EDUCATED TO CRIME:
COMMUNITY AND CRIMINAL JUSTICE IN UPPER CANADA, 1800-1840

by

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Abstract

From 1800 to 1840, Upper Canada witnessed a crisis that affected the administration of criminal justice in Upper Canada: the fear that pauper immigration was bringing a criminal element into the province; a growing loss of faith in older systems of punishment; and the overpopulation of district gaols. According to recent penal historians, the response of the executive arm of the Tory government reflected its entrenched conservatism. Believing in the efficacy of coercive institutions, the ruling elite initiated two signal events: the Penal Reform Act of 1833 and the construction of what was to become an instrument of social control: the Kingston Penitentiary.

This thesis takes the position that the crucial factor that drove the restructuring of criminal law was a breakdown in the administration of punishment. Canadian historians have considerably underestimated the influential role that local communities played in sponsoring penal reform. Prior to 1833, with few exceptions, capital sentences were reduced to banishment to the United States. Many, however, never left the province. Many others returned early. In both cases their communities, believing the system of primary and secondary punishment to be too severe, sheltered them. Interpreted as a demonstrated lack of respect for the legal system, the Tory executive reacted by using its central authority to push through funding legislation for a penitentiary.

A legal culture, which included the harbouring of "banished" convicts, operated within and among Upper Canadian communities. Through grand jury addresses published in newspapers and the regular posting of changes to the criminal code, communities were legally educated. In the absence of effective policing, neighbourhoods wielded discretionary power, hunting down criminals and prosecuting them. Within traditionally prescribed limits, they morally policed themselves. The move toward penal reform in Upper Canada was, in part, a reaction to these "democratic incursions".

In memory of my father
Jack Phillips
whose quiet interventions made it possible
for me to come this far

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INTRODUCTION

On 12 April 1831, seventeen-year-old Joseph Liquers of Grand River, Gore District, was placed in the local gaol in the village of Hamilton, U.C., to await trial at the August assizes. Liquers was accused of cattle stealing. Although he was sentenced to be hanged on October 7, the execution was respited while the lieutenant-governor reviewed his case. On 13 March 1832, he was granted an unconditional pardon. In total, Liquers was incarcerated for about eleven months before being set free.

The Gore District gaol contained twelve, nine-foot-square cells. They were nearly always overcrowded. In January of 1832, 56 prisoners were confined in a gaol designed to hold 3 prisoners in each of its 12 units—ideally 12 criminals and 24 debtors. In April of 1834, a special committee of three magistrates was struck to look into overcrowding. They reported that nineteen prisoners (all but three, capital cases) were confined to four small cells: "if they remain through the summer, there will surely be disease and death as a consequence...."[1] Until 1837, the assizes for the general gaol delivery were held once a year in the summer/early fall. It was often the case that prisoners who were gaoled immediately after the assize would wait one year for their cases to come before the court. The Gore District magistrates were asking the government to grant a Special Commission to issue for the trial of prisoners thus remedying overcrowding[2]. Their request was denied.

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[1] Public Archives of Canada {hereinafter NAC}, Upper Canada Sundries: Correspondence of the Civil and Private Secretaries, 1766-1841, RG 5, A 1, Crooks, Haycock and Hamilton to the Lieutenant Governor, Vol. 140, 76498-500, 9 April 1834.

[2] Similarily, there were many requests, up to 1837, for a second assize. Not all were predicated on alleviating an overcrowded gaol. In 1826 Justice Hagerman argued that there ought to be two assizes in the Midland District. Although the court had been at its work for a fortnight hearing both criminal and civil

Justice James Macaulay reported that he estimated each cell could hold from four to six prisoners in relative comfort. Joseph Liquers might have believed otherwise. The cells were unventilated in summer and unheated in winter, save for a stove placed in the outer hallway, and no provision was made for blankets. What fresh air there was was admitted through a four-inch hole cut into each cell. The gaol lacked an exercise yard and was so insecure it was necessary to shackle prisoners who attempted to escape. Typical of Upper Canadian gaols, prisoners were not classified. Liquers, although a youth, would have been placed in a cell with hardened criminals.

Four years later, Liquers was back in custody, this time for horse stealing, a crime, like cattle stealing, made non-capital under the Penal Reform Act of 1833. On 2 September 1836, he was sentenced to five years in the provincial penitentiary. At Kingston, Liquers would not share quarters with other prisoners. Instead, he was isolated in a nine-foot-by two-and-one-half-foot cell. Here he would be subject to corporal punishment for the slightest infringement of prison rules. He would have virtually no communication with the outside world or with his fellow prisoners and would spend his waking hours at hard labour. In contrast to the harsh conditions of the Hamilton gaol, where rehabilitation was an impossible notion, the Kingston Penitentiary, according to its champions, constituted a moral imprisonment aimed at reforming prisoners like Liquer.

When he left the penitentiary at the age of twenty-one, Liquers had experienced both the older, regressive system of punishment—a regime that employed local gaols, public whippings, the pillory, extensive fines and banishment—and the reformative

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cases, several important law suits had been left undecided. [NAC, RG 5, A1, Hagerman to Hillier, Vol. 79, 42683-6. 22 September 1826.]

promise of the new. Recent penal theories that have explored the reasons for the transition have appeared ill-suited to the Canadian situation. While the penitentiary of Melossi and Pavarini[3], Ignatieff[4], Foucault[5] and others was a functional by-product of industrialization, at mid-century, Ontario was still primarily an agrarian economy. An apparent aberration, how did the Kingston facility come to be built?

For much of the twentieth-century, the perspectives of James Edmund Jones and George Taylor Denison bracketed historiographic approaches to Upper Canadian criminal justice history. Near contemporaries, both men were Toronto magistrates. Their take on crime in early Ontario, however, could not have been more different. In the foreword to Jones's Pioneer Crimes and Punishments in Toronto and the Home District, W. L. Smith promised the reader that, in contrast with the severe machinery of colonial justice, "there will be a sense of relief and thankfulness from the fact that the darkness of Night has passed and the dawn of a New Day has come."[6] In his preface, Jones assured that his account would "make it clear that more real progress has been made in the last sixty years than in the centuries before in applying humanitarian principles to our dealings with persons charged with crime."[7] One is reminded here of John G. Diefenbaker's great-grandfather who is reputed, in 1837, to have witnessed the execution of a sixteen-year-old

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[3] Dario Melossi and Massimo Pavarini. The Prison and the Factory: Origins of the Penitentiary System. London: 1981.

[4] Michael Ignatieff. A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850. London: 1989.

[5] Michel Foucault. Discipline and Punish: The Birth of the Prison. New York: 1979.

[6] James Edmund Jones. Pioneer Crimes and Punishments in Toronto and the Home District. Toronto: 1924, viii.

[7] James Edmund Jones. Pioneer Crimes, xiii.

boy in Upper Canada for picking pockets. It is not difficult to imagine why the accuracy of this Dickensian episode might have gone unquestioned. Like Jones, those with Whiggish inclinations would find cause for comparative optimism in this description of a dark and sanguinary past. After all, we Canadians no longer hang juveniles, and pilfering objects from the pockets of the unsuspecting scarcely signifies as a crime worthy of our attention.

Where Jones saw darkness, Denison saw light. Founded on bedrock of Loyalist principles and values, colonial British North America was, he argued, "a community almost free from crime."[8] While its neighbour to the south was violent and lawless, the "Peaceable Kingdom" was unmarked by political and social upheavals. Upper Canadian neighbourhoods were stable, cohesive, pious, conciliatory and, most importantly, law-abiding and moral: "Murders and theft were practically unknown, and for many years the country increased in strength and population, almost without a need for legal restrictions or regulations." We would be hard pressed to locate the treatment of Joseph Liquers in either of these two generalized accounts.

In the last thirty years, criminal justice historians, nibbling on archival documents, have tended to centre their interest on the penal reform act of 1833 and the building of the Kingston Penitentiary. Jerald Bellomo, revising Denison's thesis, takes into consideration that not all social elements accepted or shared Loyalist values. Pauper immigrants, it was feared, threatened to dissolve the common moral glue that held the colony together. The response was "an intense and profound conservatism reacting against the alien assault on

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[8] From an address to the Royal Society of Canada, 1904, by G. T. Denison quoted in W. Thomas Matthews. "The Myth of the Peaceable Kingdom: Upper Canadian Society during the Early Victorian Period." Queens Quarterly 94/2 (Summer 1987): 383.

the society."[9] Bellomo concludes that the penal reform movement, incorporating a strategy informed by an alarming rise in crime and violence, was essentially rearguard. Solidifying rather than tinkering with traditional morality would best insure law and order. "The reformers," he enlightens, "innovated in order to conserve. Kingston Penitentiary stands as a monument to their efforts."

C. J. Taylor discounts the argument that crime was a problem in Upper Canada. Instead, he argues that the Kingston Penitentiary was built in reaction to a number of particular and general concerns. In February of 1831, Hugh C. Thompson cited a list of material reasons supporting his proposal for a provincial penitentiary: overcrowded local gaols that put juvenile offenders, debtors and the insane in the same cells with hardened criminals; with the exception of some murders, an unenforced death penalty; shaming rituals that were now considered morally improper. At least as important, Taylor argues, the penitentiary reflected conservative ideology, which pictured the universe as a moral and rationally integrated organism whose parts were hierarchically ordered. To those so convinced, the penitentiary constituted a perfect society where deviants who challenged the social order could be refitted. Its moral architecture "represented a community, albeit an artificial one, where the old values of obedience by the lower orders to a higher power were implicit."[10] Simply put, the penitentiary became an instrument of social control.

Because they looked for causal factors in and around the early 1830s, Russell Smandych chastised earlier studies for being restrictive. Basing his own historical inquiry on neo-revisionism (David Garland, and others), Smandych has argued for the need to

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[9] J. Jerald Bellomo. "Upper Canadian Attitudes Towards Crime and Punishment (1832-1851)." Ontario History 64 (1972): 14.

study "the broader macro-historical context" of penal reform, to place such a study within the wider spectrum of historical continuity. Looking back to the decades immediately preceding the Kingston prison, Smandych found little concern over spreading social disorder or a rising crime rate, discovering instead an abiding understanding on the part of the Upper Canadian Tories of "the need for state coercive control institutions."[11] Acknowledging Peter Oliver's study of district lock-ups, Smandych has argued that when, in the 1830s, Tory paternalism was confronted with the overcrowding of the multi-purpose district gaols, its conservative notions about the appropriate institutional response to deviancy and disorder kicked into action: "Members of the Tory government elite simply viewed (the penitentiary) as another control mechanism that could be employed to maintain a 'well-ordered' society."[12]

It is curious that the same historians who view penal reform in terms of a social control/repression paradigm are the very ones (Bellomo being an exception) who point out that serious crime was largely absent in Upper Canada. In 1988, Greg Marquis countered the instrumentalism of Smandych and others. Marquis argued that the emphasis on social control "neglected the question of the popular legitimacy of state institutions."[13] Imploring penal justice historians to be sensitive to the "complexities and ambiguities of popular attitudes towards the law", Marquis challenged us to create a "demotic intellectual history", not so much to counter institutional approaches, but rather to complement them.

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[10] C. J. Taylor. "The Kingston, Ontario Penitentiary and Moral Architecture." Histoire sociale/Social History 12/24 (November 1979): 241.

[11] Russell C. Smandych. "Beware of the 'Evil American Monster': Upper Canadian views on the need for a penitentiary, 1830-1834." Canadian Journal of Criminology (April 1991): 131-32.

[12] Russell Smandych. "Beware of the 'Evil American Monster', 137.

A number of recent studies of social and cultural life in Upper Canada have focused on grassroots activities and social rituals whereby communities attempted to affect cohesiveness among their disparate members irrespective of top-down state intervention. These studies have acknowledged that power relationships both defined community membership and acted as a means of moral regulation. In her examination of work bees in Upper Canada, Catharine Anne Wilson has argued that economic success, particularly in rural settlements, necessitated a reciprocal reliance on others within the neighbourhood. By bringing together diverse members of the community, the work bee became an agent for "social integration and bonding."[14] As a social and economic network, bees tended to affect a sense of community belonging.

Acknowledging mutuality as necessary to community survival, Pauline Greenhill has argued that the charivari was an essential neighbourhood mechanism for integrating brides who came from outside the community. This would afford some guarantee that the communal order would successfully reproduce itself: "It is important that a couple be shivareed, because it affirms that there is a collective watch on their fertility and thus on their willingness to reproduce and continue, not only the traditional community itself, but also its society, culture and values."[15]

According to Julia Roberts, taverns in Upper Canada were a less formal means of establishing a sense of community. "The taverns," she writes, "supported an informal public life, where practices of sociability unique to the setting encouraged a feeling of

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[13] Greg Marquis. "Doing Justice to 'British Justice': Law, Ideology and Canadian Historiography." W. Wesley Pue & Barry Wright. Canadian Perspectives on Law and Society. Ottawa: 44.

[14] Catharine Anne Wilson. "Reciprocal Work Bees and the Meaning of Neighbourhood." The Canadian Historical Review 82:3 (September 2001): 440.

belonging."[16] First Nations people and blacks were forcefully denied access to these public spaces, which otherwise tolerated gender and class differences. They found their place in Upper Canadian communities ambiguous, consequently privileging "Anglo-American custom and culture" at the expense of neighbourhood heterogeneity.

While these studies make clear that economic and social networks operated within and among Upper Canadian communities, they (especially Greenhill) obliquely suggest that an informal legal network—what Marquis refers to as "a distinct legal culture"—might also have been at work. To what extent were local communities involved in the criminal justice process beyond their traditional role as members of grand and petit juries? Did community involvement always complement the legal order or did it sometimes rub against it? I take the position, *vis-à-vis* Marquis, that communities in Upper Canada, rather than viewing legal mechanisms as operating repressively over and against them, both welcomed and used the legal apparatus. The public were apprised of additions and modifications to legal statutes. As private citizens, communities both hunted down criminals and acted as private prosecutors in criminal courts. There were, in addition, some elements within local communities who took it upon themselves to morally police their neighbourhoods either informally or to the full extent of the law. Perhaps of greatest consequence was the impact of communities on penal reform. I agree with contemporary penal justice historians that, at least from 1800 to 1840, there was no crisis in respect to the rate of crime within the province, no ground swell of criminal activity, no crime of epidemic proportion. Rather there was a crisis in the administration of punishment. There

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[15] Pauline Greenhill. "Welcome and Unwelcome Visitors: Shivarees and the Political Economy of Rural-Urban Interactions in Southern Ontario." Journal of Ritual Studies 3:1 (Winter 1989): 52.

were an inordinate number of offences prior to 1833 that, as even the Upper Canadian judiciary frequently admitted, did not merit the death penalty. In order to prevent law from taking its natural course in such cases, grand juries often failed to find "true bill" and petit juries either reduced a charge to a non-capital crime or found guilty parties to be innocent. The gears of justice ground slowly. After sentencing, prisoners could expect to wait several months in gaol under conditions equal to or worse than those experienced by Liquers while their cases came under review. Prior to 1835, virtually all capital sentences were reduced to banishment from the province for a period anywhere from 7 years to life. Many prisoners, however, either never left the province or returned early. In both cases their communities, believing that both primary and secondary punishment were too severe, harboured them. This, I argue, was the catalyst that brought about penal reform in 1833 and the building of the Kingston Penitentiary.

Chapter one proposes that immorality, and not crime as such, was of immediate concern to Upper Canadians. To moral crusaders like William Lyon Mackenzie as well as to the many who sat on grand juries, it was the theatre, street beggars and brothels, all of which were compounded by the liberal availability of alcohol, that fuelled crime. Some located the nexus of the problem in the breakdown of class deference, while others equated immorality and immigration. Understanding the importance of immigration to the economic prosperity of the province, the government introduced immigration schemes aimed at morally cocooning recently arrived workers. The Children's Friend Society was a case in point.

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[16] Julia Roberts. " 'A Mixed Assemblage of Persons': Race and Tavern Space in Upper Canada." The Canadian Historical Review 83:1 (March 2002): 7.

Chapter two examines how black immigrants, as an exogenous class, responded to criminal stereotyping. I argue that the actual amount of crime committed by blacks never exceeded their percentage of the overall population. Invariably, blacks countered racist attacks by using the legal system. Although attempts to create all-black communities failed, blacks laboured to realize their rights as British subjects.

Chapter three examines juveniles as a perceived endogenous criminal community. Throughout the period 1800-1840, children sixteen and under constituted slightly more than half of the population of Upper Canada. As child-rearing theories warned, the moral ambivalence of juveniles made them imminently dangerous. Nevertheless, children were not thought to be beyond moral reclamation. Their treatment in provincial gaols (witness Joseph Liquers) was a cause of ongoing concern for government officials and parents alike.

Chapter four demonstrates that much of the criminal justice system rested on the compliance of communities. A complex interrelationship among magistrates, police and the community developed, in which the last held much discretionary power. The actions of John Mewburn and Graves Chamney Swan illustrate that the customary role of magistrate was to equitably adjudicate rifts within the community. When individual magistrates took it upon themselves to morally police their communities, their efforts were often met with resistance.

Chapter five describes how communities became legally educated. In the absence of an effective police force, neighbourhoods policed themselves by hunting down criminals and bringing them before magistrates or by exercising other discretionary options.

Chapter six examines how communities morally regulated themselves by working both within and outside of the legal system. Despite publicly expressed fears concerning

social breakdown, the legal regulation of moral codes and conduct had little broadly-based public support. Rather, it was vested interest groups—women struggling to keep their farms and families afloat and evangelicals—, who used the courts to fight intemperance and Sabbath breaking, all to little effect. The charivari and church disciplinary bodies regulated aspects of customary morality. In Upper Canada, I argue, the former was viewed by the governing elite as a dangerous exercise in democratic excess. I also argue that it came into some disrepute as it frequently came to be used as an excuse for personal vendetta.

Chapter seven re-examines the Penal Reform Act of 1833 and the building of the Kingston Penitentiary. While not discounting previously cited causal factors, I argue that these have ignored the role played by the community. Believing that the pre-reform code was overly harsh, communities responded in one of two ways: by writing petitions in respect to capital crimes—often noting that the penalty afforded by the law was overly severe—and, of concern to a government opposed to democratic exercise, by sheltering local criminals whose sentences were reduced to banishment. The Kingston Penitentiary effectively eliminated this discretionary response. Even as the province was on the eve of responsible government, the rationalization of the legal system was in reaction to the democratic intrusion of local neighbourhoods.

Many of the cases cited in appendix three are not referred to in the main body of the text. The reader should be reminded that although capital crime figures in chapter seven, it is not my primary focus. One should also note that I do not include political crimes, i.e. sedition. In other chapters, I make reference to non-capital offences. Here I have taken the Niagara District as my micro-study. Although a fire in the Niagara records office destroyed

district documents prior to 1828, RG 22, Series 372, Court of General (Quarter Sessions) of the Peace, St. Catharines Session Records in the Ontario archives contains a nearly complete set of Quarter Sessions and Summary Court records from 1828-1840.

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"A DEPRAVED AND DEGENERATE PEOPLE"[1]: IMMORALITY AND CRIME IN UPPER CANADA

In the first paragraph, on the first page, in the first issue of the first newspaper printed in Upper Canada, Lieutenant-Governor John Graves Simcoe addressed the issue of law and order in the new province.[2] By proclamation, he ordered that all laws against blasphemy, profanity, adultery, fornication, polygamy, incest, profanation of the Lord's Day, swearing and drunkenness should strictly operate in all parts of the new colony. Deputed as agents of Christian virtue, all constables, judges and magistrates were commanded to execute said laws. And if Simcoe failed to mention more serious crimes like larceny (both grand and petit), burglary, arson and murder, it was simply understood, and would continue to be implied, that where moral failing prevailed, more serious crimes against life and property would be sure to follow. In his classroom text intended for the edification of Canadian youth against crime, Israel Lewis wrote that "those who keep the Moral Law of God, in nine cases out of ten, will be found keeping the Criminal Laws of the land—because it forms a part of their moral character."[3]

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[1] Edward Talbot. Five Years Residence in the Canadas. London: 1824, 125-26.

[2] Upper Canada Gazette, 18 April 1793. It was ordered that this proclamation be read in every courtroom and four times a year in every church. The newly crowned William IV issued a similar proclamation in 1830. [See the Upper Canada Gazette, 23 September 1830.]

[3] Israel Lewis. Youth's Guard Against Crime. Kingston: 1844, vi. To this end, it is perhaps logical that in ordering his chapters, Lewis begins with the Ten Commandments followed in turn by a discussion of English Common Law and Canadian Legal Statutes.

Martin Wiener has stressed that the early Victorians placed great importance on the need to build moral character. Referring to England, Wiener has argued that, after 1820, this need was exacerbated when it became apparent that traditional controls on human volition were dissolving at the same time as traditional structures of authority were coming under increasing criticism. Although for different reasons, and expressed by spokesmen less learned than their English counterparts, these same anxieties raked Upper Canada. "Images of the criminal reflected rising anxieties about impulses and will out of control; crime was a central metaphor of disorder and loss of control in all spheres of life."[4] One can get an idea of how especially troublesome this was for the Upper Canadian authorities when one learns that the jewel in their judicial crown, Justice John Beverley Robinson, took as his watchword "the important truth that 'order is Heaven's first law'."[5]

In order to promote the development of inner behavioural controls, the efforts to prevent crime focused on the need to inculcate moral habits throughout the whole social spectrum, especially in juveniles, who epitomized those ruled by passion and instinct. John Macaulay, the chairman of the Midland District quarter sessions, professed to the House of Assembly that the first step in the prevention of the growth of vice was the education of the young in the precepts of religion and morality. Without a profound sense of their moral obligations, among which Macaulay earmarked self-restraint, young people would sink

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[4] Martin Wiener. Reconstructing the Criminal: Culture, Law, and Policy in England, 1830-1914. Cambridge: 1990, 11.

[5] The Canadian Emigrant, 25 August 1836, Robinson to the Western District Grand Jury.

under the weight of daily temptations.[6] One such temptation, intoxication, was a special concern of Upper Canadian authorities.[7] A number of petitions for clemency noted that "spirituous liquors" had rendered the criminal temporally insane, an appropriate euphemism for both loss of reasoned behaviour and moral restraint. Macaulay alerted a quarter sessions' grand jury that they would find, in a Kingston gaol cell, a wretched person whom it had been necessary to commit because of evident insanity. He was accused of having destroyed two local homes by fire. His insanity, Macaulay believed, "was probably caused by the intemperate use of spirits."[8]

Intoxication was thought to have an especially debilitating effect on the moral conduct of young people. When sixteen-year-old Thomas Preston was sentenced to three years in the provincial penitentiary for horse theft, his father expressed a deep sense of humiliation in ascribing the origin of the offence to a "thoughtlessness"[9] induced by so disreputable a cause as intoxication. His son, otherwise described as honest and uprighteous, would not have been capable of such an act if sober. It was only when his suppressed moral faculties revived "in the morning, (that he) realized that he had done wrong."

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[6] PAO, Report of John Macaulay to the House of Assembly, Journal of the House of Assembly, Appendix 44, 1836, 3-4.

[7] Before passing sentence at the 1833 Home District assizes, Chief Justice John Beverley Robinson addressed the prisoners: "Most of you pleaded intoxication. No stronger argument could be adduced against the great evil of drinking (then) your standing there as convicted criminals..." [Canadian Correspondent, 26 October 1833.]

[8] Kingston Gazette and Religious Advocate, 30 October 1829.

[9] NAC, RG 5, A 1, Charles Preston to Colborne, Vol. 145, 79365-68, 12 September 1834.

Justice John Beverley Robinson made note that apprentices in particular, and young people in general, were more exposed to illicit temptations. It was their frequent congregation at places of public amusement—venues that promoted drunkenness, gambling and the profanation of the Sabbath—that was, according to Robinson, "the source(s) of most crimes."[10] The inexperience of young people made them heedless, he warned, blinding them to the consequences of their actions. "They do not clearly enough see, nor deeply enough feel how inevitably a continued indulgence in an idle dissolute life must lead to the destruction of their character....still less are they likely to reflect in time how almost hopeless it is that character once forfeited by notorious profligacy will ever be fully regained". This moral discourse would come to frame the reasons given by apprentices for committing crimes. When nineteen-year-old James Jobbet, an apprentice to tailor William Knott of York, was convicted for assault and sentenced to a fine and imprisonment, he petitioned for mitigation. Besides not being able to pay the £5 fine, he explained that he had fallen "in with a party of riotous persons belonging to York."[11]

Like infants let loose in a candy store, juveniles, it was widely believed, were easily seduced by various vices—the neighbourhood brothel, the illegal tippling houses, the theatre—all tantalizingly close at hand. This may explain the insertion of "morality" clauses in apprentice contracts.[12] An agreement between apprentice and master was morally

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[10] Colonial Advocate, 10 April 1834, Robinson to the Home District Grand Jury.

[11] NAC, RG 5, A 1, Jobbet to Maitland, Vol. 43, 21638-41, 16 August 1819. See chapter 2 for further examples.

[12] Even advertisements for apprentices often stipulated, as did one for a boy, fourteen years or upwards, for the brewery trade, that they come recommended for their "moral and orderly behaviour." [Niagara Herald, 8 May, 1802.] By English common law (*32 G. 3. C. 56*), an indentured servant could be

as well as legally binding argued the Western Herald.[13] If the first contract made by the apprentice as a useful member of society was broken, how could it be expected that he or she would ever keep one? "Much of the misery of this world," wrote the editor, "—the idleness—the dissipation—the vagrancy of young men may be traced to this one cause. They lose their own self-esteem—their natural pride—and become reprobates."[14] The indenture of William Crysler specified that during his term "he shall not play at Cards or Dice nor any other unlawful game whereby his said master may be Damnified, with his own or others he shall not absent himself day or night from his said masters service unlawfully, nor haunt ale houses, taverns or play houses..."[15] When seven-year-old Elias Benger was apprenticed to Jacob Gander as a servant in 1806, the indenture specified that "at any unlawful games he shall not play, nor frequent any places of public entertainments,

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discharged "at a moment's warning for immorality, or gross misconduct." [See W. C. Keele. The Provincial Justice, or Magistrate's Manual. Toronto: 1835, 408.]

[13] The template for apprenticeship contracts was found in John Burn's Justice of the Peace and Parish Officer, (usually shortened to Burn's Justice) London: 1797, Vol. 1, 115-16.

[14] Western Herald and Farmer's Magazine, 18 September 1839. The editor referred to a report published by the Warden of the Eastern Penitentiary wherein it was stated that of 187 prisoners received during the previous year, 28 had been bound to a trade and served till the age of 21 while 34 had been bound and left their masters; the remaining 116 had never been apprenticed. The editor boldly inferred that this clearly proved that those who served out their time faithfully were not as liable to crime as runaways. "Had these one hundred and sixteen criminals been apprenticed, it may be presumed that very few of them would have been inmates of a penitentiary."

[15] John M. Crysler. Chrysler and Other Early Settlers in the Township of Niagara. Niagara: 1936, 109. W. C. Keele included a common form of an indenture of apprenticeship in his magistrate's handbook. Keele's example distinguishes between playing at cards, dice or any other unlawful game and haunting taverns or playhouses. The former were prohibited because they provided an opportunity for the apprentice to gamble away his or her master's property, the latter, because such behaviour spoke to a breach of the servant's fidelity to the master. [W. C. Keele. The Provincial Justice, or Magistrate's Manual. Toronto: 1835, 36.]

(and) fornication he shall not commit..."[16] As late as 1855, five-year-old Catharine Aiken was cautioned not to attend playhouses nor to haunt taverns.[17] The indenture of John Faluy stipulated that he should, unless prevented by sickness or some other sufficient reason, attend divine services "in such a Church as his father shall profess, twice in every Sunday"[18] for the duration of his apprenticeship. Expected to be constantly vigilant, it was a master's duty to steer his apprentice along a virtuous pathway.[19]

As John Beattie has argued, for the propertied classes in Upper Canada, "criminality, indeed, provided evidence of much deeper and more serious evils—evils that threatened the moral and social fabric of the society, and that called for powerful measures of defence."[20] For the governing elite within the upper province, the monitoring of vice at the community level promised some degree of social stability and an accompanying diminution of crime.

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[16] A 'Canuck'. Pen Pictures of Early Pioneer Life in Upper Canada. Toronto: 1905, 278. Elias absconded in 1817.

[17] Baldwin Room, Metropolitan Toronto Reference Library. Indenture to William Stodders, 10 September 1855.

[18] PAO, L 44, MU 5904, John Beverley Robinson Papers, 27 March 1829.

[19] Period journals and newspapers often published advice to apprentices that supported the importance of virtuous behaviour. One journal implored apprentices not "to suffer themselves to be tempted by their passions to violate the respect which they owe those to whom Providence has subject them." Another advised that, having selected their profession, they should resolve not to abandon it "but by a life of industry and enterprise to adorn it." They might be aided by selecting only the best books on morality and religion, by modelling their behaviour on "the purest and greatest characters", by serving God and attending church. [Juvenile Entertainer. Vol. 1, nos. 2 & 18 (1831).]

[20] J. M. Beattie. Attitudes Towards Crime and Punishment in Upper Canada, 1830-1: A Documentary Study. Toronto: 1977, 2. Beattie holds that it was this conviction that spirited many changes in both penal law and practices in Upper Canada. While it is my contention that this is certainly true at the municipal level, I will argue that the changes in the substance and practice of the law at the State level were the result of community attitudes concerning the appropriateness of statutory punishments and the failure of existing secondary punishments to deter crime.

Canadian criminal-justice historians have chewed over the question of whether serious crime was a problem in Upper Canada. Jerald Bellomo has defended the proposition that the province was troubled by a steady increase in the rate of indictable offences.[21] Yet his appears to be the exceptional voice. John Beattie[22], Rainer Baehre[23], Charles Talbot[24] and Peter Oliver[25] have countered that serious crime was largely absent in this period. The potential for concern that might be elicited by reports of increases in the rate of crime was continually offset, and put into perspective, by acknowledging the concomitant increases in the population. One newspaper even went so far as to argue, "that while the population of the Province has been greatly on the increase, the diminution of crime has been in like proportion."[26] Such was the editor's belief in the proportional decrease in crime that he considered the building of the Kingston Penitentiary to be an unnecessary extravagance.

Grand jury charges at the Court of King's/Queen's Bench regularly monitored the criminal pulse of the province. Over a seventeen-year period, they appear to support Beattie and his like-minded colleagues. Having studied thirty-seven such charges between the

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[21] J. J. Bellomo. "Upper Canadian Attitudes towards Crime and Punishment," Ontario History 64 (1972). Peter Oliver takes issue with Bellomo pointing out that his argument stands or falls on a few scattered reports in the Upper Canadian press. [Peter Oliver. "Terror to Evil-Doers": Prisons and Punishments in Nineteenth-Century Ontario. Toronto: 1998, 89.]

[22] J. M. Beattie. Attitudes Towards Crime and Punishment in Upper Canada, 1830-1850. Toronto: 1977, 1-5.

[23] Rainer Baehre. "Origins of the Penitentiary System in Upper Canada," The Ontario Historical Society (1977), 187.

[24] Charles K. Talbot. Justice in Early Ontario, 1791-1840. Ottawa: 1983, 145.

[25] Peter Oliver. "Terror to Evil-Doers". 86-97.

[26] Reprinted from the Acadian Recorder in the Kingston Chronicle and Gazette, 1 February 1834.

years 1822 and 1839, I have found that in more than half the instances, various presiding judges, with obvious relish, pointed out that the number of cases before the court were "not numerous", "comparatively light", "very small", "trifling" or "not of unusual extent". Justice James Macaulay took great pleasure (but probably employed fallacious reasoning) in congratulating the Johnstown District grand jury for their empty gaol that he believed signalled the total absence of local crime.[27] Chief Justice Robinson was, likewise, gratified to see that an increase in both population and affluence in the Western District had not brought about a proportional increase in crime.[28] In only two charges was there any mention that the calendar was more than usually heavy. In one of these, Justice Jonas Jones exculpated the Ottawa District by drawing the jury's attention to the fact that the lumber trade "was unavoidably the cause of bringing numbers of dissolute and unprincipled characters to this quarter, and that from their conduct, no doubt arose the increased number of crimes and their aggravated nature."[29] Insofar as lesser crimes tried at the assizes, courts of quarter sessions and summary courts were concerned, the records for the Niagara District reveal that between the years 1829 and 1839 there were but small fluctuations in the ratio of crimes to population, the ratios themselves being quite small throughout. Moreover, by the end of this period, the percentages had actually decreased (**Table 1.0**).

Gaol returns and trial records are notoriously poor foundations for criminal statistics. Justice Macaulay might have believed that an empty gaol indicated a crime-free

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[27] Brockville Recorder, 19 August 1836.

[28] The Canadian Emigrant, 25 August 1836. For an extended analysis of Robinson's grand jury addresses see Donald J. McMahon. "Law and Public Authority: Sir John Beverley Robinson and the Purposes of the Criminal Law." University of Toronto Faculty of Law Review 46:2 (Spring 1988): 391-423.

Table I.0 Ratio of Prosecutions to Population (per 10,000) in the Niagara District, 1829-1839

Date	Population	Total Crimes Prosecuted at Assizes	Total Crimes Prosecuted at Quarter Sessions	Total Crimes Prosecuted at Summary Court*	Crime Overall Prosecuted per 10,000
1829	20,617	11	63	-	36
1830	20,916	27	88	-	55
1831	20,974	19	81	-	48
1832	24,181	20	57	-	32
1833	24,722	15	94	-	44
1834	27,347	21	55	35	41
1835	28,735	18	28	71	41
1836	30,428	33	25	43	33
1837	32,296	64^	52	69	57
1838	30,521	29	40	38	26
1839	29,953	38	27	22	29

*Summary court begins 1834.
^This figure includes 25 cases for non-attendance of petite jury duty. I found this charge only for 1837.
Source: Assizes, court of quarter sessions & summary court records as found in PAO, RG 22, Series 22/ Assize Minutebooks Criminal and PAO, RG 22, Series 372.

Johnstown District but it might just as well have been the result of poor policing, the reluctance of victims to prosecute or structural inadequacies in the gaol leading to frequent escapes. When we examine the larger archival record, namely grand jury reports, period literature, addresses to grand juries as well as newspaper articles, editorials and letters, we find that if crime was not thought to be a problem, it was because, comparatively speaking,

[29] By-Town Gazette, 27 September 1837,

immorality was thought to be more immediately troublesome. Simcoe's proclamation was to the point—criminal discourse was often subsumed under moral discourse. As I demonstrate below, what Upper Canadians feared was not a growth in crime *per se*, but a steady erosion of the moral infrastructure, which could and would occasion both criminality and a withering of patriarchal authority. One diarist even argued that the continuing light calendar at the assizes should not be thought a cause for celebration, being instead an indication of just how low Upper Canadian morality had sunk. Edward Allen Talbot, a social observer of Upper Canada for four years, wrote that the English judicial calendar was the best indicator of the state of English morality. However, because the number of trials in Upper Canadian courts bore no relation to the number of crimes actually committed, this rule did not hold good in Canada. Talbot concluded that this made it more difficult to ascertain the relative moral condition of Upper Canadians. This was not to suggest that unprosecuted crime abounded but that the state of morality was such that many crimes were not recognized as such, for instance, adultery, breach of promise of marriage, and seduction: "For such, as I have before observed, is the laxity of morals in which the Canadian youth of both sexes are educated, that this sort of conduct is scarcely viewed in the light of a crime."[30]

Even reformers, or at least reformers in public office, shared this analysis. William Lyon Mackenzie confessed that by the age of twenty-one he had battled his inner demons and won the moral high ground. He disavowed gambling and adopted a temperate

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[30] Edward Allen Talbot. Five Year's Residence in the Canadas Including a Tour Through Part of the United States of America in the year 1823. London: 1824, 83. Of course it does not strictly follow that these were not viewed as crimes. It may well have been the case that they were dealt with as such within the community albeit extra-legally.

lifestyle.[31] Using his newspaper to conduct a moral crusade, he alerted his 1828 readership to the fact that there was one venue either selling or serving alcohol in the town of York for every 33 citizens. He sermonized that many of these outlets were haunts for the idle and profligate, and all of them known to the magistrates, "and in some cases owned by them, but which they permit to exist and to multiply, as hotbeds of vice and infamy, and allurements to draw youth (along) the swift road that leadeth to destruction."[32] In 1829, he campaigned for paved and lighted streets and a competent police force "and such other alterations, as would deliver us from accumulations of mud, filth, degraded tippling houses, and drunken vagabonds in every corner of our streets..."[33] For the year 1831, it was calculated that consumers had spent £560,000 on spirits and wine, a figure that translated into the estimated 80,000 drinkers in Upper Canada consuming 40 gallons each that year[34]. "It is this proneness to intemperance, and its handmaids debauchery and crime, that destroys the efforts of the generous friends of liberty (among whom Mackenzie undoubtedly included himself) in many a land."[35] Drunkenness, he wrote, was a formidable obstacle to political reform: "The tippler and the sot may bawl for 'Liberty,' but they are

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[31] The Constitution, 8 February 1837.

[32] Colonial Advocate, 12 June 1828.

[33] Colonial Advocate, 3 December 1829.

[34] Garland & Talman have calculated that, collectively, the six distilleries operating in the Bathurst District produced 108,000 gallons in 1836, an output "rather formidable for a district of 30,000, many of whom were children." [M. A. Garland & J. J. Talman. "Pioneer Drinking Habits and the Rise of the Temperance Agitation in Upper Canada Prior to 1840," F. H. Armstrong, et. al., eds. Aspects of Nineteenth-Century Ontario. Toronto: 1974, 172.] They also argue that before the building of the railroads, taverns in Upper Canada averaged about one per mile.

[35] Colonial Advocate, 19 May 1831.

unworthy of its blessings; we can expect little permanent advantage from their support."[36] Mackenzie was wont to mix his tirades over lax morality with a critique of the ruling elite. He wrote that the gross improprieties of those of high station served as an "evil and pernicious example."[37] Mass education (a moral panacea for both reformers and many Tories alike) was, he lamented, utterly neglected by the government. Those who taught were given little encouragement "unless their political and religious creeds are held to be orthodox by Doctor Strachan."[38]

As Toronto's first mayor, Mackenzie extended his concern over the improper regulation of taverns and houses of entertainment to the huts and shanties springing up along the bank, and on the beach, of Lake Ontario.[39] He was convinced that many of them attracted "the worthless and dissipated" and consequently were responsible for corrupting the morals of the city's youth.[40] When the Toronto police investigated, they found

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[36] Colonial Advocate, 26 June 1834.

[37] Colonial Advocate, 29 July 1829. Likewise, Catharine Parr Traill observed that intemperance belonged "most decidedly to those that consider themselves among the better class of emigrants." She argued that as a poor example to those whom they considered their social inferiors, they had no right to complain when the labouring class put on "airs of equality". "If the sons of gentlemen lower themselves, no wonder if the sons of poor men endeavour to exalt themselves above him in a country where they all meet on equal ground; and good conduct is the distinguishing mark between the classes." [Catharine Parr Traill. The Backwoods of Canada Being Letters from the Wife of an Emigrant Officer. London: 1836, 272.]

[38] Colonial Advocate, 29 July 1829.

[39] Mackenzie was unsure of his jurisdiction in this area of the newly incorporated city. Attorney General Robert Jameson reported that all land from the road to the edge of the bank was invested in Trustees for the use of the public. The space between the edge of the bank and the lake, however, was Crown land and trespassers could be evicted in the name of the King. Not one squatter in the shantytown had ever received government permission. [NAC, RG 5, A 1, Jameson to Rowan, Vol. 141, 77283-84, 27 May 1834.]

[40] Although there is no doubt that he shared their concerns, Mackenzie was basically reiterating a number of complaints listed in a petition that his office had received 5 May 1834 from over thirty-five concerned citizens. They claimed that the huts and shanties were a means of supplying spirituous liquors to

numerous unlicensed persons selling liquor and "affording room for gambling and vice in its blackest shapes."[41] Mackenzie added that most of the indictable cases investigated by the Toronto police originated in intoxication.[42] In his weekly reports on the Toronto Police Court, he associated intemperance with virtually every case presented. This he offered as empirical support for his allegation that alcohol "was the remote or direct cause of nearly all crime"[43].

In one of the earliest accounts of a charge to a grand jury (1799), Chief Justice Elmsley complained about the "pernicious effects"[44] of alcohol abuse. He contended that both health and morality were subsequently compromised. Rather than indicting the entire

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the community "in defiance of the law and to the injury of public morals." [Colonial Advocate, 8 May 1834.]

[41] NAC, RG 5, A 1, Mackenzie to Rowan, Vol. 140, 76923-29, 7 May 1834. Francis Collins's reform newspaper, the Canadian Freeman, was critical of Mackenzie's hard line on crime and criminals. Reviewing the proceedings of the Mayor's Court, the paper complained that Mackenzie had betrayed his reformist principles when he harshly sentenced Edward Hannigan, a soldier of the 15th regiment, to securities for keeping the peace, and to stand committed until complied with, after learning that the man's commanding officer would not post them. "Here is Mackenzie, the liberal pious and humane reformer, who cried out so loudly against Judges Sherwood and Hagerman for their tyrannical sentence against the Freeman, some time ago, because it amounted to what they intended—perpetual imprisonment." [The Canadian Freeman, 17 July 1834.] The Tory newspaper, the Courier, conducted an ongoing campaign to sully Mackenzie's reputation as Chief Magistrate suggesting that the punishments meted out were too strict and rigid especially in the case of "trifling violations." [Canadian Correspondent, 5 July 1834.]

[42] See, for instance, the Colonial Advocate, 24 May 1835. The Toronto Recorder also blamed the grog shops in Toronto for the high number of army desertions. They implored the magistracy to stamp out this "crying evil." "These are places in which every crime that disgraces our city is connected and they ever have and ever will have, the worst possible effects upon the well being of the civil as well as the military portions of our community." [Reprinted in The Canadian Emigrant, 22 August 1835.]

[43] Anna Brownwell Jameson recalled an observation made to her by two Upper Canadians to the effect that they rated "the morality of the Canadian population frightfully low; lying and drunkenness they spoke of as nearly universal; men who come here with sober habits quickly fall into the vice of the country; and those who have the least propensity to drinking find the means of gratification comparatively cheap, and little check from public opinion." [Anna Brownwell. Winter Studies and Summer Rambles in Canada (1838). Toronto: 1965, 41.]

[44] Upper Canada Gazette, 2 November 1799.

society, however, he restricted his warning to "the lower class of people." Thirty-one years later little had changed. At the 1830 York assizes, Chief Justice John Beverley Robinson pondered the question of why it was that there was scarcely an assize in any one of the provincial districts that had not one of two cases of homicide on the docket. What made this especially troublesome was that, comparatively speaking, there were counties in Great Britain where, for several years, there was not one instance of a conviction for murder. The same was true of many districts in Holland, some of which contained large cities. The answer, Robinson postulated, was to be found in the intemperate use of spirits and the ensuing loss of moral and religious feeling. Within the colony, "spirituous (sic) liquors" were most often used at barn raisings, land clearances, "or some such purpose."[45] It was as well in the mother country. However, there, where people were raised to fear God and obey the law, these events rarely promoted excessive violence. At most, they occasioned harmless amusements—"trials of manly strength." In Upper Canada, Robinson regretted, the old were unable to restrain the young, a theme that resonated in the writings of "genteel" women like Susanna Moodie. The want of early discipline meant that what began as sport and amusement often ended in riot, cruelty, and sometimes, murder. "This," argued Robinson, "is no exaggerated picture—we have more than once seen the sons of respectable farmers, whose names were, till that unhappy moment, unstained by any violation of the law, standing at the bar as criminals, in consequence of such riotous excesses as I have mentioned." The law could punish offenders, but it was the religious community that could prevent such outrages through exertion and example.

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[45] Kingston Gazette and Religious Advocate, 23 April 1930.

Municipal councils would continue to wrestle with the issue. In 1839, a select committee was struck to examine the complaints made in a petition from Joseph H. Smith contending that certain licensed innkeepers were not providing lawful accommodation. *6 William 4th Chap.* stipulated that an innkeeper must provide at least three spare rooms and three spare beds as well as stabling for four horses (**Appendix 1**). The committee discovered twenty-one innkeepers in the city who either provided partial accommodation for the public or none at all.[46] They also found at least as many persons selling spirituous liquors and/or ale without licence. Rather than providing suitable quarters for travellers, many inns in Toronto were fuelling the local consumption of voluminous amounts of alcohol. The committee was of one mind with the spirit of Smith's petition– licence infractions "were the main source of the immorality existing in the City, and the frequent infractions of the Public Peace too frequently (of late) ending in the loss of human life."[47]

The grand jury reports for the Toronto Mayor's Court[48] attest to the propertied classes' shared belief in a causal connection between various forms of virulent immorality and the increase of crime within the city. After reviewing the cases put before them, one of the first grand juries to report to the Mayor of the newly incorporated city of Toronto,

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[46] One Toronto innkeeper who provided neither beds nor stable facilities was Francis Rossi (See below).

[47] TA, MS 385, Toronto City Council Papers, File 40, 4 March 1839.

[48] Although grand jury reports (both quarter session and assize), with the exception of their reports on local gaol conditions, were seldom published in newspapers, they did, nevertheless, establish an important link between the agricultural and commercial classes (those who made up the juries) and the local magistracy, King's Bench judges, and, after June of 1834 when jury reports were sent to Government House, the lieutenant-governor. The governing elite in Upper Canada found their attitudes and assumptions concerning crime and criminal behaviour substantiated by these reports while the attitudes and assumptions of the agricultural and commercial classes were themselves shaped by newspapers, grand jury charges and so on (as will be later illustrated) in an ever widening circle of mutual reinforcement.

expressed alarm over the prevalence of tippling houses in the city. They strongly advised their entire abolition. An 1836 grand jury recommended that only those of good character and suitable accommodation should be trusted with liquor licences.[49] Critical levels of intemperance and "gross immorality" in the city required "the most vigorous efforts of every friend of the welfare of Society for its suppression,"[50] especially from magistrates who were urged to expend more time and energy in detecting and punishing offenders. [51]

Although temperance societies cast their critical net wide, they too narrowed in on the equation between crime and alcohol. The Committee of the Kingston Temperance Society was a case in point:

> The moral and civil effects of intemperance are deplorable. Every person acquainted with the administration of justice knows that most of the murders, manslaughters, riots, assaults, and breaches of the peace, besides a large proportion of other offences, for which criminals are convicted and punished are occasioned by intemperance. It is that, which fills the gaol with convicts, the hospital with patients, the mad-houses with maniacs, and the town at large with wretches, whose families are left to beg or starve and their children brought up in ignorance, idleness, vice and rage.[52]

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[49] Toronto Archives (hereinafter, TA), Mayor's Office, Series E, Box 1, 6 December 1836.

[50] TA, Mayor's Court, Series E, Box 1, 1 June 1836.

[51] Guardians of social morality could be quite hard on those who breached these shibboleths. James Lyon, one of the Newcastle District's representatives in the lower house, was issued a bench warrant for having "adopted the personification of a certain lady's husband." What "disgusted" the editor of the Cobourg Star was the fact that Lyon had, for many years, claimed "all the virtues of a Patriot---been a constant Professor of Religion! A perfect Saint!, to whom intemperance of any kind has been an utter abomination." The very morning that the charge was made to the magistrates, Lyon had attended, "with assumed sanctity and grief," the funeral of his father-in-law, "the parent of his abused and deserted wife." How then was one to understand the criminal behaviour of this "gentleman" who was neither a tippler, idle nor poor yet who had fled the country in consequence of his impending arrest? [The Cobourg Star and Newcastle Advertiser, 8 October 1832.]

[52] Barnabas Bidwell, H. Cassady Jr. and John Parker to The Patriot, 25 February 1830.

Patrick Brode has remarked that loyalist judges, like Chief Justice John Beverley Robinson, "rather than seeing a society swamped by crime.... appreciated the law-abiding nature of the province."[53] Overly concerned with making 'feel-good' "professions of loyalty to those in power", the loyalist judges did not perceive, as the reform judges of the 1850s did, that the province was slipping "into an abyss of ignorance, drunkenness and crime." As we have seen above, Brode is correct in his first point, but his second misses the mark. Robinson was, as were the justices that preceded him, quite aware of the problem of intemperance and other dissipations.[54] His contemporary, John Macaulay, as Chairman of the court of quarter sessions of the Midland District, reminded the grand jury that they were, to a certain degree, "guardians of public morality."[55] Part of their duty was to identify any disorderly public houses that "do infinite mischief to the morals of those by whom they are much frequented" and suppress them. As respectful and moral men, they were reminded that they must find the increasing vice of drunkenness a matter of deep regret.[56]

Robinson was acutely aware of the precarious moral state of the province. He believed that any degree of moral depravity, and any number of what he called the

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[53] Patrick Brode. "Grand Jury Addresses of the Early Canadian Judges in an Age of Reform." The Law Society of Upper Canada Gazette 23 (June: 1989), 146.

[54] See supranote 7.

[55] Kingston Gazette and Religious Advocate, 30 October 1829.

[56] Brode also implies that the idea of using the penitentiary to reform the moral character of inmates was a project that consumed the reform judges. Yet as early as 1832, Robinson was advocating the same to the Home District Grand Jury. Assessing the effects of forced labour, he wrote: "There will always be some offenders too heedless for reflection, or too profligate to be reformed by experience, but this can hardly be the case universally, and, at any rate, it is most desirable that we should make the experiment, for certainly the present system of punishing by mere imprisonment, is in too many respects objectionable, to admit of its being continued long after a country has become populous. Policy and humanity both concur to recommend the course upon which we are about to enter."

"dissolute and abandoned"[57] among the general population, necessarily indicated the physical presence of pockets of disreputable housing. Robinson had in mind more than the usual suspects— brothels and tippling houses. He was referring to the makeshift dwellings that were growing like mutant appendages on the peripheries of the province's urban centres. He directed that the proper city officials remove them. As early as 1817, the sheriff of the Midland District had complained to the lieutenant-governor about "Black People and others...a nuisance to that neighbourhood"[58] who were constructing huts on a government park lot adjoining the town of Kingston. The lieutenant-governor ordered that the squatters were to be notified that they had eight days to vacate, otherwise steps would be taken to remove them forcibly. To these, and other public officials in Upper Canada, an ethically cleansed society was a lawful and ordered society. Like the person writing under the name MONITOR who suggested that prostitution in the town of Niagara was a pestilence that should not be tolerated and that prostitutes should accordingly be "drummed out of town"[59], a common knee-jerk reaction to urban vice was to banish its practitioners. "Thus," MONITOR intoned, "shall domestic happiness prevail, the public morals be kept from reproach, and the judgments of heaven averted."

Huts and shanties, brothels and tippling houses, were but a few of a number of more-telling indications of moral slippage. Chief Justice Robinson brought to the attention of the Home District grand jury that of the twenty-four cases before them, eleven involved

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[57] The Courier, 29 October 1836.

[58] NAC, RG 5, A 2, Draft Correspondence to the Lieutenant-Governor's Secretary, 1804-40, MacMahon to Ridout, Vol. 5, 11 August 1817.

[59] Niagara Gleaner, 20 May 1826.

women charged with felonies. Because, he warned, women had so many more scruples to overcome before they descended into crime, and because their moral example had so powerful an effect upon society, there ought to be much reason for concern. It was, for Robinson, clear and quantifiable proof that a "depravity of morals"[60] was on the rise.

Some newspapers argued that the liberal fashion in which "vagrant" bands of "strolling players" were permitted by towns and villages to run at large was a sign of immoral infestation. The Young Men's Society of Cobourg, a moral watchdog, petitioned the local magistrates to refuse permission to theatre companies to perform in the town.[61] The practice, they argued, "corrupts the morals of youth and is subversive of the true principles of virtue."[62] Part of the problem may have been that wandering players most often performed at taverns and hotels both of which were already targeted as morally suspect[63]. After the execution of Charles French in 1828 for the murder of Edward Nowlan, popular theatre in Toronto was shut down for five years. The confrontation between French and Nowlan had begun at a local theatre where the two young men had gone to see a

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[60] The Courier, 29 October 1836.

[61] The editor of the Cobourg Star praised the Society for furthering the security and respectability of the community, predicated, as it was, on the moral reform of its young men. [Cobourg Star, 1 November 1837.] A branch of The Young Men's Society was established in York in 1832 (Edith Firth argues that it was founded in 1831 with 20 members). It's objective was to provide information to young men upon their arrival at the town: "directing them to the most proper boarding-houses—cautioning them against associating with idle, drunken wretches, swearers (sic), Sabbath-breakers, &c.... in short, to rescue them from every species of vice, into which too many are apt to fall, upon their first coming to a new country." [The Canadian Magazine, 1.3 (March 1833), 223.] Its members also delivered moral/religious tracts to the Home District gaol and urged children to attend Sunday School. Member James Leslie described the attendance at its meetings as "large." [Edith Firth, ed. The Town of York, 1815-1834. Toronto: 1966, 334.]

[62] The Cobourg Star, 2 April 1834.

[63] See Gerald Lenton-Young. "Variety Theatre," Ann Saddlemyer, ed. Early Stages: Theatre in Ontario 1800-1914. Toronto: 1990, 167ff.

production of "Tom and Jerry (or Life in London)". Mackenzie had complained that although the York theatrical company professed to open its doors at seven in the evening, it proved closer to nine or ten "thereby introducing irregular habits among our youth, encouraging midnight depredators to make the playhouse their rendezvous, and alluring the hardworking tradesman from his peaceful home and regular hours to the midnight company of persons dangerous to the public peace."[64] When the theatres reopened in 1833, Mackenzie wondered that such groups performing in the Toronto streets late into the morning hours were not arrested as vagrants and banished from the town:

> Do our authorities wish the morals of youth reduced to a more degraded state than it is? We hope they will not suffer these pests, these public nuisances to continue much longer. We are very sorry to see some of the corps editorial (sic) patronize these floodgates to debauchery and dissipation. But we say clean the vagabonds out at once and free the town from a nuisance.[65]

Circuses, too, came under criticism partly, as Gerald Lenton-Young points out, because of the "gamblers and flimflam men who followed them."[66] Some circuses skirted censure by calling themselves "menageries", a label which spoke favourably to their supposed didactic value.

Yet another indication of increasing immorality in the first half of the nineteenth century was the multiplying number of beggars infesting city streets. A Toronto jury reported that the majority of beggars were either the direct victims of intemperance and vice or the "unfortunate children of such parents who, whilst they are trained to every

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[64] Colonial Advocate, 12 June 1828.

[65] Colonial Advocate, 25 July 1833. Among a list of six things certain to ruin a son, the Western Herald included permitting him to attend the theatre. [Western Herald and Farmer's Journal, 4 September 1838.]

[66] Gerald Lenton-Young. "Variety Theatre," 174.

species of falsehood and deception, become inured to crime and wickedness, thereby themselves enduring the greatest possible misery on earth and jeopardizing their immortal souls (whence) they cannot fail to grow up a pest and a nuisance to society which must ultimately endanger the more virtuous part of the rising generation."[67] As would be the case with other grand juries, the Toronto jury was motivated by a desire to maximize the welfare and prosperity of the "social community." Those who moved within "scenes of depravity and the contagion of evil example"[68] required immersion within a controlled environment of "virtuous example". This suggested (as it would in other communities) the urgent need to construct a House of Industry. Citing the example of "thousands of its inhabitants who have risen from poverty to comparative affluence," the jurymen added that poverty was only a temporary condition for those who were moral, temperate, and industrious. An asylum that stimulated habits of industry would be the catalyst that would catapult the city's indigent into the ranks of honest consumers. Philanthropic agencies were meant to alleviate poverty through an infusion of self-discipline and an admixture of the proper values. Underlying this strategy was the commonly held belief that poverty was epiphenomenal. Delinquency and pauperism were interpreted as indications of moral weakness rather than the consequences of economic struggle. This fit well with the free-will slant of classical jurisprudence, that, when assessing criminal responsibility, ignored social factors and considered the adult individual—as the captain of his or her destiny—wholly culpable. Such an approach to crime, Marie-Christine Leps has concluded, "offered

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[67] TA, Mayor's Court, Series E, Box 1, 11 March 1837.

[68] Ibid.

the immediate advantage of transferring economic and social problems onto (sic) moral and even medical planes which left structures of authority untouched."[69] John Weaver concurs. He argues that the quickening pace of economic activity in the province was too closely associated with the idea of progress to warrant critical analysis. "Instead, relying on old-country beliefs and trends, the authorities in Upper Canada blamed (crime on) cultures (Irish and plebeian) rather than socio-economic conditions."[70] Until at least 1840, no matter what qualitative differences there were between the insane, the debtor, the criminal, and, as some Tories would have it, the radical dissenter, they would all share the same prisons because they were all transmutations of the same underlying condition. They were, to a person, afflicted with moral degeneracy.

The grand jury for the court of quarter sessions in the Niagara District, July of 1829, offered "that it would tend greatly to the peace, comfort and safety of His Majesty's subjects within the Town of Niagara"[71] if a small number of itemized nuisances and abuses were addressed. Gathered from among the most respectable farmers and tradesmen in the district, the grand jury was inspired by an economic imperative to keep the streets of district towns and villages safe for commerce. David Thompson, a justice of the peace and jury foreman, identified four annoyances. First, persons frequently in the habit of shooting off their muskets and firing squibs within the town posed a fire hazard to private property

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[69] Marie-Christine Leps. Apprehending the Criminal: The Production of Deviance in Nineteenth-Century Discourse. Durham: 1992, 26.

[70] Weaver, "Crime, Public Order, and Repression: The Gore District in Upheaval", R. C. McLeod, ed. Labouring Lives. Toronto: 1995, 45.

[71] PAO, RG 22, Series 372, Box 4, File 9, 18 July 1829.

as well as putting its good citizens at risk. Second, in contravention of police regulations, many were given to allowing their swine to roam the streets at large, greatly disrupting the comings and goings of His Majesty's liege subjects and visitors (presumably Americans travelling on business) alike. Third, the reckless driving/riding of carriages, wagons, carts and horses endangered the lives of pedestrians. And fourth, a further danger was engendered by women of wanton habits who prowled the streets at all hours of the night "stealing such loose property as happen to fall in their way and carrying unlawful weapons for the purpose of gratifying a malignant and vindictive spirit."[72] For Thompson, civility was measured by the lawful eradication of its antithesis—frontier anarchy.[73] What appeared at first to be strictly pragmatic concerns, turned out, when one scratched beneath the surface, to signal an unravelling of moral restraints and a descent into social chaos.

In England, industrial growth and the expansion of the market economy, conditions that could hardly be said to prevail in pre-industrial Upper Canada, helped to undermine seasoned controls, especially on women and juveniles. In Upper Canada, causal factors were perhaps more subtle although, it was believed, no less subversive. Some writers, like Susanna Moodie, pointed to the fact that Upper Canada was literally being

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[72] PAO, RG 22, Series 372, Box 4, File 9.

