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The Lottery of Death: Capital Punishment, 1867–1976

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UNTIL THE NINETEENTH CENTURY, there was no appreciable movement to abolish the death penalty in Canada. In the 1910s a Liberal backbencher waged a one-man campaign but he was largely ignored by members on both sides of the House. In the inter-war years, individual parliamentarians of all political stripes introduced private members' bills from time to time, but they persistently failed to pass second reading. When Britain launched a royal commission to consider capital punishment in 1949, abolitionists' hopes brightened. While Canadian politicians cautiously awaited the commission's recommendations, Prime Minister Louis St. Laurent's government initiated a flurry of criminal justice reform measures, most notably the overhaul and rationalisation of the *Criminal Code* in 1954. In the course of revising the *Code*, the government decided to reserve several criminal justice issues, including capital punishment, for further study. In December 1953, the Minister of Justice, Stuart Garson, appointed two committees to carry on the mission of legal reform: one, a panel of experts mandated to review parole and the remission of sentences and another, a Special Joint Committee of the House and Senate, to study "capital punishment, corporal punishment, and lotteries."¹

Although this peculiar combination of objectives sounds like a twisted joke, no one seemed to appreciate the irony of including flogging, executions, and games of chance in the same mandate. The Committee dealt with all three issues concurrently, requiring them to consider testimony on matters ranging from bingos to execution techniques—often in one day.² Although the Committee did not conflate the issues of punishments and lotteries in its final reports, it established that life and death decisions were reached in seemingly lottery-like fashion. Standards of mercy or severity were nowhere spelled out, and repeated inquiries failed to turn up anything

¹ Canada, *Debates of the House of Commons*, 15 December 1953, at 940 [hereinafter *Debates*].

² Committee members were somewhat reluctant to switch from issue to issue, but decided that it was the only practical solution. One MP, F.D. Shaw, asked the Chairman: "is it the intention to jump from lotteries to corporal punishment to lotteries to capital punishment, to jump back and forth all over the board?" Senator Hayden replied: "I think your aim is quite desirable, but if we have a witness coming here who has knowledge of the three matters and he wants to make a presentation on all three, it would be rather useless to bring him back three times, ... [so] we are trying to separate these as much as possible, but we cannot do it on all occasions": Minutes of Proceedings and Evidence before the Joint Committee of the Senate and House of Commons on Capital and Corporal Punishment and Lotteries, *Journals of the Senate*, 2 March 1954, at 31 [hereinafter J.C. Minutes].

like a scientific scheme to measure culpability. Rather, the Committee's investigation of post-conviction case reviews revealed for the first time that the most critical decisions in criminal justice were those least governed by rules.³

Joint Committee members were surprised to discover this apparent violation of the spirit of the "rule of law"; but they were prepared to accept Department of Justice claims that the very nature of capital case reviews demanded a flexible approach, albeit one guided by general principles known to the participants. The decision-making process, a vestige of the royal prerogative, could neither be defined nor disclosed. Finding it impossible to discern the principles governing capital case reviews, the Committee resolved that this was all for the best:

It would defeat the purpose of the exercise of the prerogative of mercy to attempt to codify the instances in which it might be invoked. The only safe and fair generalization that can be made is that commutation occurs in all cases where extenuating circumstances of a substantial nature exist or the degree of moral culpability is not sufficient to warrant the supreme penalty.⁴

After two years of interviews with key decision-makers, Committee members could not provide precise details about decision-making because none were forthcoming. Not even the Joint Committee's scrutiny, followed by two decades of abolitionist politician's dogged questioning, could pry open the closed doors of Cabinet deliberations.

What, then, can we learn about the history of the death penalty's application, given its lottery-like appearance? Determination of condemned persons' suitability for commutation or execution may have seemed more random than principled, as abolitionists charged, but quantitative evidence suggested that cabinet review results were hardly arbitrary. Kenneth Avio has traced significant patterns in the enforcement of the death penalty over the mid-twentieth century: certain characteristics (such as the offender's ethnicity and occupation, or the degree of aggravation in a murder) contributed markedly to the likelihood of execution. As one might predict, certain types of people, especially young working-class males, as well as men from ethnic and racial minorities, tended to suffer disproportionately. However, Avio has cautioned against statistical analyses that focus on any one characteristic, such as ethnicity or gender, arguing instead that a broad range of factors associated with offenders and their crimes contributed to outcomes. Still, he has confirmed conclusions of earlier authors who employed less sophisticated statistical analyses to build similar arguments: there is convincing evidence that the death penalty was imposed in a discriminatory, unprincipled fashion.⁵

³ Of course, critics of the death penalty had long suspected this to be the case. The Committee's Report was the first comprehensive review of the penalty's administration, however.

⁴ Special Joint Committee of the House of Commons and the Senate, "Final Report on Capital Punishment," *Debates of the Senate*, 27 June 1956, at 545e [hereinafter J.C.R.].

⁵ Kenneth Avio, "The Quality of Mercy: Exercise of the Royal Prerogative in Canada" (1987) *Canadian Public Policy* 366 at 371-2. For further statistical studies, see Avio, "Capital Punishment: Statistical Evidence and Constitutional Issues" (1988) *Canadian Journal of Criminology* 331; David Chandler, *Capital Punishment in Canada* (Toronto: McClelland and Stewart, 1976); C.H.S. Jayewardene, *The Penalty of Death: The Canadian Experiment* (Lexington, Mass: Lexington Books, 1977).

Qualitative evidence adds texture to the statistical outline of discrimination. At the micro-level of case studies, we can see that cabinets conducted case reviews like primitive lotteries—as if they drew lots to determine whether or not to execute. The results were not random because condemned people ended up with different combinations of short and long lots representing factors—both legal and extra-legal—that cabinets considered. The conviction, of course, was a short straw, so advocates of the condemned scrambled to find longer ones: steady workers, self-sacrificing mothers, or beloved members of communities could be constructed as persons meriting mercy. Alternatively, people with histories of combativeness, as well as outsiders of all sorts, tended to fare poorly. Racist and class-based assumptions were also at play, yet these forms of discrimination did not always operate to the disadvantage of those sentenced to die. Racist notions of intelligence and moral character, for example, could inspire pity for people of “lesser” races. Furthermore, persons who were economically and politically marginal, notably women, and people subjected to colonisation schemes, particularly Aboriginal peoples during early phases of contact with whites, were often treated leniently by paternalistic cabinets. Some saw their luck shift because their cases arose in the wake of a controversial hanging or commutation; others benefited or suffered because their reviews occurred when cabinets were bombarded by lobbyists. In other words, patterns of severity were generally disfavoured to the poor, to men, and to those from identifiable racial and ethnic groups, but the drawing of lots on a case-by-case basis yielded surprises. Such was the drama of capital punishment.

Cabinet members and Department of Justice officials always claimed that they adhered to strict standards of fairness and impartiality; but variations in sentencing patterns over time point to the influence of political concerns and the deeper, cultural meanings of capital crime and punishment. Prime Minister John A. Macdonald’s decision to execute Louis Riel in 1885 sent a chilling political message, but so did the execution of obscure convicts who have since faded from historical memory. In any political régime, capital punishment is the most spectacular symbol of justice (or injustice) in action, but in parliamentary democracies, cabinet members are keenly attuned to their fellow members’ opinions and the general public’s perception of their decisions. The men who reviewed capital cases were first and foremost elected politicians, anxious to maintain their own legitimacy as well as that of the law. Every decision, while prompted by a judicial act, was ultimately produced through a political process. Bureaucrats and politicians read every case selectively, placing greater weight on some factors over others; after all, this is the essence of discretion—discriminating between different options. From the commission of the crime to the conviction, a chain of discriminatory practices (a witness’s decision to report the crime, the prosecutor’s choice of a capital charge, the jury’s recommendation for or against mercy, the judge’s emphasis on the condemned person’s merits or demerits) produced the files that cabinet members reviewed. The critical difference was that ministers of the crown were the last in this series of discriminating actors to draw lots.

In the wake of Foucault’s *Discipline and Punish*, most historians abandoned the Whiggish notion that penal change over the nineteenth and twentieth centuries expressed the triumph of humanitarianism. However, they have eagerly attacked his macro-theoretical approach to penal history by chalking up empirical evidence of inconsistencies between jurisdictions and of exceptions to the general rule of a

movement away from physical punishment toward an economy of privation and restricted liberty. Certainly the enduring practice of capital punishment, one hundred and thirty years after the first penitentiary was built, has undermined the applicability of Foucault's theory to the history of capital punishment in Canada. Some researchers have recuperated Foucault's insights by recognising that he never meant his observations to become rigid *schemata*, unassailable by empirical evidence. In Michael Dutton's history of punishment in China, for instance, he abandons Foucault's timetable of penal transitions because of "the constantly re-emerging spectre of past practices," including corporal and capital punishments. Still, he pursues Foucault's project of mapping transitions in regimes of punishment that are oriented toward spectacle, on the one hand, and discipline, on the other. Like David Garland, Dutton modifies Foucault's analysis by stressing the unevenness and partialities of penal change and by pointing to the constant threat of the re-emergence of older technologies of punishment. In Garland's terms, the "trend towards normalizing, disciplinary sanctions and an administrative mode of dispensing them has never successfully banished the punitive, emotive character of the penal process."⁶

In the Canadian context *ad hoc* lotteries of death and the lingering practice of capital punishment illustrated the synchronicity of "ancient" and "modern" forms of punishment. Moreover, contrasts between the ethos of spectacular and regulatory criminal justice policies and practices produced internal tensions that eventually provoked a crisis of legitimacy, which politicians resolved through the formal abolition of capital punishment in 1976.⁷ Tracing its history from Confederation to abolition is therefore not a story of progress, but an account of struggles between conflicting rationales of punishment, struggles that were played out on the broader terrain of culture and political exigencies.

