The Practice of Execution in Canada

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Ken Leyton-Brown

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UBC Press
The University of British Columbia
2029 West Mall
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604-822-5959 / Fax: 604-822-6083
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Preface and Acknowledgments

In a recent Supreme Court of Canada decision, Mr. Justice Louis LeBel wrote of how developments within the criminal law and, more recently, the *Charter of Rights and Freedoms* have come to ensure that "the criminal process ... is governed by principles of fundamental justice that are set out clearly in the *Charter.*"[1] This he contrasted with the situation in earlier times, which he evoked with a reference to one of the most abiding images in legal history: "At least, after a few centuries, the path of the criminal law no longer leads from the gloom and filth of Newgate to a dance in the sky at Tyburn after a brief encounter with a hanging judge."[2] Equating hanging – neatly bundled with flawed courts and an inhumane penal system – with injustice in this way suggests that it is a relic of the distant past, but, though there may be considerable truth to this view insofar as courts and prisons are concerned, there is much less truth with respect to hanging per se: hangings were conducted in Canada as recently as the 1960s, and the death penalty was abolished only in 1976. Before that, capital punishment was securely entrenched in Canada's legal system, and indeed, at the time of Confederation and for many decades after, hanging occupied an important place – in some senses a central place – in Canada's criminal justice.

During this period of roughly a century – a little less if one counts the years during which hangings did occur, a little more if one counts the years in which they could have taken place – several hundred people died on gallows raised across the country. Their deaths seem in many respects to have been part of the normal life of the nation: they were routinely reported in newspapers and, latterly, in other media, as part of the news of the day; the federal Cabinet, which was required to issue an Order-in-Council before each hanging, actually had standardized forms printed up for the purpose, with blanks so that the appropriate names and dates could be filled in; and as recently as 1956, after two years of deliberations, a Special Joint Committee of the Senate and the House

of Commons delivered a report on capital punishment that advocated its preservation, the only significant change mooted being whether a different means of killing ought to be employed.

All this suggests that, during Canada's first century, capital punishment, with hanging as its central feature, was unchallenged and unchanging, but that is very far from true. As in other jurisdictions, in British North America many individuals and groups struggled during the first half of the nineteenth century to achieve a reduction in the number of capital crimes and even to realize the total abolition of the death penalty. Their efforts had been rewarded with such substantial success that, by midcentury, the number of capital crimes in the various British colonies had fallen dramatically. The subsequent confederation of four, and later others, of those colonies did nothing to end these efforts, and though success came less easily in the succeeding century, the fight to end capital punishment in Canada continued and expanded. Nor was hanging – the only means employed in Canada to effect a death sentence – the unchanging practice it might at first glance seem to be: despite government attempts to impose continuity and uniformity, much variability existed, both over time and in the many places where hangings were conducted. This can be seen in such things as the way in which death was caused, the apparatus used, many of the rituals observed, and especially in the manner in which the public was involved in the process.

Not surprisingly, the death penalty has attracted the attention of historians, and the history of capital punishment in Canada has been addressed in many works, focusing on a range of aspects within the broader subject. This substantial literature, in concert with studies in other jurisdictions, including the United Kingdom, the United States, and a number of Continental European countries, has given us an increasingly sound understanding of the Canadian experience of the death penalty. For example, a steadily growing number of studies of individual cases and groups of cases have explored how gender, race, ethnicity, and a range of cultural and socio-economic factors determined who were most likely to find themselves caught up in the criminal justice system and facing a sentence of death, and who were less likely to do so. Other studies have explored the factors that, in different places and at different times, determined who might be shown executive clemency and who might not, and how the ideas of professionals and of society more broadly have informed concepts regarding criminal responsibility. The present study has benefited greatly from work on these and other themes, and seeks to build on it by casting greater light on one of the less frequently considered aspects of capital punishment. It is not about what led some people to the death cell while enabling others to avoid it, or about what led some of them safely away from the death cell: it is about what befell those

who left the death cell only to go to the gallows; it is about the rituals and traditions they confronted; it is about the partially successful attempts of authorities to assign what might be termed official meanings to the various parts of their executions; it is about the institutionalizing of death.

Different writers have adopted different perspectives when considering the death penalty. In some instances, their purposes were such that the exact implementation of a death sentence was not of central importance, and thus comparatively little needed to be said about it. Other authors provided a much more extensive treatment of this aspect of the subject, and they have needed to identify the particular theoretical underpinnings that shaped their work. This study, which suggests that execution be viewed as a complex social institution, has been informed most significantly by practice theory. Practice theory has been useful because of the insight it offers into the origins of social institutions and regularity in behaviour, and also because it illuminates the effect of these institutions and regularities on the behaviour of people.

Historical works such as this usually bear a single name on their cover, but they are always the result of contributions from many others. This certainly includes colleagues, who encouraged me to develop my ideas into book form, and extends to a number of institutions and, though it may be invidious to single them out, individuals, a few of whom I will mention here. I would like to begin by acknowledging the help afforded me by the staff at Library and Archives Canada, and I would like to mention in particular George de Zwaan. I also wish to acknowledge the help I received from staff at the Dr. John Archer Library at the University of Regina, and in particular Larry McDonald, Dianne Nicholson, and Susan Robertson-Krezel. I owe a great deal to the students who helped me read through a great many microfilm reels, especially Loriel Anderson and Dwayne Meisner. And finally, I express my appreciation to the people at UBC Press, to the anonymous readers who helped me communicate my ideas more effectively, and in particular to my editor, Melissa Pitts, all of whose efforts have very much improved this book.

CHAPTER ONE

Introduction

Reproach confronts reproach; it is difficult to judge between them.
The spoiler has been despoiled; the killer has paid full recompense.
It remains that while God abides on his throne, the killer must be killed;
for that is the law.

– Aeschylus, *Agamemnon,* 458 BCE

On July 1, 1868, Canadians celebrated the first anniversary of their young country. For many, it was a chance to gather with family and friends to observe a memorable occasion, and nowhere in Canada was it to prove more memorable than at St. Hyacinthe, Quebec. A platform had been erected some little time before, in the open space in front of the common jail, and on the morning of the 1st, a crowd of perhaps as many as eight thousand gathered before it.[1] At about 10:00 A.M., the central figure in the drama soon to be enacted on this very public stage appeared. The man's name was Joseph Ruel, and as the crowd watched he was helped to mount the twenty-three steps to the platform. After kneeling briefly in prayer, he stood before them while one end of the rope already secured around his neck was fastened to the beam above him. A moment later, as several thousand watched, he began to die, a process that took some seventeen minutes.

The hanging of Joseph Ruel was obviously of interest to a great many St. Hyacinthe residents and those of the surrounding region – the number of people who attended it was roughly twice the population of St. Hyacinthe. It was also seen as newsworthy in Montreal, some sixty kilometres distant, where on the following Monday, July 3rd, it was front-page news in the *Montreal Gazette:*

The Execution of Ruel at Hyacinthe

The celebration of Dominion day at St. Hyacinthe was darkened by the execution of Ruel, who poisoned one Boulet on the 12th of February, and for which he was tried at the May term of the Queen's Bench at St. Hyacinthe. The details of the

crime which were related in the evidence showed a deeply-laid plan, and long-felt desire to make away with his unfortunate victim, and he accordingly carried out his plans in a long series of administering poison in small doses under the pretence that Boulet was suffering from a loathsome disease. In all these attempts he received the sympathy of Boulet's wife, whose conduct as shown by the evidence, was most improper and rendered her liable to suspicion. The circumstances of Boulet's death, and some expression of Ruel's, caused the authorities to arrest the latter, and he was brought up for trial on a charge of murder. The evidence has appeared in print.

Yesterday, July 1st, having been most strangely the day fixed for the execution, a crowd of about seven or eight thousand persons assembled in the vicinity of the jail. All ages and both sexes were represented. Their behaviour, however, was very orderly. Here and there a woman fainted, which was a good sign, as it showed that a horrible curiosity had not altogether effaced the better womanly instincts. It would have been better, however, if all woman [sic] and children were debarred from such scenes.