[73] Every urban centre in Upper Canada took measure of the lawlessness in its streets. The Kingston Gazette argued that breaches of the peace were more common in Kingston than any other town or village of equal population much to the detriment of its reputation "in neighbouring and even distant places". Frequent assaults, batteries and affrays were blamed on a combination of factors: hot tempers, the lack of education of its inhabitants, the variety of their national character, the intermixture of military and naval residents of the lower classes, the reluctance of citizens to prosecute and the laxness of the magistrates. But more than any of these, the editor blamed the police for not enforcing "the good laws (already) in place." [Kingston Gazette, 3 August 1816.] Fifteen years later, the situation had not much improved. A writer to the Kingston Chronicle calling himself "Orion" complained that the Kingston police were negligent in their duties for not clearing the streets of swine. The writer had heard a gentleman passing through town comment that "Pigville was a more appropriate appellative to this place than the one it holds." (Kingston Chronicle, 30 August, 1831.]

carved out of the forests. The bush, she wrote, had a demoralizing effect, especially on the young. "Freed suddenly from all parental control, and exposed to the contaminating influence of broken-down gentlemen loafers, who hide their pride and poverty in the woods, he joins in their low debauchery, and falsely imagines that, by becoming a blackguard, he will be considered an excellent woodsman."[74]

Nearly all travellers' accounts or letters from settlers commented on the levelling effect of pioneer life. Catharine Parr Traill wrote of house raising bees:

> In no situation, and under no other circumstance, does the equalizing system of America appear to such advantage as in meetings of this sort. You will see the son of the educated gentleman and that of the poor artisan, the officer and the private soldier, the independent settler and the labourer who works out for hire, cheerfully uniting in one common cause.[75]

Outside of mutual aid, however, the blurring of class distinctions was received less cheerfully. It was the equality of conditions and the economic parity of those who successfully overcame the hardships of "roughing it in the bush" that levelled social divisions.[76] As one observer put it, the fact that people felt more on a par with each other as

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[74] Susanna, Moodie, Life in the Clearings. Toronto: 1959, xxxi. Another visitor to Upper Canada, Charles Daubeny, shared Moodie's observations: "The young men brought up in these distant settlements seldom turn out well; it is difficult to educate them, and still more so to preserve them from bad company." Daubeny warned English gentleman that, upon migrating to Canada, it might be possible for them to save their social positions but that taking up residence in the backwoods would inevitably degrade their children more "than an apprenticeship to farming or to mechanical employments in the old country would have done." [Charles Daubeny. Journal of a Tour Through the United States and in Canada, Made During the Years 1837-38. Oxford: 1843, 42.] It should be noted, however, that not every writer shared this analysis. Anne Langton commended life in the woods "where there are so few temptations, and fewer opportunities for dishonesty." [A. Langton. A Gentlewoman in Upper Canada. Toronto: 1950, 157.]

[75] [Catharine Parr Traill]. The Backwoods of Canada: Being Letters from the Wife of an Emigrant Officer. London: 1836. 122.]

[76] Not all visitors to Canada appeared to agree. John MacTaggart, chief engineer for the Rideau Canal project, implied that Upper Canada was incontrovertibly stratified to the point "where no encouragement is held out to virtue and talent." Consequently, "the noble spirit of man begins to droop, and Vice to show her ugly visage." [John MacTaggart. Three Years in Canada. London, 1929, 295.] Levelled or

a consequence of lessening economic disparity had established the Canadian maxim—"civility and not servility."[77] Nevertheless, genteel pioneers like Susanna Moodie, found the underclass disrespectful and rude. She agreed with other commentators on Canadian mores who argued that social restraints placed on the European underclass had bred a servile deference. Economic independence in the colony had the effect of shattering old-world social dependency. This did not sit well with patricians like Moodie. She regretted:

> They no sooner set foot upon the Canadian shores than they become possessed with this ultra-republican spirit. All respect for their employers, all subordination is at an end; the very air of Canada severs the tie of mutual obligation which bound you together. They demand the highest wages, and grumble at doing half the work, in return, which they cheerfully performed at home.[78]

William Hutton wrote to his brother-in-law in Ireland, June 26, 1834, that in Upper Canada there were not as many social gradations as at home: "all appear pretty much on a level, and, except in cities, there is little or no aristocracy."[79] Like Moodie and others of her station, Hutton too deplored the presumption of equality on the part of servants: "In speaking of their master, they call him Mr. so-and so; and it is surprising how soon the poor Irish pick up this democratic feeling, even though they have all their lives been accustomed to use, 'your honour' and 'your honour's honour'."

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stratified, either way the case would be made by various commentators that crime was the inevitable consequence.

[77] Anonymous. A Cheering Voice from Upper Canada: Addressed to all Whom it May Concern, in a Letter from an Emigrant. London: 1834, 6.

[78] Susanna Moodie. Roughing it in the Bush. 140. [See also James Taylor. Narrative of a Voyage to, and Travels in Upper Canada with Accounts of the Customs, Character and Dialect. Hull: 1816, 35; Martin Doyle. Hints on Emigration to Upper Canada. Dublin: 1834, 11; "An English Farmer." A Few Plain Directions for Persons Intending to Proceed as Settlers to His Majesty's Province of Upper Canada. London: 1820, 96-7.]

[79] Gerald Boyce. Hutton of Hastings: The Life and Letters of William Hutton, 1801-61. Belleville: 1972, 26-7.

If domestic servants experienced a sense of equality, then how much more so did successful farmers? John Howison commented that no matter how many cattle they owned or how much grain was in their barns, the amelioration of their initial poverty had not produced an equivalent improvement of their manners and character. "They are still the same untutored incorrigible beings that they probably were, when, the ruffian remnant of a disbanded regiment, or the outlawed refuse of some European nation, they sought refuge in the wilds of Upper Canada."[80] It would be expected, Howison offered, that economic prosperity would extinguish, or at least suppress, "evil habits and vicious propensities" in once poor emigrants. But this was not the case. The parvenu were, in point of fact, morally depraved and this, Howison believed, was because "the lower classes are never either virtuous, happy or respectable, unless they live in a state of subordination, and depend in some degree upon their superiors for occupation and subsistence."[81] Economic good fortune might have made for social equality but, in so doing, it had a corrosive effect on traditional restraints resulting in a backlash of immorality. While political reformers in Upper Canada would base their demands for responsible government partly on the increasing economic contribution and success of the underclasses, the government would point to their apparent lack of moral improvement as an excuse to regenerate patriarchy[82].

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[80] John Howison. Sketches of Upper Canada, Domestic, Local and Characteristic. London: 1821, 114.

[81] Howison. Sketches of Upper Canada, 176.

[82] Cognizant of E. P. Thompson's warning that social analysis which colours its subject "patriarchal" stands in danger of obscuring the subtleties of power-play and shifts within social hierarchies, I take the concept to mean any social institution in which authority, gendered and class-biased, generally flows downward from the top. See Customs in Common. New York: 1993, 503-505.

As we will see in subsequent chapters, both the government and the press became preoccupied with devising strategies that would reinstitute control.

The adverse effects of material prosperity on organized religion directly challenged social patriarchy. The Scottish Presbyterian church, for one, saw among its cultural roles that of supporting standards of moral conduct and inculcating a respect for authority in its congregation. With irreligion pervasive in backwoods communities, deference to authority, moral values and a respect for the law fell like dominoes. Reverend Peter Macnaughton wrote that the inhabitants of Thorah and Eldon townships in the Home District "seemed to be as rugged as the rocks they left in Scotland and wild as (the) forests they possess in Canada. They seemed much given to drink, and if I judge what I witnessed, a few of them are given to fight. Free from the restraints of religion and education they are growing up like wild beasts."[83] Macnaughton wrote that Old World customs and traditions had fallen victim to New World democracy extending even into the church polity. He deplored the fact that "Farmers, Mechanics, Artisans, Merchants and Traders, and...unlettered men generally...think that they have the power by their votes, to admit or exclude any Candidate for the Ministry."[84]

The freedom and reclusion of the backwoods frontier, it was argued, proved conducive to cultural backsliding into heathenism and lawlessness. Perhaps the best

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[83] Quoted in Peter Russell. "Church of Scotland Clergy in Upper Canada", Ontario History 78.2 (June 1981), 99.

[84] Russell. "Church of Scotland Clergy in Upper Canada", 98. Some, like Lieutenant-Governor George Arthur felt that even the "old-world" Scottish Presbyterian Church was too democratic for Canada. Arthur preferred immigrants from England and Ireland to those from Scotland. Their "form of Church Government", he wrote, "is a little too Republican for this part of the world—for men are too much disposed to think that what is beneficial for their spiritual interests, may also be beneficial to advance their temporal concerns." [Arthur Papers, Vol. 1, Arthur to Howick, 11 October 1838.]

indication that things had gone amiss, or as Macnaughton put it, that Upper Canada was covered with a "thick moral darkness," was a perceived indifference to the religious observance of the Sabbath. Howison blamed this on the fact that churches were few in number, and sometimes as far as two hundred miles from a village.[85] A dearth of places of public worship, he insisted, could only have a fatal effect upon the principles of those who were already "in a state of the most pitiable moral degradation." Basil Hall, a British observer of Upper Canada in 1829, agreed. Reporting on a religious service conducted by an itinerant preacher in the woods just outside of Cobourg, Hall wrote:

> For we can easily believe, that in the midst of the woods, where the population are employed all week long at hard labour, and the neighbourhood is but scantily settled, there can be very little or none of that (religious) example, or that public opinion, which are found so efficacious elsewhere, to encourage good morals, and to check bad habits.[86]

Edward Talbot was disgusted by the fact that Upper Canadians "were more depraved in their morals, more profligate in their manners, and more graceless in their general deportment, than any other people upon earth with whom I was acquainted,"[87] and this because the Sabbath was considered but another day in the week. Abstaining from labour on Sunday, more from habit, it was argued, than from principle, too many Upper Canadians spent their day in idleness and amusement. Writer John M'Donald observed that few Upper Canadians cared for the gospel and most studiously avoided observing the Sabbath. One

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[85] Howison noted that there were only two places between Niagara and Ancaster (a distance of fifty-miles) holding regular church services. The next church west of Ancaster was two hundred miles. [Howison, Sketches of Upper Canada, 142.]

[86] Basil Hall. Travels in North America, Vol. 1. Edinburgh, 1829, 278.

[87] Edward Talbot. Five Year's Residence in the Canadas, 125.

man, M'Donald noted, reported "that it was not at all like a Sabbath with them, for they come in with their waggons full and transact all their business on the Lord's Day."[88] Talbot observed that he had heard more profanity in Canada in a single week than he had heard during his twenty-year residence in Ireland. Talbot summarized that Upper Canadians "live in the regular commission of crimes," by which he meant both infidelity and impiety. When an increasing number of pauper immigrants were thrown into the mix, it threatened to become volatile.

"Invited To The Feast": Immigration And Crime

The idea that a common morality was the cornerstone of social stability, Jerald Bellomo writes, was a tenet of hegemonic conservatism in Upper Canada: "The conservative desire for social order and stability helps to explain the great fear of the 'increase of crime', which seemed to accompany the new foreign elements entering Upper Canada in the 1830's."[89] At stake was a vulnerable way of life and system of established values. Immigrants, especially the Irish, sailing to Upper Canada in the early 1830s, imported more than diseases like cholera: they brought moral contagion. The supposed defects of their national or ethnic character—drunkenness, idleness and poor parenting skills—would act like a parasite, eating away at the indigenous moral fibre. Bellomo might

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[88] John M'Donald. Emigration to Canada: Narrative of a Voyage to Quebec and Journey from Thence to New Lanark in Upper Canada. London: 1826, 25.

[89] J. Jerald Bellomo. "Upper Canadian Attitudes Towards Crime and Punishment (1832-1851)". Ontario Historical Society 64 (1972): 12.

well have located this attitude at least a decade earlier. An 1824 London District grand jury had complained to Chief Justice William Dummer Powell that:

> ...due to the recent influx of immigrants from various parts of the world and the consequent difference of opinion and increase of business thereby occasioned, some improprieties of conduct have taken place at these courts, exhibiting in several instances, insult, uprorary (sic) and contempt of legal authority on the part of the suitors and visitors which appear not to have been resisted by sufficient firmness on the part of the commissioners.[90]

The influx of Episcopal Methodists from the United States posed problems of a different sort. Methodism was shot through with republican zeal and democratic inclinations, or so the Tory press argued. "Unlike the highly structured doctrine of the Anglicans," writes Cecilia Morgan, "the evangelical message was one of individual responsibility for salvation and a direct, intimate relationship with God."[91] It was feared that Methodism, if left to its own devices, would iron out the vertically structured Upper Canadian society and rub up against social inequality and patriarchy. At its worst, Methodism was, in a word, seditious.

Of equal concern was the effect of Methodist "irrationality" on the state of morality in the province. A series of editorials and letters in The Patriot and Farmer's Monitor in 1831 directed against camp meetings illustrate the range of concern. Editor Thomas Dalton's opening salvo was a rather temperate argument that Methodism led to a socially irresponsible lifestyle. He remonstrated that camp meetings, usually two weeks in duration, pointed young Canadian males in the direction of "vagabondism."[92]: "it is said

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[90] NAC, RG 5, A 1, Grand Jury to Powell, Vol. 68, 36025-27, 4 September 1824.

[91] Cecilia Morgan. Public Men and Virtuous Women. Toronto: 1996, 100.

[92] The Patriot, 28 June 1831.

in England that if a youth live a gipsey's life for a fortnight, he will have a hankering for it ever after." A letter from CHRISTIANITY in the same issue levelled a more serious accusation. At least half of the camp proceedings occurred in the evening, a fact, the writer argued, that made it "favourable to deeds of darkness and to the carnal enjoyment of the substantialities of love feasts." The further fact that camp meetings were held in the countryside well clear of the distractions of home and town prompted AN OBSERVER to equate the meeting sites with the groves and forests associated with Devil worship. They were, he advised, "haunts of immorality where the Saviour's religion is burlesqued by the Priests of Mammon and the worshipper of Venus", a veiled charge that camp meetings were lascivious gatherings where female chastity was no match for the dogma of "licentious indulgence"[93] practiced by charismatic Methodist preachers. Dalton had no doubt that camp meetings occasioned the seduction of young females. If any of these cases were to come to court, where parents knowingly permitted their children to attend meetings, he advised juries against finding for the prosecutor. He informed his readers that he had polled no less that eight persons who regularly sat on petit juries "who had been unanimous in decrying their determination to withhold damages in certain cases, considering, as they justly observed, that to tolerate in young girls the frequenting of such haunts of iniquity was voluntarily to consign them to destruction."[94] And so the case against Methodism was built. On July 19th, Dalton reported from an American source that about half of the female prostitutes in New York City had "been reduced to that state of

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[93] The Patriot, 28 June 1831. A letter from CHRISTIANITY.

[94] The Patriot, 12 July 1831.

utter desolation from frequently attending camp meetings." The American advice to Canadians?": "Extirpate from your country these horrible nuisances."[95]—the Methodists, not the prostitutes. CONSTANT READER reiterated. When "giddy girls" were "wickedly enticed" to camp meetings (or as one correspondent referred to them, "open-air brothels"[96]) they all too frequently fell victim to sexual seduction. Prostitution was the "frequent fruit of these most iniquitous mob assemblages."[97]

A Dalton editorial in the summer of '31 more or less marked the end of the exchange. Towards the end of July, the Royal Circus rolled into Kingston. Evangelicals had targeted theatre, in alls its forms, including circuses, as a hotbed of immorality. Heedless, Dalton recommended that the youth of Kingston attend the circus that "they may return with their innocence unsullied" rather than camp meetings where "every moral feeling is violently assailed if not extinguished."[98]

Undoubtedly Upper Canadians were apprehensive about the increasing number of immigrants entering the province. It was generally held that English parishes would jealously protect their honest and industrious agricultural workers and send out only those who were a burden on their communities, namely the drunken, vicious and idle. One could only hope that those who cared little to improve their prospects would not easily be induced to leave a parish that maintained them for a colony where there were no poor

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[95] The Patriot, 19 July 1831.

[96] The Patriot, 16 August 1831.

[97] The Patriot, 9 July 1831.

[98] The Patriot, 26 July 1831.

laws and in which they must labour for their living.[99] The districts of Upper Canada appeared willing enough to pay for the support of local paupers who were unemployable: the insane, the elderly, the orphaned and the injured. As Peter Oliver has observed, welfare initiatives were, of necessity, either localized or the preserve of *ad hoc* boards. The Upper Canadian government was "immature and chaotic"[100]. Without a Cabinet, executive authority was unfocused. Although the Executive Council contained some department heads, social welfare was not the responsibility of any one of them. With no central guidelines to follow, welfare was a district initiative in the hands of local magistrates, who seemed to be driven more by economic considerations and less by moral compassion[101]. Both parish clergy and district grand juries were often critical of suggestions by district magistrates to discontinue allowances to paupers. Describing various families and individuals who were in economic distress, Robert Addison wrote to the Niagara magistrates at quarter sessions that "without help some of them must perish."[102] Earlier that year, another grand jury, acknowledging that the proportion of tax

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[99] See William Dunlop. Tiger Dunlop's Upper Canada. Toronto: 1967, 72.

[100] Peter Oliver. "Terror to Evil-Doers": Prisons and Punishments in Nineteenth-Century Ontario. Toronto: 1998, 145.

[101] The government, whenever the question of assistance arose, seemed intent on throwing the costs back on the community. The care of destitute prisoners was a rare exception. In 1835, justices Robinson, Sherwood and Macaulay suggested to the governor-general that more "precise and satisfactory regulations than are at present provided" were required for the care of prisoners confined on criminal charges in several local gaols. "We are aware," they wrote, "that private charity might, and would, if appealed to, extend its aid to these miserable objects; but besides that such a resource is precious and unsteady, it is already heavily burthened by other claims; and the proper maintenance of prisoners seems to us to be a charge peculiarly incumbent upon Civil authority." [NAC, Rare Book Collection, 22 December 1835.]

[102] PAO, RG 22, Series 372, Box 4, File 40, 1829.

to each inhabitant "to be very trifling in the present system,"[103] implored the magistrates not to discontinue pauper support. Ten years later, the community was still fighting against cutbacks in compensation to helpless persons in destitute circumstances. In March, 1839, the Niagara grand jury wrote to the magistrates at quarter sessions that the non-payment of the orders on the Treasurer of the District to those individuals compensated for the maintenance of the insane was "an intolerable 'grievance' more especially as the class of people in that charge are generally extreemly (sic) poor and quite unable to lay out their money the long time they are required to do so many of them being upwards of a year in arrears."[104] The jurymen recommended an additional tax or assessment that would enable the district to defray current expenses as well as all debts in arrears. The names of sixteen insane persons requiring immediate and continuing support were appended to the memorial. Although it was sometimes recognized that necessary precautions ought to be taken to screen out unworthy applicants, most grand juries agreed that when district money was well applied it was "so crediable (sic) to the sympathies of human nature, and so justly bestowed when given a worthy object."[105] But while a populous and wealthy district "ought of right" to support the usual small number of local

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[103] PAO, RG 22, Series 372, Box 3, File 38, April 1829. In fairness, the grand jury at the January quarter sessions for the same year presented that, in 1820, the pauper list had been £100 and now, in 1829, was £250 pounds. They complained that the sum total of £2000 was too rapid an increase for the district to afford. The apparent solution was to review the pauper list and strike out anyone who, after critical consideration, was deemed unworthy of support. The point is that district welfare appeared to be a matter of collective caprice rather than a system based upon thoughtfully articulated principles.

[104] PAO, RG 22, Series 372, Box 33A, File 14, March 1839. Earlier in the decade, a grand jury was "greatly grieved" that the magistrates were determined "to withdraw any succor (sic) from the paupers of this District." They stated to the magistrates that they believed the general sentiment among the district population was in favour of the further extension of funds rather than any restriction. [PAO, RG 22, Series 372, Box 4, File 32, 29 January 1831.]

[105] PAO, RG 22, Series 372, Box 4, File 32, 29 January 1831.

paupers, there was little support to levy a poor rate.[106] The encouragement this would give to pauper emigration seemed apparent to all. The Kingston Spectator spoke for many Upper Canadians when it railed against the imposition of anything resembling the English Poor Laws: "It might be well enough to relieve our own indigent poor, but we shall have thousands of miserable people upon us from the old country." The editor punctuated the point by adding that a friend had "supposed we must support the run-away Negroes also!"[107] To support this sort of emigration, it was believed, was to support a certain increase in crime.

Assessing each pauper case on its own merits, as fumbling, unfair and inconsistent as this often appeared to be, nevertheless, served its purpose. In the absence of external directives, it allowed local authorities discretionary control of welfare initiatives. A more generalized policy, such as a poor law, might loosen their control and open the floodgates to the exogenous poor. And despite the continued determination of district magistrates to either reduce or eliminate welfare payments, the congregate will of the community prevailed and, at least in the Niagara District, payments continued to be made to community families sheltering the unemployable, without fail, at least until 1840.

In some towns, citizen committees were struck to administer charity to the poor. In 1833, the Niagara District Indigent Committee provided William Riley with ten shillings to

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[106] Russell C. Smandych has found an analogous sentiment among the magistrates and inhabitants of the Midland District—"reasonable support" for the local poor, as one's Christian duty would dictate, but no Poor Laws. [R. Smandych, "The Exclusion of the English Poor Law from Upper Canada," in Louis Knafla & Susan Binnie, eds. Law, Society, and the State. Toronto: 1995, 99-129.]

[107] Kingston Spectator. Reprinted in the Brockville Recorder, 12 October, 1837.

see him through a bad patch[108]. But such committees were ephemeral, their approach to poverty unsystematic.

There were other legal and charitable options available for the provision of orphaned or impoverished children. An Act to Provide for the Education and Support of Orphan Children, *39 Geo. 3, chp. 3, 1799*, gave town Wardens the right to bind out orphans and abandoned infant children (where no relation could be found willing to support them), with the agreement of two magistrates, as apprentices, until they attained the age of twenty-one in the case of males and eighteen in the case of females. Such children above the age of fourteen could not be apprenticed without their consent. The binding out of Edward Davis, under the age of four years and ten months and abandoned by his parents, to Gore District farmer Christian Swartzentruber, was arranged by the Wardens of Wilmot and two district magistrates, William Scollick and Henry Peterson.[109] Providing children a home and upbringing until the age of maturity took the onus of supporting pauper children off the district. And providing them with a trade guaranteed that they would not be a future burden to their neighbourhoods. Local benevolent societies might also target poor children. Poverty implied the absence of morality and religious instruction. Never meant to alleviate the former, local interventions were meant to compensate the latter. The Dorcas Society of Kingston, managed by local society women, provided clothing for eighty-nine children in the year 1828. Operating under a religious mandate, the provision of clothing was contingent on the children's attending any Sabbath school of their choice. "Those who

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[108] Niagara Gleaner, 20 April 1833.

[109] Waterloo Historical Society, 57 (1969), 80-81.

were of age to render it proper they should support themselves have been advised to do so, and sometimes an inexpensive article has been bestowed, as an encouragement."[110] Ever conscious that their efforts might make them complicit in supporting idleness, the society matrons made a point of visiting the beneficiaries of their charity in order, "to exert a good moral influence upon them".

The year 1825 witnessed the simultaneous implementation of two antithetical government initiatives, initiatives that were so contradictory as to aggravate the fears of settled Upper Canadians: the end of land grants in Upper Canada[111] and the beginning of various strategies to use the province (poor laws or no poor laws) as a means for ridding the indigent and delinquent poor from the urban slums and destitute rural areas of Great Britain. The latter were least likely to be in a position to purchase parcels of land. Those in Upper Canada and abroad who profited, or hoped to profit, from increased immigration had to convince wary provincials that these immigration schemes would not unleash a criminal tidal wave. Provisional planning for relocating disadvantaged children was a case in point.

In 1832, William "Tiger" Dunlop, colonizer and executive member of the Canada Company, wondered aloud why the advantages of infant emigration had not occurred to the Home authorities. Dunlop extolled the economic benefits. A young pauper could be removed from a parish at a quarter of what it cost to send out an adult. As settlers, malleable children, unlike intransigent adults, "could easily be habituated to the work, the

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[110] Kingston Chronicle, 25 October 1828.

[111] The children of United Empire Loyalists and those who had served in His Majesty's navy and army were exceptions.

climate, and the ways of the country."[112] It was proposed to send parish children to Canada as servants or apprentices, their colonial employers and masters standing in loco parentis. The scarcity of reliable labour in the province would, Dunlop hypothesized, prevent ill-treatment. When a child could so easily abscond (scarcely a week went by without a newspaper giving notice to this effect)[113], employers and masters would be careful not to alienate the affections of their infant charges. Dunlop conjectured that forms of moral suasion softer than corporal punishment would be used. A government memorandum on juvenile emigration went so far as to suggest that in no part of the world were servants and apprentices treated with more kindness than in Upper Canada. "More evil," the writer postulated, "may be apprehended from the want of severity, than from an excess of it."[114] Nevertheless, the constant number of apprentices fleeing service suggests, among other possibilities, either mistreatment or the intention of apprentices to enter the labour market as wage earners with their newly acquired skills. An order by the Court of General Quarters Sessions for the London District, hinted at general mistreatment. The court ordered that the Wardens in each township would, at the request of any magistrate in the district, visit any

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[112] William Dunlop. Statistical Sketches of Upper Canada for the Use of Emigrants (London: 1832). Found in Tiger Dunlop's Upper Canada, Toronto: 1967, 72.

[113] Despite such advertisements, it is difficult to calculate the number of apprentices and indentured servants who actually absconded. There are some legal references in the quarter-sessions records. For instance, George Rolph of the London District swore out a warrant against his apprentice, William Sutoce, who had absented himself from service "without leave or licence." [PAO, RG 22 Series 62, London General Quarter Sessions, Vol. 1, Filings 1810-1846, 8 August 1810.] Police Court records for Toronto show that eleven male and four female apprentices/indentured servants were brought before the court in 1848 for deserting their employment. This was an increase of eight from the previous year. [Baldwin Room, Metropolitan Toronto Reference Library, Statistical Statement of Crime in the City of Toronto for the Year 1848.] Such evidence is impressionistic at best and makes it difficult to draw conclusions about trends or numbers.

[114] NAC, RG 5, A 1, Memorandum Respecting Juvenile Emigration, Vol. 143, 78147-50, 1833.

indentured apprentice within their township and report on the condition of the same.[115] There are also scattered cases in the Judge's Benchbooks to support fears of potential abuse. James Sullivan, an eleven-year-old apprentice in the confectioners trade, prosecuted his master, fifty-one-year-old Francis Rossi of York, for physical abuse[116], a misdemeanour in law. In 1830, Rossi had capitulated to the pleas of the boy's destitute parents to take on their son and "to try and reclaim him from his idyll (sic) and dissolute habits."[117] "Perplexed" by the boy's incorrigibility, his thieving, lying and idleness, Rossi had attempted to modify this behaviour by continually threatening to send the boy to gaol. The failure of this "gentle means" induced Rossi to resort to "harsh measures" much against his will in consequence of which the High Constable forcibly took the child away without prior consultation. Sullivan's narrative (as related by Richard Harris), given in evidence at the assizes, told a different tale. Sullivan had wandered into the shop of Richard Harris who found the boy to be half frozen. Sullivan's boots were in ruins. When Harris removed them, the boy's toenails came away. Harris learned that Sullivan was beaten two or three times a day. Upon further examination, Harris discovered welts on the boy's neck, and black, blue and green bruises on his legs. Harris obtained a warrant for Rossi's arrest and Sullivan was admitted to the hospital. Rossi's neighbour, Martha Thompson, testified that she had repeatedly heard Rossi whipping Sullivan and had seen the boy's torn pants covered in crusted blood. Another neighbour, Jane Grisson, had seen Rossi knock the boy down and

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[115] PAO, RG 22 - 7, London District Court of Quarter Sessions Minutes, 16 October 1817.

[116] English common law permitted masters to chastise their apprentices "with moderation". [See W. C. Keele. The Provincial Justice or Magistrate's Manual. Toronto: 1835, 31.] This may explain why the prosecution witnesses in the Rossi trial were pumped for details concerning Sullivan's ill-treatment.

[117] NAC, RG 5, A 1, Rossi to John Colborne, Vol. 115, 64942-45, 21 April 1832.

kick him for "trifling occasions." Grisson remembered having seen the boy tied with cords or chained to a post in the oven house and left in the cold without a coat for a day and a night. Other neighbours variously reported hearing the whippings, seeing the boy walking out in a frost without shoes, being whipped by Rossi in the street to make the boy hurry along and being given a black eye. None of the witnesses could testify to the boy's stealing or absences from work. Rossi was sentenced to one month's imprisonment and fined £10.[118] Commenting on the case at the request of the lieutenant-governor, Justice John Beverley Robinson wrote that the inhumane and cruel treatment would have merited a much more severe punishment if it had not been for the fact that there was reason to believe that the boy was "a very vicious and depraved child." Robinson also gave consideration to the fact that Rossi was a "respectable tradesman." Consequently, any longer term of imprisonment would, because of the public disgrace to Rossi, be considered severe. Rossi's petition for release from gaol was turned down.[119]

Indentured servants, who believed themselves abused, likewise used the courts. Servant, Nancy Peterson, took her employers, W. B. and Martha Peters, to the Niagara assizes[120]. Peterson successfully sued them for assault and cruel treatment. Peters was

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[118] PAO, RG 22, Series 390, Supreme Court of Ontario Judge's Benchbooks, J. B. Robinson. The King vs. Francis Rossi. Assizes 1831-34.

[119] NAC, RG 5, A 1, Rossi to John Colborne, Vol. 115, 64942-6, 21 April 1832.

[120] On master and servant prosecutions, see Paul Craven in Hay and Craven eds. Master, Servant and Magistrates in Britain and the Empire (forthcoming, University of North Carolina, 2004).

ordered to provide recognizances of £100 pounds to keep the peace towards Peterson for one year.[121]

Apprentices and indentured servants could, and did, use the Statute of Labourers, *5th Eliz. Chap. 4, Section 35*, that required, on complaint being made to a magistrate, the master to appear at the next Sessions of the Peace to answer for breach of contract. James Cannon of Kingston, a bound apprentice to hatter Emmerson Busby, charged his master, 23 of April, 1799, at the court of quarter sessions with breach of contract. Busby had failed to provide Cannon with sufficient food and had employed his apprentice as a servant ("a domestic drudge"[122]) and not at the trade of hatter. Cannon, giving full proof of his complaint, was discharged and freed from his apprenticeship. Even members of the colonial elite were subject to such judicial interventions. John Beverley Robinson was successfully sued by his apprentice, Charles Small, for breach of covenant. The Robinson/Small indenture was exhibited in court as proof that Small had been apprenticed for a five-year clerkship that he might qualify to be sworn and admitted as one of the barristers and attorneys for the court of King's Bench. Although Small had fulfilled all of the specified covenants and agreements, Robinson dismissed Small from his service[123] before the expiration of the indenture.

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[121] PAO, RG 22, Series 134, Vol. 4, 19 September 1811, 100.

[122] Adam Shortt. Early Records of Ontario Being Extracts from the Records of the Court of Quarter Sessions for the District of Mecklenburg (afterward the Midland District). Kingston: 1900, 37.

[123] Baldwin Room: Metropolitan Toronto Reference Library, Powell Papers, 2 January 1819. Small was eventually called to the bar on April 21, 1824 and succeeded his father as Clerk of the Crown and Pleas in 1825.

Dunlop's speculations aside, it was generally recognized that the scarcity of skilled workers in the province offered a material incentive for apprentices and servants to abscond.[124] Consequently, most indentures specified that the apprentice/servant, at the expiration of his or her indenture, was to be paid a set sum, usually in the form of livestock to the value of £30 to £50. The above-mentioned government memorandum noted:

> The object which the farmers have in view in this arrangement is to secure the services of their apprentices after they become sufficiently valuable to entitle them to wages, the temptation to leave their masters in a country where labour is so valuable being very great.... that their object is to be as liberal as possible to their apprentices at the expiration of their time as an inducement for them to remain the full period for which they are bound.[125]

Although the Home government may not have actively supported them, there were a number of British initiatives to place British children in Upper Canadian homes. In 1827, the Incorporated Society of Protestant Charter Schools in Dublin inquired "if there is anything in the province of Upper Canada for apprenticing 50 to 80 boys who would be sent to Quebec free of expence."[126] The boys were fourteen years old and upward. The societies' wards, the lieutenant-governor was assured, had been reared in the principles of

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[124] In the absence of a large pool of skilled labourers, a good apprentice was essential to the success of any small business. Toward the end of 1812, John Cameron, a government printer, permitted his apprentice, Edward William McBride, to volunteer in the incorporated militia. Eighteen months later, Cameron, working with only one "unsteady" journeyman, argued that it was "essential to have the assistance of McBride in the Printing Office." Indicating the scarcity of reliable apprentices, Cameron was requesting that his letter be taken as a requisition from him to General Drummond for the release of McBride from military duty for three months or until he was able to procure an additional journeyman. [NAC, RG 5, A 1, Cameron to Capt. R. R. Laing, Vol. 20, 8383-6, 26 May 1814.] Six months later, he wrote that his endeavours to find another apprentice had been fruitless. Mentioning that the lieutenant-governor had agreed to release McBride back for a time, but presuming that some urgency must have delayed the return, the frustrated Cameron boldly "wished now to have the release effected without any hesitation." [NAC, RG 5, A 1, Cameron to McMahon Vol. 21, 8998-99, 26 November 1814.]

[125] NAC, RG 5, A 1, Memorandum Respecting Juvenile Emigration, Vol. 143, 78147-50, 1833.

[126] NAC, RG 5, A 1, Vol. 85, 46591-93, 10 December 1827.

the Protestant religion and would make good citizens. Perhaps inspired by Dunlop's book on the subject, Dr. C. Lushington, chairman of a provisional committee organized in England to provide for destitute children, inquired whether healthy boys and girls between the ages of twelve and fifteen might be provided with suitable positions as indentured servants and apprentices in the Canadas.[127] Lushington went so far as to solicit support for his scheme from various Upper Canadian newspapers like the Western Mercury.

Not all schemes were necessarily charity-assisted. In 1839, Lord John Russell provided the Executive Council with a detailed questionnaire exploring the viability of placing English juvenile offenders in similar positions. But the first in a number of schemes by which the mother country hoped to slough off its juvenile dross, Canada was thought to be that rarefied, morally uncontaminated mecca in which youth could thrive. Russell was proposing to send "young persons for whom it has been found impossible to provide an effectual protection here against the temptations to which they are exposed in our large cities."[128] None of the foregoing proposals bore fruit. Lushington's project appears to have been pre-empted by the cholera outbreak of that year (1832). As for the others, the government of Upper Canada appeared little interested in supporting immigration initiatives that might cost them money as witnessed by the case of Rachel Tyrell. After nursing two sickly emigrant children, Martha and Hiram Lee, back to health, Tyrell wrote to the lieutenant-governor, "I would be glad Your Honour would let me know where I am to get paid for my trouble.... I have made great improvements in them." In an appended

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[127] NAC, RG 5, A 1, Lushington to Colborne, Vol. 115, 64651-54, 26 March 1832.

[128] NAC, RG 1 E 3, Submissions to the Executive Council on State Matters, Vol. 22, 44-46.

note, a government official penned, "she has been misinformed, that no aid has been authorized to be given by Government for the support of Emigrant Children." Tyrell was informed of this a month and a half later.[129] As was the case with other social unfortunates, for example the insane, the government relied on community charity and/or district funding.

In 1834, the Children's Friend Society under the tutelage of British philanthropist Cpt. Edward Pelham Brenton, advertised in a number of Upper Canadian newspapers that it was "willing to undertake to convey children to Montreal with clothes and everything requisite for the voyage".[130] From the point of embarkation they would be chaperoned by Society secretary, John Orrok, until they reached Toronto where they would be entrusted to a General Committee of Management consisting of such luminaries as Chief Justice Robinson, Archdeacon Strachan, Sheriff W. B. Jarvis, and the mayor, aldermen and common council of the city. A similar committee was set up in Cobourg. Land agent Joseph Talbot organized the Toronto Committee. Talbot received applications for the children's services, passing them along to the Committee of Management for final approval. The Cobourg branch committee consisted of The Rev. A. N. Bethune plus several members of Parliament and magistrates. Applications for children were addressed to R. D. Chatteron, committee secretary, care of the Cobourg Star. Described later as nominal, these committees never corresponded with the home society. Talbot's counterpart in Lower Canada did, however, in 1836, visit each child after placement and reported

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[129] RG 5, A 1, Tyrell to Rowan, vol. 135, 74244-45, 29 October 1833.

[130] The Emigrant, 5 July 1834.

favourably.[131] Each master reported that he was well pleased with his apprentice. The report, however, was silent as to how well pleased the apprentices were with their new positions. It was the avowed support by government dignitaries—in England, the Royal Family became patrons of the society—that convinced Mrs. Lucy Cripps, a widow with "numerous"[132] children, to entrust her son Richard to the society. Promised that her son would "obtain an independent subsistence", she "yielded to their advice." Apprenticed to John Somerville of Huntingdon, Lower Canada, in November of 1835, Richard Cripps had never contacted his mother. In 1841 she wrote to Lord John Russell:

> Whether there is any such person as Mr. Somerville or whether my child is really with him or what are his presents (sic) I have not been able to discern. ...I permitted my son to embark for America under their (the Society's) guidance. I do not know whether the society still exists but if so it may perhaps be in your Lordship's power to obtain from them a more full statement than I have been able to procure of what they know or have heard regarding my child.

Founded in 1830, the Society had been formed, its prospectus stated, to rescue destitute children "which swarm in the metropolis."[133]

> It is unnecessary to enlarge upon the Advantages which must follow from removing that Host of young and wretched Beings with which the Streets of the Metropolis are frequented, and rescuing these poor Children from certain Wretchedness and Temptation to Crime, while they are still at an Age when it is practicable, by a judicious and well-considered System of moral Discipline, to

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[131] NAC, CO 42, Colonial Office Papers, Vol. 485, G. Sparke, Children's Friend Society to Lord Russell, 29 June 1841, 351.

[132] NAC, CO 42, Vol. 486, Mrs. Cripps to Lord Russell, 22 June 1841, 186. G. Sparke, spokesman for the society, reported that in 1840, John Beverley Robinson had suggested seeking the assistance of Rev. Bethune, now Rector of Montreal, to investigate the condition of the young emigrants. A sum of money was placed at his disposal to underwrite the costs of the enquiry. A year later, a report had had yet to be issued.

[133] The Courier of Upper Canada, 11 April 1835.

> reform their Habits and to render them happy in themselves, and Contributors to the general Welfare.[134]

As it turned out, the majority of boys and girls came from parish workhouses while a few were drawn from prisons. Boys were placed in the Brenton Asylum at Hackney Wick, and the girls in the Royal Victoria Asylum at Chiswick, for a minimum of three months. Here they were trained to be independent, grow their own food, prepare their own meals, mend clothes and to do maintenance work on the premises. When their conduct was believed satisfactory, they were sent, only with their consent, to the colonies. Temporary wards of the colonial committees, the children were to be apprenticed out to respectable masters who were required to pay fifteen dollars for each boy or girl.[135] Remitted by the colonial committee to the Society in London, the amount partially covered passage and expenses. And if the apprentice absconded[136], the fee was to be returned. From 1834 to 1837, when the Rebellions brought Society emigration to a standstill, between 186 and 232 children were relocated in Canada.[137]

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[134] Sessional Papers of the House of Lords, Vol. 28, "Appendix to Minutes of Evidence Taken Before the Select Committee of the House of Lords Appointed to Inquire into the Present State of the Several Gaols and Houses of Correction in England and Wales, Part 4", 1835, 267.

[135] The Cobourg Committee appeared to have slightly different terms. The Master, in addition to being responsible for the apprentice's board, lodging, washing and clothing, also undertook to pay for his or her services a sum of ten dollars per annum, three of which were paid in advance and forwarded to the society in London. The remaining seven dollars remained in the hands of the branch committee in an accumulating fund for the benefit of the boy when he left his apprenticeship "should he prove good, of which the said Committee are to judge on report of the Master, or returned to the latter if otherwise." This fund was apparently an incentive to prevent the apprentice from absconding. The Master was also required to pay a further sum of two dollars for the boy's passage from Montreal to Cobourg. [Cobourg Star, 30 September 1835.]

[136] The Committee of Management in England quickly discovered that boys over the age of fifteen were objecting to being bound. In addition, they attempted to induce younger boys to object as well. Consequently, the Society admitted boys and girls only between the ages of ten and fourteen.

[137] Charlotte Neff's tally is much lower. She has established that seventy-six children arrived between 1834 and 1835, and perhaps more in 1836. [Charlotte Neff. "Pauper Apprenticeship in Early

Henry Amsinck, Secretary of the Society, stated that it was his intention to select masters who were themselves industrious and respectable and thus likely to mould good servants and apprentices. Ideally, such candidates would see beyond the positive advantage of such labour at a moderate rate and "consider, in its strongest light, the charge and moral responsibility they incur for the well-doing of the apprentice."[138] Unable vigilantly to extend its managerial arm across the Atlantic, or perhaps simply because its members were remarkably naive, the Society eventually saw its benevolent objectives eclipsed by avarice. Soon after Pelham's death in 1841, the Society closed its doors, sabotaged by those guided less by philanthropic idealism and more by self-serving greed in providing property owners in the colonies with an inexpensive and supple labour force.[139]

Nineteenth-Century Ontario." Journal of Family History (April 1996), 153.] My figures have been taken from Geoff Blackburn. The Children's Friend Society. (Northbridge, South Australia: 1993). Blackburn notes that the Society sent 1135 children to the various Colonies; 820 to the Cape, 72 to the Swan River Colony and 2 to South Australia. He conjectures that the rest, 232, were sent to Canada. Relying exclusively on thirteen ship's manifests prior to 1837, he accounts for 186 (160 boys and 26 girls) of the 232. By his own admission, this has been the full extent of his research into the Society's involvement in Canada. There is some evidence, however, that I take to support the lower number of 186 rather than higher figure of 232. The Dundas Weekly reported that the state of political agitation in Upper Canada had grown to such a level by the spring of 1836 that the Society "have relinquished their design and will send barely twenty Boys of the number (100) proposed!" [The Dundas Weekly, 21 June 1836.]

[138] Kingston Chronicle and Gazette, 14 June 1834.

[139] These seeds had been planted at the very beginning of the enterprise. Cutting through the altruistic verbiage, an advertisement for the Society placed in the Cobourg Star spelt out the advantages that the Society offered merchants and farmers: "One of the greatest drawbacks hitherto experienced in Upper Canada, and which has nowhere been felt more than in the Newcastle District, is the inefficiency and high price of labour." [Cobourg Star, 19 November 1834.] If after 1837, merchants and farmers were no longer able to draw on the Society for a cheap source of labour, there were always other institutions providing a similar service. In 1840, Mr. Curran, the superintendent of the House of Industry in Toronto, requested that provincial newspapers, "to aid the cause of charity", place advertisements advising persons desirous of obtaining apprentices and servants, that the House Committee was anxious to procure permanent provision for a number of its child inmates "from one to eleven years of age." [St. Catharines Journal, 20 August 1840.] The official explanation of the society differed. G. Sparke wrote that the committee in London were obliged to discontinue sending children to British North America "in consequence of the disinclination of the residents to take upon themselves any active superintendence." [NAC, CO 42, G. Sparke to Lord Russell, Vol. 485, 29 June 1841, 351.]

It was argued that if the Society gave its young charges a correct moral education and inculcated industrious habits, then they could be calculated "to make good servants—a necessary class of society of which the Canadas are deficient."[140] A subscriber to the Kingston Spectator disagreed. Writing under the pseudonym LET US LOOK AT HOME, the complainant argued that Society children placed with farmers or tradesmen were unfair competition for Kingstonians who were unable to find situations for their own sons, whom, it was thought, ought to have prior claim. It was lamentable, he wrote, to see so many unemployed boys running about the streets of Kingston—a situation noted by other writers to the Kingston newspapers that many of them connected to the cities' crime rate—for want of instruction in the "mechanical employments."[141] If the authorities insisted on allowing child paupers to emigrate[142], they might be more usefully employed on farms where they would "do but little injury to the public". The editor of the Spectator summarized the complaint in a later issue: "Many persons take these strange boys and girls in preference (to Canadian children), thinking they will be more obedient, tractable and industrious. But strange as it may appear, those people who have been the most degraded and submissive in the old country, are the most insolent, extortionate and idle in America."[143] This raised the prospect that immigrant children were feared both for their competitive labour and their disreputable character. Nevertheless, the editor acknowledged,

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[140] The Courier of Upper Canada, 11 April 1835.

[141] The Spectator, 19 May 1836.

[142] See Joy Parr. Labouring Children. Toronto: 1980, 1994 for an account of the juvenile emigration movement during the later part of the nineteenth century and early twentieth.

[143] The Spectator, 4 November 1836.

Canadian boys were even more "impudent, idle and disorderly" and, as such, not fit subjects for the homes of any decent and regular family. Many town boys, in particular, demonstrated conduct that was "disgraceful, and brought on by the neglect and bad example of their parents."

When one takes a larger overview of the period from 1800 to 1840, it becomes apparent that there were contesting points of view concerning immigration. On the one hand there was a general apprehensiveness, found in many social quarters, that was fuelled by long-received stereotypes. On the other, the government and its supporters—in co-operation with the Home government—viewed the United States as a competitor with England in both agriculture and world trade. They saw the promotion and expansion of agriculture in Canada as one way of checking this rivalry. Such a visionary scheme required mass immigration and thus the necessity of smoothing the waters vis-à-vis those who saw a connection between immigration and crime. Jerald Bellomo's account, while it paints a picture of all-pervasive fear, overlooks the various efforts of those in positions of responsibility to moderate this widespread trepidation. One such voice, the Farmer's Journal, saw fit to allay the fears of St. Catharines' area residents. The paper reported that "creditable to the labourers on the Welland Canal, who are said to be a motley assemblage of good and bad, from almost every part of the civilized world,"[144] not one of their number was convicted, nor were they the recipients of even one complaint, at the 1826 Niagara assizes. Chief Justice John Beverly Robinson, in his charge to the Home District grand jury in October of 1831, cautioned jurors that some of them might misconstrue a

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[144] Farmer's Journal and Welland Canal Intelligence, 20 September 1826.

correspondence between an increasing rate of crime and an increase in the number of immigrants entering the district. One might expect "an unfavourable effect", given the great number of newcomers entering the district in such a compressed period of time. Nevertheless, he added, although many were destitute, some ill, and almost all in want of employment, experience proved that this would be but a temporary state, yielding readily "to change of circumstance." Pointing to a period when the population was not one quarter the number it was then, he prompted the jury to recall that the number of criminal charges was "not infrequently greater in proportion than we find (them) upon this occasion."[145] While not denying "repeated instances of crime among this class of our population," this was more than offset by the many examples in other districts where the business of the assize concluded without seeing one case of an immigrant charged with a criminal offence. Once immigrants established a fixed residence and acquired private property, Robinson assured the jury, there would be no difference between their conduct and that of any other inhabitant of Upper Canada. On balance, he concluded, immigrants added more to the wealth of the province than they did to its crime rate.

Robinson's argument clearly rested on how successful immigrants would be in establishing permanent residence. In the same year that Robinson made his address to the Grand Jury, Charles Shirreff published his thoughts on emigration. At one period, he argued, Canada held out little other prospect of employment "but the labour and produce of her soil." Consequently, emigration policy focused on settlement. The most recent arrivals, however, were poverty-stricken and thus ill-suited to agriculture. This would necessitate

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[145] PAO, MU 5907, John Beverly Robinson Papers, Grand Jury Charges, 17 October 1831.

alternative employment strategies. Most immigration schemes operated on the basis of government subsidies that were to be paid back over time as the immigrant family put down roots and prospered.[146] The advantage of bringing in immigrants as labourers rather than settlers, Shirreff reasoned, was that it was cheaper and that as labourers, they could be more easily gathered into groups and kept under control:

> How can it be expected, that men who have never been accustomed to look beyond the wants of the present moment, brought direct from the haunts of idleness and dissipation, and whose very title to enrolment is that vagrancy to which they have been habituated, should all at once become a body of peaceable, prudent, industrious, and persevering husbandmen. Such a transformation could only be the work of supernatural influence.[147]

Supernatural or not, those who, like Peter Robinson (brother of Chief Justice John Beverly Robinson), profited from immigration schemes, painted a more sanguine picture. Of one such enterprise in 1832, the Courier[148] wrote that the experience had succeeded beyond expectation. The paper assured its readers that, although once penniless, the recently settled immigrants were now "most comfortable and independent." As an added

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[146] See John Bannister. Sketches of Plans for Settling in Upper Canada a Portion of the Unemployed Labourer Great Britain and Ireland, 2nd ed. London: 1822, for one such proposal.

[147] Charles Shirreff. Thoughts On Emigration and on the Canadas as an Opening for It. Quebec: 1831, 15-16. In reality, immigrant camps were more difficult to police than Sherriff imagined. In 1824, a riot in one such camp near Perth resulted in the sheriff's party resorting to armed force. Although the court exonerated the sheriff's deputies for shooting into the crowd, several of the immigrant ringleaders were prosecuted and sentenced to fines and imprisonment at common law. [NAC, RG 5, A 1, Campbell to Hillier, Vol. 68, 36010-3, 31 August 1824.] Employing immigrants on public works or otherwise also came under criticism. An anonymously written guide for prospective immigrants argued that such employment served no advantage beyond the wages they received for their labour. "He learns nothing of the country or of agricultural occupations and is much more tempted to give way to intemperate habits." Because work was seldom steady, immigrants were frequently thrown out of employment. One needed little imagination to speculate on the potential for an ensuing escalation in property crimes. [NAC, RG 5, A 1, Guide for Prospective Immigrants with Capital Intending to Settle on Land: Questions and Answers, Vol. 260, 141880-924, n.d.]

[148] This article, almost certainly written by Tiger Dunlop (publishing under his pseudonym "The Backwoodsman"), demonstrates the collusion between Tory newspapers and those who profited as immigration agents.

benefit, "their morals too, contrary to the general rule, have improved with their circumstances; and they are—considering always that they are Irishmen—a quiet, peaceable, sober and industrious population." The very men who at home would be rebelling against authority, "tracing their path with.... roasted Peelers,"[149] were, in the backwoods of Upper Canada, quietly pursuing peaceful and useful careers as self-respecting, loyal and devoted subjects of His Majesty.

Commenting on Peter Robinson's Irish settlement in Upper Canada, 1826, a contemporary, Edward Angell, wrote that not only the indigent but the more provident classes "with small means" and other persons "more competent to invest CAPITAL in the purchasing of freehold estate, are likewise invited to the feast." This, he noted, would be more and more the case as it became better understood in England, that property in Upper Canada was secure under British laws. This picture of Canada as a peaceable society was often supported by the published accounts of visitors and letters from settled immigrants. Irishman Thomas William Macgrath, in a letter home, mentioned that capital punishment in the colony (in contrast with Great Britain) had occurred only three or four times over many years. In fairness, he continued, we have had, "lest you should suppose us to be too perfect a set of beings, an Irish row or two."[150] Nevertheless, he qualified, "a solitary instance of outrage need not alarm or deter a settler." He reassured his reader that any man determined to exert himself could only prosper.

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[149] The Courier, 22 September 1832.

[150] Rev. T. Radcliff, ed. Authentic Letters from Upper Canada, Toronto: 1953 (originally published, 1833): 67. Radcliff added that even the "vexatious and useless severities" of English law in respect to debtor and creditor were mitigated in Upper Canada by local statutes.

The cholera epidemics of 1832 and 1834, combined with the economic crisis of 1837, led to a decrease in the number of immigrants to Upper Canada.[151] By 1838, there was a shortage of labour.[152] Even so, from 1832, it was difficult for pauper immigrants, despite the best public relations efforts of the Robinsons and others, to find work. In 1832, the Midland District petitioned the lieutenant-governor for funds that would allow officials to continue to employ immigrants as stonebreakers on road-building projects because local farmers wouldn't hire them. The prevalence of disease, and the farmers' "unnatural dread of emigrants, superseded their need for casual labour."[153]

Government expenditures on work projects in 1832 were described by Colborne as "large"[154] but, nevertheless, warranted in that they allowed for the distribution and employment of at least thirty thousand persons. In January of 1833, he proposed to Viscount Goderich that, in order to support an expected thirty or forty thousand more during that year, these new arrivals be conducted into the interior where each township would be assigned four or five hundred emigrant labourers to clear the land owned by officers and settlers with capital who had elected to take up residence. Rather than have them build roads (work for which they were unaccustomed and for which there was no government remuneration) they could be more profitably used in clearing fifteen or twenty

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[151] William Forbes Adams estimates that the total Irish emigration to British North America was 50,305 in 1832. The following year it had decreased to 23,139. In 1834, following the second outbreak of cholera, it had dropped to 10,764. Following the economic crisis of 1837, it was further reduced to 2,908 for 1838. As found in Donald Harman Akenson. The Irish in Ontario. Kingston: 1984, 14-15.

[152] See Ruth Bleasdale. "Class Conflict on the Canals of Upper Canada in the 1840's." In Michael Cross & Greg Kealey, eds. Pre-Industrial Canada, 1760-1849. Toronto: 1982.

[153] NAC, RG 5, A 1, John S. Cartwright to Rowan, Vol. 118, 66033-36, 4 July 1832.

acres on each of the lots intended for sale "and in planting potatoes and Indian corn for the supply of the settlers that may be located, and for the Emigrants employed in clearing the ground."[155] The crux of the plan was that surplus crops could "probably" be sold for the price of the labour expended in raising them. And the improvement would entice settlers of small capital to purchase the lots in the innermost interior regions, further helping to defray the year's expenses. Furthermore, such improvements would increase the value of land in every other part of the respective townships.

Colborne admitted the logistical problems of such a plan. It required, as did the road-clearing projects, "superintendents of great experience, intelligence and integrity." Like many government proposals, this one appeared to lack the necessary middle managers to guarantee its success. Little or nothing was to come of it. By 1840, the government had fallen back on proposing more road-building projects. The British Colonist reported that the Chief Agent for Emigrants had travelled to Montreal to meet with the Governor-General. It was proposed that that year's contingent of immigrants might (i) work on the improvement of existing roads by Macadamization, (ii) open a new road to Owen's Bay, on Lake Huron, and (iii) continue the extension of the Trent River to Lake Huron. Again, the point of these projects was to use pauper immigrants to open up large tracts of land for "enterprising settlers."[156] Yet even when such projects were realized, the work was short term. The upshot was a significant pool of itinerant poor moving across the province in

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[154] Colborne calculated that the province spent £8,582.10s.11d. on work projects for the year 1832.

[155] Colonial Advocate, 10 October 1833.

[156] British Colonist, 20 May 1840.

search of work or in transit to the United States and underwriting the alarm of those like Robinson's more skittish jurors.

Conclusion

As a measure of the judicial success of Lieutenant-Governor Simcoe's proclamation, miscreants given to profanity, breaking the Lord's Day act, drunkenness and operating brothels would take up their fair share of space on the quarter sessions dockets for the next forty-seven years. However, as argued below, the degree to which this may be attributed to the initiative of judges, magistrates, and the myriad of constables appointed at quarter sessions, is questionable. John Weaver has pointed out that the higher rates of prosecution for cases of drunkenness, prostitution and vagrancy that occurred in the late 1840s can be explained by an increasing intolerance "toward the rough pastimes of plebeian culture."[157] I have attempted to demonstrate that the will to scour these blots on moral respectability was in evidence from the beginning of our period. What was missing was any social organization or substantial urban middle class, which could effectively deal with the problem. The problem was that district constables, an amateur, part-time force at best, were handcuffed by having to act under warrant. First, it would take democratically-elected boards of police, which began by legislation, and following town incorporation, to appear in the 1830s[158], to actively engage and combat

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[157] John Weaver, "Crime, Public Order, and Repression: The Gore District in Upheaval", 23.

[158] As early as 1816, magistrates residing in Kingston were given special policing powers, powers extended to York, Amherstburg and Sandwich in 1817 and to Niagara in 1819. Frederick Armstrong has argued that the Family Compact resisted incorporating towns fearing their democratic autonomy. In 1828, when a reform assembly passed bills for elected governments in Kingston and Belleville, the Legislative Council vetoed them. Armstrong makes the point that Toronto was permitted to incorporate not because the

moral outrages in the province's larger cities[159]. John Beverley Robinson believed that incorporation held promise for the prevention of crime. Following one such incorporation (Toronto) he wrote: "Even those measures which are undertaken primarily with the sole view of ministering to the convenience or safety of the inhabitants such for instance as lighting and watching the streets, must in some degree conduce to restrain offences, by throwing additional difficulties in the way of their commission, and by facilitating the detection and consequent punishment of offenders."[160] City magistrates were empowered to suppress tippling houses, to enforce the observance of the Sabbath, to regulate or prevent exhibition and shows and to regulate theatres. In other words, it was within their power to secure the peace and good government of the city and to impose moral order. The New City Charter for Toronto allowed that the Mayor and Alderman or any one of them:

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ruling elite had changed its mind regarding the spread of democratic institutions, but because the system of government by magistrates had broken down, I suppose, because of increasing urban density. (Armstrong. Handbook of Upper Canadian Chronology. Toronto: 1985, 200.]

[159] The act that established the Board of Police in Brockville in January of 1832 decreed that the role of the Corporation was to "generally prevent vice and preserve good order." [*2nd. Wm. 4, Chap 17, 1832*, An Act to Establish a Police in the Town of Brockville, in the District of Johnstown] The Police Regulations issued by the Board of Police for Brockville, January 1835, ordered that the High Constable was to keep the peace and preserve good order in the town. He was "to complain of and prosecute to conviction all and every person or persons who shall transgress any of the Laws or Ordinances of the said Corporation". Two constables appointed for each ward were put under his direction Among the "nuisances" relating to public morality, the constabulary was empowered to enforce regulations that prevented anyone fishing within the limits of the town on the Sabbath, grocery stores operating on the Sabbath, drinking, gaming or fighting in private homes to the disturbance or annoyance of their neighbours, any person from resorting to or using a bawdy house or brothel, and any person from exposing their person while bathing in front of the town between the hours of six in the morning and nine in the evening. The Board also addressed those issues enumerated in the Niagara grand jury report mentioned above. There were regulations in place to prevent swine from roaming at large, guns being fired in the streets, and horses and carriages being rode or driven on any flagged or side-walk within the limits of the town. The Corporation expected the co-operation and full compliance of all its citizens. Any person guilty of obstructing a constable in the exercise of his duty could be fined between five and thirty shillings. [Brockville Recorder, 23 January 1835.]

[160] Colonial Advocate, 10 April 1834.