I. Deliberating Death

The Dominion government's jurisdiction over criminal matters meant that the federal cabinet would assume responsibility for reviewing capital cases. Executive review was bound by procedural rules set out in the *Criminal Procedure Act*, 1869, and codified in 1892.⁸ Shortly after Confederation, the Department of Justice (usually headed by the Prime Minister until the 1890s) apparently established administrative procedures to govern cabinet consideration of cases. Whenever persons were convicted on capital charges, the convicting provincial or territorial judge was to prepare a report detailing his impressions of the trial and expressing his opinion on the appropriateness of the death penalty. In addition, clerks prepared

⁶ David Garland, *Punishment and Modern Society, A Study in Social Theory* (Chicago: University of Chicago Press, 1991) at 161; Michael Dutton, *Policing and Punishment in China, from Patriarchy to 'the People'* (Cambridge: Cambridge University Press, 1992). Dutton rejects the Foucault timetable of penal transitions because Chinese socialism has "fused certain traditional technologies of policing, punishment, and propaganda to the body of socialistic practices ...": *ibid.* at 6.

⁷ On the abolition of capital punishment in England, see Harry Potter, *Hanging in Judgment: Religion and the Death Penalty in England from the Bloody Code to Abolition* (London: SCM Press, 1993). Potter argues that political lobbying and pressure from fringe elements, rather than the established church, provoked the government into action.

⁸ 55 Victoria., c. 29.

verbatim transcripts of the trial. These two documents were forwarded to the secretary of state whether or not prisoners launched formal judicial appeals.⁹ Although ministers of justice had the power to order a new trial or to refer cases to provincial courts of appeal, they did so seldomly: only nine new trials were ordered from 1892 to 1955. The 1892 *Criminal Code* provided for appeals on questions of law, or mixed questions of law and fact, but the death sentence itself could not be appealed. Executive clemency was the last possible resort for the vast majority of the condemned, a kind of safety net of equity according to the death penalty's defenders. Testifying before the Joint Committee in 1954, Minister of Justice Stuart Garson assured detractors that capital case reviews expressed the very essence of democracy: "no matter how friendless and how terrible a rogue a man may be, even if he has no other human being to speak for him at all, his case comes before the whole cabinet and is reviewed in detail just as if he has a host of friends."¹⁰

In practice, the scope and contents of capital case files varied dramatically since some people had many friends and some had none, and because case review procedures were governed both by statute and by customs which altered over time. As the Joint Committee on Capital Punishment noted in 1956, the Remission Service had always been receptive to evidence concerning the condemned person's "background, character, personality, conduct in prison, and other relevant matters from police, custodial officers and other responsible sources."¹¹ Interested individuals and organisations contributed material beyond standard reports for cabinet to consider. Letters from anguished relatives, appeals from religious or community leaders, and earnest pleas from total strangers consumed with sympathy, and sometimes vengeance, appeared in many files. When capital convictions were especially unpopular, petitions with hundreds of thousands of signatures were sent to the government by organisers who also co-ordinated letter-writing campaigns. Editorials and articles were also filed in cases that attracted extensive media coverage. Although each case received the same, minimum standard of consideration, the amount of material in individuals' case files varied enormously, from a few sheets of paper penned by the trial judge and a terse note indicating the cabinet's decision, to cartons of petitions, letters and clippings.¹² As the ex-director of the Remissions Office reflected in 1974, the fattest files usually belonged to financially and socially well-placed individuals, although not necessarily those who were spared.¹³

Once materials were collected by the secretary of state, the nominal representative of the governor-general, they were shunted to the Department of Justice whose officials prepared a synopsis of the contents for the minister. By the 1880s the

⁹ Automatic appeals of capital convictions to a provincial court of appeal were not instituted until 1961.

¹⁰ J.C. Minutes, *supra* note 2 at 38

¹¹ J.C.R., *supra* note 4 at paragraph 11.

¹² Evidence of personal visits with the minister also exists in case files, particularly by the mid-twentieth century when air travel became feasible. In these cases, condemned persons who were tried near Ottawa, and those fortunate to have resourceful lawyers with political connections as well as money, fared better than their fellow condemned.

¹³ Chandler, *supra* note 5 at 34, note 4.

Dominion government decided that sorting through the growing contents of files and preparing reports required greater manpower; accordingly the task was assigned to the Remissions Branch, a sub-department of Justice that dealt principally with "tickets of leave" and modifications to fines and sentences of imprisonment. With the Remissions Branch report in hand, the Minister of Justice met with his cabinet colleagues and suggested a course of action that typically corresponded to the Remissions Officer's recommendation. Once cabinet reached its decision, the minister conveyed it to the governor-general who, by the late-nineteenth century, generally rubber stamped it. Disputing cabinet decisions was rare, particularly after Lord and Lady Aberdeen's controversial influence-peddling to commute Valentine Shortis's sentence in 1895. Not only did the governor-general and his wife overstep the informal boundaries of office, but their lobbying activities made politicians uncomfortable about having the politics of death penalty dealings so exposed.¹⁴

How politicians decided who to hang was shrouded in privilege and mystery, but the procedures that governed the flow of documents and the division of responsibilities was a model of Weberian bureaucratic rationality. Although the prerogative of mercy allowed unlimited scope for discretion, its application was established by statute law. Here we see an instance of conflicting legal principles, co-existing within the same legal text. The 1892 *Criminal Code* explicitly allowed that the royal prerogative could revise or overturn any punishment dictated by statute. The absence of a sovereign to dispense personal justice in the new Dominion was remedied through letters patent which empowered the governor general to act on behalf of the monarch in consultation with the elected cabinet of Canada. As the 1956 Committee of Inquiry that studied the Remissions Branch and parole policies observed: "this combination of prerogative and statutory powers provides a useful flexibility which assures that, ultimately at least, relief can be granted in all deserving cases."¹⁵ Those who drafted the *Code* and those who applied the law recognised that the prerogative of mercy was a loophole in a legal system that otherwise dictated severity through the mandatory sentence of death. Mercy was to counterbalance terror, to insure fairness and equity (in the eyes of its supporters) or, as detractors charged, to reinforce the legitimacy of a fundamentally unjust political and economic order.

Historians debate whether or not the scales of justice were tipped systematically in favour of hegemonic groups, but recent studies confirm that the lottery of death reflected and reinforced inequality on the basis of class, race, sex and a host of other factors, including age, religion, and region. Although humanitarian sentiment motivated most abolitionists, their arguments against cruelty and unfairness ultimately proved less persuasive than their charges of irrationality and unaccountability in the disposition of capital cases. The prerogative of mercy had long allowed an inner circle of politicians to hold mini-referenda on capital punishment, without having to adopt a policy of abolition or amend the *Criminal Code*. The post-war emphasis on

¹⁴ Martin Friedland, *The Case of Valentine Shortis: A True Story of Crime and Politics in Canada* (Toronto: University of Toronto Press, 1985).

¹⁵ Canada, Department of Justice, *Report of a Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada (Fauteux Report)* (1956) at 28.

rationalising the criminal justice system, coupled with increasing efforts to establish administrative guarantees of human rights, rendered this ancient form of *ad hoc* personalised justice more difficult to defend by the 1950s and '60s. In spite of the capital statutes' severity, then, mercy had always been exercised as a matter of political will. Similarly, it took political will to abolish capital punishment in 1976.

II. Deciding Who Dies

The history of the death penalty in post-Confederation Canada is essentially a story of murder and its legal sanctions.¹⁶ With one noteworthy exception, the only people executed were those found guilty of murder, although traitors, rapists, child molesters and pirates were also liable at various times. The death penalty was carried out selectively, both in terms of the offences to which it was applied, and in terms of the offenders who were executed. It was also used conservatively. From Confederation to 1960, almost one half of convicted murderers escaped the gallows through executive clemency and, after 1961, thanks to a policy of *de facto* abolition.¹⁷ There was an enormous gap between mandatory pronouncement of the death penalty for capital crimes, on the one hand, and actual application of the death penalty, on the other. There was nothing illegal in the dispensation of mercy, nor were there legal safeguards to ensure that individual prejudices and sympathies might not colour cabinet reviews. Although neither Liberals nor Conservatives adopted an abolitionist policy until the Liberals' temporary abolition bill of 1967, both parties when in power commuted close to half the sentences they reviewed. In spite of governmental assurances of fair and impartial reviews, patterns of mercy and severity were nevertheless discernible. Condemned persons' chances of commutation were clearly linked to assumptions about the dangerousness of certain criminals and the culpability of various categories of offenders, as well as to public anxieties about changing rates of criminal violence. Until the 1960s, capital punishment remained an important symbol of the state's commitment to law and order, yet its sporadic deployment eventually drew criticism from retentionists and abolitionists alike.

The character of capital case reviews varied over time, as governmental priorities shifted and as the sentiment and pseudo-science of culpability-determination altered. This was particularly evident in cases concerning Natives, women, youth, and ethnic and racial minorities. Equally important was the impact of the abolition movement by the 1950s, and broader calls for a correctional and therapeutic orientation in criminal justice. Analysing the changing historical contexts in which capital punishment decisions were reached pushes us beyond exploring outcomes, to explaining them.

¹⁶ Manitoba joined Confederation in 1870; British Columbia in 1871; and Prince Edward Island in 1873. Saskatchewan and Alberta did not join until 1905 and Newfoundland did not become part of Canada until 1949. All subsequent statistics refer to the federal union as it was constituted at various points after 1867.

¹⁷ Guy Favreau, *Capital Punishment: Material Relating to its Purpose and Value* (Ottawa: Information Canada, 1965) Appendix I. Between 1867 and 1960, 54% of persons sentenced to death, and whose convictions were not later set aside on appeal, were executed, and *infra* note 54.

