been the most popular "booty" of grave robbers (Wilf, 1989, pp. 511-512). So apparently useful was this idea of punitive dissection that the United States Congress in 1790 gave federal judges the right to include it when imposing a sentence of execution for murder committed in a military garrison or other federal domain. Thus dissection moved from being an "unnatural act" to both a medically and legally useful practice, the latter being strengthened by the belief that hardened criminals would be more deterred by the prospect of dissection than the anticipation of hanging (p. 516).

The success of doctors in overcoming the overall resistance to dissection through such legal compromises opened a new domain of inquiry in the medicine of species. Disease became biologically "knowable," and with this knowledge came the potential for its control. In Foucault's analyses this development afforded the possibility of a medicine of the population, which he called the medicine of social spaces. The conception of health differs between the two medical approaches: while the medicine of species is concerned with the cure of disease, the medicine of social spaces focuses more on the prevention of disease (Cousins & Hussain, 1984, p. 145). It was this view towards prevention which

made the administrative management of daily life an increasing concern of the medical profession and, in turn, the government. As such, the domain of medical practice (and thus power) in the eighteenth century extended into the lives of the population as a whole, instead of being limited to specific cases of sick individuals.

While the cause of death became knowable in the new biological-anatomical capacities of medical understanding, life itself also became a knowable entity. The medicine of social spaces reflects a new kind of political concern with health of the population, and in a microanalysis, with the health and life of the individual. The individual, in this analysis, is constituted by the scientific discourses of medicine. This is epistemologically significant, Foucault argues, since it marks the possibilities of the human sciences. In other words, the medical focus on the individual human body in pathological anatomy marks a shift in ways of knowing which allows the human to emerge as a subject of inquiry. The corporeal capacity of the "person," as limited by birth and death, makes it possible for a scientifically structured discourse about the individual to exist. Bernauer (1992, p. 53) summarizes, "In death the subject can become object for science." Conceptually, scientific knowledge of the individual, as limited by death, was made possible, while the inquiries of the human sciences themselves are focussed on the living human subject.

By the early 19th century, the shift in medical knowledge afforded by the practice of dissection was well under way. The "discovery" of biological "man" was expressed in the practices of medical institutions, and in the public policy concerns of the health of the populace. Doctors themselves, who had not been very successful in the cures (much less prevention) of disease until then, began to be recognized as sources of legitimate knowledge. Indeed, their new effectiveness in responding to diseases and increasing life expectancy would seem to warrant this credibility. Doctors began to lend their knowledge to other venues of public life, such as the courtrooms in which the pathology reports of victim autopsies became a standard feature of murder trials.

This particular focus on the biological human body appears to have influenced the medical approach to "diseases of the mind" as well. The Cartesian split of body and mind was already an accepted verity of scientific epistemologies as it remains today, and doctors seemed eager to transfer the knowledge of pathological medicine gained from the dissection of the dead to the presumed abnormalities of mental functioning in the living. Thus, the problem of the "mad" was to be reconstituted in the medical model offered by modern psychiatry.

Mental Illness and Psychiatry

The concept of madness had existed long before the emergence of the psychiatric knowledge which would medicalize it in the 19th century. In Renaissance writings, for example, madness was associated with frivolity, whereby the mad were characterized by folly rather than illness (Shumway, 1992, p. 31). However in everyday life, the mad of the Renaissance were problematised in more deviant terms which were rooted in religious imperatives. The "playful" mad were like irresponsible children who could not care for themselves or work and, in defiance of the Christian taboo against idleness, were a burden to the rest of society.

By the early 1800s religion itself had come to be regarded as one cause of madness (Shumway, 1992, p. 40). Religious beliefs were seen as being grounded in faith rather than material reality, and the mad seemed inclined to the use of religious metaphors in their delusions. In the epistemological context of an emphasis on reason, the authority of religious institutions was losing ground to the emerging authority of science. Where the mad had been seen as afflicted by spiritual demons, they were now perceived as animal-like, without reason (Foucault, 1973a, p. 75). This animal nature was depicted as unreason, and as found in humans, provided empirical evidence of a potential underlying madness which threatened to "swallow up reason" (Shumway, 1992, p. 34).

Doctors and laypersons in the eighteenth century began to see the mad as morally impaired rather than as victimized by demonic possession (Andrews, 1988, p. 1). The response to madness which saw this state of being as a problem of morality, found expression in "treatments" which were meant to teach and tame the more savage members of society to employ a particular form of reasoning. Although the opening of institutions for the mad (such as England's St. Luke's Hospital for Lunatics in 1754) was originally intended to provide a kind of respite for the incurably insane until their "diseases" ran their natural courses, "enlightened" doctors of the time felt that confinement itself was always necessary for a cure to take place (p. 3). Confinement had already been used as a tactic of power since the establishment of general hospitals in the mid-17th century, thus it is understandable that confinement was to be a central strategy in the practices of psychiatry. By the end of the 18th century doctors began to believe that they could play a more active role in the cure of insanity, and a medicine of the mind, psychiatry, was possible.

When the mad became the mentally ill, the practices of response toward them became treatment oriented. Medicine now held within its purview the diseases of the mind as well as those of the body, and the institutional setting of the incurably insane was conducive to the study and treatment of its defective population. The confinement of the

mad, then, enabled the establishment of psychiatric knowledge and the "authority" of psychiatric practitioners. In 1844, the doctors who ran these institutions in the United States formed a professional network in the American Association of Medical Superintendents, which later became the American Psychiatric Association (Alexander & Selesnick, 1966, p. 405). Psychiatry began to establish its domain as a legitimate source of medical knowledge.

The medical split of the mental from the physical on moral grounds, as manifested in the specific internment of the mad, not only made psychiatry possible but also transformed madness into a curable disease. But before the mad could be seen as the mentally ill, it was also necessary for them to be recognized as legal subjects, with moral rights and obligations. In the nineteenth century, the disease of madness was reflected in a proliferation of new categories of mental illness, such as monomania, hysteria and moral insanity. Since the mad were perceived to have failed in their morality, as opposed to being afflicted by demons, "their responsibility for that failure was the condition of the possibility of a cure" (Shumway, 1992, p. 41). Mental illness was perceived as a kind of malfunctioning, a belief which was reiterated in a mid-twentieth century treatise of psychiatry in which it is claimed:

> [A] necessity to accept objective as opposed to purely subjective standards, reality as opposed to fantasy, impresses itself upon us all. We normally make a realistic

> adjustment between our hopes and desires and fears on the one hand, and our experience of life as it actually is on the other, by means of our resilient emotional and intellectual equipment. A failure of this process, whatever its primary cause, is an essential feature of every form of mental illness. It follows from this that a refusal or inability to accept some or all of the demands of reality is characteristic of such patients, and it is this above all that separates them from their fellow men and provokes the hostility and antagonism which they still encounter (Stafford-Clark, 1971, orig. 1952, p. 12).

This description presumes the certitude of objectivity and reality against which mental illness is defined, and likely reflects the scientific medical basis of psychiatry itself. But morality, a historically subjective and decidedly unscientific phenomenon, is invoked in this definition of mental illness in the description of the hostile and antagonistic social response to it.

The issue of morality expressed in law is key to Foucault's genealogy of madness, as are the issues of the body and confinement. Lemert and Gillan provide an interpretation of this genealogy (1982, p. 72):

> *Madness and Civilization* [1973a] focuses on the isolation of madness from the generality of unreason by the intervention of the moral law in confinement and through the construction of asylums in which madness became a subjectivity through the experience of moral guilt. The mad are confined as the consequence of a moral perception. Madness, sloth, and poverty intermingle. The body of unreason is distinguished from the body of labor. In confinement, madness is isolated by breaking the classical unity of the soul and the body . . . Subjectivity . . . comes into existence by the subjection of the body in confinement. It is the internalization of moral subjection in the asylum. In the history of madness, the subjectivity of madness is the result of the subjection of the body.

Just as Foucault provides a description of techniques of response to the mad, psychiatrists might well be described as medical "technicians" of the mind. In confining the bodies of the mad, the study of the minds which inhabited them was spatially and temporally feasible. The doctors employed in the mental asylums began to develop a body of knowledge around the medical treatment of the mind, knowledge which would become recognized as psychiatry.

The splitting of the body and soul, key to the emergence of psychiatry itself, may have also played a perceptual role in the spoken thoughts of the mad. Cartesian epistemology had already enunciated the mind/body division and medicine had located death in the body. Death now had a new meaning as an embodied threat to self-existence. The image of death, a psychiatrist has argued, is key to the aetiology of mental illness (Lifton, 1975, p. 152):

> Psychiatrists have turned away from death, as has our whole culture, and there has been little appreciation of the importance of death anxiety in the precipitation of psychological disorder . . .
>
> The principle of impaired death imagery -- or more accurately, of impaired imagery of death and the continuity of life -- is a unitary theme around which mental illness can be described and in some degree understood.

This link between the image of death and mental illness has also been suggested by Ernest Becker (1973), who described schizophrenia as taking "the risk of evolution to its furthest point in man: the risk of creating an animal who perceives himself, reflects on

himself, and comes to understand that his animal body is a menace to himself" (p. 219).

(4) Interpreted this way, however, the schizophrenic can be seen as suffering from the truth (as opposed to delusions of truth) of his/her dualistic essence (Loy, 1990, p. 154), since death is a fact of life applicable to everyone. So while the separation of mind and body made psychiatry possible, the meaning of mortality posed by the new conception of death in medicine itself is a contributing influence to the mental illnesses which psychiatry sought to cure.

Psychiatry and the Murderer

The issue of insanity in determining guilt appears to have been a consideration for several centuries in western societies, well before the emergence of psychiatry in the early nineteenth century. Ruggiero, for example, demonstrates that decisions in the fourteenth century regarding the determination of insanity and the fate of the insane in murder trials in early Renaissance Venice were based on judgements made by the community, as opposed to those made by doctors. These decisions on "excusable" murder in the fourteenth century were made primarily by merchants and bankers, who comprised the ruling groups mandated to address criminal affairs. Such legal opinions were based not on medical knowledge, but rather on observations of the suspect in jail and the testimony of neighbours about the suspect's previous behaviour (1982, pp.

110-113).

In 1836 in France, a debate on the use of psychiatric concepts in criminal justice was well underway. The case of Pierre Riviere (who killed his mother, sister and brother) around this time provides evidence of the presence of medical testimony in a legal context, in three reports by medico-legal experts assessing Riviere's sanity (Foucault, 1982a). As in 14th century Venice, the testimonies of Riviere's neighbours in 19th century France were integral to the legal decisions made on the sanity of the convicted; by Riviere's time, these testimonies were mediated or "interpreted" by medical knowledge which had secured itself an authoritative position in the considerations of law. In criminal justice, doctors were no longer restricting their expertise to anatomical medicine and causes of death, but had expanded it to include knowledge about madness as an excusable "cause" of murder.

Cases diverted from the justice system to forensic institutions were not included in this study, but there is evidence of increasing psychiatric intervention with the law towards the second half of the 19th century in the murder cases studied. In these cases the legal question of insanity itself, which was significantly raised in British law in 1843 in the McNaughten case, would guide Canadian legal decision-making about culpability in

murder to the present. The unpopular insanity acquittal of Daniel McNaughten for the murder of the secretary to Britain's Prime Minister Sir Robert Peel provoked the House of Lords to ask the opinion of fifteen judges on the law relating to the insanity defence; fourteen of these judges held that the correct test was the ability of the accused to distinguish between right and wrong with respect to the particular act with which he/she was charged **(5)**.

The legal perspective of insanity reflected in the McNaughten case was not the only point of cross-section between psychiatry and the law. Other categories of mental "abnormalities" were used by psychiatrists in assessing prisoners before and after the determination of their sentences (East, 1927, p. 28). Seventy years after McNaughten, the Mental Deficiency Act of 1913 in England, for example, listed four classes of "defective" persons which defined the varieties of amentia (mental deficiency). All four categories see mental "illness" in relation to the individual's capacity to be socially competent and self-reliant, in short, the capacity to be a responsible citizen:

> **"Idiots**: . . . persons so deeply defective in mind at birth or an early age as to be unable to guard themselves against common physical dangers;
>
> **"Imbeciles**: . . . persons in whose case there exist from birth or from an early age mental defectiveness not amounting to idiocy yet so pronounced that they are incapable of managing themselves or their affairs, or, in the case of children, of being taught to do so;
>
> **"Feebleminded persons**: . . . persons in whose case there exists from birth or from an early age mental defectiveness not amounting to imbecility yet so

> pronounced that they require care, supervision and control for their own protection or for the protection of others, or in the case of children, that they by reason of such defectiveness appear to be permanently incapable of receiving proper benefit from the instruction in ordinary schools;
>
> **"Moral imbeciles**: . . . persons who from an early age display some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has had little or no deterrent effect." (in East, 1927, p. 29)

These early twentieth century classifications of mental deficiencies show not only how the psychiatric classifications, according to an act of the British Parliament, had expanded since psychiatry's emergence, but also how madness was then interpreted by the law. In its extreme, mental deficiency relates to a person's demonstrated inability to take care of him/herself physically -- that is, how mentally incapable the person is in protecting his/her body from physical danger, or more specifically, the death that is danger's limit.

Other categories of mental deficiency in the Act are described as relative to the classification which precedes it; thus, the categories possess a relational quality. Idiots are at the top end of the mental deficiency scale and thereby define the upper limits of amentia, a point from which all other categories directly or indirectly refer. Idiots, we can presume, were people who could not take simple personal safety precautions, a "deficiency" which made them vulnerable to certain dangers, such as maiming or death. In more modern terminology, idiots would be recognized as "mentally retarded" (Lunde, 1976, p. 111) or "developmentally handicapped," and they were unlikely to find

themselves in punitive detention. Indeed, in an introductory text to forensic psychiatry it is observed that "The idiot is not seen in prison. The imbecile is occasionally, but the majority of offending aments are feebleminded persons" (East, 1927, p. 29).

In law, however, psychiatric testimony was and still to a degree is compelled to provide assessments on the basis of the accused's ability to distinguish between right and wrong in the *committing* of the act; since 1992 in Canada, this determination is one of "criminal responsibility" rather than insanity. Insanity itself was not a psychiatric term, but a legal category which recognized the existence of individuals who were unable to be held responsible for their actions (Lunde, 1976, p. 107) -- the mad, as opposed to the bad individuals who commit criminal deeds with sane minds. Assessments of the accused's sanity were not, however, confined to the exclusive domain of psychiatry. The 1879 murder case of Joseph Hirtle in Nova Scotia, for example, documents such opinions from a variety of witnesses, including a justice of the peace who saw Hirtle as having "sense enough to know right from wrong . . . not a lunatic [but] contrary and strange" and a collection of neighbours who described him as legally sane but as "naturally stupid," "a kind of ignorant man" **(6)**. The 1874 case of Timothy Topping, who killed his wife and four youngest children at Woodstock, Ontario by cutting their throats, includes a report from the presiding judge who was so convinced of Topping's insanity that he disagreed

with the jury's finding of guilt in the trial. Witnesses at the trial had attested to Topping's severe financial despair (in a note to one of his surviving sons he explained, "I killed them and I done it to save them from a cruel world") and his suicide attempt immediately after the murders, which failed only on account of the forceful intervention of the surviving sons. In an attempt to spare the condemned man from execution, the judge argued that "the prisoner is not a fit subject for punishment in my opinion. He is undoubtedly a dangerous man but not a criminal. He must be restrained for his life but probably more as a patient than an offender" (7).

Psychiatrists were, of course, also solicited for their opinions on the mental state of the accused in Canadian trials by the end of the 19th century, although at times the presiding judges found some of this medical testimony a bit hard to swallow. For example, in response to the testimony of the experienced "alienist" (psychiatrist) Dr. Henry Howard in the 1881 murder trial of Hugh Hayvern -- which included assertions such as, "It is a purely physiological fact that the face is the index of the mind. Nature has written every man's mind upon his face, if we only learn to read it" -- the presiding judge stated in his jury charge:

> It is the opinion of enthusiastic scientists that insanity is on the increase. It is admitted by the physicians that [Hayvern] could discern between right and wrong. [His] convulsions have not been shown to have been epileptic fits. Dr. Howard is a man of great experience, but he is one of those scientific enthusiasts, whose mind on

> this subject is formed of many theories, and it is for them to decide whether it is corroborated by facts **(8)**.

Such discourse demonstrates a conflict between psychiatry and the law, which was to be repeated through the next century.

Accepting that some people were incapable of distinguishing between right and wrong and were thus not appropriate subjects for punishment, the lawmakers created the possibility of an insanity defence. However, psychiatric knowledge did not fit comfortably with the legal idea of insanity (Ryan, 1967, pp. 43-45), and the struggle to constrain psychiatry by this legal standard would lead a Canadian psychiatrist in the 1950s to complain,

> The psychiatrist's difficulties with the McNaughten Rules begin with the administration of the oath. He is sworn to tell the whole truth, but the rules, because of their concern only with the intellective aspects of mental function, prevent him from telling the whole truth about the accused's mental condition. If he attempts to tell of the disorganized emotional aspects which may have caused the crime, he may be sharply interrupted by the trial Judge and ordered to limit his comments to insanity as defined by the McNaughten Rules as laid down in section 19 [now 16]. He is in an impossible position -- sworn to tell the whole truth and prevented by the court from telling it. No wonder psychiatric evidence at times appears confused and contradictory! **(9)**

It appears as though the public could at times be amenable to the psychiatrists' perspective on mental illness and murder **(10)**, provoking petitions and letters to the different Ministers of Justice which attempted to influence a clemency for the condemned where mental illness was not considered legal insanity by the court, but where the public

felt execution was too extreme a penalty for the cases at hand. Following the 1889 murder trial of William Harvey Harvey in Guelph for the killing of his wife and two children, for example, a petition for Harvey's clemency signed by 3,270 Ontario residents noted,

> At the trial the plea of Insanity was raised, Drs. Joseph Workman, Daniel Clark, Charles C. Clarke and Stephen Lett, declared upon oath that, judging from all the circumstances in connection with the case, and from their long and varied experience in the specialty of Insanity, they had no hesitation in stating the said William Harvey Harvey was insane at the time the act was committed.

Discomfort with the McNaughten Rules was felt not only by the psychiatrists who were constrained by them, but by the public as well. This is seen in the Ontario petitioners' assertion that "Whilst not denying the correctness of the verdict as being within the strict limits of the law in such cases, your petitioners firmly believe that the mental condition of the said William Harvey Harvey, at the time of the homicide, was such as to render him irresponsible for his actions, although he may not have been insane according to the legal criterion propounded by the Courts in determining such cases" **(11)**.

Not all doctors, of course, were anxious to attribute acts of murder to the concept of insanity, legal or otherwise. In the late 19th century medical testimony also attempted to conform to such legal standards by distinguishing between mental illness which could cause legal insanity and moral deficiencies which did not amount to insanity. For

example, the doctor called upon to assess the sanity of Michael Lee on trial for the killing of his fiancee in Kingston, 1882, distinguished insanity from mentally and morally deficient behaviour in the following assertion:

> My conclusions are that Michael Lee though a man of low intellect -- having no proper moral sense, and deploringly ignorant, -- is nevertheless in a condition to distinguish between right and wrong, and that any peculiarities manifested, leading to the suspicion of Insanity, may be attributed to his low habits of life. I cannot therefore in consideration of all the circumstances believe him to be a truly Insane man.
>
> If a personal interview was necessary with you, I could show that we have many men of Lee's class in the Penitentiary undergoing various sentences. I have observed these men closely for years, and have declined excusing them from work or punishment. Results have proven the correctness of my opinion **(12)**.

Statements such as this demonstrate the integral connection of punishment to the mental state of the accused. If it can be determined that one knew what one was doing and that it was wrong, then it can be assumed that the logical consequences of the subsequent punishment can be understood by the person. The role of medical testimony in law was to clarify the mental state of the accused in view of this.

The legal requirement that the accused be "intellectually insane" in order to establish his/her diminished responsibility continued to cause friction for the alienists, and the discourse of justice officials demonstrates that the medical attempts to "challenge" the limits of the law on insanity were resisted from the courtrooms to the Ministry of Justice. For example, it is noted in a summary of the 1910 murder case of Robert Henderson in

Peterborough, Ontario to the Minister of Justice that "The medical testimony included the usual amount of discussion as to 'moral insanity,' as usual quite inconclusive, and if I may say so, beyond the mark" **(13)**. Such an observation makes it clear that while there was a role for psychiatry in murder trials where the accused's state of mind was in question, *the final judgement of insanity was a legal one.*

The alienists, however, continued to persist in advancing their own definitions of insanity in a legal context, aided in their challenge by a growing body of psychiatric knowledge. The shifts in this knowledge are seen in the 1925 case of John Pirie, convicted of killing his wife and two children in Ottawa, in a report by an examining doctor:

> There is a distinct mental disease called manic-depressive insanity; this used to be described as mania and melancholia; but it was found that the patients who have the mania at some period also have melancholia and those who have melancholia at some period have the mania . . . [E]very case of manic-depressive insanity will show periods of excitement one time, period of depression at another time and periods of normal mental health at other times.
>
> In the depression which I believe he had at the time of the crime he would be so under the influence of his melancholic ideas that his judgment would be warped to such a degree that he would not know what he should do or what he should not do. He would not be able to decide what was right and what was wrong **(14)**.

The trial judge differed in his opinion in this case. Apparently unswayed by this new medical interpretation of insanity, he stated in his charge to the jury: "[A] man may be as mad as a March hare on some subject, but if when he kills a man he appreciates the

nature and quality of the act, or/and if he knows such act were wrong the law does not excuse him" **(15)**.

Today, psychiatrists in Canada still have a role in the courts and remain bound to a similar legal definition of criminal responsibility. By the 1950s psychiatrists had also been integrated with the prison, although their role in this domain was soon supplemented by psychologists at the end of the decade. Psychologists would eventually take over this area of prison services related to the "treatment" of offenders, and in the 1990s psychiatry has a minimal presence in Canadian prisons. The influence of psychiatry in the prison remains, however, in the idea of the dangerous individual.

The Dangerous Individual

The idea of the dangerous individual was explored by psychiatry in the 19th century, in the notion of homicidal monomania – an entity described by Foucault as "a crime which is insanity, a crime which is nothing but insanity, an insanity which is nothing but crime" (1988, orig. 1978, p. 132). This union of delinquency and mental illness in a "forensic psychiatry" marked a contrast to the late 18th century questioning of the co-confinement of the mad and the bad; efforts to separate delinquency from mental illness appear to have been weakened by the new currency of psychiatric knowledge in

the administration of criminal justice.

Foucault argues that the psychiatric foothold in the issue of crime became desirable because it was "a modality of power to be secured and justified" (1988, p. 134). The exclusion of the mad in lunatic asylums had afforded medicine an opportunity to study the behaviours of the confined "patients," and to develop a body of knowledge around these observations. The later intervention of psychiatry into criminal justice gave psychiatry a role in a domain outside of medicine, by applying the knowledge of the mind to the adjudication of law. By the 19th century, forensic psychiatric knowledge had moved beyond the matter of legal culpability of the accused to the idea of the accused's dangerousness, or potential to commit other harmful acts.

In Foucault's analyses, this particular development in psychiatry and the law has broad implications. He notes (1988, pp. 149-150):

> . . . has not something more been introduced into the law than the uncertainties of a problematic [psychiatric] knowledge -- to wit, the rudiments of another type of law? For the modern system of sanctions -- most strikingly since Beccaria -- gives society a claim to individuals only because of what they do. Only an act, defined by the law as an infraction, can result in a sanction, modifiable of course according to the circumstances or the intentions. But by bringing increasingly to the fore not only the criminal as author of the act, but also the dangerous individual as potential source of acts, does one not give society rights over the individual based on what he is?

The discernment of "what" a person is in this context, of course, occurs through the

deployment of psychiatric knowledge in conjunction with some kind of individual act or behaviour which attracts outside attention. The "dangerous individual" is constituted by different knowledges which attempt to explain that person's character through her/his words and actions.

The point of defining a person as a dangerous individual was to enable the predictive capacities of psychiatric knowledge. The prediction of future dangerousness has important social policy implications, as Foucault has suggested. Instead of confining people for what they *do*, criminal justice is then open to confining people for what they *might do* again. For its part, however, clinical psychiatry in the late 20th century has not relied as heavily on its own knowledge in assessing dangerousness as it has on the knowledge produced by the social sciences. In one psychiatrist's study of homicidal threats (Macdonald, 1967), for example, only one of ten listed items to be used in the psychiatrist's "emergency assessment of homicidal potentiality" is based specifically on clinical psychiatry (pp. 478-480). Indeed, a 1994 Canadian publication called **The Violence Prediction Scheme** (Webster, et al.) credits the research contributions of sociology and psychology, in addition to psychiatry, for the possibilities of a predictive tool in assessing dangerousness. These examples show that while psychiatry still has a presence in the discourses on the dangerous individual, its authority has been somewhat

diluted.

Notwithstanding Foucault's warnings about social policy on preventive detention, there is an appealing quality to the idea of predicting future behaviour because of the physical threat of dangerous actions. The possibility of circumventing or preventing the tragedies of the future appears to be a desirable goal for all, and it is likely that such prediction schemes will gain wide favour and currency. Indeed, given the policy of conditional release, the practice of prediction with respect to the future behaviour of convicted violent offenders has already been established. The threat to personal safety is a concern of many Canadians, in part because of the distorted view of the magnitude of violent crime in our society, but also because we depend on our physical bodies for existence as individuals. Danger implies the exposure to possible injury, pain or loss of limb or life and is thus a threat to our bodies. The current public clamour for postwarrant preventive detention, fewer conditional releases and longer prison sentences indicates a concern with the potential danger posed by the already convicted.

In the current public climate, most of the concerns around dangerous individuals are directed toward sex offenders. The sex killings of children, youth and women in Canada by strangers in the past 100 years have been characterized in public discourse as

particularly heinous and atrocious. The danger of these crimes relative to other kinds of killings seems to relate to the apparent randomness in prey selection, and the predatory sexual component of the murders themselves. The particular danger posed by sex offenders was "officially" acknowledged by the Canadian government in 1948, when it ordered a royal commission to study the Criminal Law Relating to Criminal Sexual Psychopaths. In part, this was a response to concerns expressed in public discourse about the dangers posed by sex offenders. The minutes of the organizational meeting of this royal commission suggested that "[t]here is a considerable public outcry that such people should be put away pretty permanently" **(16)**.

The archival documents relating to this royal commission record the efforts of doctors and lawyers to ascertain the meaning of psychopathy and how it related to sexual deviancy. The commissioners were also very interested in soliciting psychiatric knowledge about the treatment prospects for sex offenders, in order to inform their recommendations on a criminal law addressing the problem. The psychiatric classification of psychopathy, however, was noted to be insufficient in defining the dangerous individual, as seen in the Deputy Commissioner of Penitentiaries' claim that

> You will find if you refer to qualified people who have given quite a lot of study to this sort of thing, that they can recognize so many characteristics which would indicate that a man is a psychopath. Still others may say, "But you do not find those." In other words, all the symptoms may not be present in the same degree in any individual, but

still judging them socially they are dangerous (17).

The possibilities of psychiatric therapy were also seen as being limited, in part because of the disinterest of psychiatrists in treating sexual psychopaths (who were seen by many as untreatable) and in part because of the vulnerability of the psychiatrists to deceit, strategically positioned as they were to influence decision-making on the release prospects of offenders. In short, the authority of psychiatry in public policy around dangerous sex offenders had no more potency than that of Commission witnesses from law and law enforcement professionals.

The notion of dangerousness has changed somewhat since the psychiatric designation of homicidal monomania in the 19th century. Perhaps most significantly, the authority of psychiatry has been gradually undermined by other domains of power/knowledge in the area of dangerousness. While modern "dangerousness" emerged from the psychiatric idea of homicidal monomania, it was not long before the agents of criminal justice made the argument that someone could be dangerous and not be mentally ill. The scope of behaviours included in this now dominating concept of risk, of course, has widened, and in criminal law this designation relates to an application of the crown to have an individual detained indefinitely on the basis of his/her repetitive and persistently aggressive behaviour. "Dangerous offenders" (C.C.C. Part XXIV) in Canada today, however, are not murderers (who must serve life sentences anyway) or homicidal

monomaniacs, but individuals convicted of other violent crimes whose behaviour patterns are deemed to pose such future dangers to society as to warrant their indefinite detention **(18)**.

The power of the legal designation of "dangerous" offenders has demonstrated the capacity to extend beyond the parameters of knowledge set by psychiatry. This can be seen in the case of Garry David in Australia, which shows how dangerousness can also be *made* to fit the category of mental illness, even if such a fit is denied by psychiatry itself. Garry David, due for release from a sentence for a shoot-out with the police which left a woman a paraplegic, was the subject of a government attempt to detain a prisoner after his sentence expiry date. A summary of David's life was provided in this journalistic account (in Craze and Moynihan, 1994, p. 33):

> Appallingly treated as a child -- he was sexually abused by his father, and by his own account, once crucified on the wall. He was taken from his alcoholic mother when he was five and put in an institution. He committed his first crime at 11, and between 1966 and 1982 was convicted more than 70 times. He [had] spent all but nine months of the past 20 years in prisons or institutions.

Special legislation to detain him indefinitely because of his "dangerousness" was passed, putting the problem of David in the lap of the mental health professionals who had argued that they could not help him. As Glaser (1994, p. 46) noted, "Psychiatry, often an ally of the state in this sort of endeavour, became, in Garry David's case, one of the major

casualties," since the state's response to psychiatry's resistance to the enterprise was for the state to "take upon itself the authority to decide the nature and scope of psychiatric knowledge."

This Australian case shows how psychiatry was used to further a carceral mode of response to dangerousness, even when psychiatry itself admitted that it had nothing to offer Garry David in the way of treatment. The problem of dangerousness, in this particular "solution," was not really addressed, much less solved, provoking Glaser's wry commentary on the matter:

> What would a man want who hated people but who loved birds, who craved comfort but who avoided intimacy, who feared crowds but wanted an audience? There is much to be gained in stating the obvious solution to his 'dangerous[ness]': a comfortable home, hundreds of kilometres from nowhere, with an aviary and a radio-transmitter. If this sounds bizarre, then it is at least as pragmatic as the solution which the state seemed intent on imposing: incarceration in an institution by psychiatrists who did not want him as a patient, having treatment which he did not need for an illness which he did not have (1994, pp. 48-49).

In this case, the "psychiatrization of criminal danger" (Foucault, 1988, p. 128) amounted to psychiatry's claim to some authority in designating the dangerous individual, not to claim an authoritative cure for the individual's dangerous behaviour. Indeed, the notion of dangerousness itself is somewhat foreign to the responsive practices of both law and psychiatry to "dangerous" acts. As Foucault notes (1989, p. 174), "The law has never pretended to punish someone because he is "dangerous," but because he was a criminal.

But in the realm of psychiatry, the question isn't any more meaningful: as far as I know 'danger' is not a psychiatric category, nor is the concept of 'rehabilitation'."

While a definitive notion of dangerousness may be missing in psychiatric and legal discourses, the idea of the dangerous individual can transverse both of these discourses in a construction of the murderer. For example, in 1932 in Joliette, Quebec, the trial judge in one case wrote to the Minister of Justice:

> Albert Preville is a born murderer. The murder he committed is one of the most atrocious in our criminal annals; and his crime was coldly planned and premeditated. Albert Preville is far from being insane, quite to the contrary; but he is a coward and as such has become almost a genius in the art of hypocrisy and dissimulation. Should Preville be interned as insane he would kill even in the asylum, and should he succeed in ever escaping woe be to those who brought about his conviction . . . Preville is one of the most dangerous men in this country **(19)**.

Preville's crime was situated in the context of a "love triangle," in which he and his younger brother were rivals "for the love of the woman" **(20)** he killed. It was apparently ascertained that he was not legally insane, thus reducing the influence of psychiatry in the juridical response to the crime which was, of course, to execute him.

In the Preville case, as in the David case in Australia, the idea of dangerousness stood apart from the discourse of psychiatry which had earlier given it expression in criminal justice in the form of homicidal monomania. The label of the "dangerous offender" has

recently acquired a momentum of its own, conforming to neither psychiatric nor legal expectations. Since a conviction of first or second degree murder already results in a sentence of life imprisonment, murderers may be detained indefinitely or until the end of their lives, and thus the indeterminate sentence provisions sought in dangerous offender applications are not necessary. The attempts to have Paul Bernardo declared a dangerous offender, in spite of his two first degree murder convictions in Ontario in 1995, indicates that the designation bears more symbolic weight than the present law recognizes.

Attempts to define offenders as dangerous may be seen as a strategy of preventing murder by indefinitely confining those whose past behaviours indicate a future potential to kill. It should be noted, however, that crown applications for the dangerous offender status are selective, and reflect particular biases. For example, the status was successfully applied in 1995 to Lisa Neve, a young woman in Alberta who had assaulted several customers in her work in the sex trade. However, the status has not yet been applied to men who have repeatedly stalked and attacked their estranged partners, even though this activity often culminates in murder.

In more recent times, the idea of dangerousness has been supplanted by the notion of risk, which gainsays the question of prediction -- psychiatric or otherwise. In part, this is

because policy-makers have found it difficult to define and designate the dangerous individual in order to circumscribe the person according to "what he/she is" instead of to "what he/she does." For example, a committee struck in England in the mid 1970s to consider the problem of releasing persistently violent men chose to describe acceptable and unacceptable risks rather than to define dangerousness itself: "There is no such psychological or medical entity as a dangerous person and . . . dangerousness is not an objective concept. Dangers are unacceptable risks" (in Nash, 1992, p. 339). The problem of how to rationalize the confinement of the dangerous individual who cannot be medically or legally defined is displaced by the problem of how to determine the risk that entire cohorts pose to the physical safety of the population at large.

Castel argues that newly developing preventive strategies of social administration "dissolve the notion of a *subject* or a concrete individual, and put in its place a combinatory of *factors*, the factors of risk" (1991, p. 281). In this innovation, the face-to-face relationship between psychiatry and its "clients" is supplanted by a kind of mathematical calculation of risk based on abstract factors, whereby "[t]he examination of the patient tends to become the examination of the patient's records" (pp. 281-282). Indeed, a Risk Assessment Guide in the Canadian **Violence Prediction Scheme** (Webster, et. al., 1994, p. 36) gives numerical weights to twelve factors which can be

retrieved from the male subject's clinical records, only three of which would presumably be based on some kind of personal interview in the subject's past **(21)**.

Predictions of dangerousness have been criticized as being "more likely wrong than right," with errors largely resulting from "the exercise of excessive caution" (Baker, 1993, p. 528). One British study in the 1970s has demonstrated that for every true positive in the prediction of violence there were three false positives (Nash, 1992, p. 340). Such observations speak to the problems inherent in current risk assessment tools, and perhaps with the enterprise itself of predicting future behaviour. In this, the role of psychiatry remains a part of the discourse on dangerousness despite the fact that "psychiatrists cannot predict dangerousness to others" (Menzies, 1989, p. 187). This role, however, is becoming less pronounced as psychology and psychometry begin to dominate this discourse as it moves from predicting dangerousness to risk assessment. Given the public trepidation with the conditional release of offenders, particularly murderers, risk assessment will likely assume a high priority in criminal justice practices.