> may order to be taken up and arrested, all Rogues, Vagabonds, Drunkards, and disorderly persons, and as the said Mayor or Alderman, or any two of them, shall see cause, to order such Rogues, &c. to be committed to any work-house that may hereafter be erected, or else to any house of correction, there to receive punishment not exceeding one month's imprisonment, or to the common stocks.[161]

As early as 1834, many of the cases that came before the Toronto Mayor's Police Court were exactly the kinds of cases itemized by Weaver. Compiling a list of typical complaints that came before his court, Mackenzie included those "for selling whiskey without licence, for husbands beating their wives, for wives threatening to behead their husbands, for unruly neighbours, for snappish dogs, for disorderly houses, for assaults, cap-pullings (sic), drunkenness and the like, and for bastard children, poverty, scarcity of employment, &c." [162] All of this was contingent upon larger gaols to hold the vagrants, drunks and other moral reprobates that were increasingly targeted by the city constabulary. Moral policing in the newly incorporated city of Toronto was complemented by such a new facility. In 1836, the 25 cells in the new Toronto gaol were capable of holding up to 140 prisoners[163]. With smaller, obsolete facilities, other jurisdictions would have to await the building of new gaols before they too could actively campaign for a new moral order. In the meantime, as discussed in chapter six, moral

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[161] Colonial Advocate, 20 March 1834.

[147] The Colonial Advocate. 1 May 1834.

[148] Robert Martin. Statistics of the Colonies of the British Empire. London: 1838, 201.

agency would be synonymous with various vested interest groups within Upper Canadian communities.

2

"VOID OF TRUTH, VIRTUE OR INDUSTRY": BLACK COMMUNITIES IN UPPER CANADA

As targets of colonial xenophobia, some consideration has been given by historians to the incoming Irish but virtually none to black immigrants in the period leading up to 1840. Many blacks fortunate enough to escape the fetters of slavery came from broken families and were bereft (or so it was commonly believed) of religious instruction. Both fugitive and freed slaves were thought by those factions in Upper Canada opposed to black immigration to be hopelessly dissolute, mired in debauchery and beyond moral reclamation. On slave plantations, this characterization of blacks was underscored by the very ways in which they resisted their condition. The frustration experienced by slaves most often surfaced in "crimes" against property: sabotaging equipment, setting fire to buildings, mistreating livestock, pulling down fences and various acts of thievery.[1] Other forms of individual resistance—feigning illness, bouts of drunkenness or simply performing their tasks with ill-efficiency—all played to the discourse that typified blacks as "frivolous, improvident, reckless…(and) as a body the most licentious, turbulent and worthless part of our population."[2] And if this were not enough, the means by which fugitives from "the peculiar institution" found their way into Canada would be used to

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[1] See John Franklin & Loren Schweninger. Runaway Slaves: Rebels on the Plantation. New York: 1999, chpt. 1. The same behaviour repeated itself in Upper Canada. Elizabeth Russell described her house slaves Peggy and John Beacher as "very dirty, idle and insolent". Their son Jupiter was said to be "a thief and everything that is bad…." Daughters Milly and Amy were described as "much addicted to pilfering and lying." [Extracts from Elizabeth Russell's diary for the year 1806 as found in Edith Firth, ed. The Town of York: 1793-1815. Toronto: 1962, 259-61.]

[2] Buffalo and Erie County Historical Society. Peter B. Porter Papers, I-14, Porter to James Boulton, September 20, 1837.

mark out black immigrants as a criminal class. Yet paradoxically, as we will see below, the more that black immigrants were portrayed as immoral/criminal, the more fiercely loyal they became and the more tenaciously they held to the principles and institutions of British justice.

In July of 1835, William Stanford, his wife Dorcas and their infant child Elizabeth were kidnapped by a party of "whites"[3] and taken across the Niagara River into New York State[4]. The "Southrons"[5] were reported to have been "lounging about in this (the Niagara) vicinity for the purpose of kidnapping runaway slaves." The British American Journal reported that the following morning "the coloured people rallied their forces and rushed on in pursuit of the enemy, with all possible despatch (sic); and on the second day they returned in triumph, with the captives in charge—having retaken them from their assailants, some distance beyond Buffalo." The foray into Canada, like most others before it, employed (or "bribed into their service" as the Brockville Recorder would have it) black confederates on the Canadian side[6]. Although the white miscreants had escaped "back to

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[3] British American Journal, 23 July 1835.

[4] Slaveholders, and their agents, also attempted to lure fugitive blacks back to the United States by promising money or jobs. To counteract subterfuge and kidnappings by slave catchers, "vigilant" committees were set up by black communities on the Canadian side. They periodically published notices of suspicious strangers and warned of newly hatched schemes to entice blacks across the border. Beginning in the early 1840s, the Provincial Freeman printed a general warning in each issue.

[5] Brockville Reporter, 31 July 1835.

[6] William Lyon Mackenzie reported in the spring of 1828 that some of the party who kidnapped James Smith (a black man working in Clinton) wore disguises: "They are supposed to be Canadian spies bribed for the disgraceful purpose. It is a pity that the law could not seek them out for punishment as an example to others." [Margaret Fairley, ed. The Selected Writings of William Lyon Mackenzie. Toronto: 1960, 34.]

their own alligator swamps with the mark of their brother Cain on their forehead"[7], shortly after the return of the Standfords, Henry Craig and John Henderson, both of Niagara, were arrested and tried at quarter sessions for kidnapping and assault. Henderson was acquitted. Craig, locally employed as an auctioneer caller, was sentenced to twelve months in the Niagara gaol in addition to being pilloried for one hour on the first day of each quarter session.[8]

Periodic incursions into Canada, either to abduct free blacks for (re)sale into slavery or to capture and return runaways to their slave masters, were surreptitious and without legal authority. This would change with the Solomon Moseby affair. On May 14th, 1837, Moseby, "a dark mulatto, about five feet, ten inches high… a fine manager of horses and fine driver"[9], escaped from his master, David Castleman. Six days later he arrived safely in Queenston. Moseby was reported to have sold Castleman's horse for $95 sometime before crossing the border.

Moseby was but one of a number of runaway slaves from Fayette County, Kentucky who had settled in the Niagara area. In June of 1837, George Cabell was charged, *in absentia*, with stealing two horses belonging to his slave owner, Mrs. John Breckinridge, "one of which," Castleman sympathized, "was Big Sam, which has discommoded the old

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[7] Brockville Recorder, 31 July 1835.

[8] PAO, RG 22, Series 372, Box 20, File 31, Quarter Sessions, July 1835. The British American Journal incorrectly reported that Craig was sentenced to five years in the Kingston Penitentiary, "a fearful warning to all future kidnappers and their dupes."

[9] Buffalo and Erie County Historical Society, Peter B. Porter Papers, I-3, Castleman to Porter, 11 July 1837.

lady very much."[10] Three years before, Jesse Happy had "stolen" a horse from his master, Thomas Hickey, before making his way into Upper Canada. All three cases were brought before the grand jury for Fayette County and all three men were indicted for horse theft. Warrants were issued for their respective arrests and return to stand trial. Castleman enlisted the advice and help of Peter Buell Porter, an esteemed resident of Black Rock some two and a quarter miles north of Buffalo. Porter had been a congressman, major general (militia) in the War of 1812 and later, Secretary of War. Porter himself had received twenty-five slaves as part of the patrimonial estate of his Kentucky-born wife. Castleman suggested that Porter employ someone who would decoy Moseby "over the line and have him apprehended and confined in jail as a felon or fugative (sic) from justice."[11] Castleman's strategy differed from previous kidnappings only in that he intended to use an arrest warrant once his property was safely returned across the border. Castleman further requested that Porter investigate whether there was any arrangement between the governments of the United States and the Canadian provinces for the return of fugitives from justice. If such an agreement existed "it would be probably polacy (sic) not to speak of him (Moseby) as a slave but as a fellon (sic)."[12] In either case, Castleman promised, no expense was to be spared: "It is important that energetic measures should be used to put a stop to those escapes for they are becoming very common."[13]

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[10] Porter Papers, I-3, Castleman to Porter, 11 July 1837.

[11] Porter Papers, I-3, Castleman to Porter, 11 July 1837.

[12] Porter Papers, I-3, Castleman to Porter, 11 July 1837.

[13] Porter Papers, I-3, Castleman to Porter, 11 July 1837.

His private papers indicate that Porter was familiar with the Fugitive Offenders Act (*3rd W 4 (1833) Chap. 7*) as enacted by the Upper Canadian assembly in February 1833. Information about the Act was most certainly communicated to Castleman. The legislation allowed for the return of felons who had escaped across the border. An American request to extradite fugitive Kentucky slaves, Thornton and Rutha Blackburn, tested the new reciprocity agreement late that winter. In his legal commentary on the case, Attorney General Jameson argued that escaping from slavery was not a crime in Upper Canada and, as such, the Blackburns were not felons. Castleman would not make the same mistake. Moseby, unlike Blackburn, was to be identified not as a slave but as a felon. Moseby's crime was not escaping from slavery but horse theft[14], a felony covered by the 1833 act. Late in August, Castleman and entourage arrived in Niagara and immediately solicited the services of James Boulton, a Niagara lawyer in the employ of the sheriff's office, to help the Americans navigate unfamiliar Canadian legal waters[15]. Castleman presented the Niagara authorities with Moseby's arrest warrant and a letter from Governor James Clark of Kentucky requesting that Moseby, Cabell and Happy be returned to Kentucky to face charges. Porter had advised Castleman that the requisition for extradition would have to be presented to the lieutenant-governor. To this end, Boulton provided a letter of introduction for Castleman's confederate, deputy sheriff of Black Rock, Daniel Kelly, to the civil

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[14] Magistrate Thomas Butler testified at the corner's inquest into the deaths resulting from the Moseby riot (See below) that, when he was presented with the warrant for Moseby's arrest, "a gentleman deputed to receive him…told me that his object was to pursue Moseby not as a slave but as a fugitive from justice." [The Cobourg Star, 11 October 1837.]

[15] As it turned out, Boulton proved to be of little value. In the fall of 1837, Castleman complained to Porter: "I think you are mistaken in Boulton. In the first place I have no confidence in his firmness or sincerity—but what is still more important, he has no weight or influence at Toronto among the men in

secretary, John Joseph. On September 7, Castleman was in Hamilton to present the arrest warrant for Jesse Happy to Gore District magistrate Michael Aikman. In a letter to Porter, Castleman clarified his intentions:

> There is another fugative (sic)—precisely similarly situated. He stole a horse in 1833 from the Hon. Thomas M. Hickey of the city of Lexington and an indictment found against him—The last account judge Hickey had of him he was in Hamilton, Upper Canada. If I could get holt (sic) of him it would lesson (sic) the expense of the trip. His name is Jesse Happy about forty years of age, five feet nine inches high. His colour usually red—one of his upper fore teeth out, a good forehead, which shows more at some season than others, his eyes are yellow or hazle (sic)—a scar on the back of his head more than an inch long, covered by his hair which is black and bushey (sic)—the little finger on one of his hands is crooked at the middle joint and stiff—plays on the violin—his ears are bored and he usually wears small gold rings in them.[16]

Both Moseby and Happy were arrested and placed in the Niagara and Hamilton gaols respectively. Meanwhile, Castleman pressed ahead for their extradition. The black community in Niagara countered by hiring Alexander Stewart to undertake Moseby's legal defence. Stewart found it incredible that Castleman had travelled 1,500 hundred miles at a personal cost of $400 merely to punish a slave for stealing a horse worth a quarter of that value[17]. Alarmed by the increasing number of slaves escaping to Upper Canada, a better-informed group of slave owners, Stewart conjectured, were now intent on using the Fugitive Offenders Act to stem the flow. A confidential letter from Porter to Boulton

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power, he is altogether rather a small concern." [Porter Papers, I-17, Castleman to Porter, 13 November 1837.]

[16] Porter Papers, I-10, Castleman to Porter, 15 August 1837.

[17] Castleman would not have disagreed. He admitted to magistrate Thomas Butler "that he had gone to a great deal of trouble and expense, not for the value of the man but in order to make an example of him to deter others. [The Cobourg Star, 11 October 1837.] A day or so later, he appeared to contradict himself when he confessed to magistrate McDougal that when Moseby was returned he would be immediately sent to Liberia. "Not a syllable," McDougal recollected, "was said about punishment." [The Cobourg Star, 4 October 1837.]

confirmed Stewart's suspicions: "As regards the value of the three Negroes assuming them to be slave or of the plunder they took with them, it is of but trifling moment. But the whole transaction viewed in its various aspects and consequences involves considerations of immense importance to our slave holding states and in my humble opinion not less important to the peace and security of Canada itself."[18]

In his petition to the lieutenant-governor, Moseby insisted that if he were returned to Kentucky it would not be to a courtroom but directly to the plantation: "(David Castleman) is one of the most cruelest (sic) men in all Kentucky. He has said if he even had one of his slaves run away he would go to the middle of hell to catch him, also he has said if any one run away he would whip them to death."[19] A committee of seven citizens of Toronto petitioning on behalf of the black residents of that city and vicinity argued both to Castleman's intentions and the spurious case against Moseby. Protesting Moseby's guilt, the memorialists carefully prefaced their arguments by "heartily depreciating the introduction of any immorality in this community being as much opposed as any others can be to offer any encouragement to vice by offering an asylum to fugitives from justice."[20] The "sole object" of Moseby's persecution was to return him to slavery and again to "expose the unfortunate man to all the cruelty that the rage of the master can invest..." As for Castleman's legal case, it was a sham. Both the Toronto petition and a similar petition from 117 white inhabitants of Niagara argued that, while a slave in Kentucky, Moseby was

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[18] Porter Papers, I-14, Porter to Boulton, 20 September 1837.

[19] NAC, RG 5, C l, Provincial Secretary's Correspondence, Vol. 8, Moseby to Bond Head, 11 September 1837, 3992.

[20] RG 5, C 1, Committee on Behalf of the People to Bond Head, n.d. 3993-3995.

not a free agent. Consequently, "neither morally nor legally can a slave be guilty of the offence charged against him..."[21] The Niagara Reporter informed its readers that according to the laws of Kentucky a slave was legally accountable for only three felonies: murder, arson and the rape of a white woman. "For all other offences the master is answerable, the same as for a trespass committed by his cattle."[22] Lieutenant-Governor Francis Bond Head later summarized these arguments in a letter to the Colonial office:

> It is argued (by others) that the republican states have no right, under the pretext of any human treaty, to claim from the British Government, which does not recognize slavery, beings who by slave-law are not recognized as men, and who actually existed as brute beasts in moral darkness, until on reaching British soil they suddenly heard, for the first time in their lives the sacred words "Let there be light and there was light!" From that moment it is argued they were created free men, and if this be true, it is said they cannot be held responsible for conduct prior to their existence.[23]

Bond Head's personal position was succinctly précised in his response to the petition from Niagara: "It is true, that a Slave in the United States is not a true agent, and that he becomes one the instant he arrives in Upper Canada: but in obtaining freedom, he becomes responsible for his conduct, like other free men."[24] By this convoluted logic, Bond Head meant that responsibility was retroactive. Believing that Moseby's guilt was well proven, the lieutenant-governor ordered the extradition to proceed.

From the first week in September, a large party of blacks stood vigil outside the Niagara gaol in anticipation of rescuing Moseby the moment that he was to be handed over

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[21] The Patriot, 22 September 1837.

[22] Niagara Reporter, 14 September 1837.

[23] Bond Head. Narrative. Appendix to the Legislative Assembly, 4th Session, 13th Parl. 2nd Victoria, 1839, 67.

[24] The Patriot, 22 September 1837.

to the U.S. authorities. On September 9th, deputy sheriff Alexander McLeod received a warrant instructing him to that end. McLeod later testified at a coroner's inquest that he was unable to act immediately "in consequence of no person coming to receive the prisoner."[25] Three days later, arrangements were made with McLeod to have Moseby delivered to Daniel Kelly. On Friday, September 15th, the deputy sheriff, a handful of constables and a non-commissioned officer of the Royal Artillery and three of his bombardiers, while preparing to transport a manacled Moseby to a waiting boat, were confronted by "numbers varying from 250 to 3 to 400 (both Black and White and of both Sexes) assembled in front of the Prison and manifesting a Riotous Spirit of Resistance."[26] Witnesses would later offer in evidence that many of the blacks were armed with sticks or clubs "and some," although unspecified, "with still more dangerous weapons."[27] Despite the deputy sheriff's best effort, Moseby escaped in the confusion of the moment.

David Murray, relying for the greater part on a newspaper report written the day of the riot and various eye witness accounts and recollections compiled much after the fact, has provided the most recent account of the events immediately leading up to Moseby's escape.[28] Unfortunately he makes no reference to the Porter papers or to the most compelling testimony given by various witnesses at coroner W. D. Miller's inquest into the

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[25] The Cobourg Star, 11 October 1837.

[26] NAC, RG 5, A 1, Vol. 210, Justice Macaulay to Bond Head, 21 November 1837, 115619-26.

[27] Ibid.

[28] See both David Murray, "Hands Across the Border: The Abortive Extradition of Solomon Moseby". Unpublished paper, 2000 and Murray. Colonial Justice: Justice, Morality and Crime in the Niagara District, 1791-1849. Toronto: 2002, 196-216.

deaths of Jacob Green and Herbert Holmes[29], both killed during Moseby's escape.[30] The inquest, which began on Saturday, September 16th and concluded four days later, included testimony from two of the magistrates who tried to maintain some semblance of order during Moseby's imprisonment, deputy sheriff McLeod and some of his constables, one of the bombardiers (John Winster) and a number of bystanders. The composite account of what occurred on September 15th offers a kind of *Rashomon* from which we can cobble the following. McLeod testified that early that day it had been reported to him that three of the black "ringleaders" had taken an oath to fire at the deputy sheriff if this proved necessary to effect Moseby's liberation. Later that morning, McLeod decided to defuse the growing agitation among the blacks standing vigil outside the courthouse by arresting and disarming the three men in question— Captain Peter Lee, Lieutenant Davis and one unidentified man. Instead of throwing the blacks "into confusion"[31] as McLeod calculated, the crowd only became more agitated. It was becoming clearer that the blacks had chosen this day to storm the gaol. McLeod conferred with magistrate Daniel McDougal and it was decided that if

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[29] Holmes and Green were respected leaders within the Niagara black community. Holmes was shot to death during Moseby's escape and Green apparently died from a bayonet wound. The inquest also inquired into two injuries—Thomas Parker, a black rioter, whose arm was broken by a rifle ball and one of the sheriff's officers who received a knife wound. [The Cobourg Star, 4 October 1837.]

[30] Two examples will suffice, the first speaking to the inaccuracies and the second to the incompleteness of Murray's sources. His narrative of the events leading up to Moseby's rescue relies on a story printed in the Niagara Reporter. One wonders about the trustworthiness the reporter who refers to Moseby throughout as Johnson Molesby. Murray bases his account of the trial of ten men indicted for contravening the Riot Act on a letter written by sheriff Alexander Hamilton. Of the ten who were indicted (six black and four white), the Assize Minutebooks report that only William Sims, a black man, was capitally sentenced. Murray claims, however, "neither McIntyre nor any of his fellow African Canadians arrested and charged with the riot were convicted. [Murray, 8.] This might appear to be a trivial oversight but for the fact that Murray draws a very definitive conclusion from his belief in the absolute innocence of all involved as seen below.

[31] The Cobourg Star, 11 October 1837, McLeod to Miller.

the magistrates could not quell the crowd, then they would be left with no other choice than to read the Riot Act[32]. McDougal first tried reasoning with the "mob"[33], lecturing that it was their duty to obey the law. However, as McLeod made his way toward the gaol, scuffling broke out between his officers and those among the crowd. Magistrates McDougal and Thomas Butler announced, to little effect, that if the crowd refused to immediately disarm, they were to be arrested. At noon, McDougal read the Riot Act. Butler then warned the "rioters" that if they did not disperse within the hour "they would be shot down with impunity, and the persons shooting them would be justified in so doing."[34] Butler testified that many replied that they would "sooner be shot than taken to slavery." Every person who was arrested for refusing to disperse (both before and after the Riot Act was read), Butler deposed, was immediately rescued "by the women." When, by one o'clock, it was apparent to the authorities that what had begun as a peaceful vigil had escalated into what the St. Catharines Journal would later refer to as "mobocracy", the magistrates ordered McLeod to deputize as many special constables as he was able. When McLeod reported that every person that he had approached refused to help, the magistrates implored him to leave Moseby where he was and to petition the lieutenant-governor for a suitable military escort. McLeod was adamant in his refusal to postpone the extradition any further. Convinced that Moseby would be rescued if McLeod proceeded and fearful "of the bad consequences of allowing a mob to supersede the law"[35], the magistrates, first

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[32] See supranote 6, chpt. 6.

[33] The Cobourg Star, 4 October 1837, McDougal to Miller.

[34] The Cobourg Star, 11 October 1837.

[35] The Cobourg Star, 4 October 1837.

transferring authority over the bombardiers from themselves to McLeod, "told him to take the responsibility upon himself and retired." McLeod believed that if he didn't proceed, Moseby would be rescued. He would later testify that his actions were not without justification. He informed the inquest that he had overheard the "coloured people saying that they would be sorry to hurt me, but if the order (to liberate Moseby) did not arrive that night from Toronto, they would break into gaol which they could easily do as the white people would not prevent them, and liberate the man."

The coroner's inquest concluded that Holmes's death was justifiable homicide. The evidence in the case of Green was insufficient to allow the jury to arrive at a decision. McLeod and his deputies were exonerated. But the affair did not end here. At the November assizes, ten men–six black (including Peter Lee) and four white–were indicted for a capital felony under the Riot Act. At the arraignment, the two racial groups decided to "sever on their trials."[36] The six black men, being the first six names on the indictment, were tried first. Evidence given at the trial focused exclusively on whether or not the prisoners continued to defy the law one hour after the act had been read. As the court transcript makes clear, the testimony of witnesses for the prosecution conflicted with that given by witnesses for the defence, except in the case of William Sims.[37] After a twenty-

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[36] NAC, RG 5, A 1, Macaulay to the Lieutenant-Governor, Vol. 210, 21 November 1837, 115619.

[37] PAC, RG 22, Series 290, Macaulay Benchbooks, Box 4, File 1. After sentence had been passed, the lawyer (Macdonell) for the defendants argued that the case should be dismissed on a technicality. It had been read into the court record that the reading of the Riot Act had concluded with the words "God save the King" rather than "God save the Queen". Macaulay ruled the objection invalid.

four hour deliberation, the jury acquitted all but Sims[38] who was recommended to mercy.[39] Macaulay wrote that the condemned prisoner was a fit subject for clemency:

> The ringleaders have escaped conviction and he alone of numerous offenders no less culpable stands condemned… and they (the jury) may have persuaded themselves that the open opposition which occurred did not proceed from any wanton contempt for His Excellency's Warrant, but an absorbing solicitude about one who had escaped from Slavery and whose restoration had been solicited under the ostensible but insincere plea of satisfying criminal justice in the spirit of amity which dictated the Provincial Stat: 3rd W 4, C. 7.

A petition from the inhabitants of Niagara confirmed that Sims's "zeal to rescue one of his suffering race from the cruelties of an unfeeling master… urged him on to riot of which he has been found guilty and caused him to lose sight of the impropriety of breaking good and wholesome laws."[40] As if to cement Sims's dedication and sincerity in the cause of aiding fugitive slaves, the petitioners noted that he had been instrumental in both pursuing the Stamfords's kidnappers and returning "his neighbours" to Niagara. After the acquittals, and considering that the evidence against them was "less positive", the Attorney General declined to prosecute the four white defendants. Shortly thereafter, Sims received a free pardon.

Bond Head's request to the Colonial office for guidance in the above cases was answered a year later. In response to an objection from Chief Justice Robinson, the Law

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[38] George Arthur referred to Sims as "the best man of that class in the Province." [Arthur Papers, Arthur to Sydenham, File 1510, 15 Oct 1840.] Born in Jamaica, Sims was sent, when still a child, to the United States to further his education. Unable to endure the sustained oppression of life in America, he sought refuge in Canada in 1830. From the outbreak of the Rebellion, he served in the Coloured Corps rising to the rank of sergeant.

[39] David Murray incorrectly concludes, "Neither McIntyre (a black man originally indicted for riot) nor any of his fellow African Canadians arrested and charged with riot were convicted." [Murray, Hands Across the Border, 8.]

Officers of the Crown, to whom the cases had been referred, concluded that evidence for offences committed in the United States should be taken in Canada "upon which (if false) the Parties making it may be indicted for Perjury."[41] In his commentary on the case, Robinson wrote:

> To proclaim impunity to all slaves who may fly to Upper Canada after murdering or robbing their Masters, or others, would be inviting a description of population which, to say the least, it is not desirable to encourage, and a Province which should thus hold itself out as a place of refuge for atrocious criminals from other Countries ought to expect consequences fatal to its own security and independence.[42]

But wasn't this just the point? Were the fugitives in question guilty of their attributed crimes? One of the objections to returning escaped slaves accused of committing crimes in the United States, Robinson noted, was that the charges were probably insincere, a mere contrivance to return the slave to his master. Robinson objected that:

> to conclude, without proof of any such abuse, that a fraud of this kind must be intended, merely because the fugitive is a slave, and to refuse on that account to regard the Acts and representations of public authorities in the United States as authentic and honest, would not only be unwarrantable and unjust, but it would produce this natural consequence that the Government and the people of that Country would feel themselves absolved from all obligation to surrender fugitives from Upper Canada—they might content themselves with surmising that the criminal charge was a mere pretence to accomplish an arrest for debt in a civil action; or they might avow any other injurious suspicion.

While Robinson was content to allow the courts in the southern United States to determine

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[40] NAC, RG 5, C 1, Dutiful and Loyal Subjects in the Niagara District to Bond Head, File 1115, 20 November 1837.

[41] J. Mackenzie Leask. "Jesse Happy, a Fugitive Slave from Kentucky". Ontario History 54:2 (June 1962), 96.

[42] Document reproduced in Mackenzie Leask. "Jesse Happy, A Fugitive Slave From Kentucky", 97-98.

the guilt or innocence of accused slaves like Jesse Happy, the Colonial office was not. Lord Glenelg[43] dictated that the Upper Canadian government was to act in each case "according to their discretion."[44] Glenelg, following the advice of the Law Officers, adopted the principle that, where the slave had used his master's horse "for the purpose of making his escape, and not with the object of appropriating the property to himself", there was no felonious intention and thus, no crime. The difference was more than the splitting of hairs. Robinson's line of reasoning led to the conclusion that many fugitive slaves were, as slave owners and colonizationists believed, a criminal class unless a southern court proved otherwise. In the case of Jesse Happy, the Law Officers concluded that what had taken place was not horse theft but, according to Provincial law, "merely an unauthorized use of a Horse, without any Intention of appropriating it."

The black community was not content to let the issue rest. Convinced that government discretion was a poor substitute for penal reform, they pressed on. Fearing that what had happened to Moseby and Happy could happen to any and all, they lobbied for a revision of the law such that it would permit any black in the province charged with a crime committed before entering Canada to be tried before a provincial jury rather than returned to the United States. Lord Durham was presented with a petition to that affect which he promised to present to the Colonial Office. When, one year later, there was no

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[43] Charles Grant, lst Lord Glenelg, was Secretary of State for War and the Colonies from 18 April 1835 to 19 February 1839.

[44] Leask. "Jesse Happy, A Fugitive Slave from Kentucky", 95

response, Thomas Rolph[45] was dispatched to England. That an escaped slave could face possible extradition "merely for carrying away the clothes he wore, since these belonged to his owner"[46], Rolph argued, was surely an injustice that must be immediately remedied. Although they had committed identical crimes, the fact that Moseby was subject to extradition while Happy was exonerated spoke to the capriciousness of the existing legislation. In the summer of 1840, Rolph argued the case for penal reform before a convention of the British and Foreign Anti-Slavery Society in London. He also argued the necessity of making fugitive slaves British subjects the moment they crossed the border, a move intended to eradicate discriminatory practices that prevented blacks free access to churches and schools. A committee struck to examine Rolph's proposals sent petitions to the Colonial Office endorsing the same while recommending that the government make it mandatory for Upper Canadian schools to admit blacks, all to no avail. Meanwhile, raids into Upper Canada by disaffected supporters of MacKenzie's failed rebellion, and the fact that a number of dangerous criminals had escaped south of the border, had convinced the British Government that the existing extradition treaty needed to be reopened. Although Chief Justice Robinson recommended that robbery and horse theft remain in the agreement, Henry Fox, the British counsel in Washington, anticipating that the question of extraditing fugitive slaves would continue to plague the Upper Canadian government, argued that any revision of the existing treating must take this fact into consideration. While a draft of the

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[45] From his arrival from England in 1833 until his departure from Canada in 1843, Thomas Rolph resided in Ancaster. A surgeon and emigration agent, he was employed to represent the interests of the black population in Upper Canada.

[46] Allen Stouffer. The Light Of Nature and the Law of God. Montreal: 1992, 60.

revised treaty was being circulated for discussion, Rolph's letters pointing out that a fugitive slave could be accused of having stolen the clothes he wore and subsequently charged with felony arrived on the British foreign secretary's desk. Lord Palmerston, moved by Rolph's arguments, struck horse stealing and robbery from the draft treaty. In 1842, the Webster-Ashburton Treaty closed the legal door to any future extradition of fugitive slaves.

David Murray has correctly concluded that Moseby's escape could not have been orchestrated without "the enormous effort made by the local African community under their leaders... first to organize themselves and then to mount an extraordinary vigil outside the Niagara jail for some three weeks."[47] Hundreds of blacks from the Niagara region, at great expense and personal hardship, journeyed to the Niagara courthouse to stand watch. What must also be mentioned is the role of the white community that, to a great extent, made this effort possible. Although more circumspect, the white community was clearly on Moseby's side. Although Cpt. Eccles cautioned the black community that they should exhaust all possible legal channels before acting rashly, on learning of the deaths of Holmes and Green, he found the deputy sheriff wholly culpable: "This is sad work for your slave holders; if murder has been committed the responsibility must fall on Mr. McLeod."[48] By drawing up petitions and supporting a subscription taken up to provide provisions for the blacks standing guard at the gaol, by generously opening their homes and inns to blacks from outside the town and by refusing McLeod's request for extra deputies

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[47] Murray. Hands Across the Border, 16.

[48] The Cobourg Star, 18 October 1837.

and, finally, through their physical involvement in Moseby's rescue, many within the white population actively supported the rectification of a perceived injustice. We should, however, be cautious in attributing white intervention to a pervasive belief in racial equality. In 1837, Col. John Prince's name appeared first among a long list of signatories petitioning on behalf of Patrick Fitzpatrick, a black man sentenced to death for raping a child under the age of ten. The same Col. Prince would write several years later:

> Of the coloured citizens of Toronto I know little or nothing; no doubt some are respectable enough in their way, and perform the inferior duties belonging to their station tolerably well... I believe that in this city (Toronto) as in some others of our province, they are looked upon as necessary evils and only submitted to because white servants are so scarce.[49]

As argued below, the belief in the racial inferiority of blacks was not incompatible with a belief in their right to British justice. While blacks in Upper Canada might not have been considered members of the social community—even the reaction to Moseby's extradition was segregated in that most whites offered support from the sidelines—their access to legal redress was seldom put in question.

White intolerance in Upper Canada appears to have been in direct proportion to the relative size of the black population. In September of 1829, Charles Jackson petitioned the lieutenant-governor's office. Acting as an agent for "sundry coloured persons"[50] who were desirous of emigrating to Upper Canada from the United States, and a number of other blacks already settled in the province, Jackson informed the government that his clients wished to purchase about ten thousand acres of an unsurveyed block of clergy reserves in

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[49] Stephen Hubbard. Against All Odds. Toronto: 1987, 12.

[50] Journal of the House of Assembly, 2nd session, 10th Parliament, 22 February 1830.

the Gore District, County of Lincoln. This was not the first time that blacks from the United States had tried to establish an all-black community. In the late 1700s, loyalist Richard Pierpoint and other blacks petitioned the government for adjoining blocks of land in the Niagara District "for mutual support in a white-dominated and sometimes hostile environment."[51] Nor was this the first request for this particular block of land. A year earlier, more than two hundred blacks "residing in different parts of the province"[52] insisted that their social and economic progress laboured under two disadvantages—the dearth of educational opportunities for their children and the constant threat from slave catchers. They petitioned the government for a remedy, suggesting that they be granted a portion of the wastelands contiguous with the main road leading from Burlington to Lake Huron. Here they proposed to form a black settlement predicated on mutual aid and protection:

> where they could combine and unite their means and exertions for so laudable a purpose as that of securing to their posterity the means of obtaining a moral and religious education, with all its happy consequences; and that it will be the means of preventing the system of kidnapping, which is now carried on through his Majesty's provinces by the Georgia and Virginia kidnappers from the southern states of America.

The lieutenant-governor's reply was most likely the same as that to the Ohio request. Any vacant Crown land, in any part of the province, that was surveyed and open for location, Jackson was informed, could be purchased by any individuals of any "Class or Colour" upon terms made public by the Commissioner of Crown Lands. Two blacks, Israel

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[51] Power & Butler. Slavery and Freedom in Niagara, 43.

[52] Kingston Gazette and Religious Advocate, 25 June 1828. People of Colour to Lieutenant-Governor Peregrine Maitland.

Lewis and Thomas Cresap, representing a group of freed slaves residing in Cincinnati, Ohio, met with Colborne and received essentially the same message: "Tell the Republicans on your side of the line that we do not know men by their color. If you wish to come to us, you will be entitled to all the privileges of the rest of his Majesty's subjects."[53] Lewis and Cresap entered into negotiations with the Canada Company to purchase four thousand acres near present-day Lucan on the Au Sable River twelve miles north of London, but lacked the capital to complete the transaction. Instead, a consortium of Quakers from Ohio and Indiana managed to buy eight hundred acres. Of the original one thousand or so black settlers who set out for the new community, fewer than two hundred arrived in October.

Information may have reached Canada that Lewis and Cresap's long-term objective was eventually to purchase the entire one million acres of the Huron Tract as a black refuge. As news of the petition leaked out, "sundry" was somehow magnified into worrisome rumours that several thousand American blacks were about to augment the population of the Western District. In February of 1830, A. K. McKenzie, and sixty-eight others from the townships of Gosfield and Colchester in the Western District, petitioned the House of Assembly. The memorialists pointed out that recent (but unspecified) laws passed and enforced in many of the adjacent states had led to several hundred blacks entering into the western part of the province[54]. In this respect, the petitioners were correct.

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[53] Jason H. Silverman. Unwelcome Guests: Canada West's Response to American Fugitive Slaves, 1800-1865. Milwood: 1985, 27.

[54] The signatories were most likely referring to Ohio's Black laws. Although slavery had been abolished in Ohio in 1802, legislation passed in 1804 required that any black seeking work in the state must produce a court-issued certificate of freedom. In 1807, the legislation was amended. It stipulated that all black fugitives entering Ohio must post a five hundred dollar bond signed by two white men as security. This was meant as a guarantee that blacks would not become wards of charity or public nuisances. The legislation further denied blacks the right to testify in court against whites. Until 1829, these laws were, for

According to Robin Winks, by 1827, there were nearly six hundred blacks living in Amherstburgh and the back concessions of Colchester,[55] constituting about 20% of the population. But more alarming, the petitioners complained, several thousand were preparing to follow them to the annoyance and injury of the community at large. Years of experience, they offered, had proven "that by far the greater proportion of these people are void of truth, virtue or industry."[56] If corroboration was required, one need only witness the repeated thefts, robberies and murders committed by them, as substantiated by the courts that "upon all occasions (are) filled with them." The petitioners threatened that if some restrictions were not placed on those already living in the Western District, and if measures were not taken to prevent their further emigration, many of the white population would either be induced to leave the province or to take the law into their owns hands.

The white community[57] was responding to the growing number of blacks in the Amherstburgh/Colchester area thrown out of work. Fugitive slaves had originally been drawn to the area because of the demand for labour in the tobacco fields. In his travels through the district, Joseph Pickering observed:

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the most part, ignored, when, due to an accumulating increase in the black population in Ohio, the slave states began to complain that the lax state of affairs in Ohio was proving to be an enticement for slaves to escape. In July of that year, Cincinnati announced that it would begin to enforce the black codes. Public officials enacted legislation that disallowed black participation on juries and in the militia. Blacks were also prevented from carrying firearms. Between 1,100 and 2,200 blacks left Cincinnati in the months that followed. As Jason Silverman has concluded, "the impetus for mass migration (to Canada) had thus been provided. A committee chaired by James C. Brown was appointed to organize the group movement and two black representatives, Israel Lewis and Thomas Cresap, journeyed to Upper Canada to 'beg it elsewhere' and to locate a suitable area for black settlement." Jason Silverman. Unwelcome Guests, 27.

[55] Robin Winks. The Blacks in Canada, A History. Montreal: 1971, 145.

[56] Journal of the House of Assembly, 2nd sessions, 10th Parliament, Appendix.

[57] In the Western District these would be mostly late Loyalists with entrenched views concerning the "proper place" of blacks

> Tobacco is becoming quite a staple article of produce in these western parts of the province. I am told there are several hundred acres of land in tobacco towards Amerstburge (sic) this season: while it continues to be used so generally, I fear excessively, it will pay the cultivator much better than any grain crop. Black slaves, who have run away from their masters in Kentucky, arrive in Canada almost weekly (where they are free), and work at raising tobacco: I believe they introduced the practice.[58]

Local tolerance of the black population was in direct proportion to the economic viability of tobacco and the concomitant need for cheap labour. However, 1827 found the Montreal markets overstocked, and the Canadian market saturated. The resulting price drop from 6d. to 3d. per pound meant that farmers in the area began to abandon the cultivation of tobacco making "black labour… superfluous when whites themselves undertook whatever aspects of the limited tobacco harvest remained."[59] As Jason Silverman has argued, the impoverished blacks constituted such a large percentage of the area population that they could neither be "ignored nor approved".

The petitioners further suggested that it might be good policy to include with the immigrant blacks, all white foreigners who were unable to produce sufficient documents from their home countries in support of their good character. Both groups, it was urged, should be held to bail for their good behaviour during their stay in the province by giving good freehold security or else quit the country. It was noted that this policy was similar to laws already in force in several American states (Ohio in particular), and one explanation as to why "the lowest class of the (American) population is thrown upon us." The petitioners intended to put an immediate halt to further black immigration by exploiting the

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[58] Joseph Pickering. Inquiries of an Emigrant: Being the Narrative of an English Farmer From the Year 1824-1830. London: 1832, 96-7.

[59] Jason Silverman. Unwelcome Guests, 24.

very reason that the Ohio blacks were desirous of taking up residence in Upper Canada—their having neither money nor property.

The petitioners also reminded the House that, as the law now existed, there was nothing to prevent "negroes and mulatoes (sic)" from both attending and voting at town meetings, and even, in elections, to send members to the Assembly. "We trust for the honor and welfare of this Province, that efficient measures will be taken by your Honorable House to prevent such occurrences."

The petition was tabled February 16. On the 18th, the Assembly moved that the petition be referred to a Select Committee composed of Messrs. Baldwin, Dickson, Dalton and Berczy "with power to send for persons and papers to report thereon by Bill or otherwise." On the 25th, the Committee put seven resolutions before the House: (1) that the House had just cause for alarm for the peace and security of the inhabitants of the Western District "by reason of the rumoured intention" on the part of the Canada Company, to introduce "large bodies" of negro settlers into the province, (2) that the Canada Company appeared not to have reflected on the danger of such a policy, (3) that the settlement of Upper Canada was a priority issue and called for the serious attention of the Legislature, (4) that although the House recognized "the law of nature" by which fugitive slaves fleeing to the province ought not to be delivered up to their pursuers, nevertheless, the sudden introduction of "a mass of Black Population, likely to continue without limitation, is a matter, so dangerous to the peace and comfort of the inhabitants, that it now becomes necessary to prevent, or check, by some prudent restrictions, this threatened evil.", (5) that in those states where the black population approaches the size of the white population it

has proven dangerous, and that like disasters must occur in Upper Canada if the organized immigration of large bodies of blacks be allowed to proceed, (6) that, if necessary, the committee will bring forward a bill to prevent blacks and mulattoes from entering the province as settlers with all the civil rights of people already within the province. (7) that the lieutenant-governor be requested to forward the resolutions to His Majesty's Secretary of State for the Colonies to be put before the House of Commons, and for the lieutenant-governor to discourage the introduction of such a population until the Legislature may be enabled to make some enactment on the subject.

Individual fugitive slaves were accepted into Upper Canada, or at least somewhat tolerated, for the same reason that they settled near the border. As exiles, it was expected that they would eventually return to the United States. Moreover, given that slaves did not escape *en masse*, and that many were recaptured before they reached the Canadian border, it was believed their numbers would remain small. As Winks has argued, the Upper Canadian government got great ideological mileage from its acceptance of runaway slaves. A moral strike against the Republic, it marked the superiority of British liberties. The Toronto Commercial Herald positioned itself as a newspaper that welcomed the infusion of blacks into the province:

> ... the very increase of their numbers among us fills our hearts with the most unmingled joy in as far as it tends constantly to remind us of the many privleges and immunities which the British Government confers upon those who have the happiness to live under it.[60]

Forgetful of Canada's own flirtation with slavery, the Niagara Gleaner wrote:

> It is disgusting to hear our neighbours of the United States boast of their

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[60] Toronto Commercial Herald, 31 September 1837.

> liberty and equality, while thousands of human beings are chained together and driven from place to place and sold like beasts…to the everlasting disgrace of the people of that Republic. We (subjects of Great Britain) glory in being a subject of the greatest and most benevolent nation ever in existence, either of the present or subsequent ages of the world.[61]

Mass immigration into the interior, however, went beyond tokenism. It spelled permanence. It was at such junctures that the façade of toleration withered. The blunt reality was closer to Thomas Smallwood's observation on arriving in Toronto in 1843: "I have met a prejudice equal to anything I ever experienced in the South"[62]. Nevertheless, Smallwood extolled, Upper Canada was "a land of true freedom.... where the laws are equal, and know no difference between man and man on account of colour."[63] This was not hyperbole. As argued below, I have found that, although racial stereotyping extended even into the judiciary, the dispensation of justice to blacks, as Smallwood believed, was both fair and equitable so much so that blacks in the Niagara District used the quarter sessions and summary courts with impunity often in numbers exceeding that of whites per capita **(Table 2.0)**. By the 1840s, emerging urban and rural segregation patterns denoted that the black population had, in fact, settled in, many, if not most, as property owners. In 1842, the population for the township and town of Niagara combined was 3,900.[64] Of these,

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[61] Niagara Gleaner, 19 October 1833.

[62] Richard Almonte, ed. A Narrative of Thomas Smallwood (Coloured Person). Toronto: 2000, 27.

[63] Richard Almonte, 53.

[64] See Michael Power and Nancy Butler. Slavery and Freedom in Niagara. Niagara-on-the-Lake: 1993, appendix. Donald Simpson has put the percentage of blacks in the Niagara area at 10%. See Donald Simpson. Negroes in Ontario from Early Times to 1870. Unpublished Ph.D. thesis. University of Western Ontario, 1971. Power and Butler's figures, based on the '42 census, would appear to be more accurate. This proportion (Power & Butler's 5%) is larger than that for the province as a whole (approx. 2.5%). The total population of Upper Canada in 1838 was 400,000 of which 10,000 were blacks. The higher percentage in the Niagara area may be explained by the fact that black communities tended to be concentrated at border points. [Robert Martin. Statistics of the Colonies of the British Empire. London: 1838.] Edward de St.

approximately 198 were black and constituted 5% of the total population. In the town of Niagara, the black population lived in an area south of William Street (between King and Mississauga) officially known as "the colored village" and unofficially as "nigger town."[65] Along the Niagara River, part of this black community congregated in an area of Drummondville—the eponymous Pollytown—commemorating the man who helped blacks settle in the area. A black community near Chippawa was called Slabtown, named for the shanties constructed with the otherwise useless outside cuts—timber siding—of trees felled for lumber. In St. Catharines, blacks gravitated to North Street. McNab Point on Lake Ontario was more familiarly known as Nigger Point.

Lewis and Cresap's Wilberforce Settlement, as it came to be known, initially attracted only about two hundred blacks. When Benjamin Lundy visited the settlement in 1832, the population had already shrunk by forty. He reported 32 families averaging five individuals each[66]. The petitioners' fears were scarcely realized and nothing came of the House resolutions. Nevertheless, this was but the first attempt to draw the government into some co-ordinated effort to deal with this perceived criminal class. A second petition regarding blacks in the Western District was sent to the Assembly in late February of 1831 from magistrate William McCormick and one hundred and twenty-nine others. As did the petition the year before, the Assembly was asked to put a stop to blacks immigrating into

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Remy put the black population for the province in 1841 at 12,500. [NAC, CO 42, Vol. 478: 370-75, 20 May 1841.]

[65] With intermarriage, black families (e.g. Talbot and Primus) by 1840 had begun to settle in the more expensive downtown area.

[66] Fred Landon, ed. "The Diary of Benjamin Lundy." Ontario Historical Society, Papers and Records 19 (1922), 114.

the district. It was suggested that blacks and other "renegadoes" already in the district should be put under perpetual bonds to secure their good behaviour.[67]

In 1836, the inhabitants of the Western district, upon learning of the government's plan to withdraw troops stationed at Fort Malden, Amherstburgh, petitioned the lieutenant-governor to consider the consequences. They saw a pressing need to "control the numerous and troublesome black population daily coming into the District from the Slave states."[68] These newcomers were described as depraved and reckless and "who are almost daily violating the laws and even threaten to put the civil authority at defiance." The petitioners believed that armed troops were the only check that blacks feared. If the garrison were removed, there would be little safety for the person or property of the district's white inhabitants. Public authorities, responding to rumours of impending black riots, supported the petitioner's position. On September 29, 1838, a fifty-eight-year-old black man, William Sanders, was sentenced to six months in gaol for killing a neighbour's ox. The Western Herald reported that the sympathies of the black population had been enlisted on behalf of

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[67] Colonial Advocate, 3 March 1831.

[68] NAC, RG 5 B 3, Upper Canada: Petitions and Addresses, 1792-1841. Vol. 8, 941, n.d. A similar petition was sent from the inhabitants of the Niagara District urging the necessity of maintaining an armed force in support of the civil authority. A dispatch to Lieutenant-Governor Bond Head clarified the Home government's position. Given that there were no longer any purposes of an exclusively military nature that justified maintaining frontier garrisons, they would have to be abandoned. Lord Glenelg wrote that law enforcement and the maintenance of the public peace "belonged not to the military but to the civil authorities". His Majesty's government, the petitioners were informed, could little afford the burden of using troops to protect frontier settlements, protection "that ought to be found in an efficient Local Police." [PAO, RG 22 - 372, Box 24, File 8, Glenelg to Lt.- Gov. Francis Bond Head, 2 March 1836.] A similar petition had been sent a year earlier. Learning that the government was contemplating withdrawing troops from the town of Niagara and disposing of the military reserve (food supplies) "which has hitherto proved so beneficial to the poor", the inhabitants of the town suggested to Lieutenant-Governor Colborne that the removal of the troops "would be attended with the worst consequences." Their greatest fear concerned the district gaol. From its proximity to the United States, it was "filled with a host of criminals." In a deplorable state, troops were often required to guard it "without which there is no doubt but numerous offenders might have made their escape and have proved a nuisance to the community." [PAO, RG 22, Series 372, Box 21, File 15, 14 October 1835.]

"the sable *Beefocide* (sic)"[69] and that a rescue attempt was imminent. Readers were reassured, however, that the local magistrates, as the administrators of British justice, "have provided a sufficient military force to ensure order and peace. So look out, Darkies!"[70]

By 1840, the efforts of those within the Western District who would prevent fugitive slaves from settling the area were an admitted failure. That same year, a group of district magistrates petitioned the legislature to stop the "rapid importation of this unfortunate race, such as have of late inundated this devoted section of the province, to the great detriment of the claims of the poor immigrant from the mother country."[71] If the petitioners were insinuating that district loyalty to Queen and country were being thus undermined, they were, as witnessed below, seriously in error.

The Wilberforce Settlement turned out to be a failure[72]. Increasing mismanagement, misappropriation of funds and a fundamental unfamiliarity with the basics of farming

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[69] Western Herald and Farmer's Journal, 35 September 1838.

[70] Facts or information that newspapers chose to keep from their readership were often as revealing as what they included in their reportage. Court records indicated a long-standing animosity between Sanders and his white neighbours. Neighbour Moses Bertran had previously taken Sanders to court for killing a hog. The grand jury dismissed the charge and Sanders was not prosecuted. Neither this nor the fact that the ox that Sanders shot was a "breach bull" with a reputation for charging at people was ever reported by the Herald. The ox had, on more than one occasion, leaped Sanders fence and damaged his wheat field. He had warned the ox's owner, Moses Bertran, that he would take action if the ox continued to roam at large. A witness for the defence had heard Sanders say, immediately after the shooting, that he was merely trying to frighten the animal into leaving his field. Justice Macaulay, after hearing the testimony, advised the jury against a conviction. Against this recommendation, Sanders was found guilty and given a six-month sentence. On the 24th of November, upon review of the case, Sanders was granted a free pardon. [PAO, RG 22, Series 390, Box 4, Macualay Benchbooks.]

[71] Quoted in Allen Stouffer. The Light of Nature and the Law of God. Montreal: 1992, 63.

[72] For a complete account see Pease and Pease. Black Utopia: Negro Communal Experiments in America. Madison: 1963, chpt. 3.

proved to be its undoing. By 1840, the number of black settlers was reduced to fewer than one hundred. Silverman has argued that the collapse of the Wilberforce Settlement was a signal event in shaping racial prejudice in Upper Canada: "...the impractical plan seemed to prove to white Canadians the incapability of black self-sufficiency and the unfeasibility of future planned black settlements. ...Throughout Upper Canada, negrophobia began to surface as the reports of Wilberforce's failure spread."[73]

I somewhat doubt Silverman's chronology. In the first half of the nineteenth century, it was generally held that black inferiority was environmentally grounded[74]. It was just such a belief that underscored Porter's advice to Castleman. "Scientific" racism, the belief that mental, moral and psychological characteristics were innate, and therefore unalterable, had little currency at this time. Of the twenty-five slaves that Porter had received from his wife's family, all but seven were given money to pay their passage to Liberia. Porter was in agreement with those who argued that no slave should be released into the American body politic "because of the moral effects on the attempt to govern."[75] At one with the American colonizationists, he attributed black depravity to the heritage of slavery and the deprived conditions under which free blacks were forced to live. As Henry Clay argued, it was because blacks were "rational beings like ourselves"[76] that they reacted

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[73] Jason Silverman. Unwelcome Guests, 33-34.

[74] George Fredrickson notes that the frequent use of "degraded" to describe blacks suggests that degradation was not thought to be a matter of inherent characteristics but rather a result of circumstances. It intimated that there was "some ideal of manhood from which the Negro had fallen or to which he might be raised." [George Fredrickson. The Black Image in the White Mind. New York: 1971,13.]

[75] Porter Papers, I-14, Porter to Boulton, 20 September 1837.

[76] Frederickson. The Black Image in the White Mind, 11.

to slavery in a way analogous to how whites would react. The deep-rooted memory of the injuries suffered while under the yoke of slavery when combined with white prejudice toward freed blacks made them not only unassimilable but also "a dangerous and degraded pariah class."[77] For this reason, many colonizationists in the early nineteenth-century, fearing a race war, combined their demands for emancipation with proposals for the colonization of freed blacks outside the United States.

Porter's seven unemancipated slaves accompanied him to Black Rock. The Gradual Emancipation Law of 1799 governing the manumission of slaves in New York allowed that those born subsequent to a specified period might be brought into the state as indentured apprentices/servants until they reached the age of twenty-eight. Porter reported that they proved "useful as servants until they were fastened upon by the emancipators and free blacks of Buffalo and Canada by whom they with the exception of two... were persuaded to flee across the river."[78] "There are now three of four of them," Porter wrote to Boulton, "who have become, I am told, as worthless as this species of the population generally is—but I have never made any efforts to recover them." This was not strictly true. In May of 1821, Porter had made extensive efforts to have one of the females returned. Porter had enlisted the help of Niagara magistrate and chairman of the quarter sessions, Thomas

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[77] Fredrickson. The Black Image in the White Mind, 3. Fredrickson points to the fact that many abolitionists in the first half of the nineteenth-century were fearful that the cause of emancipation was negatively effected by the behaviour of blacks in the emancipated North. Antislavery spokesman Ebenezer Baldwin expressed his fears that the conduct of freed slaves was proving an embarrassment "... the corrupted characters of manumitted slaves was fruitful of crime, but rarely productive of happiness", a view shared by the New York Manumission Society who regretfully reported on "... the looseness of manners and depravity of conduct in many Persons of Color in this city." This, they qualified, was no fault of the blacks but rather that of the appalling environment into which they had been "liberated."

[78] Porter Papers, I-14, Porter to Boulton, 20 September 1837.

Dickson. Dickson, however, was unsure whether he could legally interfere. He requested, and received, clarification from attorney-general John Beverley Robinson. Robinson advised that although no extradition treaty existed at the time between Canada and the United States "yet in cases of felony, at least for an atrocious nature, I have no doubt a criminal escaping from either country into the other would be apprehended and committed till he could be sent for."[79] Slavery, however, "(was) no crime for which she can be apprehended in this province where she is free and entitled to the protection of the law the moment she arrives in it." If Porter were to counter-argue that she was to be regarded only as an indentured servant, then she had merely violated a civil contract and could no more be seized and returned than could a creditor who had broken gaol and slipped across the border. It was perhaps from this early experience that Porter deduced that a stronger case for the return of escaped slaves could be made if it could be demonstrated that they had committed a felony before crossing into Canada.

Porter claimed that he had no personal interest in the Moseby case "beyond the fears which the late and rapidly increasing influx of the black population cannot fail to inspire that the borders of one beautiful river will soon become haunts of a banditto (sic) of negroes capable of giving great and continued annoyance."[80] Porter's denigration of escaped slaves ultimately devolved into fear-mongering. If the slaves of the southern states came to the realization that Canada offered a safe haven, he predicted it would soon be inundated with a black population "of the most profligate and worst kind." If proof was

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[79] Porter Papers, I-15, Robinson to Dickson, 16 May 1821.

[80] Ibid.

needed, Porter suggested that one need look no further than "the late murderous riot at Niagara; and you may well imagine what these people will do when they should have acquired a strength that will enable them to compete with your white population." Some border communities took Porter's prognosis to heart. They implored the government to prevent free and fugitive blacks from settling in the province. Their reasons were simple enough. Blacks, they insisted, were indolent, shiftless and, more regrettably, without virtue. Many left a trail of felonies behind even as they made their way northward to Canada. Bad immigrants, it was reasoned, would make bad neighbours. The Moseby riot only illustrated what others had already known—their disrespect for law and order would have an incrementally corrosive effect on otherwise law-abiding communities if their numbers were permitted to increase without limit.

Silverman claims that once knowledge of the Wilberforce "debacle" began to circulate, "white Canadians commenced treating all blacks as social inferiors." While it is true that the Wilberforce example tended to offer 'empirical' evidence for those already predisposed to the belief in black inferiority, the criminal justice records for Upper Canada point to the fact that 'negrophobia' predated the Wilberforce Settlement. What Silverman fails to see is that it was not "negrophobia" that began to surface but an already present "negrophobia" now differently based. The failure of Wilberforce would be used to discredit environmentalism. Rather than understanding blacks to be "rational beings like ourselves", as Henry Clay put it, debased and degraded by the institution of slavery, Wilberforce suggested to those predisposed to racial prejudice—especially recently arrived white Americans—that black inferiority was inherent. In the failure of this and later planned

communities, we find one of the roots of scientific racism, an ideology that took flower in the 1840s both in the United States and Canada. In so far as this became the case, blacks in Canada became the prototypical criminal class. Yet regardless of when such denigration began, blacks for the greater part were, and remained, at least equal before the law.

Unlike the Irish, the black population of Upper Canada appeared to have few champions in high places. Official records clearly indicate that a black crime wave was fictive. Mackenzie, when solicited by the American Anti-slavery Society as to his opinion of blacks as citizens, responded: "... As a people they are as well behaved as a majority of the whites, and perhaps more temperate. To your third question (regarding crime), I would say, not more numerous."[81] Nevertheless, public officials with access to court documents did little to dampen the flames of suspicion. In 1826, Justice Campbell, reporting on the cases of two sheep-stealers, George Scroggins and Thomas Weldon[82], recommended that they be banished for life "it being generally supposed that nine tenths of the Blacks in this place, and I believe, in all other parts of the Province, subsist principally by theft."[83] These sentiments were shared by other King's/Queen's Bench judges. Justice Hagerman,

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[81] Mackenzie to the American Anti-Slavery Society, 30 January 1837. Quoted in Fred Landon. "Social Conditions Among the Negroes of Upper Canada Before 1865." Ontario Historical Society, Papers and Records 22 (1925), 153. In October of 1836, the AAS commissioned Hiram Wilson to gather information concerning the sobriety, reliance on public charity and criminality of six hundred blacks living in the Toronto area by questioning a number of prominent Upper Canadians. The results, including Mackenzie's response, were published in a number of abolitionist periodicals. Capt. R. G. Dunlop, member of the Assembly for Huron County, and John H. Dunn, Receiver-General of Upper Canada also responded. Dunlop praised the black citizens of U.C.: "... there are not in His Majesty's dominions a more loyal, honest, industrious, temperate and independent class of citizens than the coloured people of Upper Canada." Dunn characterized them as "truly loyal subjects of the government... both temperate and well behaved."

[82] Scroggins was convicted at the Gore assizes and Weldon at the Home District assizes for stealing sheep. Court records are inconclusive but it appears that both men had their capital convictions reduced to banishment for life.

[83] NAC, RG 5, A 1, Campbell to Hillier, Vol. 77, 41648-50, 8 May 1826.

deploring the number of blacks on trial at the Niagara assizes, lectured the grand jury: "They come to the country for protection; they are kindly received, protected from slavery, and admitted to all the privileges of the white inhabitants; and if instead of showing their gratitude by acting like industrious and honest men, so many of them continue to perpetrate offences against the laws, it may be found necessary before long to send them back again."[84] In 1830, Sampson Catlett was capitally convicted at the Western assizes for shooting a cow and attempting to carry away the carcass. Sixty-three white inhabitants of the village supported Catlett's bid for a non-capital sentence. They wrote of his inoffensive character, arguing that his time already spent in prison had served the ends of justice. Catlett was said to be "miserably poor"[85], so much so that if he were banished to the United States, this being January, he would undergo great hardship in travelling from the province. But the most telling point was the petitioners' belief that Catlett would cross the border "with the certainty of being almost immediately subjected again to slavery." By the time Chief Justice Robinson came to comment on the case, Catlett had already been banished. Robinson recommended that the misnamed "Catlet Sampson" should be left where he was. "They have too many such people about Amherstburgh already," he wrote, "—he was detected in killing a cow on the common with the intent of stealing the carcass a very common offence among the blacks and one it is very necessary to put a stop to."[86] How Robinson came to this conclusion is puzzling. The assize minutebooks record no

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[84] Niagara Chronicle, 10 April 1844.

[85] NAC, RG 5, A 1, Inhabitants of Amherstburgh to Lieutenant-Governor John Colborne, Vol. 102, 59259-63, 3 January 1831.