III. Treason and the State

Treason trials and the execution of traitors offer incontestable evidence of capital punishment's political dimensions. Although treason was obviously a crime against the state or the sovereign, all criminal offences shared this definition. The crown, rather than victims of crime or their families, prosecuted and the sovereign exercised the right to dispense mercy. With the rise of constitutional monarchy, that right was exercised indirectly and the executive branch of government assumed responsibility for determining whether or not offenders would receive their punishments. The *ad hoc* nature of the decision-making process, and the scope for personal and political prejudices inherent in cabinet reviews, retained the idiosyncratic character of the royal pardon. That capital punishment was never administered according to a stated policy or an objective set of criteria was hardly surprising. Cabinet reviews of capital cases were always politically tinged: condemned traitors merely made this obvious.

The most famous capital trials in the post-Confederation period and, arguably, in Canadian history, concerned charges of treason. The Northwest Rebellion, a violent clash between defenders of Métis self-government and those who enforced federal powers over the Northwest Territory, led to the trial and conviction of its leader, Louis Riel, on a charge of high treason.¹⁸ Politically motivated accounts have concentrated on the appropriateness of Métis' and Natives' resort to violence, as well as on Ottawa's refusal to commute the sentence. Yet the trial was also significant as a unique, Janus-faced capital case.¹⁹ In one respect, it harkened back to the sedition and treason trials of the late-eighteenth and early-nineteenth centuries: Riel's trial stood out because it was the last treason trial in the history of the Canadian state to result in an execution.²⁰ In other respects, dwelling on evidence concerning Riel's alleged insanity presaged the practice, rare before the 1920s, of using psychiatric assessments to determine an accused felon's culpability.

Although Riel's trial has been described as a judicial farce, both by contemporary and more recent sympathisers,²¹ anomalies in the case expose some of the inconsis-

¹⁸ Differences between the Métis and Ottawa over Native land rights and new settlement schemes in the West escalated from letter writing campaigns to armed rebellion in 1885. Louis Riel was the self-proclaimed leader of the rebels. By the spring, Riel led a band primarily of Métis who fought a costly but successful battle against the newly formed North West Mounted Police at Duck Lake, only to be defeated at Batoche in May. In these battles and Native skirmishes, several hundred people were killed before Ottawa subdued the rebellion. Riel, made a martyr for his cause, surrendered himself for trial.

¹⁹ General histories of Riel and the Northwest Rebellion include George R.B. Stanley, *Louis Riel* (Toronto: Ryerson, 1963); Desmond Morton, *The Last War Drum* (Toronto: Hakkert, 1972); Association of Métis and Non-Status Indians of Saskatchewan, *Louis Riel: Justice Must be Done* (Winnipeg: Manitoba Métis Federation Press, 1979); and Thomas Flanagan, *Louis "David" Riel: "Prophet of the New World"* (Toronto: University of Toronto Press, 1979). For an account that focuses on the trial, see Thomas Flanagan, *Riel and the Rebellion Reconsidered* (Saskatoon: Western Producer Prairie Books, 1983). Desmond Morton, ed., *The Queen v. Louis Riel* (Toronto, University of Toronto Press, 1974) provides the trial transcripts.

²⁰ Aside from Riel, only five men have been convicted for capital crimes other than murder or rape. In 1871, Louis Letendre of Fort Garry, Manitoba, was convicted of unlawfully levying wars against her majesty and, in 1872, four men were convicted in Victoria on charges of piracy. None were executed. Canada, Department of the Solicitor General, *Questions and Answers Relating to the Capital Punishment Issue* (Ottawa: Department of the Solicitor General, 1976), Question 44.

tencies that had plagued the administration of justice in the west for a century. The court system was only a recent artifact of federal governance in the northwest and many felt that a serious capital case might more appropriately be tried in an established provincial court. The possibility of conducting the trial in Ontario or Quebec was entertained, but the government decided that it should proceed in the jurisdiction in which the felony occurred, in spite of the infancy of the legal system in the territory.²² Crown prosecutors Christopher Robinson and B.B. Osler, two of the most eminent lawyers of the period, pledged to accord the accused every protection consistent with the legal procedures outlined under *The North-West Territories Act*. In spite of, or due to, the defence tactic of painting Riel as unbalanced, he was convicted on a charge that carried a mandatory sentence of death.

Hopes for a reprieve were not unfounded, since the jury had recommended Riel "to the mercy of the crown" and because the execution of traitors was, by the 1880s, a distant memory. Riel's counsel pressed his appeal at the most vulnerable point: the prisoner's state of mind. A finding of insanity would have offered the Conservatives, torn between Quebec's demands for clemency and Ontario's cries for vengeance, a politically palatable compromise of retaining the verdict while permitting the exercise of mercy. None of the three medical men appointed secretly by Macdonald to examine Riel was an "alienist" (psychiatrist) but each agreed that the prisoner had peculiar ideas and delusions; they differed, though, on the question of Riel's accountability for his actions.²³ In the end, Macdonald and his cabinet decided that it would be more expeditious to make an example of a traitor, particularly one who threatened Canadian sovereignty in an area vulnerable to American annexation sentiments, than to adhere to inconclusive medical opinion. After launching an unsuccessful appeal to the Manitoba Court of Queen's Bench and the Judicial Committee of the Privy Council, all avenues for a reprieve closed and Riel was hanged within the gaol yard at Regina on 16 November 1885.

The prosecution of a treason trial and its aftermath are obviously loaded with political import but the Riel trial only dramatised the political nature of decision-making evident in all capital cases that came before the cabinet. The fate of less famous condemned persons was equally determined by the weight not of judicial opinion but of the political ramifications of execution or commutation. The overt

²¹ See L.H. Thomas' scathing assessment, "A Judicial Murder— The Trial of Louis Riel" in Howard Palmer, ed., *The Settlement of the West* (Calgary: Comprint Publishing, 1977). The impending centenary of the Rebellions in 1985 inspired modern-day supporters of Riel, including the Association of Métis and Non-Status Indians of Saskatchewan, to petition for his posthumous pardon. This has not yet occurred.

²² The *North-West Territories Act* of 1880 made no provisions for a grand jury or an indictment to be drawn against an accused felon. Because of the sparseness of settlement, a full jury was set at six members. Finally, a stipendiary magistrate, rather than a tenured judge, was to try the case. These liabilities, along with the brevity of the case, have been the focus of criticism of the government's handling of the affair. Flanagan, *supra* note 19 at 116–7.

²³ On the medical commission and Macdonald's determination to see Riel hanged, see Flanagan, *supra* note 19 at 135–45. Flanagan agrees with the doctors who found Riel accountable because his ability to distinguish right from wrong did not excuse him under the definition of the McNaughten Rule, then in force in Canada. Irresistible impulse was not part of the definition of insanity in Britain, Canada or many of the U.S. states.

nature of this process was inescapable in cases of both ruthless and lenient treatment of Aboriginal condemned.

IV. Colonisation and the Death Penalty

Complaints about the impropriety of procedures in the Riel trial overshadowed criticism of the trials of Natives accused at the time of the North West Rebellion. In the aftermath of arson and armed attacks by Métis and local Natives, settlers keenly sought the full severity and demonstrability of the law. Ten of twelve Aboriginal men tried for murder were found guilty, a not surprising figure considering that none of the defendants had an interpreter or counsel. If this travesty might be interpreted as one in a series of episodes of partial justice, the public execution of eight Natives (two had received reduced sentences) were blatantly illegal. Overlooking the 1869 private execution statute brought in by his own government, Prime Minister Macdonald ordered the executions to be conducted on a scaffold of sufficient height to permit public viewing. It was not the white spectators who concerned him — they would be eager to attend as much as the local Natives, whom he ordered rounded up to witness the execution of their relatives.²⁴ This extraordinary orchestration of ritualised punishment suggested that the periodisation of criminal justice régimes was not as neat as historians of punishment have assumed. Racial conflict and the blind ambition of state formation led to legal short cuts and outright violations of their own laws; white colonisers' casuistry explained away a style of rough, summary justice supposedly left behind in the early-nineteenth century.

Prior to the 1920s, shifting phases and strategies of colonisation produced swings between mercy and severity. Although patterns and paces of colonisation varied across the country, the 'otherness' of Aboriginal peoples in the eyes of white cabinet members was always foremost in their minds. As Spencerian theories of racial taxonomies gained credibility and the federal project of assimilation was set into place by the 1870s, "scientific" notions of Native and Inuit primitiveness legitimated cabinet members' opinions that such people were not fully responsible for their actions. As will be discussed below, similar assumptions of irresponsibility arose when the executive deliberated cases involving women—likewise lower on the male evolutionary scale! There were important differences in perceptions of 'savage' versus feminine irresponsibility, however. When it came to condemned Natives, arguments could be made against the deterrent effect of killing wrongdoers who were little more than 'brutes.' Moreover, in the wake of the Riel Rebellion, armed Native resistance was reduced to isolated skirmishes and individual assaults that failed to

²⁴ Cyril Greenland, "The Last Public Execution in Canada: Eight Skeletons in the Closet of the Canadian Justice System" (1987) 29 *Criminal Law Quarterly* 415 at 418–9. The scaffold was erected at a height of twenty feet and placed inside the fort at Battleford. Frank Anderson shows that this was not the last "public" execution, in part because sheriffs were permitted to invite witnesses (over 200 turned up for the double hanging of Cordelia Viau and her accomplice Samuel Parslow in Montreal in 1899), but also as a result of the low walls or fences that surrounded local gaols, particularly in the west. Hundreds clamoured for perches to witness the execution of Reginald Birchall in Woodstock in 1890. Hilda Blake's hanging was clearly visible from behind the fence at the Brandon provincial gaol in 1899. Locals considered the execution unwarranted and avoided the scene in protest. Frank Anderson, *A Concise History of Capital Punishment in Canada* (Calgary: Frontier Publishing Ltd., 1973) at 41, 43, 48.

inspire an uncompromising policy of severity in enforcing the death penalty. In effect, lenience was a by-product of colonisers' arrogance about their own superiority and disdain toward the victims of Aboriginal homicides, more often than not other Natives.