At 9:45 A.M. Ruel received the fatal summons. He showed signs of strong emotion during his preparation, especially during the process of pinioning, and when the rope was placed around his neck, he seemed as if totally deprived of his senses. He was assisted to the scaffold by the Revd. Messers. DeLacroix and Blanchard, weeping nearly all the way, and exhibiting little resignation to his fate. After a while he became somewhat more composed, and ascended the steps of the scaffold with a kind of firmness till he reached the dreadful landing, when he nearly fell to the ground. He was supported on, however, and he knelt down and repeated a short prayer with his spiritual advisers. The rope was then fastened to the hook, he took one step, the signal was given, and there was a murmur of mingled horror and pity as the body was seen hanging in the air, swinged to and fro by the gentle breeze. In about 17 minutes life was extinct, but the body was allowed to hang for half an hour longer, when it was taken into the jail. The *post mortem* examination was by Drs. Turcotte and Malhiot, showed that the organs were all in their normal state, except a part of the lungs adhered to the ribs. The fall had produced the separation of the first of the vertebra from the cranium, and had lacerated the spinal marrow. The body was not claimed by the parents or friends, and so was consigned in silence to oblivion. The execution naturally threw all St. Hyacinthe into sadness, and was a damper to all enjoyment of the national holiday.[2]

This account, which enabled readers to continue their participation in a matter that had been of interest for some months, was in most respects typical of the way in which hangings were reported at the time (and in years to come). It is as interesting for what it says as for what it does not say.

The narrative begins with a short paragraph briefly recapitulating the crime that had brought Ruel to the gallows and situating the hanging in social, religious, and legal contexts. For regular readers of the *Gazette,* it was more a recap than new information, since the case had been extensively covered earlier that year. They had first heard of the affair in February of 1868, when the account of the coroner's inquest into the death of Toussaint Boulet had appeared under the headline "Another Provencher Poisoning Case."[3] This headline itself is of interest, since it referred to a recent murder case involving a married woman named Sophie Boisclair and her paramour, Modiste Villebrun, who was more commonly known as Provencher. The two lovers had poisoned François-Xavier Jutras, Boisclair's husband, and subsequently had been charged, tried, and convicted together for his murder.[4] Jutras had died on December 31, 1866, and Provencher and Boisclair had been convicted on April 6, 1867. They were sentenced to be hanged together on May 3rd, but in the end Provencher went to the gallows alone: Boisclair was pregnant, so she was granted a reprieve until the birth of her child, and her sentence was eventually commuted to life in prison.[5] The "Provencher Case" had created a sensation at the time, and its details must still have been fresh in readers' minds, so this headline will have left them well prepared for the story to follow and provided an important context within which they were to understand the case of Joseph Ruel.

In the *Gazette*'s account of the coroner's inquest, they read that, for some time, Joseph Ruel had been having an affair with the wife of Toussaint Boulet, a farmer at L'Ange Gardien. Ruel had previously been married, but his wife had died in November 1866, and shortly after that he had become a boarder at the Boulet farm. This facilitated his affair with Arzalie Boulet (née Messier) – whether it began before or after the death of Ruel's wife is unclear – and also provided the opportunity for Ruel to put Boulet out of the picture for good.

As interested readers learned, Ruel was greatly aided in his schemes by the fact that Boulet had been suffering from a "slow disease, the character of which," the newspaper tactfully reported, "has not yet been defined."[6] On absorbing this, all but the most naive would immediately have suspected that Boulet had a venereal disease, probably syphilis. Their suspicions would have seemed confirmed by the fact that Ruel, who claimed some medical experience, had been treating Boulet with medications that he received from a local doctor.

The third and final piece of the puzzle came when the paper noted that, while carrying on the affair with Boulet's wife and treating Boulet's illness, Ruel had been acquiring poisons from local doctors. Claiming to be engaged in trapping foxes, he had obtained both arsenic and strychnine, ostensibly to poison the animals. However, since Ruel had not previously been known to trap foxes, and since they were rare in the region, suspicions naturally arose about the intended

use of these poisons. Matters finally came to a head on February 12, 1868, when Ruel and Onesime Messier (sister-in-law of Boulet) administered "a dose of medicine" to Boulet. Within ten minutes he began to vomit; this was followed by convulsions, and two hours later he was dead. Given all these suspicious circumstances, and after hearing from medical experts, police concluded that Boulet had died due to strychnine poisoning and that Ruel was the probable poisoner: Ruel was duly arrested, charged with the murder of Boulet, and committed for trial.

The account of the inquest into Boulet's death had appeared on the second page of the *Gazette,* but that of Ruel's trial for his murder was given even greater prominence – on the front page – and coverage could hardly have been more extensive. Each day throughout the trial, witness testimony was printed almost verbatim, albeit with the occasional omission or circumlocution that served both to enlighten readers fully while seeming to acknowledge their delicacy. This was visibly so with respect to Boulet's apparent illness, which Ruel claimed to be treating. On May 6th, Aurelie Boulet, daughter of the deceased, testified that Ruel had frequently said that her father suffered from the *mal anglais* (syphilis). In response to questioning, she added that he had "said so to different persons in father and mother's presence" and that no one had ever contradicted him.[7]

This euphemism reappeared in testimony two days later, on May 8th, when Dr. François Theriault, a local practitioner, took the stand. He testified that, on the day before Boulet died, Ruel had told him that Boulet suffered from the "mal anglais." He added that Ruel claimed the illness to be of "long standing without proper treatment to survive."[8] His further remarks on the subject were not reported in the *Gazette,* however, which merely inserted a parenthetical note to the effect that "(The details of this portion of the evidence are unfit for publication)." From this, it appears that Dr. Theriault never examined Boulet himself to confirm the diagnosis, though he seems to have accepted it nonetheless, since he gave Ruel more medication with which to treat Boulet.

The proper name of Boulet's alleged condition was finally mentioned three days later, when two more doctors briefly addressed the topic. Dr. Napoleon Jacques, who conducted the post-mortem examination of Boulet's body, was confident that Boulet had died from strychnine poisoning and stated that he had seen "no marks of syphilitic disease on the body." Dr. E.P. Provost, an acknowledged expert in poisoning, also testified. He supported Dr. Jacques' conclusion regarding the cause of death but would say only that he did "not think Boulet died of a syphilitic disease," which is not at all the same as asserting that he did not have syphilis.[9] Whatever conclusion was to be drawn from this evidence might seem unimportant – after all, every expert who addressed the

question accepted that, regardless of any underlying condition, Boulet had died from strychnine poisoning.

In fact, it was bound to be of great interest to the court, and to the readers of the *Gazette,* since it was crucial in understanding the motives and assessing the actions of the people involved. Readers – put in the position of jury – had to weigh the evidence for themselves. On the one hand was the testimony of the doctors, who either did not examine Boulet at all or who did so only after his death (and not necessarily to determine whether he had VD). Most doctors who testified seem to have felt that Boulet did not have the illness, though none said so explicitly. On the other hand, though, was the plain testimony of Boulet's daughter that neither Boulet nor Arzalie had contradicted Ruel when he had said (more than once) that Boulet had syphilis. The fact that Boulet had accepted the medicines and other ministrations provided by Ruel to treat it further suggests that Boulet believed he had syphilis. And finally, there was the testimony of Frederic Archambault, a local resident who knew both Boulet and Ruel, that Boulet had "told [him] he was very sick, [and] had sores on the private parts."[10] This was corroborated by Marie Tetreault, Boulet's sister, who admitted that, before his death, she had seen sores on his body; while he was lying in bed, she had entered the room and had "lifted the blankets and saw he was swollen."[11]

Each jury member – and each reader of the *Gazette* – could reach his own conclusion, but a persuasive case had been made that Boulet was suffering from some sort of venereal disease.[12] Once this was accepted, the actions of Boulet's wife, if not forgivable, became much more easily understood. And moreover, her behaviour may have been the most telling argument in support of the view that Boulet had contracted a venereal disease some time before.

Curiously absent from the evidence heard in court is the question of how Boulet might have become infected, but perhaps the silence is not so odd: that it could have occurred solely by breaking his marriage vows, probably in consorting with a prostitute, would have been apparent to all.[13] By the standards of the time, then, he had received no more than his just deserts: punishment for his sin. But what of Arzalie? She was an innocent who was being made to suffer by an errant husband. She could not divorce him and marry another man, for the church did not countenance divorce under any circumstances. Nor would it be proper for her to leave her husband and children. However, the standards of her world do seem to have tolerated a situation in which she remained married to her husband while having an affair with another man, one that seems characterized by very little discretion.