[86] NAC, RG 5, A 1, Robinson to Colborne, Vol. 107, 61330-32, 7 July 1831.

prosecutions of either whites or blacks in the Western District, 1829-31, for either cattle theft or cattle mutilation. The mitigated sentence was left to stand as a deterrent to other blacks within the district.

William Hands, sheriff for the Western District, described King Haw[87], convicted for infanticide, as a "mild mannered black man" but defamed the black witnesses for the prosecution as "adulterers and men of bad character."[88] Blacks in the Western District, he added, "generally make too light of an oath when called as witnesses against each other." Judge Campbell concurred in this belief. In 1825, Phoebe Actley, a black woman in the Gore district, was tried for malicious shooting. Campbell interrupted the prosecutor's examination of Mr. Wade, a witness for the Crown. In answer to Campbell's questions, Wade admitted that he did not know the Lord's Prayer, nor the Commandments nor the consequences of taking a false oath although he had a notion that he would go to Hell if he lied.[89] This line of questioning was usually reserved for children under the age of fourteen. Traditionally, the courts did not permit anyone under that age to give testimony. However, by the 1820s, a child might be admissible as a witness if, as Chief Justice Robinson explained to a Brockville grand jury, the child had an adequate sense of truth and sufficient intelligence and knowledge of religion to understand the nature and obligation of an oath[90]. This was established by collecting the child's answers to questions asked by the court.

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[87] Haw, 65 years old, was found guilty of murdering his daughter's newly born child in 1825. He was later pardoned. It is not clear whether this was free or conditional.

[88] NAC, RG 5, A l, Hands to Hillier, Vol 74, 39327-30, 8 September 1825.

[89] The Colonial Advocate, 27 April 1826.

[90] PAO, J. B. Robinson Papers, MU 5907, Address to the Brockville Grand Jury, 9 August 1831.

Wade, however, was not a child. Campbell's parallel line of questioning appears then to have been precipitated by the fact that the witness was black.[91] Yet the very fact that blacks were thought to exhibit a child-like intelligence was used as a mitigating factor in assessing penalty. Found guilty of committing arson, William Farnsworth[92] was recommended to mercy by the petit jury "on account of his 'apparent ignorance and stupidity' (sic)."[93] Justice Hagerman concurred: "...his countenance and demeanour evinced very little intelligence indeed."[94]

The sexual stereotyping of black males found its way into the trial of Jacob Briggs[95], accused of raping seven-year-old Frances Hazeltine of the Western District. Called as a witness for the defence, the staff-assistant surgeon to the local garrison, Dr. McIntosh, testified that he was "of the opinion that it would have been impossible for a full grown man, particularly a Negro (my emphasis), to have entered the body of (Frances Hazeltine) to the usual extent without leaving plain evidence of great injury..."[96] Under cross-examination, McIntosh reiterated that "the introduction of the penis beyond the

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[91] It should be noted that Campbell did not pursue a similar line of questioning with any of the white witnesses.

[92] Farnsworth, a twenty-year old labourer, was convicted at the Western assizes in 1840. He was transported to Van Dieman's Land.

[93] RG l, E3, Trial Transcript and Notes, Hagerman to Arthur, File B, Vol. 11, 25 April 1840, 36.

[94] Ibid.

[95] Thirty-six year old Briggs was convicted on a charge of carnal knowledge at the Western assizes in 1840. His sentence was reduced to transportation.

[96] RG 1, E3, Trial Transcript and Notes, Hagerman to Arthur, File B, Vol. 11, 25 April 1840, 30. At this point, Hagerman felt it necessary to point out to lieutenant-governor Arthur in a marginal note that "The prisoner is a Negro. The child a white child."

glands (sic)" was impossible in this case. Yet if it was the reputed size of his genitalia that was meant to exonerate Briggs, it was common law that found him guilty. Justice Hagerman cited the recent case of Rex vs. Rupen in which the English judiciary reviewing the verdict adopted the opinion that the hymen did not need to be ruptured to constitute rape.

Rev. William Johnson, Rector of Sandwich, petitioning on behalf of Farnsworth and Briggs, proposed that "the miserable beings having been for the greatest part of their lives slaves, hardly instructed, or rather not instructed at all, in the pure and perfect doctrines of Christianity" should, nevertheless (and perhaps paradoxically), spend their days in confinement where, by penitence and prayer, they may make some amends for the wickedness of their lives."[97]

There were some who thought that the Courts were too lenient when handing out penalties to black felons. Jason Bryant was given six months imprisonment and thirty lashes "for stealing much valuable property" to which the Brockville Recorder complained, "is it not an encouragement to black rascals?"[98] And when Farnsworth and Briggs, had their executions commuted to transportation, the editor of the Sandwich Herald "deeply sympathized" with the crowd who had assembled for the execution "in their disappointment at not being gratified with a sight of the two darkies swinging from the jail window."[99] It was generally complained that blacks were being allowed to evade and

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[97] RG 1, E3, Johnson to Arthur, File B, Vol. 11, 25 May 1840, 43-45.

[98] Brockville Recorder, 18 October 1827.

[99] Sandwich Herald reported in The Saint Catharine's Journal, 4 June 1840.

transgress the laws with impunity. A letter writer to a Sandwich newspaper complained that persons identified as selling liquor in the district without a licence were only nominally fined while licensed tavern keepers had to pay a substantial fee for a licence. The former were said to be, with one exception, "all coloured people, a race highly favored in this community."[100] In 1842, the Brantford Courier reported that:

> It is high time that the majesty of the law should be vindicated as regards Indians and Negroes. Really the government has been too lenient to both these classes of men in Canada; for of late years it was found to be sufficient reason to be an Indian or Negro to escape the gallows, no matter what crime they may have committed; whilst in too many instances white men were punished with all the rigours of the law.[101]

This viewpoint, at best impressionistic, collapses under the review of court records and newspaper reports. For the period 1800 to 1840, I have found documented evidence for the execution of thirty-six persons excluding those hung for treason (**Table 7.0**) Of these, three were blacks: John Qualls, and Thomas Morgan, both from the Western District, and Tobias Speck from the Eastern District. All were convicted murderers. These three constituted 7.9% of the total number executed, a figure certainly higher than the proportion of blacks in the province during this period and suggesting that, if anything, blacks were slightly over-represented at the gallows.

In weighing these charges and counter-charges, the case of Archibald Lewis is archetypal. Lewis had moved his family from Ohio to the Western District in 1823. Two years later, he was capitally convicted for maliciously shooting at a neighbour who had

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[100] Western Herald, 25 September 1838.

[101] Quoted in John D. Blackwell. "Crime in the London District, 1828-1837: A Case Study of the Effect of the 1833 Reform in Upper Canadian Penal Law" in J. K. Johnson, ed. Historical Essays on Upper Canada: New Perspectives. Ottawa: 1989, 581.

seduced his wife. In his petition for mitigation of sentence, Lewis charged that the district was rife with "strong prejudices" against persons of colour, perhaps referring specifically to the fact that the authorities, refusing to take his word that he was lawfully married, directed that he should return to Ohio to procure a marriage certificate. If statements on the record were an indication of prejudice, Justice Campbell certainly merited Lewis's accusation. Yet in commenting on this case, and two others for the same charge (one, a black woman, Phoebe Actley, and the other, a white man, Henry Ausman), Campbell recommended that the same measure of clemency be extended to all three who, because of their irritable natures, were to post bonds to keep the peace against any future demonstration of their violent tempers. Acknowledging the destitute state of many blacks in Upper Canada, Campbell observed that while the circumstances of the crimes might be similar, the economic circumstances of the criminals greatly varied. Because, as Campbell noted, "people of colour are unable to procure sureties to a large amount", it was suggested that Actley and Lewis were to find securities of £25 each while Ausman, an established farmer, was to find £100.

Although there are some recorded cases, at least one of which is noted below, in which judges were discriminatory in handing out punishment to blacks, for the most part, the Upper Canadian courts appear to have been colour-blind. Justice Campbell may have believed blacks to be a criminal class, yet in handing out sentences, and later assessing cases for the lieutenant-governor, his treatment of the black minority does not appear to have departed significantly from his treatment of the white majority. Although slightly more blacks appeared as defendants in the Niagara District (an average of 7% a year over a

thirteen year period) than as prosecutors, the significant percentage of black prosecutors (an average of 5.6% a year over the same thirteen year period, a figure commensurate with the percentage of blacks in the Niagara District population) at quarter sessions and summary court best testifies to their belief that the criminal justice system afforded them just remedy (**Tables 2.0** and **2.1**). Unintimidated, blacks were almost four times as likely to prosecute a white defendant as they were a fellow black. A survey of Tables 2.0 and 2.1 reveals that they were no more or any less successful in their prosecutions than their white counterparts.

What most alarmed whites were what they regarded as a lack of civilizing principles in blacks, most notably the absence of moral restraint. The belief that blacks lacked the basic precepts of Christianity meant that, at best, they were considered amoral. In a petition for clemency on behalf of rapist Olmstead Hightower[102], the inhabitants of Picton brought to the lieutenant-governor's attention the fact that "this person, a coloured man of about nineteen years of age, has been brought up without religious or moral instruction, belonging to a class which it is to be regretted has been overlooked and neglected ... being alike free from the restraints of the Gospel."[103] In a separate petition, Rev. Wm. Macaulay described Hightower as "uneducated, undisciplined and merely animal."[104] Like many other fugitive slaves spirited into Upper Canada, Hightower was said to be a recent arrival "and by no means entitled by length of abode or even migratory

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[102] I was unable to find any documentation which indicates Hightower's ultimate fate. Given that local newspapers were silent, it is unlikely that he was executed. Neither was he part of the contingent of those whose sentences were mitigated to transportation nor does his name appear in the Kingston Penitentiary registry.

[103] NAC, RG 5 A1, Inhabitants of Picton to Joseph, Vol. 193, 107262-68, 2 May 1838.

[104] NAC, RG 5 A1, Rev. Wm. Macaulay to Joseph, Vol. 193, 107269-73, 2 May 1838.

Table 2.0 Black Prosecutors at the Niagara District Quarter Sessions and Summary Court, 1828-1840

Date	Black Prosecutors	Against Blacks	Against Whites	As a % of Total Prosecutors	Cases Won	Cases Lost	Unrecorded or not Prosecuted
1828	5	0	5	11.3	2	2	1
1829	4	1	3	6.3	0	4	1
1830	4	1	3	5.4	2	2	0
1831	9	1	8	14.1	2	6	1
1832	0	0	0	0	0	0	0
1833	4	4	0	5.2	0	4	0
1834	1	0	1	1.4	1	0	0
1835	5	3	2	2.1	1	0	1
1836	2	2	0	3.2	1	0	1
1837	10	2	8	8.3	10	0	0
1838	4	1	3	9.3	4	0	0
1839	1	0	1	1.8	1	0	0
1840	5	1	4	4.4	4	1	0
Total	51	13	38		28	19	5

Source: Court of quarter sessions and summary court records as found in PAO, RG 22, Series 372

Table 2.1 Black Defendants at the Niagara District Quarter Sessions and Summary Court, 1828-1840

Date	Black Defendants	Prosecuted By Blacks	Prosecuted By Whites	As a % of Total Defendants	Cases Won By Defendant	Cases Lost By Defendant	Unrecorded or not Prosecuted
1828	2	0	1	4.5	2	2	1
1829	7	1	6	11.0	4	3	0
1830	12	1	11	14.0	9	2	1
1831	6	1	5	7.3	3	3	0
1832	3	0	3	4.6	2	0	1
1833	9	5	4	9.8	7	2	0
1834	2	0	2	2.2	1	1	0
1835	11	5	6	11.3	4	5	2
1836	4	3	1	6.1	0	3	1
1837	7	2	5	4.7	0	6	1
1838	3	1	2	5.0	0	3	0
1839	4	0	4	6.2	1	2	1
1840	12	1	11	6.9	5	6	1
Total	80	20	59		36	38	9

Source: Court of quarter sessions and summary court records, PAO, RG 22, Series 372

changes to be considered as one of the inhabitants." Macaulay's argument for mitigation of punishment had little to do with the specifics of Hightower's case (in fact, the petition was a racial indictment of the youth's character[105]), but centred on the Macaulay's general opposition to the death penalty. Reporting on the Hightower case, the Kingston Spectator observed that, if it was detestable for young, white women to be raped by males of their "own race, it must be truly abhorrent to be abused by a negro."[106] Allowing negroes the privilege of living and mixing with white people, the editor argued, "will be attended to with the greatest possible curse to the white inhabitants." To integrate blacks and whites was to introduce a "firebrand" into the white community resulting in the destruction of their persons and property. Segregation, the editor suggested, was God's will. Blacks were created by the Almighty as a distinct race of people and placed by Him in geographically segregated countries. It was the brutality and avarice of certain whites that had forced blacks from their geopolitical isolation, upsetting the natural order. Criminal acts, like that of Hightower, were the inevitable consequence.

Although Hightower may have been unacquainted with the doctrines of Christianity, it would be fallacious to infer that it was generally the case with blacks in Canada. While it is certainly true that many, if not most, slave owners in the United States discouraged or actively prevented their slaves from taking religious instruction for fear that they would be infected with notions of social and racial equality, in Upper Canada organized religion for blacks can be traced back to at least the mid-1820s. The First Baptist

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[105] In this, and analogous petitions, black juveniles were invariably referred to as men.

[106] Kingston Spectator, quoted in The St. Catharines Journal, 26 April 1838.

Church was organized in York in 1826. But even before this, Baptist churches had been interracial, often with larger black congregations than white. Black-initiated Baptist churches like that at Colchester in 1830 and at Niagara in 1831 were interracial at first, but by the 1840s had become segregated as the growing white congregation left to form their own church. By 1831, 22% of the congregation of the United Church of Canada were black and that of the Church of England 17½%.[107]

In the 1830s, Susanna Moodie could morally reprehend her rusticated American neighbour, Mrs. D___, for not allowing her otherwise "excellent (black) servant" to take his meals in common with the rest of the family and hired help. Such conduct, such lack of fellow-feeling, Mrs. Moodie indicated, subverted the principles of Christian fellowship.[108] "What a dreadful thing is this prejudice against race and colour," she wrote in 1853, "how it hardens the heart, and locks up all the avenues of pity!"[109] Despite personally witnessing to racial tolerance, even Moodie's self-righteous beliefs were not impervious to the Upper Canadian mentalité respecting crime and race. After visiting Kingston Penitentiary, she would comment:

> The constant influx of runaway slaves from the States has added greatly to the criminal lists on the frontier. The addition of these people to our population is not much to be coveted. The slave, from his previous habits and education, does not always make a good citizen. During the last assizes at Cobourg, a black man and his wife were condemned to be hung for a most horrible murder, and their son, a young man of twenty years of age, offered the sheriff to hang his own father and mother for a new suit of clothes. Those who laud the black man, and place him

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[107] See Winks, The Blacks in Canada, 2nd ed., 339-342.

[108] Susanna Moodie. Roughing it in the Bush. Toronto: 1962, 149-50.

[109] Susanna Moodie. Life in the Clearings. 27.

> above the white, let them produce in the whole annals of human crime a more atrocious one than this![110]

The mention of the young black man who bargained to execute his parents might appear apocryphal to the modern reader. To Moodie's readers, however, it may well have gone unquestioned. This would be, in part, because the judicial authorities employed blacks both as executioners and as agents of corporal punishment. "Black Joe", a discharged regimental drummer, administered public whippings under the direction of the sheriff of York,[111] an act calculated to augment the public humiliation that normally accrued from this shaming-ritual. Blacks were also employed as executioners. The authorities appeared to operate under the impression that blacks, believed to be deficient in civilized principles, would have few scruples about putting the noose around the neck of a convicted felon. The response of the black community suggested otherwise. Shortly after the double execution (1828) of John Christie[112] and Charles French[113], the hangman at York (a black man) was assaulted in the street by a black woman and forced to take refuge in the gaol. The authorities at York experienced difficulty when they tried to recruit a replacement from the black community. The Colonial Advocate reported: "Some of the blacks in town having been applied to in the late emergency to act as executioner, demurred, saying 'let whites

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[110] Susanna Moodie. Life in the Clearings. 157.

[111] Henry Scadding. Toronto of Old. Toronto: 1987, 17 & 117.

[112] Christie was a farm labourer. In 1828 he was convicted at the Home District assizes for murdering Isaac James, the son of his employers.

[113] Twenty-year old Charles French was executed for the murder of Edward Nolan. I elaborate on this case in chapter three.

hang the whites'."[114] And again, in the summer of 1839, a black man in London was assaulted by a mob when it was reported that he had officiated as the hangman at the execution of patriot prisoners the previous winter.[115]

As the petitions from the Western District noted above demonstrate, many Upper Canadians considered blacks an alien population. In fact, blacks had taken up residence in Upper Canada at the beginning of its settlement. A few had accompanied the Loyalists northward as house slaves.[116] By 1840, blacks constituted four percent of the population of Toronto.[117] A survey conducted in that year at the behest of Lord Sydenham[118], testifies to the fact that much of this population was "respectably" employed, e.g. cooks, bakers, carpenters, shoemakers, tobacconists, blacksmiths and publicans. Many of these were trades that ex-slaves had learned on southern plantations. The report spoke to the prosperity of some Toronto black families. William Ross, a retired carpenter, owned two hundred acres in the Toronto area, half of it under cultivation, with extensive buildings and good livestock. Wilson Abbott, a retired tobacconist, was said to live off the rents from five or

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[114] The Colonial Advocate, 6 November 1828.

[115] London Gazette. Reprinted in the Niagara Reporter, 21 June 1839. The account does not make clear whether the "mob" was white, black or mixed.

[116] In 1792, the year before slavery was abolished in U.C., it is calculated that there were between 500 and 700 blacks slaves residing in the province. [Power & Butler. Slavery and Freedom in Niagara, 13.]

[117] This figure is based on a Toronto population of 13,029 of which black citizens accounted for 522. The latter figure is taken from PAO, John Beverley Robinson Papers, L 44, MU 5907, 25 July 1840.

[118] The survey itself was conducted by Peter Gallego, a twenty-nine-year old Toronto black abolitionist and emigration agent. Gallego was a student of bishop Strachan. He studied at Upper Canada College and the University of Toronto.

six frame houses "and the interest of a capital valued at 30,000 dollars."[119] Many, like carter William Lafferty, came to Canada penniless. Lafferty's name appears in a document from Chief Engineer Thomas Harris. Harris, reporting on Toronto fires between March of 1838 and March of 1840, appended the names of four carters who, first to appear at each fire with puncheons of water, earned monetary prizes. Among the names from a pool of fifty or more Toronto carters, Lafferty's appears repeatedly[120]. Through enterprise and initiative, Lafferty came to own several houses on King Street. Edward L. de St. Remy argued that the results of the survey met "the charge of idleness brought against them (Blacks) by persons more prejudiced than observant." He did, however, understand how such attitudes gained credence: "What has given some colour to this accusation is their hanging about the Towns." De St. Remy explained that, arriving without capital in the province, blacks were reluctant to hire on as field labourers from the "resemblance of such occupations to those they fled from" and the trauma that this engendered. In 1846, James Taylor reported that the blacks in Toronto appeared "to be a very industrious and sober race, very orderly in their conduct.... During the whole time I was in Toronto, I never heard of more than one or two dark deeds having been committed by them to add a stain to the pages of the public record."[121] On the Niagara frontier, many blacks served as waiters in the hotels that serviced Niagara Falls or worked as tour guides. Their professionalism prompted the master of the Clifton House to comment "they far surpassed the whites in the

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[119] NAC, CO 42, Edward de St. Remy to Lord Sydenham, Vol. 478, 5 April 1941, 371.

[120] PAO, Toronto City Council Papers, March 16, 1840.

[121] James Taylor. Narrative of a Voyage to, and Travels in Upper Canada with Accounts of the Customs, Character, and Dialect of the Country. Hull: 1846, 18-19.

neat and elegant manner in which they laid out a table—that he scarcely knew what he would do without them."[122]

Much to the consternation of reformers like William Lyon Mackenzie, the black population of Upper Canada remained loyal to the Crown during the Upper Canadian rebellion[123], a favourable fact often cited in their government petitions.[124] "No discouragement to their industry," Edward de St. Remy observed, "nor insult to their persons can shake their steadfast loyalty."[125] Recruitment officers appealed to black patriotism and emancipation. Major Richard P. Webbe placed the following notice for the formation of a coloured corps under his command in a Niagara newspaper:

> Brave and Loyal Coloured Men!—Your services are once more required to defend the Liberty you now enjoy. VOLUNTEERS, (not Slaves!) are now called upon to rally around the British Constitution, which proclaims

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[122] Susanna Moodie. Life in the Clearings. 254. An 1842 census for Niagara shows blacks engaged in other occupations such as teamster, barber, domestic servants (all under the age of sixteen), carpenter, housepainter and blacksmith among others. [Power & Butler. Slavery and Freedom in Niagara, 54-57.] While not denying the successful integration of blacks into the Upper Canadian economy, there was some criticism among black leaders that, on sum, blacks were enlisted in menial occupations. Henry Bibb, editor of Voice of the Fugitive, complained: "Canada is no place for barbers, bootblacks and table waiters... We want farmers, mechanics and professional men." [Fred Landon. "Social Conditions Among the Negroes in Upper Canada Before 1865." Ontario Historical Society, Papers and Records 22 (1925), 157-8.

[123] Early in 1837, Mackenzie wrote to the American Anti-Slavery Society: "I regret that an unfounded fear of a union with the United States on the part of the coloured population should have induced them to oppose reform and free institutions in this colony, whenever they have had the power to do so. The apology I make for them in this matter is that they have not been educated as freemen." [James Walker. A History of Blacks in Canada. Hull: 1980, 156.]

[124] John and Melinda Smith, parents of convicted arsonist Grace Smith, in their petition on behalf of their daughter wrote that they had lived in the province for twenty-one years and had twelve children. The character of their family name and their fidelity to the British government could be attested to by any one of several distinguished gentlemen residing in the city of Toronto. To further the point, the petitioners emphasized that when the Rebellion broke out, three of their sons voluntarily took up arms "on the instant to repel the invaders." NAC, RG 1, E 3, Submissions to the Executive Council on State Matters, John & Melinda Smith to Lt.-Gov. Arthur, Vol. 86, 16, 29 May 1840.

[125] NAC, CO 42, De St. Remy to Lord Syndenham, Vol. 478, 5 April 1841, 373.

LIBERTY TO THE WHOLE COLOURED RACE.[126]

Lieutenant-Governor George Arthur publicly noted their patriotism, even though he himself, in 1840, expressed his opinion that further immigration of blacks would lead to serious racial problems.[127] Notwithstanding, in 1838, a group of "coloured people" felt it necessary to meet at a Methodist chapel in Toronto to discuss their alien status and to draft a memorial to Queen Victoria. One resolution under discussion focused on the unpopular policy of having to serve a seven-year "apprenticeship" in the province before they were viewed as proper subjects. The meeting argued that as black slaves, and unwilling residents in the United States before and after the American Revolution, they had never at any time relinquished their allegiance to England. Their spokesman, Dr. Thomas Rolph, argued that their fidelity to the Crown had been demonstrated by the "uniform tenor of their public conduct whenever on great emergencies they have been drawn forth to action."[128] Not all were convinced. Late in 1837, a coloured militia, the 1st Haldimand Militia, had been formed under Captain Robert Runchey of Toronto.[129] Blacks, it was reasoned, were well

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[126] Niagara Reporter, 30 November 1838 and subsequent issues.

[127] Robin Winks. The Blacks in Canada, a History. 148.

[128] Western Herald and Farmer's Magazine, 14 August 1838. In an aside, the editor antagonistically smirked, "we think that long suffering slaves should be ameliorated in the West Indies."

[129] Runchey had commanded a coloured corps during the War of 1812 until Ralfe Clench, a colonel in Runchey's Lincoln Militia, and other officers, castigated him. Subsequently, the command was taken over by James Robertson. Runchey's latest command was one of several black units formed along the Niagara frontier, but it was not the first. James H. Sears had succeeded in raising a company at Chippawa of forty black militiamen in the fall of 1837. Niagara District magistrate George Rykert informed Allan McNab that Runchey was about to take Sear's Company away from him and give it to some favourite of his own. Rykert reasoned that Sears would be perfectly satisfied if he could succeed to first Lieutenancy in the Company. Rykert wrote: "Mr. Runchey the Commander and Chief I know little of personally, but am informed he is ill qualified for the situation." [Charles R. Sanderson, ed. The Arthur Papers: Being the Canadian Papers Mainly Confidential, Private, and Semi-Official of Sir George Arthur {hereinafter, The Arthur Papers}, Toronto: 1957, Vol. 2, Rykert to McNab, January 1, 1838, 48.]

suited to serve along the border.[130] Unlike their white counterparts, black soldiers were said to be less likely to desert to the United States for fear of being returned to slavery[131]. In the fall of 1838, one of Runchey's Company, Robert Clarke, was summarily convicted by Niagara District magistrate John Mewburn for shooting and carrying away a hog, the property of farmer Cornelius Foster. Fine and costs amounted to 2£.10s. 6d. Mewburn's colleague, magistrate Col. Philip Delatre, suggested that the punishment needed to be exemplary "for the purpose of preventing the many depredations committed by the coloured men of Cpt. Runchey's company."[132] In addition to his fine, Clarke was also sent to gaol, a punishment both illegal and unparalleled at summary court in the Niagara District.[133]

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[130] The St. Catharines Journal reported that several companies of "coloured men" on the Niagara frontier were to be consolidated under the command of Lt.- Col. Ogden Creighton. Yet even here, racism raised its head. "These same blackguards," the paper reported, "make capital soldiers and they will fight like mad bulls whenever it is necessary." 24 May 1838.

[131] Lieutenant-Governor Arthur wrote to Governor General Colborne: "The Coloured Companies seem very useful men, & will be highly serviceable on the Frontier to prevent desertion." [The Arthur Papers, Vol. 2, May 28, 1838, 126.]

[132] PAO, RG 22 - 372, Box 32, File 24. Robin Winks writes that a Robert Runchey absconded across the border with his Company's pay in August of 1838. [Robin Winks. The Blacks in Canada, A History. Montreal: 1971, 151.] A letter from Major Ogden Creighton makes it clear that Runchey had fled to the U.S. when an order to disband the coloured militia was promulgated on August 3. But by this point, both Runchey's and James Sear's companies were combined under Creighton's command. Creighton was thus responsible for paying Runchey's company from the time that he, Creighton, took command of it in May of 1838. Because independent companies were to be paid by their own company commanders, any earlier monies still owing were eventually assumed, in Runchey's absence, by Cpt. Sears. Sears was not reimbursed until 1840. Runchey's quick departure was in aid of keeping one step ahead of the bailiffs that had been pursuing him for the past two years. Until the money came from the Paymaster, it is to be assumed that Creighton was responsible for these men. This would explain why Clarke's fine was paid by his company. It might also explain why Clarke was driven to theft, his salary being many months in arrears. [See Ernest Green. "Upper Canada's Black Defenders". Ontario Historical Society's 'Papers and Records' 27: 1931, 374-5.] Further to Clarke's crime, Winks allows that petty thievery occurred among the black troops but that such illegality was not unusual for any army billet.

[133] The act under which Clarke was convicted (An Act to provide for the summary punishment of Petty Trespassers and other Offences) allowed that a defendant could be gaoled up to a maximum of one month only upon failure to pay the allotted fine. Fairer and better legal minds prevailed and magistrate

Segregation went well beyond the provincial militia. Grand juries throughout the period, would, as a matter of course, recommend that local gaols introduce the classification of prisoners. And so it was no surprise when an 1828 grand jury in the Niagara District suggested the propriety of separating prisoners charged with assault and battery from those imprisoned for felony. However, this jury also thought it desirable "that a distinction should be made in confining white people (sic) separate from people of colour in different apartments."[134] Segregation also extended to the province's common schools.[135] The situation reported in West Flamborough was prevalent throughout the various districts: "Old Canadian families were unwilling to allow their children to sit promiscuously with Negroes and Mulattos."[136] Black education, consequently, became reliant on the philanthropic intervention of church and other groups such as the Baptist mission-type school run by Herbert Holmes in Niagara in the early to mid-1830s. By 1841, Hiram Wilson, working through the American Anti-Slavery Society, had recruited forty-three teachers[137] to fill positions in a number of schools he had set up for black students

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Major Ogden Creighton eventually released Clarke. As to Delatre's accusation, there is nothing in the Niagara quarter sessions/summary files that appears to support it. Delatre might well have confused Runchey's Company with that of Captain Sears whose Company included a number of blacks detained in the Niagara gaol for their part in a riot that saw the rescue of Solomon Moseby. [See Wayne Edward Kelly, "Canada's Black Defenders" The Beaver Vol. 77:2, (April-May 1997).]

[134] PAO, RG 22, Series 372, Box 1, File 12. If racial prejudice governed this recommendation it, nevertheless, had practical import. In the spring of 1833, Philip Anger, described by Niagara magistrate James Kerby as a vile character, was imprisoned while awaiting trial on an assault charge. In the presence of several cellmates, he drew a knife but was subdued before he could stab his intended target, a black prisoner. [PAO, RG 22, Series 372, Box 5, File 26.]

[135] In 1850, the Common School Act officially sanctioned segregated schools in the province. [Powers & Butler. Slavery and Freedom in Niagara, 58-59.]

[136] Quoted in Julia Roberts. " 'A Mixed Assemblage of Persons': Race and Tavern Space in Upper Canada." The Canadian Historical Review 83: 1 (March 2002), 19.

[137] Allen Stouffer. The Light of Nature and the Law of God. Montreal: 1992, 67.

including one at Colchester and one at Amherstburgh. Many of these teachers were recruited from the student body at the Oberlin Institute in Ohio and the Oneida Institute in New York. Both institutions inspired their students with anti-slavery ideals. Wilson solicited funds from various anti-slavery groups in the U.S. and abroad. Teachers were placed in black schools with the proviso that the community provide their educators with board and ten dollars a month. Even so, it was reported that most teachers resumed their college studies after a year of teaching, penniless and in debt.

While, in sum, it is evident that blacks within the province responded to racial discrimination by exercising their rights as British subjects, most notably their legal options (as noted in the tables above), it is in the particulars that we best see their singlemindedness. In the summer of 1840, fifty-five residents of Toronto (including Wilson Abbott and E. de St. Remy) complained to the Mayor's office that blacks in the city were subjected to racial indignities in the city's theatres. They reported:

> with sorrow that the American Actors who from time to time visit this City invariably select for performance plays and characters which, by turning into ridicule and holding up to contempt the coloured population, cause them much heart burning and lead occasionally to violence. They therefore respectfully entreat His Worship and all those to whom the right pertains, to forbid in future the performance of plays likely to produce a breach of the public peace.[138]

The Council took the position that under existing city laws, the grievance could not be addressed. The mayor was advised to apprise the petitioners that "this Council can hold out to them no hope of bringing in a Bill for such purpose without prohibiting such exhibitions

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[138] PAO, D 22, Toronto City Papers, 20 July 1840.

altogether which at the present moment they are not prepared to do."[139] One month later, the Council appeared to relent. In August, they gave third and final reading to An Act to Regulate Theatrical Performances and Other Public Exhibitions. The new municipal law required the prior licensing of acts with the proviso that those who failed to comply could be subject to fines. It is clear that the bylaw did not outrightly forbid racial performances for on October 14, 1841, thirty "people of colour residing in the City of Toronto" complained to the Mayor and Council that:

> 'circus actors' from the United States are shortly to visit this City for the purpose of performing &c. That Your Petitioners from the general and almost invariable practice of such Actors in their performances, have good reason to apprehend annoyances and insults in the manner they endeavour to make the Coloured man appear ridiculous and contemptible in the eyes of their audience. Your Petitioners humbly pray that Your Worship would be pleased to prevent the occurrence of such annoyances and insults as Your Petitioners believe that such attempted Exhibitions of the African Character are not at all relished or approved of by the sensible and well thinking Inhabitants of this Community.[140]

Eighteen years later the issue was again raised at Council but nothing developed beyond discussion. "Offending Toronto's Blacks," Stephen Hubbard concludes, "was not a priority at the time; the Black community was relatively small and virtually powerless."[141]

"Much of the formal public," Julia Roberts writes, "remained, literally, off-limits to blacks," in Upper Canada. Blacks were barred from most common schools (at least those where white children attended), juries and all but the most menial jobs. But what of informal sites where blacks might interact with whites in a less structured environment?

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[139] TA, Mayor's Office, Series E, 1840, File 177.

[140] PAO, D 22, Toronto City Papers, 14 October 1841.

[141] Stephen Hubbard. Against All Odds. Toronto: 1987, 16.

While it is evident from the petitions cited above that Blacks (at least those in Toronto) were permitted to attend theatre performances, Roberts focuses on what was arguably the most frequented site of casual class and racial interaction, the Upper Canadian tavern. She recounts the experience of two black men who, in the summer of 1836, were forcibly ejected from the tavern of Mr. Maisonville in the Western District. The Canadian Emigrant sited the hotel's parlour as a place where civilized men having civilized conversations were rudely interrupted by "a couple of ruffianly (sic) Negroes." The editor excoriated:

> There are few Britons who think that the colour of the skin is an index of the heart. But there never was one true Briton—one son of merry old England, taught to allow his rights to be trampled on by others—and trampled on too by such a degraded set of beings! As an Englishman… there are no insults so long remembered, few that enter so deep in a man's soul as those directed at the undeniable rights which each Briton exercises over his home.[142]

Maisonville, and his accomplices, as Roberts explains, were said to be operating in the interest of all who would defend the British Constitution whereas the blacks in question were a degraded lot "incapable of civilized association with truly public men." How frequently such acts occurred is open to conjecture but a petition from Nero Lyons of Amherstburgh to have his tavern licence reinstated in order that "the Coloured population of this town and vicinity have… a Publick House that they can resort to"[143] seems to point to the fact that blacks were often excluded from taverns in the Western District. They were sometimes excluded from taverns in Niagara as well. What is evident here is that there were individual acts of resistance to barring blacks from informal public spaces and the ensuing racially motivated acts of violence. In December of 1839, William Sims was

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[142] Canadian Emigrant, 26 July 1836.

[143] Roberts, " 'A Mixed Assembly of Persons' ", 26.

turned away from Adam Fralick's tavern. Sims returned an hour later with two other men. Fralick later deposed that the men "were Darkies." Although he bolted the door against them, Fralick testified that Sims kicked it in. Demanding service, Sims pulled a dirk out of his trouser pocket. Fralick picked up an axe and threatened that if Sims did not leave he would hack off his hand. Peter Hurted, a Fralick employee, remembered that on the night in question he "was called by Fralick saying for God's sake come in Hurted here are three or four Niggers drunk and they want to do me an injury." Hurted explained to Sims that, as the owner's servant, it was his duty to keep peace and quietness in the room. He testified that he was cut several times on both arms as he tried to usher the insolent blacks out door. Sims account of the incident differed in a few important respects. He stated that he did not break down Fralick's door but simply pushed it open. He was told by Fralick, "I don't want you here." Sims further clarified that he was unarmed.

Fralick's tavern was open for business at the time of the confrontation. Two men drinking in the bar testified that Fralick had refused to serve "the coloured people" who were then pushed out the door by Fralick and Hurted "who was in liquor at the time." When they re-entered the tavern, Hurted's arm was said to be bleeding from deep cuts. Sims was charged with cutting and wounding with intent to kill and the case was remanded to the court of quarter sessions.[144] The language used in the depositions parallels that in the case cited by Roberts. The civilized peace and order of the tavern was contrasted with the drunken recklessness of Sims and party. That Sims had stood his ground only came to

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[144] There is no record of the case in the quarter session files for the Niagara District suggesting that either the charges were dropped or the case was settled out of court.

count against him in the end. Sims, who had played a leading role in the Moseby rescue, remained actively involved (see chpt. 4) in the cause of civil rights for blacks. There is reason to believe that he may have deliberately targeted Fralick's tavern. In 1837, an assize grand jury found a true bill against the innkeeper for arson. He was charged with setting fire to the home of two black men.

Both blacks and the Irish were unwitting victims of the prevailing belief that immorality parented crime. Blacks, purported to be unshielded by even the most rudimentary religious instruction and the Irish, marked by an "untamed animal instinct,"[145] were believed to form a pool of immoral predators.[146] For Upper Canadians guided by these caricatures, the odds in favour of incipient crime grew exponentially with the increasing number of blacks and Irish entering the province. Even though court documents do not support those who would contend that there was an escalating rate of crime in the province, it is to be expected that, given the above mentioned stereotypes, as the number of Irish and blacks entering the province increased, so too did the expectation that the number of crimes would do likewise.

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[145] Thomas Haliburton. The Clockmaker, quoted in Jerald Bellomo, "Upper Canadian Attitudes Towards Crime and Punishment," 13.

[146] Both Peter Oliver and Anne Long have provided evidence to show that the Irish were not over-represented in Ontario penal institutions. In his study of the Central Prison, Peter Oliver found little support for the popular belief that, as hard drinkers, the Irish were disproportionately represented in the criminal class. [Anne Long. Sentenced to Penetanguishene: A Study of Reformatory Inmates, 1859-1904. M.A. thesis, Laurentian University, 1994, 53-61. And Peter Oliver. "Terror to Evil Doers": Prisons and Punishment in Nineteenth-Century Ontario. (Toronto: 1998), 414.]

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"CONTAMINATED BY EVIL EXAMPLE": JUVENILE CRIME IN UPPER CANADA

On November 18, 1839, sheriff William Botsford Jarvis arrived in Kingston from Toronto with two prisoners in tow—John Hamlin and Grace Smith—bound for Kingston Penitentiary. He carried a letter for Warden Henry Smith from the lieutenant-governor's office informing Smith that Hamlin and Grace Smith's capital convictions had been commuted to hard labour. Jarvis also conveyed patents of pardon for the warden "as your authority for receiving and detaining the said convicts."[1] Smith would be the institution's 390th inmate since it opened in June of 1835, but the first in the province to be incarcerated for his or her natural life. Occupying cell number nine in the first range of the east wing, she would find it "quite convenient"[2] if rather narrow[3]—well lighted, ventilated and warmed in cold weather. She would approve of the "wholesome" food and would concur that the whip was the best punishment for enforcing discipline, finding prison punishment in general "kindly and merciful" although, as she confided to prison chaplain William M. Herchmer, she believed that beatings made some prisoners sullen and turned them against their keepers. The diminutive (five foot) and docile Smith was a model prisoner. She never received corporal punishment. Even though the Kingston Chronicle and Gazette, reporting

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[1] RG 5, C2 Letter Books of the Provincial Secretary C.W., R. S. Tucker, Provincial Secretary to Henry Smith, 16 November 1839, C13140, Vol. 1, page 152.

[2] RG 73, C1-9, Records of the Solicitor General: Penitentiary Branch, Vol. 351.

[3] Each cell was nine feet long and two and one-half feet wide. C. J. Taylor argues that deputy-warden William Powers believed that the compression affected by the narrowness of the cells facilitated prisoner surveillance. C. J. Taylor. "The Kingston, Ontario Penitentiary and Moral Architecture", Histoire Sociale/Social History 12:22 (November 1979), 229.

on Hamlin and Smith's arrival, referred to her as "a mulatto woman (my emphasis)"[4], perhaps the most striking thing about her was her age. She had just turned seventeen[5].

Until then, the longest penitentiary sentence had been fourteen years, either for sedition or for a double offence. And Smith was not the first juvenile[6] since the inception of the penitentiary to be convicted of arson. However, in 1834, sixteen-year-old Joseph Blophet's capital sentence was commuted to five years in the penitentiary[7] and, in 1840, fourteen-year-old Eustache Coté was sentenced to the more typical seven-year term. How was it then that Grace Smith, also a juvenile, was sentenced to spend the remainder of her life in the Kingston facility?

On August 21, 1839, Mr. Mason and Mrs. McClure opened the evening's entertainment at Toronto's Theatre Royale with a performance of *The Lady of Lyons*. The itinerant performers had been held over for a third night. Also on the program were a double hornpipe by the Misses Clarke, a song by Mr. Hennessy and a "negro

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[4] Kingston Chronicle and Gazette, 20 November 1839.

[5] Smith was only sixteen when she was sentenced to be hanged.

[6] The law in Upper Canada was age specific. Legally, a juvenile (or minor) was anyone under the age of twenty-one. Any child under the age of ten was considered *doli incapax* (incapable of crime). Children between the ages of ten and fourteen were also considered *doli incapax*, however, this could be rebutted if evidence could be produced that the child had a guilty knowledge that they were doing wrong, by *militia supplet aetatem* (malice supplements age) or simply by a "mischievous discretion", the single exception being rape. Children above the age of fourteen were considered *doli capax* (capable of crime) for it was believed that such was their knowledge of right and wrong that they were criminally answerable for their actions. In court records and petitions, reference to "juveniles" was conspicuous by its absence. Instead, the respective documents would refer to the "youth" of the offender. "Youth" (see below) was a much more flexible concept than "juvenile". [See John Henry Willan. A Manual of the Criminal Law of Canada. Quebec: 1861.]

[7] Blophet was incarcerated in the Newcastle District gaol until he could be transferred to the penitentiary in June of 1835.

extravaganza"[8] by Mr. Linton. The finale was a staging of "the Catharine and Petruchio or Taming of the Shrew" by Mason and McClure. Among the pit band was John Smith, a twenty-year resident of Toronto and father of nine. One of the nine, sixteen-year-old Grace was in the audience that evening. Although it is likely that Grace frequently attended the theatre under her father's supervision, the British Colonist would point to her presence that evening as proof of her criminal character, referring to the theatre as "the present resort of such persons in Toronto."[9] Returning sometime after midnight to her Newgate St. (now Adelaide) rooming house, which she shared with her mistress, Lucinda Morris, Smith took a lighted branch from the fireplace, along with some dry wood-chips, and carried them to Francis Collins's stable. Collins, the nephew and namesake of the Toronto newspaper editor, resided at 24 Newgate, the former St. George Inn. Collins had inherited the property from his uncle. He also owned and operated a liquor and grocery store at 16 Church Street, two doors south of King. Three evenings before (Monday, August 19), an incendiary had set fire to the outside chimney of Collin's home. The fire had been quickly detected and extinguished even before the fire brigades arrived. The damage was minimal, amounting to only £15.

The Thursday-evening fire proved to be more calamitous. A half hour after Smith placed the smouldering wood chips under the footings, the stable caught fire. If the intended effect was to set Collin's house on fire, the exercise failed. A wind blowing off the lake carried the fire north to March Street where two homes and attached shops

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[8] Commercial Herald, 19 August 1839.

[9] British Colonist, quoted in the Kingston Chronicle and Gazette, 7 September 1839.

belonging to Matthew Sweetman and Edward McMahon, along with a few out-buildings, were destroyed and the dwelling of George Nicholls partially damaged. The fire was of such severity that the north walls of several homes on Newgate St. were scorched. Chief Engineer Thomas Harris calculated the property damage at £1,500.[10]

On the evening of the 28th, the wooden shingles on carpenter William Smith's home, 26 Newgate St., were set alight. Although blazing up momentarily, the fire serendipitously burned itself out causing only superficial damage. Smith, and co-landlord, Benjamin Hayward, determined that an incendiary had set the fire. Fearing a return visit, they sat evening watch. On September 1st, between one and two o'clock in the morning, Smith "saw a person with a shawl over the head, leave Marshall's house in Newgate St. and go toward Collin's stable."[11] He would later offer in his deposition:

> Hayward and I immediately went out and found the prisoner (Grace Smith) stooping down between Collins and Lindsay's stable. She was blowing the lighted stick to endeavor to set the chips on fire. I said "what are you doing with that fire there?" She rose up and said "Oh! Mr. Smith don't kill me"— she cried out and called for Mrs. Morris. I took her into custody and delivered

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[10] Neither property was insured. Sweetman and McMahon petitioned the city for compensation: "They beg to state that the unfortunate occurrence of being burnt out of Houses and Homes have brought them to the very brink of ruin and that without any fault or neglect whatever of their own. They respectfully beg to state that in all well ordered communities, the loses occasioned thro the medium of a wicked incendiary is generally sustained by the Public as no blame in respect to neglect can possibly be ascribed to the unfortunate sufferers not so with fires taking place by accident which in general can be traced to very culpable negligence on the side of sufferers." [TA, MS 385, Toronto City Papers, McMahon and Sweetman to City Council, 5 December 1839]. The city disagreed. Although they concurred that the sums for loss were correct (Sweetman asked for £250 and McMahon £300), they "regret (ted) much that the present state of the finances of the city will not permit the corporation taking upon themselves to bear any considerable proportion of the loses sustained by the petitioners." Even though the petition was co-signed by various city magistrates and aldermen, the council voted only £12.10.0 to be distributed proportionate to their loss, expressing their hope that "their fellow citizens might lend help so that they and their families will not be ruined." Somehow Sweetman was able to rebuild. The Toronto directory for 1846 shows him living at 52 March Street. McMahon, however, had moved to Queen St. East. Whether he owned or rented the property is not clear.

[11] NAC, RG 1, E 3, Submissions to the Executive Council on State Matters, Vol. 102, Deposition of William Smith, page 223.

her to Constable Earles, together with the lighted sticks and chips.[12]

Constable Thomas Earles resided in rented rooms a few houses up the street from Smith and Hayward. After taking Grace Smith into custody for attempting to "fire the house of Francis Collins", Earles arrested Lucinda Morris and Julia Lawlor as accomplices.[13] On the 2nd of September, Smith and Hayward were brought before alderman George Gurnett and entered into recognizances to appear before the next Court of Oyez and Terminer to give evidence on the charge of arson against Grace Smith. The same day, Grace Smith was brought before aldermen Gurnett and George Munro for questioning. After first being cautioned as to the consequences of any admission that might incriminate her, she volunteered that two nights before the March Street fires, Morris and fellow tenant Julia Lawlor offered that it would be "a good plan to get me to set fire to some of those old sheds—they then endeavoured to persuade me to do it…replying there was no danger if it was done in the night."[14] Smith accompanied Lawlor to Collins's stable where she was instructed where to place the fire. On the evening of August 21, before Smith set out for the theatre, Julia Lawlor brought some wood chips to Mrs. Morris's room proposing that Smith set the fire about one or two o'clock that morning. Upon her return later that evening, Smith carried a lighted branch from Morris's fireplace to Collins's stable. When she

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[12] Hayward's sworn deposition, which corroborated Smith's, added: "after we took the prisoner into custody she said that we ought to take Mrs. Morris in custody also." [NAC, RG 5, E 3, Vol. 102, 224]

[13] Lawlor and Morris were committed to the Toronto gaol on September 3. Lawlor was discharged on bail on September 10 and Morris on September 8. [PAO, RG 20-100-1 Home District Jail: Jail Returns 1839-1853]. Their cases had been referred to the Attorney General who found insufficient evidence to implicate them in the fires. [NAC, RG 1, E 2, Vols. L & M, Justice Jonas Jones to the Executive Council, 7 November 1839, 261.]

[14] NAC, RG 5, E 3, Vol. 102, Deposition of Grace Smith page 228.

returned to Morris's apartment, she was ordered to "go back and blow the fire up." It didn't matter that she refused for, a half hour later, the stable caught fire.

On the evening of Tuesday, August 27th, Lawlor called Smith to her room and ordered her to set fire to William Smith's house. Lawlor countered the girl's trepidation: "Devil a bit of danger—if you do it late at night and if you make out you are deranged, they will not do anything to you."[15] Shortly after midnight, Smith took a paper of Lucifer matches and set fire to the shingles of Smith's house. The fire quickly expired. When Morris ordered Smith to go back, she refused.

On Saturday evening, Lawlor took Smith to another of Collins's stables and indicated where she should set the fire. Morris woke Smith at two in the morning unwittingly sending her into the waiting arms of her vigilant neighbours Smith and Hayward.

After the arrests of Smith, Lawlor and Morris, the British Colonist reported:

> A clue has now been discovered to the late calamitous fire in March Street. There are three colored woman (sic) committed for trial, on a charge of arson. By the evidence taken before Alderman Gurnett and Munro, including the declaration of Grace Smith, one of the prisoners, there seems to be little doubt of the guilt of the parties, although in some respect the statements made were contradictory.[16]

The "contradictory" statement referred to the deposition of Matthew Stone. Stone lived with Julia Lawlor. He swore that on the night of the March Street fire, Lawlor was in her room from eight o'clock onward thus contradicting Smith's statement that Lawlor had brought wood chips to Morris's room shortly before Smith left for the theatre. Stone also

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[15] NAC, RG 5, E 3, Vol. 102, Deposition of Grace Smith, page 230.

[16] Reprinted in the Cornwall Observer, 12 September 1839.

deposed that on the evening of Smith's arrest, she had come to Lawlor's room between eight and nine o'clock complaining of having eaten something that disagreed with her. She proposed to boil the kettle for ginger tea but needed some chips to set a fire. Stone adduced that "Julia did not carry any chips into Mrs. Morris's room nor did she leave her own room that night."[17]

On October 24 the grand jury came in with a true bill against Grace Smith for arson. At the Home District assize on the 28th, she pleaded guilty before justice Jonas Jones. The date of execution was set for the 25th of November. On passing sentence, Jones observed, "the convicted creature was deeply affected…and was removed in convulsions."[18]

In their petition for mitigation of punishment, Smith's parents explained that their daughter, at the age of fourteen, had been placed under the care and tuition of Lucinda Morris as an apprentice dressmaker:

> On Mrs. Morris devolved then the responsibility of a girl of fourteen, mild, simple, teachable, and unfortunately but too compliant with the directions of her actual guardian. What instruction in religion, or her duties as a Christian and a subject, she received from her remorseless and unmerciful mistress, appears plainly from the simple, unvarnished tale of the guileless child; which full, unreserved confession was made voluntarily, on the impulse of the moment, and has that immutable tone of sincerity, which the very masters of crime can hardly copy, and never a weak minded, uneducated young girl, in the surprise of the moment, without time allowed for preparation or contrivance.[19]

Having first, by his own admission, enquired of individuals who had "various opportunities" to know Grace Smith, Dr. Louis O'Brien, in a supporting petition, reiterated

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[17] NAC, RG 1, E 3, Vol. 10, Deposition of Matthew Stone, 225.

[18] NAC, RG 1, E 1, Vols. L & M, Jones to the Executive Council, 7 November 1839, 261.

[19] NAC, RG 5, B 3, Petitions and Addresses, John and Melinda Smith to George Arthur, Vol. 10, n.d., 01344-45.

that the girl was "of a very weak, soft and easily persuaded character. That those who profess to know anything concerning her agree that this woman Mrs. Morris with whom she lived could make her do anything."[20] O'Brien concluded that it was "universally" held that Smith was "the weak and easily persuaded dupe of some individual." Some one hundred and thirty-nine Toronto residents including George Gurnett shared these same sentiments. The petitioners, from information that had come to their attention, believed "that the perpetration of the heinous crime…was not an emanation from her (Smith's) own mind but that she (had) been the dupe and instrument of some more designing and wicked incendiaries who yet remain undetected."[21] Smith also found support from the "Ladies of Toronto."[22] Many of these women were more likely than not customers of Lucinda Morris and thus had a passing acquaintance with her apprentice. They, like the other petitioners, pointed, with an air of familiarity, to Smith's "extreme youth" and good character "until the fatal moment."[23]

As it would turn out, the very considerations that the various petitioners believed ought to count towards mitigation—youth and susceptibility of mind—the government would count against youthful offenders like Smith. Ironically, it was their very innocence and susceptibility that made children among the most dangerous criminals. Reporting on

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[20] NAC, RG 5, B 3, Louis O'Brien, M.D., J.P., H.D. to George Arthur, Vol. 10, n.d., 01341-43.

[21] NAC, RG 5, A 1, Inhabitants of Toronto to George Authur, Vol. 232, 12 November 1839, 127244-52.

[22] This petition, which contained sixty-three signatures, crossed political lines. It included Lady Campbell, Mrs. Grant Powell, Mrs. J. S. Baldwin, Mrs. John Powell, Mrs. de St. Remy, and Mrs. J. G. Ridout, in other words, a sampling of both reformers and conservatives.

[23] NAC, RG 5, B 3, Toronto Ladies to George Arthur, Vol. 10, n.d., 01346-49.

the case of ten-year-old Peter Deucalan[24], Chief Justice William Dummer Powell warned that it was his very "premature talent of mind and body" that made this juvenile horse thief "capable of being a dangerous instrument in the hands of others." Like sheep to the slaughter, juvenile criminals often willingly confessed to their crimes before the examining magistrates. Most likely on the objection of Deuclan's counsel, Powell respited the execution in order that he might consult with his brother judges on the legality of reading a child's confession against him on the trial[25]. A year earlier, twelve-year-old Jacob Pier had been sentenced to death for arson at the Home District assizes on his own voluntary confession. Perhaps anticipating the objection that would be raised in the Deucalan decision, Powell, as presiding assize judge, added that Pier's guilt was "sustained by circumstances which required not that confession." Powell, in consideration of Pier's youth, had recommended him to mercy immediately after the sentence was recorded. However, in his report on the case, Powell qualified that he could not now recommend mercy:

> to be exercised in its full extent nor can I know, however sensible I may be that the incendiary design did not originate with the convict, but that he was selected, as he himself declared, as the instrument especially on account of his youth which it was presumed would exempt him from capital punishment.

An unconditional pardon would set a dangerous precedent. It would encourage, Powell believed, the idea "that agents of a still more tender age might and would be employed to

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[24] Deucalan was convicted for horse theft at the Johnstown assizes in 1820. His sentence was mitigated to banishment from the province for life.

[25] Powell would have known that children under the age of fourteen could only be convicted on their own confession if they were "conscious of the nature and malignity of the crime." [W. C. Keele. The Provincial Justice or Magistrate's Manual, 3rd. ed. Toronto: 1851, 114.]

gratify malignant resentments by similar attempts if youth only was understood to be a Protection." Solitary confinement would be an acceptable compromise. It would have a salutary influence on the young Pier but, more importantly, "come to restrain the dangerous belief that such an instrument (youth) may be employed with impunity."

Grace Smith was also a victim of contingency. Justice Jones, in his report to the Executive Council, had recommended that Smith's sentence be reduced to seven years in the penitentiary. After giving Jones's report "careful consideration", the council, taking into account the deliberate manner in which the crime was committed, the attempt to commit it again and, perhaps most importantly, "the prevalence of the offence in the Province was well as other parts of the Continent", were of the opinion that the safety of the community determined that sparing Smith's life set limits on leniency. "It would not be admirable to commute the sentence in this case", they concluded, "to less than imprisonment in the Provincial Penitentiary for the term of her natural life."[26] At the bottom of the report, George Arthur had scribbled: "At this present crisis[27] it is of great importance to strike terror into criminals of this kind. Such a crime must, if possible, be suppressed—therefore I concur with council." The morning after the March Street fires, secretary S. B. Harrison had written to mayor John Powell expressing George Arthur's concerns that the fire had been set by those politically opposed to the government[28]. Jones

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[26] NAC, RG 1, E 3, Report of the Executive Council in the case of Grace Smith, Vol. 86, 7 November 1839, 23-27.

[27] Arthur is referring to the period following the Mackenzie Rebellion: the fear of imminent attack from across the border and the burning of a number of homes in both the Niagara and Western districts of those loyal to the government. See chapter four for a fuller account.

[28] For an account of the incendiary crisis in the province, see chapter 4.

had also noted the number of "wilful burnings" that had occurred within the last few months. Powell wrote back that he was certain that the fire had been set "for private motives"[29] It is clear that Arthur meant Smith's mitigated sentence to be a warning to the politically disaffected who were setting fires on both the Niagara and Western borders.

On 29 May 1840, the Smiths—"coloured persons residing in Toronto"[30]—petitioned for a full pardon. Again they wrote that their daughter had been "enticed and instructed" by Lucinda Morris, a woman in whose "care and protection" they had placed their daughter from a "misplaced confidence." How, they queried, could a girl of "less than sixteen" have any self-motive for committing such a heinous act. Pulling out all the stops, they noted that they had lived in the province for twenty-one years and pointed to the fact that three of their sons had taken up arms in support of the government in the late rebellion, testament to the families' abiding loyalty.[31] Misguided as she was, they hoped that the government would free their daughter so that she could accompany them on their move to Lake Simcoe to cultivate tobacco and there become a useful member of society. The petition was forwarded to Justice Jones for his comment. In the period between Smith's imprisonment and her parent's second petition, Jones had been examining the legal fine points of the case. He had referred specific concerns to his fellow judges and now reported to the lieutenant-governor that "a question has arisen upon the form of an indictment for arson in a case like that of Grace Smith's and it is the unanimous opinion

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[29] NAC, RG 5, A 1, Powell to Harrison, Vol. 227, 23 August 1839, 124283-85.

[30] NAC, RG 1, E 3, John and Melinda Smith to George Arthur, 29 May 1840, 16.

[31] In their earlier petition they noted that two sons had voluntarily taken up arms. It should also be noted that in the present petition, Grace's age had been reduced by one year to fifteen at the time of the fires.

of the judges that the judgment of death upon record in this case is erroneous. The indictment is not drawn so as to make the conviction capital under our Provincial Statute but merely to subject the convict to other punishments short of death."[32] Jones did not specify what was wrong with the indictment and so we must speculate. First, the absence of an apparent motive for setting a fire—a point that many of the petitions in favour of Grace Smith made reference to—was not considered a defence under common law. Jones himself had noted: "I am at a loss to conceive any possible motive."[33] This only entailed that the conviction would require clear proof. Second, arson was an act not against property, as commonly believed, but against the habitation—the possession—of another. The offence was against the security of the habitation rather than against the building as property. Thus, setting fire to an outbuilding, rather than the principal residence, where flames might spread to the house, was considered arson as it endangered the habitation—the process of living in the house. It followed that an indictment for arson had to lay ownership in the person having possession e.g. a tenant—the person thus endangered—rather than in the one having legal title. Because Francis Collins both owned and resided at 24 Newgate St., it appears that the Smith indictment could not have been found wanting on this point. Third, according to common law, to constitute an act of arson there had to be a burning of only the smallest part of a building even if the fire were to go out by itself. Scorched or smoked didn't count.

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[32] NAC, RG 1, E 3, Justice Jones to R. A. Tucker, Vol. 86, 13 July 1840, 14-15.

[33] NAC, RG 1, E 3, Jones to the Executive Council, Vols. L & M, 4 November 1839, 261.

On 12 January 1830, Bernard Reilly and two accomplices, in a case borne out of religious animosity "between different persuasions of Irish people"[34], placed a keg of gunpowder through the window of a house belonging to James Lyttle of the Hogs Back near Ottawa. The man igniting the barrel was killed in the explosion. Reilly and the remaining accomplice were convicted of arson. Responding to legal objections in the case, Justice Macaulay and his fellow judges considered whether the blackened timbers were the result of the blast alone or fire caused by the blast, noting that if the former, the act did not constitute arson. Reilly was subsequently granted a free pardon for time already spent in the penitentiary.