Medical Knowledges and the Construction of the Murderer

The influence of medical knowledge in the construction of the murderer and the response to murder has been both epistemological and strategical. A significant

epistemological implication is the emergence of a medicine of the mind, psychiatry, whose object is mental illness and the individual. Psychiatry's intersection with criminal justice reveals its strategic capacities in the construction of the murderer, by calling into question the legal assumptions about criminal culpability and the concomitant issue of punishment in the context of a medical science of the mind. The murderer is no longer just the man who has been proven by legal "facts" to be the author of the crime, but he can also be the man with a disturbed mind; using the context of mental illness, psychiatry helps to reshape the image of the murderer.

The texture added by psychiatry to the image of the murderer is noticeable in the critiques of psychiatrists on the limitations of the McNaughten Rule in Royal Commission hearings. These critiques were also considered by lawyers, one of whom stated

> The McNaughten Formula has been criticized on several grounds, but principally because it treats criminal responsibility as a matter of intelligence and not of the will and emotions. Psychiatrists point out that insanity attacks the will and emotions more frequently than the intellectual powers and that insane people, although capable of discerning right from wrong, may nonetheless be deprived of all control over their actions by reason of impulses beyond their powers to resist. **(22)**

The knowledge of psychiatry expressed in these words expands the territory of what can be known about the mind. The accused murderer is not only imbued with a depth of intellect, but with capacities of will and emotions as well.

The expression of psychiatric talk in this history of responses to murder marks its fluctuating influence in the construction of the murderer. Psychiatrists seemed eager enough to provide their opinions when called upon to do so in specific cases, although the judges and justice officials seemed more inclined to skepticism given their role in upholding the law and its integrity. The voices of psychiatrists, however, were countenanced by criminological positivism and therefore were not so easily dismissed. The decline of psychiatric influence in criminal justice may have begun with the reluctance of psychiatrists to work within federal penitentiaries. This was noted as a problem by the Commissioner of Penitentiaries, in a meeting with the members of the Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths in 1954:

> At St. Vincent de Paul [Penitentiary] we have not been able to find anybody who is prepared to take on this work . . . Unless a man has some sort of call for that kind of work he is not too keen to take it on . . . The result there is, of course, that when psychiatric treatment is needed, or when psychiatric examinations are needed, we make arrangements to employ an outside psychiatrist **(23)**.

In avoiding employment within the prison, psychiatry may have inadvertently relinquished a domain of power to psychologists, who began working in federal penitentiaries in the 1950s.

Whatever the role of psychiatry in criminal justice in the past, it seems clear that it

still bears some influence on the system of the present. Modern psychiatry remains involved in pre-trial assessments of people charged with murder, and lends its knowledge to the criminal justice quest of predicting the future behaviour of people whose "dangerousness" has not been defined in either law or psychiatry. Notwithstanding its elusive definitions, the idea of the dangerous person has been an important factor in the relationship between psychiatry and the law, from homicidal monomania to risk assessment. Psychiatry has not only addressed itself to issues of justice and mental capacity in its intervention with the law but has acted as a physician of the social body, through a "preventive medicine" which attempts to predict the human sources of physical danger. The recent domination of these areas of expertise and practice by psychology and psychometric strategies, however, illustrates the waning influence of psychiatry on criminal justice intervention.

ENDNOTES

1. Dr. Howard was credited with having been the superintendent of St. John Lunatic Asylum for fourteen years and the superintendent of the Longue Pointe Asylum for four years. In capital case file Hugh Hayvern, RG 13, Volume 1418, the National Archives of Canada.

2. Exhibit 3 of the transcripts of meetings held by the Royal Commission on the Law of Insanity as a Defence in Criminal Cases 1952-1956. RG 33/130, Public Hearings Ottawa, the National Archives of Canada.

3. Wilf (1989) notes that the explanations offered for the resistance to dissection, such as the religious/spiritual views of the culture offering possible revival of the dead, are not adequate to explain the horror of dissection at the time. Alternatively, he argues that "Rather than being rooted in either a religious mentality or a new-found sentimentalism, this trepidation was more visceral than ideological. It involved creating a mental image of dismemberment" (p. 510).

4. West (1992) argues that identity is "fundamentally about desire and death. How you construct your identity is predicated on how you construct desire and how you conceive of death" (p. 20). This poses a dilemma for psychiatric assessment of the schizophrenic who, on the one hand, is deemed mentally ill because he/she cannot discern reality but whose problem, on the other hand, is said to be caused by an entirely realistic appraisal of the implications of his/her corporealness.

5. This historical account of the genesis of the M'Naughten rules is taken from a treatise by W. C. J. Meredith, Q. C. Montreal, provided to the Royal Commission on the Law of Insanity as a Defence in Criminal Cases (1952-1956), and listed as Exhibit 2. RG 33/130, Volume 1, Public Hearings Ottawa file, the National Archives of Canada.

6. From the transcript of the trial of Joseph Hirtle in the Supreme Court, Lunenberg, Nova Scotia, Monday, June 2nd, 1879. RG 13, Volume 1416, capital case file Joseph Hirtle, the National Archives of Canada.

7. Letter to the Hon. Secretary of State, Ottawa from Adam Wilson, dated at Toronto on April 13, 1874 and trial transcript. RG 13, Volume 1411, capital case file Timothy Topping, the National Archives of Canada.

8. Transcript of the trial of Hugh Hayvern for the murder of another prisoner while incarcerated in St. Vincent de Paul Penitentiary, 1881. RG 13, Volume1418, capital case file Hugh Hayvern, the National Archives of Canada.

9. From a treatise by Dr. G. H. Stevenson provided to the Royal Commission on the Law of Insanity as a Defence in Criminal Cases 1952-1956, and listed as Exhibit 3. RG 33/130, Volume 1, Public Hearings Ottawa file, the National Archives of Canada.

10. Public opinion can also be diametrically opposed to psychiatric opinion, as was the case in the1913 Wagner murder in Germany where the public wanted the killer executed instead of being committed to a mental asylum (Bruch, 1967, p. 693).

11. From The Petition of 3,270 Residents of the Dominion of Canada for the Commutation of the Sentence passed on WILLIAM HARVEY HARVEY By the Honorable Mr. Justice Street, at the Wellington Fall Assizes, 1889. RG 13 C1, Volume 1426, Capital Case file William Harvey Harvey, Vol. 1, the National Archives of Canada.

12. Letter to the Hon. Sir A. Campbell, Minister of Justice, Ottawa from Dr. Lavelland (name is unclear on document) dated on October 28, 1882 at Kingston, Ontario. RG 13, Volume 1419, Capital Case file Michael Lee, the National Archives of Canada.

13. From the Memorandum for the Honourable Acting Minister of Justice, dated June 8th, 1910 in Ottawa. RG 13 C1, Volume 1457, Capital Case file Robert Henderson, the National Archives of Canada.

14. From the Memorandum for the Honourable The Minister of Justice from Harvey Clare, M.D., dated at Ottawa, on March 16th, 1925. RG 13, Volume 1533, Capital Case file John Buchanan Pirie, the National Archives of Canada.

15. Judge's charge to the jury in the trial of J. B. Buchanan. RG 13, Volume 1533, Capital Case file John Buchanan Pirie, the National Archives of Canada.

16. From the Report of Organization Meeting held in the Supreme Court Bldg., Ottawa, commencing Monday, March 29, 1954, p. 10. The Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths, RG 33/131, Volume 1, the National Archives of Canada.

17. Testimony of Dr. Louis Phillippe Gendreau, Deputy Commissioner of Penitentiaries, at a meeting of the Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths, March 30, 1954. RG 33/131, Volume 1, the National Archives of Canada.

18. Part XXIV of the Criminal Code of Canada addresses dangerous offenders, who are convicted but not yet sentenced for a serious personal injury offence, as defined in s. 752 as

    "(a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving

    (i) the use of attempted use of violence against another person, or

    (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another

person, and for which the offender may be sentenced to imprisonment for ten years or more, or

(b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault)."

Applications made under this Part must establish to the satisfaction of the court (in s. 753) that the offence fits the above definitions of serious personal injury offences and that "the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing

(a) (i) a pattern of repetitive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his behaviour,

(ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseen consequences to other persons of his behaviour, or

(iii) any behaviour by the offender, associated with the offence for which he has been convicted, that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint, or

(b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his conduct in any sexual matter including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses and a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses.

19. From the Memorandum for the Honourable the Minister of Justice, from the Deputy Minister of Justice, January 3, 1933, Ottawa. RG 13, Volume 1577, Capital Case file Albert Preville, the National Archives of Canada.

20. In a letter to Mr. W.W. Watson, Inspector, i/c Finger Print Section, Royal Canadian Police, Ottawa from R. Lasnier, Detective-Sargeant, i/c C.I.D., the Police Provinciale Division de Montreal dated at the Palais de Justice, Montreal on November 4, 1932. Capital case file Albert Preville (see supra note 20).

21. These factors are the psychopathy checklist score, a DSM-III Diagnosis of Personality Disorder and a DSM-III Diagnosis of Schizophrenia. The remaining nine factors are: elementary school maladjustment, age at index offence, residence with both parents to age 16 (except for death of parents), failure on prior conditional release, Cormier-Lang criminal history score, marital status, victim injury for index offence, history of alcohol abuse, and female victim for index offence.

22. Exhibit 2 (Treatise by Mr. W.C.J. Meredith, Q.C., Montreal), "Insanity as a Criminal Defence: A Conflict of Views." RG 33/130, The Royal Commission on the Law of Insanity as a Defence in Criminal Cases, 1952-1956.

23. Testimony of Major-General R. B. Gibson, Commissioner of Penitentiaries to the Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths, March 30, 1954. RG 33/131, Volume 1. The National Archives of Canada.

Chapter 6
POPULAR CONSTRUCTIONS OF MURDER AND THE MURDERER

THE JUDGE (*reading*): I continue: did you steal?
THE THIEF: I did, I did, my Lord.
THE JUDGE (*reading*): Good. Now answer quickly, and to the point: what else did you steal?
THE THIEF: Bread, because I was hungry.
THE JUDGE (*he draws himself up and lays down the book*): Sublime! Sublime function! I'll have all that to judge. Oh, child, you reconcile me with the world. A judge! I'm going to be the judge of your acts! On me depends the weighing, the balance. The world is an apple. I cut it in two: the good, the bad. And you agree, thank you, you agree to be the bad! (*Facing the audience*) Right before your very eyes: nothing in my hands, nothing up my sleeve, remove the rot and cast it off. But it's a painful occupation. If every judgment were delivered seriously, each one would cost me my life. That's why I'm dead. I inhabit that region of exact freedom. I, King of Hell, weigh those who are dead, like me.

(Jean Genet, **The Balcony**, 1958)

Darkness, disaster! How the world fed on it. In the war to come [news] correspondents would assume unheard of importance, plunging through flame to feed the public its little gobbets of dehydrated excrement.

(Malcolm Lowry, **Under the Volcano**, 1947)

We got the bubble-headed bleach-blonde who comes on at five
She can tell you 'bout the plane crash with a gleam in her eye
It's interesting when people die -- Give us dirty laundry.

(D. Henley & D. Kortchmar, **Dirty Laundry**, 1982) **(1)**

This chapter is about popular culture, as reflected in literature and the mass media, and the public appetite for stories about death and crime. The opening examples reflect their authors' questioning of morality in the public conscience, in the mass media and in the seats of judicial power. Death figures prominently in these thoughts about modern

culture, both in the ways we think about morality and in our aesthetic responses to violent premature loss of life.

The issue of morality in the case of murder seems clear cut, as the act of murder itself is widely disapproved. But if we widen the context in which murder is considered, the issue quickly becomes complicated. This can be readily seen in the decision of a small American company in 1992 to publish trading cards featuring serial killers and mass murderers. Publicity on this venture provoked public discussion over the moral ethics of exploiting individual pain and misery for economic profit. Victims' advocates argued that the cards glorified murder and murderers, and that the cards would reopen the memories suffered by the victims' families. In the face of such controversy, it is noted in the **Globe and Mail** (1992) that:

> The publisher and one of the writers strongly defended the series on the 55 different killers. They consider their work identical to news reports on the killers found in newspapers and magazines and on television.
>
> "I think *Newsweek* is much more lurid than anything we publish," said Dean Mullaney, an owner of Eclipse Enterprises in Forestville, 100 kilometres north of San Francisco. *Newsweek* featured Mr. (Jeffrey) Dahmer on its cover this week. **(2)**

This observation is difficult to refute when the aspect of economic profit is the subject of scrutiny. The news media may be confronted by the question of the moral ethics of profiting from others' miseries. And notwithstanding some important arguments about freedom of expression and public accountability, the very existence of the news media is

less dependent upon these abstract rationales of democracy than it is on the immediate concrete demands of private economic ownership.

Another related issue is raised when we consider the cultural meaning of the killer trading cards in the solicitation notices sent by the company to retailers and wholesalers, "which speaks of 'lurid, tantalizing, and sensationalistic' cards and promises that 'the fraternity of killers includes names mothers scare their children with'." **(3)** The message of the modern folk devil, thanks to the mass media and modern technology, is no longer limited in its transmission to personal contact between people but is relayed to "much larger audiences and with much greater dramatic resources" (Cohen, 1987, p. 17). While the difference between the killer trading cards and the news media seems to relate to the form or medium of the message, the message itself -- that there lurks among us the stench of evil in a human form -- appears relatively unchanged.

The moral ethics of killer trading cards illustrates a conundrum of the murder/mass media nexus that has been a recurring feature of public debate. The controversy over public executions in Canada at the end of the 19th century, for example, demonstrates how the mass viewing of death was problematic for some critics, whose protests helped to change execution practice from an open spectacle to a closed affair. A more recent

version of this controversy is found in the unsuccessful attempt of a San Francisco PBS station in 1992 to secure the legal right to broadcast the execution of Robert Alton Harris. The examples of "killer trading cards" and public executions reveal a particular discomfort with the mass "celebration" of death, even while death is a fascinating subject for many people. This idea will be explored early in the chapter.

The frequent presence of the murderer in the mass media also makes it possible to review the images of this folk devil as a media construction. This will be considered later in the chapter, in a discussion of depictions of murder and the murderer in the print and electronic media. Newspaper articles used in this chapter were largely found in the sampling of capital case files in the National Archives, with current articles pertaining to murder selected from Canadian newspapers when an attempt to grapple with the "truth" of this particular crime was evident in them. The images of the murderer will be further examined in the context of the responses to murder which judge the act and punish the actor. Media constructions of the murderer are a particular kind of talk on murder, since they include audio-visual representations in addition to print. The mode of presentation, it will be argued, adds an additional texture to the image of the murderer.

The Construction of "Truth" in the Media

Neil Postman argues that "definitions of truth are derived, at least in part, from the character of the media of communication through which information is conveyed" (1985, p. 17). Different media direct us to organize our minds and process our experiences, in particular ways which are not always obvious. There is a bias to a medium which "sits heavy, felt but unseen, over a culture" (1985, p. 18). He explains this argument by using different cases of truth-telling to demonstrate how different epistemologies can influence the concept of truth. One case is that of a rich oral tradition of a tribe in western Africa, where disputes were solved by a chief who searched his mental repertoire for a proverb which spoke to the situation at hand. He points out that the reliance on sayings for resolving disputes in the modern western world is reserved mostly for the guidance of children. Juries, for example, are not expected to render a verdict in a court of law in the form of a proverb -- a "to err is human but to forgive is divine" response would be ridiculous in our system of truth-telling. The modern courtroom is print-based, where written materials "define and organize the method of finding the truth" (p. 19), to which the oral tradition evident in practices such as witness testimony must conform. Another case is exemplified in Socrates' trial in 399 B.C., at which he apologized for not having a well-organized speech to present his case. The apology contrasted with the prevailing Athenian method of rhetoric -- the art of persuasion -- which demanded an orderly

progression of arguments in the form of "spoken writing" (Postman, 1985, p. 22). To the early Greeks, rhetoric was the truthful manner and the proper means by which to discover the "right opinion." Each of these examples demonstrates how different epistemologies influence perceptions of truth in the realm of justice, depending on the method or medium of expression.

This assessment of the construction of truth in the media harkens back to Marshall McLuhan's **Understanding Media** (1964), in which he argued that different media of expression require different ways of knowing. He explains (1967, pp. vii-ix):

> The art and poetry of Zen create involvement by means of the *interval*, not by the *connection* used in the visually organized Western world. Spectator becomes artist in oriental art because he must supply all the connections . . .
>
> By Plato's time the written word had created a new environment that had begun to detribalize man. Previously the Greeks had . . . memorized the poets . . . With the advent of individual detribalized man, a new education was needed. Plato devised such a new program for literate men. It was based on Ideas . . . [C]lassified wisdom took over from operational wisdom and the tribal encyclopedia.
>
> Now, however, in the electronic age, data classification yields to pattern recognition . . . It is a world not of wheels but of circuits, not of fragments but of integral patterns.

McLuhan argued that the media could be conceptualized as "hot" or "cool" depending on how low (hot) or high (cool) the participation or completion required by the audience. Hot media is of high definition and does not leave much to the audience to fill in (for example, television), whereas cool media is of low definition and requires more to be

filled in (for example, the telephone) (1967, p. 36).

A history of communications might readily show a gradual shift in ways of knowing as media forms change from being predominantly cool to substantially hot, with television and film accounting for a significant influence of this shift. In general, the transition from oral to written communication in Western cultures took several centuries to move beyond the limits of a literate elite to a broader literacy of the masses. Indeed, it took until the beginning of the nineteenth century and the development of a mass-produced, cheap press for the idea of universal literacy to overcome the concern among political, economic and religious men of authority over the prospect of literate masses. The incumbent authorities of pre-mass literate societies feared that a reading populace would upset the "natural order" of society by, among other things, "teaching [the lower orders'] heads to reason rather than their hands to work" (Leps, 1992, p. 71).

In the examples used in this chapter, the representations of the murderer in the different media require some sensitivity by the reader to each medium's constraints, and the ways of knowing necessary for the audiences to connect to the images or ideas contained within the text. This is demonstrated in a study of film literacy in Africa, where a researcher gained an unexpected insight in his attempt to use film in teaching

natives to read (in McLuhan, 1969, pp. 48-50). A film was presented to a group of villagers about sanitation techniques in the disposal of rubbish, in which the demonstration of methods was deliberately slow, methodical and thus presumably clear in its purpose. Questioned about what they saw in the film, the natives immediately responded that they had seen a chicken, which had in fact appeared for only a second of the five minute film. The researcher commented (in McLuhan, 1969, p. 50):

> [W]e found out . . . that a sophisticated audience, an audience that is accustomed to film, focuses a little way in front of the flat screen so that you take in the whole frame . . . You've got to look at the picture as a whole first, and these people did not do that, not being accustomed to pictures. When presented with the picture they began to inspect it, rather as the scanner of a television camera . . . and they hadn't scanned one picture before it moved on, *in spite* of the slow technique of the film.

This example shows how audience participation with a medium requires a particular way of knowing which affords access to the meaning or message presented in the medium. Similarly, the print media differs from audio-visual media in its representation of murder and the murderer, in the technique of participation required by the audience to perceive this representation. With murder -- where death figures prominently -- the level of participation required to engage the viewer with the representation requires a variable *involvement* of the audience with murder and the murderer. This results in perspectives which are relatively detached to relatively integrated, depending on how hot or cool the medium of representation is or the experience of the viewer. An examination of the response to murder may then consider how active or passive involvement with media

representations affects individuals' overall assessments of the murderer, as well as their "techniques of knowing."

The questioning of the kind of involvement required of the message receiver as a "spectator" to an event leads to the significant, albeit understated, issue of aesthetics in media representations of murder. Associated with an area of German philosophical inquiry relating to the nature of the beautiful, the use of aesthetics took on macabre associations in the English language through early 19th century romantic writing such as "On Murder Considered as One of the Fine Arts" by Thomas deQuincey in 1827. In the **Aesthetics of Murder** (1991) Joel Black suggests that once we seriously consider the problematic role of aesthetics in western culture:

> . . . we may begin to sense -- although not without resistance -- the extent to which our customary experience of murder and other forms of violence is primarily aesthetic, rather than moral, physical, natural, or whatever term we choose as a synonym for the word *real*. Only the victim knows the brutal "reality" of murder; the rest of us view it at a distance, often as rapt onlookers who regard its "reality" as a peak aesthetic experience (p. 3).

While close family members and friends of murder victims might object to their experiences of particular murders being viewed from such a perspective, Black's point relates to the vast majority of others to whom such an experience is distant.

There seems to be something about murder which fascinates people, as the numerous

narratives of crime attest. Foucault argues that the very existence of these narratives "[magnifies] the two faces of murder; their universal success obviously shows the desire to know and narrate how men have been able to rise against power, traverse the law, and expose themselves to death through death" (1982a, p. 206). When placed in the context of Black's approach to understanding murder, this argument could be expanded to include the idea that there is an aesthetics to acts of power that can be explored at the limit of death. "Aesthetics" was the study of sense experience generally in its Greek origins, until the term was appropriated by German philosophy in the mid-18th century to refer more specifically to questions on our judgments of taste and beauty (Flew, 1979, p. 6). The notion of aesthetics in relation to power, then, can refer either to the animal visceral responses to acts of power or to the analytical assessments of its form in the context of "taste." This notion of a sensory element to power is not new, but it is not so explicitly expressed in accounts and narratives of murder. Because murder and its punishment play with power at the limits of death, the relations of power are more sensational and dramatic.

The reception of aesthetics in western cultures may be seen as a reflection of the conflict between aesthetics and morality. Black argues (1991, p. 4):

> Because our aesthetic sensibility often conflicts with our aesthetic experiences, we create a moral "reality" that is, in fact, our supreme fiction. This grand artifice or

> ideology of moral reason can only maintain itself as Truth at the continued expense of the individual's own subjective feelings, his or her aesthetic and erotic responses to the world.

Thus, murder is as much a cultural problem as it is a problem of law or the human sciences **(4)**. The newspaper coverage of the 1910 trial of Robert Henderson in Peterborough, Ontario lends some credence to this assertion. This particular story of murder and criminal justice is conveyed with a theatrical air of morality in the newspaper coverage by **The Daily Review**, although the descriptions of the demeanor of the convicted youth appear to be more visceral in expression:

> Henderson stood in an easy, confident attitude when the sentence [of death] was given -- not an attitude of defiance or overconfidence -- for, while he seemed cool and undisturbed, his demeanor was not impudent or forced.
>
> . . .When the door was opened he stepped out of the [prisoner's dock], and, with the turnkey following him, walked down the short corridor towards the cells. He didn't falter or reel under the awful blow that had often prostrated men of iron nerve, and a reserve of feeling under trying circumstances bred from habitual appearance in the dock and the receiving of heavy penalties of the law. **(5)**

There is more than news reporting reflected in this commentary. Such writing was meant to arouse feeling in the reader, as well as conveying a moral narrative. Today, news commentary on the reactions of accused people at the pronouncement of verdict is still a feature of murder trial coverage, perhaps more so and in different ways given the existence of visual media such as television and film.

Black's interest is in our relationship to the experience of the murder itself -- our

aesthetic response to murder -- not the adequacy of morally administrative responses to murder, whether formulated by Dante or an anonymous bureaucrat. Aesthetics, however, are essentially inimical to the demands of science and reason and thus are neglected in conventional calculations of the murder act and the murderer actor. This is particularly noticeable in psychological accounts of the behaviours of murderers, perhaps because an aesthetic component to the description of individual motivation is difficult to define and measure. Attempts to understand murder as an act of "beauty" or "good taste" as per the aesthetic sensibilities of the murderer are also overridden by the more dominant moral/rational assessments of his/her motives. Nonetheless, the subject of murder is a popular contributor to the offerings of literature and the news/entertainment media, and this is because there is a market of consumers who have indicated a desire for representations of violence and murder. It might be possible that such a demand is motivated by some mass need to work out the limits of moral reason. As Burke pointed out in the mid-eighteenth century, "We delight in seeing things, which so far from doing, our heartiest wishes would be to see redressed" (1958, p. 47).

Thus, it is not only the depictions of violence which attract audiences but also the wider story, which includes a criminal justice follow-up that usually shows the moral and practical superiority of "good" over "evil," of the law over evil-doers. Literature and the

mass media are effective venues for the narration of such stories, and thus play a key role in constructions of the murderer. Because of their claimed status as purveyors of facts as opposed to fiction, the news media not only narrate "real life" stories but also advance particular constructions of murder and the murderer cast in empirical authenticity.

Media Politics and the Construction of the Murderer

Not surprisingly, the notion of the media as neutral arbitrator of different claims of fact has long been criticized for its simplistic idealism. Stan Cohen, for example, has claimed that the media has a clear role in the definition and shaping of social problems since it influences our ideas about what causes deviation. He notes: "A crucial dimension for understanding the reaction to deviance by both the public as a whole and by agents of social control, is the nature of the information that is received about the behaviour in question" (1987, p. 16). Thus how we conceive the murderer to be influences how we respond to the murder, and since the media is a regular contributor to the subject of murder it qualifies for scrutiny in analyses of the construction of the murderer.

It has already been argued that media portrayals of crime and criminal justice overemphasize the irregular, unusual or horrific over the more mundane and typical acts

of violence. Over time, depictions of the more rare types of violence become the standard of norm in the public mind in the construction of the murderer (Epstein, 1974, p. 265). Schneider describes the media version of crime as being almost exclusively violent crime between strangers; as concentrating on the perpetration and the detection of the offense; where the offender is an unfair, disagreeable, reckless and egotistical character; where the victim is guileless and completely surprised by the crime; where crime control is performed almost exclusively by the formal social control through police, courts and corrections; and where there is insufficient attention paid to the possible causes of crime (1992, pp. 88-89). Chibnall argued that journalists' treatment of violence was guided by informal rules which assert the relevancy of visible and spectacular acts, sexual and political connotations, graphic presentation, individual pathology, and deterrence and repression (1977, p. 77).

Such views of crime and criminals in the news media not only exaggerate atypical kinds of violent crime, but can downplay other kinds of illegal transgressions -- such as corporate or white collar crimes -- by providing minimal if any coverage of these less "exciting" activities (Snider, 1978). Cirino, for example, observed that "[a]n analysis of which types of crimes and criminals are featured -- and therefore brought to the public's attention -- reveals distorted news priorities which must greatly please the establishment

criminals" (1971, p. 237-238). There has, admittedly, been a gradual increase in the newsworthiness of white collar, corporate and governmental crime; the interest in Canadian government business negotiations with a European aircraft company and the alleged financial kickbacks accepted by specific political individuals is a recent example of this. These increasingly popular news stories, however, address different themes than those pertinent to violent death. White collar/corporate/government crime stories tend to speak to the evils of political power, such as greed, corruption, lies or the betrayal of trust rather than to the evils of the physical mortal vulnerability of crime victims and the tragedies inflicted on the victims' survivors, as do stories of murder. When we speak of fear of crime, it is not the confrontation with an image of three-piece suit power-brokers in the halls of financial institutions and government buildings which provokes *fear*. Rather, it is the image of the predatory, psychopathic killer which is the more likely image to inspire fear-motivated responses to crime.

In the world of entertainment media, the picture of violence and murder is similarly skewed. Here, the business orientation is clear and what counts in the presentation is the ability to attract viewers in order to cultivate them as consumers. As Diamond comments, "[t]he need to engage viewers, to hold their attention -- even a bemused and wandering attention -- is the prime requirement of all television presentations" (1980, p.

93). The typical murder as an event in which passions prevail and the murderer and victim are known to each other is rarely explored by television scriptwriters, for whom "[m]otivation for evil . . . is one of the more vexing pitfalls" (Sklar, 1980, p. 55). Notwithstanding this, the presence of murder stories in the entertainment media would suggest that murder still has wide popular appeal.

Cartoons and comics have also been criticized for reproducing skewed images of crime and criminals. The role of ideology is privileged in one Marxist analysis of Disney cartoons, where it is argued that the proletariat worker is represented as either the "noble savage" or the "criminal-lumpen" (Dorfman and Mattelart, 1984, p. 59). According to these authors, in Disney comics criminals

> . . . are all oversize, dark, ugly, ill-educated, unshaven, stupid (they never have a good idea), clumsy, dissolute, greedy, conceited (always toadying each other), and unscrupulous. They are lumped together in groups and are individually indistinguishable. The professional crooks, like the Beagle Boys, are conspicuous for their prison identification number and burglar's mask. Their criminality is innate: "Shut up," says a cop seizing a Beagle Boy, "you weren't born to be a guard. Your vocation is jailbird."
>
> Crime is the only work they know; otherwise, they are slothful unto eternity. Big Bad Wolf reads a book all about disguises (printed by Confusion Publishers): "At last I have found the perfect disguise: no one will believe that Big Bad Wolf is capable of working" (p. 66).

From a Marxist perspective the implications of such interpretations of Disney are obvious. The lines between the bad guys and the good guys, poorly simplified for

audiences of children, are marked on the basis of capitalist ideologies. The criticism presented is familiar: that representations of criminals are distorted and vulnerable to the influence of capitalist forces, in this case, portraying the bad guys as ignorant, self-serving thugs who refuse to work.

The problem of capitalist ideologies and media content, however, can also be related to private ownership of the media and the influence of economic imperatives in the day to day functioning of its outlets. The Beagle Boys may be distorted representations of criminals, but if viewers found these images boring or obscene they would not be offered for long. Media content appears to be a balancing act between different imperatives. De Fleur hypothesizes, "The ideal, from the standpoint of the system, is content that will capture the audience member's attention, persuade him to purchase goods, and at the same time be sufficiently within the bounds of moral norms and standards of taste so that unfavourable actions by the regulatory components are not provoked" (1968, p. 28).

For the purposes of this discussion, the point of the Marxist critique of the Beagle Boys is that ideologies, specifically capitalist ideologies, have a noticeable effect on representations of criminals and that these representations do not offend regulatory components of the mass media. Such ideology nurtures the idea, beginning with the

youthful members of western societies, that criminals are a class of people. But further, the idea of an underworld -- a "criminal class" -- gives crime an identity. In a study on the English response to crime in literature of the sixteenth and early seventeenth centuries, Curtis and Hale (1981, p. 124) argue that the identity of crime was distinguishable from that of the illegal:

> . . . what the ordinary citizen does, even if wrong, even if illegal, is not a crime, for that is done by professional criminals who inhabit the underworld. Crime becomes a special form of, and something slightly apart from, the illegal; there is a distance and distinction between the two. The way is thus clear for the idea of crime to be moulded as a container to receive the undesirable in whatever may be the appropriate form . . .

In this study, the newsclippings from the 19th century and early part of the 20th show ample evidence of the resonance of the "criminal class" designation in the minds of public commentators. In 1903, for example, an editorial on the commutation of Joseph Carver's death sentence in the Prince Edward Island **Morning Guardian** questions the point of capital punishment if not enforced against the "criminal classes":

> Many serious crimes, culminating in the cold-blooded murder of Alexander Stewart had preceded that awful atrocity. We are informed that for fear of the gang, peaceful, law-abiding citizens of that vicinity have avoided prosecuting the offenders for many notorious offences. Yet these criminals apparently have influence enough in Ottawa to escape the lawful and just punishments which our courts and juries impose. How is it to be explained? What are such commutations and pardons but an assurance to the criminal classes that no matter what their offences, they have friends at the seat of power who can and will get them off **(6)**.

In a similar vein, a letter to the editor of **The Canadian** in 1907 identifies not only a criminal class, but Italians as a kind of criminal class:

> Capelle and his associates in crime entered the house of Mr. McCormick a peacable citizen, evidently for the purpose of committing an unlawful act and gratifying his carnal passions. He carries with him a dangerous weapon in violation of the law of our land. When thwarted in his diabolical purpose, he wreaks vengeance upon some of those who interfere with him by committing murder, and when the deed is done he flees from justice.
>
> *It seems to be characteristic of the Italian race that they, in accordance with the practice in their own country, carry their secret and dangerous weapons with them wherever they go, and are ready to use them when the least pretence offers for them to do so*, and if they are not taught a severe lesson, the lives of peacable and law abiding citizens will be in jeopardy (7).

The identity of a criminal class is highlighted more dramatically when the subject of violence is introduced to the discussion, since the news visibility of crime is heightened when violence is involved. Violent crime and criminals are newsworthy, as Hall et. al. (1978, p. 68) explain:

> Violence represents a basic violation of the person; the greatest personal crime is "murder," bettered only by the murder of a law-enforcement agent, a policeman. Violence is also the ultimate crime against property, and against the state. It thus represents a fundamental rupture in the social order. The use of violence marks the distinction between those who are fundamentally *of* society and those who are *outside* it. It is coterminus with the boundary of "society" itself . . . Violence thus constitutes a critical threshold in society; all acts, especially criminal ones, which transgress that boundary, are, by definition, worthy of news attention.

This assertion is particularly interesting for its focus on socio-legal limits of behaviour, as the transgression of the threshold marked by the sanctity of the individual person. The danger posed by the transgression of violence, of course, is bodily injury or death, which only enhances the newsworthiness of crimes such as murder. Further, the moral/social

distinction marked by the violence threshold also serves as a dividing line between "us" and "them" or the "good" and the "evil," and demarcating murderers as a group.

The inclination for news and entertainment media to feature violent crimes and criminals has also been boldly appropriated in the form of campaign advertising by political candidates. One recent and recognized example of politicians using folk devil imagery to enhance their election potential occurred in the United States 1988 presidential campaign, in George Bush's attack advertising on Michael Dukakis's alleged "softness" on crime. The "devil" used to advance this tactic was William Horton, a prisoner who had escaped while on furlough from his sentence for murder and was later convicted for raping a woman and assaulting her fiance **(8)**. Five years later and by then a household name, Horton offered his own version of his exploitation by the Bush campaign (Elliot, 1993, pp. 201-204):

> The fact is, my name is not "Willie." It's part of the myth of the case. The name irks me. It was created to play on racial stereotypes: big, ugly, dumb, violent, black -- "Willie." I resent that. They created a fictional character -- who seemed believable, but who did not exist. They stripped me of my identity, distorted the facts and robbed me of my constitutional rights. No one deserves that . . .
>
> At the same time, the President took an oath to defend the Constitution. The Constitution applies to me, too. His actions not only hurt me, they hurt the entire society. How would anyone like to be tried in the court of public opinion by a series of thirty-second attack ads?

In spite of the costs enumerated by Horton, this tactic was a politically successful tool for

the Bush campaign, and as noted in an editorial of **The Nation** (August 23/30, 1993) "since then crime and capital punishment have become the true political litmus tests" (p. 196).