Not surprisingly, considerable evidence pertaining to the relationship between Arzalie and Joseph Ruel was adduced in court. According to a number

of witnesses, the two had habitually kissed a great deal where others could see them. These apparently included Arzalie's husband, who may have been driven by guilt to tolerate an otherwise intolerable situation. Numerous people, including family members and neighbours, testified to this effect. Nor did it stop with hugging and kissing: two witnesses had seen Ruel and Arzalie "wrestling" on numerous occasions; others had seen them sneaking out of the room and going to the barn; it was even reported that, when Arzalie had given birth to her last child, she had wanted Ruel rather than her husband at her side and that Ruel admitted that people would say the child was his. Under the circumstances as people accepted them – with Boulet having destroyed the marriage by his infidelity and consequent illness – no one seems to have been outraged by this behaviour. But even such a knowing and forgiving society could not tolerate, and certainly the criminal law of Canada in 1868 could not tolerate, Ruel's actions in speeding matters to what may have seemed to him (and to others) an inevitable conclusion. The evidence that Ruel had poisoned Boulet was clear; at the conclusion of the trial, the jury returned a verdict of guilty as charged, without any recommendation for mercy.

On July 3, 1868, only a few sentences were necessary for the *Gazette* to remind its readers of all that had happened in the months leading up to the guilty verdict: Ruel's relationship with Arzalie, the murder of Toussaint Boulet, and the charges brought against Ruel. Only a few stated facts were necessary since readers could readily fill in the rest, most of which had been told to them before. However, Ruel's hanging on July 1st was discussed in no greater detail – just a few sentences – and this provides a point of departure that informs the chapters to follow.

The *Gazette* began with two preliminary observations – that July 1st had been "most strangely the day fixed" for Ruel's death and that the crowd assembled in St. Hyacinthe to watch him die numbered "about seven or eight thousand persons." This was followed by an assessment of the crowd's behaviour, which was described as "very orderly," and of its composition. The journalist noted that it included "all ages and both sexes" and was pleased to inform his readers that "here and there a woman fainted." This, he opined, was "a good sign, as it showed that a horrible curiosity had not altogether effaced the better womanly instincts." He ended this section of his coverage with the judgment that it would be better "if all woman [sic] and children were debarred from such scenes." Only at this point, with readers properly prepared and the scene set, did he finally turn to Ruel himself, and to his hanging.

The third and concluding paragraph opened with a brief description of the preparations Ruel underwent in his cell and of his progress to the scaffold. The "fateful summons" was received at precisely 9:45 A.M., and Ruel "showed signs

of strong emotion during his preparation, especially during the process of pinioning, and when the rope was placed around his neck, he seemed as if totally deprived of his senses." What is most striking here is not that Ruel showed strong emotion as his arms were secured behind him or when the noose was put in place; he could hardly be blamed for that since he would have been all too aware of what was coming next. Rather, what is most arresting is the almost casual way in which the reporter mentioned elements of Ruel's preparation in the privacy of the death cell – "the process of pinioning" and "when the rope was placed around his neck." These actions are mentioned not to inform readers that they occurred – it was assumed that readers were already familiar with them and knew that they would take place just before Ruel went to the scaffold – but rather to provide reference points for indicating precisely when he became emotional. The process of preparing a man to hang was well understood; only the variability of this particular instance merited comment.

We see this again in the account of Ruel's walk to the scaffold and his climb to the platform where he was to be hanged. The names of the spiritual advisors who accompanied him, "the Revd. Messers. DeLacroix and Blanchard," are briefly mentioned as is Ruel's emotional turmoil throughout this time, but again one realizes that these facts simply elaborate upon an understanding readers were presumed already to have. They expected religious advisors to be present and knew what their role was; what they did not know was their names. Similarly, they knew that Ruel would be subject to great stress as he walked to his death, the noose hanging around his neck; what they did not know was whether visible signs of his emotions would arise and when these would be seen.

It is not surprising, then, that what followed was also told in this mix of assumed knowledge and particular attention to detail. The fact of the hanging, in essence no different from so many others, could be recounted in a single sentence: "The rope was then fastened to the hook, he took one step, the signal was given, and there was a murmur of mingled horror and pity as the body was seen hanging in the air, swinged to and fro by the gentle breeze." Again, however, particular aspects of this case could not be known in advance, and these were meticulously detailed: how long it took Ruel to die (seventeen minutes) and how long his dead body was allowed to hang in public view (thirty minutes).

This sense that a familiar story was being retold continued even after Ruel's body was taken down. No explanation was presented as to why a post-mortem examination should occur, but the names of the doctors who conducted it were given, along with a précis of their findings. And a single sentence noted that the body had not been claimed by family or friends, "and so was consigned in silence to oblivion." The writer then ended his description of the very public killing of Joseph Ruel by returning to the timing of the execution and observing

that it "naturally threw all St. Hyacinthe into sadness, and was a damper to all enjoyment of the national holiday."

What I hope has been demonstrated through this examination of one newspaper account is that, when Joseph Ruel was hanged, Canadians, or at least those who read newspapers, could be presumed to know in considerable detail what was involved in an execution and to have a nuanced understanding of the entire process, from the apprehension of a criminal to the disposal of the body. Execution was a social institution, one with which people were familiar. The authorities knew this and recognized that execution embodied and communicated a meaning, or, better, a group of meanings, and so they used it to accomplish a variety of public purposes.

One involved the First Nations, and a number of immigrant groups as well, who were frequently unfamiliar with execution and its associated meanings. Execution provided a means to educate them about important values of Canadian society and, it was hoped, to change them into better members of that society; it was also convenient that this means to improvement and assimilation was a very powerful means to control.[14] This was highly appealing to officials who at best were uneasy when confronted with difference and who frequently found it intolerable, but First Nations and new arrivals in Canada were far from being the only targets for the messages authorities sought to convey through the imposition of the death penalty. Executions, publicly carried out under their aegis, served to legitimize their authority, or at least to demonstrate their power, to all who witnessed them. This reinforced an existing social order and existing power relations; in effect, society was reconstituted in a very intended way each time an execution took place. And, it is important to note, this tended to be the result regardless of whether people accepted the official meaning of execution; it was enough that they were aware of it.

Crucial to all this was the highly public nature of Canadian legal proceedings at the time: the public could attend coroners' inquests, which were convened to investigate deaths and make recommendations about criminal charges; it could attend trials where those accused of murder came before judge and jury; and it could attend the hangings where those sentenced to death met their end. If the people did not attend in person, they could do so vicariously through the articles in their local newspapers. As it happened, however, this public involvement was about to be restricted in one important respect, a change that was seen by some as threatening the ability of the authorities to control and to communicate the meaning of execution, and even to imperil the survival of capital punishment in Canada.

In 1868, when Joseph Ruel was executed, people convicted in Canada of capital offences were sentenced to death by hanging, and unless they were the object

of royal mercy, they died publicly. These comparatively infrequent events could draw large crowds, and it is clear that hangings were designed with this public view always in mind. Through careful staging and choreography, a range of meanings were communicated to those who watched and a benefit derived from what was, in starkest terms, an intentional killing. The hanging of Joseph Ruel is a perfect example of this, and it is interesting that no surviving record indicates that any member of the attending public disapproved of the manner in which he died, or that any newspaper accounts did, beyond a minor cavil about the presence of women at the event.

However, though opposition to this particular hanging may have been comparatively muted, a considerable battle raged in Canada and elsewhere regarding whether public hangings should continue and even whether hanging should continue at all. In 1868 the British Parliament passed a bill that marked one of the milestones in the history of capital punishment: *An Act to Provide for the Carrying out of Capital Punishment within Prisons, 1868.*[15] This act has been heralded as a great victory in the campaign against hanging, but it has also been seen as a triumph for those who wished to preserve the noose, since the adoption of private hanging – conducted either completely out of public view or with restricted public attendance – forestalled the total abolition of the death penalty and resulted in another century of hanging.[16] Not surprisingly, the passage of the 1868 act was noted in the nascent Confederation of Canada, where the new Parliament was addressing a busy legislative agenda. An important element in its task was ensuring that the uniform criminal law called for in the *British North America Act, 1867,* was achieved, with the result that a substantial criminal statute was in the works. Historically, British North America had tended to follow the example of Britain in these matters, and thus it was decided to follow the British example and provide for private execution.[17] This was accomplished in some nineteen sections of *An Act respecting Procedure in Criminal Cases, and other matters relating to Criminal Law, 1869,* which provided a legislative framework for administering the death penalty in Canada that was to change very little over the next century.[18] This eagerness to follow the English lead with respect to the death penalty was further evidenced early in 1870.

