Negotiating Responsibility

Law and Society Series
W. Wesley Pue, General Editor

The Law and Society Series explores law as a socially embedded phenomenon. It is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking, scholarship, educational practice, and social life. Books in the series treat law and society as mutually constitutive and seek to bridge scholarship emerging from interdisciplinary engagement of law with disciplines such as politics, social theory, history, political economy, and gender studies.

A list of the titles in this series appears at the end of this book.

Kimberley White

Negotiating Responsibility: Law, Murder, and States of Mind

UBCPress · Vancouver · Toronto

16 15 14 13 12 11 10 09 08 5 4 3 2 1

Printed in Canada on ancient-forest-free paper (100% post-consumer recycled) that is processed chlorine- and acid-free, with vegetable-based inks.

Library and Archives Canada Cataloguing in Publication

White, Kimberly (Kimberly-Jo), 1966-
Negotiating responsibility : law, murder, and states of mind / Kimberly White.

(Law and society)
Includes bibliographical references and index.
ISBN 978-0-7748-1276-4

1. Insanity (Law) – Canada. 2. Competency to stand trial – Canada. 3. Mentally ill offenders – Canada. 4. Murder – Canada. I. Title. II. Series: Law and society series (Vancouver, B.C.)

KE8841.W45 2007 345.71'04 C2007-905475-7 KF9242.W45 2007

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada through the Book Publishing Industry Development Program (BPIDP), and of the Canada Council for the Arts, and the British Columbia Arts Council.

Printed and bound in Canada by Friesens
Set in Stone by Artegraphica Design Co. Ltd.
Copy editor: Deborah Kerr
Proofreader: Dallas Harrison
Indexer: David Luljak

UBC Press
The University of British Columbia
2029 West Mall
Vancouver, BC V6T 1Z2
604-822-5959 / Fax: 604-822-6083
www.ubcpress.ca

For my grandmothers, Joyce White
and Helen Bailey





Contents





Preface

The epistemological questions I address in *Negotiating Responsibility,* regarding the way in which knowledge about criminal responsibility was socially and institutionally produced during the early twentieth century, grew from my attempt to make sense of the rich archival materials collected in the case files of individuals convicted for murder in Canada between 1920 and 1950. It was not my original plan to study responsibility knowledge. At the start, I was primarily interested in documenting the nature of psychiatric expert opinion evidence and evaluating any influence experts may have had on legal decisions – decisions about guilt and decisions about mercy. Only over time did I come to realize that the stories imbedded in the case file texts (trial transcripts, newspaper clippings, psychiatric reports, letters, and petitions) were profoundly about negotiating the boundaries between moral and legal responsibility, and that the roles played by psychiatric experts in the decision-making process were often minor. As this inquiry unfolded, it became clear that socio-legal narratives around the "expert" and "expertise," as they are represented in Canadian murder cases, did not easily fit with contemporary critical social-history literature, or with historiographies of forensic psychiatry in particular.

For instance, my findings could not adequately be explained by the now widely accepted medicalization (or psychiatrization) model, which proposes that psychiatric experts and discourses of scientific expertise became increasingly influential in social, political, and legal spheres during the early twentieth century. Evidence provided in *Negotiating Responsibility* confirms a deep paradigmatic shift between the late nineteenth and early twentieth centuries in the conceptualization of criminality with the rise of scientific knowledge about human determinism. However, the general argument made by theorists and historians (most notably, Michel Foucault, Andrew Scull, Catherine Crawford, Michael Clark, J.E. Goldstein, and Robert Menzies) that psychiatric experts wielded considerable power through the professional mobilization of scientific "truths" is not apparent in the adjudication of

Canadian capital murder cases, at least not in a straightforward way. This is not to suggest that we should discount scholarly evidence that points toward the obvious ways in which psychiatric theories about crime and social digression came to include an increasing number of behaviours and conditions under the rubric of "illness" or "disorder." Quite the opposite. I simply mean to point out that evidence of medicalization processes established in non-capital and civil commitment cases, and in cases where the legal outcome was a finding of not guilty by reason of insanity, must be considered alongside the many inconsistencies in form, substance, and use of expert knowledge that can be seen in the adjudication of capital cases, including cases where insanity was not the formal defence.

Conflicting historical evidence regarding professional and ideological formations between law and psychiatry suggests we cannot generalize across different social/cultural contexts. Several scholars, including Michael Clark and Catherine Crawford, address the importance of historical setting to the development of medical-legal knowledge and practices.[1] However, even within a particular historical context, or site of investigation, researchers rely on various forms of evidence that can inspire competing arguments/interpretations. For instance, Joel Eigen and Ruth Harris describe examples of co-operation between psychiatric experts and legal authorities in England and France, whereas others compare it to a bad marriage or an ambitious battle over professional and social power. Alternatively, Roger Smith shows that medical men were at times faced with contempt in English criminal courts.[2] Such inconsistencies flag the inherent complexity and specificity of medical-legal knowledge and bring attention to the need for further analysis.

In what follows, I trace several important discussions regarding the professional and ideological interactions between criminal law and psychiatry, highlighting conflicting accounts about the role of the psychiatric expert in criminal cases. In doing so, I maintain that conclusive and generalized claims about such critical historical developments must be read shrewdly, and with the recognition that they are in fact partial histories to be read in conjunction with other partial histories.

Making Sense of the History

Legal historians have shown that, before the nineteenth century, law and medicine in most Western countries had little interaction outside the occasional instance in which a medical witness was called in a murder trial to testify regarding cause of death. For instance, Crawford suggests that, in eighteenth-century England, common law had little need for medical evidence and that there was no pressure to improve the "quality" of medical testimony by excluding inexperienced medical experts. For the same reasons, she argues, "the epistemological problems encountered in applying

medical knowledge to legal questions were rarely a focus of attention or concern in eighteenth-century trials ... Medico-legal questions simply had no perceived relevance to the art of healing."[3]

Likewise, historians' accounts of the eighteenth century are unlike those for the nineteenth, which depict medical experts practically champing at the bit to get on the witness stand. Crawford again argues that, before the nineteenth century, French medical experts actually held "disobliging attitudes" toward the idea of having to testify in court.[4] However, for most historians, the formative period of forensic psychiatry – whether it was the early eighteen hundreds in France and England or later in the century in the US and Canada – represented a time of conflict between law and psychiatry when it came to making legal decisions about insanity and criminal responsibility. Although the specific dynamics of professionalization during the formative years of Western forensic psychiatry certainly varied from place to place, it seems that some measure of disagreement predictably developed over the way in which legal responsibility was, or ought to have been, established.[5]

However, depending on how they read and interpret the relationship between law and psychiatry, and between psychiatric knowledge and legal decision making, historians draw differing conclusions regarding the influence each profession had on the way in which the other was practised. In *Madness and Reason,* Jennifer Radden argues that, as regards the issue of insanity, medical discourse came to have an increasingly powerful influence at both a theoretical and a procedural level of Western law.[6] Her investigation into the philosophy of insanity discourse generalizes across the US and Britain and suggests a "passing of responsibility" from the authority of legal decisions to a heavy reliance on expert opinions. Radden's evidence is not empirically driven: instead, she focuses primarily on the philosophical shifts in the notion of madness and the continuous desire of populations to "excuse" the insane. Her analysis defines "madness" strictly within the conceptual – rather than social, medical, and/or legal – notion of "unreason." Radden's claim regarding the desire to "excuse" the insane is not borne out by the findings of Walter Bromberg. In his *Psychiatry between the Wars,* he argues that American psychiatrists participated in "celebrated" trials only because most offenders were not afforded, or could not afford, the luxury of a "mental study."[7] He also proposes that the American public was not generally receptive to the inclusion of psychiatric testimony in criminal trials and actually resisted the idea of "excusing" criminals on the basis of mental incapacity.

In contrast to historians who suggest a well-respected professional hierarchy, or at least a co-operative working relationship, Janet Tighe compares the relationship between American law and psychiatry in the late nineteenth century to a "marriage on the rocks," a relationship between two "volatile

partners" who managed to co-exist in order to maintain their professional interests.[8] She argues that each provided the other with an appearance of legitimacy through organized and public attempts to reconcile theoretical differences. However, the sort of equal playing field that Tighe describes – suggesting that each profession gave the other a leg up – is quite different from what Goldstein observes in the French context, and what Smith observes in the English context. Although Goldstein recognizes the judicial "need" for medical witnesses, she concludes that legal discourses on responsibility and mind-state had far more impact on the production of medical knowledge than did medical discourses on criminal law proceedings.[9]

Although the full degree of "impact" that one form of knowledge may have had on another is in many ways immeasurable, it is possible in the works of Goldstein and Tighe to discern how some medical men were able to acquire social status and professional legitimacy through their associations with the law, and through the application of medical knowledge to social problems. My analysis of Canadian archives produced during the adjudication of capital murder cases supports, to some extent, Goldstein's argument. Although Canadian criminal law was not affected on a doctrinal level – the laws of insanity have been the same for over 150 years – expert knowledge, infused with common-sense knowledge, nevertheless had a significant effect on the ways in which criminality and responsibility came to be interpreted in each case.

In *Trial by Medicine,* Roger Smith explores the issues of insanity and responsibility in Victorian trials and argues that the apparent surge in the number of citizens labelled insane and irresponsible – which included the poor, the old, and petty criminal types – moved the psychiatric expert to the political foreground in efforts to come to terms with the social problems of criminality and insanity.[10] However, Smith does not suggest that experts gained social/legal authority in the process, or that they vaulted to the top of the medical profession: rather, it appears from the evidence that medical men who chose to deal with the insane and criminal often faced derision from the press and the legal profession, as well as from traditional medical practitioners.[11] Although psychiatrists were stigmatized by association for defending "insane paupers," Smith argues that insanity and the insanity defence nevertheless "became" an important mobilizing problem for some of them, both signalling and aiding their struggle for professional legitimacy.