North of the 49th parallel in Canada, the effectiveness of using violent criminals and their punishment to seduce voters is well understood and the practice has also become a staple ingredient of political rhetoric. Further, crime and punishment in the U.S. and Canada have been amplified to a much greater degree since the 1950s, owing to an expanding variety of mass media and ever-broadening audiences, in addition to an apparent willingness of political candidates to stand on others' weaknesses rather than on their own strengths. The fledging Reform Party of Canada promises to issue a call for yet another debate on capital punishment in the House of Commons in the near future, in the wake of the conclusion of the Paul Bernardo trial, one of this country's most infamous murder cases **(9)**.

Print Media Depictions of Murder and Murderers

The emergence of the mass media can be traced to print, a medium made possible by the mechanical development of the printing press. The possibilities of reaching a wide audience through news and literature, however, were limited by the illiteracy of the vast

majority of western populations. By the 1830s in the United States, a generally literate population had been established and mass distribution systems were in place, affording the existence of penny press newspapers. Human-interest crime stories quickly became regular features of these newspapers, which had responded to the marketability of such news (Surette, 1992, p. 52).

Crime news itself had already been published in England for at least three centuries by then, albeit in a different form than the penny news. "News" about the categories and activities of a collection of "villains and vagabonds" who terrorized the country was transmitted in prose, in Tudor "rogue pamphlets" from the mid-sixteenth century onwards (Curtis & Hale, 1981, p. 112), but this reach was limited by the relative illiteracy of the English. In Canada, newspapers marketed for mass circulation existed a few decades before Confederation. As Beattie (1977) has shown, discussion of crime and punishment was a spirited topic in editorials and letters to the editor as well as in news coverage in Upper Canadian newspapers.

Print images of crime and criminals have also been produced in literature, particularly writing which emerged at the end of the eighteenth century. Responding to a shift in audience from that of a small group of private patrons to that of an impersonal market

with its constant pressure of economics, modern literature became less constituted by works of "erudition" and more by works of fiction (Leps, 1992, p. 135). By the 1830s, "social realism" became imbedded in popular fiction, where "the dark German dungeons [of gothic writing] were exchanged for dark English or French criminal ghettoes" (p. 84). The modern detective story emerged out of this context.

The origin of the detective story in modern form is generally traced to Edgar Allan Poe in the early 1840s, in his three tales about C. Auguste Dupin in "The Murders in the Rue Morgue," "The Mystery of Marie Roget" and "The Purloined Letter" (Breen, 1993, p. 3). Detective stories have been presented as puzzles, an assortment of pieces of information which need to be sorted out in order to present a clear picture of the crime. The crimes featured in detective stories are usually murders, a consistency which seems to indicate the importance of criminal death to the success of the story.

The construction of the murderer in literature and the print media is an expression of culture. The individual is central to the idea of murder in Canadian cultures -- indeed, the answer to the problem of murder is found in the question at the heart of detective stories, newspaper accounts and courts of law: "*Who* did it?" Once the murderer has been caught and identified as the perpetrator of the crime, the problem of the "case" is essentially

solved. The problem of murder thus becomes a tidy casebook which can be closed until the next killing requires its reopening.

The focus of the news media, not surprisingly, has been on the murderer and the kind of person he/she is. The cause of murder as found in the moral weaknesses of the individual was proclaimed in the early 1800s in England, for example, in a newspaper writer's stern assertion that:

> It will be instructive to the public to view the rapid transitions that take place from gaming to robbery; from professions of friendship among villains to their betraying and murdering one another -- from the hazard table to the gaol -- and from the scene of drunken revelry to the place of execution (Boyle, 1989, pp. 50-51).

Newspaper accounts of murders a hundred years later in Canada provided more specific observations of the murderer's "character" and demeanor in court. In the bizarre triple murder case of Arthur Bannister in New Brunswick, for example, the **Sunday Mirror** (April 12, 1936) described the 19 year old accused in court as "stolid and dull, ceaselessly toying with his teeth with a stubby forefinger. As the jury was being impaneled, he giggled and sucked his thumb" **(10)**. In this case the villain is portrayed, perhaps realistically, as stupid or child-like rather than as misled by the temptation of vice -- indeed the far-fetched and ill-fated attempt to steal a baby to enable his mother to extort child support from two of her former lovers would seem reason enough to qualify Bannister for imbecility. The particularly horrific aspects of the crime, however,

overshadowed any significant question as to his mental capacity and Bannister was hanged with his brother Daniel for the murders of the baby's brother, mother and father.

The case of Tony Frank in 1924, along with five others convicted of murder after a bank robbery in Montreal, was reported in great detail by the local press. The mystique of the Italian underworld king (ie. Frank) fuelled news coverage of the trial, providing ample opportunity to describe the convicted man's character:

> Tony Frank and Frank Gambino were the uncrowned kings of Montreal's underworld. Always well dressed and groomed, these two could be seen any day of the week in the "red light" district. They haunted the corridors of the police courts, and knew a great many lawyers and even judges. Their boast was that they could never be arrested, and, indeed, it was found impossible to convict either of them. Tony Frank was the power of the red light district, and owned several resorts **(11)**.

Tony Frank's image as a powerful man wasn't sufficient to prevent him from "weeping" on his arrival at death row in Bordeaux jail after his conviction, as the newspaper solemnly reports. Closer to the execution date, newspaper coverage of the case headlined another piece of information regarding the character of the convicted "gang" members:

MURDERERS AWAIT DEATH NOW WITH SOME RESIGNATION

Quintette to Suffer Friday Morning Learn Last Hope is Gone

ONLY ONE CAN READ

> . . . Louis Morel, ex-detective, is perhaps the happiest of the five. He is more normal than the others; he has had little hope of being saved from the gallows from the very commencement. He, too, is far better off than the others, inasmuch as he can read and write. The others cannot do so, except to write their own names . . . **(12)**.

From a current standpoint it is difficult to understand how, with less than one week to go before being executed, the knowledge of one's literacy could contribute to a sense of happiness. It is probably safer to surmise that the author meant only to describe Morel's "civilized" normality, in contrast to the illiterate likes of Tony Frank and the others, presumably in order to make a point about the lack of formal education and crime. With the execution date looming, the press continued to report information which elaborated on the personas of the condemned murderers and must have been relevant at the time, however silly the headline "Only One Can Read" may seem to us now.

The case of Harry O'Donnell in 1936 provided much for the Toronto press to write about. First of all, O'Donnell's crime was the rape and murder of a young woman who was returning home from work very late in the evening. This random crime had a particularly shocking effect on the public, evident in the numerous newspaper accounts of the killing and the expressions of public concern documented in these accounts. Before O'Donnell's apprehension, the perpetrator was described in the **Globe and Mail** as "a criminal maniac" and it was reported that the authorities were checking the whereabouts of two men who had recently been released from Kingston Penitentiary **(13)**.

Descriptions of Ruth Taylor's body at its discovery and the emotional reaction of her father in the morgue were all carefully articulated, providing a vivid account of the crime's aftermath, which included descriptions of the reactions of her friends.

A second compelling feature of the murder was the relative normalcy of the apprehended O'Donnell, a "popular gas attendant" who was "apparently a faithful husband, a highly satisfactory employee, and a dutiful son" **(14)**. His wife had given birth to their first child just two days before the murder, and was still in hospital when O'Donnell was arrested on November 7, 1936. Owing to her condition, it was somehow decided that "the shock might kill her" and the authorities put off telling her the news until November 16. This dramatic feature of the case was apparently very compelling to the press, which offered almost day by day reports of the situation. O'Donnell's surface "normality" was evident in his domestic lifestyle, as a husband and new father with st ady employment. The hidden problem, according to a press report, was that O'Donnell was "a victim of uncontrollable impulses" such that he "was accustomed to taking long walks at night in an effort to achieve some peace of mind" **(15)**.

A recent opinion column in the **Vancouver Sun** (July 29, 1995) addressed this intriguing aspect of our response to murder, in the wake of a number of well-publicized

murder trials in Canada and the United States. Harry O'Donnell's normal social appearance was a stark contrast to the deeds he committed, provoking newspaper coverage which seemed to focus on this contradiction; today, such contradictions are still food for journalistic thought: In 1995, a Vancouver columnist wrote:

> In our myths and nightmares, evil is easy to portray and to know. It comes with all kinds of markers: horns, warts, stinking breath, black Stetsons, fiery eyes. But Frank was just a shuffling guy who'd help you jumpstart your car and who kept the sidewalk clear of snow. He wouldn't stand out in a crowd any more than Susan Smith, whose picture has been in the papers everyday this week . . . If we didn't . . . know her to be the convicted murderer of her two sons, she might just as easily be a distracted woman on a packed bus . . . And here are Lorelei and Steven Turner, coming down the steps of the courthouse in Miramichi, N.B., assailed by jeering spectators, appalled that the couple allowed their three-year-old son to starve, but who in the photographs look for all the world as if they're remembering to turn off the oven before going to the grocery store. And in St. Catharines, the Cape Cod house that was once the home of Paul Bernardo attracts a steady stream of tourists. It is ordinary in its every outward aspect and has nothing to reveal about the awful whys of the murders alleged to have happened within.
>
> . . . The victims, we say, must be avenged and we vent our anger, ostensibly on behalf of the dead and the maimed. But I wonder how much of our outrage is rooted in the fear we bring to the violation of ordinariness in the evidence that evil is not extraordinary and removed but quotidian and, yes, even banal; that it chooses people who look just like us as its cuckoo nest **(16)**.

This particular newspaper account of murder, of course, differs in its approach to the subject as a matter of personal opinion rather than as a news account of a particular case. Its author reflects wholly on *our responses* to particular murders, in a manner presumably meant to provoke introspection of our own questionable motivations.

An editorial in the same Vancouver newspaper 73 years earlier also commented on the response to a different murder, albeit with an apparently different purpose in mind. Questionable motivations were also the concern of this editorial, but the target of criticism was specifically women and the tone of its presentation moralistic. Written in the wake of the 1922 conviction of Alan Robinson in a Vancouver robbery murder, the piece makes several assertions and claims which are reflective of the social tempo of the times:

MOCKING JUSTICE

By a vote of 106 for and 13 against, the Vancouver Council of Women has decided to ask the department of Justice to shut Alan Robinson up for life instead of hanging him.

These 106 women who were persuaded to cast their votes for clemency are being made the instruments of mawkish and maudlin sentimentality.

Murderers like Robinson represent social disintegration. They represent outrage on women, outrage on homes and outrage on peaceful citizens.

If the law were set aside, strong men, carrying guns, could probably protect themselves. Women and children, being weaker, could not.

The law which has sentenced Alan Robinson to die is a law which protects women and children, protects the sanctity of the home, makes civilization and progress possible. Obedience to law has made Canadians free.

Weaken the law and women and children have no protection. Society will be in process of disruption.

And the best way to weaken Canadian law is to breed disrespect for it by slighting it, as these 106 women would have the Department do.

The law stands. And while it stands it is inviolable. To make exceptions is to go backward 10,000 years when there was little, if any, law.

If the relatives and friends of William Salsbury asked that vengeance be taken on Robinson, they would be called barbarous, because we know today that the processes of justice are not vengeance, but simply protection of society.

The women's request that the law be set aside is just as barbarous and

> retrogressive as any request for vengeance would be.
>
> Capital punishment may be wrong. It is assuredly an expedient. But at present it is the ONLY known scientific way of protecting society from the animal impulses, and of affording a discipline to those mentally diseased persons whose social instincts are not strong enough to make them law-abiding of their own good sense and judgment.
>
> Women's new sphere gives scope for constructive work. Attempting to interfere with the machinery of justice by outbursts of ill-timed gush, is neither constructive nor profitable to women or to civilization **(17)**.

This stern reprimand of the Vanc uver Council of Women and its opinion on the response to murder was written before women in Canada were given the right to vote federally, and speaks loudly of gendered relations of power in the 1920s. The editorial attack is decidedly paternalistic, but it is also based on the premises of then-prevailing knowledge about the "scientific" basis of capital punishment responses to murder. In the 1922 editorial the murderer is a dangerous animal who requires extinction for the protection of others; in the 1995 opinion column, the murderer is an ordinary person whose outward appearance masks the evil he/she is capable of. In both cases, however, the authors admit that the problem of murder is still a mystery which lies beyond our grasp.

Depictions of Murder and Murderers in Television and Film

When the problem of murder is positioned in a culture whose ideas, information and ways of knowing are shaped by television (Postman, 1987, p. 28), the problem becomes differently constituted on the basis of this particular medium's method of truth-telling.

Postman argues that any major new medium alters an existing structure of discourse "by encouraging certain uses of the intellect, by favoring certain definitions of intelligence and wisdom, and by demanding a certain kind of content" (1987, p. 27). The introduction of television in 1948 was a "successful" venture in that its public acceptance and growth was so phenomenal that television soon dominated the media industry (Surette, 1992, pp. 30-31). In 1981, the chair of the U.S. Federal Communications Commission under former president Ronald Reagan described television as "just another appliance: a toaster with pictures" (**The Vancouver Sun**, Monday, February 19, 1996). More recently, it has been called "the command center of the new epistemology" predicated on image and instancy (Postman, 1987, p. 78). Entertainment has become "the natural format for the representation of all experience" (p. 87). On a material basis, however, entertainment is not the *purpose* of television; television shows may be seen primarily as packaging for commercials (Surette, 1992, p. 31), either corporate or political.

The entertainment "packaging" used to sell goods, services or ideas must capture the attention of the audience by appealing to their interests. That murder is a very common subject matter both in television news and drama speaks to its utility in attracting minds and bodies to the television set. Television audiences are very large as compared to audiences of other media such as print or radio, owing in great measure to the

"democratization" of access to entertainment which began with the advent of the film industry in the United States in 1895. Entertainment content was nationalized by the industry's ability to make its portrayals, originally silent and inexpensive, available to people regardless of social, economic, linguistic and intellectual background (Surette, 1992, p. 25). Today, television has surpassed the influence of film by virtue of its pervasiveness and availability, 24 hours a day in the home. Images of murder and the murderer thus have wide exposure through the medium of television in our culture.

Fictional stories of murder have always been popular in movies, and on average about one-fourth of all American television prime time shows from the 1960s to the 1990s have been based on crime or law enforcement (Surette, 1992, p. 32). Indeed, crime is the largest single subject matter on television, covering different types of programming (p. 32). Murder stories are not always fictional, however, and Canadian television news shows are likely to report most of the real murders which occur in our immediate cities and towns. Often, news accounts of murder come across as chapters of a story, beginning with the discovery of the body, continuing through the pursuit and trial of the culprit, all of which is reported as news but sounds very much like the historically familiar murder narrative. Whether fictional or "factual," murder stories suit the demands of television and film which give these stories wide distribution.

The image of the criminal in television and film is in some ways more vivid than print because the representations of these media are both visual and auditory. There is a perceived confirmability about audio-visual images, perhaps because we can "witness" them "directly" instead of reading about something in a printed interpretation. While the murderer can be described in print, television and film put a visual face on the murderer, and a distinct voice to their words. In news accounts of crime, the image of the criminal is taken when he/she is at his/her worst possible vantage point, perhaps looking a little rough, and in the process of being led handcuffed from one place to another. William Horton, for example, describes the circumstances of his own televised image (Elliot, 1993, p. 203):

> At the time the photograph was taken, I was a suspect in the rape case. I was still recovering from the gunshot wounds. After two surgeries, they took me from the hospital to the Upper Marlboro Detention Center, where I was placed in a cell in the hospital for three or four days . . . They then placed me in segregation, where I stayed for two and a half months, after which I was taken down, fingerprinted and booked. During that period, I was denied the right to have a shave or a haircut. I only had three or four baths during those several months. It was then that they took the picture. That's why I looked like a zombie. Again, it wasn't an accident. They chose the perfect picture for the ads. I looked incredibly wicked.

Not all images of the murderer produced by television and film are geared to make him/her look like a dishevelled monster, but as Schneider argues (1992, p. 89), suspense and entertainment are achieved "by portraying criminality as something outrageous, obscure, weird, extraordinary and miraculous." A dramatic presentation of murder and

the murderer is what is necessary to draw us into the story being told, whether it is a tale about how George Bush is tough on crime or the latest episode of the television program "Law and Order."

The Bush television ads exploiting the "case" of William Horton contributed to the defeat of Dukakis in his bid for the presidency by making Dukakis look personally responsible for Horton's furlough. Horton has become a legacy, as seen in the kind of "expressive justice" which is now demanded by popular opinion: a punishment that reflects not justice but the anger of the people (Aird, 1995). In this context, the issue may also be one of control; we are frightened by the images presented to us, and even if the empirical threats represented by these violent images are remote, we might really feel better if we thought something was being done about it. This might help to explain the popularity of "real crime" shows, where law enforcement officers are granted the privileged vantage point in the film recordings of actual criminal arrests and are largely portrayed as successful "soldiers" on the "front line" of crime. As one writer explains in an article recounting her experiences as a "story analyst" for the television show "American Detective" (Seagal, 1993):

> There are, I've learned, quite a few of these reality and "fact-based" shows now, with names like *Cops*, *Top Cops*, and *FBI: The Untold Stories*. Why the obsession with this sort of voyeuristic entertainment? Perhaps we want to believe the cops are still in control. The preponderance of these shows is also related to the bottom line:

> They are extremely inexpensive to produce. After all, why engage a group of talented writers and producers to make intelligent and exciting T V when it's more profitable to dip into an endless pool of human grief?

Thus while the element of perceived "realism" brought to the fore by such television shows adds to their credibility; the success of these shows is owed in part to the kind of morality play which unfolds and the economic benefits of producing them.

The "realism" afforded by television and film has also generated debate about the morality of presenting audio-visual recordings of real crimes. In Britain, on one hand, a video created by an opponent of capital punishment showing nearly two dozen actual executions in gruesome detail met with public furore, after The British Board of Film Classification had approved it for its documentary qualities (Branswell, 1995). On the other hand, graphic videos of the sexual assaults by Paul Bernardo and Karla Homolka on Leslie Mahaffey and Kristen French were shown as evidence in the Canadian trial to jury members and officers of the court only, owing to the violent pornographic basis of the recordings which were presumably made for the later viewing "pleasure" of the attacker. Newscasts never aired footage from these tapes, but used excerpts from Homolka family videos of the accused in news stories on Bernardo's trial for the teenagers' murders to portray the outward normality of Bernardo and Karla Homolka. Decisions around the ethics of providing audio-visual images of real crimes and/or the apprehension and punishment of their perpetrators thus seems motivated by a variety of factors, such as the

status of the subject (victim or offender) or the circumstances under which the recordings are made.

The moral problematics posed by the public viewing of real crime and punishment were examined in the aforementioned 1991 California trial held to determine whether or not the public television station KQED had the right to bring a television camera into the witness area of the forthcoming execution of Robert Alton Harris. Debate over the beneficial versus detrimental effects of televising a real execution was a heated and decidedly complex affair, mixing factions of pro- and anti-capital punishment proponents variously into opposing camps on the issue of public viewing of executions. Arguments against the televising of Harris's execution reflected concerns such as the right of the condemned person's privacy, the propriety of airing a premeditated death, and the cultivation of public desire for violence. In support of KQED's request, opposing arguments reflected concerns about the public right to know what an execution actually is, and the public right to participate in the punishment which is meted out in the name of "the people." In her analyses of the case, Wendy Lesser (1993) described the gruesome reality facing the American television viewing public had the KQED attempt been successful: "Randall Adams, the Death Row inmate whose wrongful conviction was the subject of Errol Morris's *The Thin Blue Line*, at one point described to the filmmaker

exactly what happens to a man in the electric chair: 'His eyeballs pop out, his fingernails pop out, his toenails pop out, he bleeds from every orifice . . .'" (pp. 54-55).

Lesser argues that the horror of this scene is not restricted to its transmission by some visual medium, but can also be felt in words which allow us to create "sickening mental pictures" (1993, p. 55). Her observations of the case, however, probe beyond a strict examination of the rights and wrongs of televised executions, to an uncomfortable questioning of what it is about a live execution which would have provoked such a case in the first place:

> There is something beyond fearful curiosity in our desire to observe Robert Alton Harris at the moment of his death. We want him to enact something *for* us; we want to live the terror of death through him, and then be able to leave it safely behind. Carried to an extreme form, we call this kind of identification madness: the inability to tell the difference between ourselves and another; ourselves and the rest of the world. Limited to its usual form, we call it empathy (pp. 59-60).

Lesser appears to be referring to some symbolic function of a live execution which gives us access to death without directly experiencing it ourselves. Indeed, she argues that death is the one experience in life which we cannot directly experience, "if that verb connotes the chance to contemplate afterward what the experience meant, as the noun -- in its opposition to innocence -- implies" (p. 134). The problem with televised executions is a matter of exploiting the condemned person's integrity for a taste of the experience of death: "['dying-through-another'] seems nothing short of ghoulish, as if in sharing among

ourselves the dying man's *singular fate* we make it less singular, less his own. This is why our collective presence at a condemned man's execution would be such a violation; it is also why we so much long to be there" (p. 134, emphasis added). Lesser's thoughts on the matter of televised executions speak to what might well be at the heart of our responses to murder: a need to reconcile our own deaths through the deaths of others.

In his study of crime and television, Richard Sparks (1992) argues that central to heroic fictions of crime and their legal responses is a "dramatic moral structure of outrage and reassurance" (p. 4). Crime stories are recurring features because they deal with "some potentially important passions and sentiments," predominantly fear and anxiety (p. 4). The stock crime of television stories is murder, because murder affords the story-teller some "basic and emotionally effective moral distinctions and oppositions" (p. 141). Sparks' analyses suggest that our responses to murder have roots in our fear of the particularly nasty forms of death which murder implies; this conforms to Lesser's point that the viewing of actual death is in part driven by our need to reconcile ourselves with our own deaths. The stories are appealing to us because they speak to our concerns by presenting the issue of murder/death, followed by a moral institutional response which is usually portrayed as being more powerful than the murderer. The problem of murder and the anxiety it provokes, then, is metaphorically addressed in the tales of detection,

apprehension, and punishment of the murderer.

The cathartic effect of televised murders, real or fictitious, is worth noting about the responses to murder. Another feature was highlighted in a study by Ericson et al. (1991), which focuses on the images of institutional responses to murder and depictions of the power of authority:

> Popular narratives of crime, law, and justice . . . display justice as the fulfillment of institutional needs. It is not only the heroics of individual decision-makers, but the strength of institutions and "the system" that is on view: images of institutional success through its rituals of morality, procedure, and hierarchy. While particular authorities -- journalists, police, church leaders, politicians -- are shown to be hard at work, it is *authority*, more than their particular authority, that is reproduced (p. 110).

The images of authority which are endemic to crime narratives are amplified by the quantity and severity of the murders which are presented in television and film, regardless of how poorly these stories reflect actual rates and types of murder. Thus while the problem of murder is exaggerated -- whether for the purposes of enhanced entertainment, economic profit or moral exercise -- so also are the images of authority seen as required to control the problem.

Mass Media and Murder

Whether depicted in print or film/video, representations of murder and the murderer in the mass media are directed for consumption by "the public," an entity which owes its

identification to the penny dailies of the nineteenth century (Leps, 1992, p. 71). "The public" made its first appearance in the discourses of newspapers, where editors and reporters spoke on its behalf and opinions of its constituent individuals were published in the form of letters. In the more recent medium of television, individuals from the public not only have opinions but faces and voices associated with them. The notion of public opinion, however, connotes a unified voice, especially when, as Charles MacKay observed in 1852, "whole communities suddenly fix their minds upon one object, and go mad in its pursuit . . . Men, it has been well said, think in herds; it will be seen that they go mad in herds, while they only recover their senses slowly, and one by one" (1977, pp. xix- xx).

The contagion of media influence in the public pursuit of madness has been well-documented. For example, the British television show "Crimewatch," similar to our shorter "Crimestoppers" segments, was reported to have the effect of increasing the fear of crime in over one half of respondents in a study of the show (Schlesinger and Tumber, 1993, p. 29). A similar mass fear was generated earlier in 1862 when the new crime of "garotting," a violent robbery that involved choking the victim, figured prominently in newspapers which simultaneously issued public warnings about "a social panic [which] naturally produces a great deal of wild excited talk" (Pearson, 1985, p. 131). Public

interest in crime may at times even exceed the interest of newspapers in reporting crime; a study of respondents' guesses as to the percentage of total newspace devoted to crime in the 1970s revealed that their guesses were wildly high, provoking the explanation that people overestimate reports of crime because they are more likely to read them (Roshier, 1973, p. 31).

Not only have the media influenced our perceptions and responses with respect to murder and the murderer, but they have apparently influenced incidents of real crime as well. A report of the Inspector of Prisons for the Northern Districts of England in the mid nineteenth-century, for example, noted the pernicious effects of plays and books about famous thieves on the motivations of imprisoned teenage boys, who had been earlier exposed to these stories of crime (MacKay, 1977, pp. 636-637, fn.). In 1994, the debate over the effects of television violence on children's behaviour became re-ignited over the controversy generated by the "Mighty Morphin Power Rangers" show; based on teenagers who do martial-arts combat with monsters, the show was described by a Fox network official as "a program which includes pro-social messages regarding positive conflict resolution" (**Vancouver Sun**, October 21, 1994). Television's influence in individual acts of violence has also been more direct, as seen in the recent murder of a homosexual Michigan man by his heterosexual male neighbour in the aftermath of their appearance

on a "Secret Admirers" segment of the "Jenny Jones" talk show **(18)**.

Today, the mass media has been analogized to the Church, for its role in linking different groups and providing a "shared experience that promotes social solidarity," and "interpreting and making sense of the world to the mass public" (Curran, 1990, p. 227). It is a powerful tool, in the representation and construction of murder and the murderer, and the ways we might respond to these. Such responses seem underpinned by more than the need to resolve particular tragedies; what figures prominently is the need to preserve society's system of institutional and moral authority (Ericson, et. al., 1991, p. 74).

This was made clear in the newspaper coverage of the 1903 case of Joseph Carver, a Prince Edward Island farm labourer who killed his employer after a dispute over clothing. The legal evidence reviewed by a government official in the memorandum on Carver's case for the Minister of Justice, as well as the jury's strong recommendation to mercy, culminated in the official's strong discomfort with the prospect of Carver's execution:

> While I have no doubt that the evidence fully justifies the verdict, and that there is no legal justification or excuse, I cannot free myself from a strong doubt as to whether the case is one which calls for the application of the extreme penalty . . . The circumstances of the case . . . in my opinion remove it from the category of "cold blooded and premeditated murders," using such words of course in the popular and non-technical sense. **(19)**

This opinion was not shared by the writer of an editorial in **The Morning Guardian**

(Friday, October 2, 1903), who saw Carver's commutation as "a sad failure of justice":

> To ordinary minds it is inconceivable that any reasons could be found in connection with the crime or the trial to call for executive clemency. The cold-blooded and persistent brutality with which the murderer pursued his victim to the death, and the utter heartlessness in the face of the wife of the man he had slain while yet his life blood was flowing, have seldom found a parallel in the annals of crime . . .
>
> Thus encouraged, it is to be feared, nay it is to be expected, that lawless and violent men will soon proceed to other acts of crime and bloodshed. And what recourse remains to honest peaceful citizens for the protection of their lives and property when the just sentences of our righteous courts are thus set at naught by the strong hand of power? **(20)**

Such media responses to murder which focus on preserving moral and institutional authority contribute to the belief that the problem of murder is a problem of the murderer, and that the solution to this problem lies in the maintenance and strengthening of existing legal and moral institutions against him/her.

ENDNOTES

1. Song written by Don Henley and Danny Kortchmar, recorded on Henley's 1982 collection **I Can't Stand Still**.

2. The article referred to was by Robert Digitale (of the Santa Rosa Democrat), reprinted in the **Globe and Mail**, Friday, January 31, 1992.

3. From the Digitale article, endnote 2.

4. Depictions of murder in literature, for example, show that murder is not only the "punishable act" of law but also the evil or sinful act. Like punishable acts, however, sins have also been subject to some kind of moral classification such as seen in

Dante's nine circles of hell.

5. From **The Daily Review**, Peterborough, Ontario, Thursday, March 31, 1910. RG 13, C-1, Volume 1457, Capital Case file Robert Henderson, Part 2, The National Archives of Canada.

6. From **The Morning Guardian**, Editorial, Friday, October 2, 1903. RG 13, Volume 1482, Capital Case file Joseph Carver, Part 1, the National Archives of Canada.

7. From **The Canadian** (undated), Letter to the Editor "Capelle, Shall He Hang?" (emphasis added in the quoted text). RG 13, C-1, Volume 1484, Capital Case file Frank Capelle, the National Archives of Canada.

8. In an interview with Jeffrey M. Elliot in **The Nation**, Horton claimed he was innocent of the original murder conviction and the subsequent rape and assault charges.

9. This refers to the murder trial of Paul Bernardo in Toronto, Ontario, charged in the sexual assault/killings of two teenage girls in St. Catherines. Bernardo was later convicted of two counts of first degree murder.

10. In an article "How Mounties Solved the Weird Doll-Baby Murder," in the **Sunday Mirror** magazine section, April 12, 1936. RG 13, Volume 1602, Capital Case file Arthur W. Bannister, Volume 1, Part 1, the National Archives of Canada. Arthur Bannister was convicted along with his brother Daniel for the murders of Philip and Bertha Lake, and their two year old son Jackie, in the kidnapping of six month old Betty Ann Lake in a convoluted extortion scheme conceived by the young men's mother near Dorchester, New Brunswick.

11. In the (Montreal) **Gazette**, June 24, 1924. RG 13 Volume 1530, Capital Case file Tony Frank, Volume 1, the National Archives of Canada.

12. Name of newspaper publication unknown, but story headline begins "Murderers Await Death Now with Some Resignation", the Capital Case file Tony Frank (see note 11).

13. From the **Globe and Mail**, Wednesday, November 6, 1935. RG 13, Volume 1601, Capital Case file Hugh O'Donnell, Volume 1, Part 2, the National Archives of Canada.

14. From the **Globe and Mail**, Thursday, November 7, 1935. See endnote 13.

15. From the **Ottawa Journal**, May 18, 1936. See endnote 13.

16. Written by Bill Richardson, regular columnist for the **The Vancouver Sun**, Saturday, July 29, 1995.

17. Editorial in **The Vancouver Sun**, Wednesday, July 12, 1922. RG 13, Volume 1514, Capital Case file Alan Robinson, Volume 1, Part 1, the National Archives of Canada.

18. The show, about men who have secret crushes on men, was not clearly explained to Jonathan Schmitz who had been led to believe by show personnel that the topic was "Secret Admirers." Apparently humiliated by Scott Amedure's televised public confession of homosexual interest in him, Schmitz shot his admirer to death three days later. Reported in **The Province** (Vancouver, Sunday, March 12, 1995).

19. Memorandum for the Honourable The Minister of Justice, Ottawa, September 14, 1903. RG 13, Volume 1482, Capital Case file Joseph Carver, Part 1, the National Archives of Canada.

20. "The Carver Commutation," (editorial), **The Morning Guardian**, Friday, October 2, 1903. RG 13, Volume 1482, Capital Case file Joseph Carver, Part 1, the National Archives of Canada.

PART III:

PRACTICE

Chapter 7
PUNISHMENTS FOR MURDER IN CANADA: THE DEATH PENALTY AND LIFE IMPRISONMENT

> *The spirit of revenge:* my friends, that, up to now, has been mankind's chief concern; and where there was suffering, there was also supposed to be punishment.
>
> 'Punishment' is what revenge calls itself: it feigns a good conscience for itself with a lie . . .
>
> No deed can be annihilated: how could a deed be undone through punishment? That existence too must be an eternally-recurring deed and guilt, this, this is what is eternal in the punishment "existence"!
>
> (Friedrich Nietzsche, **Thus Spoke Zarathustra**, 1885)

> I know not whether laws be right, or whether laws be wrong;
> All that we know who lie in gaol is that the wall is strong;
> And that each day is like a year, a year whose days are long . . .
> The vilest deeds like poison weeds bloom well in prison air:
> It is only what is good in man that wastes and withers there . . .
>
> (Oscar Wilde, **The Ballad of Reading Gaol**, 1898)

> Being on Death Row, in and of itself, is a form of death. The environment sucks the life from you, and the passing of a single day at times can be but the blink of an eye, or as long as a heartbreaking life. Then there's the drudgery, the soul wrenching monotony of staring at the same steel and concrete, the same people, ad nauseam. Being taken to the death house is, in a way, a relief. Finally one is afforded the opportunity to confront one's killers, who cowardly hide behind the mask of shamelessness. To look into their eyes, smell their raw fear, and feel one's own strength being pitted against the ultimate sanction, Death.
>
> (Field Marshall Johnny "ByrdDog" Byrd, "The Last Mile," 1995)

In the classic **Divine Comedy**, Dante describes the fate of murderers in the seventh circle of Hell, a circle of three rings of punishments for different crimes of violence. Occupying the first ring of the circle for those who were violent to others, murderers are

doomed to eternal immersion in Phlegethon, a river of boiling blood whose banks are guarded by centaurs. This vision of externally imposed punishment is significant in light of its allegorical image, which for Dante was the deepening possibilities of evil within the soul -- Hell is "the condition to which the soul reduces itself by a stubborn determination to evil" **(1)**. In this Christian imagery, punishment comes from without and within, based on a hierarchy of sins.

Historical responses to murder in Canada have been shaped by Christian beliefs of sin and punishment as well as reason and science. If not specifically Christian, more recent responses to murder rest on some notion of morality, the breach of which has demanded individual consequences. The classical belief that individuals are free-willed, rational beings who must be accountable for their actions is integral to precepts of law and concepts of morality. How the murderer has been constituted in Canada, on the basis of such beliefs, may now be related to the problem of how to punish this criminal actor. In Canadian criminal justice the identity of the punishable actor is about more than the answer to "whodunnit?"; identity features other information about the actor such as life history, associations with others, living habits, employment, and so on. This detailed identity, in combination with a fluctuating sense of moral culpability with respect to specific murders, factors into the practices of punishment.

Until 1961, the automatic penalty for a conviction of murder was death. Commutations to life imprisonment were granted to roughly half of the men and about two-thirds of the women convicted of murder from 1867 to the mid-1950s **(2)**. From 1958 to 1962, over 82% of all convicted murderers received commutations (Boyd, 1988, p. 32). In 1962, capital punishment in Canada ceased *de facto*, although its legal abolition did not occur until 1976. After the abolition of capital punishment the penalty for murder became life imprisonment, with parole eligibility at 25 years for those convicted of first degree murder and between 10-25 years for those convicted of second degree murder (C.C.C. s. 231, s. 742). Accompanying this change in the law of murder was a provision in the Criminal Code of Canada for persons serving life sentences who have completed 15 years of their sentence to apply for a "judicial review" of their parole eligibility dates (C.C.C. s. 745). Since then, an attempt to reinstate the death penalty was voted down in the House of Commons in 1987. A promised effort by the Reform Party to revive the debate seems futile in view of the general lack of support for the death penalty by both Liberal and Bloc Quebecois Members of Parliament who currently constitute the vast majority of seats in the House of Commons.