Capital punishment could be an instrument of racist terror, yet selective mercy toward Aboriginal capital offenders was no less racially informed or politically hued. The majesty of the law was integral to Canadian attempts to colonise Native peoples, but rigorous law enforcement—in different geographical and temporal contexts—was balanced, consciously, with lenience in sentencing. In some instances, merciful treatment sprang from whites' appreciation of the culturally distinct context of Aboriginal killings. As one Department of Indian Affairs Deputy Superintendent put it, Ottawa had to consider the "impossibility of judging only by the white man's methods, the conduct of a savage governed by superstitions and whose habits are entirely opposed to civilization."²⁵ For this reason, "Wendigo" homicides, or the ritual slaying of persons believed to be possessed with an evil, threatening spirit, were treated rather casually, particularly in places where Christianity's hold was tenuous. Some show was made in arresting and trying culprits but few were capitally convicted, and those who were received light, commuted sentences. Lenience was applied even in cases where Indian agents and local whites had demanded justice and expensive North West Mounted Police investigations had been conducted.²⁶

Show trials, followed by mercy, reinforced the broader agenda of racist assimilation. When A.E. Forget, the Indian Commissioner for Manitoba and the Northwest Territories, wrote to his superior to urge the prosecution of a Wendigo homicide, he warned that "should the Government fail to investigate it completely ... the Indians may lose their respect and fear of the law." In addition, he felt that suppressing a "Pagan" custom fell under the Government's "policy of civilizing its wards"²⁷ Firmness at the sentencing stage was another matter, however. Officials in the Department of Indian Affairs knew that mercy could also be manipulated as a tool of acculturation, as this 1899 commutation plea illustrated:

[T]he enforcement of the extreme penalty might create an impression, amongst the Indians ... that contact with civilization imperilled their existence. Such an impression would defeat the object, recognized by the Indian Act, and the provision made by Parliament from time to time for the Indians, namely gradually to inculcate in them habits of thought similar to those of the white population in this country.²⁸

²⁵ This is an excerpt from a plea issued by the Deputy Superintendent of Indian Affairs for clemency in the case of Paul Sabourin, a Native man convicted of the murder of his sister-in-law at Great Slave Lake in 1899. Quoted in Cornelia Schuh, "Justice on the Northern Frontier: Early Murder Trials of Native Accused" (1973) 22 *Criminal Law Quarterly* 74 at 83.

²⁶ Although the details of the final disposition of cases are incomplete, it appears that most of those accused of Wendigo murders were convicted of manslaughter and given sentences of several months. Schuh, *supra* note 25 at 76.

²⁷ Quoted *ibid.* at 78.

²⁸ At the time, the Department was preparing to negotiate a treaty with the Indians of Great Slave Lake and was concerned that they not receive a fearsome image of the law. Sabourin's sentence was commuted to life and he died of tuberculosis in Stoney Mountain Penitentiary after three years' imprisonment: *ibid* at 81-3.

Prosecutions sent a message to white colonisers that statutes were mightier than swords; at the same time, mercy was meant to forestall Aboriginal peoples' all-too-reasonable impression that contact with whites had been disastrous.

Racist paternalism saved a few necks, but it never guaranteed escape from the noose. Furthermore, it seemed that cabinets became less susceptible to the acculturation argument and more receptive to the rationale of uncompromised punishment. Avio's studies confirmed that from 1920 to 1957, Aboriginality contributed significantly to the likelihood of execution: Native condemned persons' risk of execution was 62% (if their victims were also Natives), but it jumped to 96% when victims were white.²⁹ Clearly the effectiveness of a racist cultural defence strategy was limited: it might prove persuasive in periods prior to enforced acculturation, or in cases where victims were Natives, but it became less effective by the mid-twentieth century, and it had never provided a serviceable defence if victims were white.

Paternalism evaporated in the face of inter-racial slayings involving Native defendants. Cabinets were averse to granting clemency if Natives killed whites, or if conflicts with whites had provoked homicide. In 1899, for instance, three of four brothers by the name of Nantuck, convicted of killing a U.S. prospector in the Yukon, were executed, while the fourth acted as a crown witness and was reprieved. International pressure for reprisal and anxieties to secure access to the untapped riches of the north tipped cabinet in favour of allowing the executions to proceed. The 1921 trial of Albert LeBeaux, the first Native person to be executed in the Northwest Territories, might have turned out differently had a white man not been implicated. In his report to the Secretary of State, Stipendiary Magistrate Dubuc wrote that the theatrics of the trial had obviated the need for the penalty to be carried out: "[The] ends of justice have now been amply attained by the trial, the verdict, the sentence and the publicity."³⁰ Petitions for clemency were issued on LeBeaux's behalf but cabinet decided against commutation and the condemned man was hanged. In this case the defendant's claim, that he had killed his wife and newborn because he believed that a Catholic missionary had fathered the baby, cast doubt on the integrity of such civilising missions. Putting LeBeaux to death was an attempt to bury these allegations along with the condemned man.³¹ Cabinet apparently assumed that the hanging would leave the far north with a good impression of Canadian law, justice and Christianity.

²⁹ Avio, *supra* note 5 at 372. In her study of adult murder suspects, Sharon Moyer found that Natives were significantly less likely than non-Natives to be convicted of first or second degree murder. For instance, non-Native people were twice as likely as Natives to be convicted of second degree murder, and non-Native men were more than three times as likely (13.5% as opposed to 4%) to be convicted of first degree murder. Sharon Moyer, "Homicides Involving Adult Suspects 1962-1984: A Comparison of Natives and non-Natives" (Ottawa: Ministry of the Solicitor General, 1987). Moyer does not relate verdicts to the race of victims, however, a fact that likely accounts for the apparent lenience toward Natives. See Carol LaPrairie, "The Role of Sentencing in the Over-Representation of Aboriginal People in Correctional Institutions" (1990) *Canadian Journal of Criminology/Revue Canadienne de Criminologie* at 429.

³⁰ Dubuc, Stipendiary Magistrate in LeBeaux, vol. 1513, RG 13, National Archives of Canada [hereinafter NAC]. All of the capital cases considered by cabinet since Confederation are maintained in this record group.

³¹ Schuh, *supra* note 25 at 84

The trial of Inuit men charged with capital offences underwent a similar transition, from initial contact with whites at the turn of the century to the 1920s, when the federal government began to assert the full powers of the *Criminal Code* and to dramatise to any challengers, Canadian sovereignty over the far north. Sinnisiak and Uluksak, arrested by Mounted Police officers for the 1913 murder of two French missionaries, were treated leniently at their 1917 trial in Calgary. The minister of justice had taken the liberty of informing the chief justice to announce the sentence and commutation simultaneously to ensure that “they know now what our law is and if they kill any person again then they have to suffer the penalty.”³² Alikomiak was the first Inuit to discover that this threat was not idle. He had incurred the wrath of the fledgling northern white community when he killed an R.C.M.P. corporal who had employed him as a personal servant, even though he was under arrest for murder. He, along with several other Inuit prisoners arrested on capital charges, were tried at Herschel Island in the Yukon Territory in 1923, so that the locals might appreciate that violence would no longer be overlooked by the authorities. Since a hangman, laden with lumber for a scaffold, travelled with the trial court party, the intentions of the federal government in this case were starkly conveyed.

Far from Herschel Island, a battle raged in southern Canadian newspapers over the propriety of executing the young man. Advocates of clemency pointed to his age (16) and to the travesty of trying a man in a language he did not understand. On the other side, hardliners argued that lenience in the Sinnisiak and Uluksak cases had failed to convince Natives of settler sovereignty. An editorial in the *Ottawa Citizen* put the case for execution bluntly:

The belief that the Eskimo knows nothing of our law is absolutely unfounded ..., clemency does not appear to have had any beneficial effect ... [and] those conversant with the conditions in the north [know] it is to the best interest of law and order that the present sentence be carried out.³³

The [Toronto] Globe was even more Machiavellian in its assessment: “Canada’s Rule Will be Vindicated.”³⁴

Infliction of capital punishment against Natives varied according to shifting political objectives of and pressures upon the central government. Wilful indifference toward inter-Native conflicts, and the enormous difficulties involved in apprehending offenders suspected of capital crimes, meant that Aboriginal people living in remote areas were more likely to escape capture, conviction and execution than those who lived in more densely settled areas with well-established judicial systems

³² Quoted *ibid.* at 91. The Order in Council that led to their release two years later explicitly directed that the released men inform their communities that, according to the law under which they were now governed, further criminal acts would be punished in relation to the gravity of the crime, and that murder would dictate capital punishment.

³³ Quoted in Sydney Harring “The Rich Men of the Country: Canadian Law in the Land of the Copper Inuit” (1989) 21 *Ottawa Law Review/Revue de droit d’Ottawa* 1 at 23.