Smith breaks away from a straightforward medical-legal analysis of the expert witness to consider the symbolic meanings of legal decision on insanity. He suggests that symbolic representations were the result of social relations; therefore, as social relations changed, so did the meaning and expression of symbolic elements. He also imagines that the knowledge that

came to constitute medical expertise was a reflection of social values, where the criminal trial became a critical display of "public choices."[12]

The bringing together of works on the history of law and psychiatry reveals a number of important parallels across historical accounts; but more interestingly, the literature reveals some significant contradictions. I do not consider contradictions to be a problem but do think we ought to explore this uneven terrain further. One way to better understand the historical significance of the forensic psychiatric expert in Western law, medicine, and society is to follow Smith's lead by considering the specific location in which the specialized discipline was largely constituted – the criminal trial.

The legal role of the expert witness and use of expert opinion evidence in Canadian criminal law were clearly laid out in the laws of evidence and in the *Criminal Code*. However, if we look closely, and on a case-by-case basis, at the judicial processes that unfolded during the trial and commutation stages, we can identify some of the more nuanced practices around evidence that are missed in broad-scoped or doctrinal studies. For instance, in capital cases, judges and juries were generally reluctant to accept the testimonial evidence of individual expert witnesses at face value. Even when a medical witness was granted expert status by the trial judge, his opinion was not privileged over those of lay witnesses simply because he was an "expert."

The relative lack of authority attributed to experts in some Canadian courts does not necessarily mean that what experts were saying did not influence the decision-making process, or that the medicalization/professionalization model documented by Scull and others is in all circumstances inappropriate for understanding the Canadian experience. However, as a general framework for critical analysis, it may gloss over the intricate and often highly contested nature of early medical-legal relations in the courtroom. In addition, this narrow reading does not account for the overwhelming appeal to common-sense knowledges within representations of expert knowledge. There is an important distinction to be made between "experts" and "expert knowledge" in the adjudication of Canadian murder cases. Experts were often kept at arm's length, but expert knowledge was taken up by decision makers through a variety of means.

Several social historians over the past twenty years, who have written about early medical-legal relations in the West, suggest that psychiatrists were eager to get into the courtroom because they recognized the potential career benefits of legal affiliation. Regardless of the particular place or period, questions about the professional status of experts and the legitimacy of psychiatric expertise repeatedly come up in medical-legal historiographies. For instance, some historians consider social and professional status to be the ultimate motive for psychiatrists who got involved in the "science" and

regulation of criminal behaviour. Similarly, the argument that a psychiatrist's expertise and professional worth were constituted and legitimized through law has been the focus of works by Carol Jones, J.E. Goldstein, Robert Nye, and Andrew Scull, who, with varying degrees of theoretical sophistication, construct the expert as a careerist and power-monger.[13] The idea that this intense drive for power occurred within the psychiatric profession is certainly provocative, but there really isn't much evidence in the literature to show how it transpired.

In *Witnessing Insanity,* Joel Eigen examines the participation of the expert medical witness in the courtroom drama of English insanity trials, as well as the social-cultural context of England during the Victorian era. He shows how the terms "madness" and "insanity" were deployed in popular and medical discourses to represent the same image whereby the mad became "objects of derangement." Eigen reports that the development of a specialization in "forensic witnessing" in England was mostly "consumer-driven, fragmentary, and perhaps even more court-inspired than professionally generated."[14] Eigen's rejection of the reductionist argument that the rise of psychiatric expertise was a product of the social construction and regulation of insanity is important here. But again, I think it is necessary to distinguish between the proliferation and integration of psychiatric *expertise* and the professional positioning of the psychiatric *expert* in law.

To get at some of the more complex dynamics of professionalism, expertise, and the rise of the expert, it is necessary to consider the specific cultural context – the role of institutional, economic, and political forces – that may have inspired medical knowledge about criminal responsibility. At the same time, it is important to pay attention to the ways in which the form and content of medical expertise have been interpreted, or limited, by legal procedure and legal decision makers. As Eigen points out, individual legal actors were both a part and a product of their culture, "and the images and metaphors employed by *all* parties to make sense of severe mental torment needs to be placed in the context of contemporary concerns and anxieties."[15] In this book, it is precisely the knowledge processes involved in "making sense" of crime and criminals that I am interested in.

Eigen also shows how the language of expert testimony was "freighted with the imagery of a specific scientific tradition" and that it did not reflect the traditional assumption that the sole aim of the expert was to achieve the "professional colonization of the witness box."[16] This interpretation of the role or ambition of the expert differs somewhat from that offered by Nigel Walker in *Crime and Insanity in England*. The psychiatric expert in Walker's survey of the insanity defence is presented in part as an underdog, a "wrestler who is compelled to box" in a "contest ... for which he is not trained." In the legal "game" of language, intellect, and rivalry, Walker

argues, the psychiatrist was forced into "obscuration and jargon" in order to "ensure that he arrive[d] at ... the right destination." At the same time, Walker is suspicious of evidence that shows the way in which psychiatrists actively criticized the laws of insanity for being too rigid and narrow in scope. He does not view the evidence of resistance to legal authority on the part of experts as terribly significant. He cautions, for instance, that in order to properly evaluate the "strength of attacks of this sort ... one must distinguish between those [psychiatrists] who accept the law's fundamental justification for its concern with 'responsibility' and those which do not."[17]

Walker further speculates that psychiatrists' opinions were based on "compassion rather than logic" because they generally subscribed to the notion that "the madman is punished enough by his madness." Although Walker appears to admire the social sentiment of some early psychiatrists, his representation of the expert witness in early modern England is limited to a legal perspective. In their efforts to have their voices and ideas recognized in the courtroom, experts are cast in this analysis as single-minded marketers in the "business" of manufacturing labels – "like slogans of over-enthusiastic advertisements." Walker further speculates that, although the "typical" judge or lawyer was "at least as intelligent as the typical psychiatrist" and could therefore understand medical jargon, it was necessary to send a simple but powerful message if a defence of insanity were to be sold to the jury.[18]

In contrast to Walker's image of the expert as a self-interested professional marketer, Eigen's analysis suggests that assertions about the status and value of a particular witness' expertise were (rightly) put forward by lawyers in order to secure an acquittal. This was, after all, the nature of the adversarial process. Claims of skill, according to Eigen, usually appeared during cross-examination and were "rarely used to legitimize testimony at the onset."[19] This observation is somewhat different from what I have found in Canadian trials, which indicate that there usually was some form of preparatory legitimation work done at the start of a witness' testimony to establish his medical and legal qualifications as an "expert."

However, the legal qualification of a particular medical witness as a psychiatric expert was not necessarily determined by his medical qualifications or specialized experience working with the insane. Many general practitioners, prison doctors, coroners, and occasionally even non-medical witnesses were able to fill the legal requirements of "expert witness." An expert witness during this period was simply defined as a "specially skilled" witness with knowledge of questions of science beyond the understanding of the common man.[20] Also, as I demonstrate throughout this book, the preliminary set-up of certain doctors as expert witnesses did not follow with an automatic privileging of their expert opinions on the issues of mind-state and responsibility. The contentious nature of the routine practice of legally

qualifying witnesses as "experts" stemmed from several ongoing debates about the "science" of psychiatry and the question of who was best suited to detect true evidence of insanity for the purposes of law; was it the expert, or was it the ordinary men of the jury? In several cases that I analyzed for this study, judges were not convinced that experts were necessary (even when the defence was insanity) to determine a defendant's state of mind at the time of the crime, particularly given that insanity as a defence to crime was an issue for law, not medicine.

Both Joel Eigen and Roger Smith argue that our interpretation of medical-legal relations need not be an either/or proposition – that is, psychiatric expertise was either socially constructed or, as more positivist historians such as Edward Shorter and Erwin Ackerknecht suggest, it emerged from objective scientific work.[21] Indeed, early professional literature shows that some psychiatrists campaigned for a prominent role in deciding criminal responsibility based on significant advancements in neurology and psychiatric medicine. However, at the same time, Smith points out that both legal and medical institutions reflected popular concerns more than they influenced them. He also cautions against the temptation to make generalizations regarding cause and effect when it comes to understanding trial outcomes and their broader social meaning. As Smith explains: "To understand why any particular verdict was reached requires an examination of the special circumstances of that trial. Trials were occasions for expressing theories of human nature and associated value systems ... but it would be wrong to suppose that these theories produce particular verdicts. It is necessary to separate reasons for a specific verdict from reasons for controversy over verdicts in general."[22]

Finally, I must draw attention to Ruth Harris' excellent work in *Murders and Madness*. Harris does not explicitly focus on the expert witness, however, she does a very good job of exposing the complexity of the legal processes involved in the construction of early medical-legal discourse, which included expressions of power, compliance, and resistance. The important courtroom details drawn out by Harris have particular historical and analytical relevance here because she situates her investigation within the specific context of the French murder trial. Her scope of analysis, which takes in the landscape of French culture as well as the details of courtroom procedure, provides a new depth to our historical read of the "expert" and "expertise." Her conclusions are not especially grand, in that she does not claim to offer the definitive social history of crime and madness; nor does she claim to provide the ultimate story of legal medicine. What Harris does, and what I aim to do in suit, is trace the important links between social discourse, medical theory, legal practice, and human agency at a particular place and time.

Case file evidence dating from 1920 to 1950 indicates that the legitimacy of psychiatric "expertise" in Canadian murder cases was (re)evaluated and (re)negotiated according to the particular circumstances of each trial in ways that sometimes eroded the status of experts but at the same time did not necessarily disregard expert knowledge about mental capacity and legal responsibility. This book shows that when mind-state was raised and a medical witness called, the professional status of the expert did not seem as important as what he said in court or wrote in his report. Expert opinion was more likely to be taken as legal fact if it met the substantive requirements and language of insanity law, and if it did not challenge the sensibilities of the common man on the jury.