In this chapter the punitive practices of response to murder in Canada are reviewed in three parts. The first part is a consideration of punishment itself and how it is conceived

in public discourse. The rationalities for the responsive practices of punishment for murder in these conceptions will be considered in the context of the thesis discussion thus far. The second part of the chapter examines the discourse on the *death penalty* and the shifting rationalities of its deployment as a tool of punishment for crimes generally and its use for murder specifically. In the last section of the chapter the use of *imprisonment* as a form of punishment is examined, with particular focus on the meaning of prison sentences in the views of the "experts" and the lay public.

The Social Meanings of Punishment

The concept of punishment is axiomatic to Canadian discourses on crime and the criminal. In the documents studied, punishment was likewise germane to any discussion of how to respond to murder; indeed, the idea of punishment as a "natural" phenomenon is so entrenched in the discourse on crime that it is rarely debated outside of these terms. The discourses on the punishment of murderers, rather, are debates on the *most appropriate techniques* in the punishing of people who murder, and are predicated on differing notions of justice, morality and human behaviour. The problem of death, however, is what differentiates murder from other crimes, both in the act (illegal killing) and the possible punishment awaiting the criminal (the death penalty, particularly since the later half of the 19th century when it was used exclusively for murderers).

Rusche and Kirchheimer (1939) argued that "punishment as such does not exist; only *concrete systems* of punishment and specific criminal practices exist" (p. 5, italics added). This idea of punishment as institutional practices rather than "a uniform object or event" (Garland, 1990, p. 16), however, ignores defining characteristics of the concept of punishment, such as its intended harm and intention to increase human pain and suffering (Haan, 1990, p. 102). The idea that punishment is meant to hurt is calculated in relation to the act for which the actor is punished; the biblical notion of "an eye for an eye" is a simple example of this calculation. In this sense, the means of punishment are the concrete applications of the punishment concept. While analyses of these means are necessary in the study of criminal justice and will be considered in the specific context of murder later in this chapter, these do not foreclose the value of examining the concept itself.

In terms of morality, punishment has been differently construed as retributive justice or revenge. In any of these cases, punishment is conceptualized as a counterbalance to crime. Karl Menninger, known for his criticism of punishment practices, described the popular moral rationale underpinning punishment: "inasmuch as a man [sic] has offended society, society must officially offend him. It must deliver a tit for the tat that he [sic] committed" (1979, p. 71). Retribution is the execution of justice, the legal

consequence to crime. It is a philosophical justification which recognizes punishment as a moral right and duty (Primoratz, 1990, pp. 12-13), and is based on a conception of humans as free, responsible and self-determining (p. 34). Retributive punishment is seen as the teeth of the law which gives it its bite; without negative consequences, there would be no hard incentive to obey the law. Revenge, on the other hand, has more emotive connotations and is thus associated with the psychology of individuals (Jacoby, 1984, pp. 12-13). In this sense, revenge is more of an impulse than a rational justification, and because of the problem of public safety engendered by private acts of vengeance it is considered a cultural taboo in "civilized" societies. Retributive institutions were established to address issues of public safety, but as Jacoby argues, these "remove the practical, not the psychological, burden of revenge from individuals" (p. 12).

In the documents studied, the motives of retribution and revenge figure prominently. The debates on capital punishment from the early 1960s until its abolition in 1976 are particularly useful in this discussion. In government documents, letters to Members of Parliament and newspaper editorials and opinion columns, these debates produced a significant body of discourse relating to the idea of punishment itself. The texts of these debates demonstrate that Canadians were wrestling with the meaning of law and punishment at different levels of sophistication, but nonetheless they were reconsidering

the purposes of punishments.

Some Canadians were adamant that we not confuse retribution with revenge. This is exemplified in an argument presented by a Canadian Legion Chaplain in 1960:

> . . . it is entirely fallacious to discredit retributive punishment by connecting it -- still more by identifying -- it with the motive of revenge. We can only admit the connexion [sic] if we also recognize in vengeance an impulse to restore a disturbed order, an impulse which may be obscured by passion, but which has an objective basis in justice. By punishment, things are replaced in their right order; the advantage which the wrongdoer has unlawfully acquired is taken from him; the injury suffered by society is repaired. Accordingly retributive punishment is not in any way subjective in character, but purely objective. The mechanisms of a British or Canadian court are deliberately made impersonal precisely to avoid any personal feelings of antagonism and revenge. Such a court simply accords to a man what he has earned and BROUGHT UPON HIMSELF BY HIS OWN CONDUCT. **(3)**

This attempt to explain the difference between retribution and revenge reflects a scientific rationalization by the author. The idea that retribution is objective and revenge subjective serves to cleanse the law of emotion, seen as irrational and undesirable, and lends it a detached scientificity. Further, crime is seen as disturbing a social/moral order which can be corrected by the act of punishment. The order itself is not seen as problematic and is therefore not questioned. Criminals are seen as freely choosing agents within this unproblematic order and in receiving just punishments are simply the authors of their own misfortunes.

Notwithstanding such claims for retribution, the varied responses of the general public to particularly heinous acts of crime seem more motivated by vengeance than any scientific calculation of legal retribution. In a 1964 article in the **Globe and Mail,** for example, the responses of the public to the commutation of a convicted child sex-killer are described under the heading "A Savage Releases The Savage in Others":

> When the federal Cabinet commuted Meeker's death sentence to life imprisonment this month, a wave of reaction flooded the newspaper and "audience-participation" radio shows in Vancouver.
>
> "Heaven cries for the thud of Meeker's drop" ran the headline over the Letters to the Editor column of the Vancouver **Province**. Below was a letter, signed by Henry Pick, which said the "sickly sympathies of sappy law-enforcers" have made Canada a sanctuary for human fiends. Above the headline was the third editorial in as many days attacking the Cabinet decision; some of the language exhibited no better taste.
>
> The **Vancouver Sun** was more restrained, but not much. "They should have hanged him," the dead girl's father was reported as saying, "and hired me as the hangman."
>
> Hundreds of persons vied for the telephone lines of several radio phone shows to air their views.
>
> "They should have put him in Victory Square under an ant-hill and let them eat him alive," said one woman.
>
> "They should have hung him in public and not by the neck," said another. **(4)**

It is rather difficult to deny the sentiments of revenge in such comments and the article's headline seems an echo of Jung's assertion that "the sight of evil kindles evil in the soul." Revenge is a visceral, as opposed to rational, response to murder and given its emotional basis is often a motivation for murder itself. Perhaps because revenge is an emotional response which contradicts our ideal of the rational thinking human, those who pursue its terrain are inclined to explain it in terms other than retribution, justice, deterrence,

incapacitation or rehabilitation.

A literal notion of punishment as justice is endemic in the predominantly Christian cultures of Western societies. Christianity began at the moment of punishment when its martyr was crucified by popular demand almost two millenia ago, and ever since punishment has been a dominant feature of Christian justice. The Holy Inquisition beginning in the thirteenth century made torture an integral part of the punishment of heretics (Scott, 1994, p. 66), and while this particular aspect of Christian punishment is no longer sanctioned it prevailed for many years in the punishments of "witches" and other "enemies of the church." Into the twentieth-century, the Christian will to punish has been held as a sacred duty. This was explained as God's judgement by proxy, in a letter to the editor of the **Vancouver Sun** in 1937: "After the Flood [God] established a new order of government, or rather government was established to restrain the previous lawlessness. He then committed the government into the hands of men [sic] or rulers, making them responsible for the blood of those murdered by executing judgment upon the murderers" **(5)**. This argument was also used in 1960 in a resolution of the Fellowship of Evangelical Baptist Churches in Canada, which noted that "the Christian conception is one of accepting the divine law, which makes human society responsible for the punishment of evil doers" **(6)**.

The Christian conception of secular law is centered on this belief in its derivation from "divine law." God is anthropomorphised (O'Neill, 1985, p. 11), described as a male character who can make "himself" known through the human practice of writing letters. The conditions of authority in God's thirteen letters to the Romans in the Bible makes this connection very clear:

> Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation.

This passage was a foundation for the death penalty offered by the pastor of a Toronto Baptist Church in 1960. The punishment of evil doers was thereby not in debate, but was a sacred duty. As the pastor claimed, "our Government has no proper right to abolish capital punishment, because in doing so they bring the blood of the innocent and the guilt of the murderer on all of us. Even when members vote according to their own ideas or consciences, they act as the representatives of the people and, in so doing, they involve us in the sin of neglecting to obey God" **(7)**. The very salvation of Christians thus depended on society's will and ability to punish evil doers on behalf of God.

Punishment has also been considered a pragmatic secular tool in the protection of the public. With punishments such as the death penalty and life imprisonment, there is a strong sense amongst government officials and the public that society is protected from

predatory murderers. This is seen even in the most liberal groups such as the United Church of Canada, which opposed capital punishment in its Nineteenth General Council in 1960. In its place, the United Church recommended life imprisonment under the condition that "no person . . . be released from care so long as his retention is essential to the well-being of society" **(8)**.

The protection of the public figured less prominently when the accused's sanity was in question. The concept of punishment was more difficult to connect to a murder if the author did not understand that the act was wrong, and as a consequence the response to the criminally insane was informed by more medical than punitive measures. While it would seem logical that the public required more protection from people governed by uncontrollable and delusional impulses to kill, this goal had to be achieved through means other than punishment, usually through mandatory confinement in forensic hospitals.

For the vast majority of cases, however, the goal of protecting the public through punishment has found its clearest expression in the much-debated issue of deterrence. The deterrent quality of punishment is seen as both general and specific. Whether the punishment for murder is death or life imprisonment, the individual murderer is

specifically deterred from recommitting the offense by incapacitation. This has been a most popular position of death penalty advocates, who have argued for the absolute individual deterrence afforded by the execution of the murderer over the open-ended question of any possible threat to public safety posed by the paroled murderer. This argument was expressed in a 1964 editorial in the **Vancouver Province** on the commutation of the death sentence imposed on Kenneth Meeker, convicted of a child sex-killing in Mission, British Columbia:

> . . . while most of the protesting groups and individuals say Meeker's reprieve was not warranted, they make it clear that they are not angry because this killer has escaped the noose. They simply fear that the cabinet's leniency might set Meeker free.
>
> And they reason that if Meeker, convicted of the vilest of crimes, goes free, then the law has failed in its first duty: Protection of the innocent.
>
> Some feel that Meeker has proven his life to be not worth the cost to taxpayers of keeping him in prison. Some fear that he might escape. Many fear that in a few years, when public feeling has died down, Meeker will quietly be paroled **(9)**.

A more contentious aspect to the deterrence argument of punishment relates to the potency of general deterrence. The 1956 federal government report on capital punishment notes that almost all of the provincial attorneys general (except for Saskatchewan) viewed the death penalty as an effective deterrent to murder, particularly in "deterring professional criminals from carrying weapons and committing crimes of violence" (**Reports of The Joint Committe of the Senate and House of Commons,** 1956, p. 10). The same report, however, later acknowledged that there was no statistical

evidence to support this claim, and that abolitionists argued that "certainty of detection and apprehension is a more effective deterrent than severe punishment" (p. 11). General deterrence also figured into the calculation of the alternative punishment, life imprisonment, as seen in a 1960 editorial in the **Globe and Mail**:

> One of the great objections to the abolition of capital punishment has been that the law as it now stands provides no satisfactory alternative penalty. When a murderer is sentenced to life imprisonment, he becomes eligible for parole after 10 years. Thus, "life imprisonment" tends to mean a penitentiary term of 10 to 15 years. This may not be a very effective deterrent for a hardened criminal . . .
>
> The Cabinet has now provided an alternative -- real life imprisonment, with no prospect of release. This gives the community adequate protection against the individual imprisoned, and it is severe enough to be a deterrent to others. **(10)**

In addition to the assumption that punishment deters criminal activity in general, this editorial suggests the notion that deterrence depends on an adequate *amount* of punishment prescribed for the crime. Presumably, then, would-be murderers are held back from killing by the prospect of natural life imprisonment, but not restrained by the prospect of lengthy incarceration with the possibility of parole. Notwithstanding the unsubstantiated assumptions about the potency of this deterrence argument in preventing future murders, such discourse demonstrates the struggle of Canadians to establish a punishment other than death for citizens convicted of murder.

Capital Punishment: Symbolism and Practice

Until 1976, the punishment for murder in Canada could be death. The rationality of

the death penalty as a response to murder seems, on the surface, to be a logical process: whoever takes a life illegally forfeits his or her own life. This rationality, however, is at odds with legal history which demonstrates that capital punishment was traditionally used as a generic penalty for a wide battery of crimes, rather than as a specific punishment for the crime of murder. Under the English system of justice, more than 200 crimes were punishable by death in Canada in 1793. The hanging of twelve thieves in Halifax in 1795, one for stealing a few potatoes (Anderson, 1982, p. 4), demonstrates the willingness of the authorities to use the penalty for crimes which would by today's standards be considered much less serious. In 1859, the Constituted Statutes of Canada maintained capital punishment for a reduced number of crimes, namely "murder, rape, treason, administering poison or wounding with the intent to commit murder, unlawfully abusing a girl under ten, buggery with man or beast, robbery with wounding, burglary with assault, arson, casting away a ship and exhibiting false signal endangering a ship" (Chandler, 1976, p. 17). Only six years later, in 1865, the number of capital crimes was reduced to three: murder, treason, and rape. Almost a hundred years passed before the revised Canadian Criminal Code abolished capital punishment for rape in 1954. In 1976, the death penalty was abolished altogether.

The historically reductive use of capital punishment in Canada indicates a grappling

with the problem of making the crime fit the punishment, instead of the other way around. This history also suggests that the only sure assertion that can be made about the relationship between the death penalty and murder is that murder is considered the most serious crime, meriting the most severe penalty. It is of interest that the only other crime equalled by murder in the relationship to capital punishment has been treason, a trend which continued through the abolition of the death penalty to the penalty of life imprisonment with parole eligibility at 25 years.

The "equal" status of murder and treason may have some metaphorical utility in understanding the state, as opposed to the public, response to murder when the rationale of the social contract is brought into the discussion. As described earlier, the social contract relates to the belief that individuals give up certain autonomous freedoms in order to benefit from the good of the whole. In this respect one gives up the right to kill others in order to receive state protection against being killed by others. Placed in this context, murder is treason because it is a crime and therefore an act against the state, but more importantly it is an act causing the death of a citizen which the state has been mandated to protect. The fact that the state is not imbued with the power to *restore life* puts it at a disadvantage in responses to murder, and the only recourses available have been to equalize the taking of life by ending the life of the murderer. In this way, murder

may be conceptualized as treason since it exposes the limits of state power with respect to death -- while the state may cause death "legitimately" through the power of law and its institutions, the ordinary citizen may also cause death, illegitimately, through the power of his/her own force.

The use of capital punishment can be seen as a symbolic method of addressing such issues of power. Becker (1975) has argued that "the whole meaning of a victory celebration . . . is that we experience the power of our lives and the visible decrease of the enemy: it is a sort of staging of the whole meaning of a war, the demonstration of the essence of it -- which is why the public display, humiliation, and execution of prisoners is so important. 'They are weak and die: we are strong and live'" (pp. 110-111). This idea harkens back to the practice of human sacrifice, based on the core belief that "a surrogate victim in one way or another saves others by his or her death" (Tierney, 1989, p. 368). Discourses on capital punishment, then, may also be examined apart from the legal and moral rationales upon which they are constituted. Christian cultures are particularly susceptible to this view, given that in their stories Jesus was both a victim of the death penalty and later martyred for the sacrifice of his life to "save" us from our "sins." Capital punishment may thus be considered in terms of its symbolism.

It appears that the symbolism of the death penalty is also based on the concerns of order and power, which affords it another similarity to tribal sacrifice. As two anthropologists argue, "Just as Aztec ripping out of human hearts was couched in mystical terms of maintaining universal order and well-being of the state . . . we propose that capital punishment in the United States serves to assure many that society is not out of control after all, that the majesty of the Law reigns, and that God is indeed in his heaven" (Purdum and Paredes, 1989, p. 152). Modern western concerns about the stability of order and authority are often conveyed in calls for "more severe and more ceremonious exercises of power" (Tifft, 1982, p. 66); execution as a response to murder dramatizes such power-exercises by the state, acting as a placebo to assuage the public fear aroused by the news of murder. Execution may then be interpreted as a symbolic victory over the forces of evil.

This symbolic quality of the death penalty as a response to murder is rarely articulated in the documents studied, except in resistances to state executions offered by some officials who had a role to play in them. Indeed, whatever symbolism of state authority and the rule of law which was afforded by public executions in the nineteenth century was overshadowed by a growing public resistance to frequent public hangings at the beginning of the century (Anderson, 1982, p. 14), indicating a public discomfort with the

overzealousness of authoritative power. By the mid nineteenth century public executions had declined, and in 1870 they were officially removed from public view and conducted behind prison walls. The politicians of the time, however, took special measures to ensure that the solemn symbolism of "executions of judgement" was not lost by this shift in practice. In a memo dated January 6, 1870, Prime Minister John A. Macdonald outlined four additional rules to those existing on the procedures for execution in view of this transition:

1. For the sake of uniformity it is recommended that executions should take place at the hour of 8 a.m.
2. The mode of execution and ceremonial attending it, to be the same as heretofore in use.
3. A Black Flag to be hoisted at the moment of execution, upon a staff placed on an elevated and conspicuous part of the Prison and to remain displayed for one hour.
4. The Bell of the Prison, or if arrangement can be made for that Purpose, the Bell of the Parish or other Neighbouring Church, to be tolled for 15 minutes before and 15 minutes after the execution. **(11)**

Thus while the public were no longer privy to the execution, symbolic measures such as the hoisting of black flags and the tolling of bells were adopted to ensure that the local populace knew when the execution was taking place.

The common mode of execution employed in Canada was hanging, a method which was to cause great controversy by the twentieth century. Public hangings that went awry in the nineteenth century had provoked violent public reactions. In 1829, a crowd in

Montreal attacked the man who botched the hanging of three men convicted for stealing an ox. In 1833, spectators tried to run a hangman out of town in Sydney, Nova Scotia after the protracted death of two men and a woman hanged for conspiracy to murder (Anderson, 1982, p. 14). By the twentieth century the public no longer witnessed actual executions, although accounts of bungled hangings were widely known **(12)**. During the 1965 capital punishment debates, a Member of Parliament inquired into the history of bungled hangings. This resulted in incomplete information from the Department of Justice, which furnished instead the circumstances of select cases whereby prisoners were hanged twice, died from strangulation rather than rupture of the spinal cord, were decapitated, or were cut down before death **(13)**.

The Canadian government apparently recognized the concerns about execution by hanging, a method which had a noticeable impact in public opinion on capital punishment. While few people in the early part of the twentieth century opposed the death penalty, waning support for the particular method of hanging threatened the legitimacy of capital punishment itself. In 1936, a committee appointed by the House of Commons was struck to study other methods of capital punishment. In consultation with the states of Nevada, Arizona, Colorado, Wyoming and North Carolina -- all employing gas chambers for execution -- the committee considered two principal questions: first,

which of the two -- lethal gas or hanging -- was the more humane method, and second, which was the greater deterrent to crime. The conclusion of the committee was that the economic burden for each county to build and operate its own gas chambers was too costly, and that such a change in method of execution did not result in more effective deterrence or enhanced respect for humanity **(14)**.

The question of method of execution arose again in the 1956 Report of the Joint Committee on Capital Punishment, Corporal Punishment and Lotteries, in which electrocution, the gas chamber, and lethal injection were considered. Lethal injection was rejected outright, primarily because of the offense presented to the medical profession by it: indeed, a meeting of British doctors to consider similar proposals advanced by their own government provoked the comments "that a process, which was regarded as a medical process ordinarily used to relieve pain, should be used as a method of execution was a very unhappy one" and "One could imagine what a grim and horrible joke a doctor with his syringe would become at the patient's bedside if it became the substitute for the gallows" **(15)**. The gas chamber was also rejected on the basis that it posed a danger to prison staff and presented a final strain on the condemned person who would be "tempted to hold his breath for as long as possible" (**Reports of the Joint Committee**, 1956, p. 22). Electrocution was considered favourably by the committee in

spite of the burning and mutilation of the body of the condemned person, because it produced "instantaneous unconsciousness and painless death" (p. 22).

The recommendation was never adopted, perhaps owing to the change of government in 1957 when the Conservatives unseated the Liberals in a federal election. The leader of the Conservatives, John Diefenbaker, was opposed to capital punishment and commutations of the death penalty increased significantly during his tenure as Prime Minister. Nonetheless, the debate over the appropriate method to employ in executions continued into the next decade, with contributions from members of the public such as the Torontonian who sent the following one sentence letter to then leader of the opposition, Lester Pearson: "May I Suggest that the Penalty be kept but that the method be improved by using a hypodermic needle or a decompression chamber or a humane killer pistol as used on beef cattle." **(16)**

Concern over botched executions by the mid-twentieth century was also reflected in the effects of capital punishment not only in application to the condemned but also on the officials responsible for the actual procedures of the execution, in the debates of the mid-1960's. One example of such effects on execution officials was drawn from the testimony of Canada's public hangman Camille Branchaud, who testified before the joint

committee of House and Senate on capital punishment on May 11, 1955. This testimony was not reflected in the committee's final report, but was later revived by a **Financial Post** columnist in 1965:

> Branchaud delivered his testimony in an even, unemotional manner -- just as he went about the grim business of hanging in a cool, efficient way, according to informants in the Justice department. Even so, his evidence created a sensation and one of his recommendations created a particular stir.
>
> Branchaud advised: "Before the execution, the officials should refrain from using intoxicating liquor of any kind, because it happened in some instances that the attending physician or coroner could hardly apply his stethoscope to the body of the condemned, and the body was left balancing on the rope much too long than was necessary, and such a mistake was imputed to the executioner."
>
> This confirms what was told to me privately by a former Minister of Justice. One of the great troubles about an execution, he said, was the difficulty of keeping those immediately concerned with it sober . . . [H]anging was such a beastly business that some of those involved could not go through with it unless they had the anaesthetic of alcohol. **(17)**

It is not difficult to see how the occasional hanging was botched in view of comments such as these, although the hangmen themselves were considered professionals of a sort. In choosing the occupation, professional hangmen were probably less likely than the community doctor to indulge in alcohol before performing their duties. The reluctance of other officials to fulfill their execution duties was also evident in the comments by former solicitor-general Leon Balcer, quoted in a 1965 article in the **Vancouver Province** as saying, "Sometimes, I couldn't sleep . . . Some cases were impossible to find a way out . . I had the life of a man in my hands. I was glad to get out of the job." **(18)**

A recurring concern around the practice of the death penalty centered on the prospect of executing an innocent person. While in the 1990s there are a number of known cases which illustrate the real possibilities of wrongful convictions of murder, such as Donald Marshall, David Milgaard, Guy Paul Morin, Wilson Nepoose, Gary Comeau, and Rick Sauve **(19)**, the chance that innocent people could be found guilty was largely considered speculative until the 1956 hanging of Wilbert Coffin in Quebec provoked a flurry of discourse on the merits of his conviction **(20)**. In the 1965 capital punishment debates, the director of legal aid in Metro Toronto produced evidence that three men tried and hanged for different murders in Ontario in 1946 and 1947 were defended by a lawyer who was committed to a mental hospital in 1948, and later deemed by an Ontario Supreme Court judge to have been insane since 1945. The idea that "things do go wrong in criminal trials . . . and can go really wrong if there's a madman conducting the defence" was presented as a challenge to the justice of the death penalty **(21)**.

The chance that an innocent person may be executed, it appears, is not as remote as we would hope. Since 1900 in the U.S., for example, 39 people have been sent to their deaths and later proven innocent (Strean and Freeman, 1991, p. 245). That the system is operated by a collection of individuals making different decisions in the charging, plea-bargaining, trial strategy, sentencing and appeal of murder cases provoked one U.S.

law professor to remark that "The trouble is that the system . . . must be viewed as one in which a few people are selected, without adequately shown or structured reason for their being selected, to die" (Black, 1974, p. 93). The implication here is that there is no real "science" to the trying of the accused and the calculation of punishment that is immune to the foibles of human practices, but perhaps more importantly, that underlying this solemn legal ritual there is a desire to sacrifice *someone* to death **(22)**. The practice of capital punishment itself becomes more important than the execution of individuals convicted of specific kinds of murders. This lack of uniformity, and the subsequent weakening of the "entire structure of social control" was cited in 1932 by a warden of Sing Sing Prison in New York as a reason for his opposition to capital punishment (Lawes, 1932, pp. 307-308). Some sixty years later, the standards of fairness in the U. S. system of capital punishment have not demonstrated much improvement (White, 1991).

That the point of the death penalty is more symbolic than instrumental was confirmed in one study of public support for the death penalty in the U.S. The authors of this study claimed that "political and social beliefs were found to exercise a strong influence upon support for capital punishment, while the influence of crime-related concerns was small" (Tyler and Weber, 1982, p. 40). Instrumental arguments on the pros and cons of capital punishment appear to dominate the literature on the subject **(23)**, with less discourse

concerned with the symbolism of the death penalty. This is curious, given the historical penchant for ritual human sacrifice, whether by throwing a virgin into a volcano to appease the god of rain or by hanging a criminal on a scaffold to bring order to society. Similar to both of these practices is the idea that someone else's death is a cushion between ourselves and our own deaths. To the Incas, the rain was necessary to grow food and prevent starvation, and this end was achieved by sacrificing one person to save the rest. In modern western cultures, sacrifice has been secularized. The lives of the "good citizens" are saved by the sacrifice on the altar of justice of the "bad murderer," whose death "protects" society while sending a strong message of authoritative power to those who might be inclined to unlawfully kill. In this sense, killing becomes a defence against death.

Life Imprisonment

The shift in the punishment of murderers from the death penalty to life imprisonment was generally conceived as a progressive reform befitting a civilized society, a proposition which will be challenged later in this section. Indeed, the idea of imprisonment as a response to crime long preceded any specific notion of life imprisonment for the murderer as a humane "trade-off" for capital punishment. Not to be confused with the centuries-old use of gaols as cages to ensure the attendance at the event

of those awaiting trial or corporal/capital punishment, incarceration *as* punishment itself is a phenomenon which has a history of about two hundred years.

In Canada, the opening of the country's first federal penitentiary at Kingston, Ontario in 1835 was provoked, on one level, by overcrowded local gaols, holding prisoners convicted of death punishable offences for which judges and juries were not willing to impose the ultimate sanction. At the time, capital punishment was a potential sentence for almost 200 offences but rarely used. From 1835 to 1840, the prison's population totalled 150; by 1841 hard labour had been accepted as an alternative punishment to death. The convicts were sent directly to the Provincial Penitentiary at Portsmouth, later to be known as the Kingston Penitentiary. By 1845, the population had grown to 450 prisoners (Curtis et. al., 1985, pp. 5, 22). Later growth in the population of the penitentiary between 1850 and 1857 is said to reflect the growth of the population at large, owing in part to a "massive, uncontrolled, and undesired migration" of Irish potato famine refugees to pre-confederate Canada in the late 1840s, many of whom would become prisoners (Gaucher,1987, pp. 185-186). By 1870 severe overcrowding at the Kingston Penitentiary caused the authorities to recommend the construction of another federal prison in Quebec, and in 1873 St. Vincent de Paul accepted a first transfer of 119 prisoners from Kingston (Gosselin, 1982, p. 73). Seven years later, federal prisons had

also been constructed in Manitoba (Stony Mountain), British Columbia (B.C. Penitientiary) and New Brunswick (Dorchester).

While local gaol overcrowding appears to have been an important influence in the decision to build a penitentiary, other factors seem to have countenanced the construction of the Kingston Penitentiary. One of these was the "Tory-Paternalist" sensibilities of the ruling elite and their interest in houses of correction, modelled on the Auburn system in New York at the beginning of the nineteenth century. Another factor was the reform in criminal law aimed at reducing the number of crimes punishable by the death penalty, led by Upper Canadian Tory and Chief Justice John Beverley Robinson in the early 1830s. These influences reflected the Tory endeavour to facilitate a "moral uplifting" of the population. The move to construct Kingston Penitentiary faced some opposition, mostly from politicians who were concerned with the costs of building and operating it, and from supporters of local Kingston mechanics who anticipated an uneven competition between "the labor of rogues" (the convicts) and that of "honest men." When the Tory advocates of the penitentiary made concessions to the Kingston tradesmen, opposition dwindled and the construction of the prison began (Smandych, 1991).

Much of the routine in the penitentiary's early years was devoted to hard labour, such

as the breaking of rocks to be used in the construction of churches (Gosselin, 1982, p. 72). Some of this labour took place in the fields and a rock quarry located outside of the penitentiary walls, a practice which made the convicts more visible to the outside community. Bill Westlake, a former Senior Deputy Commissioner of the Correctional Service who grew up in the vicinity of the prison in the early part of the twentieth century recalled scenes of Portsmouth village children running alongside the line of prisoners marching to and from the quarry everyday and carrying on conversations with them: "inmates of Kingston Penitentiary were neighbours, sometimes our friends, but always part of the community" (in Curtis, et. al., 1985, p. 79). Similar sentiments were voiced by a former neighbour of British Columbia's provincial Oakalla Prison in the early 1900s, who remembered prisoner trusties buying candy and cigarettes at the small local store: "there were no fences, and the people in the neighbourhood never locked their doors" (in Andersen, 1993, p. 17).

Much time has passed since these events. Communities and prisons have undergone many changes which have made the two distinctly separate. In the late twentieth century, new prisons are constructed away from larger outside communities. Most locals would cringe at the prospect of their children befriending prisoners or the idea of a prison without a fence, although most minimum security institutions today exist without a

restraining wall. The whole idea of a prison in the popular climate of the latter part of this century has been to keep certain people out of the community at large because of the presumed threat they pose to it. Our communities today are more densely populated and transitory, and there are many more prisons scattered across the country.

In 1960 there were 15 federal penitentiaries in Canada, including the Prison for Women in Kingston which opened in 1934 to accommodate the women who were previously incarcerated in separate wings of men's prisons. By 1970 there were 34 federal penitentiaries (Gosselin, 1982, p. 76), increasing to 62 in 1990 (Correctional Service of Canada, 1990, p. 12). This means that there are about four times as many prisons in the mid-1990s than there were at the end of the 1950s, indicating a significant rise in the use of incarceration as a response to crime in the past 35 years. The concerns about the costs of building and operating the first penitentiary in the early 1800s appear to have little resonance in the carceral climate of the late twentieth century; in 1992-93, the Correctional Service of Canada spent just under one billion dollars in operating costs alone (Report of the Auditor General of Canada, 1994, p. 16-7).

While factors such as demographic structures, increases in the Canadian population and increases in crime rates likely contributed to the massive prison expansion which

began in the late1950s, two influences to this end figure prominently. One of these was the increasing reluctance of the government to effect the death penalty in cases of murder and the subsequent "trial" abolition of the punishment; the second was a vigorous interest in the reformative capacities of the prison itself. These factors will be considered in the historical context of a changing philosophy in the Canadian response to crime which began in the 1800s, using the analyses of Foucault to frame the inquiry.

Revisionist histories of the prison in the last twenty years have presented a challenge to the lingering reformist perceptions of incarceration as a humanitarian alternative to the torture and execution of criminals. The work of David Rothman (1971, 1980), for example, considers the influence of both humanitarian impulses and the opposition to them in the U. S. creation of asylums in the first half of the nineteenth century. In his analyses, the focus is on the interconnections between state control institutions for criminals, the insane and the poor, and how changes to these institutions were provoked by the interplay of different national and regional ideas about the role of the state in the institutional response to such social problems. In his view, the emergence and development of the penitentiary can be traced through a dialectical process in which numerous historical circumstances and ideas have been confronted, come into conflict and subsequently changed the reforms of the institution.

Ignatieff (1978) examined the emergence of the penitentiary in England during the industrial revolution. Like Rothman, he acknowledged the influence of penal reformists in providing the impetus for the shift in punishment reflected in the creation of the penitentiary, but argued that such reforms must be examined in relationship to the ideological, political and economic facts which inspired them. The physical plausibility of the penitentiary was made possible by its "resonance with the well-ordered manufactory, the workhouse, the asylum" (p. 215), and despite its repeated failure to reform criminals it endured because it was seen as part of a larger vision of order in class relations. In this vision, "social stability had to be founded on popular consent, maintained by guilt at the thought of wrongdoing, rather than by deference and fear" (p. 211). Consequently, punishment philosophy focussed on the mind rather than the body.

This notion of a punishment directed at the mind is also germane to Foucault's analysis of the birth of the prison (1979). In this conception, the prison was possible because of its strategic suitability in disciplining individuals; by confining the movement of bodies and making them docile, the souls inhabiting them were made readily accessible to forces of correction. That the prison is rarely successful in its correctional mandate does not deflate its power as an institution of punishment, because what is of larger importance are particular disciplinary forces which the prison enables and represents. Discipline was an

emerging strategy of power by the nineteenth century, and while this strategy is clearly visible in the prison itself it is also imbedded in the wider context of society at large in softer degrees. As Foucault argued, "in a general way, the penal system is the form in which power is most obviously seen as power. To place someone in prison, to confine him there, to deprive him of food and heat, to prevent him from leaving, from making love, etc. -- this is certainly the most frenzied manifestation of power imaginable" (1977, pp. 209-210). In softer forms, disciplinary power may be seen in social institutions such as the family, workplace, or the welfare system.

While the vision of societal relations as dynamic is compelling in Rothman's analysis of their effects in the rise of the penitentiary, this approach to the issue is less clear on what it was about the penitentiary as a *method* of control that made it so durable in the face of its continual controversy over its demonstrated failure to "rehabilitate" the convict or reduce crime. Ignatieff's account goes further in this vein, by seeking explanations for "*how* the penitentiary came to be accepted as a *rational* solution to the problem of crime" (Smandych, 1991, p. 127, emphases added); however, the resort to explaining this by way of superstructural factors is confronted by the knowledge that prisons exist as forms of punishment in times and places where these factors and class relations are constitutionally different. By focussing on the *method* of control itself (discipline), and

how the prison reflects the use of this method (institutional routine and regimentation, correctional programming), Foucault shifts the analyses of the penitentiary away from the constraints of certain ideological *influences* on control and towards specific *strategies* of control. These strategies are authorized and made possible by knowledges of the criminal, as the legal and moral subject. Just as the asylum was the psychiatrist's school and laboratory, and the hospital clinic the doctor's, so was the prison for criminological sciences.

The birth of the penitentiary, and some of the justification for its continued existence in the face of its failures and criticisms, may be attributed to the prison's particular amenability to the exercise of discipline. The modern description of the penitentiary as a "correctional institution" speaks to its function as a "normalising" agency, through which unruly people are supposed to be disciplined into docility. Indeed, the change in name of the Canadian Penitentiary Service to the Correctional Service of Canada came on the heels of the 1977 parliamentary Subcommittee on the Penitentiary System in Canada report following a series of prison riots. The key problems inherent in the system and the solution to change articulated in the first two paragraphs of the report (Report to Parliament, 1977, p. 1) reflect the point of "corrections":

> To sum up the totality of needs of the Canadian penitentiary system, as we have observed them, in a single word may seem as hazardous as it is ambitious. However,

> we believe the word "discipline" says it all.
>
> The restoration of discipline is our basic objective in the reform of the Canadian penitentiary system. By discipline we do not mean the lash, clubs or tear gas; nor do we mean primarily a system of rules, even ones that are firm and consistent and fairly applied, although discipline does mean that too. Discipline is essentially an order imposed on behaviour for a purpose. It may be externally imposed, but internally imposed self-discipline is ultimately more important.