At the time, John A. Macdonald served as minister of justice as well as prime minister, and it was in his capacity as justice minister that he wrote a memorandum advising what rules and regulations ought to govern Canadian executions. This memorandum demonstrates how derivative the Canadian regime was:

> The sections in question are taken from the provisions of the Imperial Statute 31 Vic, cap 24, with which they are identical, except that the Rules and Regulations

> mentioned in section 118, to be made by the Governor in Council, are under the Imperial Statute, to be made by one of Her Majesty's Principal Secretaries of State.
>
> The undersigned has deemed it advisable to ascertain what steps were taken in England to carry out that portion of the Act, and he has obtained a copy of the Rules made by HM Secretary Gathorne Hardy, and which appear to have been promulgated by him on the 13th August 1868.
>
> The undersigned is of opinion that the same so far as suited to Canada should be adopted for the Dominion.

Macdonald's views apparently met with no resistance, and his recommendations were soon embodied in an Order-in-Council that ensured, at least in theory, that death sentences were uniformly carried out in Canada.[19] The result – fully intended – was to make Canadian law with respect to the execution of capital sentences as much like that of England as possible.[20]

The main thrust of the Canadian act of 1869 had been to end, or at least to curtail, the direct involvement of the public in executions. However, this created a problem: if members of the public did not watch an execution, there was little reason to preserve its ritual elements; nor could its intended meanings be communicated to them. The solution to this dilemma embodied a contradiction, but it could not be avoided: means had to be found to enable the continuation of public involvement, in what was to be considered private execution.

This was achieved by providing for public representatives to be present at hangings and by ensuring that what was done behind prison walls was brought directly to the attention of the public outside those walls. Henceforth, the people would be represented by a range of officials who were either allowed or mandated to witness the execution.[21] They would be represented through organized religion, since "any minister of religion who may desire to attend, may also be present at the execution."[22] They would be represented through the coroner's inquest, which was required after every hanging.[23] And they would be directly addressed through the public posting of the results of the coroner's inquest, and of documents signed by the prison surgeon, the sheriff, the gaoler, and any justice of the peace in attendance, all attesting that the sentence of the court had been carried out.[24] This approach was reinforced, and even furthered, when the Order-in-Council regulating the conduct of executions came into effect, as two of its four provisions – calling for a black flag to be displayed "upon an elevated and conspicuous part of the prison, and to remain displayed for one hour" and a bell "to be tolled for fifteen minutes before, and fifteen minutes after the execution" – were conscious attempts to involve the public at the very time a hanging occurred.

Arguably, however, the newspaper coverage of hangings constituted the most significant means by which the public was involved. Newspapers had always been an important way of involving the people as spectators – and therefore participants – and however large the crowd that watched a hanging, newspaper coverage could enable a much larger number of people to "see" it.[25] Moreover, in some respects a newspaper could more effectively present execution to the public since a single story could touch on aspects of a case – such as details of the crime, the finding of the court, and the period of the condemned's incarceration – that could not easily be relayed to a crowd gathered before a scaffold. The importance of newspaper coverage had long been recognized, and it guaranteed a privileged place for reporters, who in many ways became partners with the authorities and ensured that the people were vicarious spectators at hangings. Journalists not only told the public what happened, they explained what it meant and were crucial to the preservation of the institution of execution. Both shapers and reflections of society, newspapers provided the necessary link between the public and execution, and the narratives that appeared so frequently and so prominently in their pages allow us to track the practice of execution through the history of Canada.[26]

CHAPTER 2

Trial and Sentencing

This is a court of law, young man, not a court of justice.

– Attributed to Oliver Wendell Holmes Jr.

The institution of execution had its ultimate roots in fundamental aspects of society, and in most cases they were very long roots indeed. However, each Canadian execution may be said to have had much more proximate origins in the legal process, and in a murder trial.[1] The result of this was to embed specific executions, and therefore execution generally, in one of the most complex, sophisticated, and powerful parts of modern society: a court of law. The task of such a court was always to apply the law to a particular fact situation and, in any case where the accused had been found guilty, to pass sentence upon him. This was not always easily achieved, though, and in a society that wished its courts to contribute to the maintenance of public order, the additional necessity arose of having their legitimacy and actions generally accepted by that society. This latter end was furthered by the deliberate adoption and preservation of characteristics that impressed, and not infrequently intimidated, the people who came before the courts and those who merely watched their proceedings, and by allying the courts to other recognized powers and, even more broadly, to society itself.

Perhaps the most obvious way of impressing those who encountered a court was by housing it in a grand structure, which created the desired effect simply by its grandeur: and certainly, if one visits a capital city, such as Ottawa, Washington, Paris, or London, this is immediately apparent; their courts are among the most impressive of edifices, even in cities filled with magnificent buildings. However, for a variety of reasons, Canada decided early not to conduct all trials centrally, in some palace of the law, but rather to hold most criminal trials near the locations where the cases originated. As a result, creating an imposing effect was not always possible, especially in the first days of the Dominion, when many

centres lacked a large and impressive infrastructure. The decision to locate trials throughout the land was grounded in both practical and symbolic reasons. The former had to do with the physical evidence likely to be introduced at trial. Simply put, it was easier to gather such evidence near the crime scene and keep it secure there rather than to transport it some distance away. Moreover, it was not unheard of for judge and jury to visit a crime scene, which would obviously have posed a challenge had the trial been situated far away.[2] Witnesses were also a consideration. Summoning them to testify was far easier if they lived reasonably close to the trial venue than if they had to travel a long distance, and having them near at hand allowed greater flexibility in deciding when to call them, or even to recall them should that become necessary – this latter being impossible to anticipate and arrange beforehand.[3] When distant witnesses were called to testify, cases would have been greatly complicated, and trials were probably lengthened due to frequent adjournment. In addition, travel expenses and the cost of housing and feeding witnesses would need to be factored in – expenses the Crown might bear (though perhaps unwillingly) but that few defendants could – as would the greater disruption of work and family life. There was even a sense that local jurors could best judge the evidence, which was locally derived, and were best qualified to weigh the testimony of people with whom they lived. All these practical considerations were reasons for locating trials close to where the matter being adjudicated had arisen, and they were greatly reinforced by what may be termed symbolic reasons.

These revolved around the desire to create a connection in the public mind between the trial and the matter being adjudicated, a process facilitated if the trial were located at or near the crime scene. This helped legitimate the trial in the eyes of local citizens, and by extension, it also legitimated trials more generally, as well as the legal apparatus and, ultimately, the state that oversaw the rule of law. This was a powerful logic, and it strongly supported the dispersal of trials, even in very thinly populated parts of the country.[4] Of course, this meant that the physically imposing court building was not an invariable feature of Canadian legal life, especially during the early period, and though efforts were made to house the court, when it did come to town, in a prominent local building – a hotel, perhaps, or a town hall – a criminal court, and therefore a murder trial, could be situated in rather modest surroundings.

Nonetheless, the appearance of majesty and power could still be conferred via the court personnel and the special costumes some of them wore, the careful control of space within the courtroom, and the procedures and language of the court. The first thing that was likely to impress members of the public when they entered a court to witness a murder trial was the array of court functionaries, all of whom served to make visible the special nature of the place. These

might include ushers and would certainly include court reporters and bailiff, one or more police officers, guards for the accused, one or more lawyers, and the judge. The police and the guards would be wearing uniforms, which emphasized their status and power, and they might also be visibly armed, but arguably the lawyers, and certainly the judge, would make the most startling visual impact. Unless conditions were very austere – as they sometimes were on the edges of settlement – both would be wearing robes of a sort never seen in any other venue. These costumes set them apart and signified both that they had a special status and that they would play special roles in the dramatic events to follow.

Also obvious as people entered a courtroom was the way in which its physical space was divided. Members of the public could sit, or, in some notorious cases that drew large crowds, stand, in one well-defined area, but other spaces were barred to them, typically by uniformed and armed men. There was a special place for the jurors, enclosed and separated from the public they represented; there was a space for the lawyers and clerks of the court; there was a place for the accused, who sat somewhat apart from others, under guard and not infrequently physically restrained as well; and finally, dominating it all, there was the raised platform on which the judge sat, facing the public and the others arrayed before him.