During this time, the perceived authority of psychiatric expert knowledge was very much contingent on the changing dynamics of the criminal trial, as well as on the larger socio-political concerns.[23] However, I make the point once more that though the law of evidence specified that professional experience was important in order to qualify a witness as an expert, some Canadian judges did not uphold a ruling standard of experience or specialized skill in deciding to hear opinion evidence. Decisions regarding the value of a particular expert's testimony seemed to be heavily influenced by the circumstances of the case and by the substance or nature of the evidence itself.

My attempt to make sense of divergent social and institutional histories of forensic psychiatry, and to locate the Canadian experience in the broader context of Western medical-legal historiographies, has led me to an unexpected line of inquiry. The degrees of variation that exist across accounts of the status and role of the psychiatric expert are historically significant and intellectually provocative. Discrepancies in research findings reflect not only the ways in which scholars locate and read historical evidence but also the range of possible interpretations of expertise and the nature of expert authority on legal issues of mind-state. *Negotiating Responsibility,* therefore, begins the process of mapping a very small yet relatively unexamined corner of this rich historical landscape. In documenting the specificity of responsibility knowledge in Canadian law and society, I intend to emphasize, rather than smooth over, the rough edges of medical-legal history.

Acknowledgments

I would like to thank Carolyn Strange for her years of guidance, patience, and wisdom. I would also like to thank Mariana Valverde, the late Dianne Martin, Richard Weisman, Randy Schmidt, and especially Robert Menzies for reading and commenting on earlier sections and drafts of this manuscript and who have all expressed enthusiasm and encouragement at times when I needed it most. I also thank the external reviewers and press editors, in particular Ann Macklem, for their comments, suggestions, and editorial expertise.

I am deeply indebted to the remarkable staff and hard working archivists at the Library and Archives Canada. They helped make the daunting task of locating and working through historical documents a most rewarding experience. I appreciate in particular the attentiveness of Tony Bonacci, who went to great lengths to accommodate my ambitious research schedule by moving materials through access procedures as quickly as possible. I would also like to thank the York University Faculty of Arts Research Grant programme, and the Office of the Dean of Arts, which helped fund the final stages of this project.

This also seems an appropriate opportunity to express my ongoing appreciation for my friends, both in and out of academia, who have given me far more than I could possibly return. Kirsten Kramar, Carole Roberts, Linda Peake, Lisa Drummond, Anna Pratt, David Sealy, and Annie Bunting stand out among them. I also want to acknowledge my students in the Law and Society program at York University who, perhaps without knowing, serve as a critical and forgiving audience to much of my work in progress.

My family – in particular my grandparents – have also been a source of quiet and constant encouragement in every aspect of my life. I have always marveled and appreciated their overestimation of my abilities.

Finally, I thank my partner, Paul, and my daughter, Sadie, for everything.

Negotiating Responsibility





1
Introduction

On 17 December 1935, Elizabeth Tilford became the first woman to be hanged in Ontario in sixty-two years. Her trial, conviction, and death sentence for the poisoning of her husband, Tyrell Tilford, captured the attention of many in Canada and beyond, and brought to the fore conflicting ideas about human nature, capital punishment, and criminal responsibility. Following the murder, Inspector Hammond, the police officer in charge of the investigation, reported that the Tilfords were poor and that they lived "loosely" and in "sordid conditions."[1] This single summation of the "conditions" of the married couple's life was intended to help explain a terrible domestic murder that had taken place in the small community of Woodstock. It was also indicative of the kind of knowledge that went into making sense of a wife who was accused of killing her husband. Throughout the inspector's reconstruction of Elizabeth Tilford's nefarious life prior to her marrying, and murdering, Tyrell Tilford, the condemned woman is characterized as a self-interested bigamist and husband-killer. There was no question of her guilt here: rather, it was the apparent reason for her behaviour that was the primary subject of the police report, and what seemed most disconcerting to the inspector. He began his record of the event with the following statement: "I do not think there is any question, or the least doubt of her Guilt, for, from my personal investigation of this case, it would be hard to find a more cunningly conceived way of putting aside those who had become useless in her view."[2]

According to this version of the story, Elizabeth Tilford married for the first time in England at age sixteen. When her husband left her for another woman after only six months, she moved on to marry her cousin, William Walker, and had several children with him.[3] According to the inspector, she admitted quite freely that her marriage to Walker was bigamous, although some question was raised about whether her first husband was actually still alive at the time. During her marriage to Walker, she worked as a nurse and midwife, and he worked as a coalminer. They were brought to Canada in

1928 by the Salvation Army, which recorded that William Walker held a position as an officer of some sort and Elizabeth helped look after "insurance details."[4]

In 1929, shortly after the couple's arrival in Canada, where they lived in "apparent poverty," William Walker went blind, was unable to work, and died of unknown causes. After Walker's death, rumours surfaced that he had suspected his wife was poisoning him, so his body was exhumed and examined. But according to the police report, "too long a time had lapsed for to [sic] recover anything of a suspicious nature in this respect."[5] Elizabeth, who had managed to arrange for some disability insurance on Mr. Walker before he died, collected the full amount. She also began collecting the widowed mothers' pension allowance, and was, according to Inspector Hammond, "getting along fairly well." The inspector also noted that when Walker passed away, his widow gave him a send-off that "was more like a wedding feast, than a funeral assembly."[6]

In 1930, approximately one year following the death of William Walker, Elizabeth met and married Tyrell Tilford. Hammond reported that, after the death of Walker and before she met Tilford, the widow had a difficult time fitting in and settling down. The Salvation Army rejected her on moral grounds (apparently for living with "other men"), and her attempts to enter the folds of other churches elicited less than welcoming responses. Inspector Hammond described a woman who was desperate, turning to "spiritualism" and even "fortune telling" while travelling around with "some man under the name of Professor Blake."[7] Perhaps it was because she desired a more stable and respectable domestic life that she quickly married Tilford, a man twenty years her junior and known to come from a "very honourable family."[8] Or, it may have been, as the police report implies, that she saw the young gentleman Tilford as an easy target.

Although the inspector suggested that the Tilford family in general was well regarded, he nevertheless described Tyrell Tilford as an "ignorant type of fellow" and a "man of little ambition."[9] His family, so the story goes, was not happy about the marriage to Elizabeth but did their best to welcome the newlyweds in, even allowing them to build a small house on the family's property in Woodstock. Tyrell Tilford worked as a garbage collector, and the new Mrs. Tilford reportedly kept busy reading teacups and telling fortunes. This marriage, like her previous two, was characterized by the inspector as being quite miserable. Mrs. Tilford's children from her marriage to Walker apparently hated Tyrell Tilford. Her two eldest sons, known to be "rough characters" (one was nicknamed "Bulldog"), would frequently beat up Tilford. And Tilford retaliated by ill-treating his wife's sixteen-year-old daughter – forcing her to unload days' worth of rancid garbage. However, things seemed to turn even further downward for the Tilfords' marriage

when "Professor Blake" re-entered the picture. According to the police report, Blake, who owned two farm properties, began making frequent visits to the Tilfords' house, and Mr. Tilford became very unhappy about the straying "attentions" of his wife.

After about five years of marriage, and approximately six weeks before Tyrell Tilford's death, Elizabeth Tilford enquired about the amount of insurance that could be collected in the event of her husband's death. At the time, he was reported to have been in good health. Considering all the "relevant" circumstances leading up to the murder of Tyrell Tilford, the conditions of the couple's domestic life, and the questionable character of Elizabeth Tilford herself, Inspector Hammond summed up the case:

> At the time she made these [insurance] enquiries Tilford was in very good health, with no signs of sickness. But to her, Tilford was a useless tool, just the same as Walker became prior to his death, and she wanted freedom and the widows pension, which she got before she married Tilford, and it was discussed by her and her sons and another party just before Tilford became sick, and Mrs. Tilford denied that she ever knew there was any insurance left ... whereas she knew quite well just the exact amount that would be available at death.
>
> They were still living in poverty, and in sordid conditions, very loose generally. Before her marriage to Tilford she was getting the widow mothers pension allowance, and was getting along fairly well, but of late she claimed that Tilford never paid her one cent either for her keep or that of her family. She went out to work occasionally, and one son was working part time. She claims that Tilford was always in debt, and that she had to give him money to keep him going, and she wanted him out of the way to get mothers pension again, and living in the house put up by Tilford with the assistance of the Tilford family, with nothing to pay, she would then be on easy street again.
>
> In so far as the motive for the crime goes, 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.[10]

Very little detail is given in the three-page police report about the physical evidence that linked Mrs. Tilford to the death of her husband – evidence that she had allegedly been feeding him homemade tablets containing arsenic. In concluding, the inspector simply restated that "it is quite apparent, what occurred, and I think I have outlined clearly the reasons for doing it."[11] In mapping out the "reasons" for the murder, he also constructed a clear representation of Elizabeth Tilford as a particular type of woman/

wife – the "cunning" type who would kill for money and use sex to get what she wanted.

Elizabeth Tilford pleaded not guilty to the charge of murder and maintained throughout the investigation and trial that she did not kill her husband and that she had been framed by Tyrell's family. Following the guilty verdict, and the judge's reading of the sentence that she was to be "hanged by the neck" until dead, the prisoner shouted, "Your lordship, it is not right. Oh, if I only had a chance – a chance to give my evidence. Oh, dear, dear! Framed! Absolutely framed! May God have mercy on the Tilfords' souls."[12] Despite Elizabeth's cries of innocence, there seemed – from official reports, newspaper clippings, and letters from the public – to be wide agreement on the fact that she was legally guilty of the crime of murder. A *Toronto Mail and Empire* article reported that a petition circulated by her children received only a "few hundred signatures." This showing of support was, in comparison to that garnered by other clemency campaigns, "disappointingly small."[13] Yet, in the midst of this generally cool public reception, multiple interpretations of her motivation emerged, and some observers even voiced hesitation regarding the extent to which she should be held *responsible* for her behaviour.