The importance of discipline in the prison in the report was also relayed to the population at large, in a passage which lends credence to Foucault's analyses of discipline: "We believe that penitentiary problems are basically human problems and are solved *in the same way as other human problems*, through the discipline of rules, work and social life, for the purpose of self-reformation, to an accepted standard of behaviour" (p. 2, emphasis added).

The method of discipline in producing order within the prison is one explanation as to why the prison has survived until the end of the twentieth century. While there may be other reasons ensuring the durability of the prison, such as the public demand for punishment, these do not necessarily explain the *regime* of the prison as it exists, on a day by day basis. In the securing of individuals (prisoners) in time and space (the prison sentence), the method of discipline has been effective in the control of "life" within the concrete parameters of the prison. The prison "v. orks," in this sense, as a method of punishment. The method of discipline is not restricted to use in the prison, however, as seen in its employment in other social institutions such as schools or hospitals.

The mid-twentieth century expansion of penitentiaries in Canada began with the Fauteux Report (1956), which renewed the interest in the *reformative* capacities of the penitentiary (Lowman, 1986, p. 242). **(24)** Combined with the political ambivalence on capital punishment as a response to murder, the idea of individual reformation through a period of incarceration soon found expression in extensive reforms in the penal system. A major change came in the form of the classification of prisoners by security levels, realized through several new medium and minimum-security institutions to complement the existing maximum-security penitentiaries. In 1959, the opening of Canada's first medium security penitentiary -- called "The Joyceville Experiment" in an **Ottawa Citizen** editorial **(25)** -- marked what then Justice Minister E. Davie Fulton described as "a new era in the Canadian penal system" **(26)**. At Joyceville (near Kingston, Ontario), a revised version of prison labour was scheduled to provide more "realistic" methods of prison work which would produce goods for use only by the penitentiaries themselves (and avoiding the unfair market competition originally feared in the creation of the Kingston Penitentiary), in order to defray the costs of incarceration and prepare the prisoners for employment upon their release **(27)**. A longer working day for prisoners was complemented by visits to the psychiatrist or psychologist and socially-rehabilitative programs in the evenings, affording greater interaction among the prisoners, and between prisoners and the community at large.

The new medium and later minimum security prisons -- including some specially designed "rehabilitative" facilities such as the drug-treatment prison in Matsqui, B.C. -- hastened the abolition of capital punishment, as there was a demonstrable alternative for the handling of convicted murderers. The expanded penitentiary system afforded the accommodation of people who might otherwise be residing in graveyards, and even offered the prospect of their reformation into productive citizens **(28)**. The new trend was enthusiastically promoted by the government, which concluded that the Canadian system "is one of the most humane presently existing in the world, and that we are aiming to make it the most humane" **(29)**.

The position of the murderer in this aggressive system of correction through punishment appears hardly distinct from that of the other convicts serving time. Prison psychiatrists would later observe that on the basis of psychiatric evaluation, many murderers required few security provisions with respect to the risks they posed to society. Dr. Guy Richmond (1975), for example, argued that "even a murderer might rightly be classified as a circumstantial offender, and some I have known in this category would never have offended again if they had been released immediately after being found guilty" (p. 78). In 1982, Dr. George Scott claimed that "eighty per cent of murderers show no ongoing problems of an emotional or mental nature. Seventy-five per cent of

manslaughters have developed from situations which initially were not criminal. In these cases, minimal security institutions provide sufficient supervision" (p. 199).

Such comments echo the observations of wardens and doctors required to make assessments of prisoners serving commuted death sentences since the late 1800s, in various requests for the release from custody of murderers studied in the documents. The professionals hired in the custody and rehabilitation of prisoners generally see no particular attributes of murderers *per se* which would cause them to pose a greater danger to society. These medical and correctional assessments of murderers do not explain the severity of the punishment for murder, but they do demonstrate the limits of medical influence in the workings of law itself. As an expression of law's power rather than a correctional enterprise, punishment would then appear to be more symbolic than pragmatic.

Today, the differences between murderers and other prisoners in the Canadian prison system are generally ceded to the problems posed by the *longer sentences of confinement* served by people convicted of murder. The fiscal crisis of the 1990s has resulted in a marked limitation of institutional programs accessible to those serving life sentences, where programming is priortized in favour of prisoners serving shorter sentences who are

consequently closer to their release to the community. "Lifers" who are seen as stable influences in the prisons and who are often categorized as model prisoners eventually are problematized on the basis of the harmful psychological effects and diminished post-release prospects posed by their long-term incarceration **(30)**. And following the establishing of the life sentence with no parole eligibility for 25 years for first degree murder, the increased number of lifers and the greater length of time to be served by them as a result of the 1976 legislation has also been cited as a management problem for the Correctional Services of Canada **(31)**.

Symbolism, Punishment, and Responding to Murder

The history of the response to murder in Canada not only involves the methods of the death penalty and life imprisonment, but also the moral-rational philosophies of punishment which informed them and the practices of the individuals commissioned to carry them out. In the 1800s support for public executions was waning, perhaps in part due to the occasional botched hanging and to the number of offences for which the penalty was applicable. Into the 1900s, this is demonstrated by the frequent unwillingness of judges and/or juries to recommend the penalty when the law commanded it, and the increasing reluctance of politicians from the middle of the 20th century to 1976 follow through with death sentences. The penitentiary, already in

evidence in the justice systems of Europe, Britain and the U.S., may have been explained by the Canadian political elite as a suitable alternative to the pressing dilemma of overcrowded gaols. But this problem of increasing gaol populations should also be considered in a particular context of political struggle **(32)** which increased the number of criminals, particularly the Catholic Irish paupers who were quickly seen as a "dangerous class" (Gaucher, 1987, p. 182). That there was a deliberate difference between the existence of local gaols and the proposed penitentiary -- indeed, that the penitentiary was seen as a *solution* to the problematic gaols -- indicates a variation in the constitution and practices of each which were noticeable to those confronted with the problem. This variation is based on the notion of moral reformation.

Gaols were generally used to hold people awaiting some procedure of the justice system, such as their trial or the execution of their punishment. Gaols were also used as "debtors' prisons" and in this way may well be construed as an instrument of punishment. However, the punishments for crimes by the beginning of the nineteenth century most often entailed some kind of corporal punishment enacted in a public place, transportation, or the death penalty. The penitentiary was premised on the Quaker notion of reformation through penitence, as an alternative to the cruelty of capital and corporal punishment (American Friends Service Committee, 1971, p. v); the penitentiary thus connotes the

idea of *reformation* through *punishment*. The reformation of criminally errant citizens was made possible by the penitentiary, whereby punishment was served by the captivity of prisoners and the practice of imprisonment served as a context for their reformation. That this reformation would be imposed by coercion was explicit; a report of the Magistrates to a committee of the House of Assembly respecting a gaol and House of Correction in Montreal, Quebec in 1803 uses this point to argue against its administration by a religious order:

> The Magistrates humbly concur, with due submission to the opinion of the committee, that a House of Correction under the Management of the Grey Sisters, subject to the Control of Civil Administration, would not tend to the Advantages to be expected from such an Establishment, inasmuch as it is by Coercion, not Example, that Offenders, Objects for a House of Correction are to be brought to a Sense of their Guilt to be much better Members of Society. **(33)**

Life in the penitentiary would consist of coercive disciplinary routines of hard physical labour, minimal social interaction, limited diet, and controlled physical movement, and through these practices convicted criminals would have plenty of years to contemplate the errors of their ways **(34).**

The punitive response to murder in Canada is set in this wider context of the strategies of punishment for crimes generally. While murderers would still be potentially subject to the death penalty until as recently as 1976, it is clear that many people convicted of killing others were handled differently, from the six months imprisonment term and the

branding of the letter "M" on the right thumb of Seth Huskins in Nova Scotia in 1816 **(35)** to the numerous commutations granted convicted murderers in the 20th century. While some murderers were still hanged as punishment for crimes for a long time after the emergence of imprisonment, executions moved out of public eyesight behind prison walls. Life imprisonment was substituted as the penalty for the "lucky" murderers who managed to have their death sentences commuted. Punishment of murderers moved from a concrete symbol of the power of law and order inherent in public executions, to a symbol of punishment in the harsh discipline of long-term incarceration. The physical penitentiary became the visible punishment, although the practices within it would remain removed from the witness of the citizens who paid for it. Today life imprisonment is but a concept to those who have never ventured into a prison or experienced the phenomenon of involuntary confinement. It is, however, a potent symbol of punishment which serves as a line of security and distinction between the "good" and the "bad" people of our society.

The institution of penality, according to Garland (1990, p. 291) is one "through which society defines itself at the same time and through the same means that it exercises power over deviants." In this conception, the notion of a correctional penitence in the punishment of the criminal would be reflective of a society in which the transformation

of individuals generally is seen as a necessary endeavour. Indeed, the emergence of other social institutions such as public schools and mental asylums indicates other efforts to bring Canadians to a particular standard of normalcy deemed necessary for the effective functioning of the new society. The death penalty gradually lost currency in context with the burgeoning practice of corrective incarceration; as Foucault has explained, "if justice is concerned with correcting an individual, of gripping the depths of his soul in order to transform him, then everything is different: it's a man who is judging another and the death penalty is absurd" (1989, p. 165). The failure of the penitentiary to accomplish this correction of criminals by the 1990s has been well documented and argued, and this failure is readily used as an argument for a return to the death penalty for those convicted of murder; however, the prison still exists regardless of the criticisms directed toward it, and it continues to dominate as a method of legal punishment in North America as we move toward the next millenium.

At this juncture, it is worth considering the notion of punishment itself as a response to murder. Garland argues that punishment is an institution of last resort in society because "authority must in the end be sanctioned if it is to be authoritative, and offenders who are sufficiently dangerous or recalcitrant must be dealt with forcibly in some degree" (1990, p. 292). This position appears to assume a generic validity of laws: the "recalcitrance" of

people committing crimes motivated by poverty may well be addressed by means other than punishment, and even the defined "dangerousness" of people such as Lisa Neve who was recently given the status of a dangerous offender (a legally possible classification in her case, although she never raped or killed anyone) in Alberta is subject to the valid criticisms of such classification. Garland's tenuous acceptance of the institution of punishment, notwithstanding the scholarly treatment of the issue in **Punishment and Modern Society**, demonstrates its tenacious hold on the discursive responses to crime generally and murder specifically.

Garland's specific focus on legal punishments in his analyses is problematic when considering the aspect of gender, especially given his assertion that punishment is a "social institution" (1990, pp. 10-12). Howe (1994) argues that with respect to women it is "precisely the non-legal forms of punishment . . . which punish women the most" (p. 117). This argument could also be taken further to include children, who bear the brunt of punitive practices but are often omitted from sociological discourses of punishment except where children transgress the law. Rather than merely assessing the efficacy of punishment or determining the kinds of cultural values represented in the decision to punish certain acts, Howe asserts that we must engage "in a persistent critique of what one is up to when one calls on the state to punish women or men" (p. 217). In other

words, we must examine our own motives and agendas in responding to crime through punishment.

From this vantage point, feminist analyses of punishment may be useful in the reconsideration of our responses to crime. Snider (1994), for example, argues that the "emphasis on injuries and punishment has its origins in anger" and that "strategies built on rage which employ criminal law and the criminal justice system tend to backfire" (pp. 76-77). Punishment may be a conduit for anger, but it need not be the best response to crime:

> Punishment itself is a mystifying concept, performed by a group of anonymous employees of the state ostensibly in the name of the public, but the public has neither access to, nor control over penal power. While instruments of control and regulation are necessary even in humane and egalitarian social orders, punishment, a specific way of conceptualizing and reacting to problems of control, is not. The institutionalization of punishment as a technique of control is a socio-political device whose development is linked to particular social orders and historical periods (Snider, 1994, p. 77).

This idea of punishment as a choice rather than a given opens the possibilities of different responses to murder. Perhaps most significantly, the decentering of punishment in responding to crime affords the opportunity to respond to harmful behaviours through culture as opposed to the "criminal" him/herself.

ENDNOTES

1. From the Introduction to **The Divine Comedy**, by translator Dorothy Sayers, p. 68.

2. Based on statistics provided in Appendix "B" of the Reports of the Joint Committee of The Senate and House of Commons on Capital Punishment, Corporal Punishment and Lotteries, 1956.

3. From "Should the Death Penalty be Restored in Canada? A Review of the Argument," by Reverend E. L. H. Taylor, M.A. (Cantab), Chaplain; Canadian Legion, 1960. MG 26 N2, Justice Department (2), Leader of the Opposition. The National Archives of Canada.

4. In an article written by Ruth Worth in the **Globe and Mail**, November 21, '64. MG 26 N-11, Volume 34, file 11 Dec/62 to 28 Nov/64. The National Archives of Canada.

5. Letter to the editor of the **Vancouver Sun** by H. Fletcher, dated January 25, 1937. MG 26 (J2), file J-154, 1935-1937. The National Archives of Canada.

6. Letter to the Hon. Lester B. Pearson, M.P., Leader of the Opposition, dated February 10,1960, signed by the Secretary-Treasurer Morley R. Hall. MG 26 N2, Volume 37, file 427. The National Archives ot Canada.

7. "Five Reasons Why Our Government Should Not Abolish Capital Punishment," by Rev. J. R. Boyd, Pastor, The Berean Baptist Church, Toronto, 1960. MG 26 N2, File Justice Department (2). The National Archives of Canada.

8. The Report of the Committee on Alternatives to Capital Punishment to The United Church of Canada, Nineteenth General Council, 1960, p. 3. MG 26 N2, Volume 37, File 425. The National Archives of Canada.

9. From the editorial "The public wants protection, not revenge. . .," the **Vancouver Province**, November 12, 1964. MG 26 N-11, Volume 34, file 11 Dec/62 to 28 Nov/64. The National Archives of Canada.

10. From "In Place of the Gallows," editorial in the Toronto **Globe and Mail**, August 30, 1960. In MG 26 N-11, Volume 39, file 425, 6 Jan/60 to 9 Dec/60. The National Archives of Canada.

11. Memo from the Department of Justice, Ottawa, dated January 6, 1870 by John Macdonald. RG 2, Volume 273, File 8 Jan. 1870. The National Archives of Canada.

12. Numerous examples of bungled hangings in Canada are provided in Anderson's **Hanging in Canada** (1982).

13. From the Memorandum for the Deputy Minister, Department of Justice, from T. D. MacDonald, dated February 25, 1965, in response to a request from M.P. Matheson in the House of Commons. RG 13, Volume 1404, file Parliamentary Questions 1965. The National Archives of Canada.

14. From Memorandum for the Minister of Justice, Re: Bill 10 and proposed use of lethal gas as a means of inflicting capital punishment, Ottawa, May 12 and 20, 1936. MG 27III, BIO Volume 55, file 68. The National Archives of Canada.

15. From "The Findings of the Royal Commission on Capital Punishment," in **Medico-Legal Journal** (date unknown). RG 33/130, Volume 2 (Interim #42), file Medico-Legal Journal. The National Archives of Canada.

16. Letter by E. R. Grange of Toronto, dated February 15, 1960, to Hon. L. B. Pearson, Ottawa. MG 26 N2, Volume 37, file 425. The National Archives of Canada.

17. From "Drunken-Officials' Testimony Not in Hanging's White Paper: But this 10-year-old evidence by 'competent' hangman will likely be raised again and again in the forthcoming debate on capital punishment," by John Bird in the **Financial Post**, July 3, 1965. MG 26 N1, Volume 38, file 414, 3 July - 31 Dec., 1965. The National Archives of Canada.

18. From "There is no return from death penalty," by Jack Van Dusen, in the **Vancouver Province**, July 22, 1965. MG 26 N1, Volume 38, file 414, 3 July - 31 Dec., 1965. The National Archives of Canada.

19. In 1971 Donald Marshall, a 17-year-old Micmac Indian, was convicted of the murder of Sandy Seale in Nova Scotia and served 11 years in prison until Roy Ebsary confessed to the killing in 1982 (see Harris's **Justice Denied**, 1987). Also at 17 years of age, David Milgaard was convicted in 1970 of the sex slaying of Gail Miller in Saskatchewan and spent 22 years in prison until the Supreme Court of Canada ordered him released for a new trial. The Saskatchewan government later decided not to retry the case. An account of this story is found in Karp and Rosner's **When**

Justice Fails (1991). Guy Paul Morin was convicted in 1992 of the 1984 sex slaying of his child neighbour Christine Jessop in Ontario, but the conviction was quashed by the Ontario Court of Appeal on the basis of DNA evidence. This story is recounted in Makin's **Redrum the Innocent** (1995). Wilson Nepoose was convicted of second-degree murder in 1987, but the charges were later stayed when the Alberta Court of Appeal was presented with new evidence. Gary Comeau and Rick Sauve are still serving life sentences for the first degree murder of Bill Matiyek in Port Hope, Ontario, although many people are convinced of these men's innocence for reasons which are made clear in Mick Lowe's **Conspiracy of Brothers** (1988).

20. Coffin was a Gaspe mining prospector who was convicted of the robbery slaying of three American hunters in 1954. The case was based on circumstantial evidence and was contentious enough that the Cabinet requested an unusual review of it by the Supreme Court of Canada.

21. From "'Mad lawyer' defended 3 who hanged," by Alan Edmonds, in the **Toronto Star**, April 14, 1965. MG 26 N1, Volume 38, file 414, 4 Jan - 28 June/65. The National Archives of Canada.

22. The inclination to choose someone from a minority group for this purpose is not only an American phenomenon. In 1959, Conservative Senator W. M. Aseltine vigorously lobbied against the abolition of the death penalty "until such time when the numerous immigrants would be absorbed by the Canadian nation and would understand the Canadian laws," apparently espousing its deterrent value for "lawless immigrants from all nations." (Mr. Aseltine was a member of the 1956 Joint Committee of the Senate and House of Commons on Capital Punishment, Corporal Punishment and Lotteries.) From a translation of an editorial in **Der Nordwesten**, Winnipeg, September 17, 1959. MG 26 N-2, Volume 37, file 425. The National Archives of Canada.

23. See, for example, **The Death Penalty in America** (1964) edited by Hugh Adam Bedau, and **The Death Penalty: A Debate** (1983) by Ernest van den Haag and John P. Conrad. Chandler's **Capital Punishment in Canada** (1976) reviews the public debate on the issue as expressed in instrumental themes.

24. The capacity of the prison for the reform of convicts had also been addressed by the Brown Commission in 1849, particularly in its focus on the type of regime studied in the Kingston Penitentiary and the lack of prisoner training and classification. The notion of reform, as later expressed by the Archambault Committee of 1938, shifted

to treatment and rehabilitation (Lowman and MacLean, 19 , pp. 135-138).

25. Dated December 17, 1959. MG 28 IV-2, Volume 66, file J-6. The National Archives of Canada.

26. From the **Kingston Whig-Standard**, December 16, 1959 in "Joyceville Marks New Era in Penal System, Justice Minister E. D. Fulton Declares." MG 28 IV-2, Volume 66, file J-6. The National Archives of Canada.

27. Described by Don Peacock in "Prison Work Methods To Be More 'Realistic'," **The Financial Post**, December 17, 1960. MG 28 IV-2, Volume 66, file J-6. The National Archives of Canada.

28. In an interview in the **Vancouver Province** ("There is no return from the death penalty"), July 22, 1965, former Solicitor General Leon Balcer argued that "some convicted murderers can be returned to society to become its useful members," recalling a case of a convicted murderer originally given a death sentence (which was later commuted) who would eventually become a parole officer in the Justice Department -- "one of the best we have." M 26 N-1, Volume 38, file 414 3 July - 31 Dec./65. The National Archives of Canada.

29. From the Address of the Honourable W. J. Browne, Solicitor General, delivered at the Annual Convention Dinner of The Ontario Magistrates Association -- King Edward Hotel, Toronto -- May 5th, 1961, in which the program of reform is outlined. MG 28 IV-2, Volume 110, file Speeches -- Browne, W. J. The National Archives of Canada.

30. See, for example, McKay et. al. (1979) **The Effects of Long-Term Incarceration**, or Cohen and Taylor's **Psychological Survival** (1972).

31. See, for example, **Long Term Imprisonment in Canada**, prepared by the Ministry Committee on Long Term Imprisonment, Ministry of the Solicitor General (1984).

32. The Irish pauper migration of 1832-34 occurred at the same time as the "rising political challenge of the Canadiens and radical democrats of Upper Canada" (Gaucher, 1987, p. 181).

33. From the Draft of a Report of the Magistrates to a Committee of the House of Assembly respecting a Gaol and House of Correction, February 10, 1803. MG 23 6 III, Volume 31, file Charles Blake. The National Archives of Canada.

34. Calder (1981) provides a description of this regime in "Convict Life in Canadian Federal Penitentiaries, 1867-1900."

35. From the Records from the Prothonotary, Liverpool, Queens County, N.S. MG 9 B 9, file Liverpool. The National Archives of Canada.

Chapter 8
RESPONDING TO MURDER: PUNISHMENT, POWER AND PRACTICE

> He who is state-raised -- reared by the state from an early age after he is taken from what the state calls a "broken home" -- learns over and over and all the days of his life that people in society can do anything to him and not be punished by the law.
>
> . . . (Impulsive, raw, unmellowed) emotions [are] the hidden, dark side of state-raised convicts . . . There is something else. It is the other half -- which concerns *judgment,* reason (moral, ethical, cultural). It is the mantle of pride, integrity, honor. It is the high esteem we naturally have for violence, force. It is what makes us *effective*, men whose judgment impinges on others, on the world: Dangerous killers who act alone and *without* emotion, who act with calculation and principles, to avenge themselves, establish and defend their principles with acts of murder . . . this is the state-raised convict's conception of manhood, in the highest sense.
>
> (Jack Henry Abbott, **In the Belly of the Beast**, 1982)

> Give me back my broken night, my secret room, my secret life
> it's lonely here, there's no one left to torture
> Give me absolute control over every living soul. . .
> I've seen the future, brother: it is murder.
> Things are going to slide in all directions
> Won't be nothing, nothing you can measure anymore
> The blizzard of the world has crossed the threshold
> and it has overturned the order of the soul
> When they said REPENT, I wonder what they meant
>
> (Leonard Cohen, **The Future**, 1992) **(1)**

In the wake of the Homolka and Bernardo trials public debate over the response to murder appears to have intensified once again. In the province of British Columbia specifically, this debate has been further fuelled by recent abduction/sex killings of women and children which have provoked much fear and loathing over the state's apparent inability to protect its citizens from such tragic fates. As the twentieth century

draws to a close, responses to murder have again become a hot political issue.

The talk on murder reflected in Canadian historical documents demonstrates that the angry debate over the response to murder is a road well-travelled. Whatever the consequence for murder has been, however, be it the death penalty or life imprisonment, the social phenomenon of murder itself continues to plague Canadian society. It would seem that Hegel's assertion in 1832 about the lessons of the past still has currency over 150 years later: "what experience and history teach is this -- that people and governments never have learned anything from history, or acted on principles deduced from it" (1956, p. 6). Indeed, from a political standpoint, the view on any issue is generally directed towards the immediate future and improving the possibilities of re-election, rather than towards the past and the lessons which may be found there.

The failure to learn from the lessons of the past is one aspect of the responses to murder in Canada. On the one hand, the concern over murder is about premature violent death and the human tragedy it entails. The anger and fear of citizens inspired by acts of murder reflects this concern. Indeed, several well-publicized, predatory sex killings in Canada recently would seem to justify a sense of diminishing personal security -- an effect of "the reality and fear of crime, violence, drugs and signs of increasing

deprivation" (Smart, 1993, p. 30) -- which is expressed in public talk on murder. On the other hand, the institutional practices of response to murder manifested in the specific punishment of the individual murderer do not seem to be historically or empirically linked to reducing the pain of murder itself, particularly future murders. If murder and how to respond to it are a problem, how should we go about the business about doing something to reduce if not prevent murder, and thus the pain of the victims' survivors? This question, however, is relevant only if the motivation underlying our responses to murder is to effect practical ways by which to reduce the incidence of murder and the tragedy it infers. We can, then, also consider the possibility that there are other, perhaps more dominant motivations in our responses to murder.

The first consideration in addressing the question of motivation is to question thought itself, and how this shapes the ways we think about murder. This was the subject matter of Part I of the thesis. It was suggested that ways of thinking which are limited by human finitude tend to structure the problem of murder as the problem of the murderer. In this context, the ability and duty to reason is considered germane to both the processes of responding to murder and the individual culpability of the accused. Assessments of situations which fall into the legal category of murder are also further guided by precepts of rational morality, which distinguish between murders. But thought does not occur

independently of the relations of power which help to shape it. Thus, different conceptions of legal power were explored, in order to ascertain the limits and biases which shape the discourses on murder. Particular approaches to the study of murder were also considered in view of the question of how we think about murder. The implications of this existing research will be further discussed later in this chapter.

In Part II, the focus was directed to the talk on murder, as drawn from a sample of national archival documents and academic texts which addressed the issue. Three streams of discourse were identified in the papers studied, relating to law, psychiatry and popular opinion. Changes in our response to murder, while constrained by the centering of the subject, were related in this study to competition between professional discourses (law and psychiatry) and economic imperatives (the popular media). Through these discourses, the murderer is constructed as a legal, mental and moral subject. The construction of the murderer will be problematized, in this chapter, in the context of responding to murder.

In the final part of the thesis, the specific *techniques* of punishment employed as responses to murder are considered in view of the murderer subject who is analytically centered, and shifting relations of power. Changes in the practices of punishment have

been lauded as the result of a progressive humanitarianism, but this explanation has been largely predicated on the basis of the abolition of torture and execution. A closer look at shifts in punishment demonstrates that such changes often occurred on the basis of competing relations of power in the definition of the criminal him/herself.

The discussion in this chapter returns to the concern of the tragedy created by murder, that is, the pain which inspires the moral prohibition of murder at the outset. This is the realm of material reality, where the premature violent death of a person and the subsequent result of loss to the bereaved survivors are the results of murder. In this section of the chapter, a reconceptualization of the problem is offered in which it will be argued that the pain effected by murder might be more effectively addressed by more proactive preventive social strategies aimed at circumventing tragedy. This, of course, is hardly a new idea, but it is an apparently *unpractised* strategy of response to murder. The question of why this is so is a focus of this chapter.

The Role of Thought in Responses to Murder

The role of sociological perspectives in responses to murder is diminished when our ways of thinking of, talking about, and practicing these responses privilege the individual subject. The human sciences, according to Foucault, are made possible by a human

finitude limited by life, labour and language. Thought about murder which examines the murderer reflects the influence of the human sciences, which emerged when "man [sic] appears in his [sic] ambiguous position as an object of knowledge and as a subject that knows" (Foucault, 1973, p. 312). The role of death in a finitude in which the human subject is centered is significant. As Foucault explains (1975, p. 198):

> This experience, which began in the eighteenth century, and from which we have not yet escaped, is bound up with a return to the forms of finitude, of which death is no doubt the most menacing, but also the fullest . . . [T]he world is placed under the sign of finitude, in that irreconcilable, intermediate state in which reigns the Law, the harsh law of limit . . .

When medical experience made death a biological "truth," death became "*embodied* in the *living bodies* of individuals" (p. 196). The significance of death to thought about murder in this study, then, is expressed in two ways: (1) as a form of finitude in which the human subject is centered and the individual murderer is an object of legal, psychiatric and popular knowledge, and (2) as an empirical fate of the living body of both the subject who knows and who is confronted by the idea of murder, and the murderer him/herself as the object that is known.

Thought about murder is also influenced by reason and rationalities. Reason is the hallmark of our legal responses to murder. Beccaria's 1764 treatise **On Crimes and Punishments** provided the rationale for a codification of laws and their punishments, and

was considered by many at the time to embody the essence of reason. Jeremy Bentham, another utilitarian philosopher, once referred to Beccaria as "my master, first evangelist of Reason" (Paolucci, in Beccaria, 1986, p. x). The treatise rests on nine principles of justice based on reason and the Christian doctrine of free will (Haskell and Yablonsky, 1978, p. 436). The proportionality of punishment determined for each crime was based on two precepts, that the evil inflicted by the punishment should just exceed the advantage gained by the crime, and that any good achieved by the offender in the crime should be taken away. This measurement is calculated on the basis of deterrence. Deterrence is determined from Bentham's theory of hedonism, which argued that human beings would naturally seek pleasure and avoid pain and assumed that we all experience these sensations the same way. The prospective criminal would then be provided the information required to reason his or her actions in advance. Knowing that the punishment would be proportionately worse (pain) when compared to the possible benefits (pleasure) gained from committing the crime, the person would be logically deterred from criminal activity.

Adult citizens are expected by convention and law to use reason in the daily decisions confronting them. In law, the reasonable "man" is the ordinary "man." The ability to reason is also a distinguishing feature of mental competency, a point of leverage for

psychiatry in legal determinations of culpability. A supposed value of codified criminal laws with prescribed punishments, at least according to Beccaria and Bentham, is the deterrence it affords -- owing to our capacity to reason and the "natural" tendency of humans to avoid pain. This theory in practice, however, appears to be limited in its application to the individual offender and does not relate to socio-legal responses to murder. This, of course, assumes that murder results in pain and that we wish to avoid such pain, in which case we would be more motivated to *prevent* it than merely to respond to it after the fact.

Given this faith in reason, it is curious that Canadians have not seemed able to reason an effective way of avoiding the pain of murder. Prevention is one way of avoiding such tragedies, and as will be discussed later, there is ample empirical evidence to demonstrate how we might reasonably approach this task. Avoidance of pain, however, seems to be less of a priority than the causing of pain. Punishment is our privileged response to crime, even if the financial costs of providing it prohibit the expense of preventing it. One rationalization of punishment, offered in some judges' statements, refers to its role in reinforcing the deference of individuals to the higher social goals of law and order. Punishment is the symbol and substance of law's power, a power which is authorized and legitimated by particular moral rationalities.

The symbolic value of effecting punishments cannot be understated. Indeed, it has already been suggested that a motive for the tribal "victory celebration" is the experience of the power of life and "the visible decrease of the enemy" (Becker, 1975, p. 111). It is not difficult to see how this observation resonates with the past practice of public executions and the present public fanfare staged at the gates of U.S. prisons at the time of closed executions. There is a symbolic, ritual aspect to our punishments for murder, whether they be execution or life imprisonment. It is seen in the "dramatic" feature of criminal trials and punishments, in the prevalence of moral sermons issued loftily from the bench in the case documents studied and in the (eventually problematic) spectacle of public executions. The apparent utility of this abstract value of punishment is supported by the documented efforts of John A. Macdonald in the late 19th century to preserve some element of symbolism from the spectacle when executions were removed from the public eye, through the hoisting of black flags and the ringing of church bells.

As the punishment for murder gradually changed from the death penalty to life imprisonment, it was not without impact on the symbolic expression of morality in punishments for murder. The shift occurring from the punishment of execution (the end of life) to life imprisonment (control of life in time and space) meant that the symbolic component of responses to murder had to find expression in a punishment which was not

publicly visible or absolute. Dismayed concerns that prisons are like country clubs and that a life sentence does not mean natural life imprisonment may be reflections of a discomforting feeling, that Canadians are not expressing -- and thus receiving -- strong enough moral messages about the evils of murder. This was one obvious theme of many letters written by members of the public to newspapers and federal ministers of justice in the documents studied.

Chandler's (1976) analysis of capital punishment in Canada, as a study in the sociology of law, examined the "instrumental/expressive dilemma" (p. xxiii) of the criminal justice response to murder in the abolition debates of the 20th century. He describes the instrumental image of criminal justice as that of a "fully and exclusively rational control system" which is premised on a balancing of individual freedoms with the costs of a "minimal, but acceptable, level of disorder and personal loss" (p. xxii). The expressive image of punishment stresses the "symbolic, emotional and nonrational" features of social life (pp. xxii-xxiii):

> First, the law violator is depicted with enough sympathy to engage our empathy. Then, his motives are exposed as contemptible, his deceit in his own defense is exposed, and his weakness in receiving his punishment is displayed . . . Society has been fortified by strengthening the resistance of those who might fail, and reassuring the rest that the values are being observed and that symbolic order is intact.
>
> This image assumes that the main function of criminal justice is to illustrate, if only by keeping a law on the books, that a society as a culture is unalterably opposed to the violation of certain values. It assumes that the symbolic needs of a people may be

> greater than their practical problems, and that if either should be mutually exclusive of the other, the expressive should be retained.

Chandler used Durkheim's functionalist examination of social solidarity to guide his study of capital punishment debates. He found Durkheim's claim, that culturally uniform groups tend to see deviance as a moral rather than a practical problem, to be reflected in the inclination of Members of Parliament representing culturally homogeneous populations to support repressive law in response to murder (p. 198).

The significance of cultural homogeneity in the expressive symbolic role of punishment is also reflected in the responses to murder where the cultural identity of the murderer differs from that of the community in which the killing occurs. Some early attempts of criminal justice officials to "teach" First Nations people about "civilized" laws and foster their acceptance of European cultural morality were characterized by deliberately "lenient" punishments for murder, which were intended to demonstrate the civility of state power. Of course, once a few examples had been set, membership in a first Nations culture (as in other cultures foreign to the British standard) increased the likelihood of a murderer ultimately being executed (Boyd, 1988, p. 62). Decisions to "allow the law to follow its course" in the cases of Italian, Slavic or Jewish murderers, for examples, were aided by a belief in the moral deficiency of some cultural minorities.

Durkheim's assessment of punishment as a moral process is useful in the attempt to discern the durability of the punitive response to murder. His argument pertains to the symbolic function of punishment which, as can be seen in his explanation of punishment (1973, p. 166), is expressed in plays of power within the context of morality:

> a moral violation *demoralizes* . . . the law that has been violated must somehow bear witness that despite appearances it remains always itself, that it has lost none of its force or authority despite the act that repudiated it. In other words, it must assert itself in the face of the violation and react in such a way as to demonstrate a strength proportionate to that of the attack against it. Punishment is nothing but this meaningful demonstration.

Conceptualized in this way, the punitive response to murder is not only a practical demonstration of power in terms of consequences for the murderer. It also presents a message to society at large, that is, that everything is under control and that the rule of law prevails. Its symbolic quality is enhanced by the theatre-like atmosphere of the courtroom and the "mysteriousness" of punishment conducted out of public view, where the pronouncement of moral power is expressed in well-rehearsed ritual.