³⁴ An older man, Tatamagana, also convicted of murder, was executed as well. Schuh, *supra* note 25 at 94. It has been suggested, on the basis of a telegram from the deputy minister of justice to Dubuc, that Ottawa assumed in advance that executions would take place. For a full account of the trial, see Graham Price, “The King v. Alikomiak (a.k.a. Alicomiak, a.k.a. Alekarniaq)” in Dale Gibson and W. Wesley Pue, eds., *Glimpses of Canadian Legal History* (Winnipeg: Legal Research Institute of the University of Manitoba, 1991) 213.

and police forces. All but two Inuit capital trials in the 1920s (35 in all) involved intra-racial homicides: not one resulted in a murder conviction. On the rare occasions when men like Alikomiak and the Nantuck brothers murdered whites, there was little question about the propriety of the death sentence: an example would be made. And whenever Natives and non-Natives were accused of murdering whites, as happened in the Northwest Rebellions, it was the Aboriginal accused who felt the full terror of the law. Shifting tendencies to mercy and severity were prompted less by the character of Aboriginal crimes than by machinations of colonisation policy, the remoteness of crimes from established white settlements, and the nature of offender-victim relations—none of which had anything to do with the static legal framework of capital crime and punishment.

V. Fairness and the Fairer Sex

Shifting patterns of commutations and executions of women, youth, and racial and ethnic minority men were no less prejudicial yet they have received less attention than the subjection of Natives to the death penalty. In fact, the single most significant factor to shape the likelihood or unlikelihood of execution was gender—ironically the least studied aspect of capital punishment in Canadian history.³⁵ This neglect was not the case while capital punishment was in force. The impending execution of Angelina Napolitano in 1911, for instance, inspired over 100,000 people in Canada, the U.S., and Europe to petition the federal government for clemency. Like almost 80% of women condemned between Confederation and 1976, Napolitano was spared. Case studies have indicated that cabinets were receptive to arguments that women (like men of 'lesser' races) could not be held fully accountable for their actions. Furthermore, women, unlike men, were most likely to kill their own offspring or their male partners. Quantitative and qualitative evidence confirmed that cabinet ministers felt less pressure to execute them to protect "society." The executive practice of gendered justice never became official policy, however. Ministers of justice stalwartly maintained the pretence of impartial reviews throughout the period that the death penalty was in force.

Only twelve of fifty-seven women sentenced to death were hanged after Confederation. This rate of 21.3% was less than half that for males: 47.4% of the 1,455 condemned men were executed from Confederation to 1962.³⁶ Women's risk of

³⁵ Studies that focus on the pardoning of individual felons include Constance Backhouse, "Desperate Women and Compassionate Courts: Infanticide in Nineteenth-Century Canada" (1984) 34 *University of Toronto Law Journal* 447; Karen Dubinsky and Franca Iacavetta, "Murder, Womanly Virtue, and Motherhood: The Case of Angelina Napolitano, 1911-1922" (1989) 72 *Canadian Historical Review* 505; Kathy Laster "Arbitrary Chivalry: Women and Capital Punishment in Victoria, Australia, 1842-1967" 6 (1994) *Women & Criminal Justice* 67; Tom Mitchell " 'Blood with the Taint of Cain': Immigrant Labouring Children, Manitoba Politics, and the Execution of Emily Hilda Blake" (1993) *Journal of Canadian Studies*; Elizabeth Rappaport "The Death Penalty and Gender Discrimination" (1991) 25 *Law and Society Review* 367. There have been no systematic studies of gender and capital punishment for Canada, however. For a statistical historical survey of women as victims, see Rosemary Gartner and Bill McCarthy "The Social Distribution of Femicide in Urban Canada, 1921-1988" (1991) 25 *Law and Society Review* 287.

³⁶ Figures compiled from Favreau, *supra* note 17 at 62-65. In addition to the 689 men who were executed, a further 8 condemned men committed suicide while awaiting execution. The last woman to

execution was two to three times lower than men's, depending on other factors involved in cases.³⁷ Whenever women's cases were caught up in the lottery of death, they could bet there would be few short straws in their bundle of characteristics. Being female did not provide a passport to commutation, as the twelve who were hanged proved, but femininity clearly predisposed the executive to mercy.

The rarity of women's capital convictions lent notoriety to women killers that far outweighed their limited numbers. A condemned woman was newsworthy, not only because she was a convicted killer, but because she neither fit the profile of a typical murderer nor conformed to prevailing expectations of feminine passivity. Stories of women awaiting the hangman sold newspapers and true crime magazines, thus placing a brighter, often sympathetic spotlight on female offenders. Some historians have suggested that women were more likely than men to be pardoned because they tended to commit the sorts of crimes that were perceived to present fewer threats to the community.³⁸ But the argument that murderous women were lesser threats than men requires further consideration: why were murderers of infants and husbands treated leniently?

Culturally defined expectations of appropriate gender roles appear to have been at the root of gender biased justice. In a period when women were refused the vote, exempted from military service, denied entrance to higher education and the professions, and deprived of custody rights over their children, it was not inconsistent for legal administrators to conceive of women as less than fully rational adults. As women's legal disabilities were dismantled over the twentieth century, the powerful associations between femininity and pliability were slow to disappear. Lawyers who defended female accomplices of male killers, for instance, continued to cast their clients as gullible dupes well into the twentieth century.³⁹

Between 1899 and 1922, a *de facto* moratorium on executions of women was in effect. The organised feminist movement was instrumental in pressuring cabinets to give condemned women a merciful hearing. After all, they charged, women were tried and convicted in a system where men alone wielded power: there were no women trial lawyers, judges, or cabinet ministers, so it was up to feminists to lobby on behalf of their condemned sisters. Furthermore, typical women's murders (i.e.,

be hanged in Canada was Marguerite Pitre who was executed on 9 January 1953 for committing a far-from-typical crime. She had delivered a bomb that later exploded on a Quebec Airways flight. All 23 persons on board were killed.

³⁷ Kenneth Avio's study of the 1926 to 1957 period showed gender was the single most significant variable in contributing to the likelihood of execution. His critical commentary on discriminatory practices focused on ethnicity and race. I am grateful to him for further advice on the interpretation of his statistics.

³⁸ John Beattie "The Royal Pardon and Criminal Procedure in Early Modern England" (1987) 9 *Historical Papers* 9 at 21. Jim Phillips found higher rates of execution in eighteenth and early-nineteenth century Nova Scotia and attributes the variance to the fact that more of the colonial women had been convicted of murder, a crime for which the pardon was granted less freely. See his "The Operation of the Royal Pardon in Nova Scotia, 1749-1815" (1992) 42 *University of Toronto Law Review* 401.

³⁹ This was J.J. Robinette's tactic in defending Evelyn Dick, a Hamilton woman accused of killing her husband and infant: NAC, RG 13, vol. 1661. Such was the crown prosecutor's tactic in the 1995 Karla Homolka and Paul Bernardo trials.

killings of illegitimate children and abusive husbands) could be constructed as pathetic attempts to redress gender injustice. When Angelina Napolitano was convicted for murder after she axed her husband in his sleep, feminists rallied to her defence. Her husband, they argued, was a depraved brute, while she was a loving mother who had merely tried to protect her children. Maternal character references were mobilised even in cases of infanticide. In a 1909 case involving a woman who killed two of her daughters' illegitimate newborns, the products of incest-rape, advocates argued that she should not have to pay for her husband's sins. On the eve of Annie Robinson's execution, gender-based sympathy inspired a woman to write to the minister of justice for clemency:

We plead for her as *Sisters*, we know she sinned, but Oh! as a wife and mother, what provocation she endured. No wonder if, for a time, reason might be dethroned. God grant that *men* may pardon her—and let her return to her home again.

Sir Allen Aylesworth, the Minister, tried to counter this onslaught of sympathy with arguments about the rule of law:

Surely the deliberate taking of the lives of two helpless innocent babies is not a matter for which there should be no punishment, and I cannot help thinking that if the person who had taken these lives had been any other member of this unfortunate family than the wife of the unnatural monster who is her husband, public sentiment would have considered the punishment for the murders should be very substantial.⁴⁰

Aylesworth's actions belied his posturing over impartiality, however. Not only was Robinson's sentence commuted to the unusually low term of ten years, but she was quietly released after serving less than two years.

Male cabinet members were clearly more inclined to feel indulgent when they reviewed women's cases. The possibility that a condemned woman might be pregnant also played on their minds. In 1917, Robert Bickerdike, the first and foremost parliamentary voice for abolition, told fellow members of parliament in 1917 that the state had executed "an unborn child" along with its mother in "more than one incident."⁴¹ He volleyed charges of unmanliness at politicians who upheld the legitimacy of capital punishment for women and minors:

I cannot believe it possible that a man who is a man would stand for hanging a woman or a child, and I do not think that any of those who have spoken today would do so. They might give somebody else thirty pieces of silver to go and do it, but they would not do it themselves.⁴²

Liberal leader Sir Wilfred Laurier did not support his backbencher's efforts to abolish capital punishment but he did share his chivalrous convictions: "Undoubtedly there is something revolting in the idea that a woman should be sentenced to

⁴⁰ NAC, R.G. 13, vol. 1484 (emphasis added).

⁴¹ *Debates*, 31 January 1917, *supra* note 1 at 334. The precaution against executing pregnant women, medieval in origin, was incorporated into the English *Homicide Act* (1957) which stipulated that the sentence of death not be passed upon a pregnant woman. The statute has never been tested since no women have been executed in England since the passage of *Act*.

⁴² *Ibid.*, 19 April 1917 at 637. Bickerdike introduced unsuccessful private member's bills in 1914, 1915, 1916 and 1917.

death."⁴³ Still, the readiness of cabinet members to see women killers as victims did not give women the freedom to commit murder with impunity.