Evidence from case file records suggests that though Mrs. Tilford was not able to rally much support for mercy on claims of her innocence, many members of the public did write on her behalf asking the minister of justice to commute her death sentence to life in prison – a symbolic move that would not dismiss her guilt but would acknowledge the existence of "conditions" beyond her control. One such condition that could influence interpretations of criminal responsibility in murder cases was insanity, and several letters written to the minister following Tilford's guilty verdict expressed concerns about her state of mind. Some insisted that the sheer nature of her crime(s) indicated some form of "sickness" or mental abnormality. However, the specific cause of her purported sickness varied from writer to writer and included a range of social, biological, and psychological conditions, including menopause, poverty, feminine nature, and domestic disharmony.[14]

Others who wrote in support of mercy for Tilford expressed concern about the moral health of the nation, the conditions of an economic depression, and the undesirable message that would be delivered were a woman to be executed at that time. But here, too, we find variations from writer to writer on precisely what, in the deliberation of this case, was threatening the health of the nation. For instance, several local women wrote letters arguing that the execution of a "Christian" woman and "mother" would bring a particular brand of "dishonour" to Canada.[15] Others, in pointing to the weakened social and economic circumstances of the country at that time, were more specifically concerned about the potential social damage that might be caused

by executing a woman in the midst of a depression. Some went so far as to question or denounce the very idea of capital punishment as a legitimate practice.

For example, with a clear sense of what the role of law ought to be in the enlightened 1930s, Mr. and Mrs. Keill wrote, "at previous hangings of women in Canada there has been no small amount of disapproval among many very intelligent people. And after the last execution of a woman, there was a greatly increased abhorrence of the act ... In these sad days of depression such executions tend to further sadden and embitter the people. While, on the other hand, a show of mercy raises the spirits of those enduring great trials. Nothing can be gained by this woman's death. Considerable can be gained by clemency at this time."[16] Despite evidence of growing public disapproval for hangings during this period, historians have documented the 1930s, with an execution rate of 61 percent, as the harshest decade in Canada's history of the administration of capital punishment. Prior to the 1930s, execution rates hovered at, or just below, 50 percent.[17] And though justice ministers consistently maintained that capital case dispositions were guided by strict principles of judicial fairness,[18] the public seemed to be quite aware that the machinery of law was vulnerable to political tampering and, in some cases, capable of misfiring.

Commentary on capital punishment was certainly not one-sided. Some thought it was a fine, and necessary, tool of law. Others did not necessarily protest the practice of executions but opposed hanging as a method. As lawyer R.H. Greer stated in a *Toronto Daily Star* article, "I am opposed to hanging as the method of capital punishment; it is a dog's death ... It should be possible, through a commission to determine some much more humane form of executing criminals. I am not opposed to capital punishment in certain types of cases but I am opposed to hanging."[19] However, for many who demonstrated outright disdain for capital punishment, their sentiments were very much tied up with a growing public interest and confidence in the possibilities of "science" as a legitimate and more sophisticated form of knowledge through which to understand crime, and hence to (re)constitute criminals as subjects of science. As Margaret Sim, writing on behalf of a group of women from Hamilton, stated, "let us do honor to our enlightenment, our scientific attainments, our sure instinct to pity, and let us encourage a boundless charity so that the whole nation will be enriched. We do not believe, we again re-iterate, that we will be honored, or uplifted, nor will the life of the nation be enriched by the hanging of a poor, sick woman."[20] Similarly, in a newspaper editorial titled "Mrs. Tilford Should Not Be Hanged," an unnamed author argued that the practice of capital punishment was "perhaps a shameful necessity until our whole treatment of crime is made Christian and scientific." From this author's perspective, it was argued that

> Instead of the short and simple but sometimes hideously unsatisfactory method of getting troublesome people off our hands justice demands that the highest psychiatric skill and experience should be utilized to determine what treatment society should mete out to so extraordinary an individual in the interest of social protection and her own possible redemption. It seems a most deplorable thing that the more unnatural and shocking a crime is the stronger is the demand for swift and passionate vengeance, when the very nature of the crime should moderate the instinctive wrath by suggesting the more powerfully that the wrong-doer is less of a devil and more of a victim of an abnormal temperament.[21]

It is interesting, however, that though popular as well as legal theories about Tilford's "abnormal" mentality were freely floated, and clearly informed by "new" scientific and psychiatric discourses about the causes of criminal behaviour, no psychiatric *experts* were invited to participate in her case. In fact, most of the substantive discussions around Tilford's state of mind took place outside the courtroom and/or tended to be directed toward establishing the nature of her temperament, or *character*. Representations of character, as we shall see throughout this book, were very often framed by narratives of mind-state, and produced in part through the selective appropriation of psychiatric knowledge.

In an attempt to counter the barrage of character witnesses presented by the Crown at Tilford's trial, her defence counsel submitted the feeble argument, without medical evidence, that the defendant's state of mind had been affected by town gossip over her "unduly friendly" behaviours with another man – the elusive Professor Blake. However, in the end, the judge was won over by the Crown's more convincing argument that Tilford was exactly the "type" of woman who would maliciously kill her husband for his life insurance money. The judge stressed in his final charge to the jury of twelve men that it was important for them to decide which interpretation of the events and which characterization of the accused they would use to render their verdict. The judge reminded the jury that "she was the wife of this man" and that they must decide whether she was in fact a "wronged woman" or "a diabolical creature" who only pretended to have affections for her husband. In concluding, he drove home the urgency of a clear decision regarding Mrs. Tilford's character:

> There is no half-way house, gentlemen – no half-way place you can rest. You have to make up your minds which type that woman was on all the evidence. Was she, as counsel for the defence says, a very much wronged woman, injured by the scandal, gossip and talk of the town; or was she the type of woman who would stop at nothing to gain her own ends, and the life of her husband be of no matter so far as she was concerned if it served

> her purpose to get rid of him? You have to take your choice. She is either one or the other. If she is a Doctor Jekyll and Mr. Hyde, there is no half-way house that I can see. Which category does the accused stand in?[22]

The jury found Tilford guilty and did not recommend mercy – meaning that they did not feel the accused was worthy of commutation. The judge concurred, and after polling the jury, made the following statement:

> Gentlemen of the jury, I am sure the responsibility of this important case weighed very heavily on you. Let me say that I am proud of this jury, that I know under what stress, and what it cost the jury to bring in a verdict of this kind, and I think the County of Oxford is to be congratulated in having men who will sit on a jury and do their duty, and having the courage of their convictions. I think I can say that I concur with the verdict that you have found in this case.[23]

Defence counsel made an attempt at an appeal, but it failed, and Elizabeth Tilford was hanged.

The courtroom version of Tilford's life, character, and presumed reasons for killing her third husband matched quite closely the pre-trial account of police inspector Hammond. However, legal representations of the crime, and the formal condemnation of Tilford as a particularly dangerous type of woman/wife, did not resonate uniformly with the public; nor did they overshadow intense expressions of sadness and discomfort following her execution. The 17 December 1935 *Ottawa A.M. Journal* described the sombre tone of her execution day: "A small crowd of curious citizens gathered outside the high walls of the courtyard shortly before the lights went on inside. It was broken up by several policemen who kept citizens on the move. An hour before the execution, the 56-year-old woman, thrice widowed and mother of nine children, four of whom are living, was in a state of collapse in her cell. She was able, however, to walk to the scaffold. Snow was falling as she slowly entered the courtyard."[24]

In tracing just a few of the interwoven narratives that helped shape and give meaning to sometimes divergent representations of crime, criminality, and criminal responsibility in the case file of Elizabeth Tilford, we begin to see how little a guilty verdict actually tells us about the history and practice of criminal law in Canada. It is certainly true that the opinions expressed in a selection of newspaper articles and other selected documents that made their way into Tilford's file exemplify a mere sampling of the range of positions that may have been held by the public and legal officials on her case. Nevertheless, they provide a strong indication of the routine interplay between law and society, and between legal and social actors, when it came to interpreting the boundaries and consequences of criminal responsibility.

The contents of Elizabeth Tilford's case file, and the case files of other individuals sentenced to death for murder, also serve as valuable textual representations of the institutional structures that framed each case. In particular, we can observe the impressions of the author of the case file (the chief remissions officer) and the messages he *intended* to convey to the minister of justice in (re)constructing the summary of the evidence and trial hearings. However, much of the institutional structure surrounding capital case decision making was hidden from public view. Only in the past twenty years or so have critical social historians started to uncover some aspects of this important piece of Canada's legal history. For instance, good evidence now shows that the chief remissions officer, whose role was intended to be purely administrative, was in fact a key player in the disposition of capital cases, and may even have influenced decisions regarding the use of the royal prerogative of mercy.[25] It is possible to observe hints of this influence in the case files. I again take Tilford's case as an example.

In summarizing the case facts in his report, the chief remissions officer restated some of the trial judge's concluding remarks on the question of motive, sharpening the characterization of Elizabeth Tilford as a conniving gold digger:

> Motives were advanced by the Crown, suggesting why the accused might have administered the poison. In March last, Tyrell Tilford and the accused were in very straightened [sic] circumstances. The accused made enquiries about insurance moneys before the death of her husband. Furthermore, on the Thursday night before his death, she had his will drawn, leaving everything to her, and, finally, evidence was offered that she was very friendly with one Blake, a widower, who was possessed of property. Her own conduct both before the death of the deceased man, and after his death, was inconsistent with that of an innocent woman.[26]

The final statement of the chief officer's report was his personal vote in support of the verdict. He concluded that, "upon consideration of the facts and circumstances of this case, the undersigned is of the opinion that the law may well be allowed to take its course."[27] The decision to convict and execute Tilford for the murder of her husband seems to clearly reflect a series of judgments made within the doctrines of Canadian criminal law and through the application of legal rules. However, institutional assessments of her character, nature, and circumstances also produced distinctly political representations of her as a calculating murderess.[28]

These multiple ways of "knowing," or claiming to know, a single legal subject such as Elizabeth Tilford disclose something important about the cultural and institutional dimensions of law and legal decision making. In particular, the documents compiled in the case files of those sentenced to

death for murder allow for an exploration of the textured and contingent nature of responsibility knowledge as it was (re)produced in order to make sense of murderers and of murderous acts. These more qualitative readings of the files, which necessarily require looking beyond the official verdict in each case, suggest that the law was anything but fixed on the subject of responsibility and that legal outcomes were not simply the result of a measured application of legal rules.