Jones's objection most likely centred on this point. The assize minute books reveal that there were two charges against Smith for arson, not one. The Home District grand jury, as noted above, found a true bill against her on the 24th of October. On the 31st of October, three days after she pleaded guilty before Justice Jones, another Home District grand jury found a true bill against her for a second act of arson. If the first charge of arson involved Smith's activities on the morning of September 1st, activities that led directly to her arrest, and the second charge was for the March Street fires, then clearly the indictment, under provincial statute would have subjected Smith to a punishment short of death. Keeping in mind that Smith was apprehended before she could set the fire, if the indictment, following the language of the depositions, was for attempting to set a fire then it was not drawn so as to make the conviction capital. On 16 July, 1840, the Executive Council relented that "under the circumstance of the reported legal objections

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[34] NAC, RG 5, A 1, Macaulay to Colborne, 2 February 1831, 59594-97.

to the conviction of the prisoner appearing in Jones's letter of 13 July, (we) see no other legal or proper course than the granting of a free pardon."[35] On the 23rd of July, John and Melinda Smith were informed of the council's decision and that directions had been transmitted to Kingston for their daughter's liberation forthwith.[36]

Arson was considered a crime of such serious nature that it remained one of but a few capital crimes after the penal reforms of 1833. Upper Canadian farms and towns were cut out of the wilderness, enclaves within acres of forest. Given that timber was plentiful and inexpensive (either to purchase or harvest), buildings were, for the most part, entirely constructed of wood.[37] Consequently, vulnerability to fire was never far from public consciousness. One of the first items of business for the council of the newly incorporated city of Toronto (1834) was to appoint a Committee on Fire and Water. Their first report regretted that:

> In the present State of the city in regard to its Wealth and Means of Improvement, the Cause which the greatest Danger of Fire arises cannot be altogether obviated. Buildings of Wood must necessarily be allowed to be erected in the City for many Years until by Improvement of the mechanic Arts, Buildings of a more substantial Character may be constructed at less Expense than they can now be, or until by the Increase of Wealth and the improved Facilities of its Communication, Stone for Buildings shall be brought in such Abundance as to away with the Inducements which now lead to the Erection of Wooden Houses.[38]

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[35] NAC, RG 1, E 3, Vol. 86, 17.

[36] NAC, RG 5, C 2, Letter Books of the Provincial Secretary, C.W., Vol. I, 23 July 1840, 474.

[37] According to the General Assessments in the Several Districts for 1829, 286 single-story homes in the Home District were squared timber and 708 were wood-framed. There were 70 two-story, squared-timber houses (the exact number of combined frame and brick or stone two-story buildings is unknown for the given figure is an aggregate). In dramatic contrast to these figures, there were only 10 brick or stone single-story homes. [Canadian Almanac and Provincial Calendar for 1831, York: 1831.]

[38] TA, City Council Minutes, First Report of the Standing Committee on Fire, Water &c., Wednesday, 23 April 1834. The irony is that a fire in March of the same year that had reduced five framed houses to ashes in under two hours, and cost of the life of a young boy left home alone, had moved the editor of a Sandwich newspaper to write that such incidents were a clear demonstration of the need for the

It was suggested that if wooden houses were to continue to be built in "contiguous ranges" the addition of sufficiently thick party walls would at least prevent the fire in one home from spreading to those adjoining it. The crowding of storehouses and stables proved so potentially hazardous that the buildings in the Market block, which fronted them, were denied fire insurance. It was the opinion of the committee, that this problem might be rectified by restrictions on the size and relative positioning of outbuildings.

That the conditions for fires were propitious appears to be borne out by eyewitness accounts. Anna Jameson noted that in Toronto there was "generally an alarum once or twice a week."[39] However, many of these fires were of a minor or inconsequential nature; brush fires caused by lightning or the careless burning of fields or rubbish, the igniting of woodpiles, the spontaneous combustion of haystacks or the burning of drive and storage sheds. The Chief Engineer's report on fires, which occurred in Toronto between March 15, 1838 and March 15, 1840, listed the burning of only nineteen houses and public buildings. Of these, sixteen were caused either by human negligence or by accident. Of the remaining three, a person or persons unknown set one. The second, the March St.

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incorporation of York on the grounds that a corporate body would prohibit the erection of any houses save those of brick or stone. [The Canadian Emigrant, 8 March 1834.] The report would seem to contradict Anna Brownwell Jameson's assessment of a Toronto fire of February 20, 1837: "Talking this morning of the incidents of last night, several people have attempted to comfort themselves and me too with the assurance, that whatever might be the private loss or suffering, a fire was always a public benefit in Toronto—a good brick house was sure to arise in the place of a wooden one." [Anna Jameson. Winter Studies and Summer Rambles in Canada. Toronto: 1965, 54.] Just three years before, W. L. Mackenzie had counted among the great evils in York, "the increase of wooden houses." [Colonial Advocate, 27 February 1834.]

[39] Anna Jameson. Winter Studies and Summer Rambles in Canada, 53 [journal entry for 21 February, 1837]

fires, were set by Grace Smith, and the third (the fire to Francis Collin's chimney, the fire that Grace Smith did not confess to), we must assume, was set by Julia Lawlor.

While legislation could address the problem of negligence, John Beverley Robinson instructed a Niagara District grand jury that no amount of community vigilance could secure their dwellings against the "midnight incendiary."[40] In general, crimes were either the result of sudden impulse or motivated by material need "though occasioned by profligate improvidence." Although this didn't make them any less forgivable, it did make them understandable. Arson, however, was both a calculated and capricious act. Once set, the course and outcome of the fire was virtually beyond anyone's control. Never lacking opportunity, the arsonist was, Robinson conjectured, a coward "callous to the voice of conscience" that his or her recklessness might ruin "to an unforeseen extent" the lives and properties of the innocent and unsuspecting. Some crimes required a degree of dexterity while others posed an immediate danger to the perpetrator. While both factors tended to lessen the occurrence of such crimes, the arsonist, acting deliberately rather than from passion of the moment, sought:

> the destruction of others, for no purpose of advantage to himself; and while he can neither set limits to the ruin he is about to create, nor can foresee its consequences, he encounters no danger.

Court records support Robinson's claim that arson was principally motivated by revenge. At the Home District assizes for 1833, Robert Brown was sentenced to death for burning the barn of his neighbour Thomas Lowdon[41]. Lowdon rented a farm, which had been

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[40] Niagara Reporter, 30 April 1841.

[41] Brown's sentence was later reduced to banishment for life.

purchased from Brown by John Rowe three years earlier. Lowdon testified that Brown believed the farm was illegally held by Rowe and had sought legal counsel to get it back. Several witnesses testified that Brown had a number of times threatened to burn Lowdon's barn, a threat supposedly calculated to force Lowdon off the property. Brown made these threats only when intoxicated, and no witness gave them any credibility. Witnesses for the prisoner argued that although Brown had his lucid moments, his mental instability, drunk or sober, extended back several years, including the time at which he had held his farm, thus lending credibility to his claim that he had been taken advantage of. Although Brown claimed that he was innocent, witnesses placed him near the scene at the time of the fire, drunk and once again complaining that he has been cheated out of his property. Witness David Colon testified that on the afternoon of the fire, Brown had commented that now that Lowdon's crops were in, he would burn them. In his charge to the jury, Chief Justice Robinson noted that the arresting constable gave the most telling piece of evidence. John Hide testified that a much-alarmed Brown, on hearing that he would face execution if found guilty, was immediately desirous of going to Lowdon and "settling the matter."[42]

If Jonas Jones had carefully read Grace Smith's deposition, he would have come to understand that the fires set by Grace Smith were meant as acts of revenge, and more likely than not racially motivated. In her deposition Smith recalled:

> About three or four weeks ago before any of the fires, Mrs. Morris sent me to try and rent two rooms from Mr. Collins in the house adjoining the one we lived in. He declined—afterwards Julia went to him and he refused her also.

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[42] The Patriot, 25 October 1933.

When she came back she said "I'll fix him for it."[43]

Still we might wonder what motivated Grace Smith's complicity. Before her release from prison, Smith was subject to a series of standardized questions, one of which queried the cause that led to the commission of her offence. Smith replied that it was "to love of money, but I did not do it knowingly."[44] Old enough to be tempted by money but too young to fully understand the felonious consequences of her actions, Smith epitomized the ambiguity of juvenile criminals. Although felons under the law, many juveniles, naïve and malleable, were innocent of criminal intent.

The Indictment of Impulsiveness: Child-management and Orderly Families

In a letter to his brother-in-law dated 30 May 1834, William Hutton, in reference to the youth of Peterborough, remarked that he "was quite shocked at the depravity of the young people generally—cursing, swearing, and drinking and passing their time in lewd conversation and gossip, not appearing to have the least wish to improve their minds."[45]

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[43] NAC, RG 1, E 3, Deposition of Grace Smith, 229. The house in question appears to be 26 Newgate. Unfortunately, the Toronto assessment roles list tenants and landlords but not owners. The 1839 assessment role lists Julia Lawlor as a landlord of one Newgate St. property and Smith & Hayward as landlords of another. The last mentioned property was, vis-à-vis Grace Smith's reference, probably owned by Collins. This would explain why Lawlor had Smith target it. It would also explain why the stable directly behind Smith and Hayward's was referred to as belonging to Collins. This is also consistent with newspaper reports of Smith's conviction. Taking into consideration that the firing of outbuildings was considered an action against the principal dwelling, the Toronto Commercial Herald reported on 4 November 1839: "The coloured woman, for setting fire to Mr. Collin's houses (my emphasis), was sentenced to death."

[44] NAC, RG 73, C1-9, Vol. 351. In A Treatise on the Law of Arson, Arthur Curtis actually cites the refusal of a property owner to rent to the accused arsonist as an example of incriminating evidence. [Curtis. A Treatise on the Law of Arson. Buffalo: N.Y.: 1936, 343.]

[45] Gerald Boyce, ed. Hutton of Hastings: The Life and Letters of William Hutton, 1801-61. Hastings County Council, Belleville: 1972, 14.

Eventually settling in the Belleville area, Hutton observed that the "tone of morals"[46] in his newly adopted town were "higher than that at Cobourg or Peterboro or Hamilton" only because Belleville had "not become a fashionable place for half-pay officers' sons and long may they stay away! Peterboro' and neighbourhood is crowded with them and is a sink of iniquity." What demographic records there are for Upper Canada suggest that the median age was sixteen. Hutton's judgement that this significantly large sector of the population was morally adrift was supported by those empowered to legally supervise the province. Chief Justice John Beverley Robinson candidly admitted to a York grand jury that in Upper Canada the old were unable to restrain the young.[47] It was no great leap of the imagination for Robinson to connect the dots between the dissolute state of youth and their "standing at the bar as criminals."[48]Joseph Kett's observation concerning American youth in the first half of the nineteenth century equally applies to the youth of Upper Canada: often uncompromising in word, authority in respect to juveniles was more often compromised in application[49].

Youth was commonly thought to be a turbulent period, a crucible in which the criminal personality was forged. Nothing makes it clearer that this was a part of conventional wisdom than the public confession of condemned criminals. Although execution narratives published as broadsides or pamphlets (or, less frequently, in

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[46] Boyce, Hutton of Hastings, 38.

[47] See pages 25-26.

[48] Kingston Gazette and Religious Advocate, 23 April 1830.

[49] Joseph Kett. Rites of Passage: Adolescence in America, 1790 to the Present. New York: 1977, 60.

newspapers) flourished in England, they were much less in evidence in Upper Canada. Here, only a handful were printed[50], in one case by a local newspaper publisher as a means of soliciting money in support of the family survivors of the Kingston murderer George Bevier.[51] The ideological function of these documents was to legitimize the judicial proceedings and to justify capital punishment through the elicitation of a full confession.[52] Concomitantly, a full confession was believed to assuage the conscience of any trial witness or juryman who might have had lingering doubts concerning the guilt of the condemned. The possibility of executing an innocent man was never far from the public mind. It could, therefore, be especially disconcerting when a condemned criminal refused to acknowledge his or her guilt. Michael Vincent, capitally convicted in 1828 for the murder of his wife, adamantly maintained that he was innocent. He addressed the two thousand assembled onlookers, "I die innocent of the crime alleged against me—I declare before Almighty God, I am not guilt of the crime for which I am to suffer"[53]. When The

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[50] Only four appear to have been published as broadside/pamphlets between 1800 and 1840: George Bevier (Kingston, 1815), Charles French (York, 1828), William Kain (Kingston, 1830), and Cornelius Burley (London, 1830). More typically, local newspapers appended confessions {in whole or in part} to their coverage of executions. [See for instance the confessions of John Murdock and Michael O'Connor, Montreal Herald, 11 September 1821.] In England, the Ordinary of Newgate, always a clergyman of the established Church, wrote the Accounts. In Upper Canada, attending clergymen were often Methodist or, as in the case of George Bevier, Roman Catholic.

[51] W. J. Sheehan remarks that in England, condemned prisoners, realizing the morbid curiosity of the masses, "often attempted to make a final, dying profit from this appeal." W. J. Sheehan. 'Finding Solace in Eighteenth-Century Newgate.' in J. S. Cockburn, ed. Crime in England 1550-1800. New York: 1972, 238. There is no evidence that would support an equivalent claim for Upper Canada.

[52] For a more extended discussion of this point as it pertains to Upper Canada, see John Choules's The Periodic Necessity of Example: Deterrence and the Dramaturgy of Public Execution in Ontario, 1792-1869. Unpublished M.A. research paper, York University, 26-32. For a review of the role of execution narratives and the role of the prison-clergy in England, see Harry Potter. Hanging in Judgment: Religion and the Death Penalty in England. New York: 1993 and Peter Linebaugh. 'The Ordinary of Newgate and His Account' in J. S. Cockburn, ed. Crime in England 1550-1800. New York: 1972, 246-69.

[53] The Gore Gazette, 6 September 1829.

Rev. Sheed implored him not to die "with a falsehood on his lips", Vincent made no concessions. It was later reported that the jury who convicted Vincent felt "much uneasiness." So much better received then was the execution and more typical confession of John Murdock[54]. Attending clergyman William Smart wrote:

> As Murdock who was this morning executed for the murder of his brother wished me to take something down in writing, it was suggested to indulge him in this as his own confession in his last moments might remove any unpleasant impression on the minds of the witnesses and jury.[55]

More practically, publicly espoused confessions were meant to neutralize any potential for dangerous public sympathy for the condemned criminal.[56] The execution of Charles French in 1828 is a case in point. A quickly drawn petition in favour of mitigating his capital conviction bore the signatures of eleven hundred residents of "all ranks and conditions". French's public admission that his punishment was deserved was designed to counteract this groundswell of support and to neutralize any resentment toward, or questioning of, the capital code. Likewise, John Murdock began his confession with an admission that he was "perfectly satisfied that justice had taken place in every respect and that (he was) deserving of the death (he was) about to suffer."[57]

As each scaffold address was so completely formulaic, it is unlikely that they were a result of spontaneous authorship by those destined for the end of a rope. As historian Harry

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[54] Murdock was convicted in 1821 at the Johnstown assizes for murdering his brother James Murdock.

[55] The Montreal Herald, 11 September 1821.

[56] As a further precaution, locally garrisoned soldiers were regularly used to deter any rescue attempts or public attacks on the execution party.

[57] The Montreal Herald, 11 September 1821.

Potter puts it, executions and execution speeches were "the same Saturday matinee performance, with the same cast but a new leading man."[58] If it was "owned" by anyone, "the speech" was part of the public record, each presiding clergyman being responsible for guaranteeing that his charge substantially adhered to the template. Confession being good for the soul, the reward for prisoner compliance was the promise of God's mercy. Supervised and carefully crafted by the spiritual advisers to the condemned convict during his final few days, execution narratives (the question of their biographical veracity aside) reiterated the by-now-familiar equation between moral dissolution and criminal behaviour. The above-mentioned Charles French, a twenty-year-old[59] assistant printer, sentenced at the 1828 Home District assizes for the murder of Edward Nowlan, spent his last days in the company of clergymen Thomas Phillips, William Ryerson and John Saltkill Carroll. Robert Fraser writes that French prepared a gallows speech that was read by Ryerson.[60] The Mackenzie-Lindsey papers contain the original document.[61] The notation on the covering page reads: "Speech of Wm. Ryerson on the death of Chas. French." While the preposition "of" would indicate that it was Ryerson who read the speech to the crowd, taken within the context of the page on which it was written, it could equally well indicate authorship.

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[58] Harry Potter. Hanging in Judgment, 22.

[59] Robert Fraser estimates his age to be twenty-one. Although he may well have been twenty-one at the time of his October execution, the gaol returns for York, 1828, clearly show him to be a juvenile, aged twenty, at the time of the murder.

[60] Robert Fraser, ed. Provincial Justice: Upper Canadian Legal Portraits. Toronto: 1992, 394.

[61] PAO. Mackenzie-Lindsey Papers, F 37, MU 1864, File 2622.

After first establishing the remorse of the now-penitent convict, the religious advisers would use the confession as a base from which to launch "a lesson on the roots of criminal behaviour and the wages of sin."[62] Admitting first that he had shed Nowlan's blood and therefore deserved the jury's verdict, French then attributed his behaviour to "BAD COMPANY AND DRINKING (sic)"[63]. Through his association with "wicked and unprincipled men", it was but a short step to intemperance and then to the "commission of the crime." It was at this point in the narrative that the condemned prisoner personally addressed both those attending the execution and those who would read the dying confession at a later date. They were, each one, warned to avoid the vices that had proved his ruination. They, especially young people, were linked to the condemned man by the universality of the human condition. As the speech built to its epilogue, listeners were urged to appreciate the commonality of their sins and those enumerated by the wretch who would shortly be 'launched into eternity.' In so doing, members of the audience were meant to "see the roots of his [the prisoner's] criminal behaviour reflected in their own intemperance, Sabbath breaking and immorality."[64] It was only left for the act of execution to cement this kindred identity.

Twenty-one-year-old William Kain[65] was convicted at the Midland assizes for the murder of John Rodolph Couche. Reverend Handcock, rather than Kain, read the prisoner's confession from the execution platform perhaps as a guarantee that there would be no

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[62] John Choules. The Periodic Necessity of Example, 31.

[63] Anon. Confessions of Charles French. York: 1828, 7.

[64] John Choules. The Periodic Necessity of Example, 26.

[65] Kain was executed 6 September 1830.

embarrassing improvisations or retractions by the condemned youth.[66] Those assembled before the scaffold were implored to examine their souls and determine whether the state of any one of them was any better than his. Who among them had not transgressed the laws of God? By implication, each spectator was located somewhere along the continuum of a downward spiral to moral oblivion. Kain testified that he had gone "by degrees, from one sin to another," carrying him incrementally "headlong to destruction."[67] Advising his audience to avoid bad company and intemperance, and to keep good hours, he emphasized the importance of attending Church "for it was Sabbath breaking that led me to bad company, intemperance, and other crimes."[68]

The similarity between the confessions of French and Kain was not coincidental. Scaffold speeches operated on the principle of rote learning. By periodic repetition of script and the commonality of example, the message that crime was cultivated from vice and sin, was unrelentingly imprinted on the spectator/reader. Although the majority of executions in Upper Canada received only the briefest of mention in print, a synopsis of the prisoners' dying words was often included. Aaron Seeley, executed 1836 in the Niagara District for the murder of James Shields, "attributed his ignominious situation to bad company, cards and indulgence in the use of ardent spirits."[69] Scaffold speeches were imbued with the

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[66] Or it might have simply been a precaution against a lessening of the didactic effect as a result of an immobilizing fear. Lest one suggest that Handcock had read Kain's speech because the latter was illiterate, Kain had been educated in a regimental school to the age of fourteen (see below).

[67] Anon. The Life of William Kain. Kingston: 1830, 16.

[68] Life of William Kain, 16.

[69] St. Catharines Journal, 6 October 1836.

notion that one needn't look beyond the individual to find the origins of criminal behaviour. All blame was accepted by each of the felons. Responsibility was seldom shifted to a disadvantaged or abusive upbringing or to adverse social conditions. The criminal nearly always pointed to wilful wickedness, seldom to environmental factors or tangible, external agencies like the family. With one exception, noted below, society was never put under the microscope. The scaffold was considered an inappropriate place to debate the subjective versus objective causes of crime

Charles French confessed that had he listened to the advice of his "dear mother" he would not have set upon a course of bad company and drink. In denying his parents' complicity in his crime, French, like Kain and other executed criminals, was acting against the grain. Colonial books, journals and newspapers probing the possibilities of an environmental cause of crime often implicated the family. Within the colonial legal hierarchy, the King might have been, as Justice Sherwood informed a grand jury, the first executive magistrate, and the principal conservator of the peace.[70] In their turn, local magistrates may have derived their authority from the King, acting as his assistants "in supporting peace and good government," an authority that trickled down to all classes of citizenry whose duty it was to aid their local authorities— magistrates, sheriffs and constables—in the execution of their country's laws. In reality, however, the bedrock of this system, and the first line of defence against crime and disorder, was the equally hierarchical and patriarchal family. Joseph Kett has remarked that the colonial family was not presented in its true light as a collection of disparate individuals bound collectively by

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[70] Gore Gazette, 20 September 1828.

duty and property but rather "as an all-encompassing environment which, rightly conducted, would virtually guarantee the proper moral and religious development of the young."[71] Sons and daughters were subordinate members of the family hierarchy. It was this tradition that led boys and girls to offer their parents (as the citizenry of Upper Canada would send the lieutenant-governor in their petitions) their "duty" rather than their love.

In their small way, specialized books and journals were meant to contribute to the moral education of Upper Canadian youth or at least that middle-class portion that could both read and afford subscriptions. The editor of Youth's Monitor and Monthly Magazine regretted that the intellectual and moral improvement of juveniles in Upper Canada had been neglected by the mainstream journals. The minds of these children had for too long been allowed to remain dormant. The editor would use the magazine to "pour light into the understanding" and to point "out the many vices to which young persons are exposed—their pernicious tendency, and the consequences which must unavoidably result in persisting in them."[72] In one issue, children were advised to avoid all vicious and unlawful pleasures because the mastery of his or her passions would afford a constant pleasure greater than any such ephemeral enjoyments. In the face of present temptations, self-indulgence and impulsiveness would end in certain future suffering.

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[71] Joseph Kett. Rites of Passage, 75. It was assumed that children living at home under the control of their parents were of good character. No immoral renegade he, twenty-year-old John McDonell of Cornwall, convicted of manslaughter in 1824, stressed as a mitigating factor in his case that: "he has consistently resided with his Father in the County of Glengarry under whose direction he has always considered himself." [NAC, RG 5, A 1, McDonell to Maitland, Vol. 69, 36709-12, 10 December 1825.]

[72] Youth's Monitor and Monthly Magazine. Toronto: W. J. Coates, 1.1 (January: 1836), 2. Lacking the public support necessary for its survival, only six issues of the Youth's Monitor were published.

One of the earliest books published in Upper Canada was a miniature (child-size) volume of epigrams written for children. The author claimed that life was a pilgrimage and that any deviation from the path of virtue would cause the wanderer to lose his or her bearings.[73] Anger and revenge were flagged as particularly destructive detours. It was the role of the parents to set a personal example and to act as their child's moral compass. The author instructed the child to "hear the words of his (the father's) mouth for they are spoken for thy good, give ear to his admonition for it proceedeth from love."[74]

The Juvenile Entertainer was a mawkish Canadian journal that served up its young readers a concoction for juvenile success, the ingredients—frugality, industriousness, punctuality, piety, kindness, regularity (non-procrastination)—discussed straightforwardly or through a critique of their opposites. This recipe was dressed up in various anecdotes, fables and stories of notable personalities both real and fictional. The child-reader's imagination was made to identify with exemplary heroes whose self-control was matched against the impulsively driven behaviour of those who threw temptations in their way. Industriousness wrestled idleness, perseverance did combat with impetuousness. Formulaically didactic, the stories were typical of a growing children's literature after 1830

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[73] In a column, "Sentimental Advice to Her Daughter," 'Lady Pennington', taking a more liberal turn, wrote that diversions properly regulated were not only allowable but also absolutely necessary to youth. They were only criminal when taken to excess. In this state, the "mind" was said to become restless and impatient from the conclusion of one distraction until the beginning of the next. [Upper Canada Gazette, 21 August 1802.]

[74] Anonymous. Wisdom in Miniature or The Young Gentleman and Lady's Magazine Being a Collection of Sentences Divine and Moral. Brockville: 1824, 6. At the same time, the child was expected to be able to distinguish between moral and immoral injunctions. The Kingston Gazette and Religious Advocate (22 May 1828.) warned children that they were not, in good conscience, to obey their parents if instructed to lie, swear, or steal. Such advice, however, was question-begging. What the newspaper neglected to explain was how the child was to recognize a sinful instruction if those very same parents were the formative influence in shaping the child's moral judgments.

that was shot through with what Daniel Rodgers identifies as "pervasive reasonableness, and insistent moral choices."[75] Perhaps fearing that their mission might not meet with complete success if left to the caprice of the child alone, the journal also targeted parents. "No parental influence," one issue warned, "is necessary to turn (the child's) feet unto evil. You need only sleep over his character and condition for a few of his first years of his life and his bent to vice and ruin has become strong."[76] Parents who were negligent in the moral instruction of their children would witness, among the first effects, frequent outbreaks of angry strife with younger brothers and sisters. If followed by bouts of loud insolence, "in all human probability (he would) plunge deeper and deeper in shame and obduracy and crime until an early grave will cover a loathsome wretch from view." Taking up the plot of A Pilgrim's Progress writ large, a subsequent issue pointed out that man enters life completely ignorant of the "region through which his path will conduct him."[77] In order to pass safely among the various dangers and obstacles that he must necessarily encounter, the child was dependent "upon the information of those who have trod the ground before him." In the era before public education, the role of instructor in things both moral and practical fell principally upon the parent.[78]

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[75] Daniel T. Rodgers. "Socializing Middle-Class Children: Institutions, Fables, and Work Values in Nineteenth-Century America." Journal of Social History 13.2 (Spring, 1980), 357.

[76] Juvenile Entertainer, Vol. 1, No. 39, 25 April 1832, 156.

[77] Juvenile Entertainer, Vol. 1, No. 40, 2 May 1832.

[78] It would then be expected that the children of criminals would themselves likely follow in their parents footsteps. Under the heading "Train up a child in the way he should go, and when he is old he will not depart from it", the Niagara Reporter informed its readers that Ralph Springstead, the son of David Springstead who was banished from the province in 1826 for sheep stealing, was now in gaol on a charge of breaking into a coach house and stealing a four-wheeled carriage, a span of grey horses and a set of silver plated harnesses. [Reprinted in the St. Catharines Journal, 7 September 1837.]

It would appear then, as a corollary, that children without parental guidance (either natural or surrogate) might be set, through no fault of their own, upon a criminal path. Fifty-four inhabitants of the village of Mount Pleasant were certainly of this mind. In 1828, twenty-year-old Jesse Browne was sentenced to six months in gaol and a £10 fine for aggravated assault. Although acknowledging the seriousness of the offence, Browne's neighbours, in a supporting petition for mitigation of sentence, suggested that he was a feral child and, as such, not wholly responsible for his action:

> The youth is young in years and so very unfortunate as not to have received the fostering care of a parent since his tenth year, which we fearfully consider has been the primitive cause of his being inconsiderately led to the breach of the laws the penalty of which he now suffers.[79]

Judges, too, might view an untutored and aberrant childhood as an extenuating circumstance. In the case of Jesse Brown, Justice Hagerman wrote that there was no single factor that might lead him to recommend an extension of the royal mercy "unless the following circumstances should induce his Excellency to regard him as a worthy subject."[80] Here Hagerman included Brown's "youth, about twenty years of age" and the "probability" of having been induced to join in a criminal and indecent act "more from the persuasion of others than from a malicious disposition of his own" adding that he appeared repentant and that his neighbours believed that he was "reformable". Twenty-year-old William Newberry was convicted for highway robbery in 1800 and sentenced to be hanged. In his report on the case, Justice William Dummer Powell noted that Newberry was a young man of previous

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[79] NAC, RG 5, B 3, Upper Canada Petitions and Addresses, 1792-1841, Sundry Inhabitants of the Village of Mount Pleasant (Gore District) to Sir Peregrine Maitland, Vol. 6, 333-35, 1828.

[80] NAC, RG 5, A 1, Hagerman to Hillier, Vol. 90, 50217-20, 21 October 1828.

bad character who had been enlisted into the army straight out of gaol. "On the other hand," Powell commiserated, "his depravity and want of proper education is attributed to the early loss of his father who was a loyalist executed by Rebels for bearing arms in the Royal Cause."[81] Newberry's sentence was reduced to banishment for life.

Paradoxically, it was argued by some that the loss of a parent to crime might unsettle the moral development of otherwise good children. Mary Gallager was fearful of the effects that her husband's sentence of banishment might have on their family. Gallager described her husband as "a tender parent by whose superior judgment in domestic economy and good examples in husbandry (being matured having passed the 60th year of his age) they enjoyed the fond hope of gaining a decent, honest and comfortable living and of inculcating in the minds of their numerous offspring, habits of honesty, industry and attachment and obedience to His Majesty and His laws."[82] Ironically, Gallager was found guilty of assisting his sixteen-year-old son to escape from prison.

Small indiscretions led, by fatal degrees, to capital crimes. The Children's Missionary and Sabbath School Record acquainted its juvenile readers with the case of a man executed at Carlisle for burglary. When he was asked how he had been led from the path of honesty to commit such a serious crime, he answered that his criminal career had begun when, as a child, he took a halfpenny from his mother's pocket while she was asleep. Here, to paraphrase Wordsworth, the child was said to be the father of the criminal. Children were warned to be wary of the first and least temptation. Instead of relying

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[81] NAC, RG 1, A 5, Powell to Hunter, Vol. 1A, 443-46, 8 August 1800.

[82] NAC, RG 5, A 1, Gallager to Lieutenant-Governor Maitland, Vol. 68, 36311-14, 28 October 1824.

exclusively on parental guidance, the child was advised by the editor to "seek grace from Christ, not only to pardon your sins, but to keep you in the path of uprightness and holiness."[83]

The theories of facultative psychology and empirical philosophy popular in the early nineteenth century held that the development of memory in infancy preceded that of reason. Without the faculty of reason to sort, edit and censure them, impressions made upon the mind during childhood were both so indelible and durable as to be eradicated later only with the greatest of difficulty. Children learned by example; they became what they beheld. Initial imprinting on the susceptible minds of the young was consequently of the utmost importance. As the child's first moral guardians, it devolved upon parents to shape the psyche of their children not only for the sake of both child and parent but also for the community at large. A writer for the Upper Canada Gazette stated that "I am bold to assert that it is chiefly owing to the neglect, and misconduct of parents, and those whose duty it is to form and fashion the tender minds of youth, that prisons are so crowded with criminals, and courts of justice have the culprit so often arraigned before them."[84] So crucial was the didactic role of the parent thought to be, that when the writer witnessed an individual punished for a crime committed against the community, he was considered less guilty than those "who had the superintending of his education."[85] For had the parents not nurtured the

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[83] The Children's Missionary and Sabbath School Record. Montreal: J. C. Beckett, 1:1 (January, 1844), 12.

[84] Upper Canada Gazette, 13 July 1799.

[85] This very fact was sometimes used as the basis for recommending a lesser sentence for juveniles. In 1833, John Sparks of Pickering Mills was convicted, along with members of his family, for poaching salmon. The committing magistrates described Sparks as among the most daring, insolent and depraved of

seeds of vice, had they followed their parental vocation and suppressed their fatal growth, the child would have come to a more seemly end.

In an early version of the nature/nurture debate, the Hallowell Free Press wrote, "that many of those incurable crookednesses (sic) of disposition" which we tend to attribute to nature would be found, if it were possible to trace them back, "to have originated in the early circumstances of life."[86] Reminiscent of the "bag of virtues" theory made popular by developmental psychologists Hartshorne and May in the early twentieth century, the author drew an analogy between a perverse child and a stunted tree. The deformity followed not from any aberration in the seed from which it sprung but from the very nature of the "soil and situation" in which it grew. As one religious newspaper put it, children raised in emotionally charged families did not owe their "irritability of mind so much to the blood" as to the conduct and example set by their parents.[87] By pointed lesson and example, the writer concluded, the duty of every parent was to mould the character of the child through domestic education. Where parents had abandoned the reins of responsibility, they were cautioned "to take that forward child in hand at once, or you will soon have to be his suppliant rather than his guide."[88] When fathers spent their leisure hours outside the home at the expense of their families, it could only be expected that their

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the "lower and utterly demoralized classes of society." Three Home District magistrates explained to the lieutenant-governor why they had been so lenient in fining the four younger offenders arrested with Sparks. They assessed the lowest amount allowed by law, they wrote, because of "the youth of the...younger parties and the effect both as to precept and example, derived from the conduct of their parents..." [NAC, RG 5, A 1, Charles Fothergill to Rowan, Vol. 134, pp. 73854-61, 25 October 1833.]

[86] Hallowell Free Press, 12 April 1831.

[87] Kingston Gazette and Religious Advocate, 15 May 1828.

children would take, for lack of parental restraint, to the street, that "great school of juvenile vice" where "for one lesson at the fire side, he has a dozen in the kennel. Here are scattered the seeds of falsehood, gambling, theft and violence." Worth very little for labour, wrote one correspondent, the ages from five to ten should be devoted to elementary instruction embracing both morality and religion.[89] Anything less would negatively affect both the "temporal and spiritual happiness" of the child, and, perhaps more tellingly, the prosperity of the community.

The belief that environment determined character resulted in various proposals as to how juveniles should or should not be educated. The infiltration of seditious ideology from the United States resulted in at least one suggestion for the prophylactic education of Upper Canadian progeny. Benjamin Hut and Robert Stephens, fearing that exposure "to intermixture with the various characters of which a new settlement in the vicinity of a republican government" would alienate the province's children from "genuine British feelings,"[90] proposed that the lieutenant-governor provide for a training ship that would educate children in the values of the Constitution while at the same time enabling them to defend it against its aggressors.

A more pressing issue was the matter of classifying prisoners and the incidental education that children received in prison cells. By the early nineteenth century, the Calvinist belief in the innate depravity of children had been eclipsed. That children were

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[88] The Statesman, 11 November 1837. The article from which this quotation is taken made the rounds in Upper Canadian newspapers appearing in The Western Herald as late as 31 July 1838.

[89] Upper Canada Gazette, 30 September 1815.

[90] NAC, RG 5, A 1, Hut and Stephens to Hillier, Vol. 77, pp. 41722-6, 20 May 1826.

now believed to be amoral creatures at birth, yet pregnant, as Anne MacLeod[91] argues, with possibilities— some good, some evil—presented legal authorities with the problem of how to accommodate them. On February 28, 1829, a petition from a group of prisoners complaining of the deplorable conditions in the York gaol was read in the House of Assembly. A committee was struck to investigate the charges. One case, that of an apprentice incarcerated for refusing to work for his master, typified a common problem in Upper Canadian gaols. The York prison failed to classify its prisoners. The young apprentice had been thrown into the company of "criminals of the worst description—among them the person respited under sentence of death."[92] The committee regretted that "the company into which the verdict of the Magistrates has thrown him will not be likely to improve either his manners or his morals." A Toronto grand jury disapproved the practice of "promiscuously confining"[93] juveniles and other novices in crime, together with hardened felons and maniacs. Although virtue and religious precepts might still be fresh in the minds of the young criminal, and no matter how abhorrent or repugnant they might at first find hardened criminals, close exposure to the latter's habits and manners would "only tend to his (the youth's) destruction." Three months later, another grand jury, after investigating the Toronto gaol, reported that the superintendent (perhaps in response to the previous jury's recommendation) had done his best, under less-than-ideal conditions, to separate the young and juvenile offenders from older and more-experienced criminals.

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[91] Anne Scott MacLeod. American Childhood. Athens: 1994, 143-56.

[92] Report on the Petition of the Prisoners in the York Gaol, U. C., House of Assembly Journals, 1830, Appendix, 162.

[93] TA, Mayor's Office, Series E, Box 1, Grand Jury {George Ridout, foreman} to the Mayor, pp. 167-69, 11 March 1837.

Such classification of prisoners allowed that punishment might not only have the effect of protecting society from the depredations of criminals whose morals were already "tainted to deterioration"[94] but might also protect as well as enforce the morals of the younger prisoners and "have them come forth sensible of the evils of their former course inclined and desirous to amend." Frequent or prolonged immersion in a gaol without classification would eventually tend to the moral ruination of a juvenile prisoner. From time to time, interested groups—grand and petit juries, newspaper editors and like-minded critics of the penal system—would suggest the necessity for a second circuit of the King's Bench. Under the existing system, a prisoner later found innocent might have spent up to twelve months in a wretched gaol among criminal types while waiting for his or her trial. This was so much the worse for children. The case of two juveniles named Stambrough "excited considerable sympathy," noted the Kingston British Whig, "and furnishes another proof of the absolute necessity for a more frequent gaol delivery."[95] Indicted for horse theft, the Stambroughs had spent eleven months in the Western District gaol before they were discharged, the grand jury finding no bill against them.

When H. C. Thomson introduced a motion in the House of Assembly for funding to build the Kingston Penitentiary, William Lyon Mackenzie used the opportunity to voice his disapproval of the present mode of prison discipline. He reported to the Assembly that a young boy recently placed in the Toronto gaol for refusing to work for his employer had

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[94] TA, Mayor's Office, Series E, Box 1, Grand Jury {John Ewart, foreman} to the Mayor, pp. 188-90, 3 June 1837.

[95] Cornwall Observer, 25 August 1835 (reprinted from the British Whig). A second circuit was introduced in 1837.

found himself in the company of the worst villains. "His morals might be corrupted by his bad companions, and he might come out an accomplished villain."[96] Citing the success of "houses of refuge" in New York and Philadelphia in preventing youths from becoming "a scourge to society", and fully expecting that a provincial facility, based on reformative principles, would introduce proper classification, he threw his weight behind the penitentiary proposal, arguing that the province could find a small sum that would allow the building to begin. As late as 1857, the situation of gaoled juveniles remained unchanged. A report to the Commissioners of Public Works concerning improvements to the northeast wing of the common gaol at Montreal noted:

> The physical evil to which prisoners incarcerated in this way are compelled to submit, do nevertheless fall far short in their magnitude and consequences when compared with the moral pestilence in which this badly constructed prison, and ill-digested laws, places the tyro in crime who is so unfortunate as to be confined there—or, as is not infrequently happens, a perfectly innocent youth—who has fallen under unjust and even groundless suspicion.[97]

Petitions for the mitigation of gaol sentences for juveniles were sometimes known to use the pernicious effects of imprisonment as leverage. Eleven-year-old Mary Oliver was sentenced to six months in the Kingston Penitentiary for theft. Besides fearing the debilitating effects on her daughter's delicate constitution, Oliver's mother was more concerned that prolonged imprisonment would result in moral ruination. Alternatively, if her child was confined to her mother's care, "your petitioner will endeavour to instil such principle of virtue into her mind as would most tend to the prevention of similar conduct in

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[96] Colonial Advocate, 18 February 1830.

[97] Thomas McGinn. Final Report to the Honorable Commissioners of Public Works. Montreal: Salter & Ross, 1857, 7.

the future."[98] When eleven-year-old Thomas Berry was sentenced to two months in the York gaol for stealing a watch, his mother, Sarah Berry, feared that the good character that he had shown up until the time of the theft might be permanently reversed: "your petitioner is afraid that his confinement in gaol will be the means of totally ruining his morals from being placed in the same rooms"[99] with experienced criminals. Sheriff Alex McDonell informed the lieutenant-governor that he had made a private arrangement with the gaoler to segregate Berry effectively cutting him off from any communication with any of the older and experienced criminals in order to prevent his morals from being "further tainted." Similar arguments were made in the case of sixteen-year-old Maryanne Fraser. Shortly after being employed as a servant in the household of Col. O'Hara, Fraser left service complaining that she had been forced to do work different from that for which she was originally hired. O'Hara complained that the public should be protected from those operating under the assumption that they could violate contracts with impunity. He prosecuted Fraser for breach of contract, and she was sentenced to one week in the district gaol. The gaoler, fearing that she would be "contaminated"[100] by the older female inmates, first placed her in the kitchen, but somehow she ended up back in the cells. Only when a potential employer complained that if she spent the week among the hardened criminals she would be ruined and he would not hire her was she finally released before she had served out her one-week sentence. Thirteen-year-old William Kendrick, sentenced to four months

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[98] NAC, RG 5, A 1, Oliver to Bond Head, Vol. 165, pp. 89936-38, 8 April 1836.

[99] NAC, RG 5, A 1, Sarah Berry to Lieutenant-Governor John Colborne, Vol. 101, 57059-61, 12 July 1830.

[100] NAC, RG 5, A 1, O'Hara to Harrison, Vol. 232, 127009-27, 1 November 1839.

in the Toronto gaol for theft, played the same card. Kendrick deliberately conflated his youth and his being gaoled with a party of hardened sinners, trusting that His Excellency would "snatch him from compleat (sic) ruin that surely awaits him in a dungeon of thieves."[101] Commenting on the case, the committing justice, John Beverley Robinson, explained that, as an indulgence on account of his youth, and in the hope that Kendrick might be reformed, he sentenced him to gaol rather than subjecting him to a more ignominious punishment (a public whipping). Kendrick's second petition two months later suggested that, as an interim solution, the gaoler had placed him in solitary confinement. He was pardoned two weeks later. Those dealing with juveniles were caught on the horns of a dilemma: juveniles were either put into cells with immoral adults or placed in solitary confinement, a severe punishment usually reserved for the most recalcitrant prisoners.

Sixteen-year-old Charles Holmes was described by John Gamble, chairman of the Home District quarter sessions, as a thoroughly bad character. Gamble could find no extenuating circumstances for the prisoner's thievery. Even so, "the youth of the party and the impracticality of a proper classification of the prisoners in the present gaol of the District whereby juvenile offenders would be prevented from having any intercourse with more hardened criminals"[102] led Gamble to recommend the remittance of the rest of Holmes's sentence. The request was granted.

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[101] NAC, RG 5, A 1, Kendrick to Colborne, Vol. 106, pp. 60522-27, 18 April 1831.

[102] NAC, RG 5, A 1, Catharine Holmes to Lieutenant-Governor George Arthur, Vol. 228, 124852-53, 7 September 1939.

If one short exposure to incarceration could morally imperil a vulnerable child, repeated imprisonment, it was argued, could put them permanently beyond the reach of moral rescue. Toronto mayor Dr. Thomas D. Morrison wrote to the lieutenant-governor that in the case of young John Guerin, accused of stealing clothing from widow Anne Chapman, and later the same night, bedding and clothing from tailor John McMurchison, the jury was influenced in its verdict by the fact that Guerin had often committed similar crimes and that the imprisonment in the common gaol no longer appeared to have any salutary effect on him. It seemed that he had formed a "base conexion (sic)" with what they described as an old and incorrigible criminal, James Lenton, and a debauched woman, Mary Ingram, "who it clearly appeared were urging on the youthful offender against the laws."[103] Now believed to be beyond any easy moral reclamation, Guerin was sentenced to one year at hard labour in the provincial penitentiary.[104]

The problem of how to punish juveniles effectively was compounded by the belief that the effects of bad company outside the prison were often as pernicious as those on the inside. Nine-year-old Isaac LaPlante was sentenced at the Midland assizes to twelve month's imprisonment and two public whippings for grand larceny. When he was four months into his sentence, indisposed and subject to fits, his mother informed the lieutenant-

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[103] PAO, RG 7, B 2, Mayor's Letterbook, Box 1, Morrison to Joseph, pp. 22-25, 9 March 1836.

[104] In May of 1836, Alderman George Gurnett admitted to the lieutenant-governor that his, and the juries, impression of Guerin's former character was mistaken. It had been subsequently discovered that he was not an old offender. Gurnett, in order that "the boy's future welfare (be) promoted," respectfully suggested that he be extended the Royal Clemency. Guerin was subsequently given a free pardon. [NAC, RG 5, A 1, Gurnett to Joseph, Vol. 166, 90870-71, 25 February 1836.]

governor that he would not last out the remaining eight months of his term.[105] At LaPlante's trial, Justice Macaulay held out the hope that the boy might be pardoned if his uncle in Lower Canada would consent to take him on as an apprentice. In her petition for clemency, Mary LaPlante stated that she believed the uncle would accept the boy, provided that her son was spared from the public disgrace of corporal punishment. Asked to comment on the case, Macaulay argued that simply releasing the boy from prison without a plan in place would be to put him "among his old acquaintances and little improvement could be hoped for in his morals."[106] He believed that Mary LaPlante would honour her pledge to place the boy in care of his uncle but because LaPlante "has been a very wicked boy and has frequently been detected in little thefts", Macaulay had been unwilling to sign a petition in support of Mary LaPlante's until the boy had been once publicly whipped and had spent six or seven months in gaol, a time "sufficient to produce a salutary effect on his mind." However, when Macaulay visited the boy, he found him sick and emaciated. A month later, LaPlante was discharged upon his mother's security.

Sixteen-year-old Grace Smith, as we learned above, was described as "the dupe and instrument of some more designing and wicked incendiaries who yet remain undetected."[107] Smith's parents argued that their daughter had been enticed and instructed

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[105] The very young and the very old sometimes used the age/health equation in an attempt to lessen gaol sentences. A young man, imprisoned in the Niagara District, wrote to the magistrates, sitting at quarter sessions, for the mitigation of his sentence. He argued that because he was young (under twenty) and therefore lacked the requisite fortitude, the gaol was adversely affecting his health. [PAO, RG 22, Series 392, Box 17-A, File 19.]

[106] NAC, RG 5, A 1, Macaulay to Hillier, Vol. 80, 43240-1, 25 November 1826.

[107] NAC, RG 5, A 1, Inhabitants of Toronto and Vicinity to George Arthur, Vol. 232, 127244-52, 12 November 1839.

in the commission of the crime by the woman to whom she was apprenticed. Given that she was under sixteen when she was alleged to have set the fire, how, they argued, could she have "any motive originating from herself to commit such a heinous offence?"[108] The susceptibility of "tender" minds to malevolent influence was sometimes used both to explain and excuse the perpetration of a crime. Living within the didactic embrace of a family might enlighten young people as to their moral duty but the family was no substitute for life experience. There was no rite of passage, no period of grace, no stage of adolescence in which a young person could test his virtue against the moral ambivalence of the world that he was thrown into. Joseph Kett argues that young people in the early nineteenth century existed at one or the other of two extremes. Maturation was not the result of a gradual removal of restraints "but a jarring mixture of complete freedom and jarring subordination"[109] as young people moved away from, and back to, their families. The onset of independence was unsteady, fretful and subject to miscalculation. Many young persons in their late teens and early twenties who ran afoul of the law would play this angle in their petitions for reduction of punishment. The situation was further complicated when the agent who drew the young man or woman into crime was the same person who was responsible for instilling moral values. In 1840, Mary Huffman and her father, Philip, were convicted for killing the child of their incestuous relationship. Mary Huffman explained that her mother was of weak mind and body and "that being thus left to exercise her own Judgement without the advice of a Mother and being under the sole

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[108] NAC, RG 1, E 3, John and Melinda Smith to George Arthur, Vol. 86, 16, 29 May 1840.

[109] Joseph Kett. Rites of Passage. New York: 1977, 36.

control and influence of a Father whom she looked up to with reverence and awe and whose duty it was to have kept her in the path of virtue, she was unfortunately led away from those Paths being inexperienced and never having moved much in society."[110] Richard Jeffers's appeal was more typical. Jeffers had recently emigrated from Ireland "for the purpose of forwarding myself by genteel industry"[111] This son of a respectable linen merchant had been capitally convicted for wounding an animal. In his appeal to the lieutenant-governor, Jeffers asked that it be taken into consideration that he was a "young man unexperienced (sic) in the world and at my first onset of life (his emphasis)." Nineteen-year-old horse thief Eli Swayze wrote that he "was seduced into dishonest practices and prompted to unite in stealing three horses in the Township of Waterloo."[112] Accompanying Swayze's petition was another from his neighbours stating that from their familiarity with Swayze's character, "we think he has been misled by the Bacons."[113] Campbell argued that it was a typical example of the old playing on the naiveté of the young: "(Swayze is) a very young man of good character otherwise evidently misled by older offenders..."[114] Similarly, George Farrar, a twenty-two-year old schoolteacher convicted of cattle stealing at the 1824 Midland District assizes, had "nothing to urge in

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[110] NAC, RG 1, E 3, Mary Huffman to Lieutenant-Governor Arthur, Vol. 36, 223-31, 3 February 1840.

[111] NAC, RG 5, A 1, Jeffers to Maitland, Vol. 58, 30320-1, 21 November 1822.

[112] NAC, RG 5, A 1, Swayze to Maitland, Vol. 73, 39161-68, 31 August 1825.

[113] Ibid.

[114] NAC, RG 5, A 1, Campbell to Maitland, Vol. 74, 39295-97, 19 September 1825.

extenuation of his crime but his Youth and inexperience."[115] "Being now twenty-two-years of age"[116] when he petitioned the lieutenant-governor from his Brockville gaol cell, Charles Seaton also described himself as "young and inexperienced." In 1819, he was sentenced to be hanged for stealing a heifer. Seaton argued that his guilt was only second degree. He claimed to have been led "into a snare by the wicked cunning of the man with whom he then lived, and in whose employment he was." Inexperienced in life, Seaton protested that he had been "led astray" by his "infamous and abandoned" employer. An accompanying affidavit from eleven subscribers, seven being magistrates (including the soon-to-be puisné judge of the King's Bench, Levius Peters Sherwood) recommended Seaton to mercy. Taking into consideration his youth, they hoped "that he (might) reform and become a good man and useful member of society." On the back of the petition, Attorney General Robinson indicated that he believed the contents of both the petition and the supporting affidavit to be correct. Seaton was banished for life. Daniel Stanley, "a young man"[117], was sentenced to one year in gaol and one hour in the pillory for passing two counterfeit half dollars. In his petition for the reduction of sentence, Stanley pointed out that he was able to earn a livelihood but had been, instead, caught up with bad company "of which Lucifer at all times guides (that had) induced (him) to do those things which his God and his Country forbids."[118] When seventeen-year-old William McDonnel was sentenced to death for horse

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[115] NAC, RG 5, A 1, Farrar to the Lieutenant-Governor, Vol. 68, 136272-74, 20 October 1825.

[116] NAC, RG 5, B 28, Seaton to Lieutenant-Governor Maitland, 1 October 1819. Seaton was making the point that he was twenty-one when he committed his crime.

[117] This designation might be used for persons slightly over the age of twenty-one. It denoted the fact that the individual in question was of age but that they lacked independence.

[118] NAC, RG 5, A 1, Stanley to Hillier, Vol. 57, 29556-57, 25 April 1822.

theft, various "loyal subjects" of the Niagara District petitioned on his behalf. They argued that McDonnel would not have been guilty of the crime "but for two men of mature age who instigated, aided and assisted him in the theft."[119] Seventeen-year-old Caleb Wilson may not have been cajoled by his elders into stealing a horse, however, seventy-three petitioners from the Niagara District did point out his naiveté associated with his juvenile years: "...that he committed the said offence without that reflection and felonious intention that might be presumed of a person of riper years and without a knowledge of the atrocity of the crime and the awful consequences that must flow from the commission of it..."[120] Job and Enos Scott were nineteen and twenty respectively when they were capitally convicted for stealing a brace of pistols from a law officer while taking part in the rescue of Daniel Wilson who was being arrested on suspicion of sedition. After their sentence was reduced to three years in the penitentiary, a number of inhabitants of the London District wrote in favour of a free pardon: "...the said Enos Scott junior and Job Scott are very young men quite inexperienced in the ways of the world and were led to assist in the rescue of the said D. Wilson by the persuasion of example of much older persons while on a visit to a relative in the neighbourhood and where the offence occurred."[121] Rather than two young men who had robbed a government agent, Enos and Job Scott were made into the

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[119] NAC, RG 5, B 3, Petitions and Addresses, Vol. 6, 331-32, n.d. (from other sources, 1826). McDonnel's mother likewise argued that her son, "of tender years and penitent behaviour", "was persuaded by the persons who stole the two horses to assist them in conveying them out of province" and, as if to imply his lessened involvement, stated that he did not participate in the profits. [NAC, RG 5, A 1, McDonnel to Maitland, Vol. 75, 40358-60, n.d.]

[120] NAC, RG 5, A 1, Inhabitants of the Niagara District to McMahon, Vol. 30, 1375407, 19 October 1816.

unwitting instruments of others, naïve accomplices that happenstance had put at the scene of the crime. They were granted unconditional pardons two days later.[122]

Susan Houston has argued that cultural assumptions, specifically gendered notions of masculine and feminine characteristics, coloured the way in which mid-nineteenth-century society perceived young people. "From the initial perception of a 'crime' and the teasing out of its essential features to the adjudication of the case, the sex of the offender determined differing outcomes."[123] Gendered expectations such as a lack of education, slowness of wit and "a general vulnerability to suggestion", Houston argues, guided the petitions for mitigation of sentence forwarded on behalf of female criminals. However, such predication, as I have illustrated above, was not restricted to females. Susceptibility was associated with youth in general, owing perhaps to their lack of both formal and informal education, or the insularity of the family and its relationships of mutual dependency. As Joseph Kett has pointed out, young people over the age of sixteen who resided with their parents, regardless of their sex, existed in a limbo of semi-dependency between childhood and adulthood. This often extended into their middle twenties. Adulthood, in other words, had less to do with chronology than with one's state of social dependency. The latter was not the purview of young females but was understood to be both a necessary and sufficient condition of youth itself. John Beverley Robinson, who had entered into a professional track at the age of twenty-one when he was appointed acting

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[121] NAC, RG 5, A 1, Inhabitants of the London District to Charles Poulett Thomson, Vol. 239, 130145-56, 4 February 1840.

[122] NAC, RG 68, G555, 6 February 1840.

[123] Susan E. Houston. "The Role of the Criminal Law in Redefining 'Youth' in Mid-Nineteenth-Century Upper Canada" History of Education Review 3 (1994), 40.

Attorney General, would be considered a man while 'John Doe', at the same age, living at home as a semi-dependant, would still be considered a youth[124].

If young people were more susceptible to immoral influence, they were equally susceptible to moral reform. Or so some argued. The fourteen-year-old son of Jane Churchill had been sentenced, at the Bathurst District quarter sessions, to one year in the provincial penitentiary. The mother felt that the time already endured in prison "will make a lasting effect on his young mind and direct his morals to a better course for the remainder of his life."[125] An appendix to Mrs. Churchill's petition from five local magistrates expressed the hope that her son's confinement had had "a salutary effect on his morals." When John Endicott petitioned on behalf of his son, sentenced to five years in the penitentiary for uttering a "note of hand knowing the same to be forged,"[126] he included a supporting letter from Warden Henry Smith: "I sincerely trust whenever he leaves this place that you will find him a reformed young man." Smith, as prison inspectorate reports would make clear, would be hard pressed to make the same claim for older, hardened

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[124] Social class was certainly a contributing factor in respect to maturation. With money came education in the professions and with social standing came patronage. There are several examples in the Upper Canada Sundries of half-pay army officers (lacking both money and status) plaintively petitioning the lieutenant-governor for government jobs for their sons. Seventy-year-old Capt. Lelievre lived in Elm Grove (near Perth) with his wife and seven grown children. In 1826 he asked J. B. Robinson to recommend his twenty-five-year old son Henry and his twenty-seven-year old son Julius for newly vacant government positions. Lelievre wrote that his half-pay was "inadequate to support (his family), and being destitute of means to see any of my children settled properly and being much advanced in years I have very little hope of seeing any of them properly settled..." [NAC, RG 5, A 1, Lelievre to J. B. Robinson, Vol. 80, 43534, 18 December 1826]. Two years later, he again petitioned Robinson on behalf of son Julius. [NAC, RG 5, A 1, Lelievre to Robinson, Vol. 90, 3 October 1928.] Given Lelievre's reference to supporting his family, we might infer that his children were not gainfully employed. Given the second petition, we might further infer that his first petition was unsuccessful.

[125] NAC, RG 5, A 1, Jane Churchill to Lieutenant-Governor George Arthur, Vol. 218, 120389-91, 1839.

[126] NAC, RG 5, A 1, John Endicott to Bond Head, Vol. 167, 94244-52, 9 June 1836.

criminals. The forty-two inhabitants of the Home District who petitioned for clemency on behalf of twenty-one-year-old Lewis Lyons, sentenced to be executed for theft, stated that they had reason to hope that "the long imprisonment this young offender has suffered, and the apprehension he is under of still greater, have so reclaimed him that he may and will return to those habits of honesty and industry to which he has been trained by his worthy parents and make a good member of society and faithful subject of his Majesty."[127] The supplicants on behalf of horse thief William Osborne, in consideration of his "extreme youth",[128] believed that "his trial and sentence alone (would) be a sufficient warning to himself and an example to the Country at large." Chief Justice Thomas Scott was concerned with the prevalence of horse theft on the Niagara frontier. Time in gaol might have been enough to reclaim the young Osborne but it was an insufficient warning to would-be thieves. While acknowledging that Osborne was only fifteen, expediency dictated that an example must be made. Scott could not recommend a free pardon and Osborne was subsequently banished for life. Scott still thought of punishment in terms of deterrence. However, as society came to associate crime less with innate depravity and more with the corrupting influence of defective social institutions like the family, the idea of punishment as a reformative instrument supplanted punishment as a deterrent. The youthful mind, by which was meant 'impressionable', was still salvageable. By the 1830s, the case of Ebenezer Allan had become the rule. Allan was convicted for the same crime as Osborne.

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[127] NAC, RG 5, B 3, Upper Canada: Petitions and Addresses, 1792-1841, Inhabitants of the Home District to Gordon Drummond, Vol. 6, 1814, 36.

[128] NAC, RG 5, A 1, Inhabitants of Niagara District to Lieutenant-Governor Gore, Vol. 25, 11409-10, 1815.

Amelia Allan, his mother, wrote in support of mitigation that her son had a "youthful mind" but felt confident that "age will subdue the passing extravagance of youth and the awful warning given by the appalling sentence passed upon him will awaken him to reformation."[129]

Non-offending children were often placed in prison with their convicted parents. An alternative, but of little economic advantage, was to place the wife and children of imprisoned husbands in the House of Industry or simply the children when there was no father and the mother was incarcerated. In 1840, forty-year-old Ann Hartman and her three children were residents while Hartman's husband languished in gaol. The same was true of Mary Munn and her three children. Munn's husband had been imprisoned for high treason. Four-year-old Mary Gibbs, her father dead, was placed in the House of Industry when her mother entered prison: likewise, six-year-old Bridget Ryan.[130] Whether gaol or house of industry, this proved to be a complex problem. The children themselves were innocent of any crime yet were under the tutorship of criminal parents. Such children exacerbated the problem of overcrowding in the district gaols. In December of 1835, the Home District sheriff, William Jarvis, wrote to the lieutenant-governor's office requesting the discharge of as many prisoners listed in an appended gaol return, as his Excellency saw fit. "The peculiar situation in which some of them are placed as regards their children", Jarvis argued, was aggravating an already overpopulated gaol "by which a great expence is

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[129] NAC, RG 5, A 1, Amelia Allan to Lieutenant-Governor Maitland, Vol. 75, 40355-57, 1825.