These messages of difference and power were further emphasized by the manner in which trials were conducted. People rose as the judge – ruler of his court – entered the room, and they waited in silence until he indicated that they could sit and the action of the trial could commence; though even then, he was very much and very visibly in control of both people and events. He had guards to bring in the accused, to watch him, and, should he so order, to take him out again. He controlled the jury, telling it what to do and, to a large degree, how to do it, deciding what it should hear and what it could not, even ordering it to leave while debate over the admissibility of evidence was heard. And though largely silent while lawyers questioned witnesses and made their arguments, he was the one whom all addressed. He occupied centre stage, physically raised above everyone else in the courtroom; he alone could speak whenever he wished; and his decisions were final. He was absolutely and unequivocally a figure of power, not simply representing power, though he certainly did that, but within the confines of the courtroom possessing very real authority.

The resulting intimidation was intentional, and the means to achieve it had been carefully cultivated over centuries.[5] It was simply increased by the language used in court by its officers. This language was often archaic and full of esoteric terms that had never been understood by most citizens. With liberal elements

of early French and Latin – Latin pronounced differently from either that taught at school or church Latin, with which Catholics at least would have been familiar – this was at all times a foreign tongue and incomprehensible to many who heard it, lending trials a Kafkaesque quality that must have been chilling for an accused and scarcely less so for the jury or the public in attendance.

Nonetheless, while all this intimidation and separation was operating, it remained essential somehow to situate the trial within society, to make it a part of society, and thereby to achieve a greater degree of legitimacy. The key to accomplishing this was the jury, though a certain tension always existed insofar as the jury was concerned, since it was both separated from and joined to society by many forces. The jury is an ancient institution and at the time of Confederation came in two types: the grand jury and the petit jury.[6] Of these, the petit jury was always the more visible, and indeed, it is likely that many in Canada were not aware of the existence of the grand jury, let alone conversant with its function. The petit jury, however, was a familiar thing, and it was this jury that was active at the beginning of the execution process. The petit jury (hereafter simply the "jury") served as no other part of the trial apparatus to embed that trial within society. Not merely representatives of society, the jurors were supposed to constitute society in microcosm.[7] At the conclusion of argument in a murder trial, they would confer and decide the fate of a man. These were tasks of fundamental importance; in order to realize them, it was necessary to ensure not only that the jurors took their role seriously, but also that they were visible representatives of and embodiments of society, and that they became part of the court. This required a careful balancing and was accomplished through several means.

At the outset of a trial – in some senses before the trial even began – counsel for both the Crown and the defence questioned potential jurors to determine their suitability. Those who were connected to the case in some way – not unusual in smaller centres, where many were related by marriage or other tie – were likely to be excused, as were any others who seemed to hold strong views relating to the case, but in the end twelve would be selected.[8] This choosing had already gone some way to separating the jurors from their fellow citizens, a process reinforced by subsequent stages. They were required to swear an oath that they would perform their duties in conformity with the law and, in particular, that, during the trial, they would not discuss the case among themselves or with anyone outside of the jury. To further this isolation, they sat separately from those members of the public who attended the trial.[9] If possible, they were even sequestered outside the courtroom, taking their meals apart from others – even their families – and staying together at all times. These measures tended

to take the jury out of society, which thereby defeated one of the fundamental goals of the institution per se, as did the jurors' differing access to the trial evidence. They could be required to leave the court while the admissibility of evidence was argued – evidence that others in attendance might hear – but they had privileged access to certain other types of evidence, such as weapons and crime scene photographs, which were commonly shown to them and even given to them to handle and pass among themselves.[10] Other aspects of jury service, however, acted to re-establish and emphasize the social character of the jury. Certainly, jurors did not wear uniforms or strange robes: they dressed as any citizen might, albeit probably in their best clothes. And whenever they were addressed by the judge or a lawyer, their role as representatives of society would be implicit, and quite probably made explicit, in language directed as much to the onlookers as to the jurors themselves. They were a necessary part of the drama of a murder trial courtroom, but they were a curious mix of audience and prop, until the trial was nearing its end, and its climax. Then, briefly, they took centre stage and prepared to speak their one and only line, through the person of the jury foreman.

The jury became the centre of attention only after both the prosecution and defence had presented their cases. This reached its culmination when the lawyers for the Crown and the accused summed up the evidence and argued – the one that it proved the guilt of the accused beyond a reasonable doubt, the other that it showed his innocence, or at least failed to establish his guilt. Then, it was time for the judge to speak, to deliver his charge to the jury. This was a crucial moment in any murder trial, and it is clear, from the amount of attention devoted by newspapers to the judge's charge, that this was fully appreciated. It is also obvious that a judge who suspected that a jury might not reach the verdict he thought appropriate could tailor his charge so as to bring it about. This was very undesirable in theory – it usurped the function of the jury – but it probably proved effective since, as had been made abundantly obvious during the trial, the judge was such a powerful figure that going against his wishes would be difficult, and because unambiguous direction from him relieved the jurors from taking responsibility for their decision. Instances of such judicial behaviour were not rare, unfortunately, and cannot have failed to disturb the public when they were reported in trial accounts. The 1878 case of Michael Farrell, tried at Quebec City in the shooting death of Francis Conway, is a particularly egregious example. The *Toronto Globe* informed its readers that, during his charge to the jury, Judge Monk described the shooting as "wilful, deliberate murder" and "concluded by saying that there was nothing in law that could justify the jury in bringing in any other verdict than that of wilful murder."[11] Not surprisingly, the guilty verdict was duly returned.

A slightly less blatant charge – though to similar effect – was delivered in 1904, in the case of George Gee, tried at Woodstock, New Brunswick, in the death of his young cousin and former girlfriend, Millie Gee. Chief Justice Tuck presided and in the words of the *Globe* "charged strongly against the prisoner," ruling out the defence's plea of insanity as a result of delirium tremens and instructing the jury not to be sympathetic toward Gee, who had had to leave the courtroom on occasion for fresh air. He concluded his stern review by instructing the jury, "Now go and do your duty."[12]

During Ray Courtland's 1930 trial at St. Hyacinthe for killing a local farmer, Justice Walsh is reported to have told the jury,

> As to the question of the facts, that is up to you. I cannot draw conclusions. There is nothing in the evidence, however, to reasonably show that Courtland had killed Ward in self-defence. If Courtland wanted to leave the house he was not obliged to fight and there was no need for him to strike Ward as often as ten times with a blunt weapon. There was even no need for Courtland to quarrel with Ward. All he had to do, if things were not going right, was to run away.
>
> The statements made by Courtland, one to the police and one here in court before you, do not count for much. They do not agree on the main points and you have to remember that Courtland was once convicted of perjury. The case is in your hands gentlemen; it is up to you to do your duty and weigh the facts as you see them.[13]

Can there have been any doubt regarding what verdict Justice Walsh thought the jury ought to return?

These examples are drawn from comparatively early trials, but even toward the end of the period under consideration, judges could virtually pre-empt the jury's deliberations and direct it to convict. There can have been little doubt of the verdict Justice Danis expected in the murder trial of Marvin McKee, charged in the shooting deaths of two men near Huntsville, Ontario, in 1959, at least not if the *Toronto Globe and Mail* commentary was accurate:

> The 12 Muskoka district farmers and merchants on the panel were told by the judge in his charge to the jury that McKee's evidence was a network of fabrication.
>
> "It strikes me," Mr. Justice Danis concluded, "that the story told by McKee is not the story of an honest man. It doesn't seem reasonable to me. I don't like his evidence. I don't accept it."
>
> But he cautioned the jury was not to let his personal views overcome their own opinions. He then added that he understood hunting season begins on Monday and said he realized how anxious the jurors must be to return to their homes.

He concluded by enjoining the jurors that they "not let sympathy or prejudice cloud their vision or sway them in their decision." "Murder," he said, "must be stopped at all costs."[14] He might just as well have said, "Convict this man and be quick about it."