Although evidence of unevenness between the way in which the law defined the official threshold of criminal guilt and more multifarious socio-legal and scientific knowledges evoked in representations of responsibility is, I think, an important element, it is not novel. The perceptible divide between the law on the books and the law in action has long been a key site of analysis among legal realist and critical socio-legal scholars. However, this divide between doctrine and practice seems always to have existed and perhaps should not necessarily be viewed as dysfunctional. Rather than "explaining away" the many contradictions in legal practice, Patricia Ewick and Susan Silbey argue that "the apparent oppositions and contradictions – the so-called gap – might actually operate ideologically to define and sustain legality as a durable and powerful social institution."[29] Their use of the term "ideology" here does not simply connote a "single giant schema that determines how people think": rather, the authors borrow Michelle Barrett's words to describe ideology as a "complex process by which meaning is produced, challenged, reproduced."[30] Ideology, then, is not an abstract concept but a form of "sense making" that is "inextricably tied to practical consciousness" and consequences.[31]

I find this to be a useful way of framing and thinking about the subject of this book – as a way of connecting the theoretical to the empirical, the abstract to the concrete, the ideals of law to the effects of law. The form and content of capital case files provide a rare opportunity to trace some of the ideological processes of judicial sense making, and to observe how, through the ideological processes of sense making, we continually (re)produce the "specific structures and contests for power" within which we live and experience law. According to Ewick and Silbey, "the internal contradictions, oppositions, and gaps are not weaknesses in the ideological cloth. On the contrary, an ideology is sustainable only through such internal contradictions insofar as they become the basis for invocations, reworkings, applications, and transpositions through which ideologies are enacted in everyday life."[32] Along these lines, I am therefore not so much concerned with the inevitable and perhaps even desirable gap between what the law said and what the law did as I am with how knowledge about responsibility was produced, ordered, and contested in each case, and how convergent knowledge forms helped sustain, strengthen, and legitimize law's "ideological cloth" by providing meaning to trial and commutation outcomes. In other

words, I am concerned here with the *effects* of responsibility knowledge on the adjudication of capital cases, where the decided outcome literally meant life or death for the accused.

Themes of the Book

Given the sorts of questions in which I am interested, I have organized the book thematically through overlapping discussions of context, expertise, common sense, identity politics (including race, citizenship, and social status), character, and domesticity. In drawing attention to some of the subtler dynamics of legal decision making, several socio-legal and medical history scholars have traced the complex ways in which scientific knowledge, particularly psychiatric knowledge, has provided the language to articulate legal decisions about guilt, responsibility, and mental capacity in criminal and civil cases.[33] Although the impact of psychiatric knowledge on Canadian law and society over the past century is pretty much undeniable (even if the nature of that impact has been debated), my interest in the subject of psychiatric expertise is a bit different, and best described as two-fold. First, I am interested in understanding the role and authority that may or may not have been afforded certain psychiatric expert witnesses in defining the boundaries of criminal responsibility in particular cases. Second, and more significantly, I am interested in understanding the ways in which "common-sense" knowledges about criminality and responsibility in fact helped constitute the boundaries and legitimacy of certain forms of psychiatric "expertise" during this period.

Other critical social historians (such as Roger Smith, Andrew Scull, Joel Eigen, Carolyn Strange, Ruth Harris, and Martha Umphrey) have demonstrated that the murder trial provides a particularly good discursive site for evaluating the interplay between social-cultural attitudes and processes of legal decision making. As the many documented public reactions to Elizabeth Tilford's case indicate, Canadian murder trials during the early twentieth century were very much public affairs.[34] Before the dawn of television and other technological forms of mass communication, newspapers frequently reported in great detail the spectacle of overflowing courtrooms and the sharp interest of community members in trial deliberations. We can also trace in capital murder case files the ways in which legal officials gauged the public's view toward mercy in each case in order to determine what message a decision to execute or commute would/should send.

Individuals and groups from across Canada made their views on a particular case known by writing to newspaper editors and government officials in the form of organized petitions, eloquent letters drafted on business letterhead and personalized stationery, near-illiterate scribbles on scraps of paper, or through the pen of a third party who would write for those who

could not. Although the case file documents reveal the public's active interest in how certain cases were decided, it is important to distinguish which members of the public were in fact interested and/or able to have their views weighed in. Of course, many voices were also silenced during the judicial process and are not represented in the case file records. Most notably absent in these accounts are the voices of those who were on trial. Still, the murder trial, being an intensely cultural process, brought together a cross-section of ideas, institutions, and individuals with the common goal of trying to make sense of, and determine just responses to, acts of murder.

However, there were definite limits to what counted in law as a legitimate explanation for a murder, or murderer, in each case. Evidence here suggests that if public opinion did matter, it was only to the extent that it did not upset the basic moral tenets of the criminal law. And in the context of Canada's social, political, and economic climate, dominant rationales of justice and responsibility in the first half of the twentieth century seemed to be bound by a deep sense of citizenship, national identity, and a pragmatic understanding of the social role of the rule of law – common sense if you will. The ideals of British justice and citizenship, and the moral sentiments of the celebrated "common sense" of British-Canadian men in particular, ran through every aspect of the adjudication process. "British" and "Britishness" were used with specific racialized connotations – and employed by judges to evoke a particular sensibility.

As is the case for popular opinion, much has been written about the notion of "common sense" and the defining characteristics of "common-sense knowledge."[35] Again, I will not attempt to provide a grand theory about what common sense *is:* rather, I am interested in how common sense was understood and articulated by legal actors (judges, juries, lawyers, experts, and witnesses) as well as non-legal actors regarding questions about mind-state and responsibility. In particular, I am interested in the way in which common sense was constituted in medical-legal discourse as distinct from expert knowledge. As I show later on, there were very definite ideas about the strengths, weaknesses, nature, and role of common-sense knowledge in legal decision making. I challenge this theoretical distinction between common sense and expert knowledge throughout the book.

As well as detailing the ways in which systems of language and knowledge were organized by and through social institutions and interactions to produce contextually specific accounts in each case, this book chronicles a partial history of interfacing and overlapping ideas – ideas about criminality, about law, about expertise, and about responsibility. For instance, I consider how medical-legal standards for defining responsibility were formed and negotiated according to essentialist theories about individual difference, mental capacity, and scientific certainty. In tracing the history of ideas,

we can begin to make out the ways in which the boundaries of criminality and responsibility were constituted over time and from case to case. As well, we can begin to make sense of the ways in which the socio-political significance of those ideas was simultaneously, or subsequently, transformed.

For example, the emergence of an anthropological/scientific language about "race" origin and difference in the eighteenth and nineteenth centuries provided early twentieth-century Anglo-Canadians – concerned with the identity, quality, and security of the Anglo-Saxon race in Canada – with a system of knowledges or logics within which to interpret, order, articulate, and respond to criminality.[36] Over time, categorizations of race based on speculations about natural race order became part of the ideological and scientific formation of criminal *classes, types,* and *kinds*.[37] Of course, the historical movement of ideas and knowledges was not as linear as this, but it does help to understand the cultural significance of the language used in the formation of responsibility knowledge. I also want to point out just how transparent were the operating assumptions about human *types* during this period, and how obviously they structured the policies and practices of Canadian criminal law and forensic psychiatry. One need not dig deeply to see that certain types of women were generally considered incapable of appreciating the consequences of their actions, and that "race" was central to essentialist theories about human nature, class, and individual character.

For instance, when the defence lawyer for Louis Jones, a black man convicted for the murder of his wife (also black) in 1927, implored the minister of justice to consider the "expected" level of violence and vulgarity among people of his client's "class,"[38] or when the constable who arrested George Dvernichuk, a Ukrainian immigrant, for the murder of his neighbours in 1930, described his behaviour as "typically foreign,"[39] a set of ideas about foreign types and the criminal classes was already in place. Criminological knowledge about types and kinds further acquired particular meaning through the processes of fact-finding and legal advocacy, which often revolved around the presumed character of the defendant and victim(s).

Similarly, the presence of strong social ideals and legal sanctions around conjugality and marriage during this period helped charge the moral undercurrents of legal decisions in domestic murder cases. James Snell observed that, at the beginning of the twentieth century, the "ideal of the conjugal family" dominated Canadian consciousness and was reinforced by rigid patriarchal divorce laws. According to Snell, sentiments about the virtues of conjugality were profound and "incorporated virtually all the principles and ideals valued by Canadian society." He argues that the moral sanctity of the family was "shared by Canadians of almost all ethnic and religious origins and engaged in almost any sort of occupation" and that marriage

became the foundation of a "civilized Canadian society."[40] However, as Mona Gleason argues with good evidence, the construct of "the family" was also quite exclusionary. She shows, for instance, that "immigrant, working-class and Native families were not part of the ideal."[41]

Although Snell's portrayal of "Canadian society" may be criticized for being far too homogeneous, and his analysis of divorce law as decidedly functionalist, his general research findings point to some of the ways in which the language of domesticity and ideas about conjugality may have provided a conceptual and illustrative framework for members of the public, psychiatric experts, and legal decision makers to make sense of murder committed between "wives" and "husbands." However, where Snell holds that the "ideal of the conjugal family" was uniformly shared among Canadians, I would argue, more in line with Gleason, that the significance of conjugality (like race, gender, or citizenship) and the consequences of ascribing to the "conjugal ideal" in decisions about moral and criminal responsibility were not consistent. In accordance with the general principles of law, the significance of the domestic space and the moral boundaries of conjugality were constituted on a case-by-case basis and in relation to various other socio-political and individual circumstances. Therefore, in order to decipher the legal standards that were used to interpret facts and render formal decisions, and in order to better appreciate the general and particular effects of these processes, it is necessary to consider the specificity of circumstances that were at play during each trial.