[130] A Statement of the Inmates of the House of Industry, Toronto, 20th January 1840. Upper Canada Appendices to the Journals of the Legislative Assembly, 5th Session, 13th Parliament VI, Parts 1 & 2, 1839-1840.

incurred by the District."[131] Jarvis also reported on the case of a sailor who had petitioned for the remission of the pillory part of his wife's two-month sentence. Jarvis noted that, under the circumstances, a two-month imprisonment was a severe one "they having a family of five children which children from the destitute circumstances of the parties, we have been obliged to have in prison with the mother."[132] Grand juries, part of whose duties included visiting local gaols, could be equally adamant about releasing prisoners who had been confined with their children. After their mandatory inspection of the Toronto gaol, the grand jury for the Mayor's Court recommended that Anne Boke be recommended to the lieutenant-governor for favourable consideration. Boke's three-year-old daughter had been confined with her mother. The city, apparently, had made no provision for the support of the child.[133] The appended gaol returns included Margaret Stevenson, sentenced to six months by the Mayor's court for petty larceny. Stevenson had been gaoled with her "two small children." It was also noted that James and Ann Swineburn had, in August, been committed for six months for assisting soldiers to desert. Their four small children had been placed in gaol with them and Ann Swineburn expected "soon to be confined with a fifth one." Chief Justice Robinson recommended that an "indulgence" be extended to the Swineburns by remitting the remainder of their sentences, a request granted by the lieutenant-governor. Robinson, however, appeared less concerned with the state of the

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[131] NAC, RG 5, B 27, Quarterly Gaol Returns, January 1834-December 1835, Vol. 2, 14 December 1835.

[132] NAC, RG 5, A 1, Vol. 256, 139471-74, n.d.

[133] TA, Mayor's Office, Series E, Box 1, 6 September 1837. No action was taken for six months later another grand jury made the same recommendation. What provision had been made for the child in the duration was not mentioned. [TA, Mayor's Office, Series E, Box 1, 11 March 1837, 167-69.]

children than the fact that by releasing the Swineburns he could rid the gaol of six bodies.[134] Margaret Stevenson and her two children had been in gaol one month longer than the Swineburns but figured nowhere in Robinson's recommendations. Instead, he suggested that a convicted sheep-stealer, William Garnain, might "not improperly" be released as well. This request, too, was granted.

In June of 1840, the state of the Toronto gaol was not much improved. In order to alleviate an "exceedingly crowded"[135] facility, Justice Macaulay recommended abbreviated sentences for five prisoners, including Anthony Carter, "a coloured boy", imprisoned one month for stealing a brush, Path Larkin, "a lad about twelve", sentenced to two months for stealing cloth blankets and John Terry, "a young man" gaoled three months for stealing a piece of cloth. Also included in the list was Mary McCabe, gaoled four months for receiving stolen goods from Larkin. "Several (of her) young children" had accompanied McCabe to prison. Macaulay's request for shorter sentences was granted. Even so, McCabe's four weeks emended sentence proved the longest. McCabe was given no preference, in spite of her children. Instead, Macaulay made a point of favouring Terry and Larkin, pointing out that the jury had recommended them to mercy.

Moral contamination was only one complication. Left without a steady source of income, a prisoner gaoled with his or her family faced the problem of feeding them. From his Niagara cell, William Dickson wrote to "the honorable justices of the Court of the

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[134] As a measure of government indifference towards imperilled children, the House of Industry in Toronto reported in 1840 that Ann Swineburn (case number 72) and her four children were residents. Swineburn's husband had earlier deserted her. There is no mention of a fifth child. [A Statement of the Inmates of the House of Industry, Toronto, 20 January 1840. Upper Canada Appendices to the Journals of the Legislative Assembly, 5th Session, 13th Parliament VI, Parts 1 & 2, 1839-1840.]

[135] NAC, RG 5, B 27, Quarterly Gaol Returns, Vol. 2, 6 June 1840.

King's Sessions (sic)"[136] that his imprisonment on a capital charge had taken him from his family, and left them destitute. When his wife had taken ill, his child had twice been placed in prison with him for three or four consecutive weeks. Dickson complained that his prison ration was not enough to feed both himself and his child. Without the charity of a Mr. Whale, Dickson's child would have starved. If his child was to continue to share his cell, he implored the justices to provide adequate rations.

As late as 1857, children were still being confined with their parents or guardians. One case in Montreal caught the public's attention. Eliza, Samuel, Sarah and Ann Turner aged ten, eight, five and three years respectively, had been placed in gaol with their mother.

> Three years training by a depraved mother, with the gaol and its associations for a schoolhouse, what will it not effect (sic)? That little girl of ten years will, in three more, have practically joined the ranks of the abandoned. Little Samuel will be an expert young pick-pocket (sic), and the other children will be pressing close upon their heels along the same downward path. Justice will look with unfeigned astonishment upon such precious depravity, while it punishes the young delinquents for having learned the only lesson they were ever taught.[137]

The writer regretted that children in these circumstances were, in effect, treated as criminals even before they had learned to distinguish right from wrong. Owing to no fault of their own, they were locked up in prison, "surrounded by demoralizing associations."[138] The Ladies of the Benevolent Society, readers were later informed, eventually rescued Eliza, Samuel and Sarah Turner. Although such acts of charity extended to the source of the problem by at least temporarily separating the child from the pernicious example of his

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[136] PAO, RG 22, Series 372, Box 22, File 15, 11 January 1836.

[137] "Philanthropy". Care of Our Destitute and Criminal Population. Montreal: 1857, 5.

[138] "Philanthropy", 12.

or her parents, charity, the writer urged, was not an effective solution. What was required was legislation that would authorize children to be taken from morally depraved parents in order that they might be "trained up to industry and virtue." "Government as the common parent of all," the writer exhorted, should establish a Juvenile Reformatory where children could be placed before they had been "contaminated or branded with crime." He concluded that through this institutional extension of a kindness, which their profligate parents had denied them, children would no longer be condemned to the education of the prison. Later that year, the government of Canada West enacted legislation for establishing a Prison for Young Offenders. In order to avoid the continuing problem of criminal communication associated with long stays in prison before trial, a separate act extended the summary powers of the court in respect to juveniles, thus narrowing the time between commitment and sentencing.

Not all children, however, were placed in gaol with their parents. When Eliza Mott was convicted of larceny at the Victoria assizes, Justice Jonas Jones explained the virtue of exploiting the opportunity to separate the mother from her ten-year-old daughter. Mott, Jones indicated to the lieutenant-governor, was "a woman of ill fame and her daughter an illegitimate child. I hoped by removing her from the bad example of her mother that she might yet be reclaimed from the certain paths in which she was evidently being brought up."[139] How Jones intended to accomplish this act of moral reclamation was left unclear. Even so, one signatory to a petition requesting a lessening of Mott's sentence, argued that he believed the crime was more a vindictive trespass than a felony, "under a feeling of

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[139] NAC, RG 5, A 1, Jones to Tucker, Vol. 284, 134990-94, 13 October 1840.

great compassion for the child."[140] Pulled in two directions and evincing a degree of frustration, the signatory nevertheless agreed that Mott was an immoral woman and further concurred, "that a temporary separation from the parent and child will be for the interest of both."

"A virtuous education in early life.... is the most efficient and lasting preventive of crime that at all exists."[141]

In his gallows confession, William Burley[142] admitted to having been wicked from an early age. Although raised by parents who were, "in many respects,"[143] tender and kind, Burley wrote that they had little appreciation of the advantages of education and religion:

> ...I never was instructed to read or write, nor did they ever attempt to impress my mind with religious sentiments; having no attachment to any system of religious instruction themselves, I was left to wander through the world under the influence of depravity, without the advantages of education or religious instruction to counterbalance the influence of my natural propensities to evil of various kinds, particularly that of frequenting all places of profane resort.[144]

Marked with the telltale signs of an engineered speech, it is improbable that these articulate thoughts can be attributed to the illiterate Burley. The Rev. Messrs. Boswell, Smith and Jackson, who were, it would appear, ciphers for ideas concerning the connection between education and crime that began to circulate toward the end of the 1820s, set the confession to paper. The apparent increase of crime among the young was leading some social critics

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[140] NAC, RG 5, A 1, Thomas Coleman to Tucker, Vol. 248, 135069-82, 17 October 1840.

[141] Chief Justice John Beverley Robinson, British Whig, 31 July 1835.

[142] William Burley, a twenty-six-year-old blacksmith, was executed in the London District in 1830 for the murder of constable Timothy Pomeroy.

[143] Canadian Freeman, 16 September 1830.

[144] Ibid.

to question the absolute reliance on the family as a moral incubator. In 1827, three youths between the ages of fifteen and nineteen were tried for capital crimes at the Home District assizes: Hiram Lossee for murder, William Jones for killing a cow and Joseph Udall for bestiality. To Francis Collins, editor of the Canadian Freeman, this was but part of a progressive rise in crime, especially those characterized by wanton depravity. Collins, noting the absence of rack-rents, tithes and oppressive taxation in the province, logically eliminated poverty and distress as possible explanations for this alarming trend. In a country said to provide any able-bodied man with a good job and a reasonable wage, unemployment and the resulting difficulty of making a good living were also ruled out. "To what, then, is this increase of crime to be attributed? Chiefly, in our opinion, to the ignorance of the rising generation, owing to the inefficiency of the Common and District School system, and owing to the want of moral and religious instruction."[145] When Strachan proposed to build a seminary college at York that same year, Collins argued that the money could be better spent on the children of the poor by building more common schools.[146] Collins speculated that if the same Rev. Strachan who now preached morality and repentance to Lossee, Jones and Udall in the York gaol had paid as much attention to the improvement of the school system as he did to ferreting out aliens and calculating the number of dissenting Upper Canadians, then it would be likely that those same youth

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[145] Canadian Freeman, 25 October 1827.

[146] Likewise, Tory writer Thomas Dalton argued," All rascality arose from the want of education." He argued that at least part of the money "so improvidently" granted to the Toronto university could be better spent for the purpose of "one grand national system of education," both elementary and general, as had recently been adopted in the United States. [Colonial Advocate, 18 February 1830.]

would have turned out "honorable, industrious and useful members of society."[147] He further conjectured that if the parents of the three youths were questioned, they would be found ignorant of the principles of morality and religion. The parents had, in effect, issued Lossee, Jones and Udall each a licence for licentious behaviour. Crime, Collins believed, would continue to increase unless a more efficient means than family counsel was found to educate the country's youth.

By the end of 1835, the Provincial Penitentiary was in full operation. Although it was anticipated that it would both reform offenders and deter criminal behaviour, by the decade's end it was recognized that, with the exception of a few salutary cases, it had not lived up to its promise. In 1834, Justice Sherwood questioned whether or not the penitentiary would answer the expectations of the public in either the reformation of prisoners or in the deterrence of crime[148]. In the space of four years, his query was answered:

> No one at this day doubts that hard labour and solitary imprisonment are punishments adequate to the offence of theft, but I think it equally clear that they are but slight preventives of the crime if in truth they can be considered preventives at all.[149]

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[147] One interesting exception to the dearth of education opportunities for plebeian children was the education of apprentices. It was commonplace to include a clause in an indenture that guaranteed that the master would provide for the education of his apprentice. When fourteen-year-old Daniel Faluy was apprenticed to Charles Baker as a tailor, the latter included among his contractual obligations that "during the first two winters... (Faluy) should be allowed to attend a night school in the town..." [PAO, MU 509, J. B. Robinson Papers, 27 March 1829.] As early as 1810, Charles M'Donnel set up evening classes in York, five days a week between the hours of 6 p.m. and 9p.m., for the benefit of young lads and apprentices. As well as improving young minds, M'Donnel argued that the education provided by his school would "lead them into a proper channel for good breeding." [York Gazette, 9 June 1810.] Given the frequent reports of absconding apprentices, often with property stolen from their masters, providing for the moral education of their workers was probably considered, on expedient grounds at least, money well invested.

[148] Sherwood to the Midland District grand jury. Kingston Chronicle and Gazette, 29 July 1834.

[149] The Bytown Gazette and Ottawa Advertiser, 26 September 1838.

It was to the morals of youth that those who were intent on preventing crime must turn their attention. Sherwood joined the rising chorus of those who believed that a virtuous and liberal education "cannot fail to become a powerful preventive of crime." He remained a champion of common schools for most of the 1830s. As one of many means that society might resort to for ameliorating crime, education offered the least injury to the individual. Education was a palatable medicine that "destroy(ed), as far as possible the source of evil"[150] by diligently improving juvenile morality. Acting on the roots of the problem, a mixture of religion and education "would go further to prevent crime than any penal laws whatever." Against the background of criticism over the huge expenses incurred in the building and running of the Kingston facility, Sherwood suggested that public schooling might also prove a fiscal boon. He urged grand juries to accept that if the Legislature appropriated generous funds to this project, the necessity of erecting prisons for hard labour and solitary confinement would lessen in like proportion. The York Patriot concurred. Furious that the construction of the Kingston Penitentiary was to cost the province £56,000, the editor pointed out that a few pounds of gunpowder would efface the "scourge" which was presently under construction. Half the money that was required for the penitentiary would build a hundred schools "and the residue would handsomly (sic) endow them!!!!"[151] As the editor of a Toronto almanac put it, it was "cheaper to educate the infant mind, than to support the aged criminal."[152] Perhaps believing that he was addressing a readership of

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[150] Kingston Chronicle and Gazette, 29 July 1834.

[151] Reprinted in the British Whig, 14 February 1834.

[152] Eastwood & Skinner. Toronto Farmer's and Mechanic's Almanac. Toronto: 1839, 25.

independent-minded farmers, the editor advised them not to wait upon the government for educational subsidies but to take the initiative in "planting" the seeds of truth in their children and to save, scrape and make any financial sacrifice necessary to institutionally nourish that growth. For if the parent, through greed or negligence, "withholds from his child the light of truth," he queried, "is he not responsible for the crimes that child may commit?"[153]

Empirical support for Sherwood's pessimism was provided by the annual reports of the inspectors of the provincial penitentiary. Although it is clear that the penitentiary, from its inception, was never intended to formally educate prisoners, it was, as a prime example of "moral architecture", designed to be "a school of rules."[154] The stated importance of public education as an antidote for criminal infection carried over, as an inverted metaphor, into the critique of penal institutions. If common schools were vehicles for moral reclamation, common gaols were variously described as "nurseries for the great prison," "seminaries for the purpose of instructing his Majesty's subjects in vice and immorality," and, a special favourite, "schools of vice."[155] Board of Inspectors' President, James Nickalls, five years after the opening of the Kingston facility, admitted that it was proving easier for prison staff to restrain than to reform prisoners. The reform objectives—preventing released convicts from falling back into bad company and the guarding against a

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[153] Eastwood & Skinner. Toronto Farmer's and Mechanic's Almanac, 29.

[154] Kingston Chronicle and Gazette, 6 September 1834.

[155] These quotations are taken from various reports concerning the Kingston Penitentiary found in John Beattie, Attitudes Towards Crime and Punishment in Upper Canada, 74-137.

return to former habits—remained "as yet, a desideratum."[156] Although many complained that the penitentiary was inappropriate for children, nevertheless, children were subject to the same rules as adult prisoners. Failure to comply with the prison regimen led to severe punishment, most often a lashing in front of the assembled inmates. And this, more often than not, Peter Oliver suggests, simply for being children, i.e. playing small tricks, laughing and talking.[157] Eustache Coté both entered and left Kingston Penitentiary a juvenile. He was fourteen when he began his seven-year sentence for arson. Whenever a prisoner received corporal punishment, the month and year were logged. The Punishment Book records that Coté received the lash on thirty-four occasions over a seven-year period[158]. In fact, it was the natural proclivity of the juvenile prisoners to age-related disruptions that made them subject to repeated punishments, necessary, as one keeper put it, to keep them in proper order as required by the Auburn (silent) system.

Bruce Curtis maintains that the debate over education was part of the larger issue of social regulation. Tories believed that the regulation of communities should be left to local agents such as government-appointed magistrates and schoolteachers. On the other hand, reformers "looked to the reconstruction of individual character as the key (regulatory)

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[156] Annual Report of the Inspectors of the Provincial Penitentiary, Journal of the House of Assembly: 1839-40, Appendix.

[157] Peter Oliver. Terror to Evil-Doers. 186. The absurdity of the situation was captured in a comment by a prison guard testifying before the Brown Commission as to why a small boy, Peter Charboneau, was frequently flogged with a cowhide strap. He explained, "Charboneau's conduct was childish. He was continually playing tricks, as children would do." [First Report of the Commissioners Appointed to Investigate into the Conduct, Discipline and Management of the Provincial Penitentiary. Journal of the Legislative Assembly—1849, Appendix B.B.B.B.B., Section E.]

[158] NAC, RG 73, Records of the Solicitor General, Penitentiary Branch: Registers, Kingston Penitentiary, Vol. 365, Punishment Book.

means..."[159] Internalizing social values, the argument went, would yield up an orderly population. As such, the social reconstruction of individuals would produce politically competent communities and break down one of the barriers that had, thus far, prevented class mobility. With its emphasis on institution building and the shaping of a new political autonomy, Curtis argues that educational reform was as essential component of state formation.

In fact, the Tories were probably closer to the reformers on points of educational philosophy than Curtis admits. In his address to the Midland District grand jury, Chief Justice Robinson pointed out that there was an intimate connection between the moral training of youth and criminal jurisprudence, especially as it related to the prevention of crime. Because both Tories and reformers alike understood moral discipline to be the essence of educational practice, both wrapped their arguments around the issue of crime. When the morals of youth were diligently improved, Robinson informed the jurymen, social evil was diminished in like proportion. The formative years, those in which inveterate habits had not yet solidified, were too crucial a "period to be barren of improvement."[160] Essentially reiterating the virtues that had before been associated with a propitious family upbringing, Robinson simply shifted them to "a sufficient number of well conducted common schools throughout the entire population of the Province." Robinson argued that the province would do well to imitate the example of Scotland. In his Common School Act of 1838, Mahlon Burwell did just this, placing the organization of common

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[159] Bruce Curtis. Building the Educational State: Canada West, 1836-1871. London: 1988, 24.

[160] British Whig, 31 July 1835.

schools under the control of centrally controlled officials and leaving the greater part of school taxation in the hands of local magistrates.[161] Reformers and Tories both believed that the primary goal of public education was the moral reconstruction of young Upper Canadians. Reformers might have believed that this would result in the undoing of elite impediments to upward mobility, but both were (the Tories more so) motivated by the belief that what Robinson called a "liberal education" would result in a respect for, and obedience to, the laws and a welcome reduction in crime. The debate between Tories and reformers would centre on how best to implement and sustain these commonly agreed-upon objectives of educational reform.

Coda

Shortly after the execution of William Kain for the murder of Rodolph Couche, the Kingston Chronicle announced that the twenty-one-year-old felon had bequeathed the back wages owed him by the Couche estate either to establish or to support any school that might require it.[162] This had the effect of confirming (whether or not the editor intended it as such) the sincerity of Kain's confession that immorality had brought him down. This small endowment might provide a long and thorough education to someone who might otherwise follow in the footsteps of his or her benefactor. Even by the time of Kain's death, education was beginning to be seen as a moral panacea. In a letter to the trustees of the Eastern District schools, "A SPECTATOR" wrote of the Cornwall school:

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[161] Curtis. Building the Educational State, 37.

[162] Kingston Chronicle, 11 September 1830.

> It is not the system of instruction alone, or the mere communication of knowledge, which raises the character of the school so high in my estimation. It is the strict discipline without severity, corporal punishment being seldom or never inflicted, and the moral influence of the master over the scholar, not only during school hours, but at all times and in all places, which above all other subjects of praise call forth my warmest approbation.[163]

In a school of forty students, in a community of a thousand, over a period of three years, there had not been a single instance of riot or disorderly conduct of any kind on the part of the students, clear proof, the writer argued, that voluntary submission to lawful authority was the cornerstone of a Christian education: "To train the young to such habits, is, indeed, to train them up in the way in which they should go."

Education in itself, however, was not always sufficient to inure the child to the Bacchanalian seductions that he or she might find a street or two away. William Kain was proof of this. His anonymous biographer wrote that although educated in a regimental school until the age of fourteen, Kain had been thrown into the world at a precarious age armed "with an education scarcely sufficient to correct a violent temper."[164] Struggling with his propensity for drinking, a problem aggravated by the example of an intoxicated father, he attended and later formed a Sunday school. But later still, succumbing to old habits, he formed an anti-temperance group called the "Buck Skin Society". For all of this, he was unable to maintain, "a respectable character" the restraint being "unsuited to his unconquerable passion for pleasure and amusement." Kain was thought to be an example of "the morals of our youth contaminated by evil example" to employ a phrase often quoted in the period literature. William Kain's case proved the necessity of fighting the war on

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[163] Kingston Chronicle, 18 September 1830.

[164] Anon. The Life of William Kain. Kingston: 1830, 3.

crime and immorality on two fronts. One would be for a system of free public schooling. The second would involve the struggle of concerned individuals to win back moral control of their neighbourhoods. Despite the blustering of Simcoe and his pious successors, this battle would be fought at the community level through both intra and ultra-legal means.

4

CRIME AND COMMUNITY[1]: PART 1

Sociologist Laureen Snider maintains:

> Criminal justice systems appropriate personal problems, taking them away from those ultimately responsible for solving them. They empower states and court systems, not victims. Even the fine goes to the state, not the person whose goods were stolen.[2]

While this might be true for the period that the author refers to as the "second great confinement"—the age of consumer societies, the disappearance of wage-secure jobs, the destabilization of communities and spiralling class inequalities—it was not the case with the criminal justice system in Upper Canada where, it is my contention, inter-personal conflicts were handled, for the most part, within and by the community. Responsibility for the identification of criminals, their apprehension and eventual prosecution, if not in principle then in practice, resided in the hands of victims. In non-capital offences, all classes of society, not just the propertied elite, used the courts. John Beattie's observations concerning property crime in England from the mid to late eighteenth century apply equally to Upper Canada:

> One does not have to think that the legitimacy of the criminal law was accepted in its entirety throughout society to acknowledge that when it came to straightforward crimes against property—to robbery, house-breaking, and theft—there was no sharp disagreement between rich men of large property and the large

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[1] For a discussion of "community" see **appendix 2.**

[2] Laureen Snider. "Understanding the Second Great Confinement." Queens Quarterly 105.1 (Spring, 1998): 42.

> majority of the working population. When it came to mainstream property crime, virtually everyone in the society was propertied.[3]

Although the court records for Upper Canada are incomplete, those for the Niagara district provide what is probably a near accurate snapshot of the province as a whole (**Table 4.0**). Here court documents illustrate that farmers frequently prosecuted for theft of produce, usually grain, or the loss of small, easily transportable, farm animals—pigs and assorted fowl—more so in times of economic recession. Mechanics and artisans most often suffered the loss of the tools of their trade. There are a number of cases in the Niagara quarter sessions files specifying crimes that involved mechanics/artisans stealing from each other. There are indications here that such crimes were sometimes motivated by economic competition, one trying to put the other out of business. Women most often had small, portable domestic items stolen from their homes—watches, clothing or small sums of money—by servants or neighbourhood women. Labourers lost items closely associated with their persons—jackets and overcoats stolen from taverns, axes (often stolen by other labourers under the pretext that they would be used for a momentary job and then returned to their rightful owner), and other portable items. It is perhaps because labourers seldom had anything of much value that their numbers in **Table 4.0** are slightly under recorded when compared with other occupations. It is certainly not because labourers were reluctant to use the lower courts. In 1828, for instance, of all cases heard by the Niagara District court of quarter sessions (including theft, assault, riots, trespass and moral crimes), labourers accounted for 44.4% of all prosecutors, the nearest other

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[3] John Beattie. Crime and the Courts in England. 196.

Table 4.0 Status/Occupation of Prosecutors in Property (Larceny) Cases at the Niagara Court of Quarter Sessions, 1828-1840

Status/Occupation	Number of Cases Prosecuted^	Percentage of Cases Prosecuted	Percentage of† Population
Gentleman	14	7.7	N/A°
Farmer	41	22.4	10.3
Merchant, Tradesman	43	23.5	2.4
Mechanic, Artisan	38	20.8	5.2
Labourer	33	18.0	10.9
Femme Couvert, Widow, Spinster *	14	7.7	23.9

^ Source: PAO, RG 22, Series 372
* Refers to females twenty-years of age and older.
† These figures are taken from the earliest personal census in Upper Canada—1851-2. They exclude males under 21 and females under 20.
° The 1851/52 census does not take this category into consideration.

occupations being farmers and merchant/tradesmen at 18.5% each. In 1831, labourers again constituted the largest group at 34.5%. After the introduction of summary courts in 1834, the percentage of labourers prosecuting at both courts combined was 32.7%. In 1840, the percentage was smaller at 31.1%. Nonetheless, they were still the largest group of prosecutors that year. If the lower courts were instruments of class oppression, someone had forgotten to tell their principal users: those who laboured for a living.

Communities in Upper Canada might have agreed with the editor of a contemporary Charlottetown newspaper when he rejected the idea of establishing a police force because "every good member of the community considers himself a special

preserver of the peace."[4] Criminal justice historians have given much copy to the discretionary powers exercised by justice officials. But equally, at the community level, and certainly with respect to minor crimes, ordinary citizens, as we will see below, wielded much discretionary power themselves. Until the mid to late 1830s, there appears little evidence that would confirm Snider's claim that community victims were judicially disenfranchised by state powers[5]. The shift most likely began when what Greg Marquis has referred to as "civic justice" was ushered in with the incorporation of Canadian cities. Restricted municipal franchises and the fact that some city charters, like that of Toronto, directed that the mayor/city magistrate was to be appointed by and from the city council, guaranteed that the control of municipal politics would be the strict preserve of both the business community and small freeholders. Consequently, the masterless men, who constituted the majority of offenders were "not tried before (their) peers but by officials

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[4] Quoted in Jim Hornby. In the Shadow of the Gallows: Criminal Law and Capital Punishment in Prince Edward Island, 1769-1941. Charlottetown: 1998, 12.

[5] Further to Snider's claim about fines, in Upper Canada they were often used by local magistrates to compensate the victims of crimes for the loss of personal property or for emotional damage. In some cases, fines were funnelled back into the community either to help the less fortunate or to allow the commissioners of highways or the local pathmaster to improve the roads. In the case of moral crimes like Sabbath breaking, some Niagara District magistrates made a practice of giving the fine to the churchwardens for the use of the poor. John Mewburn passed along such fines to Matthew Otler, warden of St. John's, Stamford. [See, for instance, PAO, RG 22, Series 372, Box 25, File 7]. When Harman Goring was found guilty of an assault by reason of intoxication, Mewburn directed the fine to the widow Gates, "a poor coloured woman for the use of a destitute coloured girl and child." [PAO, RG 22, Series 372, Box 33A, File 10]. Stipendiary magistrate Graves Swan stipulated that fines for drunk and disorderly behaviour, in accordance with common law, were to be directed "for the use of the poor." [PAO, RG 22, Series 372, Box 38, Files 12.—where innkeepers were in violation of their licences, the law mandated magistrates to assess fines of 10s. for the use of the poor.] The Summary Conviction Act of 1834 gave magistrates presiding over cases of common assault, and other petty matters, the right to free convicted offenders upon compensation to the aggrieved prosecutor. As John Weaver rightly points out, allowing for damages in a criminal action blurred the distinction between criminal and civil law. [John Weaver. Crimes, Constables and Courts. Montreal: 1995, 29.]

recruited from and accountable to middle-class artisans and businessmen"[6], those whose principal concern was the protection of private property. But even in the period before civic justice when, on rare occasions, the government of the upper province appeared to bypass local judicial authorities, when the unmediated arm of the provincial hierarchy at York/Toronto reached into district communities, they were only experimenting with what Allan Greer has alluded to as "the state up close."[7] As discussed below, such initiatives were short lived and probably as important for what they revealed about community attitudes as they did about what judicial lengths the government was willing to go when it believed that its authority was in jeopardy.

In an address to a Home District grand jury, Chief Justice Robinson pointed out that the ultimate objective of justice was deterrence by example. To this end, the courts of justice must be prepared to "check and if possible wholly to destroy the hope of impunity."[8] As he reminded various grand juries, this did not necessitate the severe execution of the laws, but rather their prompt and guaranteed enforcement. An effective judicial system necessitated both the immediate apprehension of criminals and the certainty of appropriate punishment. This implied that sanctioned punishments should be consonant with the sentiments of at least that section of the population from which grand

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[6] Greg Marquis. "The Contours of Canadian Urban Justice, 1830-1875". Urban History Review 15.1 (June 1986), 271.

[7] Allan Greer. "The Birth of the Police in Canada". Allan Greer & Ian Radforth, eds. Colonial Leviathan: State Formation in Mid-19th Century Canada. Toronto: 1992. Greer makes the point that "the police did 'show the flag' of colonial sovereignty in corners of the (lower) province where its influence had not been felt on a regular basis." He also quotes Police Commissioner Gugy: "The first consequence of the establishment of the force has been to make the government visible to the most ignorant".

[8] PAO, John Beverley Robinson Papers, MU 5907, Charge to the Home District grand jury, 17 October 1831.

and petit juries would be chosen.[9] This also required that criminals be vigilantly pursued and brought to trial. In theory, this latter duty fell upon the local magistrates. In practice, however, the office of justice of the peace was more reactive than proactive. Magistrate Henry Warren may have taken it upon himself to arrest John Doey on suspicion of horse theft,[10] but he, and a few other magistrates who irregularly ferreted out and punished lawbreakers, were exceptions to the rule. For doing so, these overly zealous magistrates might face the reproof of their communities. Out of necessity, it was members of aggrieved communities that stepped into the breach created by magistrates unwilling and/or ill-prepared to hunt down criminals.

The reason for the reluctance of local magistrates to become materially involved in the detection and apprehension of lawbreakers is illustrated by an event that occurred in the Niagara District in the fall of 1839—the formation of a frontier police force under the guidance of a stipendiary police magistrate.[11] A series of politically motivated acts of arson

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[9] This would necessitate the rationalization of the criminal justice system of Upper Canada, as Robinson indicated in this and other grand jury reports from the early 1830s. As my thesis maintains, this would include apportioning punishment to the seriousness of the crime and the subsequent need for a Penitentiary, a summary court and the eventual overhaul of the policing system in order to expedite arrests. (See chpt. 7)

[10] Warren placed an advertisement in his local newspaper containing a description of Doey and the horse, which Doey was believed to have stolen. The owner of the horse was requested to appear or Doey would soon be liberated. [The Liberal, 25 July 1833.] As Doey's name does not appear in the Oyez and Terminer (assize) Minutebooks, we must suppose that he was released.

[11] A similar situation occurred in Toronto. On orders from the lieutenant-governor, the Toronto police force was to be strengthened by the appointment of twelve additional constables in the fall of 1838. The increased expenditure was to be defrayed by the provincial government. Believing the city to be a centre for political subversion, George Arthur thought the present force inadequate "for the purpose of discovering and defeating the machinations of the enemy without the actual intervention of the military." It was intended that the special force be placed under the control of Mayor William Gurnett. The Toronto Council objected that this was an intrusion by the provincial government into municipal affairs. The councilmen argued that this would give Gurnett extraordinary powers superseding the authority of any magistrate or officer of the city, in contravention of the duties of the mayor as outlined in the Act of

along the Niagara frontier following the Rebellion of 1837, prompted Dr. John Mewburn[12], a magistrate for the township of Stamford, to meet Lieutenant-Governor George Arthur in September of 1839. In the spring of that year, the Niagara Chronicle had alerted its readers to the fallout from the late Rebellion. Patriots who had escaped across the frontier, made desperate by their inability to involve the province and the United States in hostilities, had now themselves "resolved upon a war of conflagration."[13] The Home government, the paper demanded, must protect the enjoyment of life and property of its citizens along the frontier "which the meanest subject of Britain's Crown cannot be denied." Suggestions were not in short supply. Ogle Gowan, editor of The Statesman, offered a simple, sanguinary solution. As a sure deterrent, if any more "rebels, robbers, patriots, patriarchs, sympathizers or whatever name they may be styled by"[14] were to cross the border and fall into Canadian hands "they should be Princed."[15] The quarter sessions grand jury in March 1839, because they were alarmed by the increase of malicious burnings of neighbourhood

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Incorporation. The lieutenant-governor replied that this was not his intention. Gurnett's powers were increased only because it was obvious to the lieutenant-governor's office that matters "requiring secrecy and a continual watchfulness and attention" could not operate effectively if the superintendent of the special force was subject to the legal authority of others. [TA, D22, Toronto City Council Papers, 1834-1896. Report on City Police, 9 November 1838 & 3 December 1838.] Gurnett himself proposed that if the lieutenant-governor would nominate him as Commissioner of Police or Special Police Magistrate in the various districts of the province with a police force under his orders, the force could then assist the city authorities in case of emergency "and the whole difficulty with the Corporation would be at once removed." [NAC, RG 5, A 1, Gurnett to the Hon. John Macaulay, pp. 115912-13, Vol. 210, 30 November 1838.] The additional force was disbanded on 31 December 1839.

[12] Mewburn was appointed district magistrate in 1833. He immigrated to the Niagara District from England in 1832 and married into the prominent Adams/Gray family.

[13] Niagara Chronicle, reprinted in the Niagara Reporter, 31 May 1839.

[14] The Statesman, 7 July 1838.

[15] The Statesman, 1 October 1839. On December 4, 1838, 150 patriots crossed over to Windsor. The local militia, under the command of Colonel Prince, routed the invaders. "To be Princed" refers to Colonel Prince's order for the summary execution of five captives.

properties, recommended that the magistrates offer rewards for the capture of arsonists.[16] Other concerned individuals suggested that the government use local garrisons to patrol the border. The Niagara Chronicle argued for a coast guard, not a military corps but a body of "active civilians in coloured clothes authorized to act as policemen in watching the river."[17] Modelled on earlier alliances with Native peoples, Adam Ferguson proposed that "a select portion of trusty and sturdy Indians"[18] be set up as a frontier watch under the direction of a militia captain. One newspaper promoted vigilantism. The British Colonist noted that a Peace Society had recently been established in New York to bring to justice those who had broken the law along the frontier. An agent for the society had already visited St. Johns and Lower Canada to explain the objectives of the Society. The editor implied that the society might be of some use along the Niagara frontier: "The object of the Societies desired to be formed is to act as committees of vigilance, to inculcate peace among the people, and to arrest and hand over to the constituted authorities such persons as they may find committing breaches of the law."[19] Some were content to appeal to a higher authority. On December 15, 1838, designated by the lieutenant-governor to be a province-wide fast, the

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[16] PAO, RG 22, Series 372, Box 33A, File 14. March 1839. After the burning of the properties of Henry Miller and Henry Taylor (both farmers in the Twp. of Willoughby) by "wicked and malignant spirits who infest that and most other parts of the frontier," the government posted a £250 reward. [From the Hamilton Gazette, reprinted in the Niagara Reporter, 28 June 1839.] The original fiat from the attorney-general's office stated: "Let a proclamation issue offering a reward of five hundred pounds for the apprehension and prosecution to conviction of the person or persons concerned in the following outrages, viz. ...or the sum of £250 for either of the said offences." [NAC, RG 5, B 28, Vol. 3, File 1938, 11 June 1839.]

[17] Reprinted in the Western Herald and Farmer's Magazine, 14 October 1839.

[18] NAC, RG 5, A 1, Ferguson to Harrison, pp. 125853-57, Vol. 230, 3 October 1839.

[19] Reprinted in the St. Catharines Journal, 31 October 1839.

rector of St. Mark's Church in Niagara warned that both the cholera epidemics and the recent incursion of lawless plunderers from the United States had been brought on by the discontent of those not satisfied with living in a province with a larger share of civil and religious liberty, prosperity and happiness than in any other part of the world. Reverend Thomas Green proposed that the solution to the recent conflagrations (a near apocalyptic indication that the province had fallen on evil times) was "fervent prayer and supplications to the benevolent ruler of the universe for the continuation of his gracious favour, protection and support"[20]. God must be implored to guard the province against domestic traitors and foreign foes and to heal both internal and external dissension. All of the above strategies played out against a heightened state of apprehensiveness that a massive invasion of expatriates, supported by an infusion of sympathetic Americans, was imminent.[21]

Mewburn's plan conformed to a policing strategy that had been suggested by Governor General Colborne as early as June of 1838 and which had recently been introduced in Lower Canada. Anticipating disaffection and/or insurrection among native-born Americans now living in the Niagara townships and the Western District, Colborne maintained, "a well organized police could probably be established to keep you (Lieutenant-Governor Arthur) informed of their proceedings."[22] In February of 1839,

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[20] Rev. Thomas Green. Two Discourses Delivered at St. Mark's Church, Niagara on Friday the 14th of December, 1838. Niagara: 1838, 9.

[21] The reform newspaper, The Examiner, while no friend to "those pestilent foreigners who are endeavouring to mislead and destroy the more ignorant of our population," nevertheless believed that the government of Upper Canada was deliberately exaggerating the threat posed by "Hunter's Societies" in the United States. The manipulation of fear in frontier neighbourhoods, it was argued, was part of a Tory plot to turn the populace against Governor-General Durham and responsible government. [As reported in The Examiner, 15 January 1840 and The Spectator, 19 December 1839.]

[22] The Arthur Papers, Vol. 1, Colborne to Arthur, 25 June 1838, 207.

speculating that keeping local militia on the ready to repel small incursions across the border on short notice would prove "ruinous to (the economy) of Upper Canada," Colborne again suggested the need for a "disposable force at all times ready to repel invasion without calling the agriculturalists from their homes."[23] Colborne reasoned that creating a large military presence, militia or otherwise, on the frontier would "appear...rather calculated to create alarm than to allay excitement."[24] A small constabulary under the direction of a government appointee, however, could be mobilized to counter small strikes across the border. Presenting itself in the guise of a civil force would permit it to cloak any military intelligence-gathering that it might undertake thus reducing the risk of fuelling local suspicions of an impending invasion—thus Arthur's receptiveness to Mewburn's suggestion that the lieutenant-governor appoint a rural or border police force under the command of one or more stipendiary magistrates.[25] Local magistrates would be exempted from consideration because they and their families were exposed to malicious injury from "midnight marauders" crossing the Niagara River from the safety of the United States. On the day that Mackenzie's attack was made known in the Niagara District, Mewburn had

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[23] The Arthur Papers, Vol. 2, Colborne to Arthur, 12 February 1839, 43.

[24] The Arthur Papers, Vol. 1, Colborne to Arthur, 23 September 1838, 283.

[25] Both the lieutenant-governor and the executive council were receptive to the idea, so much so that Arthur believed that "should it be necessary, I shall adopt the same course on the western frontier—for these villains, who are making it their business to cross over and commit murders and robberies, must be stopped in their career, if possible". [NAC, C. O. 42, Arthur to the Marquis of Normanby, Vol. 462. September 27, 1839, 468.] Arthur's enthusiasm was probably motivated by expediency. On October 31, the militia and volunteers operating on the frontiers were to be disbanded, a fact, which he argued, made it "necessary to take some immediate action." He felt that the best protection would be afforded by a small police force rather than an increase in troops. On October 26, Lord John Russell acceded to Arthur's plan. It was agreed that the payment of expenses would come from the Casual and Territorial Revenue. [NAC, CO 42, Russell to Arthur, Vol. 462, 20 October 1839, 477.]

heard it publicly declared that he and every member of his family "should be butchered."[26] As it turned out, his barn was burned to the ground in July 1839.[27] In September of the same year, magistrate Ogden Creighton lost the barns and outbuildings on his Drummondville (Niagara Falls) estate to incendiarism. And earlier that spring (March 6), magistrate Malcolm Laing had lost his house and property in Pelham to the same cause. Laing emphasized to the lieutenant-governor that the "fire was caused on political grounds and not from private ill will."[28] Laing believed that it was his involvement in the Navy Island/Caroline affair[29], and in arrests that had been made of those residents of Pelham suspected of treasonable acts, that had led the arsonists to target his farm. The situation worsened when Laing endeavoured to insure his remaining barns and produce for £220. Acknowledging the receipt of his application, the British America Assurance Company wrote to Laing that their board of directors, "in consequence of the great hazard to which this description of property is at present subject, in the neighbourhood of the frontier"[30] had

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[26] NAC, RG 5, C 1, Provincial Secretary, Canada West, Numbered Correspondence Files, Swan and Delatre to J. B. Harrison, Vol. 26, File 700, 11 April 1840.

[27] Ray Corry Bond implies that Mewburn's barn was burned in retaliation for his presiding over the inquest of Captain John Usher, bringing in a verdict of murder and implicating "rebel sympathizers" [Ray Bond. Peninsula Village, a Study of Chippawa. Niagara: 1967, 50-51.] As it turned out, Mewburn's property was destroyed not by a politically motivated incendiary but as an act of revenge on the part of a man that Mewburn had committed to prison for endeavouring to induce soldiers to desert. [As found in the Journal of the House of Assembly of Upper Canada, 5th session of the 13th Parliament, Session 1839-1840, 18 December 1840.] Neither Laing's nor Mewburn's petitions to Parliament for compensation were successful. The compensation bill was lost by six votes.

[28] NAC, RG 5, A 1, Laing to Harrison, 125747-48, Vol. 229, 30 September 1839.

[29] See supranote 107.

[30] NAC, RG 5, A 1, Laing to Harrison, 125546-49, Vol. 229, 26 September 1839.

declined his application.[31] No premium they could affix, they explained, "would be commensurate with the risk to be run". So motivated, Mewburn circulated a memorial in support of the proposal among his fellow magistrates:

> We the undersigned magistrates of the district of Niagara residing upon the frontier believing the preservation of the peace and safety to the inhabitants against parties in their immediate neighbourhood and brigands from the opposite state who come over in small parties for the purpose of destroying the lives and properties of certain individuals.... requires more efficient assistance than can be afforded by the magistrates themselves many of whose lives and properties are hazarded by the performance of their duty respectfully request your Excellency will be pleased to approve a certain number of police or stipendiary magistrates on the frontier who will be able to adopt and carry out measures proper for the above purpose.[32]

It was suggested that the appointed police magistrate should come from outside the district. An unmarried candidate who owned no property in the area would be impervious to acts of retaliation. But it was for these very attributes that Mewburn's petition met with resistance from local justices of the peace. Magistrate James Cummings was among those who

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[31] Neither did Laing and the other victims receive government compensation (supranote 27). In the House of Assembly, January 1840, George Boulton, member for the riding of Durham, moved for a committee of supply to provide for the losses sustained by incendiarism. Boulton's recommendation that the same rule should be adopted in the Upper Canada as in England—that the loses should be made good by the district in which they occurred—was met with opposition. Member for the Niagara District, David Thorburn, argued that the acts of incendiarism on the Niagara frontier had been directed against the whole country and it would be both unfair and a burden on the district if it alone should bear the cost of compensation. Other members argued that the bill would encourage evil disposed persons to come over to any part of the frontier and burn houses for the purpose of subjecting the district to expensive restitution. Francis Caldwell, member for Essex, replied that he was opposed to his district being taxed for the losses in other parts of the province. George Rykert, member for Lincoln, opposed the bill on the grounds that it would set a dangerous precedent. "Any vagabond who chooses may procure another to set fire to a house and recover the value of it." [The British Colonist, 22 January 1840.] Edward Thomson, representing the riding of York, argued in favour of the bill. Once the population realized that it was liable for acts of incendiarism, it "would make them watchful." Charles Richardson of Niagara countered that the inhabitants of the Niagara District had always been watchful. Yet in spite of their vigilance, several buildings had been burnt down. "Is it fair," he added, "that we should thus be made to suffer all the loss?" Although the motion received a large majority, the bill was eventually lost and no compensation was forthcoming.

[32] NAC, RG 1, E 1, Mewburn to Harrison, pp. 126098-101, Vol. 230, 12 October 1839. The petition was taken and sent to the lieutenant-governor between Mewburn's initial meeting in Toronto, 24 September and the establishment of the stipendiary police force on October 4. In the above letter, Mewburn indicated that he would give every assistance to Col. Swan.

refused to sign, reasoning that the appointee would be unacquainted with the manners and customs of the people of the district and possibly prove to be too strict and severe.[33] In the end, the petition bore only two signatures, those of Mewburn and Col. Philip Delatre.

Cummings's apprehensions proved prophetic. The government appointed a career army officer, Lt. Col. Graves Chamney Swan[34], as police magistrate[35]. On October 5, Swan established his office in Drummondville in rooms rented from John Cole. The rent was paid from the £3.15s. per diem that the Home government had allotted to the provincial reserves "for the protection of the inhabitants during the winter months."[36] Initially, his police force consisted of six salaried officers and a deputy superintendent.[37] By January of 1841, the force had been expanded to eleven. Throughout the winter of 1839-1840, the

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[33] Ibid.

[34] At the Rebellion, Swan was assigned to "particular service". In October of 1838 he was promoted to major and it was Lt.-Gov. Arthur's intention to send him to Belleville where he would assume command of the Volunteer Corps and Sedentary Militia in defence of the town. Circumstances over which Swan had no control prevented him from arriving at Belleville as soon as Arthur wished. In the meantime, the government call for a militia at Niagara had been met with failure. Swan was consequently assigned to Colonel Henry Booth whom he was to assist in the formation of a Niagara regiment. Swan appears to have been a favourite of Arthur's and his career was monitored in the correspondence between Arthur and Colborne.

[35] Allan Greer points out that in Lower Canada the term "police magistrate" was not used until 1840. See Allan Greer, "The Birth of the Police in Canada," in Greer and Radforth, eds. Colonial Leviathan: State Formation in Mid-19th Century Canada, Toronto: 1992, 31. In Upper Canada, the term appears to have earlier currency. Lt.-Gov. Arthur wrote to the Home Office in the fall of 1839 that in consequence of the flagrant outrages on the Niagara frontier by marauders from the United States and the urgent requests of both magistrates and inhabitants of the district, he was appointing for their protection, a Stipendiary Police Magistrate and a small constabulary force. [NAC, RG7, G 12, Governor-General's Office, Letterbooks of Despatches to the Colonial Office, Vol. 32, No. 197, 27 September 1839.]

[36] NAC, RG 5, A 1, John Russell to George Arthur, pp. 127353-54, Vol. 233, 16 November 1839.

[37] NAC, RG 1, E 15 B, Upper Canada: Board of Audit of the Provincial Public Accounts, 1792-1841, Vol. 110, File l, Folder 36.

newly established police force regularly enforced an obscure law[38] requiring any person travelling by sleigh on any road, highway or beaten track to have two or more bells fixed to the harness. Non-compliance carried a fine of ten shillings. The charge need only be made before one justice on the confession or oath of one witness. By the spring, eighteen people had been fined for the sleigh-bell offence.

In February 1840, a petition from 325 fine-protesting inhabitants of Lincoln County was sent to Government House. A number of depositions sworn out before James Cummings accompanied the memorial. George Park's narrative was more or less synecdochal. While he was passing through Drummondville on his way to Chippawa, two men claiming to be policemen stopped Mr. Park and informed him that he was fined two dollars for driving a sleigh without bells. Although payment was demanded on the spot, Park refused to pay anyone other than the proper authority. When he attempted to move on, Park was threatened with a club and told that he might be held in the guardhouse overnight or until he paid the fine. One of the policemen identified himself as Philip Delatre Jr.[39], son of Stamford magistrate Col. Delatre. The younger Delatre allowed that if Park paid him one dollar, a sum to which he was entitled by law, Park could go on his way and save himself one of the two-dollar fine plus travelling expenses in the bargain. Park refused, demanding instead to be brought before local magistrate Samuel Street. Anxious to disassociate himself from Swan and his police force, Street appeared willing to ignore the infraction

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[38] *52 G 3. c. 4, 1812.* An Act to Prevent Damage to Travellers on the Highways in this Province.

[39] As it turned out, Delatre Jr. was not a police officer. Why he made this particular arrest or why he pretended to be a police officer was never made clear. In a letter to the lieutenant-governor, Swan made his position known. If there was any wrongdoing on Delatre Jrn.'s part, it was an internal matter that his office would settle. It would, however, serve as further proof to the community that Swan's constabulary was a maverick force.

until the sub-superintendent of police, Cpt. W. B. Roberts, reminded him of his duty. Park later testified, "After some little delay from the unwillingness of Mr. Street to act, wishing us to go to Colonel Swan's, but upon my refusing to do so, Mr. Street fined me. I then proceeded to Chippawa without further molestation."[40]

When he was brought before Swan, John Barker adamantly refused to pay the fine stating that he would rather go to gaol "for it was an unprincipled Act."[41] Three days later, a buffalo skin belonging to Barker was seized under warrant. By this point, the 10s. fine had increased, with costs, to £1.8.3.

In their petition to Lt.-Gov. George Arthur, Park, Barker and the other signatories, expressed their regret that the police force established on the frontier to protect property and suppress incendiarism had turned out to be a group of informers lying in wait at crossroads for opportunities to arrest peaceable individuals quietly pursuing their lawful vocations. Lurking policemen were anathema to early nineteenth-century British attitudes regarding the proper and effective strategies for deterring crime. Policing as synonymous with surveillance was considered too Frenchified, too despotic. The Highway Act permitted informers one moiety (half the fine), the other moiety going to the Receiver General. The petitioners believed that this gave "certain individuals (the police) an opportunity of deriving pecuniary advantages from the losses of their fellow citizens."[42]

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[40] NAC, RG 5, A 1, Complainants against the Niagara Police to Harrison, pp. 130908-47, Vol. 239, 1 February 1840.

[41] Ibid.

[42] NAC, RG 5, A 1, Inhabitants of the county of Lincoln, district of Niagara, to Harrison, pp. 130930-35, Vol. 239, 1 February 1840. In his response to this charge, Swan was adamant that no police officer on his staff profited in anyway from the fines. Swan's quarterly returns to the Receiver General give

Although they agreed that the law itself helped increase public safety, they pointed out that the accompanying affidavits demonstrated that "unnecessary severity and tyrannical conduct were exhibited by the before mentioned (Swan, Mewburn and Delatre) magistrates." They assured the lieutenant-governor that the district had been emotionally shaken by these harsh displays of power. They could "have no good effect," they argued, "but on the contrary will tend to mar that harmony which should be the anxious desire of every individual to establish in a community alas! too much disturbed already." Demonstrating a lack of sensitivity (and accuracy), which would typify his term in office, Swan wrote the complainants off as former rebels.[43]

A rural police force had also been established in Lower Canada in 1839[44]. The force's political mandate was to pacify any pockets of residual resistance to the colonial administration—to staunch the wounds that still bled from the Rebellion. A handbook issued to police officers noted that it was desirable that the force should be both popular and collectively respected. To this end, officers should demonstrate sobriety, obedience and civility. "The Police are not only directed to know, but, in their intercourse with the people,

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me reason to believe that he was telling the truth. His return for the period ending March 1, 1840 listed 17 persons fined 10s each for a total of £8.10.0. Throughout 1840, Swan repeatedly wrote to the lieutenant-governor for funds to pay his officers, funds that were perpetually in arrears. Reluctantly, he resorted to paying his men from his personal savings. Swan appeared to believe that accumulated fines could be carried over to the next quarter and so constitute a reserve fund from which he could pay his men and which he could reimburse when their salaries eventually arrived. The Lt. Governor's secretary, Samuel Harrison, advised him that this was inadmissible. In other words, Swan intended to use the fines as a temporary way of paying his constables and that his decision to enforce the sleigh-bell law may have been so motivated. [RG 5, A l, Swan to Harrison, pp. 132532-35, Vol. 242, 8 April 1840.]

[43] NAC, RG 5, A 1, Swan to Secretary J. C. Murdock vol. 237, 130452-55, 24 January 1840. Swan insisted that his police force was supported by "the influential or intelligent" within the community.

[44] Initially consisting of between 200 and 300 police officers, this force was considerably larger than its Niagara counterpart.

to respect their manner and usages."[45] Stipendiary magistrates were directed to restore and maintain order but in such a way that the people's confidence in the influence and authority of the magistracy might be repaired. One might safely infer that Lt. Col. Swan operated under a similar directive.

It is significant that both James Cummings and the police manual made pointed references to local customs. To be sure, in comparison to ethnically volatile Lower Canada, "customs" in Upper Canada were attenuated. Nevertheless, common to both provinces, they included the traditional and time-honoured role of neighbourhood magistrates and constables.

District Constables

In the first four decades of the nineteenth century, local constables, considered to be officers of the court[46], were kept on a short leash. Although empowered without warrant to arrest traitors, felons and suspicious persons, most constables appeared to act after the fact and only then at the behest of a court order. The court records for the Niagara district make clear that few constables, if any, either inaugurated inquiries or made arrests on their own

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[45] Anon. Rules for the Government of the Rural Police. Montreal: 1839.

[46] This is not to suggest that constables (or even judicial officials for that matter) necessarily saw themselves as such. At the Johnstown District assizes, 1833, Justice Macaulay found it necessary to fine a number of local constables forty shillings each and to forward a list of their names to the Attorney General. The fines followed "a very bad attendance of constables and it being supposed that they were not bound to attend the assizes or other criminal courts." Macaulay was unsure of the legal duties of local constables. As he informed the lieutenant-governor, he was using the fines "to determine whether the constables are bound by law to be aiding the courts of justice or not." If this was not the case, Macaulay suggested that the Legislature should take it upon itself to rectify the situation. [NAC, RG 5, B 27, Gaol Returns, Macaulay to Rowan, Vol. 2, 18 August 1833.]

initiative.[47] The number of annually appointed constables[48] in the Niagara District roughly averaged at one constable for every 300 inhabitants. Constables were apportioned to the various townships but this appeared to have had less to do with the population of the township than with local apprehensiveness. By the mid-1830s, Grantham, Bertie, Niagara and Stamford were by far the most populous townships in the Niagara District. Nevertheless, Grantham continued to have, throughout the decade, twice the number of constables as the other districts of comparable size. This was most probably attributable to the expectation that crime in the district would increase as a result of the large number of Irish navvies working on the construction of the Welland Canal.

Candidates for the office were either directly recommended by local magistrates or recommended after having been elected at town meetings[49]. Magistrate Bartholomew Tench forwarded the names of David Rice, James Hall and William Steel after they were elected at a meeting in the township of Humberston.[50] The appointments usually occurred at the April quarter sessions. In the final analysis, however, it was the magistrates sitting at

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[47] The Summary Punishment Act of 1834 specifically extended the constable's powers. Under this act, a peace officer might apprehend, without a warrant, any person found committing a trespass.

[48] No person was to be appointed a constable who was not also an inhabitant of the township in which he was to serve. Barristers, attorneys (and other officers of the court of King's Bench) as well as surgeons were exempted from serving. Foreigners, even though naturalized, were not liable to serve. According to English common law, innkeepers ought not to be made constables if there were other suitable candidates although this was certainly overlooked in the districts of Upper Canada.

[49] The 1794 town meeting for Stamford Township appears to be the first and last in which it elected its constables—John Everton, Noah Millard and Andrew Ostrander. [United Church Archives, Stamford Twp. Town Record Book, 1793-1844.] Until 1817, the annual meetings were held on the Monday of the first week in March after which they were held the first Monday in January. Male householders/freeholders over the age of twenty-one met to elect township officials, e.g. a township clerk, a commissioner, an assessor, a collector and any number to serve as town wardens, path-masters, fence-viewers and pound-keepers. The term of office was for one year. Fines were assessed for anyone failing to carry out the duties of their elected office.

[50] PAO, RG 22, Series 372, Box 17, File 3, 29 March 1834.

quarter sessions that both appointed and mustered out constables. As a control, the quarter-session grand juries oversaw irregularities. In 1831, one such jury warned the presiding magistrates that several individuals appeared to be unlawfully acting as constables in various parts of the district[51]. Rather than being appointed at quarter sessions, the renegade constables had been "authorized" by individual magistrates.[52] Another grand jury, over the objection of magistrates David Thompson and Samuel Birdsall, found constable James Smith of Gainsborough township 'incapable and unworthy" of holding his office after he behaved in "a disorderly and improper manner." [53]

Edith Firth[54] (in reference to the Home District) reminds us that these appointments were often made over the objections and against the will of those whose names had been put forward. On the other hand, the quarter-sessions records for the Niagara District show that a number of constables served, without apparent complaint, on a continuing basis. When Christopher Young petitioned the quarter sessions for an innkeeper's licence, he saw fit to support his request by offering that he was a native of the province and had acted as a constable for about ten years.[55]

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[51] Magistrates were permitted to appoint special constables when regularly appointed constables were unavailable. Whether these were such cases is not clear.

[52] PAO, RG 22, Series 372, Box 8, File 32, 29 July 1831.

[53] PAO. RG 22, Series 372, Box 33A, File 13, 13 March 1839.

[54] Edith Firth, ed. The Town of York 1815-1834. Toronto: 1966: lxxi.

[55] PAO, RG 22, Series 372, Box 33A, File 21, 19 January 1839.

In 1839, Mewburn's township of Stamford had four constables: John Prouse[56], a bailiff, John Wilson, a mason, David Duntor, a shoemaker and William Russell, a carpenter. Among the professions listed, that of "innkeeper" appeared to constitute a disproportionate percentage of constables for the entire district[57]. Accustomed to physical altercations in their establishments, innkeepers would already be familiar with most of the disreputable types within their townships. While serving as a constable might be considered one's communal obligation, innkeepers in particular, because the "community" had granted them a licence, might be said to be repaying a debt of trust. Earlier in the century, the Special Sessions of the Peace in York made the granting of a tavern licence contingent upon accepting an appointment as town constable, in the belief that this would make it easier for the tavern owner to "keep good rule and order."[58] Given that a number of prominent innkeepers like William and Adam Crysler never appear to have been constables, it is doubtful whether this practice was ever adopted in the Niagara District.[59]

Holding regular jobs, and drawn from the middling segment (including a significant percentage of mechanics) of the social hierarchy, for each appointee the constabulary was

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[56] Prouse joined Swan's force in the fall of 1839. The fact that his name does not appear on the list of constables for Stamford for the March, 1840 quarter sessions indicates that this was not a cross-appointment.

[57] Frances Ann Thompson has calculated that out of 247 Niagara District constables for whom she was able to find occupations, 112 were innkeepers. She argues that because many of the founding families had invested in inns, innkeepers were thus made acceptable to the magistracy. Sixty-five percent of all innkeepers in the district belonged to first families. [Frances Ann Thompson. Local Authority and District Autonomy: the Niagara Magistracy and Constabulary, 1828-1841. Ph.D. thesis, University of Ottawa, 1997: 156.]

[58] Minutes of the Special Sessions of the Peace, Home District, 30 March 1801. See Edith Firth, ed. The Town of York, 1793-1815. Toronto: 1962, 99-100.