As feminism waned as an organised political force in the 1920s, convictions of women killers were less likely to become rallying cries for executive clemency. Gaining the victory of the federal franchise in 1917 also made it more difficult to advance arguments based on gender inequality. Attempts to spare Florence Lassandro in 1922 were half-hearted in comparison to the campaigns waged in the 1910s. Lassandro was the mistress of Emilio Picariello, a rum-runner who fatally shot a policeman. Although she had been accused of having played only an indirect role, she was executed on 2 May 1923. Moments before the drop, she reportedly cried: "Why do you hang me when I didn't do anything? Is there no one here who has any pity?" Unfortunately for Lassandro, the heyday of gender-based executive justice was over.⁴⁴

At no point was this conception of masculine protectiveness and feminine weakness explicitly incorporated as a factor warranting commutation. Cabinet members preferred to present their image as that of impartial assessors who reached decisions through reasoned judgment, not sentiment. After reviewing almost a century's evidence of cabinets' reluctance to enforce the death penalty against condemned women, the Joint Committee concluded unsentimentally, and with stunningly circular logic, that women murderers were typically treated mercifully because their killings had usually been committed "in circumstances which warrant the exercise of the Royal Prerogative of Mercy."⁴⁵ Gender-based lenience was a pattern that could be upheld, yet never officially explained or sanctioned.

VI. Youth on Trial

Young people sentenced to death tended, like women, to attract more publicity than the typical offender: the adult male. Unlike women, male youths did not inspire indulgent treatment when their cases came before cabinet. Execution statistics confirmed that, if anything, cabinets were relatively intolerant toward juvenile offenders. The execution rate for male youths was only slightly below that of men between the ages of twenty-one and thirty, the age group that accounted for the largest proportion of condemned persons. Between 1920 and 1950, twenty-one youths aged twenty or less were executed and only 33% had their death sentences commuted.⁴⁶ This custom of severity was increasingly at odds with notions of childhood as a period of innocence and low capacity for judgment. Elsewhere in the criminal justice system, modifications to the criminal law and penal policy expressed the paternalistic

⁴³ *Ibid.*, 19 April 1917 at 622.

⁴⁴ Alan Hustak, *They Were Hanged* (Toronto: James Lorimer & Co, 1987) at 44. The case has inspired a play by Sharon Pollock called *Whisky Six*. It is also the subject of a forthcoming article by Aritha van Herk, in Elspeth Cameron and Janice Dicken-McGinnis, eds., *Great Dames* (Toronto: University of Toronto Press, 1995).

⁴⁵ J.C.R., *supra* note 4, paragraph 75. The Committee recommended that women be denied statutory immunity from the death penalty.

⁴⁶ *Ibid.*, Table H, Ages of Persons Convicted of Murder (1920–1952). Men between the ages of 21 and 30 were executed at the rate of 76%. These figures are not definitive because the ages of 47 people whose cases came between 1920 and 1929 were not recorded.

sentiments of the child-saving movement by the early twentieth century.⁴⁷ In spite of isolated campaigns to spare young people, such as Alikomiak, and protests that cabinets ought to be indulgent toward juvenile murderers, the execution of youths did not halt until 1959.⁴⁸

When advocates urged commutations of young men's sentences, they constructed youth as a biological and psychological excuse for irresponsibility. Like clemency pleas for "uncivilised" Natives and "wronged" women, requests for merciful treatment of youths were composites of cultural constructs. By the mid-twentieth century, medical discourses prevailed, even in pleas launched by laypersons. In much the same way that a psychiatrist might attribute a criminal act to a mental disorder or abnormality, or a medical doctor might connect an act of infanticide to the hormonal imbalances of parturition, advocates of young murderers stressed that they were victims of their own psychological or physical makeup. Efforts to save teenaged Jack Loran from the gallows, for instance, focused on his age after a defence of insanity had failed. The nineteen-year-old Saskatchewan lad had senselessly shot and killed a wealthy farmer after going on a drinking binge at a dance in 1945. In spite of the defence's claim that a childhood head injury had driven Loran to bizarre and cruel behaviour, he was convicted and sentenced to death. Premier Tommy Douglas wrote to Minister of Justice and future Prime Minister Louis St. Laurent on 14 February 1946 to argue that Loran, like all young people, was not fully accountable:

It is the policy of our increasingly humane administration of justice to intervene in behalf of minors who have committed crimes punishable by death It would especially outrage the sensibilities of the community to exact the death penalty from a boy too young to vote or to marry without permission. The execution of minors has been rare in recent years in Canada. It is to the credit of our administration of justice that this has become our policy. I urge you to intervene.

Douglas's clever appeal to St. Laurent's humanity failed to save Loran, yet it foreshadowed the emergence of a medico-psychiatric model of youth. It was that rationale that would underpin the statutory exemption of minors from capital punishment in 1961.⁴⁹ Ironically, the Canadian parliament was more inclined to recommend special consideration for youths than for women, whose cases had more consistently elicited cabinet sympathy. The Joint Committee on Capital Punishment had recom-

⁴⁷ This transition began in the late-nineteenth century with the separation of young offenders from adult criminals and the creation of industrial schools and reformatories for minors. Children's courts were established in the 1890s, as was the Children's Aid Society, which was granted extensive powers over people less than twenty-one years old. In 1908, the federal government passed the *Juvenile Delinquents Act* in an effort to tailor justice for children. In some provinces, children's courts were amalgamated with women's courts in the 1920s. These courts, in turn, were the precursors of family courts.

⁴⁸ The last minor to be executed was a twenty year old man who had killed a taxi driver in the course of a robbery in 1959. He had shot him with a rifle and bludgeoned him with a stone. Neither the jury nor the judge had recommended mercy; despite a psychiatric assessment that determined the young man to possess "below average mentality," the Diefenbaker cabinet decided on 8 February 1960 to let the sentence stand. Favreau, *supra* note 17 at 101.

⁴⁹ Another youth, eighteen-year-old Vincent Manastryski, was also awaiting his execution. He had fatally shot his abusive father in Yorkton on the same night that Loran had shot Gustav Angerman. Manastryski's sentence was commuted. Loran was executed on 20 February 1946 at the age of twenty. Hustak, *supra* note 44 at 27-40.

mended in 1956 that the Criminal Code be amended to exempt all persons under eighteen from the death penalty and to subject persons under twenty-one to capital punishment only in "extraordinary cases." This change reflected a belief in the mutability of young persons, and the reforming capacity of corrections. Although it conceded that "some of the most callous crimes are committed by young offenders showing a total disrespect for life or property," the Committee advised that "youth must always be a mitigating factor."⁵⁰ Its Report concluded that if the criminal justice system were truly to embody the principle of rehabilitation, then juvenile murderers ought to be guaranteed the chance to reform themselves in the penitentiary system.

The Steven Truscott case in 1959 energised the movement against juvenile executions and simultaneously raised suspicions that innocent murder suspects of any age might face the gallows as a result of judicial error. Truscott was a fourteen-year-old boy who was convicted, on tenuous circumstantial evidence and a disputed confession, of raping and murdering schoolmate Lynn Harper. The atmosphere in Goderich, Ontario, where the trial took place was so poisonous that Truscott was virtually convicted before the trial began. Upon his conviction he became one of the youngest Canadians in the twentieth century to be sentenced to death. Although the Diefenbaker government commuted his sentence to life imprisonment, many Canadians were disturbed that a schoolboy had come so close to execution, saved not by judicial review or a statute prohibiting such an event, but by the opinion of a handful of politicians who might just as easily have drawn a short lot and had him executed. Abolitionists seized the opportunity to promote their cause and accused cabinet members of flirting with child murder. Bowing to public pressure, the Diefenbaker government introduced legislation in 1961 that finally provided a statutory prohibition against the execution of juveniles under the age of eighteen.⁵¹

VII. Obscuring Discrimination

By the time Truscott was sentenced to death, the abolition movement was in full swing, portraying his case as a "near miss" to sway public opinion. In contrast, retentionists seized on the latest brutal child slaying or cold-blooded killing of a police officer to attract sympathy for their cause. After 1957, when the vast majority of death sentences were commuted, whether or not recommendations for mercy had been made by juries or trial judges, retentionists' sense of outrage grew.⁵² Opponents

⁵⁰ J.C.R., *supra* note 4 at paragraph 76. The Report noted that the United Kingdom Royal Commission on Capital Punishment had upheld the ban then in force on the execution of persons under eighteen, but was divided on the proposal to extend the ban to persons between the ages of eighteen and twenty-one.

⁵¹ At the time of the trial and the commutation in January 1960, those who objected to the imposition of the death penalty concentrated on Truscott's youth to argue that the sentence was inappropriate. The issue did not disappear after the commutation. Isabel LeBourdais, *The Trial of Steven Truscott* (Toronto: McClelland and Stewart, 1966), alleged that the police had failed to trace leads that might have exonerated Truscott. She also charged that the judge had erred in accepting into evidence Truscott's admission that he had seen Harper on the day of the murder. The book created a furore in parliament and prompted calls for a royal commission to investigate the case. With Bill Trent, Truscott offered his own version of his innocence in *The Steven Truscott Story* (1971). He was paroled in 1969.

⁵² The Canadian Association of Chiefs of Police sent a letter to the prime minister in 1964 that used the cases of Kenneth Meeker (a British Columbia man convicted of the sex slaying of a twelve-

of capital punishment, in contrast, struggled to find clear-cut cases of judicial error to counter the emotional impact of the retentionists' claims. Although some experts believed that innocent people were hanged, and there were certainly many condemned persons who protested their innocence, no Canadian cases of executions based on wrongful convictions, such as the Evans-Christie affair in England, have been found.⁵³

As difficult as it was for abolitionists to substantiate allegations of unfair treatment in individual cases, they trod on even shakier ground when they argued that the infliction of the death penalty had been discriminatory. Cabinets had always been tight-lipped about their decision-making processes, and it was not until the late 1950s that commutation patterns were studied and made public. Although the Joint Committee compiled statistics based on gender and age, systematic analysis of class and race was conspicuously absent in both its 1956 Report and in the 1965 report on the "Purpose and Value" of capital punishment.⁵⁴ Other than establishing that the vast majority of persons executed were young men, an observation that inspired campaigns to modify youth justice, governmental studies failed to raise the question of systematic discrimination against specific groups of Canadians.