The inimitable archival materials that make up the case files of capitally convicted women and men reveal quite vividly the social tensions and institutional frameworks that defined the parameters of criminal responsibility, and highlight the systemic leanings of legal decisions and medical diagnoses. In drawing closer attention to the role of common sense in responsibility knowledge, this book brings to the fore the more subtle dynamics in decision making that are not represented in the doctrines of law and medicine, such as the legal qualification of certain doctors and lay witnesses as "experts," the legitimation of certain kinds of knowledge as "expertise," and the remarkable instability of responsibility knowledge during that time. In these case files we can see, in a very tangible way, the contingent relations between law and society, what James Walker describes as "the operation of common sense on the perception of problems and consequences, and on the choice of solution."[42]

Chapter Overview

This book generally draws on a sustained and collective analysis of sixty-six capital murder case files, using a smaller set of case files for close readings. In Chapter 2, I discuss their contents and the institutional context in which

they were produced. Here I look critically at the institutional practices around the disposition of capital murder cases, the remissions branch, and the role of the chief remissions officer as principal author of the files.

In Chapter 3, I show how dominant themes of criminological knowledge came to influence the adjudication of murder cases by shaping the content and meaning of certain case file texts. Here I am concerned with expert theories of crime and criminality and with popular sentiments on these subjects. As Canadian historians have established, this period was marked by a number of events that informed the ways in which Canadians came to understand and respond to criminality. For instance, a substantive shift in criminological thinking occurred with the emergence of "germ theory" and the science of "degeneration" toward the end of the nineteenth century.[43] In subsequent decades, medical, legal, and popular knowledge about degeneration and criminality adapted to accommodate the experiences of, and ideas about, the effects of particular social conditions, such as war and economic hardship, on both individual citizens and the Canadian citizenry. In the context of this cultural climate, I trace the professional and ideological relationships of law and psychiatry as regards insanity and criminal responsibility as well as the dialectical relationship between expertise and common sense.

I argue in Chapter 3 that expert and common knowledges were not distinct; rather, they were bound up in and with each other in the production of a knowledge about the reasonable and responsible person. Critical medical-legal historians have recently provided a wealth of evidence to show the overt and covert discriminatory practices of those with economic, professional, racial, and sexual power. Few, however, have recognized the considerable influence of common-sense knowledge in defining the cultural boundaries of criminal responsibility and the legal use of psychiatric expertise. This analysis of the relationship between expertise and common sense illustrates how certain medical witnesses were legally qualified as *experts,* and the selective ways in which certain aspects of expert evidence were taken up as legal fact while others were rejected.[44] The case of Frances Harrop demonstrates the implications of these processes and shows that though professional status was sometimes important in getting a doctor's opinion legally qualified as expert opinion, it did not guarantee that his testimony would be privileged in decisions about legal responsibility.[45]

Chapter 4 highlights some of the socio-political and legal dynamics that brought together various knowledges about criminality and human nature in order to resolve the legal question of guilt, establish moral responsibility, and, in the end, determine an appropriate sentence. Here I examine some of the ways in which responsibility has been, in part, negotiated through particular narratives of mind-state. Drawing on Michael MacDonald's description of the various discursive "marketplaces" in which mind-state, and

"insanity" in particular, has historically been bartered, I begin by outlining the points in the judicial process where negotiations of responsibility and mind-state typically took place.[46] I also briefly examine the laws of insanity as a defence in criminal cases but then look more closely at alternative legal spaces beyond the insanity defence, where mental capacity was also negotiated.

Chapter 4 establishes the importance of looking beyond the insanity defence and the laws on insanity to get at the broader cultural meaning and ideological boundaries of "insanity" during this time. For instance, I look at the post-trial commutation stage and the defence of provocation, two other procedural/doctrinal marketplaces within which standards of criminal responsibility were routinely contested, negotiated, and classified through assessments of the accused's mental capacity.

I also consider the power of narrative in legal decision making, with the understanding that certain criminological narratives provided important discursive marketplaces within law. Here I expand the analysis of degeneration theory by considering how this particular way of thinking about criminality affected judicial decision making. In doing so, I examine the effects of appropriating scientific/expert knowledge and the implications of certain sociopolitical events on interpretations of criminality. For instance, I look at how war and poverty were seen to produce mental deficiency in certain vulnerable individuals, and how the perceived mental effects of war and poverty worked their way into evaluations of criminal responsibility. I end the chapter with an examination of the ways in which popular, legal, and medical assessments of mental capacity relied upon the ideals of British character and citizenship.

Chapters 5 and 6 focus on the relevance and implications of certain character designations and the ways in which assumptions about race difference and the conjugal ideal informed specific narratives and representations of criminal responsibility. Chapter 5 addresses the ways in which psychiatric and common-sense knowledges about mental capacity linked essentialist theories about racial inferiority to a range of behavioural tendencies and predispositions. For instance, "Indians" and "half-breeds" were characterized as naturally violent and lacking in moral discretion; it was common knowledge that the "coloured" had a loose character and an affinity for vile language; southern European immigrants were known for their "communistic" ways and drinking habits; and non-Anglo women (as well as Anglo women who kept bad company) were often seen as sexually perverse and immoral. We see in this chapter that against a backdrop of scientific certainty and deep confidence in truth-seeking techniques, legal measures of mind-state and criminal responsibility hinged on very flexible ideas about racial identity that were grounded in common-sense understandings about British authority, white supremacy, and the role of the rule of law. That said, these

dynamic institutional processes played out quite differently in each case and, I would argue, cannot simply be explained through a functionalist account of racial domination and oppression.

Chapter 6 investigates the significance of the domestic space in the adjudication of capital cases involving spousal murder. The case studies I included here help us to understand the legal implications of certain representations of mind-state and responsibility as defined through narratives of gender, domesticity, and conjugality. The cases of Paul Abraham, Mary Smith, Dina Dranchuk, and James McGrath each reveal the textured and contingent nature of criminological thinking during this period. They show, for instance, the ways in which common sense defined the form and substance of expertise, the importance of character in interpretations of criminal events and criminal behaviour, the recognition of social-structural and political conditions in understanding the meaning of murder, and how race, class, and gender divisions were legitimized through simultaneously operating theories about criminality and responsibility.

This study ends, appropriately, at a point just before the launch of the 1953 *Royal Commission on the Laws of Insanity as a Defence in Criminal Cases,* and taps into several important issues related to crime and criminality that developed during the first half of the twentieth century and were subsequently taken up by the royal commission. Most notably, the commission addressed a growing concern about the role and authority of the psychiatric expert in Canadian criminal law and the qualitative boundaries between criminal responsibility, diminished responsibility, and not guilty by reason of insanity. At the onset of the commission, the minister of justice determined that the *Criminal Code* provisions on the defence of insanity were so complex that a public inquiry should be held to determine whether the law should be amended in any respect. The initiation of the *Royal Commission on the Laws of Insanity* therefore marked an important point in Canadian legal history and helps define the significance of the time period covered in this book.[47]

If criminal responsibility has generally not been the subject of intensive social-historical inquiry, a historical understanding of the discursive nature and consequences of these social and institutional processes in Canada – as distinct from the British or American experience – has been virtually nonexistent. This book fills a substantial void in Canadian socio-legal historiography and provides a critical point of reference to evaluate current legal practices and initiatives in criminal law reform that continue to (re)define responsibility through politicized (re)interpretations of criminality and mind-state.

2
The Making and Mapping of Capital Murder Case Files

This chapter sets out the analytical parameters of the book, as well as detailing the empirical aspects of this study, such as the contents, production, and selection of capital case files. Each person identified in this book was found guilty of capital murder and sentenced to death. Yet, despite the fact that the same legal conditions may have applied in each case, wild variations appear in the conditions of responsibility knowledge, which in turn produced varying representations of individual responsibility within and across cases. By reading each case file as a unique cultural text, we soon learn that a formal verdict of *guilty* actually tells us little about the nexus of social, political, and institutional knowledges that came together to help define the structural and/or ideological boundaries of *responsibility*.[1] For instance, the absence of an insanity defence did not mean that the issue of mind-state was not central to medical, legal, and popular narratives of criminal responsibility.

To make this point, let us return to the case of Elizabeth Tilford. There we observed a contrast between the appearance of a clearly drawn formal verdict of guilty delivered by the judge (and reinforced by the remissions officer) and the more textured and overtly politicized narratives about mental health and (ir)responsibility from certain members of the public. We might also notice in Tilford's case the apparent gaps between the ideals of law – as a fact-finding, truth-seeking machine of justice – and the human performance of those ideals in the form of legal decision making. It is important, however, to move beyond explaining and (re)constructing these processes in simplistic oppositional terms – the law versus the public, formal versus informal, guilty versus innocent, the ideal versus the practical. Although it is helpful at times to deconstruct the components of a particular form of knowledge, or combination of knowledges, in order to point out its many parts, contradictions, and gaps, it is also necessary to appreciate the inextricability, instability, and necessity of these internal tensions to the complex cultural practices of sense making. To understand the nature and

meaning of responsibility knowledge, we must see a guilty verdict as only one thread in law's "ideological cloth,"[2] and see law's ideological cloth as a loosely woven and permeable patch of cultural fabric.

The Case Files

The empirical evidence to support this study is based on the case file records for 66 of the 579 individuals convicted for murder between 1920 and 1950 inclusive.[3] According to the records in *Criminal Statistics,* approximately 1,443 people were charged for murder during this period.[4] Of those charged, 12 percent were reported as detained for "lunacy" and did not go to trial. Another 48 percent were "acquitted" of murder charges and released or charged with a lesser offence. The remaining 40 percent of those charged with murder were convicted; 55 percent (319) of these were eventually executed. I am interested in this last group of murder cases, in which each of the accused was found fit to stand trial, convicted for murder, and sentenced to death.