[59] The Crysler's names do, however, appear on the militia lists for the district. This was a well-established way in which community and individual expressed their mutualism.

an avocation. Constables were unsalaried amateurs whose responsibilities were limited to serving warrants and summonses, pursuing and returning law-breakers under warrant, and appearing in court (including that of the coroner) as witnesses. For all of this, their sole remuneration was costs awarded by the court.[60] The constabulary was not a sinecure. Court duty was particularly onerous for those who lived at a distance from the district courthouse. Although they were given a daily allowance, there were complaints that this did not adequately compensate for loss of vocational income. Thirteen constables from the Niagara District petitioned the magistrates of the general quarter sessions to increase the fees for court appearances. They complained that their daily allowance was insufficient to support their families or "to render them in any degree comfortable during their (the constable's) attendance on the different courts held in the District."[61] Quick to make comparisons, they were fully aware that in the other districts in the province, constables were allotted a fee of not less that 5s. per diem.[62]

Armed only with a warrant, constables could expect to confront individual resistance (including threats on their lives) from those being arrested.[63] Every constable

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[60] Part of the resistance to establishing a full-time police force was economic. Perceived as being already highly taxed, local communities likely preferred the court-costs arrangement, especially so when the constable's costs were paid by the party at fault. Only in cases where there was no prosecution or in which a magistrate found for the defendant, were costs assumed by the district.

[61] PAO, RG 22, Series 372, Box 11, File 9, 20 October 1831.

[62] After the implementation of the Summary Prosecution's Act (1834), magistrates, like John Mewburn, were unilaterally awarding their district constables 5s. for appearing as witnesses at summary court for time lost from work. See, for instance, PAO, RG 22, Series 372, Box 32, File 23, Martin vs. Durham.

[63] George Black, yeoman, was charged with making a threat on the life of constable James Adams of Rainham Twp., district of Niagara. [See PAO, RG 22, Series 372, Box 31, File 14.] Like any other citizen, a constable was expected to uphold the law when personally witnessing a violation. Constable

after 1830 would have been aware that Timothy C. Pomeroy, while in the execution of his duty, was shot and killed by Cornelius Burley.[64] Between 1828 and 1840, twenty-eight people were charged in the Niagara District courts with assaulting a constable. Twelve resulted in fines or imprisonment, while eight of the accused were found not guilty. The remaining nine charges were either not prosecuted, or the grand jury found no bill.

The public might likewise interfere with the execution of a constable's orders. Although commanded by law to heed a constable's request for aid, there were scattered reports that the public sometimes chose to remain passive bystanders.[65] While constable Frederick Bachner of Crowland Township was executing an order out of the Court of Requests for the seizure of certain goods and chattels, one Samuel Hicks assaulted him. In the name of the King, Bachner commanded the assistance of innkeeper Samuel Forsyth and saddler James Skinner. Both men baulked. Bachner charged both of them with obstructing a constable in the execution of his duty.[66] As added insurance, some, like constable Edward Defield, employed assistants, presumably at their own expense. While Defield was serving

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Nicholas Smith was breaking up a fight "in the name of the King's peace", between Hyram Vince and Henry Fee at an inn on the Welland Canal when he was threatened by a group of canal labourers. Later that evening, the same group assaulted Vince. When Smith again intervened "and commanded the peace," the group beat him. [PAO, RG 22, Series 372, Box 4, File 50. October quarter sessions, 1829.]

[64] The following year, Francis Morgan was capitally convicted for the malicious shooting of Deputy Sheriff Wm. John Powell. See NAC, RG 5, A 1, Morgan to Colborne, Vol. 109, pp. 61934-37, 10 September 1831.

[65] Calls for assistance by magistrates also often went unheeded. When Midland District magistrate Hugh McGregor was "grossly insulted" by a Mr. Kenny, McGregor commanded the assistance of by-standers to arrest the aggressor. Either through fear or ignorance of the law respecting the authority of magistrates, the onlookers refused to intercede. [The Kingston Gazette and Religious Advocate, 11 January 1830.] felt the incident serious enough to publish for those who were apparently unacquainted with their legal obligations, the pertinent sections from Burn's Justice relative to arrest. The editor underlined that every citizen was required to assist any county magistrate or sheriff "on pain of fine and imprisonment."

[66] PAO, RG 22, 372, Box 4. Files 14 and 17, July quarter session, 1829.

a warrant to Benoni Nickals for debt, Nickals bolted, and had Defield's assistant John Stewart[67] not "been active enough to overtake him,"[68] Nickals would have escaped.

District constables appeared to have had a negligible understanding of the law. More likely than not, they had been chosen not for their legal expertise but for their pugnacity, as evidenced by the frequent number of constables and would-be constables, charged at summary court and quarter sessions for assault and battery.[69] In fact, appointing an especially violent resident of a neighbourhood as constable might have been seen as a way of rechannelling his antisocial aggression. In the winter of 1835, Niagara magistrate Daniel McDougal twice convicted Henry Brown for assault. Brown's name was shortly thereafter submitted to the quarter sessions for consideration as a constable for the town of Niagara and was approved on March 27. Similarly, John Mewburn convicted John Oldfield for an assault on John Prince in the spring of 1837.[70] Oldfield had been a constable for Stamford since at least 1835. In 1838, his name was still on the constable's list.[71] Like

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[67] By 1835, Stewart himself had become a constable for the district of Grantham.

[68] PAO, RG 22, Series 372, Box 9, File 22, quarter sessions, March 1931. Nickals prosecuted Defield and Stewart for assault, but the defendants were found not guilty. It was generally expected that a constable might have to use physical force in situations where resistance was encountered. However, this did not give constables carte blanche. Henry Fee was found not guilty for assaulting Thorold constable Nicholas Smith in the execution of his duty. The court did not deny that Smith had been assaulted but concluded: "the court are of opinion that there is just cause for action." [PAO, RG 22, Series 372, Box 3, File 18, January 1829.]

[69] Many of these indictments led to successful convictions. For example, Queenston constable Chester Wadsworth was twice fined for assault. [See PAO, RG 22, Series 372, Box 25, File 7 & Box 27, File 13.]

[70] PAO, RG 22, Series 372, Box 27, File 13.

[71] There were other cases in which constables had been prosecuted but not convicted. Bernard Roddy, who would eventually become High Constable, was unsuccessfully prosecuted for assault in 1833. [See PAO, RG 22, Series 372, Box 15, File 30.] Like so many of his colleagues, Roddy, too, was an innkeeper by profession.

Henry Brown and John Oldfield, many constables walked a thin line between law enforcer and lawbreaker. Alexander Wintermute, a constable for the township of Bertie, ran a licensed inn on the Niagara River. In December of 1834, eight of his neighbours, including three magistrates, informed the quarter sessions that Wintermute was in violation of his licence. His inn was characterized as a disorderly and indecent grog-shop without any fit accommodation for travellers. They claimed that the inn was a haunt for local drunkards, saying that it brought distress to their families. In a separate letter, magistrate Edmund Riselay, underlining the seriousness of the complaint, pointed out that the infractions often occurred on the Sabbath. Wintermute himself was described as intemperate and abusive.[72] Like Wintermute, Francis Proctor was both an innkeeper and constable in the town of Niagara. In June of 1831, he was convicted for assaults on Joshua Strothers and Richard Smith.[73] In 1832, Proctor was sentenced at the October quarter sessions to four weeks in gaol for keeping a disorderly and profane house.[74] The grand jury recommended that he be removed from the constabulary.[75] At the March quarter sessions the following year, magistrates William Crooks and Daniel Dougal recommended that the same. And again, William Forsyth Jr., innkeeper and constable for Willoughby Twp., was convicted in 1831 for assaulting Michael Morgan and sentenced to one month in gaol plus a fine. Despite these legal infractions, both Proctor and Forsyth continued to appear on the list of constables for the district of Niagara, Forsyth as late as the April sessions, 1835, and

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[72] See PAO, RG 22, Series 372, Box 18, File 26, 26 December 1834.

[73] PAO, RG 22, Series 372, Box 10, Files 36 & 37.

[74] PAO, RG 22, Series 372, Box 13, File 47.

[75] PAO, RG 22, Series 372, Box 14, File 29.

Proctor (first appointed in 1828), March 1838. Patrick McMahon's name also appeared on the March 1838 list as one of seventeen constables for the Twp. of Grantham even though, in 1831, McMahon had been convicted of blocking a highway with a rail fence and then again, in 1835, for an assault on Patrick Hogan.

A lack of professionalism could prove to be the downfall of a constable; but so, too, could his ties to the community. In 1829, Chief Justice Robinson speculated that the light calendar of offences at the Niagara assizes did not necessarily signal a diminishing crime rate. It might instead indicate a degree of negligence on the part of those entrusted to incarcerate criminals. Rather than fewer criminals committing crimes, Robinson hinted that more criminals were escaping from custody. Furthermore, if constables entrusted with the execution of a warrant were negligently to suffer prisoners to escape, the result could only increase an offender's "hopes of impunity". The effect could be corrupting: "It cannot be a matter of surprise if instances of collusion and intentional impropriety are soon found to follow."[76] The Niagara District quarter-sessions records appear to support Robinson's concern. In October of 1833, magistrate James Kerby informed the clerk of the peace that he had been ill-supported by constables Henry Putman and Robert Deming. In a "careless and wanton" manner, they had allowed prisoner George Huffman to escape. "I am informed," he wrote, "that Huffman (wanted for an assault on innkeeper Benjamin

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[76] Niagara Gleaner, 26 September 1829. Two years later, Robinson cautioned a Home District grand jury that "corrupt collusion" was often a cause of prisoner escapes. Cases in which there was any question of an escape due in part to the negligence of a constable, or where an escape occurred because by-standers failed to assist a peace officer when requested, were of special concern. Robinson believed that juries were obligated to enquire into the circumstances of escapes and that those found responsible ought to be "prosecuted and punished and not lightly passed over". Robinson feared that juries heretofore were lax in this respect and warned of the consequential danger especially as the population increased. [PAO, L 44, John Beverley Robinson Papers, 17 October 1831.]

Chadwick) has put all the Constables in this quarter at defiance and well he may for there is not one of the late appointed ones, viz. Robert Deming and Henry Putman, fit for the duty."[77] Assaulting a prisoner may have been forgivable; letting a prisoner escape was not. Kerby requested three or four blank forms for the appointment of "fit and proper" persons to serve as constables. The following year, both Deming and Putnam's names were deleted from the district list.

It was the government's intention that Swan's men were to be a professional, full-time force. They were, first and last, policeman. To this end, they were given regular salaries, 5s. per diem plus costs. Sent out on regular patrols[78], they were empowered to enforce laws and local regulations, and to make arrests. By October of 1840, Swan's quarterly statements to the receiver-general recorded fines collected in cases where the "prosecutor" was "the Queen". At summary court, prosecutors were private citizens, named as such in the indictment. The indictments here in question indicate that it was members of the frontier police force who had brought these cases to court. Swan's police officers appeared to be gradually outnumbering private individuals as chief criminal prosecutors. The substance of the indictments suggests that Swan's force was actively checking for unlicensed liquor retailers. They were also investigating innkeepers, and fining those

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[77] PAO, RG 22, Series 372, Box 15, File 26. Constable John Cleveland was brought before the July quarter sessions, 1835. Charles Gesso charged him with neglect of duty for letting prisoner Oliver Wadsworth make his escape. The case, however, was not prosecuted, Gesso having left the province. [PAO, RG 22, Series 372, Box 20, File 24.]

[78] It is not clear whether the government intended the Niagara special force to be mounted or footed. The government allotted them only two horses and 5s. for their keep per diem in lieu of travelling expenses.

whose stills were larger than those permitted by licence.[79] Neither could be considered moral or political crimes. Worse, the infractions were private indiscretions that deprived the district of lawful tax revenue.

Swan's men arrested without warrants. When eighteen-year-old David Baxter stole two bank notes from grocer Robert Tune of Niagara, Tune sent a Mr. Eastern in pursuit. Eastern lost Baxter but caught sight of him again the next day. Eastern reported the situation to Edward Bolton, one of Swan's constables, who, with colleague Thomas Honor, arrested Baxter at the Queenston ferry. The police officers took the prisoner to Mr. Tune at which time the prisoner confessed to having stolen six dollars from the grocer's till. Only then was Baxter taken before magistrate Lewis Clement.[80] In the winter of 1840, Charles McCarty, a juvenile employee at Adam Crysler's tavern, stole several items from John McGilly, a servant also in the employ of Crysler. If custom had been followed, McGilly would have notified the local authorities of his suspicions concerning McCarty's involvement. Then, and only then, a local constable would have been issued a warrant authorizing him to take appropriate measures—a search and/or an arrest. However, before McGilly could act, Swan's men had already apprehended McCarty "under suspicious circumstances."[81]

Allan Greer observes that the duties of the rural police in Lower Canada were also extended beyond that of searching out political subversives. They quickly turned their

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[79] These are the only cases of their kind found in the Niagara quarter sessions records up to 1841. It is difficult to imagine charges of this kind being laid in any other way than as the outcome of a deliberate police investigation.

[80] PAO, RG 22, Series 372, Box 39, File 14.

[81] PAO, RG 22, Series 372, Box 37, File 30.

attention to what Greer has called "garden-variety" crimes[82]. Like their counterparts in Upper Canada, they, too, began to enforce a piece of legislation designed to improve road safety. The 'sleigh ordinances' (first passed in 1839) regulated the length of sleigh runners, carriage height, and the type of hitch. The traditional *calèche* was implicated in forming inconvenient and unsafe mounds of snow along roads and highways. Between June of 1840 and July of 1842, the police stations at Ste. Scholastique and Ste. Martine alone had collected fifteen 10s fines. As in Upper Canada, these unprecedented police interventions in the lives, traditions and routines of the rural and village citizenry drew sharp resistance.

In Lower Canada, the situation was aggravated by the fact the majority (eighty percent) of rural policemen were English speaking, British army veterans. Although one of Swan's men was a local (John Prouse), the rest of his force appear to be have been composed of men from outside the Niagara District[83], a fact that many local residents found equally troubling. Many of the "sleigh bell" deponents pointed out that they had been detained by "strangers".

Greer maintains that, in Lower Canada, both the rural police and the police magistrates were "designed to permit the central government to bypass traditional local

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[82] Allan Greer. "The Birth of the Police in Canada", 34.

[83] Although I have been unable to find any specific reference to where and how Swan recruited his police force, a letter to Swan from Provincial Secretary Richard Tucker suggests that they came from outside the district. When Tucker informed Swan that the Niagara force was to be disbanded on 31 January 1841, Swan suggested that his men be paid a small gratuity. Tucker replied that the government was unable to accept this suggestion but would permit them to return home a few days before the end of the month to meet the needs of "those who reside at a distance from Niagara." [NAC, RG 5, C 2, Provincial Secretary's Office Letterbooks, Tucker to Lt. Col. Swan, Vol. 1, pp. 113-14, 11 January 1841.]

institutions and assert direct control over agrarian communities."[84] This was at first, and in principle, generally acceptable to some in Upper Canada. The editor of the Niagara Reporter was critical of the inefficiency and futility of the traditional arrangements along the province's frontier.[85] Unable either to detect or prevent crime, the present magistracy, the paper argued, ought to be supplanted by either a line of stations formed along the frontier or a numerous patrol of police officers actively engaged in investigating and detecting "midnight marauders."[86] Within four months, the initial enthusiasm had worn thin. On January 8, 1840, The Examiner reported that the Niagara District representative in the House of Assembly, David Thorburn, was bringing the question of misconduct on the part of the frontier police before the legislative assembly. In April, another petition bearing between 300 and 400 names was sent to the governor-general "remonstrating against their (Delatre and Mewburn's) oppressive acts."[87] Three of Swan's police officers, supported by soldiers from the 43rd regiment[88], had entered the house of William Hopkins, a British halfpay officer, who was farming near Chippawa Creek. They were looking for an army deserter that Hopkins was purported to be harbouring. No deserter was found, and heated

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[84] Allan Greer, 'The Birth of the Police in Canada", 31.

[85] So too was a quarter sessions grand jury. Investigating a fire in the Twp. of Pelham, the jurors concluded that it was the work of an arsonist. Alarmed by the increased incidences of arson along the frontier, the jurors intimated that the district magistrates might be incapable of preventing them. The jurors suggested that, at the very least, the magistrates should offer rewards for the capture of this and any other incendiary. [PAO, RG 22, Series 372, Box 33A, File 14, March session, 1839.]

[86] Niagara Reporter reprinted in the Toronto Commercial Herald, 30 September 1839.

[87] The Examiner, 1 April 1840.

[88] As part of his mandate, Swan was given permission to call upon local garrisons whenever he felt it necessary.

words were exchanged between Hopkins and the men searching his home.[89] Hopkins was brought before Swan, Mewburn and Delatre and was bound over on his own recognizance, a sum of £100, to keep the peace for one year towards Her Majesty's subjects, particularly to the officers of the 43rd regiment, and was ordered to pay costs.[90] In reporting on the case, The Examiner pointed out what was by now obvious to most, that Delatre and Mewburn, because of their association with the special constabulary, "were very unpopular in the neighbourhood in which they live."[91] Not only was the force believed to be unduly interfering, it was also proving itself incapable of preventing acts of political sabotage. In the spring of 1840, the pedestal and column of the Brock Monument were cracked and the observation deck blown away by a bomb believed to have been planted by disaffected rebels under the command of Benjamin Lett. Although Swan sent some of his men to the United States to investigate, no arrests were ever made. Having run out of patience, the Niagara Reporter excoriated: "After the burning of the Chippawa Church, we hinted at a foot or horse patrol from those who are paid for doing nothing (the army)—as to the so called police company, it is a 'Humbug,' a useless Bugbear."[92]

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[89] NAC, British Military Records ("C" Series) 915, 79-85.

[90] If a disillusioned Hopkins felt that the law had failed him in these proceedings, his apostasy was short-lived. At the June quarter sessions for 1840, he successfully prosecuted William Haggerty. Haggerty was sentenced to two years in the provincial penitentiary for stealing twenty of Hopkin's chickens having an estimated value of 20s.

[91] The Examiner, 1 April 1840.

[92] Reprinted in The Examiner, 3 June 1840.

On October 8, 1840, an open letter addressed to Governor General Sydenham appeared in the Montreal Herald[93]. The writer, identified only as "an American Traveller", complained of an "outrage committed against (himself) and a party of friends while travelling under the supposed protection of British Law."[94] Shortly after arriving in Chippawa on the 18th of September, the party of Southerners found their hotel surrounded by "about forty or fifty negroes, clad in British uniform and armed with bayonets as British Soldiers!"[95] Word had reached the local black militia that two female slaves accompanied the Americans. Sergeant William Sims resolved that he would inform the women that being on British soil entitled them to their freedom. The "Traveller" reported that, should there be any resistance on the part of the Americans, the blacks threatened that they were prepared to "wade knee deep in blood." First noting that the regiment's captain was nowhere to be found, the "Traveller" related that:

> our eyes were turned to the civil authority, and a message was sent to the magistrate or intendant of police, by the intelligent keeper of the hotel, Mr. Crysler. We desired the peaceable protection of the law, and this failing we wished for ourselves and or the brave and honourable men whose assistance was freely proffered, to legalize anything which it might become necessary to do. This magistrate's name as we were informed, is *Swan*, and was styled *Colonel*! ...he was informed that the law was outraged, and that the ladies were alarmed and in distress; and he refused to make his appearance at all, or to interfere in any manner whatever. ...your Excellency will judge whether *Colonel Swan's* neglect of duty arose from cowardice or corruption.

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[93] The letter had first appeared in the New York Courier and Inquirer. The letter also appeared in the Toronto Patriot on October 9.

[94] Toronto Patriot, 9 October 1840.

[95] Lieutenant Governor Arthur put the figure at "from 12 to 15 at the utmost." [Arthur Papers, File 1529, Arthur to Sydenham, 23 October 1840.]

Sydenham instructed the lieutenant-governor to sort the matter out. Arthur reported that Swan's reluctance to interfere was based on three considerations. First, as no application had been first made to the officer of the company, Swan was led to discount the seriousness of the affair. Second, Adam Crysler's summary account of the incident led Swan to infer that the senior officer present could easily handle any violence that might erupt. The third point referred to the racial animosity that informed the town of Chippawa, an animosity personified by William and Adam Crysler. Swan wrote to Arthur that his coolness to Adam Crysler was predicated on "Mr. Crysler's antipathy to the coloured people, whom several of the inhabitants of Chippawa had previously declared they would not permit to remain in the town, and thinking that the complaint thus preferred, if complaint it could be called, was frivolous and only made in furtherance of his hostility to the Coloured Race..."[96] J. G. Horne, an eyewitness to the hostilities at Chippawa, supported Swan: "one of the bystanders, an American, after abusing a black sergeant with foul and taunting language, at length struck him in the face."[97] Arthur concluded: "The letter under the signature of 'a Traveller' is not the production of the gentleman from whom it purports to emanate, but of some person resident at Chippewa (sic) who seized the opportunity of giving vent to some bad feeling towards Lt. Colonel Swan, and the coloured soldiers."[98] Swan intimated that the letter was retaliatory. Three months earlier, William and Adam Crysler had appeared before Swan and Delatre and fined £3.7.3 each for an assault on John Johnson, a black

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[96] PAC, RG 5, A 1, Swan to Arthur, Vol. 249, 135516, 12 October 1840.

[97] PAC, RG 5, A 1, Horne to Harrison, Vol. 249, 135531, n.d.

[98] Arthur Papers, Arthur to Sydenham, File 1529, 23 October 1840.

resident of Chippawa.[99] Arthur noted that Swan's police force were the unceasing target of petty jealously on the part of the local magistrates. "The truth is," he wrote Sydenham, "the Police Magistrate's appointment interferes with their Worship's profits—some miserable fees being thereby seriously diminished."[100] It was crucial, he argued, whether or not he was derelict in his duty in respect to the Chippawa incident, that Swan not be lowered "before the parties who have so much annoyed him, and as I believe conspired to counteract the benefit of a Police Establishment on the Niagara Frontier".

Four months later (January 31, 1841) the constabulary force under Swan's management was disbanded. During its fifteen months of operation, it arrested no arsonists and brought no political subversives to trial. It did, however, succeed in alienating a substantial portion of the district citizenry. A review of the cases that came before Swan's court makes Arthur's claim of petty jealously doubtful[101]. Aside from a few assault cases (many of which either favoured black defendants or members of the military), Swan primarily dealt with individuals selling spirits without a licence, drunkenness, illegal stills and, as detailed above, sleigh bell infractions. In almost all instances, Swan had acted against both the middling sections of the population and the propertied elite—innkeepers, doctors, prosperous farmers and magistrates[102]. In one of his last acts in office, Swan

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[99] PAO, RG 22-372, Box 38, File 11, June 1840.

[100] Arthur Papers, Arthur to Sydenham, File 1530, 23 October 1840.

[101] If Swan could be said to have had any unfair advantage it would be that his jurisdiction literally—vis à vis his policeman—extended over the entire district.

[102] Among those fined that first winter were nine farmers, three inn (tavern) keepers, one surgeon, one tinsmith, one brewer and one soldier. Needless to say, it would be unlikely that labourers would be in a position to own a sleigh.

arrested nine more individuals for violations of the sleigh bell offence, one month to the day before he closed his office doors.[103] Among those arrested were three magistrates: Henry Mettleburger, Lewis Clement and the afore mentioned Samuel Street. There being no doubt that all three were familiar with the controversial law, it is difficult to accept the violations as anything other than deliberate. It is tempting to interpret the action of these magistrates who had sworn to uphold the law, as civil disobedience; not so much a protest against the individual law itself as against the method of its enforcement. Their defiance was both symbolically demonstrative of the low esteem in which the magistracy of the Niagara District held Swan's style of peace keeping and a show of their solidarity with the numerous denizens who had voiced their displeasure with Swan, his myrmidons Mewburn and Delatre, and his police force. Notwithstanding, Swan's term in office foreshadowed the demise of paternalistic justice in the various districts and its replacement with salaried magistrates (beginning with Kingston in 1847) consonant with the arrival of responsible government. Often legally educated, these future magistrates would, as Greg Marquis has observed, have a greater hand in the administration of the police[104]. And as the expansion of summary justice brought more types of criminal cases within their jurisdiction, these new magistrates would find themselves presiding over an invigorated and increasingly powerful lower court.

It is clear from his private correspondence that by the late fall of 1839, Lieutenant-Governor Arthur believed that the Patriot threat on the frontier was nowhere as great as

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[103] PAO, RG 22, Series 372, Box 41, File 5.

[104] Greg Marquis. "The Contours of Canadian Urban Justice, 1830-1875", 271.

was publicly reported[105]. In a private dispatch to the Marquess of Normanby, dated September 17, 1839, four days after the church at Chippawa was burned, Arthur alluded to the rumours concerning the disaffected within the province and their patriot allies on the American frontier. He acknowledged the whispers of plots and conspiracies (the rumour that Russian agents were "at the bottom of all"[106]) and the additional excitement created by the various meetings in favour of responsible government:

> I apprehend, however, that these reports gathering strength, and augmenting terror, as they pass on from alarmist to alarmist, are founded upon what is the desire (my emphasis) of the disaffected in the Province and their partisans on the American Frontier, rather than upon what they will actually attempt.

Arthur was concerned about politically inspired crimes only insofar as he feared they would provoke loyal British subjects to commit acts of retaliation against border communities in the United States.[107] It would, he informed the Marquess, "require great vigilance" to prevent the latter, and the unsettling effects that they would have on

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[105] In November, he confided to Lord Somerset that "the Brigand War is now, I think, over." [The Arthur Papers. Arthur to Lord Fitzroy Somerset, 11 November 1839, 308.]

[106] NAC, RG 7, G 12, Arthur to the Marquess of Normanby, Vol. 32, Dispatch 191, 17 September 1839. In a letter to Lord Somerset, Arthur confided that the Patriot funds had been depleted "Tho' I hear it as a profound secret from a thousand Quarters, that the Russian Govt. will supply them with the sinews of War to any extent." [The Arthur Papers, Arthur to Lord Fitzroy Somerset, 11 November 1839, 308.]

[107] Arthur may have had in mind the burning of the American steamer Caroline by militia and naval troops under the command of Allan McNab. As Gerald Craig has noted, the Caroline affair spread a pall over Anglo-American affairs for several years after. [Gerald Craig. Upper Canada: The Formative Years, Toronto: 1963, 250.] Mackenzie, in fact, reported many such acts. He claimed that in March the "loyal volunteers" from the Canadian side burnt three barns at Champlain. Two days later, three more barns and three other buildings were burned at Rouse's Point. Mackenzie wrote that footprints left in the snow were traced back to Canada. [Mackenzie's Gazette, 30 March 1839.] An anonymous letter to the paper claimed that in November of 1838, 74 homes and 22 barns were burned, 335 houses pillaged, 131 women and 243 children turned into the street in the county of L'Acadie "by the Nero of my country, Sir John Colborne." [Mackenzie's Gazette, 4 May 1839.] Retaliation seems to be the order of the day, wrote Mackenzie, "God only knows where it will end." [Mackenzie's Gazette, 23 February 1839.]

Canadian/American relations. Arthur had consistently held this view from the spring of 1838:

> ....it is heart rending to see how the families of the loyal People of this Province are harrassed (sic). It is more than men can bear quietly and cost what it may, this state of things must be put down, or those who are loyal now will turn their arms another way.[108]

The Imperial government concurred. Writing to Arthur concerning the dangers of pursuing brigands back across the border into the United States, H. S. Fox wrote:

> "I repeat, that I consider the retaliatory infringement of the neutral rights of the American territory, as almost unavoidable, in the event of the threatened invasion of Canada being actually attempted:—but the consequences would be of such extreme and fearful importance, —involving the instant probability of a national war,—that the act ought certainly not to be sanctioned, so long as any other possible means should remain, of giving adequate protection to Her Majesty's subjects.—These arguments apply, most of all, to the supposed case of a pursuit of the invaders into the American harbours, or of a landing upon the American shore.[109]

Although I have found no evidence that would suggest that Swan employed nefarious or covert tactics in order to unearth the political machinations of ultra-loyalists in the Niagara District, it is clear that his overt policing strategy, especially the enforcement of the sleigh bell laws, was meant to illustrate that it was the Crown (embodied in the stipendiary police force), and not local factions, that was in control. In no small measure then would Swan's constabulary dedicate itself to policing its own population as well as protecting life and property from those raiding across the border.

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[108] Arthur Papers, Arthur to Colborne, June 26, 1838, Vol. 1, 209. At this time, Arthur urged that a special police force be struck that "will give confidence to the Community for at least twelve Months."

[109] Arthur Papers, Fox to Arthur, November 10, 1838, Vol. 1, 363.

The visible and constant show of force was calculated to assuage local fears by giving tangible proof of government power and authority.

The Magistracy

Swan had served only one master. The traditional magistrate had to serve two. The local justice of the peace was, as Susan Lewthwaite notes, required to perform a balancing act. He was a mediator between "two concepts of order"[110]: the neighbouring community, with its subjective and customary understanding of justice, and state law, an objective (and very often inflexible) instrument.

Local magistrates were patronage appointees. In the absence of a hereditary landed gentry, the Upper Canadian government had little other choice than to select from a middling group of relatively affluent farmers, pensioned army officers, professionals and businessmen. As the Magistrate's Books indicate, occupations included among others: mill owners, merchants, and postmasters. A magistrate's pedigree was predicated on a combination of recent ancestry and wealth (both of which were probably believed to entail loyalty) as indicated by the favourable notations found beside a number of names: "very old settler", "American; good property", "respectable Quaker", "a loyal man".[111] Some local requests for magistrates were tailored to the particular characteristics of the community. Scottish inhabitants of Williams Township in the District of London "were desirous that Magistrates understanding their own language should be appointed among

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[110] Susan Lewthwaite, "Violence, Law and Community in Rural Upper Canada," 368.

[111] NAC, RG 8, Series I-1-H, Magistrate's Books, 1836-1920.

them."[112] The petitioners also noted that the townships of Yarmouth and Southwood, about 1,200 settlers strong, were anxious to have magistrates who spoke and/or understood Gaelic. There was obvious concern within these ethnically mixed communities that minority interests might not be served. Eight months later, magistrate Murdock McKenzie recommended Edward Mikell as a suitable candidate to serve as one of the magistrates in the township of Yarmouth. Mikell was presented as "an Englishman of respectability in good circumstances (who) has a good deal of influence in his immediate neighbourhood which is wholly settled by Old Countrymen."[113]

The community appeared to recognize that an effective magistracy required men of good social standing. The inhabitants of Brock took issue when Matthew Cowan's name was put forward as a candidate for the commission of the peace. The community was concerned lest this man of "common everyday character"[114] succeed: "Your petitioners therefore not as claiming the prerogative of appointing or choosing officers but as individuals whose peace and welfare depends principally on the administration of His Majesty's wholesome and well digested law humbly pray your excellency-in-council that some other person of the township of Brock may be appointed in his place..." The petitioners might also have been hinting that Cowan was not a man of financial resources. The financial independence of prospective magistrates was a necessary condition for holding office. Without it, magisterial neutrality might be compromised, leaving the

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[112] NAC, RG 5, B 29, Court Records, 1798-1864, Vol. 14, Reverend McKillan to Lieutenant-Governor Arthur, 19 December 1838.

[113] NAC, RG 5, B 29, Vol. 14, McKenzie to Lieutenant-Governor George Arthur, 17 August 1839.

[114] NAC, RG 5, B 3, Loyal Subjects and Inhabitants of Brock to John Colborne, Vol. 9, 1081-82, n.d.

magistrate vulnerable to the influence of special interest groups. Writing on the subject to the lieutenant-governor, magistrate Murdock McKenzie was unable to recommend Major Hunt to the magistracy for the township of Yarmouth:

> ...I beg to state that I believe there can be no objection to him as a gentleman yet from his want of influence in his own immediate neighbourhood and being so little known elsewhere and likewise from his present pecuniary circumstances I would be afraid of his having much weight or independence particularly as his principal creditor is the leader of the radical party in this section of the country to whom I believe he owes about £450. I would be afraid of his having an undue influence on his conduct.[115]

Yet it was their very prosperity that opened the magistracy to criticism from political reformers. Because they were unsalaried "volunteers", the Reform press attacked them for being too concerned with their commercial activities to attend properly to their official duties. The editor of the Niagara Gleaner expressed his concern over newly appointed Niagara District magistrates: "(they) are merchants and thus more concerned with business hours than with court hours."[116] This charge certainly had some substance. In 1833, the Commission of the Peace for the Niagara District contained the names of 86 magistrates.[117] Such lists, regularly published in district newspapers, could be misleading. The Magistrate's Books, kept in the office of the Provincial Secretary, noted that for the Niagara District, 1833, of the 86 names listed in the commission, 16 were dead, 11 had left either the province or the district, 6 indicated that they would not act, 5 were objected to, 2 were not sworn and, in one case (James Birdsall), no such person could be found. For some

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[115] NAC, RG 5, B 29, Vol. 14, McKenzie to Lieutenant-Governor George Arthur, 17 August 1839.

[116] Niagara Gleaner, 16 May 1827.

[117] Niagara Gleaner, 12 October 1833.

of the active names (45) on the list, a commission might entail nothing more burdensome than sitting on the assize grand jury once a year. For others, it might mean recommending a neighbour for a tavern license. And, if the Reform press was correct, for any or all of these, it meant getting out the Tory vote at election times. Only a dozen or so names from the list regularly appear both in the quarter sessions'/summary court reports and in the district gaol returns as the committing magistrates. Of the eighty-six magistrates, court records indicate that only thirty-two (thirty-seven percent) were actively engaged in some continuing judicial capacity.

Sensitive to criticism on these grounds, government officials argued that because most magistrates were actively engaged in other occupations, several were required for each township in order to increase the odds that inhabitants would always have quick access to at least one. Even so, Eleanor Fitzgerald of the town of Niagara, bedridden after being beaten by her husband, Patrick, sought in vain for a magistrate to bind her husband to keep the peace. Constable Jacob Dockstader, acting on her behalf, had first approached Thomas Butler who would intervene only if Dockstader could procure a second magistrate. Morden Crysler claimed he was too busy to attend and Daniel Dougal refused to interfere; likewise, magistrate John Alma. Fitzgerald outlined the same in a petition to Lieutenant-Governor John Colborne. Pleading that her life was in danger, she asked Colborne "to direct or command some one of the magistrates here to attend to the subject and thereby save the life of a person who no one (in truth) can say anything against."[100]

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[100] PAO, RG 22, Series 372, Box 20, File 17, 28 May 1835. Chief Justice Robinson acknowledged to a Newcastle grand jury that in more than one district, quarter sessions were frequently impeded, or even left undone, because the court could not procure a sufficient number of magistrates. In such cases, he

The editor of the reform newspaper, The Liberal, proposed that the majority of magistrates were morally unprincipled and destitute of talent, chosen in the end only for their sycophancy. There are, it elaborated:

> ...men in the new Commission of the Peace, not one hundred miles from St. Thomas, who are ignorant of the principles of the British Constitution (although it is invariably their watch-word), ignorant of the Laws and history of even their own country—who scarcely know whether they live under the temperate or torrid zone, and who are utterly unacquainted with every kind of public business, even in its simplest forms.[101]

In fairness, many of those appointed magistrates had little or no legal training[102]. Until Toronto lawyer W. C. Keele published his The Provincial Justice or Magistrate's Manual.... for the Use of the Magistracy of Upper Canada in 1835, justices were without written authority as it pertained to both the finer points of law and the duties of a magistrate explicitly within the province.[103] This had the effect of making it difficult to determine, when a magistrate acted out of order, whether it was through ignorance or design. Gore District JP, Daniel O'Reilly, was a case in point.

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offered, the laws were never so defective that the Executive Council could not provide a temporary remedy, although Robinson neglected to specify what this might be. [Cobourg Star, 3 October 1832.]

[101] The Liberal, 22 August 1833.

[102] In 1837, the legislature conflated petty and grand larceny thus placing cases of larceny within the purview of the courts of quarter session with the understanding that the presiding magistrate must be a barrister.

[103] Previous to Keele's handbook, magistrates relied on a combination of provincial statutes and either Burn or Williams's Justice. Richard Burn's The Justice of the Peace and Parish Officer consisted of five ponderous volumes, containing poor laws, excise laws and much else that had no application to Upper Canada. By the year 1800, it had gone through nineteen editions. The editor of the Dundas Weekly Post believed that both Burn and Williams frequently led magistrates to commit mistakes [Dundas Weekly Post, 25 August 1835.], an opinion which appears to be born out by the actions of magistrate Daniel O'Reilly as found below. In Keele's handbook, all superfluous matter was jettisoned. Keele introduced only such English criminal law as was consistent with that introduced into Upper Canada and only that which was not repealed by subsequent provincial statutes.

On March 10, 1821, constable Thomas Kindry appeared before magistrate James McBride to swear out a deposition. Kindry testified that in July of 1820, he had received a warrant from O'Reilly to "take certain persons therein named for having unlawfully exhibited on the Sabbath day as a show, a certain wild animal called an Elephant."[104] The event had taken place in a farmer's barn at Burlington Bay. Kindry had been given an additional piece of paper outlining that a sum of eighteen and one-quarter dollars was to be paid by each of the exhibitors. If they complied with the fine (which they did), Kindry was instructed to let them go on their way. If not, he was to bring them in. Kindry added that, around the same time, he had turned over a sum of twenty-three dollars to O'Reilly levied under a warrant for a breach of the Salmon Fishing Law after giving the malefactors the choice of paying the fine on the spot or going to court to face the charges. On the 17th of April, the inspector general notified the lieutenant-governor of the "extraordinary conduct" of O'Reilly, acknowledging that the fines mentioned in Kindry's deposition had not been received by the receiver-general[105]. O'Reilly was brought before the district court of quarter sessions in April and acquitted for withholding fines. In a letter to the lieutenant-

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[104] PAO, RG 4 - 1, Attorney General: Pre-Confederation Records, General Correspondence, Box 1, 10 March 1821.

[105] The misappropriation of fines appears to have been a problem of some proportion in Upper Canada. In 1840, the House of Assembly struck a committee under the auspices of the Inspector General's Office, to look into the question of fines. The committee recognized that in extensive, but thinly populated areas, it was nearly impossible to monitor the "ill kept accounts" of the magistracy. The law had turned magistrates into public accountants who were required by law to turn all collected monies over to the Receiver General "but it is needless to remark on the latitude allowed to the will and pleasure of the parties themselves, by the apparent absence of any inspecting or coercive power by the intervention of which, laxity might be prevented, and default, if existing, be discovered." In the best of all possible worlds, the committee recommended, the accounting duties of the present JPs would be turned over to a District Inspector or other regularly paid officer who would become the sole receiver of any money deriving from the sentences imposed by any magistrate. [Upper Canada Appendix to the Journal of Assembly. Report of the Inspector General's Office, 5th Session, 13th Parliament, Vol. 2, 1839-1840, 6 January 1840, 56.]

governor dated July 19, 1821, O'Reilly explained that upon consulting Burn's Justice as his authority, he discovered that, by statute, when a private house was used as a place for public entertainment on the Lord's day, and if the public was admitted for money or tickets sold, the promoter(s) managing the same were subject to a £100 fine which might be assessed by a "simple magistrate". Furthermore, he found that any person driving cattle or travelling with a wagon on the Lord's Day was subject to a 20s. fine. Having driven their elephant on a Sunday, it was O'Reilly's understanding that the exhibitors were most certainly candidates for the lesser fine. He was adamant that the details of the case were accurate, they having been related to him by a respectable, although indigent, informer under oath. Knowing that the promoters had arranged in advance to exhibit their exotic animal in York and other places, and there being no question of their guilt, he did, for their accommodation, make out a bill of the fine and costs rather than subject them to a time-consuming trial at quarter sessions. His motivation, he apologized, was to render justice to the parties and faithfully to discharge his duties as a magistrate. But this was the crux of the matter. O'Reilly had no clear conception of what those duties were. He admitted that he had been informed by a "professional gentleman" that fining without trial was incorrect, but had followed "from my inexperience and the want of the knowledge of the law which would be the height of my ambition to possess but which I have never had an opportunity of acquiring." As to the fines, if he had "a right conception of the directions given in Burn's Justice," one third was given to the informer and, in his capacity as a town Warden, the remainder was to be redirected to some "charitable purpose". If he was incorrect (which

he was), he looked to the lieutenant-governor for guidance as to "what manner it (the fine) ought to be disposed of."[106]

The high expectations placed on magistrates by both the senior judiciary and the reform press were misguided. By law, magistrates investigated breaches of the peace only (unless personally witnessed) upon complaints from the public. It was the magistrate, as Robinson frequently lectured grand juries, who, when he enforced the law uniformly, constantly and impartially rather than bluntly, severely and inconsistently, was a "terror to evil doers."[107] The magistracy was the bedrock that sustained the communities' confidence in its ability to combat crime, violent or otherwise. It was of particular importance that each magistrate, as an administrator of the law, should set a personal example for others. They should be dutiful and obedient as well as correct in their own conduct.

This was the ideal, but seldom the reality. As Allan Greer points out in his discussion of the judicial system in Lower Canada, the magistracy was populated by part-time amateurs (as was the constabulary) rather than professional government subordinates[108]. As was the case with militia officers, magistrates came from, and were very much a part of, their respective neighbourhoods. Their mixed allegiance, although it did make them effective local adjudicators, meant that were poorly suited to serve as agents of state power. James Cummings admitted as much when he acknowledged that magistrates must act within rather than outside of the customs and manners of the

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[106] O'Reilly survived the ordeal. In the spring of 1829, he was one of the principal magistrates at quarter sessions that orchestrated the questionable removal of George Rolph from the office of clerk of the peace for the Gore district. (See chpt. 6).

[107] The Canadian Emigrant, 17 August 1833.

[108] Allan Greer. "The Birth of the Police in Canada", 19.

community. To preserve the peace, magistrates had to be moderate and conciliatory. Legal judgements, when measured against the good of his community had, of necessity, to be discretionary. Justice might be said to be blind, but an effective magistrate had to be unblinkered when he passed sentence. That justices of the peace acted principally as community-dispute officers, more so at petty sessions, is illustrated by a series of summary decisions made by John Mewburn. That the community, in its turn, closely monitored the judicial behaviour of its magistrates is illustrated below by a petition that makes pointed reference to a number of instances in which, it was argued, Mewburn had acted outside of these parameters.

Three cases from the fall of 1834 give us a rare insight into how at least one magistrate constructed his legal judgements. On Sunday, November 30, Stamford mason Elija Evitts, an axe on his shoulder, was passing by Wm. Russell's chapel when a barefooted Edgar Berryman seized the axe from behind and threatened to split Evitts down the middle. Two malicious swipes at the deponent demonstrated aggressive intent. Berryman complained that Evitts had taken the axe from his house that day without paying for it. Berryman's son deposed that Evitts had given the axe to the Berryman family the previous winter in exchange for future "treats"—an informal contract—which had amounted, over the course of a year, to three quarts of whiskey. Berryman was laying claim to a customary Upper Canadian practice: the purchase of goods and services not with cash but for future considerations. Evitts claimed that no such "sale" had ever been made. He had lent the axe to Berryman in exchange for a quart of whisky, and on the Sunday in question, was reclaiming his property. Had there been a breach of contract? Who was

Mewburn to believe? His decision was ultimately influenced as much by his acquaintance with the moral reputations of his besotted neighbours as it was by the "facts" of the case. In his judgement, Mewburn remarked that Evitts and Berryman were two of the most drunken reprobates in the township. Berryman, he pointed out, neglected his family and set an evil example by never attending church or sending his family there.[109] This appeared to tip the scales in Evitts's favour. With Solomon-like gravity, he decreed that the prosecutor, Evitts, was awarded the axe but was to pay for the whiskey drunk at the time of the sale or loan. The defendant, Berryman, was either to return the axe or pay a fine of 4s. 4d. The parties were to pay court costs between them as punishment for breaking the Sabbath.[110] The almost-even distribution of punishment was an indication that Mewburn realized that disputes between neighbours were seldom one-sided and was probably intended to reconcile the disputants.[111]

Mary Offerd, wife of William Offerd, a Stamford storekeeper, prosecuted butcher Thomas Newton for assault. Offerd had sent her son to Newton's shop to buy a beast's

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[109] The fact that Berryman had been a Stamford constable in 1829 appeared to have little positive affect on Mewburn's estimation of his character.

[110] In adjudicating this case, Mewburn blurred fine legal distinctions. Complaints of larceny (unless trespass) could not be dealt with at summary court, yet this case clearly involved accusations of theft. It also raised contractual questions that were dealt with at either the Court of Requests or at the assizes as a civil case. Evitts initial charge would have been for assault but it is clear that Mewburn's decision in this case had to encroach on the aforementioned legal areas if he was to have any hope of establishing a peaceful reconciliation between these neighbours.

[111] While still having a strong penal effect, assessing fines cost the district nothing. The virtues of fining would not have been lost on Mewburn. Both flogging and the pillory were shaming rituals that led to subtle, often permanent, shifts in the social equilibrium. By avoiding jail sentences, the community did not experience a loss of labour power nor did the families of the culprits' families suffer a prolonged loss of income, or, in more serious cases, have to fall back on public charity. Finally, the community (State) received reparation for the wrong done to it rather than itself having to pay for the costs of punishment. [See Georg Rusche & Otto Kirchheimer. Punishment and Social Structure. New York: 1939, 169.]

heart on account. Newton refused the sale and a short time later the boy returned with his mother, at which point a dispute broke out between them over an outstanding bill. Newton seized the beast's heart from Offerd's son and ordered Offerd out of his shop threatening to "slush" her if she didn't comply. As she stepped out into the street, Newton took a shovel full of animal blood and straw from the floor and flung it at her. He threw two more shovelfuls, covering her from head to foot. First noting that there was but a small quantity of blood on her apron, Mewburn declared that Offerd was "well known in the village as a great abuser of all parties when in passion!"[112] Newton was to pay costs and provide soap for washing Offerd's cloths. Drawing on his knowledge of neighbourhood affairs, Mewburn advised Offerd "to keep silence (sic) and avoid (the) offender." Mewburn's warning seemed to indicate his concern with keeping the future peace between the parties.[113]

And finally, on September 24, saddler Patrick Donahue met John Riley outside the Whirlpool Tavern where Riley was employed. The two men agreed to trade horses. After taking Riley's horse for a short ride, Donahue determined that the horse was glandered. He demanded that Riley give him back his horse, but Riley refused. Donahue believed he was left with little other option but to charge Riley with forcible theft. Mewburn judged that

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[112] PAO, RG 22, Series 372, Box 18, File 13, 30 December 1834. Whether as a consequence of her "passion" or not, Offerd certainly had made enemies of some of her neighbours. James Manly was convicted for attempting to strangle Offerd [PAO, RG 22, Series 372, Box 27, Series 13, April 1837.] and later convicted for trespassing on Offerd's "unfinished" house, chopping away the corner and doorways with a hatchet or axe. [PAO, RG 22, Series 372, Box 33, Series 9, 1838.] Mewburn presided over both cases.

[113] Lest it be thought that Mewburn might have favoured his *petite-bourgeois* neighbour, he, on another occasion, had fined Newton two dollars plus two dollars costs for an assault on carpenter George Green, July 1835. [PAO, RG 22, Series 135, Series 372, Box 20, File 9.]

each man had endeavoured to cheat the other. He ordered the complainant to pay for the summonses and the defendant to pay for his witnesses. He further advised Riley that if the horse was ill, Riley was to return it and take back his own. Once again, by distributing the punishment between the parties, Mewburn most likely hoped that if both parties felt that they had been treated equally their animosity might be cooled.

In all three cases, Mewburn's objective, above and beyond enforcing the law, was to reconcile the disputants, to re-establish what the sleigh-bell petitioners had referred to as communal harmony. Many of the cases that Mewburn adjudicated were not as one-sided as a prosecutor's deposition might indicate.[114] As the chairman of the London grand jury, Colonel Burwell advised the grand inquest:

> In cases of alledged (sic) assaults and batteries, complaints are sometimes made before Grand Juries of a trifling and vexatious nature; where whiskey has been the cause of quarrel; where, if both parties could have had justice done them, they would have been placed in the stocks for their immorality. —Often, when if you had heard both sides it would have been difficult to decide who most deserved punishment, and when neither have received injury but from their intemperance.[115]

Many assaults, attacks on private property and even thefts were but flashpoints in long-standing disputes or feuds between prosecutor and defendant or their families. When Mewburn believed that a summary conviction would not deter an individual from further legal violations, he would pass him up to quarter sessions where a more formidable sentence might be assessed. When ship's carpenter John Fitzmorris was accused of stealing

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[114] There are other cases in which Mewburn's decisions were tempered by the provocative behaviour of a prosecutor. When Margaret Moore charged Catherine Hamuel with assault, Mewburn stated that it appeared that Moore had used abusive language. Consequently, Hamuel was not fined but only assessed 15s. for costs. When Charles Nugent and John Butler beat each other with pails "due to violent language", each party was found subject to blame and fined one dollar each. Both men received a severe reprimand from Mewburn. [PAO, RG 22, Series 372, Box 20, File 9.]

[115] Gore Gazette, 27 April 1829.

a silk handkerchief from innkeeper George Croft, Mewburn wrote to the chairman of the quarter sessions, William Butler: "I have committed a man to gaol for a little infatuation!! in making a small mistake. It appears he has made one previous to this and as he may continue this system of infatuations, I send him to you."[116]

If Mewburn was unable to reconcile the disputants, the result could be an escalation of interpersonal violence. In the last week of June 1836, magistrate and gentleman farmer Capt. Humphrey John Tench sent his man to retrieve a small pig that had wandered on to the property of neighbour Robert Williams. Mrs. Williams refused to hand over the animal unless she was paid 1s.3d. for its keep while on her farm. On July 4, Tench and his son returned to the Williams farm whereupon Tench, according to his deposition, was struck with a stick, pelted with stones, seized by the shirt and abusively ordered off the property.[118] Later that same day, Tench pressed charges. Mewburn subsequently ordered Constable George Clark to deliver a summons requesting that Mrs. Williams present herself to answer to the charge. A bedridden Mrs. Williams refused to receive him. Clark instead left the summons with Williams's son. At the hearing, Tench's hired hand, Arthur Carson, testified that he had heard Mrs. Williams threaten to kill the pig. On the morning of the 4th, Carson saw the animal dead in the road. Mrs. Williams, not appearing, was fined 2s.6d. for the loss of the pig and 13s.9d. for costs.[119] On July 7, Robert Williams filed an

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[116] PAO, RG 22, Series 372, Box 36, File 24.

[118] PAO, RG 22, Series 372, Box 24, File 5, 4 July 1836.

[119] The Summary Punishment Act allowed that if the summoned party did not appear, the magistrate might proceed *ex parte* or issue a warrant for apprehending the party in question and bringing him or her before himself or some other magistrate.

appeal at the court of quarter sessions. It contained three objections. First, the summons or warrant had not been placed in the hand of his wife by the constable. Second, there was no assault committed by his wife, nor provocation given. And third, Tench had trespassed on the Williams's property, entered their home without permission, used ungentlemanly language and trod on Mrs. Williams's foot (presumably the reason why she was in bed when the constable came by later that day). That same month, Dorothy Williams prosecuted Tench, not for trespass, as her husband's appeal might have indicated, but for assault. Mewburn found Tench not guilty. Presumably, Williams also lost his appeal, because on July 20 he trespassed on Tench's property. Cutting through an embankment and dam between the two farms, Williams flooded Tench's fields to the sum of 2£.10s. in damages. Once again Tench used the summary court and Williams was ordered by Mewburn to pay 2£.10s. to his neighbour for injury done and 15s. costs to the court. If Williams believed Mewburn's decisions were biased in favour of his fellow magistrate, Batholomew Tench, he never said as much in writing.[120]

Williams would have had the opportunity to complain of Mewburn's egregious conduct as a magistrate (as Mary Offerd's husband did) a year later. On November 20, 1837, 157 of Mewburn's neighbours petitioned the lieutenant-governor, accusing the Stamford magistrate of frequently and repetitively "disturbing the peace of their hitherto tranquil neighbourhood."[121] They claimed that Mewburn was sowing dissension among his

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[120] If one feels, nevertheless, that Mewburn, out of partiality, had tipped the scales in Tench's favour, the second case involving Tench, cited below, demonstrates otherwise.

[121] NAC, RG 5, C 1, Inhabitants of the Twp. of Stamford to Sir Francis Bond Head, Vol. 9, 20 November 1837.

neighbours by engendering litigation and bad feelings. When the Summary Punishment (or Algerine) Act was passed in 1834, the Reform press was apprehensive about the potential for abuse of the discretionary powers it gave to local magistrates. Unlike Sir Robert Peel's legislation in England, the Upper Canadian act permitted magistrates to collect what the liberal press believed to be exorbitant fees—in the case of a conviction, upward of 16s.; 5s. if the defendant was discharged. One editor warned: "It may therefore easily be imagined that very few discharges may be expected, it being so much the pecuniary interest of the magistrate to convict in all cases."[122] This is not to suggest that Mewburn's critics were reform-minded men. They argued that if a magistrate acted selflessly and with sound discretion rather than using his position to fatten his wallet, the power the Summary Punishment Act gave him would help prevent expensive litigation. Mewburn, his critics would demonstrate, had on several occasions abused this power. They cited the case of Stephen Brown whose house had been entered by Mr. Tench and others without invitation. Brown had never thought of making the incident the subject of a complaint until persuaded by Dr. Mewburn. Tench was summonsed to appear "and although within a few moments of the time, he was told on his arrival that he was too late and that Dr. Mewburn had gone through with the examination of the witnesses." Tench was fined £2.10s. and costs and was compelled to enter into a recognizance to keep the peace in two securities of £25 each. When Tench filed an appeal with the court of quarter sessions, Mewburn thought to suppress further judicial investigation before a jury by offering to use his influence with Brown to drop the charge if Tench would only drop his appeal. The petitioners expressed

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[122] British Whig, 18 March 1834.

confidence that the lieutenant-governor would not fail to arrive at the correct conclusion respecting Mewburn's motives.

In the fall of 1837, John Davis prosecuted John Darling, a Thorold miller, for operating his mill on Sunday. The examining magistrate, John McGlashan, found in favour of the defendant. Yet even though the case had already been tried, Mewburn compelled Darling to travel twelve miles, past the doors of ten magistrates, to answer the same charge, at a personal expenditure of £3. The petitioners not only believed Mewburn's conduct to be "harassing", but also complained that it tended to reflect critically on the respectability of McGlashan.

Joseph, Elisha and Henry Currant were charged with Sabbath-breaking. Like Darling, they were brought a distance of thirteen miles, past the doors of seven magistrates. Mewburn was reputed to have said that the cost of travel alone would be a "smart fine" and that he "felt assured the jokers would not do the like again."[123] The petitioners wondered aloud about this "novel" behaviour on the part of a public official and expressed doubts as to its necessity.

But if Mewburn's reach could extend over the heads of several of his fellow magistrates to punish particular defendants, it could also favour certain others. Two individuals who appeared to exercise the sympathies of Dr. Mewburn feloniously entered Thomas Pew's premises. In order to suppress a prosecution, Mewburn personally paid Pew for the stolen property. "Such conduct in a friend," the petitioners complained, "may have

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[123] As it turned out, Mewburn's self-congratulation was premature. A year later, one of the Currants was convicted of disturbing a church service while another was convicted of cutting and mowing hay on a Sunday. [PAO, RG 22, Series 372, Box 32, File 24 and Box 33, File 9.] Again, the Crowland inhabitants were brought to Stamford for trial and again it was Mewburn who heard their case.

its extenuation, but by a justice of the peace whose duty to the public is paramount to all private considerations" cast serious doubt on Mewburn's sincerity in promoting the ends of justice. Just how far could a magistrate go in settling a case out of court before he crossed the line?

Accompanying the petition was an affidavit from James Oswald, the owner of the Whirlpool Hotel. His relationship with Mewburn was long and troubled. In July of 1833, when two half-empty trunks were found on Oswald's property, rumours began to circulate that he was somehow implicated in the murder of their owner. Inquiries by magistrate Robert Deo established that the trunks belonged David Bontelle, who was found to be alive and residing in New Hampshire. It appeared the luggage had been stolen or gone astray at Buffalo while Bontelle was travelling. In the interim, and on the basis of fraudulent testimony from both an American army deserter and a convicted felon, Mewburn persisted in publicly accusing Oswald of foul play. When Mewburn received notification that Bontelle was alive, he neglected to pass the information along to Oswald. "Instead," Oswald complained, "he continued to make it a subject of general conversation.... and had the candour to tell me that if Human Bones (sic) had been found my life would have been forfeited."[124] Mewburn would later make a feeble and ambiguous claim that information had come to his attention at the time "which gave rise to the opinion of high level authority that this man was not clear of crime."[125] From here, the level of accusations escalated. In

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[124] NAC, RG 5, C 1, Oswald to Bond Head, Vol. 9, 22 November 22, 1837, p. 4751.

[125] NAC, RG 5, C 1, Remarks and Statement of Dr. Mewburn, Danby House, Stamford, File 1119, 18 March 1840.

January of 1839, Mewburn followed up on a circular from the lieutenant-governor instructing the magistrates to investigate the nationality of all innkeepers within their townships and to revoke the licence of anyone who did not have citizenship. Believing Oswald to be such a person, Mewburn dutifully stated that Oswald's name could no longer remain on the list. As it turned out, Mewburn had been mistaken about the number of years that Oswald had been resident in Canada, and a day or two later, his licence was reinstated. Six months later, Mewburn's barn was burned to the ground. Oswald, posting £500 and finding two securities of £250, was bound over to appear at the 1840 assizes and answer charges connected with the fire. Swan and Delatre conducted the inquiry into Oswald's involvement. Mewburn complained that even if the best legal evidence could be obtained, it would prove utterly useless, given the present excited state of the neighbourhood, in bringing Oswald to trial:

> It certainly speaks little for the morality and charity of Canadians of all classes that, prejudging the case, their whole sympathy is in his favour and I am accused of having made the charge for the purpose of revenge! against a most respectable man! —it should be understood that the word respectable in Upper Canada means wealthy!

The ground swell of support for Oswald may have had less to do with his popularity than with the fact that Mewburn appeared to be abusing his power as a magistrate. Instead of taking his cue from the community, he was relentlessly pursuing a line of investigation that must have appeared both personal and persecutory.

When it was discovered that a man that Mewburn had sent to prison for encouraging soldiers to desert had set the fire, the charges were dropped. With his name once again cleared, Oswald hired Henry Boulton as his attorney and sued Mewburn over

the licensing incident. Mewburn petitioned the government for legal aid necessary, he said, to relieve him from the enormous expense incurred without debt "by the performance of my duty as a magistrate."[126] Mewburn's reach, however, had exceeded his legal grasp, as even the lieutenant-governor had to acknowledge. A response came two days later: "This is a private suit between yourself and another." Mewburn's request was denied.