Opponents of the death penalty had long contended that poor, ill-educated people received substandard legal representation; but politicians were loath to explore the possibility that the Canadian justice system did not ensure equal treatment before the law. The last substantial governmental report produced before capital punishment was abolished did consider the abolitionists' charge that "the death penalty is discriminatory," but it provided only U.S. data to substantiate the allegation. The

year-old girl) and George Marcotte (who fatally shot two Montreal policemen during the course of a robbery) to argue for the death penalty. Their campaign was unsuccessful. Favreau, *supra* note 17 at 12.

⁵³ Neil Boyd turned up four cases among the 96 he sampled "in which there was no sound evidence linking the accused with the crime." Boyd, *The Last Dance: Murder in Canada* (Scarborough: Prentice Hall, 1988) at 3. Timothy Evans is the only man executed in Britain to have received a posthumous pardon. He was executed in March 1950 for the murder of his baby daughter and wife, having been convicted only on one capital charge—that of the baby's murder. Three years later, Reginald Christie, Evan's neighbour and a crown witness who had helped to convict him, was found to have murdered six women and, more significantly, he confessed to the murder of Evans' wife and baby as well. After a parliamentary inquiry into the matter in 1966, Queen Elizabeth II issued Evans' pardon. Syd Dernley with David Newman, *The Hangman's Tale: Memoirs of a Public Executioner*, (London: Pan Books, 1989) at 70–82. The Evans case was well publicised and presented on the C.B.C. program "Background" on 23 April 1962, in which Canadian judges and lawyers debated the case.

⁵⁴ One of the Report's most significant findings was that the proclivity to execute capital offenders had varied significantly since Confederation. In the 1870s, an era when the accused persons' right to testify had not yet been established and few offenders could afford counsel, over seventy percent of death sentences were commuted. The percentage of executions among all capital convicted offenders hovered around the fifty-five percent mark from the 1880s until the 1930s when, in the midst of the social dislocation of the Depression, it suddenly shot up to seventy-five percent. In fact, the government's own evidence showed that condemned persons were significantly more likely to hang in the 1930s than in any other decade since Confederation. There are discrepancies between the figures provided in the 1956 Report and the 1965 study commissioned by Solicitor-General Guy-Favreau. I have quoted the figures from Favreau's *Capital Punishment* because the 1965 tables trace each case through to its conclusion within the decade in which the sentence was imposed. The proportion of executions in the post-1930s era was 66.2% for the 1940s, 49.3% for the 1950s, and 12% for the first half of the 1960s; Favreau, *supra* note 17 at 98.

Canadian government was prepared to show that the U.S. judicial system discriminated on the basis of race and ethnicity, but it skirted the issue of systematic discrimination in Canadian execution practices.⁵⁵

In the wake of recent attempts to reinstate the death penalty, criminologists and sociologists have been eager to test long-term patterns in cabinet decisions. Their findings confirmed that case dispositions were not determined impartially. Over the century following Confederation, young, single, poor, white Anglo-men who killed strangers or acquaintances for reasons of revenge, jealousy, or hatred were most likely to be convicted of murder. The profile of persons hanged, however, varied in several respects, although class was not one of them. The poor were certainly over-represented among the hanged, but the general population of convicted killers was equally skewed toward persons in low-skilled, low-paying occupations.⁵⁶ Any favouritism toward wealthy, well-educated people would have occurred at the trial or pre-trial stage. Race and ethnicity, in contrast to class, appeared to have been persuasive factors in cabinet decisions. In addition to the increased severity toward Natives in the post-1920s era, statistical analyses of the characteristics of persons condemned to death between 1926 and 1957 showed that French Canadians were significantly more likely than English Canadians to be executed.⁵⁷ David Chandler's study of capital cases deliberated between 1946 and 1967 suggested that ethnicity was more influential a factor than race: 46% of French Canadian offenders were executed, while only 27% of English Canadian murderers suffered a similar fate.⁵⁸ Although Avio's and Chandler's results were slightly different, both studies confirmed that white, Anglo-males were, at least from the 1920s to the 1960s, more likely than men of any other racial or ethnic group to receive a favourable cabinet review.

Systematic discrimination against other ethnic groups, including blacks and non-Anglo Europeans, was also evident. In the early twentieth century, members of parliament openly contended that southern or eastern Europeans in particular required the death penalty to teach them about the value (Anglo) Canadians placed on law and order. During a debate on Robert Bickerdike's second private member's abolition bill in 1915, Minister of Justice Charles Doherty attributed the elevated

⁵⁵ In spite of overwhelming evidence to the contrary, and in the face of logic, the U.S. Supreme Court retreated from its 1972 judgment in *Furman v. Georgia*, that the death penalty was applied in a racially discriminatory fashion. In *McLeskey v. Kemp* 481 U.S. 279, (1987), the Court ruled that racial disparities existed in patterns of white and black executions, but accepted the State of Georgia's claim that the nature of the crimes alone explained the fact that 22% of blacks who killed whites were sentenced to death, while only 3% of whites who killed blacks received the same penalty. See Gregory D. Russell, *The Death Penalty and Racial Bias: Overturning Supreme Court Assumptions* (Westport: Greenwood Press, 1994).

⁵⁶ Chandler, *supra* note 5 at 219. Class analyses of capital offenders have been crude because occupation has been the only indicator available. An "unemployed" person might, for instance, have been a wealthy bootlegger; a "housewife" might have been a mother of ten on a failed farm or the wife of a rich entrepreneur. Chandler has, however, confirmed that the 4.2% of condemned persons who were managers or professionals were executed at a rate as high as or higher than all other groups except the "lower white collar" workers.

⁵⁷ Avio, *supra* note 5 at 372.

⁵⁸ Chandler, *supra* note 5 at 216.

Canadian murder rate at the time to the rise in “foreign” immigration. Of 79 murders that had occurred between 1900 and 1914, he claimed, 38 had been committed by newly-arrived foreigners and 27 of them had come from countries where capital punishment had been abolished. “We are getting flooded with a population who are accustomed to think that you can kill your neighbour but that your life is so sacred that the state will never touch you.”⁵⁹ Subsequent ministers of justice were more circumspect but the aggregate statistics over the twentieth century confirmed that Doherty was not alone in his opinions about the murderous propensities of “foreigners.”

Anecdotal evidence from capital case files further supported the contention that the allegedly impartial cabinet review process was influenced by widely held prejudices. Although statistical analyses do not point to religion as a significant factor in capital case dispositions were rare, notable cases such as Abraham Steinberg’s in 1931 suggested that non-Christians may have faced a greater risk of execution than the majority of condemned persons. Steinberg had offered an alibi, supported by four eye witnesses, to explain his whereabouts when his business partner was shot to death; nevertheless, he was convicted on circumstantial evidence. The verdict shocked the Toronto Jewish community which collected 20,000 signatures on a petition to protest Steinberg’s sentence. Thinly-disguised religious intolerance swayed the government to permit the execution, as this Remissions Branch memorandum for the solicitor-general suggested:

An organized expression of opinion may be quite misleading and certain sects have acquired the reputation of being more industrious than others in working upon the sympathies of their fellow men.... I see no good ground left for interfering with what appears to me to have been a logical and, in truth, a sound verdict.⁶⁰

Normally, strong community ties added longer lots to the bundle of characteristics from which cabinet members drew. Remissions officers considered petitions all the time, and knew well that every mass petition was, by definition, “organised.” The decision to withhold clemency held more than a hint of anti-Semitism.

In most respects, Steinberg was more privileged than the vast majority of condemned persons. He was a comfortably well-off businessman who was ably defended by a respected member of the bar. He was a member of a cohesive community that threw its support behind him. And he had been convicted on circumstantial evidence. Still, he was executed. Most capitally convicted persons would have envied such advantages. Drifters and social outcasts faced dim prospects of mercy, irrespective of the type of crime for which they were convicted. The last

⁵⁹ *Debates*, 15 February 1915, *supra* note 1 at 270. Other members were equally prepared to paint all foreigners with the brush of criminality. F.B. Carvell, the Member for Carleton New Brunswick, thought it was premature to abolish capital punishment at a time when foreign immigration was at its peak. Abolition, he predicted, would throw Canada “into chaos.” He also accused abolitionists of showing unwarranted sympathy to people who “are not very much entitled to [it].”: *ibid.*, 5 February 1914.