The words of judges in these and other cases amounted to directing the jury to return a guilty verdict and clearly went beyond the limits of what they ought to say in the charge. However, it is easy to see why judges occasionally overstepped the bounds of their role in law: jurors often had trouble returning a guilty verdict. The reasons for this were several. For one, jurors generally knew that a murder conviction carried an automatic death sentence.[15] Some were conscientiously opposed to the death penalty and were understandably disinclined to support a verdict that would lead inevitably to a violation of their moral sense. Others, though not opposed to the death sentence in principle, found a guilty verdict unpalatable because their sense of personal responsibility was too great. Then too there was the natural human tendency to sympathize with the accused, which in some instances might prompt jurors to decide that, though they fully supported the death penalty, *this* defendant ought not to be convicted.[16] In all these cases, the effect would be to acquit, when a cold consideration of the evidence and the law seemed to the judge to call for a conviction. Thus, the judge's charge had not merely to refresh the memories of the jurors and inform them of the law and the questions they had to answer – it also had to prepare the jury for the possibility that it might have to convict.

In general, three elements in the judge's charge sought to achieve this end. The first was to remind the jurors of the oaths they had sworn and of the seriousness and importance of the task before them. This was relatively straightforward, and identical words could have been used in almost any charge. The second was to present the evidence and the law in a manner that provided helpful guidance and, when appropriate, indicated decisions that seemed clear-cut. This was much less straightforward, and, as shown above, judges sometimes went too far in presenting the case to the jury. However, in difficult cases – where matters were complicated, much evidence had been offered, or the legal issues were intricate – a degree of guidance was essential if the jury were to perform its job properly. The third was to persuade the jury that its task was to deliver a verdict, that it had no responsibility for what happened next, and in particular, that it had nothing to do with sentencing. To some extent, of course, this view was difficult to accept, especially when the death sentence was mandatory in murder cases, but judges could marshal a number of persuasive arguments here. The starting point was to remind jurors that they had sworn an oath to perform their duties with all possible care, that the welfare of society depended upon their work, and that, without it, the administration of justice would fail and a

society based on the rule of law would be threatened. A second argument – less easy to defend in certain instances – was that their task was relatively uncomplicated, that the verdict they were asked to deliver was, on the basis of the evidence, the arguments presented, and the relevant law, an obvious one, and that, in fact, reaching any other verdict would be wrong. And finally, the case could be made that, for a number of reasons, returning a guilty verdict should not be seen as amounting to dooming the accused to death.

This last involved separating, in the minds of the jurors, a guilty verdict from the death sentence inevitably to follow. This required careful husbanding of a triad of arguments. First, the jury was simply a small though important part of a much larger machine for administering justice, which included Parliament, police, courts, and prisons. The accused was dealt with by that great machine, not the jury, which was charged only with providing answers to a few questions. The second theme sprang from the first but focused on the court system, with its many checks and balances. As a result, though a guilty verdict might seem to equate to a death sentence, it did not, since all manner of additional stages could intervene. Judges invariably pointed out that sentencing was their responsibility, not that of the jury, and further, that the accused could appeal through the courts or to Ottawa. These arguments all tended to persuade jurors that their decision was a preliminary one, neither directly related to nor the cause of a death sentence. Third, and finally, if jurors did convict but were concerned about the punishment, they could attach a recommendation for mercy to their verdict, which would be passed along by the judge and considered by the authorities in Ottawa before any final decision was taken.

The aim of these points was to make it easier for juries to convict – needless to say, acquittal presented no such problems – and consideration of the materials in the capital case files suggests that they were effective. As a result, many convictions were registered in circumstances that may cause us to shudder: in certain instances, self-defence seems plausible, the identity of the accused was questionable, circumstantial evidence suggested rather than proved, and in many examples, it seems inconceivable that jurors could be assured of guilt "beyond a reasonable doubt." It is impossible to know whether this was an unintended consequence of attempts by judges to help juries convict, but the possibility certainly exists that jurors, feeling pushed to do so, acted in the confidence that any mistake they made would be rectified later on. This sense is strengthened when we read the reactions of some judges to jury recommendations for mercy. An example of this occurred in the case of John Boyd, convicted in the shooting death of Edward Wandle. The evidence indicated that, after an altercation with Wandle, Boyd had purchased a revolver, gone to Wandle's restaurant, pursued him to an upstairs apartment, and shot him.

However, the shooting occurred only after Wandle had refused to tell Boyd where his former mistress was and after he had struck Boyd with a leaded cane. The jury apparently took these "provocations" into account, as well as Boyd's claim that he had not fired with the intent to kill, and so it decided to convict but to attach a recommendation for mercy. Justice MacMahon's response merited quoting in the next day's *Toronto Globe:*

> For myself I do not know upon what grounds the jury could find any recommendation to mercy. In all my long years of connection with the criminal courts of our land I have never heard of a more cruel or premeditated murder. The evidence must have satisfied the jury that you brought the pistol and followed the dead man unrelentingly from room to room, and burst open the barrier that protected him in order to murder him. A higher law than man's has said, "He that sheddeth a man's blood, by man shall his blood be shed." You gave your victim no opportunity of asking God to have mercy on his soul before you slew him. The law is more merciful than you, and I advise you to spend the time now left to you in seeking pardon from God for the crime you committed.[17]

The case of William Milman produced a similar reaction from the judge who delivered the death sentence.[18] Milman's crime had been a horrific one. At age nineteen, he had seduced the seventeen-year-old Mary Tuplin, but when she became pregnant he decided not to marry her. Instead, he borrowed a gun and shot her twice, killing her and the six-month-old fetus she was carrying. The evidence against him was almost entirely circumstantial, but the main facts had been clearly established and the guilty verdict was unsurprising.[19] Nonetheless, the jury brought in a recommendation to mercy. On hearing this, Chief Justice Palmer remarked to Milman, "The jury have recommended you to mercy – upon what part of the case or of your evidence this favourable expression of their opinion rests, I must own I do not at present perceive." He elaborated on just how little sympathy he felt for Milman: "I was for a considerable time under the impression that the criminal must have been some stranger, some person from another country – from some populous city where vice and crime are not so unfamiliar to human experience as here."[20]

The apparent frustration of Justice MacMahon and Chief Justice Palmer with these jury recommendations to mercy is understandable, and it was shared by the many judges who declined to support similar recommendations in other cases. Part of the frustration probably sprang from the fact that the judge himself had told the jurors that they could register the recommendation, but it also stemmed from the fact that juries had been making recommendations to mercy

in a wide number of circumstances, not all of them appropriate.[21] One such circumstance was the youth of the accused: for those who were younger than twenty, juries usually recommended mercy, perhaps thinking not that the crime was somehow less serious, but that the execution of someone so young was more tragic than that of an older person. A good example of this arose in Amherst, Nova Scotia, in February of 1933. The Smiths were a well-known family in Amherst, where it was common knowledge that they kept a large amount of money in their house. One night, while Mr. Smith was working in the family restaurant and his son was supervising a pool hall owned by the family, nineteen-year-old Alvah Henwood and eighteen-year-old Trueman Smith decided to take advantage of their absence to rob the house. They knew that Mabel Smith – described as "aged" by one newspaper, and so badly crippled by rheumatic arthritis that she needed crutches to walk – would be at home, but they forced their way in regardless, hit her on the head with a baseball bat, and then cut her throat before ransacking the house. It took two weeks for police to crack the case, but eventually both Henwood and Smith were arrested and charged with murder. The two were tried separately, in June 1933, and both were convicted. Despite the brutality of the crime, however, the jury registered a strong recommendation to mercy in the case of Trueman Smith, the younger of the two men.[22]

Recommendations to mercy were common for youthful offenders, but youth was not alone in provoking them. They generally arose when the convicted murderer was a woman and, perhaps more unexpectedly, if the accused had a family.[23] In this latter instance, the concern was not so much with the murderer as with the family itself: having a father who had been hanged for murder was considered much more shameful than if he had been sentenced to life in prison. The case of Thomas O'Neil is illustrative here.[24] O'Neil had been a widower with six children when he remarried. His new marriage had not been happy, though, and after giving birth to O'Neil's seventh child, his young wife returned home to live with her parents. Greatly discontented, O'Neil blamed his in-laws for his wife's decision to leave him; he particularly blamed his mother-in-law, whom he later killed with a butcher knife. There was no doubt that O'Neil had killed her, and nearly killed his father-in-law at the same time, and the jury can have had little trouble deciding that the Crown had made its case. However, ten of the twelve jurors felt enough sympathy with O'Neil's situation that they later signed a petition seeking a commutation of his sentence, which they sent to Ottawa. This petition, supported by a large petition raised in the community, sought commutation on the grounds that O'Neil had a wife and seven children; it also pointed out that he was an "old man" of sixty.