Public executions were, among other things, symbolic moral rituals through which the state could demonstrate its powers over the individual criminal. This display of power, however, was eventually challenged by public sentiments against the practice of public executions, such as seen in the dwindling attendances or the mob rebellions whereby executioners were run out of town by the local folk. Moving executions behind walls

seems to have only enhanced the forbidding symbolism of the practice, especially at the end of the 20th century when the popular media can touch virtually every person in the U.S. and Canada with dramatic American media coverage of its state executions. Yet, the failed attempt in San Francisco of KQED to televise the execution of Robert Alton Harris in 1992 demonstrates a legal unwillingness to make executions truly public again. The inability to directly witness an execution does not seem to have significantly altered the symbolic impact of this punishment, particularly with the technological capacities of this new "information" society.

A punishment of life imprisonment, however, appears to require a different symbolic interpretation. In terms of the modern Canadian state, we symbolically (and substantially) "decrease" the murderer/enemy, as Becker might see it, in punishments where the presence of the murderer in "free" society is diminished in his/her isolation from it. Thus while the murderer's life is preserved, he/she is civilly and socially "dead." The symbolic impact of the life sentence, however, would appear to be reduced by the future prospect of parole. Indeed, the public controversy currently staged in the media over the conditional release from prison of violent offenders may reflect, in part, a malaise over its diminishing symbolic impact on the sentence of punishment.

The public concern about the possible paroles of murderers, however, cannot be wholly reduced to the imperative of symbolic justice. As the documented opinions of some B.C. residents in response to the commuted death sentence of Kenneth Meeker in the early 1960s show, the concern about parole also relates to the issue of safety and the protection of the public. This particular concern with public safety becomes more noticeable as we move towards the present in the documents surveyed in this study, particularly in the 20th century, and remains an influence in our responses to murder today. This is also seen in a 1988 survey in which it was documented that the main purpose of the criminal justice system, according to Canadians, was "to protect and serve society" (Adams, 1990, p. 10). In this sense, the threat is contained in the individual criminal, from whom society requires protection. When the criminal is one who has killed, the need for protection is even greater.

Talk about Murder and Discursive Power

The centering of the individual in the discourse on murder was related earlier in the thesis to the notion of biological death which arose from medical science; in studying the human body through pathological dissection, medicine subjected all of the body to the scientific "gaze." Scientific objectivity transversed the individual's dead body and in so doing, Foucault argued, made the human sciences possible. By the end of the 19th

century, the notion of God as the center of all knowledge was replaced by the notion of the human as the source of knowing, and it became the task of the human sciences to examine who this knowing being was (Fillingham, 1993, p. 83).

The focus on the human body and the individual as sources of knowledge has implications for historical analyses of power. Foucault observed that conventional historians considered humans as abstract beings, and rarely treated them as thinking beings existing in bodies. By looking at *how* embodied people were *regulated* by the state and lesser institutions, Foucault noted that a major shift in modes of power occurred in Europe at the end of the eighteenth century. By moving from the abstract human to the embodied individual, historical analyses become more empirically concrete. In focusing on the techniques of power which transversed the individual body and the discourses of disciplinary knowledge which informed or "authorized" these techniques, "history" then becomes the study of power/knowledge as centered on the individual.

In Canadian criminal justice, the focus on the individual criminal is necessary for the exercise of law and punishment. The police and courts seek to determine *which* specific individuals are directly responsible for the crime, and the punishment is invoked *through* the individuals found guilty of the crime. While classical criminology has been described

as objectively focusing on the *act* and rationally determining the punishment of the actor on the basis of this act, the individual is still central to its operations in practice. Positive criminology finds its very basis in putting the individual at the center of analysis, an individual whose essence is "dissected," examined and later described in the different knowledges of the human sciences.

The constitution of "the murderer" is thus informed by classical definitions of law and positive descriptions of the individual murderer's history. Law begins the identification process by discerning whether the individual's act can be reasonably and logically defined as culpable homicide (C.C.C. 229), and if so the individual is authorized for subjection to institutionalized punishment. The history of shifts in murder legislation and the rationales underpinning these shows that sentiments about particular kinds of murders changed at different times. The changes in homicide law in the last two hundred years in Canada appear to be an outcome, in part, of the irritation produced by the struggles of the authorities to maintain the rule of law on murder and the resistance to this by the lay and professional people involved in the criminal justice process.

This conflict is seen in the tension over definitions of criminal insanity and the problematization of punishment in the context of the murderer, who might be mentally

and emotionally incapable of understanding his or her actions as criminal and thus comprehending the justification of his or her punishment. Juries, as lay decision-makers, were in a position to be influenced by competing legal and psychiatric arguments in defining the limits of criminal responsibility of the accused. But as the case of John Wilson in 1833 suggests, there is evidence that juries were already inclined to make their own extra-legal assessments of individual culpability on the basis of their own experiences and intuitions. They sometimes made decisions which clearly violated legal standards by acquitting the guilty, or strongly recommending mercy in the punishment of cases which inspired their sympathies. If perhaps not explicitly responsible for creating jury ambivalence with the rigid limits set by the law of murder, psychiatric knowledge eventually enabled juries to justify their "challenges" to the law by providing "medical" reasons for their decisions.

The discourse studied shows that Canadians, however harsh they may have wanted the penalties for murder to be, were not so comfortable with the "ultimate" punishment of execution when they themselves were intimately involved with particular individual cases. Obvious examples in the documents used in this study were the killings of spouses or children by distraught controlling men in "crimes of passion" and the killing of infant children by young unmarried women in the twentieth century. When the symbolic force

of the law was seen as weakened by frequent recommendations for mercy by juries, the law of murder was adjusted. By the 1950s, the politicians themselves were becoming uncomfortable with enforcing the law through capital punishment, and commutations to life imprisonment became the "real" punishment for murder from 1962 to 1976.

This shift in punishment was helped by the expansion of prison construction in Canada beginning in the late 1950s. The idea of imprisonment as a form of punishment had been employed for a variety of offences since the 1800s. The construction of Kingston Penitentiary, which was partly motivated by the need for long term punitive facilities, is evidence of this. Murderers with commuted death sentences had been included in prison populations with convicts serving sentences for offences other than homicide at least since the late 1800s. By the 1960s the idea that murder could be punished by life imprisonment was more an official recognition of a practice which had already been in existence for a number of years than it was a radical change in the legal response to murder. The *de facto* and later legal abolition of the death penalty, however, is what seems to have disturbed Canadians most, perhaps because of the loss of a powerful moral symbol if not an effective tool of deterrence.

These changes to murder laws may also be seen as responses to a shifting view of the

individual criminal generally, and specifically the individual murderer. The emergence of penitentiaries in the 1800s was also made possible by the shift in modes of punishment, from a calculated physical torture to a calculated discipline of the soul. The penitentiary could "correct" the individual criminal while confining his/her body in time and space. By virtue of this, the human sciences, particularly psychiatry and criminology, could now further define the knowledge about this individual beyond his/her legal identity as a murderer. As Foucault argued (1979, p. 251):

> . . . the offender becomes an individual to know. This demand for knowledge was not, in the first instance, inserted into the legislation itself, in order to provide substance for the sentence and to determine the true degree of guilt. It is as a convict, as a point of application for punitive mechanisms, that the offender is constituted himself as the object of possible knowledge.

The observation of prisoners, then, afforded the development of criminological discourses, and offenders became cases (Shumway, 1992, p. 135); as such, the violent offender becomes a "type" of case.

The knowledge of criminology, however, penetrates beyond the point where the individual becomes the individual convict. Beyond the knowledge accumulated from the direct surveillance of the prisoner, criminological discourses also include biographical knowledge. The significance of prisoner biography to penality and criminology is explained by Foucault in **Discipline and Punish** (1979, p. 252):

> The introduction of the 'biographical' is important in the history of penality. Because it establishes the 'criminal' as existing before the crime and even outside it. And, for this reason, a psychological causality, duplicating the juridical attribution of responsibility, confuses its effects. At this point one enters the 'criminological' labyrinth from which we have certainly not yet emerged: any determining cause, because it reduces responsibility, marks the author of the offence with a criminality all the more formidable and demands penitentiary measures that are all the more strict.

The biographical constitution of the murderer in this account is clearly defined by the discursive influence of psychology, and he later attributes the concept of the "dangerous" offender to the juncture of penal discourse with psychiatry. Thus criminological discourse is seen in its practice to be more strongly related to the sciences of the individual than to the sciences of society. This makes sense, given the centrality of the individual to juridical and punitive practices. Foucault, however, was not concerned about the influence of *sociological* factors in criminal biographies, and how these might help to shift the focus from the criminal to the culture in which he/she has "evolved." This will be considered later in the chapter.

Images of murder in popular discourses of the news and entertainment media, as well as works of fiction, are also etched in the figure of the individual murderer. That these discourses are primarily tied to business interests of the companies and corporations which own them (and those which support them with advertising dollars), speaks to the commercial value of murder reflected in our eager consumption of murder stories.

Whether our interest is motivated by aesthetics, or the desire to "witness" the moral narrative of murder repeatedly, or both, we seem drawn to the idea of murder because it transgresses significant limits of death and morality.

The narratives of murder in the popular discourses studied are mainly related through a focus on the individual murderer, who is most often described as a "type" of person and is defined by various traits. Newspaper accounts often relayed descriptions of the individual's demeanor and attitude during trial, sentencing and punishment, and people known to the killer or the victim were solicited for their appraisals of the individual's character. In the entertainment media and literary fiction the license to define the murderer is less inhibited than are the accounts of real murders, such that the murder and the murderer are portrayed as more unusual and bizarre than the empirical incidence of murder would suggest as the "norm." In these discourses, the constitution of the murderer seems more intimately related to the symbolic potency of more aesthetically shocking images of murder and the murderer. In such images the lines of morality are vividly transgressed and the individual transgressor becomes the caricature of that which is villainous, evil or bad. In popular narratives, the problem of murder usually becomes the problem of the murderer, who must be found, tried and punished.

Thus it would seem that the truths we hold about the murderer are tenuous, as the different knowledges produced by law, psychiatry and the popular media negotiate their power to define murder and its punishment. While the law was granted the power to define the murderer -- a task approached with various levels of moral enthusiasm by the judges in the capital cases studied -- it still had to be, to some degree, responsive to the knowledge claims of psychiatry and the voices of public opinion. The talk on murder, in this study, demonstrates the struggles of lay citizens, psychiatrists and lawyers to establish their own discourses of truth in the construction of the murderer as a punishable individual.

Punishment as a Response to Murder

The gradual change in punishment for murder in Canada from execution to life imprisonment may be explained by Foucault's analysis of the death penalty in the 17th century, in its contrast to the punishments of imprisonment and the "behind the wall" executions which have been employed since then. In this analysis, he used the conceptual couple of death/life to explain shifting forms of power in punishment (Foucault, 1980, pp. 137-138):

> Together with war, [the death penalty] was for a long time the other form of the right of the sword; it constituted the reply of the sovereign to those who attacked his will, his law, or his person. Those who died on the scaffold became fewer and fewer in contrast to those who died in wars. But it was for the same reasons that the latter

> became more numerous and the former more and more rare. As soon as power gave itself the function of administering life, its reason for being and the logic of its exercise -- and not the awakening of humanitarian feelings -- made it more and more difficult to apply the death penalty. How could power exercise its highest prerogatives by putting people to death, when its main role was to ensure, sustain, and multiply life, to put this life in order? For such a power, execution was at the same time a limit, a scandal, and a contradiction. Hence capital punishment could not be maintained except by invoking less the enormity of the crime itself than the monstrosity of the criminal, his incorrigibility, and the safeguard of society. One had the right to kill those who represented a kind of biological danger to others.
>
> One might say that the ancient right to *take* life or *let* live was replaced by a power to *foster* life or *disallow* it to the point of death.

Foucault reconceptualizes the shift in modes of punishment, then, not by recourse to the progressive humanitarian challenges to state practices of torture and execution, but in the re-evaluation of the focus of power itself. Power was no longer a mere tool of repression, seen at its limit as the sovereign right to take life, but became a *productive* force over life -- that of the individual body and of the population to which it belonged (p. 139). Sovereign power gave way to bio-power, and in so doing, provided a rationality for the use of imprisonment over public executions as a response to murder.

In the context of Foucault's analysis, then, to execute the murderer by the beginning of the 18th century was to disallow life in the name of the biological safety of the population. The point of execution was more oriented to the practical concerns of threats to life and limb than to the symbolic display of sovereign power. However, if practical elimination of the murderer was the focus of state power in response to murder, it seems

clear that in the view of many citizens a moral expressive aspect to punishment was also necessary. This was particularly true in cases of murder involving a sexual component, or where the murder occurred during the commission of another offence.

The expressive quality of punishment in asserting moral limits, however, cannot be construed as a qualitative reflection of the virtuous morals represented by the forces of good on the one side of the moral limit. The fact that killing is seen to be an immoral act which must be sanctioned against has not historically prevented the force of law from engaging in the same act (killing) and thus transgressing this same moral limit. This is acknowledged by the fact that capital punishment has only been abolished for 20 years (with public calls for its reinstatement recurring ever since), and that the "legitimate" use of force remains a standard explanation exonerating police officers for killings in the line of duty. The justification of difference between notions of murder and execution in the arguments for the use of capital punishment, then, has not been as much about the "righteousness" of the *limits* themselves as of the righteousness of the *power* exercised to enforce these limits.

Opponents of the death penalty on moral grounds may be seen in this respect as attempting to subject authoritative power to the same moral limits as are imposed on the

collective. These moral limits are amplified in murder and execution, where the existential limit of death is central to the crime and capital punishment. But the limit of death also figures prominently in political power *per se*, as Lemert and Gillan explain (pp. 85-86):

> At every point where power is applied, there is an image of death . . . In the application and development of power and knowledge the fear of death is mundanized and interiorized. The effectiveness of the strategies at work in power is not due to the fact that they exorcise death and allay anguish over the futility of life. Rather, these strategies work by their ability to mobilize that fear of death by objectifying death.

The fear of premature violent death implied by murder is, in this analysis, addressed by political power through the objectification of death in the execution of the murderer. Executions objectify death because, like other historical events, they are "fixed in a space bounded by the body and by death" (p. 91).

Challenges to the exercise of state power in the death penalty, then, are limited when advanced on the basis of moral inconsistency, because they fail to account for the issue of death as an integral aspect of power-knowledge itself. The questioning of political power requires an analysis which recognizes the importance of death as "in the service of a power controlling life, its extent, duration, and conditions" (Lemert & Gillan, 1982, p. 89). Capital punishment and life imprisonment since the beginning of the 19th century are two variations of the same power in a dialogue with death. The significance of death

in political power, however, is found in the human subject, and the particular power-knowledges of life which find expression in the subject. Challenges to either of these punishments to murder, then, must transgress this limit of death in order to analyse the strategies and objectifications of power-knowledge as they are evident in the individual murderer.

In terms of its legal sanctions, murder is considered the crime of crimes in Canadian society. However, many killings in our society such as police killing in the line of duty or executions (until 1962) were/are not considered crimes at all. Thus "murder" might be more accurately described as "illegal killing." But even among illegal killings, the law and the people who directly influenced its exercise differentiated murders on the basis of moral culpability. We sanction against murder because we are morally opposed to the infliction of violent premature death *per se*, yet this moral opposition may be mitigated or exacerbated by differences in individual murder cases. This may be seen as a difference between the general response to the *act* of murder and the specific responses to particular murderer *actors*.

It was suggested that the issue of death was central to the problem of murder in two ways: death as a materially irreversible consequence of the crime of murder, and death as

a limit to thought with respect to ways of knowing about murder and the murderer. That death is irreversible is an important consideration in assessing the exercise of juridical power in responses to murder. When the crime involves the loss of life, the power of law is demonstrated in punishments which either confront the illegal infliction of death with the death of execution or seize the body of the perpetrator and subject it to a life of intense control. At the same time, the notion of death makes the very idea of the individual possible, including, of course, the individual who is killed and the individual who kills. As such, authoritative power may be concretized in the individual; through the punishment of the criminal, authoritative power is made visible. Life imprisonment implies the control of a murderer's life through the incarceration of his/her body. Because capital punishment deals with the limit of death, its symbolic value was perhaps more potent in demonstrating the power of law, assuring us that criminals "are weak and die: we are strong and live" (Becker, 1975, p. 111) and "that society is not out of control after all" (Purdum and Paredes, 1989, p. 152).

Dualist thought presents moral problems as binary oppositions. Thus, the idea of murder depends on the coupling of life/death, of victim/offender and of crime/punishment; human behaviour is determined by the extremes of "bad" and "good." The response to murder is either the ending of life or the meticulous control over life.

Such simple dichotomies contain the debate on how to respond to murder and shape the content of what can be said and what can be considered valid. The emotive quality of murder pushes the debate to absurd limits, such that to argue against the death penalty may be construed as arguing in favour of murder by being "soft" on the murderer or as arguing against the victims. During the capital punishment debates of the 1960s and 1970s, arguments in favour of the "soft" punishment for murder were presented in the context of a correctional philosophy premised on the rehabilitation and reform of the individual. While politicians voted according to their own consciences (and often against the majority opinion of their constituents), the close victory of 130 votes for the abolitionists over 124 votes for the retentionists demonstrates a strong discomfort with this philosophy.

The documents on murder surveyed in this study, however, show how human agents did not always conceive of murder and punishment in such crude oppositions. Murder was rarely a black-and-white issue to people confronted with the possibility that murderers might be insane or just too ignorant to know any better, or that they might be otherwise "normal" human beings acting unreasonably in extenuating circumstances. Psychiatric knowledge helped validate resistances to the rigid definitions of law -- resistances by juries and some members of the Canadian public (who wrote letters to

newspapers and signed petitions) which were expressed before psychiatry achieved an established presence in murder trials. The imposing limit of the death penalty for murder until 1976 appears to have encouraged the inclination to see murder as a "grey" rather than a "black-and-white" issue, given what was at stake in pronouncing a guilty verdict.

The juxtaposition of the murderer versus the victim is also problematic. If the definition of what constitutes a victim extends beyond the limits of the immediate victim in the case at hand, the tidy "casebook" solution to murder seems somewhat simplistic. Surviving families and friends, as secondary victims, are left to seek solace in symbolic punishments to make their losses more manageable, coping with the images of the deaths suffered by the primary victims and with bereavement generally. The murderer may also be construed as a victim of harmful acts at some point in his/her history, such as child abuse, sex abuse or spousal abuse or, in the case of execution, of a "slow-grinding judicial system . . . dragging him/[her] toward his/[her] death" (Lesser, 1993, p. 83). Lesser, for example, challenges the rigid distinction between victims and murderers: "is it not possible for murderers to be a different kind of victim on their own, without usurping the role of the people they themselves have victimized?" (p. 83).

The lines of morality around killing also do not seem to conform to rigid distinctions

between "bad" and "good." For example, it seems obvious that to get pleasure from killing is morally wrong, which is one reason why Bernardo and Homolka were tried and imprisoned for the sex torture/killings of two teenage girls. But it could also be argued that it is morally wrong for murder victims' families to get pleasure in witnessing the execution of their loved ones' murderers. What separates these two examples are the rationalizations offered for the flexibility of rigid moral lines. These rationalizations appear to depend more on the perceived righteousness of the person gaining pleasure from inflicting death than the moral taboo itself. Such contradictions demonstrate our discomfort with simple black-and-white morality, and suggest that it may be the power of juridical authority and not the power of moral reason which ultimately defines acceptable practices and attitudes toward killing. Dualist oppositions, then, may help us to define the limits of acceptable social behaviour. But almost at once, these limits become morally and rationally negotiable when it comes to defining individual culpability in specific murders and the concomitant punishments to be imposed.

The classical school of thought still bears significant influence in the modern Canadian criminal justice system, although it has been modified to a great extent by the positivist approach to crime and deviance reflected in sentence ranges and conditional release provisions. The classical approach is evident in the Canadian system in the

premise of individual free will, in determining whether or not the accused is guilty of the murder. The positivist view of determination can factor into the decision regarding parole eligibility dates, and later into whether or not the assumed risks posed by the individual's past history supercede his/her desire for conditional release when eligible.

But the focus on reason is only employed in a conceptual space between the act and the actor, where criminal justice is invoked. It is in this space where the discourses on murder and the murderer ebb and flow in their influences on the practiced power of criminal law. This is where the visibility of law is concrete, where the force of its power can be determined, and where reactions to murder (in terms of power and knowledge) are expressed. But there is less focus on the space between the actor's existence and the later act, that is, *before* the act and after the actor's origin. This is not to say that discourses here do not exist, but rather that what they speak of is not *practised* in terms of responding to the phenomenon of murder itself, except in responding to the individual murderer after the act. Responding to murder after the fact affords the opportunity for a symbolic demonstration of force, the force of the collective over the individual. This is repeated in endless waves of cases, where murder is "solved" by the apprehension and punishment of each murderer until the next case is presented.

Preventative strategies toward reducing instances of murder do not afford the same opportunities for the symbolic demonstration of authoritative power, which may help to explain why they do not figure prominently. These strategies also use reason, in determining patterns or trends in the wider socio-cultural context of the actor's life up to and including the event of murder. The sociological factors of murder which have been identified in academic research are barely noticeable in the response to murder, probably in large measure to the unsuitability of their implications to a symbolic demonstration of authoritative power. This power is more easily and dramatically practised through the reactive example of the individual's punishment than it is in the proactive example of violence prevention.

Reconceptualizing Responses to Murder

The focus on the actor in our responses to murder is visible both in the techniques of punishment and control of the individual murderer, and in the symbolism of power and authority which find expression in these techniques. The rationalities for the responses to murder are based on the centering of the individual who is brought to the attention of the authorities on the basis of the act. The act itself, murder, becomes almost inconsequential once the individual murderer becomes the object of response. While the tragedy of murder as a serious moral transgression is the motivation for a coordinated

authoritative response to it, the phenomenon of murder itself is displaced by the figure of the murderer.

This would, perhaps, not be so much of an issue if the responses to murder manifested in a life imprisonment or execution of the murderer reduced the incidence of premature violent death which repulses us so much. The responses to murder in the last two hundred years in Canada cannot claim much success in this respect, in part because *no empirical link between the punishment of the murderer and the reduction of murder has yet been established* (or will likely ever be established, given the methodological implications), and also in part because these responses are *reactions after the fact* of murder, requiring the initial sacrifice of some victim(s) which will draw our attention towards the offender.

The talk on murder, being so oriented towards the individual murderer, seems caught in the space between this transgressive act of murder and the murderer him/herself in the time and space in which the documents are written. While the human sciences of the individual investigate the biographical space between the existence of the individual and the act of murder which later defines him/her, the knowledge produced in these investigations is used primarily to inform the judging, control and normalizing practices

exerted through the murderer after the murder. It can be argued that this practice may be preventive insofar as future murders by already convicted murderers may be avoided, but based on empirical evidence of the past most of the murders to be committed in the future will occur by the hands of people at large who have never killed before. Since we do not yet know them as killers, we can do little but wait for these tragedies to happen and hope that it is not our own lives which are ruined when they do.

If we wish to avoid the pain caused by the tragedy of murder, it would be seem more reasonable to focus our energies of response into preventing similar tragedies than by tinkering with the techniques of punishment after the fact. Bentham's hedonist principle that people will avoid pain -- also recognized in Beccaria's classical deterrence reasoning in the calculation of punishments for crimes -- is not reflected in the history of our responses to murder. Criminal justice policy seeks the avoidance of the pain inflicted by murder through the expectation that potential murderers will calculate their actions on the basis of avoiding pain to themselves. Thus punishments are the main focus of policy adjustment. When it appears that acts of murder are "increasing," the explanations and solutions for this are formulated on the basis that existing punishments for murder are not "tough" enough to deter. However, this two centuries-old belief in rational deterrence is poorly demonstrated in the murder documents surveyed in this study. Canadians who

have killed seem to have done so without reference to the prescribed punishment for their crimes, whether the penalty was death or life imprisonment. In so doing, they may be privileging the avoidance of a pain other than that of punishment or simply not avoiding pain at all.

The idea that punishment itself is an adequate response to murder is further diminished by the phenomenon of death, since punishment can compensate neither the primary victim who no longer lives nor the secondary victims who must cope with the loss effected by death. The argument that punishment serves an important symbolic function with respect to the demonstration of authoritative power over moral/legal transgressors may have more currency than arguments based on the instrumental functions of punishment, but this is also limited by the phenomenon of death. Foucault made this point in his observation that there is no force of law for the person who risks his/her life before power (1981, p. 8). The alleged killers in the sex murders of Melanie Carpenter and Melissa Deley in British Columbia demonstrated this point in committing suicide before their respective trials **(2)**. Indeed, the suicides of the alleged killers did not satisfy the victims' families, members of which were reported as saying, "I'm glad he's gone because he'll never have the chance to reoffend. But I would have wanted to see him go through the justice system and see how it dealt with him . . . It's a double-edged

sword," "If he dies, we don't get our chance to see him in court and be punished," and "It's definitely the coward's way out -- the only way for him to stay in control of the situation" (**The Vancouver Sun**, Wednesday, September 13, 1995). If the murderer decides to kill him/herself before trial, there is no punishment. Foucault's analysis of punishment as "the law overstepped, irritated, beside itself" (1987, p. 35) suggests the significance of the suicide killer to perceptions of law itself -- if punishment is the force which confirms the law's authority and power, the suicide killer usurps this power by making him/herself unavailable for punishment.

The responses to murder described in Canadian historical documents appear to be limited, with respect to our ways of knowing, by the centering of the murderer subject, and in rigid binary oppositions such as crime/punishment or victim/offender. In empirical terms, our responses to murder appear to address the phenomenon more symbolically than substantially, and it is probably safe to say that Canadians will continue to demand symbols of law and justice for a while to come. Our responses to murder can, however, be reconceptualized by privileging the purpose of reducing social harms while retaining the moral symbolism of individual punishments. The focus on social harms broadens the base of possible strategies by which to reduce the incidence of murder which may include, but is certainly not limited to, the individual-centered punishment of

the murderer. In this shift, the focus is on murder as a harmful event with a social context, affording the examination of social relations of power beyond those reflected in the professional and popular discourses on the individual murderer.

By looking at murder as a socially contextualized event, the space between the actor's existence and the act of murder becomes at least as important as that between the act and the now defined murderer actor. When the centre of concern is the phenomenon of murder as a social harm rather than the murderer per se, the actor-act space may be widened to consider the context of murder by using the individual as a *conduit* to the social context rather than as an end in itself. The question "how does murder happen?" becomes at least as important as the question "who is the murderer and how shall we punish him/her?"

Much has been written from the sociological perspective addressing the problem of how murder happens, from positivist quantitative accounts of the phenomenon to the analytical challenges posed by critical social theories. These accounts view murder as a social event, and as an outcome of particular social relations. Thus murder is not calculated simply on the basis of how many happen in the country each year, but also in the context of victim-offender relationships and geographical comparisons. Murder is

also analysed as a product of relations of power which reflect specific political ideologies such as capitalism and patriarchy. The problem is not that there is a lack of knowledge which might help us to prevent or reduce murders in Canada, but that there is an apparent lack of political and popular will to use these resources. Thus, the focus in this dissertation has been on the relations of power concretized in the historical responses to murder, as they shape what is said and done about murder.

The idea of crime and punishment as action and consequence may be the dominant way by which murder and its response are understood, but it is by no means the only possible way to conceptualize the tragedy of premature violent death and how a society should address such occurrences. Willem de Haan (1990), for example, sees crime and punishment as "spiralling cycles of harm" (p. 156) and proposes a reconceptualization of these two interrelated issues in terms of *redress* (p. 151). This concept, according to Haan, means "to assert that an undesirable event has taken place and that something needs to be done about it" (p. 158). This "something" may include the element of punishment. Although punishment is the deliberate infliction of harm and would seem to work against the broader goal of reducing social harms, its long history as a symbolic moral strategy ensures its existence as a criminal justice policy for a while to come. But it is also possible that the emphasis on punishment could be reduced, and over time this

particular response to murder (and all other crimes) may be seen as less rational or effective than other harm-reducing strategies.

Strategies for Reducing Social Harms

Stanley Cohen (1985) provides an avenue for such a revised program of responses to crime in the social control criterion of *moral pragmatism.* The first moral element of this criterion is the idea of "doing good," by which he means "not just individual concern about private troubles but a commitment to the socialist reform of the public issues which cause these troubles" (p. 252). The second is the idea of "doing justice," specifically the "sense of rightness and fairness of punishment for the collective good" (p. 252). The pragmatic element relates to the question of evaluating social policy practice in terms of the "guiding values of social intervention," specifically "doing good" and "doing justice" (p. 253). Thus, in responding to murder, the question to be answered about strategies chosen is "what difference does this particular policy make?" Solutions offered towards the response to murder would be evaluated in "terms of [their] consistency or inconsistency with preferred values, the alternative solutions realistically available at the moment of choice, and the likelihood of the programme being able to realize (intentionally or otherwise) the desired goals with the minimum cost" (p. 253). The idea of doing justice has been aired in the discussions on punishment and its importance as a

symbolic expression of collective disapproval. In this final section, suggestions will be advanced with respect to the "doing good" element of Cohen's criterion in the specific context of murder.

The study of the social contexts of violence may be viewed as the study of competing relations of power which help to shape our experiences -- as well as our interpretation of these experiences -- as individuals in a social world. Social context is an important consideration in the analyses of human history, as Marxism(s) and feminism(s) have well demonstrated. Just as it was "obvious" that the world was flat and the sun orbited the earth until we were able to put our planet in the context of the wider universe, the "obvious" notion that murder is the solitary deed of the evil doer is an oversimplification of experience that is wrenched from its social context. As Silverman and Kennedy (1993) have noted, in confronting murder it is necessary to "see beyond individual events, which seem to require immediate reaction, to the larger issues which may create the tension and conflict that results in fatalities" and use "an approach that acknowledges the social dynamics of the events that precede fatal attacks and proposes ways in which these events can be short-circuited into harmless outcomes" (p. 4). The discourses on the social contexts of murder, within the limits of this dissertation, were found mostly in the research of the social sciences and in the experiences of "front line" community/social

workers reported in the popular press.

The issue of power in the thought, talk, and practices of response to murder has been a major theme in this dissertation. But power has also been the focus of critical social analyses of violence which have been virtually ignored in official and popular discourses on murder. These analyses recognize violence not only as an expression of power, but as an outcome of the relative absence of power. Powerlessness, for example, is a common theme in the problems of poverty and the hierarchical social relations related to gender. The problem is how to shift the knowledge and practices of power so that they will accommodate a rationality of violence prevention which addresses the issue of social powerlessness.

The first task is to determine the guiding values of social intervention which authorize the state response to murder. Historically, Canadians have demonstrated a long-standing concern with justice in responses to murder, with an eye towards balancing the evils of the act with a suitable punishment. Moral rationalities figure prominently here, where the form and amount of punishment may be expressed as a calculation of how much harm is justified on the basis of how much harm was caused by the act -- for example, the biblical "eye for an eye, tooth for a tooth." Justice must not only be done but must be

"seen to be done," thus ensuring a symbolic aspect to punishment. This is why a response to murder in Canada, using moral pragmatism, requires a punitive component, at least in the short term. However, there is no reason to believe that the punishment for such actions must always take the form of life imprisonment or execution in order to satisfy the requirements of justice in responding to murder. While pragmatic consequences for committing murder may well include incarceration for those who pose an immediate threat to the physical safety of the population, it is also the case that justice need not be limited to this form.

Preventive strategies towards the reduction of violence are well suited to the task of "doing good" in moral pragmatism. This is where critical social theory and social science research may be effective in addressing the wider social context in which individual powerlessness may arise. The immediate context of murder in Canada is generally a social situation involving people who are known to each other, such as family members, business associates, friends and acquaintances: 78% of the murders between 1961 and 1990 fit this description (Silverman and Kennedy, 1993, p. 15). Murder is also more likely to be committed in a private place (74%), such as the house of the victim, the suspect, or someone else. About two-thirds of murders in Canada are motivated by anger, arguments, jealousy or revenge (p. 12). Effective strategies to reduce the numbers of

murders experienced in Canadian society would thus seem to be related to improving interpersonal behaviours between people known to each other.

Critical social analyses have focussed attention on specific imbalances of power between individuals and groups in society. Economic deprivation, especially in a culture where individualism and consumerism are promoted and resources distributed unevenly, is one factor which might be addressed in reducing violence. Poverty is also a barrier to the post-secondary education required for the kinds of jobs which provide decent wages and meaningful employment. The powerlessness resulting from the inability to provide for the basic needs of housing, heat, clothing and food, much less any other goods and/or services seen as desirable for a comfortable life, can result in desperate measures which may include violence. Indeed, a 1992 Ontario Child Health Study found that "low income or poverty is more strongly associated with emotional or behavioural problems than being [with] single parents . . . [C]hildren from the bottom five to 10 percent of income levels were three times as likely to develop problems as better-off kids" (**The Vancouver Sun,** Saturday, March 19, 1994). Child poverty is a significant problem in Canada, as reflected in the observation that "we have more poor children proportionately than the average industrialized country, and far more than France, Sweden or Germany. Only the United States is worse than us" (**The Vancouver Sun**, Saturday, May 7, 1994).

The United States, it should be noted, also has the distinction of having the highest homicide rate of 22 industrialized nations considered in a 1991 survey of international homicide rates **(3)**.

Educating girls has also been advanced as an important factor in cultivating healthier and more prosperous families (**Vancouver Sun**, Saturday, March 19, 1994). This is mainly because educated girls are less likely to have babies when they are too young to afford raising them, since there are more choices available to them. Indeed, the strategy of providing greater education to women has been recently brought forward as a crucial element in curbing the high population rates of third world countries, where the conventional methods of teaching about and providing birth control have failed to convince the women whose whole status in life revolves around child-rearing. By strongly emphasizing and encouraging education for girls, the numbers of unwanted pregnancies and "inopportune children" could be reduced.

Violence, as a physical form of aggression, is also a problem related to gender. Murder specifically and violence generally is overwhelmingly a male problem -- 98% of convicted murderers are men (Boyd, 1988, p. 3). One obvious strategy towards reducing instances of murder would be to focus on changing social practices whereby men are

taught and rewarded for aggressive behaviour, first as children and later as adults. Implicit in this is the need to challenge the privileging of male subjectivity, which diminishes women's power and affords an impetus for the physical assault and "righteous slaughter" (Katz, 1988) of women. This also involves social policies which curb the objectification of women and children.

The issue of child abuse must also be considered in the social-historical context of murder. Child abuse is generally seen as the physical assault and/or psychological abuse of children -- it is more "proactive" than the passive neglect imbued in issues such as poverty. The learning of violence as a conflict management technique first occurs in the child's home (Silverman and Kennedy, 1993, pp. 49-50) and while most do not go so far as to kill another human being, victims of abuse in childhood deal with the experience as adults in ways which are destructive both to themselves and others. The "resolution" of problems through violence may well be a lesson derived from an education of survival received through "smack therapy" and the school of "hard knocks," since children who grow up in violent households are said to more likely be violent as adults (Wilkes, 1978, p. 129; Webster et. al., 1994, p. 50). Children who grow up in these conditions are more prone to accept violence as a "normal" part of intimate relationships, especially when the childhood experiences of violence are not substantially offset by regular nurturing.