⁶⁰ Memorandum from M.F. Gallagher, former Chief Officer in the Remission Services branch of the Department of Justice, to the Solicitor-General. This assessment was particularly misguided since it was not the verdict that was at issue for the Cabinet’s consideration but the suitability of the case for executive clemency. Quoted in Boyd, *supra* note 53 at 61–2.

man to be hanged in Nova Scotia, Everitt Farmer, was typical of the ill-fated men who failed to elicit cabinet sympathy. He was a member of Shelbourne's black community, a group that "got on the nerves of respectable white people," as one local paper commented. Farmer had admitted that he had killed his brother-in-law but claimed that he had shot him, while drunk, in self defence. Unable to afford counsel, Farmer did not receive an appointed lawyer until a week prior to his trial; lack of funds also meant that the labourer could not afford to appeal the verdict. He was hanged on 15 December 1937.⁶¹

Although defence lawyers tried to manipulate racist appraisals of character to exonerate their clients, non-whites and whites from eastern and southern Europe were disadvantaged well before the stage of cabinet review. Just as Aboriginality was offered as an excuse for ignorance of the law, so was being black, or slavick, or italian. The problem was that racist defences perpetuated stereotypes of 'foreigners' as primitive brutes, without offering guaranteed mercy at the executive level. John F. Mahoney, a Halifax trial lawyer, enthusiastically defended accused wife killer Louis Jones, but his racist excuses for Jones' behaviour ultimately backfired. On the one hand, Mahoney claimed that the all-white jury had convicted Jones because they had "decided feeling[s] toward all niggers"; on the other hand, Jones was a suitable candidate for mercy because of his racial inferiority: "[T]he half white ... are usually people of very strong feelings, possessing a good deal of the white man's pride, without the mental qualities to off-set them." Furthermore, what would be the deterrent effect of an execution, he asked? Local blacks were "victims of passion" who were incapable of learning from the example, while local whites saw Jones as "just another nigger." In spite of, or even because of, Mahoney's racist construction of his client, Jones was hanged in Halifax on 19 January 1928.⁶²

Anecdotal evidence was undoubtedly suggestive but it was impossible to prove that ethnicity, race, religion or any other single factor swayed the cabinet to opt for or against commutation. Avio has found, for instance, that the likelihood of execution increased for persons whose cases were considered in a year following one in which an elevated homicide rate had been recorded. In certain periods, notably the Depression, cabinets were inordinately punitive, irrespective of homicide statistics. In 1931, the year that Steinberg's case came up, 25 out of 28 condemned persons were executed. This number and rate of execution (89%) were the highest for any year in post-Confederation Canadian history.⁶³ Extra-legal factors, even luck, were wild cards. Had nineteen-year-old Jack Loran's case not surfaced at the same time as another youth's, who was granted a commuted sentence, Loran might not have ended

⁶¹ Hustak, *supra* note 44 at 6 and 9.

⁶² Jones, NAC, R.G. 13, vol. 1545, quoted in Michael Boudreau, "Blacks, Chinese, and 'Foreigners': The Ethnic Dimensions of Halifax's Criminal Underworld, 1918-1935," paper presented to the Atlantic Law and History Workshop, Dalhousie University, March 1995. The jury had recommended mercy, likely on account of the victim's reputation as a fast woman, a characterisation Mahoney dwelled on in the trial.

⁶³ J.C.R., *supra* note 4 at 62-5. The number of homicides was actually greater during the 1910s, when 237 cases came before cabinet. Almost half (113) were commuted. In the 1930s, 80% of 208 capitally convicted persons were hanged.

up losing his lottery of death. The scope for speculation over executive decision-making rationales is limitless.

Ironically, abolitionists' and retentionists' reviews of idiosyncratic and prejudicial commutation patterns led them to the same conclusion by the 1960s: the impartiality of the justice system had been compromised by the sporadic application of the death penalty. They differed only in their proposed solutions to the problem. In Canada, unlike the U.S., evidence of racial and class prejudice was not marshalled until the period after capital punishment was suspended; similarly, arguments about the discriminatory character of capital punishment did not push the federal government to abolish it. Rather, the incompatibility of pre-modern, discretionary forms of justice, and the ascendant rationale of rule-bound decision-making processes rendered the death penalty's administration indefensible.

VIII. Conclusion

On 31 July 1956, the Special Joint Committee of the House of Commons and the Senate presented its Final Report on Lotteries. After pouring over testimony and submissions on bingos and bazaars, it recommended that lotteries conducted for strictly charitable purposes be permitted as long as organisers adhered to regulations. State lotteries, in contrast, were to be prohibited: "the proper role of the state is to control and regulate such gambling activity ... [and] it is not appropriate for the state to provide facilities for gambling to the public."⁶⁴ It was another twenty years before discomfort over gambling with people's lives culminated in the abolition of capital punishment. Ironically, by the mid-1970s, attitudes toward lotteries relaxed considerably. Canadians might take a chance on a lottery ticket, but the fate of the capitially condemned would no longer be determined by drawing lots.

The erosion of the death penalty began in 1961, when John Diefenbaker's Conservatives introduced the concept of degrees of murder. Perhaps the terrible responsibility of the executive could be tossed back to the courts if gradations of responsibility were codified. The government of the day had been commuting death sentences at an unprecedented rate and had faced considerable criticism from law enforcers and its own back-benchers over flouting the spirit, if not the letter, of the law. In effect, amending the *Criminal Code* to distinguish between capital and non-capital murder, and therefore providing automatic commutation for the great majority of murderers, refashioned the statute for existing practices. The Minister of Justice, E. Davie Fulton, cautioned that reform legislation did not presage the end of the death penalty: "It is not an abolitionist measure or a first step toward abolition but a bill for the purpose of bringing the present position with regard to capital punishment into line with present day ideas of crime and punishment."⁶⁵ History proved him wrong. In the wake of Arthur Lucas' and Ronald Turpin's executions in 1962, every case that came before Diefenbaker's, Pearson's, and Trudeau's ministers

⁶⁴ "Final Report on Lotteries," *Debates of the Senate* (1956) at 933. State lotteries might be necessary in "countries of radically different racial origins and traditions" because those governments had to "direct the gambling instincts of the public into a controlled channel." Apparently, Canadians were not "instinctively" driven to gamble.

⁶⁵ *Debates*, 24 May 1961, *supra* note 1 at 5318.

resulted in a commutation. Tinkering with the death penalty was only a temporary solution, however: neither abolitionists nor retentionists were satisfied, so both lobbies set about to prove the other wrong. In 1967 a formal moratorium on executions was imposed to determine whether suspending the death penalty inspired people to commit murder. It did not, and the abolitionists won.

In the first decades after Confederation, when legislators framed the statutes that would govern capital crime and its sanctions for the following century, they had never intended that every offender sentenced to death might actually be hanged. Mercy was to offset rigour so that deserving subjects might be accorded the privilege of commutation. Cabinets commuted the sentences of almost half the condemned persons whose cases they considered, yet there were never formal principles to guide their decisions. Instead, cabinet assumptions about the relative dangerousness and culpability of various classes of offenders, their responses to campaigns in individual cases for or against commutation, and their evaluation of the political ramifications of their decisions, all played significant roles in determining who would die and who would be spared.

The importance of extra-legal considerations, clearly evident in treason trials and the punishment meted out to Aboriginal offenders in the early years of the Canadian state, were equally important in the disposition of more mundane cases that came before cabinet—the robberies that went wrong, the lovers' quarrels that escalated to violence, the brutal beatings that turned rape into murder. Although Canadian capital offenders continued to face the death penalty until 1976, only a minority were executed, and none died at the hands of the state after 1962. The selective use of clemency varied over time and in response to the nature of the condemned person and his or her crime, but mercy was no less a product of political demands and cultural predispositions. Only seldomly, when a minister of justice decided that a new trial was warranted, were matters of law the factors that determined whether or not a condemned person would face the gallows. Indeed, the process of cabinet review was established to allow the government to consider the merits of cases beyond their strictly legal parameters, so that this most crucial stage in the legal process, at which life and death decisions were finalised, was ungoverned by jurisprudential or penological reasoning.

This image of unprincipled and partial justice proved to be the downfall of the death penalty: both abolitionists and retentionists demanded to know why some condemned persons were executed when others were granted reprieves. On the one hand, capital cases, especially those ending in executions, had placed justice on public display; on the other, the decision-making process was a jealously guarded secret and the remnant of an archaic form of justice, glaringly out of step with modern penological concepts of predictability and accountability. Although politicians who championed the cause of abolition during the twentieth century may have characterised capital punishment as a barbaric sanction unsuited to enlightened democracies, capital punishment's administrative indefensibility, not its moral distastefulness, ultimately led to its abolition.

The statute that replaced the death penalty aimed to rationalise distinctions between different types of murders and to predetermine levels of culpability. The royal prerogative remains in effect, but automatic executive reviews of convicted murderers' cases no longer occurred. Instead, parliament set 25 years as the new mandatory minimum term of imprisonment to appease law enforcement lobbyists.

Legislators thereby fused their new commitment not to kill those who killed to their equally strong desire to project an image of sternness toward criminals. Consequently, the elimination of capital punishment from the range of legal sanctions has not spelled the end of Canadians' search for just and equitable responses to criminal violence.

Nor did the removal of the deadliest weapon from the state's arsenal of defences against crime mean that capital punishment has lost its potency in the public imagination. Sporadic executions carried out between Confederation and 1962 provide pointed reminders of the full rigour of the law, and nothing prevents the federal government from reinstating the death penalty. A vigorous campaign for the return of capital punishment was waged in 1987 and defeated by a margin of only 21 votes in parliament. Periodic panics that arise over murderers like Clifford Olson and Paul Bernardo invariably lead to demands for reinstatement of capital punishment. In contrast, the political left has failed to convert the over-ruled convictions of Donald Marshall, David Milgard, and Guy Paul Morin into such heady political capital.⁶⁶ Canada's proximity to a country increasingly disposed to electrocute, gas, shoot, and lethally inject its criminals means that the issue is ever present in the media. The unparalleled power of the death penalty to signify the maintenance of law and order continues to tempt governing and opposition parties, particularly during periods of economic and social upheaval. In the end, capital punishment is never truly abolished: it is merely in a state of statutory abeyance.

⁶⁶ In the aftermath of the Nova Scotia provincial inquiry into the wrongful murder conviction of Donald Marshall, the issue of discriminatory justice became a hot political issue: Michael Harris, *Justice Denied* (Toronto: Macmillan, 1986). Criticism focused on the issue of racism, however, and little discussion of Marshall and the other two men, as men who might have hanged had capital punishment still been in effect, ensued. Right-and left-wing political manipulations of crime are critiqued in Wendy Kaminer, *It's All the Rage: Crime and Culture* (Don Mills: Addison Wesley, 1995).