These reasons for recommending mercy derived from the circumstances and character of the accused, but others, in many senses more troubling, had less to do with a particular accused, and they raise apprehension about the approach of some juries to the performance of their duties. That juries did not like to see two (or more) people hang if only one victim had been killed was common knowledge. Of course, the law provided no basis for such a balancing between crime and punishment, but one wonders whether reservations regarding the degree of punishment sufficiently influenced jurors that they sometimes went further than recommending mercy, deciding to acquit rather than convict. The fates of Alvah Henwood and Trueman Smith, discussed above, may exemplify this kind of thinking at work: their crime was extremely brutal, and one would expect them to evoke little sympathy in jurors. Nonetheless, Smith, younger by one year than Henwood and, perhaps more significantly, convicted after Henwood, received a very strong recommendation to mercy from the jury.

The case of William Robertson appears to be an even clearer example of this process.[25] Along with two other freighters, he had killed a fourth man in their company. When suspicions arose about the safety of the missing man, Robertson had cooperated with the police – in fact, without his help, the body might never have been found – and later agreed to testify regarding what had happened. He was charged nonetheless, tried before the other two men, and was convicted, though with a strong recommendation to mercy on the ground that he was young (aged nineteen) and had been used by the other two accused. In their trials, jurors apparently decided that, because one person had already been sentenced to hang for the crime, they would acquit despite the evidence against the two, which indicated that they were "more" guilty than Robertson was.[26]

The same kind of reasoning seems to have applied to Giuseppe Neuccera, convicted in 1918 of killing Giovanni Bettiol. Neuccera was charged along with another man, Antonio Fouda, and the two were tried together. At the conclusion of their trial, the jury announced that it wanted to convict one of the men and let the other go. Amazingly, the jurors were unsure of their names, and when the foreman announced their verdict could only say that "they had found the taller and older man guilty of murder, while the smaller man was acquitted."[27]

A January 1946 murder trial in Ottawa also appears to exemplify this tendency to limit the number of those convicted, though further complications having to do with jury composition did apply here. The case arose from the shooting death of Thomas Stoneman, a police detective, which resulted in murder charges being laid against three men. The Crown attorney, who was also the province's deputy attorney general, argued that all three were equally guilty – all had been engaged in a crime when Stoneman had tried to arrest them, and all had been carrying guns – but in the end the jury convicted Eugène Larment and acquitted

his two companions. The case attracted extensive newspaper coverage (in Ottawa and elsewhere), which reveals that difficulties with the jury had arisen before the trial even began. These started when a large number of potential jurors were absent during the selection of the grand jury and the petit jury, apparently because of illness. The trial judge therefore ordered that additional potential jurors be summoned, but even then things did not go smoothly. Amidst much coughing, one potential juror remarked that he opposed the death penalty, and so was excused from serving at the request of the Crown. At that point, a juror named Bradley, already sworn, jumped to his feet and announced that he too was opposed to the death penalty and wished to be excused. Justice Barlow would have none of it, though, ordering him to sit down and telling him that, because he had already sworn his oath, he would be required to serve. At the end of the trial, Bradley agreed with the other jurors that Larment was guilty as charged, but he announced publicly that he remained opposed to capital punishment and that he would be giving his jury pay to a local charity.[28] Bradley wept openly as the verdict was announced, and one cannot help wondering how all this contributed to the acquittal of the other two defendants.[29]

It seems clear from instances such as these that the sensibilities of jurors could be an important factor in their deliberations, despite the efforts of judges to impress upon them the true, and in some senses very limited, nature of their duties. Nor are the examples given here the only circumstances in which jurors might decide not to convict, or at least to recommend mercy. Recommending mercy appears to have soothed the consciences of jurors who did not want to feel personally responsible for bringing about the death of another person. This seems to have been true in a number of instances, such as the Larment case just mentioned, where individual jurors who opposed the death penalty were persuaded to accept a guilty verdict in exchange for an undertaking by the rest of the jury to recommend mercy.[30] Once again, this raises concerns about the proper behaviour of juries and the process by which verdicts were reached.[31] Most disturbing, however, are a few cases in which the jury evidently decided to recommend mercy because it had doubts about the guilt of the accused. The proper course of action under such circumstances was to acquit, but this was not always done: why? Without access to the jury-room, the question cannot be definitively answered, but it seems likely that two factors were at work. First, the jury might tend to assume that, if the accused were not guilty, he would not have been brought to trial. After all, the police, prosecutors, and probably a coroner's inquest had been satisfied of his guilt, and they knew what they were doing. This is a disturbing line of reasoning, since it suggests that juries are likely to assume the guilt, or at least be somewhat predisposed to recognize the guilt, of any accused brought to trial as a result of a public investigation – as

long, that is, as they respect the police and Crown prosecutors. At least as disturbing, however, is a second line of reasoning, which holds that the system beyond the trial stage can be relied upon to correct a jury's erroneous conviction but cannot act if a jury errs by acquitting. It might seem unreasonable to suggest this, but one must bear in mind that the jurors in all these cases had been explicitly instructed that their role and responsibilities were limited and that final decisions would be made during the stages following their deliberations in the jury-room. Such instructions were given with the best intentions but may well have had effects beyond those anticipated by the judges who delivered them, and they may help explain the frequent recommendation to mercy made by juries in murder trials.[32]

How aware the public was of problems associated with murder trial juries is impossible to assess. Certainly, judges' charges to the jury were seen as important and were extensively documented in newspapers. Certainly, those same newspapers informed the public about recommendations to mercy, that judges sometimes strongly disagreed with them, and that jurors who conscientiously opposed capital punishment had become something of an issue. However, the surviving record of capital case files in Ottawa and the thousands of newspaper articles that deal with capital cases do not reveal the extent to which these facts were put together so that the public might reach disturbing conclusions about the nature of jury deliberations. It is clear, though, that judges achieved considerable success in shifting the responsibility for the death penalty to the sentencing phases, with the result that, at the final stage of a murder trial, much attention focused on the reading of the sentence and on the demeanour of the accused/soon-to-be-condemned person, whereas the jury generally receded from view.

This narrowing of focus was anything but accidental: a result of careful staging, it had been developed and refined over many years. Sentencing was a special moment, and it allowed much of what a murder trial was about to be crystallized and communicated to the society that watched, reinforcing messages about the power of the law and the state, reconstituting society by identifying and prescribing the removal of the individual who threatened it, and once again seeking to exonerate those involved in trying and convicting the accused. It began with a caesura, a break in court proceedings, logically unnecessary when the only penalty for murder was death but in fact essential if the moment of sentencing were to confer the greatest benefit. In many respects, it marked the end of a trial and the beginning of an execution.

The break in proceedings had developed in England, long before Canada came into existence, during an age when the death penalty was much more common than it was by the late nineteenth century. This may explain why the practice arose of delivering all the death sentences at the end of a court session

rather than interspersing them throughout it. Also, when the death sentences were read concurrently, the result was much more dramatic, creating something of a climactic moment. Even when the severity of penalties had so diminished that death sentences became comparative rarities, and most assizes did not see even one, the break between conviction and sentencing remained.

In Canada, the court was occasionally adjourned after a murder verdict had been heard, and sentencing did not take place until one or more days later. Much more common, however, was a shorter break, sometimes of only a few minutes, during which those attending the trial were likely to remain seated in the courtroom. After this interval, the judge would return to the bench, but it was a very different judge, transformed to reflect the very different role he was about to perform. In some senses, the transformation was symbolic, and it relied on the knowledge of those in attendance for its meaning, but at the time of Confederation and for some years thereafter, it was physical as well, with the judge donning a special costume before reading the sentence of the court. This was a retention of the earlier practice in England, when judges delivering a death sentence wore a tight black skullcap and black gloves.[33] Black was symbolic, of course, being associated with death, but these grim accoutrements also served to distance the judge from the sentence he held in his hands and to disconnect in people's minds – even in his own mind – his person from the function of delivering a death sentence. Much of this was preserved in Canadian practice, though with some variation from province to province and over time.