The recent increase in stranger killings and so-called "senseless" murders may also be considered by examining the impact of modern technologies, in conjunction with shifting family relations, on Canadian children and their ways of thinking. While most of the debate in this vein is focussed on the influence of violence in television programming, less is said about the relatively recent practice of prolonged television watching of any kind on young peoples' ways of knowing. Postman (1985) has argued that "television has made entertainment itself the natural format for the representation of all experience" (p. 87). Since television is most effective commercially when its images are brief, ever-changing and entertaining (so as to avoid boring the viewer who might then change the channel or turn it off), the image of the world received is one of discontinuity rather than coherence. The impact of this is that "the public has adjusted to incoherence and been amused into indifference" (pp. 110-111). This statement appears to become increasingly relevant when we consider the factors of the age of the viewer (how television *per se* contributes to the developing epistemologies of children) and the amount of television watched (the extent to which the television is a child's "babysitter").

Since the 1970s, television has exploded as a medium of entertainment, with satellites, cable, and many more channels, paid for by commercial interests which cultivate in consumers "the desire for certain things and encourag[e] instant gratification and

impulsiveness" (Surette, 1992, p. 121). While in the 1960s children's television programs were few and far between, by the 1980s a whole channel programmed specifically for children was available, so that television viewing is a possible pastime for children -- rich or poor -- most hours of the day. Combined with the recent child activities of video and computer games, it is easy to see how the experiences of reality can become more closely related to a television screen or monitor than real life. Violent, senseless murders by teenagers and young adults may be related in part to an epistemological vulnerability to the new cultural values of consumerism and entertainment, and an acquired "immunity" to the tragic consequences of real actions for real people **(4)**.

The last feature of Cohen's moral pragmatism relates to the evaluation of social policy on murder. This involves a consideration of policies on the basis of "preferred values," which would surely include both justice and protection of the public. It seems that we see punishment as a strategy which addresses both of these values, albeit not very well according to current and historical popular opinion. The idea that "more is better" characterizes our proposed solutions to the inadequacy of social policy on murder: more punishment produces more justice and more public protection. However, if this was true then the United States, with capital punishment in 38 of 50 states (Trombley, 1993, p. ix) and an incarceration rate four times higher than that of Canada (Correctional Service of

Canada, 1990, p. 10), would be one of the most just and safe countries in which to live in the Western world. There are probably not many Americans willing to make this claim about their country, yet they, too, are afflicted with what the controversial social commentator Hunter S. Thompson described as "a Punishment Ethic that permeates the whole infrastructure of American life" (1989).

It is difficult to measure how well punishment has satisfied the criteria of justice, a relative and abstract concept. Indeed, the specific punishment of execution has simultaneously satisfied and offended different peoples' perceptions of justice and morality. The idea that harmful acts require powerful consequences can amount to a justification of revenge, and the desire to inflict suffering on those who have hurt others. The desire and perceived moral right to hurt those who have hurt us was particularly noticeable in the 20th century documents sampled in this study where the focus was on specific, individual murderers. Punishment may then be nothing more than an administrated revenge, a motivation which is cleansed of its emotive implications by the claim to justice. Notwithstanding such concerns about the value of punishment in producing justice, in a report produced by the American Friends Service Committee -- which is typically critical of punishment practices -- it was conceded (1971, p. 150):

> The imposition of punishment, it seems, is superior to doing nothing when either there is strong reason to believe that the behavior in question is capable of being

> deterred or when the norm is one where noncompliance is generally felt to be so serious that doing nothing will be unacceptable to individuals or groups in society. Murder is an example of the latter. Although murder is one of the crimes least capable of being deterred, since it most often is more impulsive than calculated, it is doubtful that members of society would tolerate doing nothing about it.

This explanation is premised on a pragmatic assessment of implementing changes to social policy on crime. It begins with an acceptance, however reluctant, of the situation as it now exists and works from there. That the AFSC also recommended the abolition of the death penalty and the reduction of sentence lengths (p. 151), speaks to the agenda of weaning ourselves from the will to punish.

Evaluating current punishments for consistency with the preferred value of public safety yields weak results. Public safety is served by incarceration if the murderer would have injured or killed again had he or she not been physically imprisoned. Since the prediction of human behaviour still lies mostly in the realm of speculation, this would be a difficult assessment to evaluate. We do know, however, that almost all of the people serving murder sentences who have been released have not killed again. There is also good reason to believe, as critics have long pointed out, that prisons are schools of crime. Further, the damaging effects of the prison experience itself have been noted as contributions to the powerlessness of those who are violent. In these ways, the use of imprisonment may actually work against the protection of society.

Conclusion

This history of the response to murder in Canada suggests that our ways of understanding this crime are limited by competing discourses of power, which struggle to assert their authority in knowledge on murder and murderers. These discourses reflect myriad beliefs about certain "kinds" of people -- in particular, women, aboriginals, immigrants from specific countries, the "criminal class" and the "mentally ill" -- in the documented discussions of particular murder cases. These beliefs, in turn, helped to shape the responses to murders committed by the people to whom the beliefs corresponded. The lay people involved in the responses to murder attempted to make sense of these competing discourses in the context of their own experiences and their own moralities. Within the confines of a legal framework, the responses to murder have explored this space between the act and the actor in order to ascertain an individual culpability, and concretize a moral sanction through the punishment of the guilty person. Murder is thus "solved" as an individual problem.

The problem with this approach, however, is that murderers are not creatures from another world parachuted to this planet to wreak havoc in otherwise peacable societies. The person who kills illegally is still the member of a culture, a culture which often permits killing of other descriptions, a culture which demonstrates a marginal respect for

the conditions of the lives of some of its other, less empowered members, a culture which perpetuates hierarchical power relations. If we are indeed witnessing a greater number of predatory murders, this is but a reflection of a culture in which this is possible.

Prisons may be required for instrumental purposes for some time to come, to restrain the decidedly few individuals who demonstrate an "appetite" for killing and whose physical freedom threatens the lives of their prospective "prey." They may also be demanded as a symbolic response for the "average" murder, although the human and financial expense of imprisonment should dictate its limited and judicious use. Ultimately, however, responses to murder which fail to address the social and cultural contexts which make killings possible -- and even desirable -- will only add to the vicious cycle of violence which we claim to abhor. Punitive responses to murder are left with only one direction when murders continue unabated or begin to escalate in spite of the legal consequences, and that is to punish more often, more severely. The history of the response to murder in Canada indicates that this strategy neither eradicates the tragedy of murder nor does it satisfy our insecurities about our vulnerability to violent death in the long run.

There is reason to believe that our concern about this vulnerability is a potent force in

the popular responses to murder. In late 1995 Statistics Canada reported a 6% decrease in the 1994 homicide rate -- the lowest rate in 25 years (1995, p. 1) -- yet the response of individual citizens, victims' groups and particular politicians was to publicly contest this claim. Fear of violent crime appears to dominate our assessment of the responses to murder, even when such fear is not empirically grounded. Specific groups have been the targets of anger by the public and certain politicians, especially people with criminal records and immigrants who commit crimes. Concern over perceived lawlessness and the privileging of "criminal's rights" has led to the predictable demand for more punishment.

ENDNOTES

1. From the song "The Future" written by Leonard Cohen (1992). On **The Future**, produced by Leonard Cohen et. al., 1992.

2. Melanie Carpenter was abducted from a Surrey, B.C. tanning salon where she was working alone in early January, 1995. Her abductor's identity as Fernand Auger was tentatively established through a security video recording of him at a bank machine using Carpenter's bank card. Auger killed himself before Carpenter's body was even found. Ten-year-old Melissa Deley was allegedly taken from her parents' home in Surrey in the middle of the night by Brett Shane Neff in an early September, 1995, sexually assaulted and killed. Neff was caught the next day in a car stolen from the family home with the victim's body in the front seat. Neff hanged himself in detention after being charged with first degree murder.

3. Canada ranked 16th in this comparison of international homicide rates, with a rate of 2.9 per 100,000 citizens between the ages of 15 and 24. As presented in Silverman and Kennedy's **Deadly Deeds: Murder in Canada** (1993, p. 31), "The rates range

from 0.3 in Austria to 5.0 in Scotland for the first twenty-one nations on the list. The highest country is the United States with a rate of 21.9 per 100,000 -- more than four times the next closest rate."

4. This was concretized for me when I coincidentally tried to cross a New Westminster, B.C. bridge in the summer of 1994 which was closed due to the presence of a man on the uppermost girders of the bridge. He had been there for six hours contemplating a death leap to the Fraser River below, during which time hundreds of people had congregated in small groups to observe the intended jump. Some of these groups seemed infected with a party atmosphere, some were conducting betting pools to see if the distraught man would jump, and others shouted "encouragements" to jump. When he did finally jump, to the horror of members of the man's family who had been standing on the bridge, many of the spectators clapped, as if signalling the conclusion to an entertainment spectacle.

5. In 1992, 1,265,000 children under the age of 18 lived in poverty, the largest single group of poor people in this country (**Vancouver Sun**, Saturday, May 7, 1994).

REFERENCES

Abbott, Jack Henry. (1982) **In the Belly of the Beast: Letters from Prison**. New York: Vintage Books.

Abel, Donald C. (1989) **Freud: On Instinct and Morality**. Albany: State University of New York Press.

Adams, Michael. (1990) "Canadian Attitudes Toward Crime and Justice," **Forum on Corrections Research**, Vol. 2, No. 1, pp. 10-13.

Agger, Ben. (1989) **Socio(onto)logy**. Chicago: University of Illinois Press.

Aird, Elizabeth. (1995) "If a sex offender isn't fully cured, we should err on the side of potential victims," **The Vancouver Sun**, Tuesday, January 17.

Alexander, Bruce K. (1990) **Peaceful Measures: Canada's Way Out of the 'War on Drugs.'** Toronto: University of Toronto Press.

Alexander, Franz G. and Sheldon T. Selesnick. (1966) **The History of Psychiatry: An Evaluation of Psychiatric Thought and Practice from Prehistoric Times to the Present**. Introduction by Jules H. Masserman, M.D. New York: Harper & Row Publishers.

American Friends Service Committee. (1971) **Struggle for Justice: A Report on Crime and Punishment in America**. New York: Hill & Wang.

Andersen, Earl. (1993) **Hard Place To Do Time: The Story of Oakalla Prison 1912-1991**. New Westminster, B.C.: Hillpointe Publishing.

Anderson, Frank W. (1982) **Hanging in Canada: Concise History of a Controversial Topic**. Surrey, B.C.: Frontier Books.

Andrews, Jonathan. (1988) "The Lot of the 'Incurably' Insane in Enlightenment England," **Eighteenth Century Life**, Vol. 12, n.s. 1, February, pp. 1-18.

Aries, Phillipe. (1981) **The Hour of Our Death**. Translated from the French by Helen Weaver. New York: Oxford University Press.

Armstrong, Pat and Hugh Armstrong. (1983) **A Working Majority: What Women Must Do for Pay**. Prepared for the Canadian Advisory Council on the Status of Women. Ottawa: Minister of Supply and Services Canada.

Backhouse, Constance B. (1984) "Desperate Women and Compassionate Courts: Infanticide in Nineteenth-Century Canada," **University of Toronto Law**, No. 4, Fall, pp. 447-478.

Bailey, M. E. (1993) "Foucauldian Feminism: Contesting bodies, sexuality and identity", in **Up Against Foucault: Explorations of Some Tensions Between Foucault and Feminism**, edited by Caroline Ramazanoglu. New York: Routledge.

Baker, Estella. (1993) "Dangerousness, Rights and Criminal Justice," **The Modern Law Review**, Vol. 56, No. 4, July, pp. 528-547.

Baker, Keith Michael. (1994) "A Foucauldian French Revolution?," in **Foucault and the Writing of History**. Edited by Jan Goldstein. Cambridge, U.S.A.: Blackwell.

Baldus, Bernd. (1990) "Positivism's Twilight?," **The Canadian Journal of Sociology**, Vol. 15, No. 2, Spring, pp. 149-163.

Bartkowski, Frances. (1988) "Epistemic Drift in Foucault," in **Feminism & Foucault: Reflections on Resistance**. Edited by Irene Diamond and Lee Quinby. Boston: Northeastern University Press.

Baskerville, Stephen. (1993) "Blood Guilt in the English Revolution," **The Seventeenth Century**, Vol. VIII, No. 2, Autumn, pp. 181-202.

Baumgold, Deborah. (1993) "Pacifying Politics: Resistance, Violence, and Accountability in Seventeenth-Century Contract Theory," **Political Theory**, Vol. 21, No. 1, February, pp. 6-27.

Beattie, J. M. (1986) **Crime and the Courts in England 1660-1800**. Princeton: Princeton University Press.

_____ (1977) **Attitudes Towards Crime and Punishment in Upper Canada: A Documentary Study**. Toronto: Centre of Criminology, University of Toronto.

Beauchesne, Eric. (1994) "Parole board, tax cheats targeted," **The Vancouver Sun** Wednesday, November 23.

Beccaria, Cesare. (1986, orig. 1764) **On Crimes and Punishments**. Translated, with an introduction, by Henry Paolucci. New York: Macmillan Publishing Company.

Becker, Ernest. (1975) **Escape From Evil**. New York: The Free Press.

_____ (1973) **The Denial of Death**. New York: The Free Press.

Bedau, Hugo Adam (ed.). (1964) **The Death Penalty in America: An Anthology**. Garden City, N.Y.: Anchor Books.

Beechey, Veronica. (1979) "On Patriarchy," **Feminist Review**, 3, pp. 66-82.

Beirne, Piers. (1979) "Empiricism and the Critique of Marxism on Law and Crime," **Social Problems**, Vol. 26, No. 4, April, pp. 373-385.

Benston, Margaret. (1982) "Feminism and the Critique of Scientific Method," in **Feminism in Canada: From Pressure to Politics**. Edited by Angela Miles and Geraldine Finn. Montreal: Black Rose Books.

Bentham, Jeremy. (1973, orig. 1789) **An Introduction to The Principles of Morals and Legislation**. With an introduction by Laurence J. Lafleur. Toronto: Hafner Press.

Berbeshkina, Zoya; Lyudmila Yakovleva; and Dmitry Zerkin. (1985) **What is Historical Materialism?** Moscow: Progress Publishers.

Berger, Peter L. (1963) **Invitation to Sociology: A Humanistic Perspective**. New York: Anchor Books.

Berger, Peter L. and Thomas Luckmann. (1967) **The Social Construction of Reality: A Treatise in the Sociology of Knowledge**. Garden City: Anchor Books.

Berman, Marshall. (1982) **All That Is Solid Melts Into Air: The Experience of Modernity**. New York: Simon and Schuster.

Berman, Morris. (1988) **The Reenchantment of the World**. N.Y.: Bantam Books.

Bernauer, James W. (1992) **Michel Foucault's Force of Flight: Toward an Ethics for Thought**. New Jersey: Humanities Press.

Binder, Arnold. (1984) "Restrictions on Statistics Imposed by Method of Measurement: Some Reality, Much Mythology," **Journal of Criminal Justice**, Vol. 12, No. 5, pp. 467-481.

Black, Charles L. (Jr.). (1974) **Capital Punishment: The Inevitability of Caprice and Mistake**. New York: W. W. Norton & Company Inc.

Black, Joel. (1991) **The Aesthetics of Murder: A Study in Romantic Literature and Contemporary Culture**. Baltimore: Johns Hopkins University Press.

Blackburn, Robin (ed). (1973) **Ideology in Social Science: Readings in Critical Social Theory**. Suffolk: Fontana/Collins.

Bottomore, Tom (ed.). (1983) **A Dictionary of Marxist Thought**. Cambridge, Mass.: Harvard University Press.

Boyd, Neil. (1991) **High Society: Legal and Illegal Drugs in Canada**. Toronto: Key Porter Books Limited.

_____ (1988) **The Last Dance: Murder in Canada**. Scarborough: Prentice-Hall Canada, Inc.

Boyle, Thomas. (1989) **Black Swine in the Sewers of Hampstead: beneath the surface of Victorian sensationalism**. Markham: Penguin Books Canada Limited.

Bracken, Christopher. (1991) "coercive spaces and spatial coercions: althusser and foucault," **Philosophy and Social Criticism**, Vol. 17, No. 3, pp. 229-241.

Branswell, Helen. (1995) "MPs demand ban on video showing various executions," **Vancouver Sun**, Tuesday, June 20.

Breen, Jon L. (1993) "Introduction," in **The Fine Art of Murder**, edited by Ed Gorman, Martin H. Greenberg, Larry Segriff, with Jon L. Breen. New York: Carroll & Graf Publishers, Inc.

Brown, Norman O. (1959) **Life Against Death: The Psychoanalytical Meaning of History**. New York: Vintage Books.

Brown, Stephen E. (1989) "Statistical Power and Criminal Justice Research," **Journal of Criminal Justice**, Vol. 17, pp. 115-122.

Bruch, Hilde. (1967) "Mass Murder: The Wagner Case," **American Journal of Psychiatry**, 124: 5, November, pp. 693-698.

Buchholz, Erich; Richard Hartmann; John Lekschas; and Gerhard Stiller. (1974) **Socialist Criminology: Theoretical and methological foundations**. Lexington, Mass.: Lexington Books.

Burchell, Graham. (1991) "Peculiar interests: civil society and governing 'the system of natural liberty'," in **The Foucault Effect: Studies in Governmentality**, with Two Lectures by and an interview with Michel Foucault, Graham Burchell, Colin Gordon and Peter Miller (eds.). Chicago: The University of Chicago Press.

Burke, Edmund. (1958) **A Philosophical Enquiry into the Origin of Our Ideas of the Sublime and the Beautiful**. Edited by J. T. Boulton. London: Routledge & Kegan Paul.

Burtch, Brian. (1992) **The Sociology of Law: Critical Approaches to Social Control**. Toronto: Harcourt Brace Jovanovich Canada Inc.

Butler, Judith. (1987) "Variations on Sex and Gender: Beauvoir, Wittig and Foucault," in **Feminism as Critique**. Edited and introduced by Seyla Benhabib and Drucilla Cornell. Minneapolis: University of Minnesota Press.

Byrd, Field Marshall Johnny "ByrdDog". (1995) "The Last Mile," **The Journal of Prisoners on Prisons**, Volume 6, Number 1, pp. 70-74.

Cain, Maureen. (1993) "Foucault, feminism and feeling: What Foucault can and cannot contribute to feminist epistemology", in **Up Against Foucault: Explorations of Some Tensions Between Foucault and Feminism**, edited by Caroline Ramazanoglu. New York: Routledge.

Calder, W. A. (1981) "Convict Life in Canadian Federal Penitentiaries, 1867-1900," in **Crime and Criminal Justice in Europe and Canada**. Edited by Louis A. Knafla. Waterloo, Ontario: Wilfred Laurier University Press.

Cameron, Deborah and Frazer, Elizabeth. (1987) **The Lust to Kill: A Feminist Investigation of Sexual Murder**. New York: New York University Press.

Carroll, David. (1989) **Paraesthetics: Foucault, Lyotard, Derrida**. New York: Routledge.

Castel, Jacqueline R. (1990) "Discerning Justice for Battered Women who Kill," **University of Toronto Faculty of Law Review**, Volume 48, No. 2, Spring, pp. 229-258.

Castel, Robert. (1994) "'Problematization' as a Mode of Reading History", in **Foucault and the Writing of History**. Edited by Jan Goldstein. Cambridge, U.S.A.: Blackwell.

_____ (1991) "From dangerousness to risk," in **The Foucault Effect: Studies in Governmentality**, with two lectures by and an interview with Michel Foucault. Edited by Graham Burchell, Colin Gordon and Peter Miller. Chicago: The University of Chicago Press.

Chambliss, W. and R. Seidman. (1982) **Law, Order and Power**, (2nd ed.). Reading, Mass.: Addison-Westley.

Chandler, David. (1976) **Capital Punishment in Canada**. Toronto: McClelland and Stewart Limited.

Chatalian, George. (1991) **Epistemology and Skepticism: An Enquiry into the Nature of Epistemology**. Carbondale: Southern Illinois University Press.

Chibnall, Steve. (1977) **Law-and-Order News: An analysis of crime reporting in the British Press**. London: Tavistock Publications Limited.

Cigman, Ruth. (1981) "Death, Misfortune and Species Inequality," **Philosophy and Public Affairs**, Vol. 10, No. 1, Winter, pp. 47-64.

Cirino, Robert. (1971) **Don't Blame the People: How the news media use bias, distortion and censorship to manipulate public opinion**. Los Angeles: Diversity Press.

Cohen, Marjorie. (1982) "The Problem of Studying 'Economic Man'," **Feminism in Canada: From Pressure to Politics**, edited by Angela Miles and Geraldine Finn. Montreal: Black Rose Books.

Cohen, Stanley. (1987) **Folk Devils and Moral Panics: The Creation of the Mods and Rockers**. New York: Basil Blackwell Inc.

_____ (1985) Visions of Social Control. Cambridge: Polity Press.

Cohen, Stanley and Laurie Taylor. (1972) **Psychological Survival: The Experience of Long-Term Imprisonment**. New York: Pantheon Books.

Collins, Randall. (1986) **Max Weber: A Skeleton Key**. Beverly Hills: Sage Publications.

_____ (1985) **Three Sociological Traditions**. New York: Oxford University Press.

Connell, Ian. (1984) "Television News and the Social Contract," in **Culture, Media, Language**. Edited by Stuart Hall, Dorothy Hobson, Andrew Lowe and Paul Willis. London: Hutchinson.

Cook, Deborah. (1987) "The Limit of Histories: Michel Foucault's Notion of Partage," **Canadian Journal of Political and Social Theory**, Vol. XI, No. 3, pp. 46-55.

Correctional Service of Canada. (1990) **Basic Facts About Corrections in Canada 1990**. Ottawa: Minister of Supply and Services Canada.

Cousins, Mark and Athar Hussain. (1984) **Michel Foucault**. New York: St. Martin's Press.

Cox, Murray. (19) "Interview: Morris Berman", **Omni**,

Craze, Leanne and Patricia Moynihan. (1994) "Violence, Meaning and the Law: Responses to Garry David," **The Australian and New Zealand Journal of Criminology**, Vol. 27, No. 1, June, pp. 30-45.

Culhane, Claire. (1991) **No Longer Barred From Prison: Social Injustice in Canada**. Montreal: Black Rose Books.

Curran, James. (1990) "Communications, power and social order," in **Culture, Society and the Media**, edited by Michael Gurevitch, Tony Bennett, James Curran and Janet Woollacott. New York: Routledge.

Curtis, Dennis; Andrew Graham; Lou Kelly; and Anthony Patterson. (1985) **Kingston Penitentiary: The First Hundred and Fifty Years**. Ottawa: Canadian Government Publishing Centre, Supply and Services Canada.

Curtis, T. C. and F. M. Hale. (1981) "English Thinking About Crime, 1530-1620," in **Crime and Criminal Justice in Europe and Canada**. Edited by Louis A. Knafla. Waterloo, Ontario: Wilfred Laurier University Press.

Dante Alighieri. (1949) **The Divine Comedy 1: Hell**. Translated by Dorothy L. Sayers. Markham: Penguin Books.

Davidson, Arnold I. (1987) "Archaeology, Genealogy, Ethics," in **Foucault: A Critical Reader**. Edited by David Couzens Hoy. New York: Basil Blackwell Inc.

De Fleur, Melvin L. (1968) "Mass Media as Social Systems," in **Violence and the Mass Media**, edited by Otto N. Larsen. New York: Harper & Row Publishers.

De Fleur, Melvin and Sandra Ball-Rokeach. (1975) **Theories of Mass Communication**. (Third Edition). New York: Longman Inc.

Dean, Mitchell. (1994) **Critical and Effective Histories: Foucault's Methods and Historical Sociology**. New York: Routledge.

Deleuze, Gilles. (1988) **Foucault**. Minneapolis: University of Minnesota Press.

Denzin, Norman K. (1970) **The Research Act: A Theoretical introduction to Sociological Methods**. Chicago: Aldine Publishing Company.

Descarries-Belanger, Francine and Shirley Roy. (1991) **The Women's Movement and Its Currents of Thought: A Typological Essay**. Translated by Jennifer Beeman. Ottawa: CRIAW/ICREF.

Descartes, Rene. (1960) **Meditations on First Philosophy**. Translated, with an introduction, by Laurence J. Lafleur. New York: The Bobbs-Merrill Company, Inc.

Diamond, Edwin. (1980) **Good News, Bad News**. Cambridge, Mass.: The MIT Press.

Digitale, Robert. (1992) "Killer trading cards get bad reviews -- Exploitation of 'people's pain and misery' decried," **The Globe and Mail**, Friday, January 31.

Dolan, Frances E. (1992) "The Subordinate('s) Plot: Petty Treason and the Forms of Domestic Rebellion," **Shakespeare Quarterly**, Vol. 43, No. 3, Fall, pp. 317-340.

Doob, Anthony N.; Michelle G. Grossman; and Raymond P. Auger. (1994) "Aboriginal homicides in Ontario," **Canadian Journal of Criminology**, Vol. 36, No. 1, January, pp. 29-62.

Dorfman, Ariel and Armand Mattelart. (1984) **How to Read Donald Duck: Imperialist Ideology in the Disney Comic**. Translation and Introduction by David Kunzle, with Appendix by John Shelton Lawrence. New York: International General.

Dostoevsky, Fyodor. (1962) **Crime and Punishment**. New York: Bantam Books, Inc.

Dreyfus, Hubert L. and Paul Rabinow. (1982) **Michel Foucault: Beyond Structuralism and Hermeneutics**, 2nd Edition. With an Afterword by and an Interview with Michel Foucault. Chicago: The University of Chicago Press.

Durkheim, Emile. (1982) **The Rules of Sociological Method and Selected Texts on Sociology and its Method**. Edited with an introduction by Steven Lukes. Translated by W. D. Halls. New York: The Free Press.

_____. (1973) **Moral Education**. New York: The Free Press.

East, W. Norwood. (1927) **An Introduction to Forensic Psychiatry in the Criminal Courts**. London: J. & A. Churchill.

Eichler, Margaret. (1988) **Non-Sexist Research Methods**. Boston: Allen and Unwin.

Eisenach, Eldon J. (1983) "The Dimension of History in Bentham's Theory of Law," **Eighteenth-Century Studies,** Vol. 16, No. 3, Spring, pp. 290-316.

Eisenstein, Zillah R. (1988) **The Female Body and the Law**. Berkeley: University of California Press.

Elliot, Jeffrey M. (1993) "The Willie Horton Nobody Knows: The Man and the Symbol," **The Nation**, August 23/30, Volume 257, Number 6, pp. 201-205.

Epstein, Edward Jay. (1974) **News from Nowhere: Television and the News**. New York: Vintage Books.

Ericson, Richard V.; Patricia M. Baranek; and Janet B. L. Chan. (1991) **Representing Order: Crime, Law, and Justice in the News Media**. Toronto: University of Toronto Press.

Faith, Karlene. (1994) "Resistance: Lessons from Foucault and Feminism," in **Power/Gender: Social Relations in Theory and Practice**. Edited by H. Lorraine Radtke and Henderikus J. Stam. London: Sage Publications.

Fillingham, Lydia Alix. (1993) **Foucault for Beginners**. New York: Writers and Readers Publishing, Inc.

Fine, Bob. (1986) "Young Marx's Critique of Law and the State: The Limits of Liberalism," **The Political Economy of Crime: Readings for a Critical Criminology**. Edited by Brian D. Maclean. Scarborough: Prentice-Hall Canada, Inc.

Fine, Sean. (1994) "Trying to remove luck of draw in judging the truth," **The Globe and Mail**, Saturday, July 30.

Fink-Eitel, Hinrich. (1992) **Foucault: An Introduction**. Philadelphia: Pennbridge Books.

Flew, Antony (ed.) 1979) **A Dictionary of Philosophy**. London: Pan Books.

Fotheringham, Allan. (1995) "The excesses of the O.J. watch", **Maclean's**, Vol. 108, No. 5, January 30, p. 88.

Foucault, Michel. (1991) **Remarks on Marx: Conversations with Duccio Trombadori**. Translated by R. James Goldstein and James Cascaito. New York: Semiotext(e).

_____ (1991a) "Politics and the study of discourse," in **The Foucault Effect: Studies in Governmentality**. Edited by Graham Burchell, Colin Gordon and Peter Miller. Chicago: The University of Chicago Press.

_____ (1989) **Foucault Live (Interviews, 1966-84)**. Translated by John Johnston. Edited by Sylvere Lotringer. New York Semiotext(e).

_____ (1988) **Politics, Philosophy, Culture: Interviews and Other Writings, 1977-1984**. Edited with an introduction by Lawrence D. Kritzman. New York: Routledge.

_____ (1987) "Maurice Blanchot: The Thought from Outside," in **Foucault/ Blanchot**, Transiated by Jeffrey Mehlman and Brian Massumi. New York: Zone Books.

_____ (1986) **The Use of Pleasure: Volume 2 of The History of Sexuality**. New York: Vintage Books.

_____ (1983) "The Subject and Power," in **Michel Foucault: Beyond Structuralism and Hermeneutics**, by Hubert L. Dreyfus and Paul Rabinow. Chicago: The University of Chicago Press.

_____ (1982) "is it really important to think?," an interview translated by Thomas Keenan. **Philosophy and Social Criticism**, No. 1, Vol. 9, Spring, pp. 29-40.

_____ (1981) "is it useless to revolt?," **Philosophy and Social Criticism**, No. 1, Vol. 8, Spring, pp. 1-9.

_____ (1980) **The History of Sexuality, Volume I: An Introduction**. New York: Vintage Books.

_____ (1980a) **Power/Knowledge: Selected Interviews & Other Writings, 1972-1977**. Edited by Colin Gordon. New York: Pantheon Books.

_____ (1979) **Discipline and Punish: The Birth of the Prison**. New York: Vintage Books.

_____ (1977) **Language, Counter-Memory, Practice: Selected Essays and Interviews**. Edited, with an introduction, by Donald F. Bouchard. Ithaca: Cornell University Press.

_____ (1975) **The Birth of the Clinic: An Archaeology of Medical Perception.** New York: Vintage Books.

_____ (1973) **The Order of Things: An Archaeology of the Human Sciences**. New York: Vintage Books.

_____ (1973a) **Madness and Civilization: A History of Insanity in the Age of Reason**. New York: Vintage Books.

_____ (1972) **The Archaeology of Knowledge and the Discourse on Language**. Translated from the French by A. M. Sheridan Smith. New York: Pantheon Books.

Foucault, Michel (ed.). (1982) **I, Pierre Riviere, having slaughtered my mother, my sister, and my brother. . .: A Case of Parricide in the 19th Century**. Translated by Frank Jellinek. Lincoln: University of Nebraska Press.

Freuchen, Peter. (1965) **Book of the Eskimos**. Edited with a preface by Dagmar Freuchen. New York: Fawcett Publications, Inc.

Freud, Sigmund. (1915) "Thoughts for the Times on War and Death," **The Standard Edition of the Complete Psychological Works of Sigmund Freud, Volume 14**. Edited and translated by James Strachey. London: The Hogarth Press and The Institute of Psycho-Analysis, 1953-74, pp. 275-300.

Fuchs, Stephan. (1993) "Three Sociological Epistemologies," **Sociological Perspectives**, Volume 36, No. 1, Spring. Pp. 23-44.

Gabor, Thomas. (1994) **Everybody does it! Crime by the Public**. Toronto: University of Toronto Press.

Gadoury, Lorraine and Antonio Lachasseur. (1992) **Persons Sentenced to Death in Canada, 1867-1976: An Inventory of Case Files in the Records of the Department of Justice (RG 13)**. Ottawa: Government Archives Division, National Archives of Canada.

Garfinkel, Harold. (1967) **Studies in Ethnomethodology**. Englewood Cliffs: Prentice-Hall, Inc.

Garland, David. (1990) **Punishment and Modern Society: A Study in Social Theory** Chicago: The University of Chicago Press.

Gaucher, Robert. (1987) "Canadian Civil Society, the Canadian State, and Criminal Justice Institutions: Theoretical Considerations," in **State Control: Criminal Justice Politics in Canada**, edited by R. S. Ratner and John L. McMullan. Vancouver: University of British Columbia Press.

Gavigan, Shelley A. M. (1989-1990) "Petit Treason in Eighteenth Century England: Women's Inequality Before the Law," **Canadian Journal of Women and the Law**, Vol. 3, No. 2, pp. 335-374.

Gaylord, Mark S. and John F. Galliher. (1994) "Death Penalty Politics and Symbolic Law in Hong Kong," **International Journal of the Sociology of Law**, Vol. 22, No. 1, March, pp. 19-37.

Geerken, Michael R. and Walter R. Gove. (1975) "Deterrence: Some Theoretical Considerations," **Law and Society Review**, Volume 9, Number 4, Summer, pp. 497-513.

Genet, Jean. (1958) **The Balcony** (revised version). Translated by Bernard Frechtman. New York: Grove Press, Inc.

Glaser, William. (1994) "Commentary: Gary David, psychiatry, and the discourse of dangerousness," **The Australian and New Zealand Journal of Criminology**, Vol. 27, No. 1, June, pp. 46-49.

Glover, Jonathan. (1977) **Causing Death and Saving Lives**. Markham, Ont.: Penguin Books.

Gobetti, Daniela. (1992) "Goods of the Mind, Goods of the Body and External Goods: Sources of Conflict and Political Regulation in Seventeenth-Century Natural Law Theory," **History of Political Thought**, Vol. XIII, No. 1, Spring, pp. 31-49.

Goldstein, Jan. (1994) "Foucault and the Post-Revolutionary Self: The Uses of Cousinian Pedagogy in Nineteenth-Century France," in **Foucault and the Writing of History**. Edited by Jan Goldstein. Cambridge, U.S.A.: Blackwell

Gordon, Colin. (1991) "Government rationality: an introduction," in **The Foucault Effect: Studies in Governmentality**, with two lectures by an an interview with Michel Foucault, Graham Burchell, Colin Gordon and Peter Miller (eds.). Chicago: The University of Chicago Press.

Gordon, David Cole. (1972) **Overcoming the Fear of Death**. Baltimore: Penguin Books Inc.

Gosselin, Luc. (1982) **Prisons in Canada**. Translated by Penelope Williams. Montreal: Black Rose Books.

Gould, Stephen J. (1987) "Life's Little Joke," **Natural History**, 96, April.

_____ (1981) **The Mismeasure of Man**. New York: W. W. Norton and Company.

Gouldner, Alvin W. (1971) **The Coming Crisis of Western Sociology**. New York: Avon Books.

Graburn, Nelson H. H. (1969) "Eskimo Law in Light of Self- and Group-interest," **Law and Society Review**, Vol. 4, No. 1, August, pp. 45-60.

Grant, Isabel; Dorothy Chunn; and Christine Boyle. (1994) **The Law of Homicide**. Scarborough: Carswell Thomson Professional Publishing.