Because there were relatively few cases of women sentenced to death for murder during this period (4 percent), I hoped to include all of them in my sample. Unfortunately, three of the twenty-six files of women convicted for murder were unavailable for viewing at the time of this research. I selected the case files of men from *Persons Sentenced to Death in Canada, 1867-1976,* an inventory of capital case files organized by the Government Archives Division of Library and Archives Canada. Each case in the series is assigned a catalogue number and classified by year. From the catalogue numbers, I randomly selected two cases per year for the years 1920-50, for a total of sixty cases.[5] Eight of these were already included in my sample of women. Of the remaining fifty-two cases of men, nine were subsequently dropped, six because they were incomplete or poorly documented, and three because they were unavailable.[6] Therefore, my final sample includes the complete, or nearly complete, case files of twenty-three women and forty-three men who were sentenced to death for murder. None of the original sixty-six cases was chosen according to previous knowledge of the file contents, and each of the thirty years covered in this study is represented by at least one case. The case studies discussed in each chapter are not exceptional in nature and were primarily chosen due to the richness of the file contents.

When I first surveyed each file, I was interested only in establishing a profile of the contents and gathering enough information to ascertain the key issues and characteristics of each case. I documented the essential demographic factors, including gender, age, racial/ethnic identification, occupation, and year and location of the trial, as well as any information that seemed to shed light on the adjudication process and, in particular, on the role of the psychiatric expert in this process. For instance, in each case I identified factors that were noted in one way or another as significant to the outcome of the case, such as the victim-offender relationship, the method

used by the defendant to kill, the alleged motive, the official legal defence, whether the defendant's state of mind was raised as an issue at trial or during the commutation stage, whether expert opinion evidence was admitted, and whether mercy was recommended. Appendix A-1 provides the details of this initial survey and a synopsis of the basic information gathered from each file. Appendix A-2 presents the same information on a case-by-case basis.

I do not present the cursory information in the appendices as statistically meaningful in any way; nor do I wish to suggest a correlative relationship between factors based on these summary statistics. In fact, I have intentionally not taken the statistical analysis of these cases any further. I provide this information only to establish the general representativeness of the case files. As I have already made clear, a more qualitative and interdisciplinary approach to reading the case file documents is necessary in order to understand the specific dynamics of each case, and to understand the meaning and significance of any interplay between legal and extra-legal factors such as outcome and race, or defence and gender.

In terms of gender frequencies, this collection of files is significantly, and necessarily, skewed by the intentional overrepresentation of women convicted of murder during this period. However, it is still safe to say that the cases of women, taken on their own, are representative of all cases of women convicted for murder during this period, and likewise that the cases of men are representative of cases of men convicted for murder at this time. The general demographic features of these sixty-six cases, and the nature of the documents contained in the files, appear to be a fair representation of all capital case files compiled during this period. They are also consistent with statistical information gathered by Kenneth Avio in terms of the frequency of commutations and recommendations to mercy – even after accounting for the overrepresentation of women.[7] The individuals represented in this collection, both women and men, were typically lower working class, lived mostly in the central and western provinces, and were predominantly non-Anglo – with 35 percent identified by court records as originating from south-central and eastern European countries. They were most likely to be between the ages of twenty and thirty-nine and most often killed a member of their family or someone they knew. Again, I must say that though it is useful for descriptive purposes to make general observations about capital cases in Canada, a qualitative reading of the case file texts reveals far more inconsistencies than similarities.

Authoring and Authorizing: The Institutional Production of Capital Murder Case Files

In early-twentieth-century Canada, the governor general, acting as the Crown's representative, was the official authority over whether the royal

prerogative of mercy would be exercised. However, by this time the governor general's signature on commutation and execution documents was literally rubber-stamped and did not necessarily indicate his actual authorship of the final decision.[8] Instead, decisions about executions and whether to exercise mercy were the result of a series of institutional procedures and structures beyond public view. As Carolyn Strange describes it, clemency decisions took place "in judges' chambers, in bureaucrats' offices and in the plush quarters of the federal Cabinet."[9] Formally, it was the job of the justice minister to review all capital case files and report his decision regarding clemency to the governor-general-in-council for the final word, but because Cabinet minutes were not recorded, very little has been known about how final decisions were made. Only recently have historians, relying on evidence in capital case files, ministerial records, and chance archival findings, begun the important work of mapping the executive decision-making process. One such chance finding was a 1941 booklet entitled *Capital Cases Procedure under Section 1063 C.C.,* published by the Department of Secretary of State.[10]

The 1941 booklet expanded on the guidelines for capital case procedures previously set out in section 1063 of the *Criminal Code of Canada* by providing more detailed instructions for capital case file dispositions as well as administrative instructions for executions. As noted by Bruce MacFarlane, QC, the lawyer who uncovered the booklet, "the instructions provide an invaluable insight into the thinking of the government during the period when it was most active in the execution of Canadians."[11] The publication also reflects, as Strange observed, "the federal government's desire to appear systematic, rule-bound, and utterly impartial, in spite of mounting evidence that capital justice was haphazard, unregulated, and idiosyncratic."[12]

An important aspect in the disposition, or ordering, of capital cases that can be gleaned from the 1941 manual is the requisite documentation that was to be arranged following every death sentence and forwarded to the minister of justice for review.[13] The following is an excerpt from the *Capital Cases Procedure* manual under the heading "Résumé of Instructions":

> During the Two Weeks Following the Trial:
>
> (a) The trial judge should send directly to the Secretary of State [via the remissions branch] his report containing a substantial summary of the salient facts of the case, together with any remarks or recommendations from his personal notes taken during the trial with reference to the exercise of executive clemency.
>
> The report is then referred to the Minister of Justice, who, after perusing the evidence, gives to each capital case the most anxious consideration. When reaching a decision before making his report to Council, he finds it

> very helpful to have the views of the trial judge regarding any feature of the case which has a bearing upon the exercise of executive clemency.
>
> (b) It is also imperative that the trial judge should give instructions to the stenographer to complete and forward to the Secretary of State the transcript of evidence at the earliest possible date, together with his address to the jury.

The instructions further "invite" the judge, when making his report, to "give his personal detailed observations regarding medical testimony on any insanity issue and concerning the prisoner himself."[14] Judges' reports, though produced in an official capacity, were highly discretionary and value-laden texts. As we shall see in later chapters, judges' evaluations of the cases and individuals tried in their courts did indeed extend beyond strict discussions of law to include personal reflections on the event, the trial, and the convicted murderer.

The manual also stated that the minister was to be sent any sketches or photographs that were "filed as exhibits" at trial, a copy of the evidence, including an index of witnesses and exhibits, and a copy of trial transcripts, including all proceedings subsequent to the judge's charge (reading of the verdict, accused's response, remarks of the jury and judge, and reading of the sentence). In the remissions branch, the chief remissions officer was responsible for receiving and arranging capital case file documentation. From 1924 to 1953, this bureaucratic position was held by one man, Michael Gallagher.[15] In preparing each file, he wrote a summary report, highlighting the nature of the offence, the facts of the case, and notable evidence taken from the trial transcripts; he also included supplementary documents such as medical/psychiatric assessments – assessments that he had often ordered himself. How, and by whom, the case files were produced are important because it seems that the summary report from the remissions officer and the judge's report filed after the trial were perhaps the most influential documents in clemency decisions.

Most of the official documentation contained in the case files allowed the author a considerable amount of discretion. For example, the summary report of the chief remissions officer was a sharply edited version of the full trial transcripts. The process through which this edited text was produced is easily traced by observing which transcript passages he marked with coloured pencil to be included in his summary. Therefore, it is possible to determine which circumstances of the crime or which aspects of expert evidence, for example, he considered to be most noteworthy. Given that trial transcripts could run into thousands of pages, and the condensed remissions report was typically a document of fewer than fifteen pages, much of the evidence presented at trial was intentionally omitted.

In addition to providing an abbreviated version of the trial proceedings, each remissions report concluded with the chief officer's recommendation on how the case should proceed. The executive almost always followed his recommendation; in a few cases, it prevailed over differing recommendations from the trial judge or jury. Gallagher, given his long reign as chief officer, had considerable influence over the routine administration and interpretation of capital cases during the twenties, thirties, and forties.[16] And during this time, he was known as a bit of a hard-liner. For instance, following the Second World War, he was reported to have despised social workers and other "do-gooders" whose proposed approach to corrections was more individualized and rehabilitative than his.[17] Despite his important role in the production of capital case files, there is little record of the chief officer's official duties. Perhaps the most telling bit of evidence here comes from a memo that was drafted by Gallagher himself and found in his personnel records as part of an application for a pay raise.

Carolyn Strange provides a synopsis of the memo and paints a clear picture of Gallagher's own sense of authorship and authority over capital case file dispositions. Gallagher considered that his "most important" duties relating to "Capital Case Work" included summarizing and reporting the facts and legal points of each case as well as "investigating alleged impaired mentality; appointing alienists [psychiatrists] to report, instructing them and considering their findings; collecting data bearing upon character, embracing elements of general reputation, individual disposition and personal temperament and considering all material obtained or submitted bearing upon the innocence of the accused, improbability of guilt, community sentiment, mitigating circumstances of case or redeeming features deemed proper ground for commuting death sentence."[18] This account of his professional duties suggests that Gallagher did not see his work on capital case files as simply administrative but as investigative and directive. In collecting and "considering" evidence toward establishing the condemned person's "mentality," "character," "reputation," "disposition," and "temperament," Gallagher obviously saw it as his duty to provide the minister of justice with additional evidence regarding *who* the condemned person was, including "redeeming features deemed proper ground for commuting death sentence." His remarks also clearly indicate that evidence bearing upon "community sentiment" was actively sought and considered, at least by Gallagher, to be relevant to executive decision making.