Exactly how much the public saw of this, and how it understood it, is difficult to say with confidence. However, newspapers did comment on the special sentencing regalia sufficiently often that readers would have had some familiarity with what was happening and what it meant. In Ontario, when sentence was passed on William Harvey in 1889 for the murder of his wife and two children, the *Toronto Daily Mail* stated that, after hearing the verdict and having asked Harvey if he had anything to say why the sentence of the court should not be passed, Justice Street "put on the black cap, and sentenced W. H. Harvey to be hanged on Friday, the 29th of November."[34] Clearly, the *Mail* expected its readers to know that "the black cap" was a normal part of the sentencing process. This was equally true of the *Regina Morning Leader:* describing the conviction of George and John Stevenson for the murder of John McCarthy, it noted that the presiding judge dispensed with "the customary black cap," which was unusual enough to evoke comment from the *Leader* reporter.[35]

The practice of wearing a black hat and black gloves when reading a death sentence seems to have been most firmly entrenched in Quebec, where it was also most widely recognized by the public as an integral part of court ritual. Mention of these signs is very common in Quebec newspaper coverage of

murder trials. On April 3, 1902, Thorvald Hanson was convicted of murdering eight-year-old Éric Marotte, whom he killed to get the few coins the boy was carrying and spend them on whisky. The *Montreal Gazette* provided readers with a verbatim account of the sentence, prefacing it with the comment that, before reading it, "Judge Wertele put on his black hat and black gloves."[36] On September 19, 1912, Antonio Ferduto was sentenced to death for cutting the throat of Louis Hotte in an apparent dispute over a couple of bottles of beer. The jury returned its verdict late that evening, and the trial judge decided to pass sentence as quickly as possible. The *Montreal Gazette* noted that a brief delay followed "while Mr. Justice Trenholme was donning the black hat and searching through the papers on his desk for the death sentence."[37] This was a busy session for Justice Trenholme: one week later, he again "donned the black hat and after asking if the accused understood English sentenced [Carlo Battista] to hang on 20th December next."[38] This was the third time in the session that Trenholme had read a death sentence, and these frequent accounts of the court process had made the peculiar dress of a judge while delivering the sentence a familiar thing for readers. In fact, even outside Quebec, it was so common a feature that, the very next year, when a British Columbia judge failed to wear the black cap, this was suggested as a possible ground upon which defence counsel would be launching an appeal.[39] However, in the case in question, neither this nor any other argument proved successful, and Herman Clark and Frank Davis, both convicted in the death of police constable James Archibald, were hanged together on May 15, 1914.

As time passed, the practice of resorting to the black hat and black gloves seems to have faded in most Canadian jurisdictions (it appears to have been most faithfully preserved in Quebec).[40] Even so, the phrase "putting on the black hat" remained something of a euphemism for "preparing to read a death sentence," and it continued to figure in print until the 1950s, though not without occasional slippage.[41] However, one element of traditional English practice was even better preserved – the wording of the final part of the death sentence. These words were few, and they had an archaic cast, but this simply helped to create the desired effect and to ensure that their meaning was unmistakable.[42]

It was usual, however, for the judge to preface them with a few comments addressed to the jury, to those attending the court, to those involved in the functioning of the court, and, perhaps curiously, to the judge himself. Almost without exception, the judge began his sentencing address by congratulating the jury for the proper performance of its duty, frequently observing that he agreed with its verdict and noting that no alternative had been possible in light of the evidence and arguments heard in the case. This was usually accomplished

in comparatively few words, unless the judge decided to add some general remarks on the importance of the rule of law in preserving Canadian society – a society that was invariably defined as British, rather than American, and white. The second element in the address commonly took the form of a few words ostensibly directed to the convicted person but clearly intended to have an impact on everyone present as well as those who would read the accounts of the reporters sure to be in attendance. In fact, the accused sometimes did not understand the language in which the judge spoke. The thrust of his message tended to be very much the same, regardless of the facts of the case. Somewhat in contrast to the message presented in the charge to the jury, it did not encourage the thought that either the appeal courts or the minister of justice would save the life of the convicted person. Rather, the judge typically informed him that his life would shortly end and that he had better spend what little time was left him attending to the health of his soul. The judge then ordered that he be returned to the prison in which he had been held during the trial and on a specific date hanged by the neck until dead.

The judge's sentence was the most powerful moment in a murder trial, and its impact on those who heard it could be dramatic. The jurors might feel relieved that their duties – in many senses, their ordeal – was done, and they might take a measure of comfort in the judge's reassurance that they had performed they task admirably and had delivered the correct verdict. However, the comments addressed by the judge to the person whom they had just convicted will in many instances have come as a shock, making it abundantly clear that the direct result of their verdict was to be the death of the accused. They would have known this, of course, but at the same time, the judge's charge had assured them that, for a number of reasons, they should not draw this simple equation. To have the truth presented to them so starkly must have been disturbing to many. Consider the case of Thomas Schooley, sentenced to death in 1874 for killing Henry Forman. Justice Gray is reported to have begun his sentencing with these words:

> Then, prisoner at the Bar, it becomes my painful duty to pass the final sentence of the law upon you. You have been found guilty of the murder of Henry Forman, a man with whom you lived, and the father of your wife. It is not my wish to utter a single word that will add to the anguish which you must feel. *To you, life may be said to be at an end,* and the Court can but express the hope that during the few weeks yet left to you, you will so prepare yourself that when the gates of this life close behind you forever you will get a vision of that better life which lies beyond.[43] (emphasis added)

Announcing to the court that the life of the accused was effectively "at an end" must have strongly impressed the jury with the fact that its actions had determined the fate of the prisoner in the dock. This is reflected in newspaper discussions of sentencing, which often remark that jurors were visibly moved by the judge's words, that they looked pale, and not infrequently that they wept.

Reporters paid even closer attention to the impact of sentencing on the convicted, often relating in great detail – and with a considerable degree of imagination – exactly how they looked, behaved, and felt. Their slightest movement excited comment, and references to their pallor (hardly surprising in people who had just spent several weeks, and possibly months, in a jail cell or a courtroom) were frequent.[44] These things, usually ascribed to frayed nerves, led reporters to characterize the convicted as "crushed" or as "emotional wrecks." On the other hand, if they responded calmly to the sentence, they were likely to be described as unnatural and even bestial. Only a very few evoked admiration for their stoicism: they might be referred to as noble, or more commonly, simply as "game." In all these cases, something of their humanity had been lost: no longer seen as people, they were viewed as objects of curiosity. This distancing is unsurprising, since it helped journalists, and their readers, to avoid a too-immediate confrontation with the brutal reality of a death beginning before their eyes.

One person, however, could not escape it, because he had played a direct role in bringing it about: the judge. Judges were very familiar with the process of a murder trial, and though they might manage to convince the jurors, lawyers, witnesses, and others involved that they had no personal responsibility for its outcome, it is clear that they frequently failed to convince themselves. The words they read had been written long before, and the costume they wore was intended to create the illusion that someone other than they themselves spoke, but on a personal level judges knew that the process they were setting in train had death as its ultimate result. Some seem to have found consolation in the knowledge that the sentence was automatic – at least for much of the period in question – and in the fact that rights of appeal automatically applied in capital cases. This was reflected in the words of Justice Logie, when he sentenced William McFadden, who, along with Roy Hotrum, was convicted for killing Leonard Sabine during a botched robbery. After reading the sentence, Logie remarked to the jurors that "they were, like himself, cogs in the wheels of justice, and that responsibility for the ultimate disposition of the case rested with the Executive in Ottawa, who could exercise the prerogative of clemency."[45] For other judges, though, and one suspects for most, this was cold comfort, and accounts of sentencing are replete with indication of their discomfort and often distress.

After sentencing Antonio Ferduto, Justice Trenholme remarked (to himself, rather than to the court, it was noted), "There, my painful task is done."[46] When sentencing Giuseppe Neuccera, Chief Justice Archambault remarked, "Now, I regret very much to have to pass the sentence of death upon you. It is the greatest regret of my life to have to pronounce the sentence."[47] Justice Mowat could hardly read the sentence, when condemning John Barty to death for the murder of Nancy Cook.[48] The judge sobbed while sentencing Emanuel Ernst to death.[49] The emotional strain was enormous, regardless of whether judges thought defendants had been properly convicted, and it could produce more visible effects than difficulty in speaking or tears. At Rheal Bertrand's first trial for the murder of his wife, Justice Bienvenue suffered a lethal heart attack while addressing the jury.[50]

Nonetheless, during the period when capital punishment was in effect, Canadian judges were required to pass sentence of death on more than fifteen hundred persons.[51]