Grant, Linda; Kathryn B. Ward; and Xue Lan Rong. (1987) "Is There an Association Between Gender and Methods in Sociological Research?," **American Sociological Review**, Vol. 52, December, pp. 856-862.

Green, Penny A. and H. David Allen. (1981-82) "Severity of Societal Response to Crime: A Synthesis of Models," **Law and Society Review**, Volume 16, Number 2, pp. 181-205.

Greenberg, David F. (1993) "The Causes of Crime," in **Crime and Capitalism: Readings in Marxist Criminology** (Expanded and updated edition). Edited by David F. Greenberg. Philadelphia: Temple University Press.

Gutting, Gary. (1989) **Michel Foucault's Archaeology of Scientific Reason**. New York: Cambridge University Press.

Haan, Willem de. (1990) **The Politics of Redress: Crime, Punishment and Penal Abolition**. Boston: Unwin Hyman.

Hall, Stuart; Chas Critcher; Tony Jefferson; John Clarke; and Brian Roberts. (1978) **Policing the Crisis: Mugging, the State, and Law and Order**. New York: Holmes & Meier Publishers, Inc.

Hanbury, H. G. (1967) **English Courts of Law** (Fourth Edition). Prepared by D.C.M. Yardley. Toronto: Oxford University Press.

Harding, Sandra (ed.). (1987) **Feminism and Methodology**. Bloomington, Ind.: Indiana University Press.

Harris, Errol E. (1988) **The Reality of Time**. Albany: State University of New York Press.

Harris, Jean. (1988) **They Always Call Us Ladies: Stories from Prison**. New York: Zebra Books.

Harris, Michael. (1987) **Justice Denied: The Law versus Donald Marshall**. Toronto: Totem Books.

Hartsock, Nancy C. M. (1983) "The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism," in **Discovering Reality**, edited by Sandra Harding and Merrill Hintikka. Holland: D. Reidel Publishing Company.

Haskell, Martin R. and Lewis Yablonsky. (1978) **Criminology: Crime and Criminality**, second edition. Chicago: Rand McNally College Publishing Company.

Hay, Douglas. (1975) "Property, Authority and the Criminal Law," in **Albion's Fatal Tree: Crime & Society in Eighteenth Century England**. Edited by Douglas Hay, Peter Linebaugh, John Rule, E. P. Thompson, and Cal Winslow. New York: Pantheon Books.

Heer, Friedrich. (1963) **The Medieval World: Europe 1100-1350**. Translated from the German by Janet Sondheimer. New York: Mentor Books

Hegel, Georg Wilhem Friedrich. (1956, orig. 1832) **The Philosophy of History**. Introduction by C. J. Friedrich. Prefaces by Charles Hegel and the translator J. Sibree. New York: Dover Publications, Inc.

Herrup, Cynthia B. (1985) "Law and Morality in Seventeenth-Century England," **Past and Present**, February, pp. 102-123.

Hobbes, Thomas. (1964, orig. 1651) **Leviathan**. Abridged, edited, and with an introduction by Francis B. Randall. NewYork: Washington Square Press, Inc.

Honderich, Ted. (1976) **Punishment: The Supposed Justifications**. Markham: Penguin Books.

Hooper, Anthony. (1967) "Some Anomalies and Developments in the Law of Homicide," **U.B.C. Law Review**, Vol. 3, No. 1, March, pp. 55-82.

Howe, Adrian. (1994) **Punish and Critique: Towards a Feminist Analysis of Penality**. New York: Routledge.

Hoy, David Couzens. (1987) "Power, Repression, Progress: Foucault, Lukes, and the Frankfurt School," in **Foucault: A Critical Reader**. Edited by David Couzens Hoy. New York: Basil Blackwell Inc.

Ignatieff, Michael. (1978) **A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750-1850**. Markham: Penguin Books.

Jacoby, Susan. (1984) **Wild Justice: The Evolution of Revenge**. New York: Harper Colophon Books.

Jacques, T. Carlos. (1991) "whence does the critic speak? a study of foucault's genealogy," **Philosophy and Social Criticism**, No. 4, Vol. 17, pp. 325-344.

Jayaratne, Toby Epstein. (1983) "The Value of Quantitative Methodology for Feminist Research," in **Theories of Women's Studies**, edited by Bowles and Duelli Klein. London: Routledge & Kegan Paul.

Jobb, Dean. (1988) **Shades of Justice: Seven Nova Scotia Murder Cases**. Halifax: Nimbus Publishing Limited.

Johnson, Leo A. (1975) "The development of class in Canada in the twentieth century," in **Capitalism and the National Question in Canada**. Edited by Gary Teeple. Toronto: University of Toronto Press.

Jones, Richard. (1990) "Educational practices and scientific knowledge: A genealogical reinterpretation of the emergence of physiology in post-Revolutionary France," in **Foucault and Education: Disciplines and Knowledge**. New York: Routledge.

Jung, C. G. (1970) **Collected Works. (2nd Edition), Volume 10**. Princeton: Princeton University Press.

_____ (1970a) **Collected Works. 2nd Edition. Volume 12**. Princeton: Princeton University Press.

_____ (1961) **Memories, Dreams, Reflections**. New York: Random House.

Jung, Hwa Yol. (1987) "The Question of the Moral Subject in Foucault's Analytics of Power," **Canadian Journal of Political and Social Theory**, Vol. XI, No. 3, pp. 28-45.

Karp, Carl and Cecil Rosner. (1991) **When Justice Fails: The David Milgaard Story**. Toronto: McClelland & Stewart Inc.

Katz, Jack. (1988) **Seductions of Crime**. U.S.A.: Basic Books.

Keat, Russell and John Urry. (1987) **Social Theory as Science** (Second Edition). New York: Routledge & Kegan Paul.

Keller, Evelyn Fox. (1982) "Feminism and Science," **Signs**, Vol. 7, No. 3.

Kennedy, Leslie W.; David R. Forde; and Robert A. Silverman. (1989) "Understanding Homicide Trends: Issues in disaggregation for national and cross-national comparisons," **Canadian Journal of Sociology**, Vol. 14, No. 4, Fall, pp. 479-486.

Knuttila, Murray. (1987) **State Theories: From Liberalism to the Challenge of Feminism**. Toronto: Garamond Press.

Kord, Susanne. (1993) "Women as Children, Women as Childkillers: Poetic Images of Infanticide in Eighteenth-Century Germany," **Eighteenth-Century Studies**, Volume 26, Number 3, Spring, pp. 449-466.

Laing, R. D. (1970) **The Politics of Experience and the Bird of Paradise**. Baltimore: Penguin Books.

Lash, Scott. (1990) **Sociology of Postmodernism**. New York: Routledge.

_____ (1984) "Genealogy and the Body: Foucault/Deleuze/Nietzsche," **Theory, Culture & Society**, Vol. 2, No. 2, pp. 1-17.

Lassman, Peter. (1974) "Phenomenological perspectives in sociology," in **Approaches to Sociology: An introduction to major trends in British sociology**. Edited by John Rex. Boston: Routledge & Kegan Paul.

Laster, Kathy. (1994) "Famous Last Words: Criminals on the Scaffold, Victoria, Australia,1 842-1967," **International Journal of the Sociology of Law**, Vol. 22, No. 1, March, pp. 1-18.

_____ (1989) "Infanticide: A Litmus Test for Feminist Criminological Theory, "**Australia and New Zealand Journal of Criminology**, Vol. 22, No. 3, September, pp. 151-166.

Law Reform Commission of Canada. (1984) **Homicide - Working Paper 33**. Ottawa: Minister of Supply and Services Canada.

Lawes, Lewis E. (1932) **Twenty Thousand Years in Sing Sing**. Philadelphia: The New Home Library.

Ledford, Kenneth F. (1993) "Lawyers, Liberalism, and Procedure: The German Imperial Justice Laws of 1877-79," **Central European History**, Vol. 26, No. 2, pp. 165-193.

Lemert, Charles C. and Garth Gillan. (1982) **Michel Foucault: Social Theory and Transgression**. New York: Columbia University Press.

Leps, Marie-Christine. (1992) **Apprehending the Criminal: The Production of Deviance in Nineteenth-Century Discourse**. Durham, N.C.: Duke University Press.

Lesser, Wendy. (1993) **Pictures at an Execution: An Inquiry into the Subject of Murder**. Cambridge: Harvard University Press.

Lifton, Robert Jay. (1975) "On Death and the Continuity of Life: A Psychohistorical Perspective," **Omega**, Vol. 6(2), pp. 143-159.

Lloyd, Dennis. (1970) **The Idea of Law**. Baltimore: Penguin Books Inc.

Locke, John. (1952) **The Second Treatise of Government**. Edited, with an introduction, by Thomas P. Peardon. New York: The Bobbs-Merrill Company, Inc.

Lowe, Mick. (1988) **Conspiracy of Brothers: A true story of murder, bikers and the law**. Toronto: Macmillan of Canada.

Lowman, John. (1986) "Images of Discipline in Prison," in **The Social Dimensions of Law**. Edited by Neil Boyd. Scarborough: Prentice-Hall Canada Inc. Pp. 237-259.

Lowman, John and Brian MacLean. (1991) "Prisons and Protest in Canada," **Social Justice**, Vol. 18, No. 3, pp. 130-154.

Lowry, Malcolm. (1985, orig. 1947) **Under the Volcano**. Markham, Ontario: Penguin Books.

Loy, David. (1990) "The nonduality of life and death: A Buddhist view of repression," **Philosophy East & West**, Volume 40, No. 2, pp. 151-174.

_____ (1988) **Nonduality: A Study in Comparative Philosophy**. New Haven: Yale University Press.

Lunde, Donald T. (1976) **Murder and Madness**. San Francisco: San Francisco Book Company, Inc.

Lynch, Michael J. (1987) "Quantitative Analysis and Marxist Criminology: Some Old Answers to a Dilemma in Marxist Criminology," **Crime and Social Justice**, No. 29, pp. 110-119.

Macdonald, John M. (1967) "Homicidal Threats," **American Journal of Psychiatry**, 124: 4, October, pp. 475-482.

Machado, Roberto. (1992) "Archaeology and epistemology," in **Michel Foucault: Philosopher**. Essays translated from the French and German by Timothy J. Armstrong. New York: Routledge.

MacKay, Charles. (1977, orig. 1841) **Extraordinary Popular Delusions and the Madness of Crowds**. Foreward by Bernard M. Baruch. U.S.A.: The Noonday Press.

MacKinnon, Catharine A. (1989) **Toward a Feminist Theory of the State**. Cambridge, Mass.: Harvard University Press.

_____ (1987) **Feminism Unmodified: Discourses on Life and Law**. Cambridge, Mass.: Harvard University Press.

_____ (1983) "Feminism, Marxism, Method, and the State: Towards Feminist Jurisprudence," **Signs**, Vol. 8, No. 22, Summer, pp. 635-658.

MacKinnon, Peter. (1985) "Two Views of Murder," **Canadian Bar Review**, 63, pp. 130-147.

Maclean, Brian D. (1986) "Critical Criminology and Some Limitations of Traditional Inquiry," in **The Political Economy of Crime: Readings for a Critical Criminology**. Edited by Brian D. Maclean. Scarborough: Prentice-Hall Canada, Inc.

Makin, Kirk. (1993) **Redrum the Innocent**. Toronto: Penguin Books.

Marcuse, Herbert. (1969) **Negations: Essays in Critical Theory**. Boston: Beacon Press.

_____ (1966) **One-Dimensional Man**. Boston: Beacon Press.

_____ (1965) "The Ideology of Death," in **The Meaning of Death**. Edited by Herman Feifel. Toronto: McGraw-Hill Book Company.

Martin, Emily. (1990) "Science and Women's Bodies: Forms of Anthropological Knowledge," in **Body/Politics: Women and the Discourses of Science**. Edited by Mary Jacobus, Evelyn Fox Keller, and Sally Shuttleworth. New York: Routledge.

Marx, Karl. (1988) **Economic and Philosophic Manuscripts of 1844**. Translated by Martin Milligan. New York: Prometheus Books.

_____ (1972) "Alienation and Social Classes," translated by Robert C. Tucker, in **The Marx-Engels Reader**, edited by Robert C. Tucker. New York: W. W. Norton and Company, Inc.

_____ (1970) **Critique of Hegel's Philosophy of Right**. Cambridge University Press.

Marx, Karl and Friedrich Engels. (1959) **Basic Writings on Politics and Philosophy**. Edited by Lewis S. Feuer. New York: Anchor Books.

McDonald, Lynn. (1979) **The Sociology of Law and Order**. Toronto: Methuen.

McGowen, Randall. (1987-88) "'He Beareth Not the Sword in Vain': Religion and the Criminal Law in Eighteenth-Century England," **Eighteenth-Century Studies**, Vol. 21, No. 2, Winter, pp. 192-211.

McGuire, W. and R. F. C. Hull, (eds.). (1977) **C. G. Jung Speaking: Interviews and Encounters**. Princeton: Princeton University Press.

McKay, H. Bryan; C. H. S. Jayewardene; and Penny B. Reedie. (1979) **The Effects of Long-Term Incarceration: And a Proposed Strategy for Future Research**. Ottawa: Minister of Supply and Services Canada.

McLuhan, Marshall. (1969) **The Gutenberg Galaxy: The Making of Typographic Man**. Toronto: Signet Books

_____ (1967) **Understanding Media: The Extensions of Man**. Toronto: Signet Books.

McNeil, Maureen. (1993) "Dancing with Foucault: feminism and power-knowledge," in **Up Against Foucault: Explorations of some tensions between Foucault and feminism**. Edited by Caroline Ramazanoglu. New York: Routledge.

Mead, George Herbert. (1934) **Mind, Self, and Society**. Chicago: University of Chicago Press.

Mellor, Philip A. and Chris Shilling. (1993) "Modernity, Self-Identity and the Sequestration of Death," **Sociology**, Vol. 27, No. 3, August, pp. 411-431.

Meloff, William and Robert A. Silverman. (1992) "Canadian kids who kill," **Canadian Journal of Criminology**, Vol. 43, No. 1, January, pp. 15-34.

Menninger, Karl. (1979) **The Crime of Punishment**. Markham: Penguin Books.

Menzies, Robert. (1995) "The Making of Criminal Insanity in British Columbia: Granby Farrant and the Provincial Mental Home, Colquitz, 1919-1933," **Essays on the History of Canadian Law: British Columbia and the Yukon**. Edited by John P. S. McLaren and Hamar Foster. Toronto: The Osgoode Society and the University of Toronto Press.

_____ (1989) **Survival of the Sanest: Order and Disorder in a Pre-Trial Psychiatric Clinic**. Toronto: University of Toronto Press.

Merquior, J. G. (1985) **Foucault**. Berkeley: University of California Press.

Mewitt, Alan W. (1967) "The Criminal Law, 1867-1967," **The Canadian Bar Review**, Vol. XLV, No. 4, December, pp. 726-740.

Mill, John Stuart and Harriet Taylor Mill. (1970) **Essays on Sex Equality**. Edited and with an introductory essay by Alice S. Rossi. Chicago: The University of Chicago Press.

Miller, Peter and Nikolas Rose. (1993) "Governing economic life," in **Foucault's New Domains**. Edited by Mike Gane and Terry Johnson. New York: Routledge.

Millett, Kate. (1971) **Sexual Politics**. New York: Avon Books.

Mills, C. Wright. (1970) **The Sociological Imagination**. Harmondsworth: Penguin.

Milovanovic, Dragan. (1988) **A Primer in the Sociology of Law**. New York: Harrow and Heston, Publishers.

Moi, Toril. (1993) **Feminist Theory & Simone de Beauvoir**. Cambridge, Mass.: Blackwell Publishers.

Morgan, Robin. (1984) **The Anatomy of Freedom: Feminism, Physics, and Global Politics**. Garden City, N.Y.: Anchor Books, Doubleday.

Morris, Meaghan. (1979) "The Pirate's Fiancee," in **Michel Foucault: Power, Truth, Strategy**. Edited by Meaghan Morris and Paul Patton. Sydney: Feral Publications.

Moyles, R. G. (1989) **British Law and Arctic Men: The Celebrated 1917 Murder Trials of Sinnisiak and Uluksuk, First Inuit Tried Under White Man's Law**. Burnaby, B.C.: The Northern Justice Society, Simon Fraser University.

Nash, June. (1967) "Death as a way of life: The increasing resort to homicide in a Maya Indian community," **American Anthropologist**, 69, pp. 445-470.

Nash, Mike. (1992) "Dangerousness Revisited," **International Journal of the Sociology of Law**, Vol. 20, No. 4, December, pp. 337-349.

Nielsen, Joyce McCarl (ed.). (1990) **Feminist Research Methods**. Boulder, Col.: Westview Press.

Nietzsche, Friedrich. (1989) **On the Genealogy of Morals and Ecce Homo**. Translated by Walter Kaufmann and R. J. Hollingdale. Edited, with Commentary, by Walter Kaufmann. New York: Vintage Books.

_____ (1982) **Beyond Good and Evil: Prelude to a Philosophy of the Future**. Translated, with an introduction and commentary by R. J. Hollingdale. Markham, Ont.: Penguin Books.

_____ (1969, orig. 1885) **Thus Spoke Zarathustra**. Markham: Penguin Books.

O'Brien, Martin. (1986) "Foucism, Marxory & Histault: A Critical Appraisal of Poster's Foucault, Marxism and History: Mode of Production versus Mode of Information," **Theory, Culture & Society**, Vol. 3, No. 2, pp. 115-123.

O'Brien, Mary. (1982) "Feminist Praxis," in **Feminism in Canada: From Pressure to Politics**. Edited by Angela Miles and Geraldine Finn. Montreal: Black Rose Books.

O'Donovan, Katherine. (1985) **Sexual Divisions in Law**. London: Weidenfeld and Nicholson.

O'Neil, Peter. (1992) "MPs duck euthanasia issue as B.C. woman's plea backed," **The Vancouver Sun**, Friday, November 27.

O'Neill, John. (1986) "Bio-Technology: Empire, Communications and Bio-Power," **Canadian Journal of Political and Social Theory**, Vol. X, Nos. 1-2, pp. 66-77.

_____ (1986) "The disciplinary society: from Weber to Foucault," **The British Journal of Sociology**, Volume XXXVII, Number 1, March, pp. 42-60.

_____ (1985) Five Bodies: The Human Shape of Modern Society. Ithaca:Cornell University Press.

Ogilvie, M. H. (1982) **Historical Introduction to Legal Studies**. Toronto: The Carswell Company.

Osborne, Judith A. (1987) "The Crime of Infanticide: Throwing Out the Baby With the Bathwater," **Canadian Journal of Family Law**, 6, pp. 47-59.

Ouimet (of the Quebec Superior Court), The Honourable Mr. Justice Roger. "Shall We Overcome?" An address delivered at Toronto, Ontario, on April 26th, 1966, at the Annual Meeting of the John Howard Society of Ontario.

Paden, Roger. (1986) "locating foucault - archaeology vs. structuralism," **Philosophy and Social Criticism**, No. 2, Vol. 11, Winter, pp. 19-37.

Panitch, Leo. (1985) "The role and nature of the Canadian state," in **The Canadian State: Political Economy and Political Power**. Edited by Leo Panitch. Toronto: University of Toronto Press.

Parker, Graham. (1977) **An Introduction to Criminal Law**. Toronto: Methuen Publications.

Pearson, Geoffrey. (1985) **Hooligan: A History of Respectable Fears**. London: Macmillan.

Phillips, Jim. (1992) "'Securing Obedience to Necessary Laws': The Criminal Law in Eighteenth-Century Nova Scotia," **Nova Scotia Historical Review**, Vol. 12, pp. 87-124.

Pizzorno, Alessandro. (1992) "Foucault and the liberal view of the individual," in **Michel Foucault: Philosopher**. Essays translated from the French and German by Timothy J. Armstrong. New York: Routledge.

Poster, Mark. (1989) **Critical Theory and Poststructuralism: In Search of a Context**. Ithaca: Cornell University Press.

_____ (1987) **Foucault, Marxism & History: Mode of Production versus Mode of Information**. Cambridge: Polity Press.

Postman, Neil. (1984) **Amusing Ourselves to Death: Public Discourse in the Age of Show Business**. Markham, Ont.: Penguin Books.

Prado, C. G. (1992) **Descartes and Foucault: A Contrastive Introduction to Philosophy**. Ottawa: University of Ottawa Press.

Price, Graham. (1991) "The King v. Alikomiak (a.k.a. Alicomiak, a.k.a. Alekamiaq)," in **Glimpses of Canadian Legal History**, edited by Dale Gibson and W. Wesley Pue. Winnipeg: Legal Research Institute of the University of Manitoba.

Primoratz, Igor. (1990) **Justifying Legal Punishment**. New Jersey: Humanities Press International, Inc.

Procacci, Giovanna. (1994) "Governing Poverty: Sources of the Social Question in Nineteenth-Century France," in **Foucault and the Writing of History**. Edited by Jan Goldstein. Cambridge, U.S.A.: Blackwell.

Purdum, Elizabeth D. and J. Anthony Paredes. (1989) "Rituals of Death: Capital Punishment and Human Sacrifice," in **Facing the Death Penalty: Essays on a Cruel and Unusual Punishment**, edited by Michael L. Radelet. Philadelphia: Temple University Press, pp. 139-155.

Quinney, Richard. (1975) "Crime control in capitalist society: a critical philosophy of legal order," in **Critical Criminology**. Edited by Ian Taylor, Paul Walton and Jock Young. Boston: Routledge & Kegan Paul.

Radford, Jill. (1992) "Introduction," **Femicide: The Politics of Woman Killing**. Edited by Jill Radford and Diana E. H. Russell. Toronto: Maxwell Macmillan Canada.

Radzinowicz, Leon. (1966) **Ideology and Crime**. New York: Columbia University Press.

Rajchman, John. (1985) **Michel Foucault: The Freedom of Philosophy**. New York: Columbia University Press.

Ramazanoglu, Caroline and Janet Holland (1993) "Women's sexuality and men's appropriation of desire," in **Up Against Foucault: Explorations of some tensions between Foucault and feminism**. Edited by Caroline Ramazanoglu. New York: Routledge.

Reik, Theodor. (1945) **The Unknown Murderer**. New York: International Universities Press.

Report of a Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada. (1956) G. Fauteux, Chairman. Ottawa: The Queen's Printer.

Report of the Auditor General of Canada to the House of Commons. (1994) Volume 11, Chapters 16, 17 and 18. Ottawa: Minister of Supply and Services Canada.

Report to Parliament by the Sub-Committee on the Penitentiary System in Canada. (1977) Standing Committee on Justice and Legal Affairs, Mark MacGuigan (chair). Ottawa: Ministry of Supply and Services Canada.

Reports of The Joint Committee of The Senate and House of Commons on Capital Punishment, Corporal Punishment and Lotteries, Third Session of the Twenty-Second Parliament. (1956) Ottawa: Queen's Printer.

Ricci, N. P. (1987) "The End/s of Woman," **Canadian Journal of Political and Social Theory**, Vol. XI, No. 3, pp. 11-27.

Richmond, Dr. Guy. (1975) **Prison Doctor: A Dramatic Insight into our Penal System and the Critical Need to Seek Reform**. Surrey, B.C.: Nunaga Press.

Robertson, Roland. (1974) "Towards the identification of the major axes of sociological analysis," in **Approaches to Sociology: An introduction to major trends in British sociology**. Edited by John Rex. London: Routledge & Kegan Paul.

Rorty, Richard. (1993) "Paroxysms and Politics," **Salmagundi**, No. 97, Winter, pp. 61-68.

_____ (1982) **Consequences of Pragmatism. Essays 1972-1980**. Minneapolis: University of Minnesota Press.

Rose, Gillian. (1984) **Dialectic of Nihilism: Post-Structuralism and Law**. New York: Basil Blackwell Inc.

Roshier, Bob. (1973) "The selection of crime news by the press," in **The Manufacture of News**, edited by Stanley Cohen and Jock Young. Beverly Hills: SAGE Publications.

Rothenburger, Mel. (1973) 'We've Killed Johnny Ussher!' **The Story of the Wild McLean Boys and Alex Hare**. Vancouver: Mitchell Press.

Rothman, David J. (1990, orig. 1971) **The Discovery of the Asylum: Social Order and Disorder in the New Republic**. Toronto: Little, Brown and Company.

_____ (1980) **Conscience and Convenience: The Asylum and its Alternatives in Progressive America**. Glenview, Ill.: Scott, Foresman and Company.

Rousseau, Jean-Jacques. (1979) **Emile (or On Education)**. Allan Bloom (trans). New York: Basic Books.

_____ (1968, orig. 1762) **The Social Contract**. Translated and introduced by Maurice Cranston. Markham: Penguin Books.

Ruggiero, Guido. (1982) "Excusable Murder: Insanity and Reason in Early Renaissance Venice," **Journal of Social History**, Vol. 16, No. 1, Fall, pp. 109-119.

Rusche, Georg and Otto Kirchheimer. (1939) **Punishment and Social Structure**. New York: Russell & Russell.

Russell, Bertrand. (1968) **Authority and the Individual**. With a terminal essay, "Philosophy and Politics". Boston: Beacon Press.

Ryan, Edward F. (1967) "Insanity at the Time of Trial Under the Criminal Code of Canada," **University of British Columbia Law Review**, Vol. 3, No. 1, March, pp. 36-54.

Salas, Luis and Raymond Surette. (1984) "The Historical Roots and Development of Criminological Statistics," **Journal of Criminal Justice**, Vol. 12, No. 5, pp. 457-465.

Sangster, Joan. (1989) **Dreams of Equality: Women on the Canadian Left, 1920-1950**. Toronto: McClelland & Stewart Inc.

Sawicki, Jana. (1994) "Foucault, feminism and questions of identity," in **The Cambridge Companion to Foucault**. Edited by Gary Gutting. New York: Cambridge University Press.

_____ (1987) "heidegger and foucault: escaping technological nihilism," **Philosophy and Social Criticism**, No. 2, Vol. 13, pp. 155-173.

Schlesinger, Philip and Howard Tumber. (1993) "Fighting the War Against Crime: Television, Police, and Audience," **British Journal of Criminology**, Volume 33, Number 1, Winter, pp. 19-32.

Schneider, Hans Joachim. (1992) "Crime in the Mass Media," **International Annals of Criminology**, Vol. 30, No. 1&2, pp. 85-99.

Schuh, Cornelia. (1979-80) "Justice on the Northern Frontier: Early Murder Trials of Native Accused," **The Criminal Law Quarterly**, Vol. 22, pp. 74-111.

Schwartz, Leonard and Jerry Jacobs. (1979) **Qualitative Sociology: A Method to the Madness**. New York: Free Press.

Schwendinger, Herman and Julia. (1975) "Defenders of order or guardians of human rights?," in **Critical Criminology**. Edited by Ian Taylor, Paul Walton, Jock Young. Boston: Routledge & Kegan Paul.

Scott, George D. (1982) **Inmate: The Casebook Revelations of a Canadian Penitentiary Psychiatrist**. Montreal: Optimum Publishing International Inc.

Scott, George Ryley. (1994) **A History of Torture**. London: Bracken Books.

Scull, Andrew. (1989) **Social Order/Mental Disorder: Anglo-American Psychiatry in Historical Perspective**. Berkeley: University of California Press.

Seagal, Debra. (1993) "Real Cops: Lost in a TV netherworld," **The Globe and Mail**, Saturday, November 20.

Shumway, David R. (1989) **Michel Foucault**. Charlottesville: University Press of Virginia.

Silverman, Hugh J. (1978) "jean-paul sartre versus michel foucault on civilizational study," **Philosophy and Social Criticism**, No. 2, Vol. 5, July, pp. 159-171.

Silverman, Robert and Leslie Kennedy. (1993) **Deadly Deeds: Murder in Canada**. Scarborough: Nelson Canada.

Sintomer, Yves. (1992) "power and civil society: foucault vs. habermas," **Philosophy and Social Criticism**, Vol. 18, Nos. 3/4, pp. 357-378.

Sklar, Robert. (1980) **Prime-Time America: Life On and Behind the Television Screen**. Toronto: Oxford University Press.

Smandych, Russell C. (1991) "Beware of the 'Evil American Monster': Upper Canadian views on the need for a penitentiary, 1830-1834," **Canadian Journal of Criminology**, April, pp. 125-147.

Smart, Barry. (1993) **Postmodernity**. New York: Routledge.

_____ (1985) **Michel Foucault**. New York: Routledge.

_____. (1983) **Foucault, Marxism and Critique**. Boston: Routledge & Kegan Paul.

Smart, Carol. (1989) **Feminism and the Power of Law**. New York: Routledge.

_____ (1985) "Legal subjects and sexual objects: ideology, law and female sexuality," in **Women in Law: Explorations in Law, Family & Sexuality**. Boston: Routledge & Kegan Paul.

Smith, Dorothy E. (1987) "Women's Perspective as a Radical Critique of Sociology," in **Feminism & Methodology**. Edited by Sandra Harding. Bloomington, Ind.: Indiana University Press.

Snider, Laureen. (1994) "Feminism, Punishment and the Potential of Empowerment," **Canadian Journal of Law and Society**, Volume 9, Number 1, Spring, pp. 75-104.

_____ (1978) "Corporate Crime in Canada: A Preliminary Report," **Canadian Journal of Criminology**, (20)

Solicitor General Canada. (1984) **Long Term Imprisonment in Canada, Working Paper No. 1: An Overview of the Long Term Prisoner Population and Suggested Directions for Further Research**. Ottawa: Communications Division, Ministry Secretariat.

Solomon, Robert R. and Melvyn Green (1988) "The First Century: The History of Non-medical Opiate Use and Control Policies in Canada, 1870-1970," in **Illicit Drugs in Canada: A Risky Business**, edited by Judith C. Blackwell and Patricia G. Erickson. Scarborough: Nelson Canada.

Sparks, Richard. (1992) **Television and the Drama of Crime: moral tales and the place of crime in public life**. Philadelphia: Open University Press.

Spitzer, Steven. (1975) "Punishment and Social Organization: A Study of Durkheim's Theory of Penal Evolution," **Law and Society Review**, Volume 9, Number 4, Summer, pp. 613-637.

Sproule, Catherine F. and Deborah J. Kennett. (1989) "Killing with Guns in the USA and Canada 1977-1983: Further Evidence for the Effectiveness of Gun Control," **Canadian Journal of Criminology**, Vol. 31, No. 3, July, pp. 245-251.

Stafford-Clark, David. (1971) **Psychiatry Today**. Baltimore: Penguin Books.

Statistics Canada, Justice Statistics Division. (1977) **Homicide Statistics**. Ottawa: The Minister of Industry, Trade and Commerce.

Statistics Canada. (1995) "Homicide in Canada - 1994," **Juristat**, Vol. 15, No. 11.

Strean, Dr. Herbert and Lucy Freeman. (1991) **Our Wish to Kill: The Murder in All Our Hearts**. New York: St. Martin's Press.

Surette, Ray. (1992) **Media, Crime, and Criminal Justice: Images and Realities**. Pacific Grove, Cal.: Brooks/Cole Publishing Company.

Swift, Jonathan. (1967) **Gulliver's Travels**. New York: Dell Publishing Co., Inc.

Taylor, Charles. (1990) **Philosophy and the Human Sciences: Philosophical Papers 2**. New York: Cambridge University Press.

Taylor, Ian. (1983) **Crime, Capitalism and Community: Three essays in socialist criminology**. Toronto: Butterworths.

Taylor, Ian; Paul Walton; and Jock Young. (1973) **The New Criminology**. London: Routledge & Kegan Paul.

Thompson, Hunter S. (1989) **Generation of Swine: Tales of Shame and Degradation in the '80s**. New York: Vintage Books.

Tierney, Patrick. (1989) **The Highest Altar: Unveiling the Mystery of Human Sacrifice**. Markham, Ont.: Penguin Books.

Tifft, Larry. (1982) "Capital Punishment Research, Policy, and Ethics: Defining Murder and Placing Murderers," **Crime and Social Justice**, Summer, pp. 61-68.

Tong, Rosemarie. (1989) **Feminist Thought: A Comprehensive Introduction**. Boulder: Westview Press.

Toqueville, Alexis de. (1969) **Democracy in America**. Edited by J.P. Mayer. A new translation by George Lawrence. Garden City, N.Y.: Anchor Books.

Trombley, Stephen. (1992) **The Execution Protocol: Inside America's Capital Punishment Industry**. Toronto: Anchor Books.

Tucker, Robert C. (ed.). (1972) **The Marx-Engels Reader**. New York: W. W. Norton & Company.

Tunstall, Jeremy. (1981) **The Media are American: Anglo-American media in the world**. London: Constable.

Turkel, Gerald. (1990) "Michel Foucault: Law, Power, Knowledge," **Journal of Law and Society**, Vol. 17, No. 2, Summer, pp. 170-193.

Tyler, Tom R. and Renee Weber. (1982) "Support for the Death Penalty; Instrumental Response to Crime, or Symbolic Attitude?," **Law and Society Review**, Volume 17, Number 1, pp. 21-45.

Vallee, Brian. (1986) **Life With Billy**. Toronto: Seal Books.

Van den Haag, Ernest and John P. Conrad. (1983) **The Death Penalty: A Debate**. New York: Plenum Press.

Weber, Max. (1958) **The Protestant Ethic and the Spirit of Capitalism**. New York: Charles Scribner's Sons.

Webster, Christopher D.; Grant T. Harris; Marnie E. Rice; Catherine Cormier; and Vernon L. Quinsey. (1994) **The Violence Prediction Scheme: Assessing Dangerousness in High Risk Men**. Toronto: Centre of Criminology, University of Toronto.

Weedon, Chris. (1987) **Feminist Practice and Poststructuralist Theory**. Oxford: Basil Blackwell Ltd.

West, Cornel. (1992) "A Matter of Life and Death," **October**, 61, Summer, pp. 20-23.

White, Welsh S. (1991) **The Death Penalty in the Nineties: An Examination of the Modern System of Capital Punishment**. Ann Arbor: The University of Michigan Press.

Wickham, Gary. (1986) "Power and power analysis: beyond Foucault?," in **Towards a Critique of Foucault**. Edited by Mike Gane. New York: Routledge & Kegan Paul.

Wilf, Steven Robert. (1989) "Anatomy and Punishment in Late Eighteenth-Century New York," **The Journal of Social History**, Vol. 22, No. 3, Spring, pp. 507-530.

Wilkes, James. (1978) "Violence in the Family," in **Violence in Canada**, edited by Mary Alice Beyer Gammon.

Wilkinson, George Theodore. (1962) **The Newgate Calendar: The blood-soaked pages of the most infamous chronicles of crime**. London: Panther Books.

Will, George. (1993) "The Meaning of Life: The way of all flesh - randomness," **The Vancouver Sun**, Monday, December 13.

Williams, Paul and Julie Dickinson. (1993) "Fear of Crime: Read All About It? The Relationship between Newspaper Crime Reporting and Fear of Crime," **British Journal of Criminology**, Volume 33, Number 1, Winter, pp. 33-56.