Strange provides further evidence to show that the underlined bits in a file, as well as the remissions officer's concluding recommendations regarding mercy, did in fact shape clemency decisions. In 1941, while defending the work of the remissions branch in the House of Commons, Justice Minister Guy Favreau spoke of the care and efficiency of the branch officers and

of his reliance on their interpretations and recommendations in rendering his own decisions about clemency:

> In cases where it is the recommendation of the officers of the branch that the law should take its course, of course it is the duty of the minister himself to read the evidence and to convince himself that that is the report which should be made to council. When the recommendation is for clemency, I always read the parts of the evidence which are specially brought to my attention, but I do not feel under the same sort of imperative duty to read every word, to look at every comma of the evidence, because the recommendation is that the law should not take its course.[19]

Government records strongly suggest, therefore, that once a death sentence was handed down and the trial information reached the remissions branch of the Department of Justice, the chief remissions officer became the principal author of the capital case file. We also now know that he was most certainly a key player in the decision-making process, and that Gallagher, at least, had a clear sense of his importance and influence in capital case procedures. And there is evidence to suggest that the authoritative persuasion of the remissions officer's recommendations may have been well established even before Gallagher's time.

For example, in the case of Florence Lassandro (1922), a woman charged and convicted for her connection to the murder of a police officer, the trial judge wrote in his report to the minister of justice that she should escape execution and be held less responsible than her male co-conspirator only because she was a woman, and for "no other reason."[20] However, this chivalrous gesture from the judge in recommending mercy for Lassandro was later levelled by the chief officer. In the remissions report, the officer dismissed "sex" as a mitigating factor and instead drew the minister's attention to the fact that Lassandro's male co-accused made an "immense fortune in bootlegging" and was able to delay the process by securing reprieves "granted as of course," therefore forcing the case to reach the highest court. He urged that these matters of due process "can hardly be considered as entitling the appellants to escape the death penalty."[21]

Therefore, even before Gallagher's appointment to the position in 1924, weighing in on capital cases was probably already considered to be within the chief remissions officer's duties. And given that both Lassandro and her co-accused were executed, this case also suggests that perhaps his recommendation carried some clout. The recommendation by the remissions officer that mercy not be granted in Lassandro's case, going against the judge, also points to some of the subtler ways in which assessments of criminal responsibility, and the nature of mitigation bias, varied among legal/government actors.

Reading the Case Files as Cultural Texts

According to the 1941 instruction manual, the standard information required for each case file was limited to trial documents and official representations of the case, but most files contained plenty more. Each file served as a repository for documents produced on the case from the arrest date of the accused until his or her execution, natural death, or release from prison was reported. Official documents – such as verbatim trial transcripts, judges' reports, summary reports, police reports, medical assessments, jail records, coroners' reports, military records, and death certificates – were produced as a requirement of the official position of the author and with varying degrees of discretion.

Texts produced through a standardized format and procedure, such as trial transcripts, jail records, arrest sheets, and death certificates, allowed for seemingly little discretion in the way the documents were constructed. This is not to say, however, that these records are void of individual and institutional biases. Even a verbatim trial transcript, intended to record exactly what was said at trial, is shaped by the highly selective way in which legal discourse represents "reality." The constitutive quality of trial transcripts is discernible in the revised and editorialized versions of events and evidence presented in court by judges, lawyers, experts, lay witnesses, and the accused through the mechanics of legal procedures. Transcripts are, by their very nature, a by-product of a series of tightly scripted institutional narratives and must be read foremost as fictional texts. However, they are an important record of what happened in court, and they provide some of the most telling evidence of how narratives about criminal responsibility and mind-state were constituted through legal language and institutional structures.

The case files also contain an array of unofficial, or supplementary, documents, including correspondence between official personnel, letters from the public, telegrams, memos, petitions, and newspaper clippings. It is likely that these texts were compiled by the remissions officer as a means to establish character evidence and to measure public opinion, or "community sentiment." Again, although providing assessments of character and community sentiment was considered an important aspect of the chief remissions officer's duties, it is difficult to determine the extent to which this evidence was influential, since commutation decisions were not made public record. We do know, however, that public opinion was considered important by legal decision makers and has historically influenced trial outcomes in a variety of ways. We also know that measures of "community standards" continue to influence sentencing decisions in Canada to this day.[22] In some case files, we can see that selected passages from letters written by members of the public to the minister of justice were cited in the remissions report to make a point about how the public perceived a certain case or individual. The

remissions officer would also include newspaper stories, editorials, and letters to the editor, highlighting certain parts to indicate the will of the public.

The concept of "public opinion" is certainly over-inclusive in that it suggests some degree of uniform thinking. The phenomenon has been defined in a number of ways, and I will not attempt to provide a thorough analysis of it. But for the purposes of this discussion, I do like this early definition: "The term public opinion is given meaning with reference to a multi-individual situation in which individuals express themselves or can be called upon to express themselves, as favouring or supporting or else disfavouring or opposing some definite condition, person or proposal of widespread importance in such a proportion of number, intensity and consistency as to give rise to the probability of affecting action directly or indirectly towards the object concerned."[23] It would be an exhaustive and perhaps impossible undertaking to document anything resembling a complete representation of "public opinion" on capital cases during this period. However, we can tap into some of the ways in which legal officials calculated and reported measures of public opinion in relation to each case; in some instances, we can make fair estimates of the influence that public opinion may have had on legal outcomes. The point again is that public opinion *mattered* in these highly politicized cases – sometimes a lot – and evidence shows that attempts were regularly made by legal officials to gauge dominant trends in public attitudes, even if "the public" was not fully represented.

The documents in capital case files were produced by a variety of authors, each with different material interests in the case. Because the issue of self-interest is always at hand – meaning that there was inevitably some practical or conjectural advantage gained by the author – caution must be taken in assessing the representations made in the document itself. For instance, the way in which a psychiatrist determined a diagnosis and structured the language of his report may have been influenced by the predetermined language of the laws on insanity and his desire to have his "expert opinion" heard as evidence. Likewise, newspaper editorials and letters written by members of the public quite often reveal the social position and moral perspectives of each author. Reading the case file documents, therefore, requires a mindful approach in recognizing both the positions authors take and the representations that are conveyed through the texts. However, it is precisely these dynamic idiosyncrasies that make this collection of texts, intended to reflect public and professional sentiment, so valuable.

Each murder, and murder trial, took place under different circumstances, with its own participants, audiences, and decision makers. Thus, from frequency estimates we cannot infer answers to all of those very important *how* questions – such as *how* evidence on mind-state was taken up in each case, or *how* these processes may have differed from case to case, or *how* this information may or may not have influenced trial and commutation

outcomes. A number of the social and institutional processes involved in the adjudication and disposition of capital murder cases are not easily quantified, including the role and significance of expert and common-sense knowledges on judicial decisions, and the influence of the remissions branch on the exercise of the royal prerogative of mercy. Statistical evidence can help shape particular research questions or suggest how we might go about further evaluating these processes, but to understand the *effects* and *meanings* of judicial decision making and the socio-political significance of particular trial outcomes, a range of analytical tools is required. In this book, I draw heavily from the tools of constructionism and text analysis, including semiotics, ethnomethodology, and narrative and discourse analysis.[24]

One of the challenges of text analysis is to establish the scholarly integrity of qualitative findings based essentially on interpretation. The interpretation of a particular concept or idea as historically/contextually meaningful goes beyond counting the number of times it appears in texts from a particular period/context. For instance, in the early twentieth century, references to "feeblemindedness" increased in medical, legal, and popular texts. However, this frequency observation does not tell us anything about the social-cultural significance of the idea of feeblemindedness or the "feebleminded" during that period. To understand the processes at work, we need to consider *how* meanings were organized through language and systems of knowledge, and how language and knowledge are represented through text.[25]

Reading a text therefore involves the analytical process of simultaneously taking account of the interests of the text's author and its various audiences, as well as of the fact that an author's intentions and a text's meanings are shaped by the social and institutional contexts in which they were produced.[26] By recognizing the legal structuring and organization of the documents, we can learn much about the institutional processes that shaped and stabilized legal narratives of criminal responsibility. But in reading the files as cultural *texts,* we can also learn something about the historical significance of legal decisions and how criminality was, at least in these cases, understood and negotiated in the Canadian context.[27]

Taking notice of the selective points of view from which the case file documents were produced also requires recognition of my own positioning in the production of this historical account. My prejudices are certainly evident in the way I structured my research questions, selected my sources, and interpreted the meaning and significance of the material. In my view, text analysis is the most provocative approach to studying documents of this nature. They are politically charged and have political consequences. Therefore, by taking account of the institutional constraints on the formation of the documents, the socio-political and moral underpinnings of the texts, and the invested interests of certain authors writing for particular

audiences, my reading of the cases is very much interpretive and tentative, rather than formalistic and resolute. My assessments about the historical significance of the cases and what they can tell us concerning the complex ways in which we have made sense of murder and murderers in the past are necessarily provisional. Much work remains to be done. My only hope is that this preliminary work will open the possibility for new questions, new research, and perhaps very different interpretations.

Conclusion

Official representations of law may at times suggest that the legal criteria for establishing criminal responsibility were sharply defined and did not accommodate subtler social-cultural shadings or other non-legal factors such as citizenship, gender, and class. However, at every stage of the murder trial we find the accused's life circumstances, ancestry, character, and disposition under moral scrutiny in order to determine whether she or he possessed the requisite guilty mind. Even when the question of legal responsibility appeared to have been settled with the guilty verdict at trial, plenty of room remained for negotiation in determining whether mercy should and would be granted. Therefore, criminal responsibility was not at all a fixed concept in Canadian law with clean-cut boundaries and predictable measures. The standards and meanings of responsibility were (re)negotiated according to many factors, including, as we would expect, the context and circumstances of each case, the decided character of those involved in the murder, and the concerns and sensibilities of legal decision makers.

In the next chapter, I look outside the institutional structures that gave rise to the production of the capital case file to consider some of the dominant themes of criminological thinking that came to influence the adjudication of murder cases, and in turn shaped the content and meaning of case file texts. In doing so, I also trace the professional and ideological relationships between law and psychiatry on the subjects of crime, insanity, and criminal responsibility as well as the dialectical relationship between expert and common-sense knowledges.