Conclusion

S. J. Noel has argued that the political culture of Upper Canada was patterned on a patron-client relationship—land in exchange for allegiance[127]. The ensuing power of landed patrons was then shared in turn with local merchant elites. The resulting commercial clientism was to prove stronger than the bonds of patronage. Frances Ann Thompson, like Noel, rejects the hinterland/metropolis theory of provincial power favoured by many earlier historians. York/Toronto may have been the administrative hub but its authority did not "radiate" out to the peripheral districts. While acknowledging that it might well have been the intention of the governing elite that magistrates were to be agents of judicial control, "once appointed," she argues, "the magistracy governed independently of York control. The obstacles of distance and poor communications which lessened the authority of the provincial government contributed to the influence of the magistracy."[128] Although many or most of them shared the conservative ideology of the Family Compact,

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[126] NAC, RG 5, C 1, Mewburn to George Arthur, Vol. 41, File 2122, 24 September 1840.

[127] S. J. Noel. Patrons, Clients, Brokers: Ontario Society and Politics 1791-1896. Toronto: 1990.

[128] Frances Ann Thompson. Local Authority and District Autonomy: the Niagara Magistracy and Constabulary, 1828-1841, 209.

the Niagara magistracy did not support government initiatives that conflicted with their local (mainly commercial) interests and those of their constituents. Out of seventy-three magistrates for whom a record of occupation could be found, sixty-one were part of a "bourgeois commercial group."[129] A most important objective of the magistracy (and, it must be noted, grand juries) was to make the community safe for local commerce. To this end it both protected private property and made continued efforts to pacify a divisive community. Although Ann Thompson has written at large about the grand commercial projects of the magistrates themselves, we should not lose sight of the fact that the local judiciary was used by all social classes, propertied and non-propertied, rich and poor, to both protect and further their smaller interests. No doubt the local magistracy felt its interests threatened by government appointed stipendiary magistrates with little or no connection with the communities that they were meant to serve. Yet they were equally mindful of the sensitivity of local customs and traditions that they, as respected members of the community, were in a position to uphold, and that police magistrates like Swan appeared to hold in abeyance. Nevertheless, the system was not without its problems. Sometimes, as we will see in the chapter six, those very traditions conflicted with commerce. It was then that the skill and talent of the magistrate as judicial broker was put to the test.

When the magistracy was criticized it was not because it was a haven for the wealthy and respectable, but because it was monolithic[130]. Criticisms were criticisms of

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[129] Francis Ann Thompson, 91.

[130] As we saw above, it was generally recognized that it was economic security that underwrote magisterial objectivity.

practice, of exclusivity, not principle. The editor of the York Courier wondered that no mechanics had been appointed to the magistracy in the Home District:

> There has been a sort of proscription exercised towards this class of inhabitants of Canada which we have ever looked upon to be as senseless as it is unjust, and a departure from this proscriptive spirit upon this occasion, by elevating to the magistracy two or three mechanics—such as we have in our mind's eye, who are respectable, intelligent, experienced and wealthy, as the most respectable of their neighbours of other occupations of life—would have been a justly popular measure.[131]

Ogle Gowan, ultra-loyalist and self-styled leader of the Irish Protestants, waged a campaign for the reform of the magistracy in the Johnstown District. Gowan was incensed that United Empire and late loyalists had a lock on the commission of peace in his district. He referred to the existing magistrates variously as Yankees, republicans and those "who are of equivocal principles or possessed of foreign predilections," [132] but ever the pragmatic politician, countered accusations that he wanted to see all but men of the old country removed. "Upon this subject," he compromised, "we desire to see the most perfect equality; and that merit and principle, not birth or party, should be the sole qualification to office." Upon what grounds of justice and equality, he ironically queried, are "15,000 of the King's loyal subjects of British birth in this District to be deprived of the right of having English, Irish, and Scotch magistrates, in an equal proportion, with their Canadian fellow subjects?" The magistracy in the Johnstown District, Gowan complained, was a network of old, and established Yankee-Canadians, a network in which he found neither Englishmen nor Irishmen.

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[131] Reprinted in The Antidote, 16 April 1833.

[132] The Antidote, 18 February 1833.

In early nineteenth-century Britain, those with landed property remained apprehensive that the central state might use a standing police force to usurp traditional rights and privileges. Equally apprehensive of a police state, city-dwellers in this same period, nevertheless, came to see the necessity of a policed state. Reacting to the rise of property crime, a precipitate of commercial success, yet reluctant to perpetuate a volunteer force of which they would be reluctant members, and critical that such a force consisting of middle class recruits aggravated class violence, the urban citizenry demanded a professional, socially neutral, police force[133]. In Upper Canada, the criticism of policing came from a different faction and for different reasons. In 1827, Francis Collins echoed the concerns of reformers that the city police were an indolent cohort of government favourites who were less concerned with watching over the peace and happiness of towns such as York and more with keeping the taxes, rents and fines that passed through their hands in "eternal privacy."[134] Collins was reacting in the wake of several recent fires set by incendiaries. Mr. Stanton, "chief literary champion of Sir Peregrine Maitland's administration" and apologist for the York force, attempted to justify the "lethargic supineness of that body of Police of which he is a drowsy member" by stating that "suspicions of a general nature (could not) be noticed by the Police" unless they were directed to act under the authority of a warrant. An incensed Collins appealed to the citizens of York to break their passive indifference and petition the government for a revision of the police law. "Let," he proposed, "proper accounting clauses be added, that no

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[133] See Clive Emsley. Policing and its Context, 1750-1870. London: 1983, 5-6.

[134] Canadian Freeman, 11 October 1827.

favourite drones may fatten on the industry of the hive—let superannuated debility give way to youthful energy and enterprize, in the appointment of officers—let the duty of the officers be imperative and clearly defined—let their power be sufficiently restrained to guard against tyranny and oppression… ." Two years later Collins was still complaining that the police were "corrupt and deficient."[135] Again he rallied the citizenry to get up a petition. This time, however, he argued for a force elected annually by ballot, a force directly responsible to the citizens that it was empowered to serve:

> Thus the police office will be kept free from scenes of prostitution—neither he-bawd, pimp, nor informer will have a lurking place about it—the hypocritical tools of corruption will be swept before the people's wrath, like chaff before the wind—and a simple, cheap, and liberal police system may be established, which will be suited to our population and our means, and consonant with the temper & spirit of a free people.

Collins was not opposed to a police force in principle. He argued that the lighting of streets in the evening and the creation of a night patrol were necessary to eliminate urban crime. This, together with his earlier concern with the increasing number of cases of arson, pointed to the fact that he was concerned with the protection of private property. What he opposed was a provincial constabulary clearly corrupted by government patronage. The government appointed magistrates and the magistrates appointed constables. Although he did not publicly share Sir Robert Peel's contention that penal reform necessitated an improved, efficient police, Collins, like Peel, did advocate the need for preventative policing. Until this time, however, it was the community-at-large which would function as effective "preservers of the peace". This entailed a citizenry informed as to both the laws

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[135] Canadian Freeman, 1 January 1829.

which governed them and their ensuing legal duties and obligations. As we will see in the next chapter, the government of Upper Canada never expected anything less.

5

CRIME AND COMMUNITY: PART 2

Educated to Crime

While not alone in shaping cultural attitudes, printed material in the Canadas played a pivotal role in the social construction of "crime" and "criminals".[1] The extent of the readership and whether exposure to printed information was frequent or sporadic is difficult to calculate. Anna Jameson calculated that in 1837, 427,567 copies of various newspapers circulated among a population of 370,000, about forty of those published in Upper Canada alone.[2] To put these figures in perspective, it must be kept in mind that subscription lists were small. In 1829, for instance, the weekly circulation of the Colonial Advocate was only 358.[3] Such small distribution figures, however, (and this may be what Jameson was getting at) belied the importance of newspapers to the social and intellectual life of the province. Jameson wrote that only one colonist in fifty could read. Nevertheless, the substance of political and social debates, and news reports would have trickled down to the largely illiterate under-class, who would have heard newspapers and journals read

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[1] Print was the principal form of mass communication in the early nineteenth-century, the only way of blanketing the population with uniform ideas. Crime and criminals are put in quotations to indicate that it is not the criminal act nor the criminal himself or herself who is being socially constructed but rather the idea or concept—what it is that counts as a criminal act or who it is that counts as a criminal.

[2] Anna Jameson. Winter Studies and Summer Rambles in Canada. 73.

[3] Colonial Advocate, 13 December 1829. When we multiply the some three and a half dozen newspapers in circulation in 1837 by this figure times fifty-two weeks, we come close to Jameson's figure. In 1836, Ogle Gowan's The Statesman had a circulation of 800. Given that Gowan placed this notice toward the back of the newspaper, it was more likely than not meant to serve as an inducement for local businesses to advertise.

aloud, or at least heard their contents discussed wherever groups of people met and socialized.

Provincial newspapers frequently featured accounts of foreign crimes, particularly murders; the more grisly and gothic the atrocity, the more attention it seemed to receive. Little detail was left to the imagination in these orgiastic narratives. A disproportionate number of reports originated in the United States, more so in the Tory press. Making a popular distinction between democracy and monarchy, the prospectus of the Toronto paper The Royal Standard advocated conservative principles and the maintenance of the British connection. It opposed any further extension of power to the "Democratic branch" of government. To do so would be to promote the tyranny of the "mob without property or education". "We wish," it extolled, "to live under a Monarchy, buttressed by a non-elective aristocracy, and resting on the broad base of a popular body, chosen by property and intelligence."[4] American democratic republicanism, with its separation of church and state and its open-door policy to non-British immigration was, in consequence, associated with lawlessness and disorder.[5] The political affinity of Upper Canadian loyalists (including late loyalists) for American federalism led the former to accept the latter's interpretation of American affairs—social splintering and perpetual disorder.[6] To this critical end, the Upper Canada Gazette reprinted an article from the federalist Connecticut Courant entitled "A

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[4] The Royal Standard and Toronto Daily Commercial Advertiser, Inaugural Issue, October 1836.

[5] See S. F. Wise. "Upper Canada and the Conservative Tradition." Profiles of a Province. Toronto: 1967. 20-33.

[6] The Niagara Herald, 28 February 1801, quoting an unspecified American newspaper, suggested that the virtue of Washington had been supplanted by the republican anarchy and mob rule of Jefferson who had gone so far as to permit the abolition of the Christian Sabbath. [See Jane Errington. The Lion, the Eagle, and Upper Canada. Kingston: 1987, 45.]

Dreadful Fact."[7] It was reported that, symptomatic of the decline in respect for law and order, crime in the United States had increased 300 per cent between the years 1814 and 1817. The Courier of Upper Canada made good use of a fortuitous find in the New York Commercial Advertiser. The editor of the Courier urged those of his fellow citizens, who were apt to make favourable comparisons between the United States and Upper Canada, to heed the self-criticism of the editor of the American paper. Americans, the latter regretted, were not in the habit of respecting the laws nor in obeying those empowered to enforce them. This he partly attributed to "ultra democracy".[8] This was not the reasonable and well-regulated democracy "for which Washington became a rebel but rather licentiousness—the will to do just what pleases ourselves individually, without regard to the obligations of the social compact."[9] As supporting evidence, the editor pointed to the daily accounts of homicides in American cities. He also noted riots, brawls "and ten thousand other violations of the law and social order." Continual reporting of American crime in the Canadian press was meant to bring this point home to those said fortunate enough to prosper under the non-democratic umbrella of a peaceable Monarchy.

This "Punch and Judy" approach to crime seldom found its way into local reporting. District newspapers often gave varying accounts of the local assizes, while quarter session

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[7] Upper Canada Gazette (York Gazette), 5 January 1817.

[8] Political pundits, contemporaries of the American editor, might have argued that he was lamenting the betrayal of the values of old Whiggism. According to this reading, the phrase "ultra-democracy" would be synonymous with "American liberalism". Whig notions of authoritative order and a deferential class structure were reworked by the experience of the American Revolution to the point of democratic excess. What emerged was liberalism with its homegrown notions of constitutional government, representation, liberty and communitarianism. It was this latter, permissive version of democracy to which Upper Canadian Tories, and American Federalists alike, took exception. See Terry Cook, "John Beverly Robinson and the Conservative Blueprint for the Upper Canadian Community," in J. K. Johnson. Historical Essays in Upper Canada. Toronto: 1975, 338-355.

[9] The Courier, 21 September 1836.

and summary-court proceedings were mentioned only briefly, if at all.[10] If and when they could (and this was not often), local editors preferred to point out that crimes committed within their districts were committed by outsiders. When newspapers recorded (as did the Kingston Chronicle when it reported on the increasing number of burglaries) that increases in the population corresponded to increases in crime, the implication was that newly arrived immigrants committed these crimes.[11] A rash of thefts in Kingston prompted the editor of a local newspaper to alert his readers that he had every reason to believe that there were some villains skulking about the town "of a late importation."[12] Reporting on the Midland assize, the Kingston Gazette listed one conviction for negligent escape of prisoners and two for counterfeiting, "a result not so unfavourable to the character of this district as the calendar predicted."[13] Its readers ought to know, the article went on, that the two principal convictions were of persons who were not only strangers to the district but to the province. Likewise, the Hamilton Gazette boasted that twelve prisoners sent to the provincial penitentiary from the Gore District "were nearly to a man, strangers in this part of the Country."[14]

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[10] In 1836, James Jessup, Clerk of the Peace for the Johnstown District, ordered that a list of convictions by magistrates sitting in summary court be published quarterly. The Statesman complied giving the names of the prosecutors, persons convicted, and examining magistrates along with the offences and fines. See for instance The Statesman, 17 November 1836. This appears to be a rare exception.

[11] Kingston Chronicle, 10 June 1824.

[12] Kingston Chronicle and Gazette, 16 August 1834.

[13] Kingston Gazette, 2 October 1810.

[14] Hamilton Gazette, 24 August 1836.

Unless the crime was murder, and a local editor took a personal interest in it[15], the reporting of civil cases usually took precedence over criminal proceedings[16]. The latter most often consisted of little more than a listing of the names of convicted criminals, their crimes and their punishments. A correspondent of the Brockville Gazette, who signed himself "WILLIAM", criticized the reform paper, the Brockville Recorder, for neglect of duty. The writer expressed his disgust that for several years he had looked in vain for a statement of the trials held at the Brockville Court of King's Bench. "In a moral view," he wrote, "it is important, and a warning to others when they see their names and crimes, with the punishment inflicted—no one can tell the benefits of having the trials thus published."[17] The editor of the Gazette was commended for putting this "infinitely useful" information into the hands of those who could most profit by it—children and servants alike. When newspapers did publish detailed reports of crimes, they sometimes felt compelled to pass off as a public service what otherwise might be construed as lurid curiosity. The editor of the York Courier appended the following tag to a story about housebreaking in York: "We state the facts for the information of the public authorities, and to put the inhabitants of York on their guard against the villains who are infesting the town."[18]

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[15] Editors might make other exceptions but they nearly always served some personal or political end. For instance, during his term as Mayor of Toronto and Chief Magistrate, Mackenzie regularly published reports in his Colonial Advocate (some of them actual transcripts) of the criminal proceedings of the Mayor's Court. When Mackenzie left office, the court reports became less and less frequent.

[16] To cite but one example, the various reform papers invariably gave full accounts of libel and slander cases.

[17] Brockville Gazette, 18 September 1829.

[18] Reprinted in the Kingston Chronicle and Gazette, 23 November 1833.

Many newspapers covered local crimes with some delicacy. The editor of the St. Catharines Journal, commenting on an "extremely disgusting" carnal-knowledge case, argued that the "moral state of private society and the ends of public justice" would not be promoted by presenting sensational details.[19] In fact, familiarizing the reader with the details of any sort of criminal transaction could only be "a powerful means of corrupting the taste, and rendering the ordinary barriers to vice, less effective against the weakness of human nature."[20] Anything beyond a simple inventory of criminal offences and sentences would inevitably result in copycat crimes by "wicked or silly aspirants" seeking public notoriety. However, this did not stop the paper from the detailed reporting of out-of-province crimes.

As self-proclaimed champions of moral propriety, newspaper editors ran the risk of hypocrisy if their crime reportage appeared gratuitous. A Kingston newspaper published a brief account, based on notes taken by an observer who attended the court proceedings, of a duel fought at Perth. The editor justified his refusal to republish a fuller account from the Brockville Recorder on the grounds that he did not want to give any additional importance to what was "a relic of barbarism"[21] and an outrage upon morality and social order.

Some editors maintained that it was not the reporting of crimes as such that was objectionable but rather how they were reported. Publicizing details that catered to the

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[19] This sentiment found support within the greater community. Writing on behalf of convicted rapist Olmstead Hightower, Rev. William Macaulay argued against imposing the death sentence. It would only serve, he believed, to bring together thousands of "silly people" and so provide an opportunity for keeping the particulars of the case before the public mind, "facts which should be sent to oblivion as soon as possible." [NAC, RG 5, A1, Wm. Macaulay to Joseph, Vol. 193, 107269-73, 2 May 1838.]

[20] The St. Catharines Journal, 20 October 1836.

[21] Kingston Chronicle and Gazette, 17 August 1833.

vitiated tastes of the readers was said to excite an interest in, and morbid pity for, the guilty. The press, which ought firmly to support morality and the law was, by its sympathetic coverage, "destroying the line that should be kept strongly marked between virtue and vice."[22] But more than creating a false sympathy, sensational coverage, which "fed the love of the marvelous", was said to harden the finer sensibilities until even the most atrocious crime seemed an ordinary part of the passing parade. If the death of a murderer and the death of an upright citizen were given similar treatment, the differences between those who represented vice and those who represented virtue was flattened out. This was especially troublesome for members of the ruling elite who believed that the natural social order was both unequal and hierarchical. Where there was no difference, there was no merit.

Small newspapers seldom could afford reporters, and editors frequently apologized to their readers for being too busy to attend court. Newspapers borrowed liberally from each other and relied on word-of-mouth information.[23] Reports of recently committed crimes often began with the phrase, 'it has come to our attention'. As might be expected, information gathered in this way tended to be inaccurate and sensationalized. For example, the Kingston Gazette incorrectly informed its readers that Point Frederick resident John Beaver (Bevier)[24] had murdered his half-sister[25] when, in fact, he had fatally shot his

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[22] Kingston Chronicle and Gazette, 7 September 1833.

[23] The editor of the Cobourg Star had an interesting take on borrowing from other papers. Referring to the coverage in the Correspondent and Advocate of a robbery and desertion by a group of soldiers in Toronto, the Cobourg editor discounted that any robbery had taken place because this part of the notice had not appeared in any other newspaper. The mention of the desertion, however, was more reliable because it had been confirmed in the Commercial Herald.

[24] Beaver was convicted of murder at the Midland District assizes. He was executed in 1815.

daughter. Sometimes such misinformation could have unforeseen consequences. On 2 March 1836, the Cobourg Star reported that a mob of Shiners[26] had murdered the wife of Captain George W. Baker and their two children.[27] The following week, the editor notified his readers that the reported outrage was entirely without foundation. In a letter to the editor, Cpt. Baker pointed out that if the paper had any circulation in England, it would have a serious effect upon both Mr. and Mrs. Baker's families and friends, who would have thought Mrs. Baker had been killed. Although Baker, as a Bytown magistrate, had dealt with the Shiners the previous summer, they had shown him no personal disrespect nor had they annoyed his family.[28] "I hope," Baker wrote, perhaps now fearing some retaliation from the Shiners, "you will immediately publish my denial of the truth of this horrible report."[29]

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[25] Kingston Gazette, 18 July 1815.

[26] Shiners were Irish navvies stationed in the Ottawa Valley. They worked in lumber camps and on log drives down the Ottawa River. See Michael Cross. "The Shiner's War: Social Violence in the Ottawa Valley in the 1830s". The Canadian Historical Review 54.1 (March 1973).

[27] Baker was a half-pay army officer and postmaster Bytown, Bathurst District.

[28] There was, nevertheless, every good reason for believing that the Shiners had targeted Baker and his family. In June of 1835, believing his own life to be in danger, Baker doubted his ability to single-handedly stem the rising violence. He argued that it would now require all his exertions simply to protect the persons and property of his own family. In retrospect, he noted that he had temporarily gaoled Peter Aylen, merchant, timber baron, mobilizer and leader of the Shiners, for assaulting Daniel McMartin. In May, Baker charged and imprisoned three Shiners for assault and rape. Other law enforcers had been beaten, killed or run out of Bytown for less. By June, as Michael Cross has observed, all authority in the Ottawa area had disintegrated. Baker wrote to the lieutenant-governor's office: "I cannot Sir describe to you the situation of the town. If I could, you would deem it incredible and it is becoming daily worse…No Person whatever can move by day without insult, or at night without risk of life—thus whole families of unoffending people are obliged to abandon the Town, and nothing except a Military Patrol will succeed in arresting this evil, and dissipating the general alarm…" [NAC, RG 5, A 1, Baker to Rowan, Vol. 153, 84409-12, 15 June 1835.] Maintaining that it was folly to confront the Shiners without government backing, Baker tendered his resignation on June 15.

[29] Cobourg Star, 16 March 1836.

Even a murderer could "correct" an error-laden article. On June 6, 1838, the Cobourg Star published a report on the shooting death of one Henry Precious by Newcastle District innkeeper Edwin Merritt. Now in gaol on a coroner's warrant, Merritt wrote to the editor requesting that one or two errors in the initial coverage be corrected. The original report had made Merritt out to be the aggressor, "a dreadfully passionate man"[30] who, having argued with Precious over the reckoning of a tavern bill, ran for his gun in the next room and shot Precious through the head. By Merritt's telling, an inebriated Precious had sworn at him and attacked him when he refused to serve Precious any more beer. Later that night, Precious returned to the tavern and demanded a gallon of beer, threatening that he would break down the door as he had done on a previous occasion. Merritt had shot in self-defence. On the basis of similar testimony at the assizes, the presiding judge had recommended that the jury return a sentence of aggravated manslaughter. On October 10, the Star's editor was astonished that the jury had found Merritt guilty of murder for a crime that "by the law of England does not amount to murder—an affray, moreover, mainly brought about by his (Precious's) own intemperance."[31] The editor, in a turnabout, now wished Merritt well in his petition for mitigation of sentence.[32]

Newspaper advertisements often carried the greater weight, on an issue-to-issue basis, when it came to informative items respecting crime. In this section of the newspaper, crime intermingled with commerce. Stripped of their melodramatic trappings, notices of crimes matter-of-factly threaded their way through notices of bailiff sales, business

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[30] Cobourg Star, 6 June 1838.

[31] Cobourg Star, 10 October 1838.

[32] The thirty-one-year-old Merritt was subsequently transported.

openings and closings and offers of various goods and services. Rewards were posted for prisoners who had broken gaol, for the return of stolen livestock, and for information leading to the arrest of housebreakers, arsonists, murderers and absconding apprentices and servants. Readers were also informed about fraudulent bills of transaction circulating within their community. However, for every criminal notation, there was a notice that items of lost property (most often wallets, bits of jewellery, bills of exchange or horses, cows and sheep that had wandered into the subscribers' enclosure) had been found and were being secured until the rightful owners could retrieve them. Collectively, these notices amounted to looking at crime through a Manichaean lens. To the contemporary reader it might appear that his or her community was composed of a relatively equal, albeit small, number of actively lawful and unlawful persons operating at either end of the social spectrum against the middle.[33]

The government of Upper Canada regularly used newspapers to apprise the populace of newly enacted laws.[34] Infrequently, a publisher might first print the transcripts of Parliamentary debates concerning the same. The editor of the Canadian Emigrant wrote

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[33] Reality, of course, was never so clearly dichotomous. Adam Fralick of the Niagara District advertised in the November issues of the Niagara Reporter for 1837 that he was holding a pair of sorrel horses, a wagon and a harness that had been left at his establishment. Having absorbed the costs of caring for the animals, he notified the owner that if they were not claimed he would be forced to sell them to cover expenses. This was the common practice for those holding animals that had strayed unto their property. The same Adam Fralick was brought before a magistrate (both summary and quarter sessions) eight times between 1833 and 1839 for various assaults, thefts and misdemeanours. In 1837, he was charged with arson at the Niagara assizes and with felony in both 1836 and 1840. Nevertheless, the district magistrates felt him respectable enough to be appointed to serve on the grand jury at the October 1833 quarter sessions. He was also issued a license to keep an inn and was appointed Deputy Collector of Customs at Chippawa. Both necessitated letters of recommendation in support of his moral character from neighbours and local JPs. He served as pathmaster for Stamford in 1833 and the annual town meeting for the Twp. of Stamford was held at his inn, 1834-36. The Niagara quarter sessions reported many individuals who at one session would appear as defendants and at another, as prosecutors, Fralick being one such example.

to his subscribers that he intended, with the exception of private or local Bills, to publish all Acts passed during the last session (1834) of Parliament. They would, he noted somewhat apologetically, take up a considerable portion of the paper over a period of weeks to the necessary exclusion of miscellaneous articles. He noted that "many of these laws are of serious interest, intimately connected with the liberties of the subject, and ought to be thoroughly understood in all their bearings"[35] by all good subjects bound to obey them. The King's printer was also employed to print and distribute, within the various districts, relevant acts of Parliament. Upper Canadians were consequently expected to be familiar with the laws of the land. Government failure to provide such information might be used as grounds to overturn a conviction.

During the War of 1812, it proved impossible for the army to use specie for underwriting military expenditures. Governor-General George Prevost proposed to the Lower Canadian legislature that paper currency (army notes) be issued under their authority.[36] In March of 1813, the Upper Canadian legislature enacted a new statute, *53 G 3 (1813), c.1*, An Act to Facilitate the Circulation Within this Province of Army Bills Issued by Authority of the Province of Lower Canada. A section of this law made it a capital offence to counterfeit army bills. On September 5, 1814, Duncan Campbell was convicted under this act at the Midland assizes. Campbell, the son of well-to-do parents and himself a

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[34] Local governments often did likewise. For example, in January of 1834, the Newcastle General Quarter Sessions of the Peace ordered that all orders made in quarter sessions be published twice in some one newspaper in each county within the district. [The Cobourg Star, 12 March 1834.]

[35] The Canadian Emigrant, 22 March 1834. True to his word, the editor published the newly enacted laws over several issues beginning with the Summary Punishment Bill.

[36] See Douglas McCalla. Planting the Province: The Economic History of Upper Canada, 1784-1870. Toronto: 1993, 32-34. This law expired May 1, 1816.

militia officer, was well connected. It is likely that Campbell, a former pupil of John Strachan, and about the same age as prosecuting attorney John Beverly Robinson, had been a classmate of Robinson. A petition from 851 inhabitants of Elizabethtown, District of Johnstown, to Gordon Drummond, president administering the Government of Upper Canada, pointed out that the law under which Campbell was sentenced, "was not promulgated in this District by a distribution of the printed copies of the Act till several months after he was arrested for the offence of which he is convicted."[37] Neither did the district magistrates know at the time of his arrest whether the offence was a felony or a misdemeanour. Campbell had been originally granted bail and had been imprisoned only when Robinson forwarded a copy of the new statute to magistrate Jonas Jones. The signatories implored the president to recognize the "perilous state of His Majesty's subjects in this province" if they should be liable to the death sentence under legally constituted laws "of which they had not a previous opportunity of obtaining knowledge." John Beverly Robinson, acting in his other capacity as provisional attorney-general, wrote to Drummond, that it was "extremely improbable" that Campbell knew that the offence would affect his life. It was, he proposed, "an absolute injustice in hanging a man upon a statute the existence of which he was ignorant where he offended against it."[38] Robinson added that "the evil has ceased" and no more forged army notes were known to be in circulation. On the strength of Robinson's report, Campbell was granted a free pardon.

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[37] RG 5, A 1, Inhabitants of Elizabethtown to Drummond, Vol. 21, pp. 8752-68, 8 September 1814.

[38] RG 5, A 1, Robinson to McMahon, Vol. 21, pp. 8772-77, 8 September 1814.

Campbell's case was not without precedent. In the same year, the Kingston magistrates had recommended that five men convicted at quarter session sessions for keeping stills be granted mercy (the return of fines) because of their ignorance of a new law, "the laws not having been promulgated."[39]

George Jarvis, collector of customs at Cornwall, resorted to an advertisement in the Cornwall Observer to advise the public that since a customs house had been erected at the border, any goods brought from the United States must be reported and duties paid. "Should the law not be complied with in this respect, the goods will be seized and in no case will they be returned to the owner, as no excuse of ignorance of the law will be hereafter admitted."[40]

Crime and Citizenry

The government may have constantly prodded justices of the peace to take a more-active role in pursuing criminals but in fact this generally fell upon individual members of the community. Newspapers, grand jury addresses and so on might have influenced the ordinary citizen's understanding of crime, but it was as victims and prosecutors of criminals that popular attitudes were shaped and understandings confirmed. Charges to the grand jury frequently outlined the court's expectations with respect to the legal responsibilities of judicial officials and private individuals alike. Justice Levius Sherwood

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[39] RG 5, A 1, Magistrates to McMahon, Vol. 21, pp. 8651-52, 11 July 1814.

[40] Cornwall Observer, 5 October 1837.

believed the point important enough to elaborate on it more than once[41]. The law, he intimated, flowed from the absolute presupposition that all members of the body politic shared an interest in the peace, tranquillity and morality of the community. To this end, the law demanded particular behavioural responses from the citizenry. It was, for instance, the duty of all private citizens who happened to witness an act of treason or felony to use all of their resources to arrest the offender. They were also legally bound, when requested, to assist peace officers in apprehending felons and putting down disturbances. One's legal responsibilities, however, diminished with distance, both spatial and temporal. Although not legally obliged to do so, it was, on their own authority and guided by nothing more than reasonable belief that treason or felony had "unquestionably" occurred (not having actually witnessed the crime), the legal option of every citizen to pursue and arrest miscreants. The fact that it might turn out, upon examination, that the supposed perpetrator was innocent made no difference. In other words, when acting in good conscience, private citizens had no fear of being accused of false arrest, public mischief or any other like charge. When lawbreakers resisted arrest, private citizens might raise the "hue and cry." Active and solicitous for the public good, they might also intervene to prevent crimes. This might include breaking and entering the home of another who had beaten a member of the intruder's family "in such a manner as to reasonably induce a fear of murder." In situations where a felon had taken shelter in a private residence, an ordinary citizen might enter the home, by force if necessary, to effect an arrest[42]. Both the sanctity of the home and the right

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[41] Kingston Gazette and Religious Advocate, 19 September 1828, Sherwood's charge to the Midland District grand jury. A similar charge was given to the Gore District grand jury in the fall of 1828.

[42] One was, nevertheless, bound to follow legal protocol—requesting entry after first stating one's legal purpose. Only when the pursuer was refused admission was forced entry countenanced.

to privacy might be lawfully violated, Sherwood qualified, when crime and outrage threatened the security of the greatest good of the greatest number.

By comparison, the duties of legal officials were more restrictive. Generally speaking, situations in which constables might make an arrest were commensurate with those of private citizens as outlined above. However, unlike the general populace, a constable was prevented, on his own authority and without a charge being made on reasonable and probable grounds, from arresting anyone for a breach of the peace that he himself did not personally witness. In other than exceptionable circumstances (situations that absolutely required his immediate interference), a constable could act only under a warrant from a magistrate. Acting within larger parameters, without the legal restrictions placed upon official conservators of the King's peace, private citizens constituted the front line in the counterattack on crime and criminals, at first, in pursuit and apprehension, and, later, as prosecutors.

Broadening the field of "thief-takers" beyond the professionally sanctioned, John Beverley Robinson argued that it was, at the very least, the moral duty of every ordinary citizen to bring offenders to justice. In cases of felony, deliberate fraud and dangerous or atrocious misdemeanours, Robinson believed it inexcusable for persons to forbear to prosecute either out of misguided compassion or a personal reluctance to expend time and energy in going to court. In fact, failure to prosecute might itself, under particular circumstances, be a crime. One might find oneself charged with compounding a felony[43].

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[43] Compound felony, a misdemeanour at common law, occurred when the aggrieved party not only knew the felon, but also took back the stolen property (or other amends) upon agreement not to prosecute. John Beverley Robinson instructed a Home District grand jury on the consequences of compounding an offence: "to forbear to deal with the guilty person as a criminal, is a breach of duty to society, which, if it

Matthias Haun of Bertie, in the Niagara District, had transacted a sale of goods to William Armstrong in exchange for paper currency. When Haun discovered that the bills were counterfeit, he pursued and arrested Armstrong. Once he retrieved his goods, Haun, instead of initiating prosecution by taking Armstrong before a magistrate, agreed to compromise the matter for $36, which he received in clothing of equivalent value. Although the circumstances leading up to it are unclear, Haun was later arrested for compounding a felony. The Upper Canada Gazette wrote that Armstrong was one of a number who were engaged in circulating spurious bills throughout the province: "It behooves everyone to exert himself to bring these scoundrels to condign punishment, as by their nefarious practice the public are in effect deprived of a circulating medium of immense advantage in commercial transaction, a general suspicion of paper currently being excited."[44] Haun, described as a man of property, was said to have no excuse whatsoever to palliate the offence. He was sentenced to pay a fine of £50 and to remain imprisoned until it was paid.

Unlike England, where the costs of prosecuting a case were assumed by the prosecutor, in Upper Canada "costs (were) defrayed from the public revenues in conformity

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were easily tolerated, would render the enjoyment of property insecure, and prove extremely prejudicial to public morals." [Kingston Gazette and Religious Advocate, 23 April 1830.] Robinson also noted that felonious intent was an indispensable (sic) requisite of a felony. Thus, cases of trespass, where the offender "asserted a supposed claim with too high a hand, and endeavouring to do that for themselves which they ought to have left to the law to do for them," could, within the law, be settled out of court. Because compounding was listed in the Upper Canada assize records under the general heading of "felony", it is impossible to know how many times this crime was prosecuted. However, when it was prosecuted, the chances of getting a conviction were slim owing to the usual dearth of witnesses. When Hugh McKenna stole five hundred weight of hay valued at £1 from Haldimand county farmer John Young, Young "contriving and intending unlawfully and unjustly to pervert the due course of law and justice" allowed McKenna to escape the consequences of his felony. Young received from McKenna the sum of £2 in exchange for a promise not to prosecute. So read the indictment. With no corroborative testimony, the grand jury found 'no bill'. In his defence, Young might not have understood the legal seriousness of the initial theft. Working out a compromise that would save both parties lost time at court and the problems associated with entering into recognizances, Young might simply have believed that he was following a time-honoured practice. [See PAO, RG 22, Series 372, Box 15, File 10.]

to a system which prevails in most other countries though not yet adopted in England,"[45] a fact which made the actions of men like Haun the more reprehensible. Neither, Robinson added, should injured parties be deterred by unwarranted pangs of conscience that too severe a punishment would be assessed by the court. While acknowledging many crimes carried the death penalty, it was well known, Robinson added, that the extreme sentence of the law was "in fact inflicted for offences which, by the common consent of mankind, (were) worthy of death."

Surviving quarter-session records, petitions, newspapers and other various pieces of archival material document the fact that, at least until 1840, many, if not most, criminals were pursued, apprehended and prosecuted by ordinary citizens.[46] Perhaps because constables had no power to execute a warrant outside of the jurisdiction of the justice who granted it (unless backed by a magistrate of the district in which the offender was found)[47], the pursuit of fleeing criminals was more easily expedited by private citizens. In an early documented example (1805), a young clerk, Thomas Vercheres DeBoucherville, in the

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[44] Upper Canada Gazette, 4 September 1817.

[45] PAO, John Beverley Robinson Papers, MU 5907, Charge to the Home District grand jury, 17 October 1831.

[46] It should be noted that court records make it clear that this practice was open to charges of abuse. In the fall of 1823, eighteen-year-old George Munro was arrested and brought to the Johnstown District gaol by Thomas Kenyon. Kenyon charged that Munro had robbed him. Munro saw it differently. Writing from his gaol cell, he claimed that Kenyon was the actual 'thief'. Kenyon, he noted in his petition to the justices at quarter sessions, had "robbed him of his liberty by binding him with a rope and keeping him several hours and carrying him 12 miles without any warrant and then did extort from him all his clothes worth £10 and a discharge in writing from the right of prosecution before the rope was untied and taken off his arms...." Munro requested that the court enquire into his charges and, that in the meantime, he be either discharged or bailed. The fact that Munro's petition ended up in the personal papers of Joel Stone, magistrate for Gananoque, rather than in the records of the clerk of the peace, suggests that no action was taken. [PAO, F537, Joel Stone Papers, 12 November 1823.]

[47] An exception was made for escaped prisoners. Constables were permitted by law to retake escaped prisoners wherever they might find them, even if in another district.

employ of York merchant Quetton De St. George, was directed by his employer to pursue a decamped debtor. DeBoucherville first obtained a warrant from the local magistrate and immediately set out by canoe for Niagara guided only by compass and candle lantern. Arriving at his destination, he was taken to the home of Count de Puisaye where he was provided with a good horse. At Chippawa, he learned that the individual he was pursuing had passed that same morning on his way to Fort Erie. After a journey lasting from morning till nine o'clock at night, he arrived at an inn operated by a man named Front. "To my great delight, I found there my man in the course of eating his supper quite peacefully. Immediately, in the presence of two witnesses, I read him my warrant and had him arrested in the name of his Majesty."[48] The prisoner passed the night under the guard of two men hired by De Boucherville and in the morning he was taken to the gaol at Niagara and from there to that at York. What makes this incident more remarkable is the fact that De St. George assumed the costs that accrued in pursuing and apprehending the creditor. De Boucherville was also careful to note the willing compliance of various members of the community in apprehending the fugitive.

Not all would-be thief-takers, however, were so economically comfortable as to be able, without some hardship, to assume such costs. When on September 24, 1828, John Christie fled to the United States after murdering Isaac James, James's parents requested two local farmers, Isaac Lundy and Joseph Mowder, to set off in pursuit. Lundy went as far as Syracuse. He returned to York after twelve days on the road, having spent £10.11s.6d. of his own money on travelling expenses. Mowder went as far as Rochester, travelling some

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[48] Thomas De Boucherville. A Merchant's Clerk in Upper Canada: The Journal of Thomas Vercheres De Boucherville, 1804-1811. Toronto: 1935, 12.

days on horseback and some days by stage. Having spent ten days in pursuit, his accumulated expenses amounted to £3.15s. Mowder and Lundy swore out depositions outlining the above before their local magistrate Peter Robinson. In February, Robinson wrote to his brother the attorney-general, "If you can do anything for these persons I wish you would." On the back of the letter the attorney-general scribbled, "I do not think the Lt.-Gov. will order anything more to be paid on this account."[49] The "anything more" was most probably a reference to a £100 reward that the government had posted for the capture and delivery of the murderer of Christie.[50]

Posting a reward sometimes supplemented pursuit or was used on its own when pursuit proved inexpedient. Not knowing the identity of the woman who induced his servant boy to steal his property, Quetton De St. George offered $50 to anyone who would bring forward information leading to her arrest.[51] On the complaint of a victim to a justice of the peace, a constable, acting under warrant, might question a suspect or make a search for stolen property. Upon arrest and conviction, the constable could recover his expenses from the court. However, self-initiated inquiries and the compilation of evidence were outside the constable's purview. It was for the victims, like St. George, to instigate inquiries and, most often, to make the arrest. When J. B. Seibert, a Williamsburg merchant was murdered, three local gentlemen, noting that the victim had no relatives in Upper Canada, posted a reward out of their own pockets. David Sheck, the estate's lawyer, wrote to the attorney-general that "it would be unjust to allow them to lose such a sum (£80)

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[49] PAO, RG 4 - 1, Attorney General: Pre-Confederation Records, General Correspondence, Box 2.

[50] As found in the Kingston Chronicle 25 October 1828, and other newspapers.

[51] Upper Canada Gazette, 28 February 1810.

particularly as the apprehension of the murderers is solely to be attributed to their exertions, and I have written to His Excellency the Lieutenant-Governor for permission to order it paid out of Mr. Seibert's estate."[52]

The government sometimes offered rewards for the apprehension of criminals, reluctantly and almost always sceptically. Unlike England, where rewards for various crimes were given under statute, in Upper Canada, they were offered at the whim of the government and usually only after receiving petitions to do so from victims and/or members of their community. The posting of rewards suggests that, in an under- policed province, this was the most effective way of apprehending criminals. On 25 April 1816, three persons, disguised and armed with pistols and knives, unlawfully entered James Hall's home in Elizabethtown. After physically threatening Hall's wife and servant, the robbers made off with coins and paper currency to the sum of £1,077. Five days later, Hall solicited the help of Justice Campbell asking that he use his influence to convince the governor-general to pardon any one of the offenders who would turn in his fellow accomplices and "also such reward for their apprehension and detention as will be the means of bringing them to punishment... ."[53] On May 14, the executive counsel ordered the attorney general to print 300 hundred copies of a proclamation offering a reward of $500. When on April 10, 1838, Charles Prior lost one of his uninsured Goderich farmhouses to arson, he "prayed" to the government to post a reward. While Prior had been away on

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[52] PAO, RG 4 - 1, Attorney General: Pre-Confederation Records, General Correspondence, Box 1. There is no record as to whether or not the government complied with this request. However, Seibert died intestate and had no apparent relations. The full estate coming to the government makes it tempting to surmize that they would have been reluctant to grant this request.

[53] NAC, RG 1, E3, Submissions to the Executive Council on State Matters, Hall to Campbell, Vol. 34-2. 169-71, 30 April 1816.

militia duty for three months, his house had been deprived of his personal protection. Ten local magistrates supported his request for relief and assistance towards apprehending the offender or offenders.[54] The government acquiesced, offering a £100 reward. No arrest ensued. As it turned out, the reward proved to be of doubtful deterrent value for, on September 14, an incendiary burned Prior's barn and stable on the same piece of property. The government followed up by increasing the reward to £200.

A series of burnings in the townships of Clarke and Darlington in the fall of 1840 induced a number of inhabitants to petition the lieutenant-governor. They argued that such acts could not properly be guarded against by any vigilance or precaution on their part. "We are all subject," they pointed out, "now to be awoken in the middle of the night to find our buildings and property reduced to a heap of ashes."[55] The Executive Council replied that, except in times of open disturbance, the Constitution could offer little more than a redoubled vigilance on the part of the magistrates and of "the well disposed portion of the community"[56] as a means for the prevention of crime and the discovery of criminals. As for offering rewards, the Council believed that when incendiarism proceeded from motives of malice or political animosity, this tactic almost always failed. If the community insisted on this course, then parties interested in the preservation of property should lead the way by taking up a subscription after which "an application for the assistance of the government

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[54] NAC, RG 1, E3, Prior to Arthur, pp. 14-19, Vol. 64, No. 11, 18 May 1838.

[55] NAC, RG 1, E3, Inhabitants of Clarke and Darlington to Harrison, pp. 188-92, Vol. 19, No. 2, 28 September 1840.

[56] NAC, RG 1, E3, pp. 188-92, Vol. 19, No. 2, 15 October 1840.

would be proper."[57] The Council further intimated the expediency of making the district in which outrages on property occurred liable for any damages that might be sustained. Government compensation would only serve as an incentive for unscrupulous, money-poor individuals to fire their own properties.

Many rewards, especially those leading to the apprehension of incendiaries, were actually directed at accomplices. It was commonplace for the government to promise accessories amnesty from prosecution (in addition to reward money) if they would become Crown witnesses leading to a conviction. Although rewards were the mainstay in soliciting community co-operation, other incentives transcended human avarice. The community's higher nature—its sense of legal obligation and public commitment—was frequently targeted. When Benjamin Wright escaped while being questioned by Niagara District constable David Smith on suspicion of stealing wheat out of Joseph Lindeberry's barn in Clinton Twp., Smith printed a broadsheet, which he inserted in the advertising section of a district newspaper, where it ran for a number of months. Including a physical description of Wright and the itemization of recovered property stolen by him and William Wintermute in a series of break-ins, Smith's notice also reminded the community that it was "duty bound, to aid in apprehending and securing the fugitive."[58] When it came to moving the public to action, however, the most effective lever was social expediency. It was in the self-interest

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[57] By the 1840s this had become the acceptable practice. A meeting of the inhabitants of Pickering Township, in August of 1848, raised over £116 that was offered as a reward for the discovery and conviction of the incendiaries who set fire to the house and barn of Jordan Post "as well as to give public expression to their feelings of unmitigated detestation and horror which the community entertain for the cold-blooded and assassin-like malignity that could impel the cowardly incendiary thus to convert the home and hearth of a respectable and unoffending family to a scene of wide spread calamity and desolation." The community petitioned the Governor-General to help with the reward. [PAO, Broadsheet. Pickering: 1848.]

[58] PAO, RG 22, Series 372, Box 28, File 25.

of the community, in which everyone was a potential victim of theft or assault, to rid it of criminals operating on their own or in gangs.

It was quite common for the victims of horse thieves to recover their own stolen property. Joseph Gibson, a resident of Wolford Township, tracked James Wilson to Prescott, where the latter had offered Gibson's horse for sale at Nettleton's tavern. Although Wilson claimed that he had traded a mare for the horse, he was arrested for, and later convicted of, horse theft.[59] When William Corbin[60] stole a horse belonging to John Gentle of Sandwich (Windsor), Gentle's son, and an unnamed friend, tracked Corbin to within thirty miles of the town of Niagara. The two men split up, Gentle going to the ferry at Queenston in anticipation of Corbin taking the horse into the United States, and his friend to Niagara. The following morning, Gentle's confederate arrested Corbin in a blacksmith's shop where the latter had stopped to get the horse shod.[61]

These incidents involved the victims of crime, or their delegates, journeying long distances for restitution. When crimes were committed closer to home, victims might approach a local magistrate, who would then direct a local constable, armed with a warrant (and often accompanied by the victim), either to conduct a search on suspicion of theft and/or bring the suspected criminal before the magistrate. Even so, there are numerous instances where this step was circumvented. Thomas McMahon, an Ameliasburgh merchant, had about £17 worth of cloth stolen from his shop. That evening, he went to the house of Mary Monaghan, the mother of Catharine Monaghan, his servant and the

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[59] Brockville Gazette, 21 August 1830.

[60]Twenty-three-year old Corbin was capitally convicted at the Niagara District assizes, 1826. His sentence was reduced to banishment from the province.

suspected thief. He accused Mary Monaghan of receiving stolen goods from her daughter. At first refusing to provide him with any light for his search, she relented only when he threatened to stay there until morning. Making a search, he found some of the stolen items under a bed. Monaghan confessed that her daughter had stolen them as compensation for what she believed were inadequate wages.[62] Adam Brown, a Queenston farmer in the Niagara District, noticed two grass scythes missing from his wagon house. From information received, he had reason to suspect that Isaac Hall and James County, two itinerant labourers whom he had discharged from his service a few days previously, had pilfered the implements. In his deposition to magistrate Robert Grant, Brown stated, "that no time was to be lost."[63] When one was situated close to the frontier, it was easy and convenient for felons to slip across the border. He employed William Defield of Queenston to pursue the suspected thieves. In his deposition, Defield stated that he followed the men in the direction of Waterloo, but when the trail turned cold, he returned to Black Creek where he learned that two "colored men" carrying scythes had taken a road that led up the creek. He overtook the two about six or seven miles above Fort Erie. Making prisoners of them, he returned to Queenston where the two men confessed to the crime before the local magistrate.[64] Defield, a relative of constable Edward Defield was, in all likelihood, a Niagara quarter sessions recorded that one William Defield arrested Cole.[65]

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[61] Niagara Gleaner, 23 September 1826.

[62] The Traveller, 14 October 1836.

[63] PAO, RG 22, Series 372, Box 20, File 26. 7 July 1835.

[64] The crime in this instance, like that committed by Catharine Monaghan, might well have been inspired by a perceived injustice. There are a number of recorded instances where a criminal act was meant to redress either mistreatment at the hands of an employer or compensation for the non-payment of wages. James McFall had worked as a servant for two army officers until he moved to York where he went to work

In small communities, if the hue and cry was given, neighbours could be counted on to take up the chase. When a young apprentice, Hiram Chewett, absconded from the service of his employer, Jacob Gabel, a tanner in the village of Ancaster, several persons in the neighbourhood started in pursuit. Fleeing in the direction of the United States, Chewett was overtaken and apprehended near the village of St. Catharines, the greater part of a large sum of stolen money and promissory notes still in his possession. He was returned, brought before magistrate James Hamilton, and committed for trial at the next assize.[66] John Beattie has argued that in eighteenth-century England, the hue and cry denoted a broadly based acceptance of the criminal law. The spontaneity and willingness of many ordinary persons to assist in apprehending thieves indicated a consensual agreement that theft was a social evil.[67] Cases like of Jacob Gabel above, and Catharine Secord below, demonstrate that Upper Canadians were like-minded. On 16 August 1839, Catherine Secord discovered an arsonist placing lit coals between her fence and a stack of hay. Secord, meeting labourer William Reilly on the road, instructed him to go to George Stevens's farm and "give the alarm."[68] As if by a reciprocal agreement among farmers, several of Stevens's labourers were summoned to give chase in different directions. In the absence of a professional and

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on boat for a man named O'Rourk. He was promised £4 per month if he worked until the close of navigation. At the end of his tenure, he was unable to collect his wages. Instead, he was offered a variety of articles, but had no use for them, preferring to wait for payment in cash. After two or three months, however, he had a change of mind. He was induced to steal two axes and a stove in part payment, "better" he said, "than being unpaid." [NAC, RG 5, A 1, McFall to Colborne, Vol. 117, 65221-24, 14 May 1832.]

[65] PAO, RG 22, Series 372, Box 18, File 32, January quarter sessions, 1835. The two mentioned cases are the only ones found in the Niagara quarter session records where an arrest, after pursuit, was made by anyone other than a constable or the private prosecutor in the case.

[66] The Gore Gazette, 31 March 1827.

[67] J. M. Beattie. Crime and the Courts in England, 1660-1800. Princeton: 1986, 37.

[68] NAC, RG 5, A 1, Malcolm Laing to Harrison, pp. 124060-69, Vol. 227, 17 August 1839.

efficient police force, the principle of mutual aid often engendered a spirit of co-operation. Yet this was not simply an incident denoting the interdependency of neighbours in times of crisis. Itinerant, propertyless workers willingly co-operated with local farmers, upon whom they were dependent for needed, albeit, temporary employment. Whether they shared Secord's and Steven's outrage over an affront to private property may only be guessed.

Within the small, colonial community, with the exception of strangers passing through, everyone was known to everyone else either by acquaintance or description; likewise their principal property. When William Surby of the town of Niagara spotted Elizabeth Robinson, a woman known by him to be a "wandering vagrant,"[69] coming through the marketplace carrying a coloured muslin dress and dragging a counterpane on the ground, his suspicions were aroused and he arrested her on the spot. The articles in question were later found to have been stolen from John and Elizabeth Wagstaff. Many horse thieves were arrested in like fashion. There are scattered newspaper reports of ferrymen who had spotted a neighbour's horse in the possession of an unlikely stranger attempting to transport the animal out of the district, most often to the safety of the United States. Augustin Morin was detained while crossing from Montreal to the Isle Bourbon. The ferryman's suspicions were aroused when he noticed that the mane, and other parts of the horse, had been painted in an inept attempt to disguise the animal. The arresting party returned the horse to its owner, John Maconochie.[70] When Michael Mason[71] ferried a

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[69] PAO, RG 22, Series 372, Box 39, File 23.

[70] The British Colonist: Stanstead, L.C., 18 August 1825.

stolen horse to Lewiston, New York, the ferryman recognized the horse as belonging to Jacob Canneff. When Mason returned to the Canadian side three days later, the ferryman informed Canneff who, prepared with a warrant, personally arrested Mason.[72] Blacksmiths, stable owners and innkeepers were similarly well situated to identify stolen animals. Sixteen-year-old Lorenzo Russ approached Mr. William Murray, the proprietor of an inn and stable near the Sandwich ferry, with a horse for sale. Murray suspected that the horse had been stolen when Russ offered to sell it for considerably less than its market value. Notwithstanding, he made the transaction. Later, thinking better of it, Murray resold the horse to Russ who then passed it on to a Mr. Pease in exchange for a silver watch. Whether or not Murray subsequently informed Pease that he had more than likely purchased stolen property is unclear. Nevertheless, now suspecting that the horse had been stolen, Peace followed Russ to the ferry and demanded his watch back. Murray, having at some point learned of the exchange, charged the boy with theft. Russ claimed that his brother could prove that he had come by the horse honestly. Murray detained the horse and when Russ (having fled to Detroit) failed to return, advertised the animal, which was subsequently claimed by Gabriel Mallett of Amherstburgh. On application to Governor Mason, Russ was eventually turned over to the Canadian authorities for trial.[73]

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[71] Mason was capitally convicted at the Niagara assizes, 1829. His sentence was commuted to transportation to Bermuda. See "Michael Mason" in **Appendix 3.**

[72] Farmer's Journal, 30 September 1829.

[73] The Canadian Emigrant, 24 January 1835 and 8 August 1835. At the assizes, Russ's family argued that the boy was subject to bouts of temporary insanity. The editor of the Emigrant replied sarcastically: "The jury, however, who appear to have studied phrenology to some purpose, discovered more of the bumps of knavery than foolery on his cranium and found a verdict of Guilty." Russ was sentenced to three years in the provincial penitentiary.

The frequency and manner of perpetration of some crimes might often outstrip the resources available to even the most resolute pursuer. Horse thieves, for instance, often operated in gangs. One such operation in the township of Lobo, Western District, was said to be connected with other bands of thieves in the neighbourhood of Buffalo and in the Michigan Territory. "The neighbours for many miles round," the editor of the Gore Gazette claimed, "are kept in constant dread of this nest of robbers, and in some instances, we are assured, tribute has been paid to procure exemption from their depredations."[74] Although the editor stated that members of the gang were well known by name, judicial administration had proven to be impotent when it came to their capture. Beyond the control of individuals or government, the editor offered the following solution:

> It has been suggested to us, that much might be done towards the detection and punishment of these depredators, by the establishment, in different parts of the Province, of Prosecuting Societies, as in Britain; or of societies for the pursuit and apprehension of criminals, as in the United States. We throw out this hint, for public consideration, indeed our only object in writing this article is to call the attention of Public Officers particularly, and of the country generally, to the alarming evil in question.

Five years later, the situation hadn't improved. A writer to the Cobourg Star, who signed himself "Tom Tough", included runaways "and all other long legged, long nosed, long eared, long mouthed and long winded inmates of the Devil's kitchen" among the group of criminals who regularly escaped the hands of justice. Addressing the "honest, industrious, and unwary part of the community," the writer suggested that a society be formed in every town throughout the province for the purpose of pursuing criminals. Every man in trade who could muster 5s. annually would be encouraged to pay it to an elected treasurer "so

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[74] The Gore Gazette, 8 November 1828.

that no escape shall be suffered over a debt of two pounds." [75] It was proposed that if such an organization used a system of relay horses and proficient riders, no criminal would make good his escape. If any did manage to slip through this net, the society would advertise the crime and criminal, with full description, in every paper in the province and neighbouring states. The mutual association of property owners was also proposed for dealing with urban crimes perpetrated at night. In June of 1830, Alfred Patrick was assaulted at two in the morning while keeping watch over his father's property. The property, destroyed by arsonists, led William Lyon Mackenzie to write: "This is a truly alarming state of things, and a watch and ward association, in the absence of an efficient night police, is contemplated."[76]

All of these suggestions came to naught. Nevertheless, the first proposal's adoption of vigilantism as an acceptable strategy was a measure of the frustrations suffered by those subject to criminal acts. Given the limited options with respect to pursuit and capture, the absence of an organized police force operating independently of court warrants, and the fact that bands of criminals appeared to roam at will, it is remarkable that more criminal gangs did not haunt the province.

Once a crime had occurred, or a criminal had been identified and/or apprehended, the victim of the crime had to decide how to proceed. One available option was not to prosecute. How often crimes went unreported, or victims were intimidated into not pressing charges, cannot be calculated. However, there is some evidence that this did occur. On the 20th of December 1838, citizens of the Township of Grantham petitioned the

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[75] Cobourg Star, 13 February 1833.

[76] The Colonial Advocate, 8 June 1830.

magistrates sitting in quarter sessions. The petitioners confessed that, for many years, they had known that numerous individuals who had obtained licences to keep public houses were "decidedly enemies and in many instances traitors to our country although possessed of property therein."[77] These same innkeepers had not, nor never would, take an oath of allegiance. It was claimed that seditious meetings occurred nightly on their premises. The petitioners, for any or all of these reasons, believed it unlawful for these men to retain their licences. None of the petitioners' names, however, appeared at the bottom of the memorial. An appended page made clear the reason. The petition had been presented to a number of "Loyalists" in the vicinity but one and all were too apprehensive to append their signatures. Should their identities become known, they feared retaliation either "in the shape of arson, or murder."

Susan Lewthwaite has determined that legal officials in the Newcastle District encouraged the community to resolve their legal disputes outside the courts[78] Even the law, *4 William IV, (1834), chap. 4*, An Act to Provide for the Summary Punishment of Petty Trespassers and Other Offences, hinted that this might be an acceptable way for an aggrieved party to find satisfaction in cases of assault or trespass. The act stated that no plaintiff should recover in an action brought before a magistrate if sufficient amends had already been made before the action was brought forward. But even before the Summary Punishment Act, John Beverley Robinson had stated on the record that in the case of misdemeanours that allowed for full pecuniary compensation, the law considered it not

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[77] PAO, RG 22, Series 372, Box 33, File 16, 20 December 1838.

[78] See Susan Lewthwaite. "Violence, Law and Community in Rural Upper Canada" in Jim Phillips, Tina Loo & Susan Lewthwaite. Essays in the History of Canadian Law, Vol. 5, Toronto: 1994, 364.

inconsistent with keeping the public peace to permit the injured party to compromise his complaint.[79] However, as Robinson qualified, a "great wrong (was) done to society" when victims failed to prosecute all felonies, deliberate frauds or misdemeanours that were atrocious or dangerous.

Settling a complaint out of court had its particular advantages. It meant that the parties involved were spared loss of time in travelling to and from court and the subsequent loss of income. Given that the out-of-court settlement met with the approval of both parties, animosities might be reconciled. Charles Richardson, clerk of the peace for the Niagara District, was informed in a letter from magistrate Henry Nelles that the recognizances for an assault and battery committed upon John Curran of Clinton by three persons (one Ryan, his wife and Susan Vanatta), might be returned. "The parties have since settled it which will save the district a heavy expense."[80] In January of 1833, an intoxicated William Rees came to the home of Robert and Ann Smart of Stamford. Subsequent to beatings by her husband, Rees's wife had confined herself to her parents' house for the past four months. Rees demanded that his wife leave with him and when Ann Smart attempted to intervene, Rees struck her twice on the arm with a pair of tongs and once on her temple with a piece of wood. The injuries were of such severity that Dr. John Mewburn testified that her travelling to the Niagara quarter sessions "might be attended with some danger."[81]

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[79] PAO, MU 5095, Robinson to the Home District grand jury, 17 October 1831.

[80] PAO, RG 22, Series 372, Box 21, File 25, October 1835 quarter sessions. A month latter Nelles had still not received the information and recognizances that he had requested. He wrote Richardson: "I therefore trust you will not lay the papers before the court as the parties will not attend unless notified again."[PAO, RG 22, Series 372, Box 21, File 15, 12 October 1835.]

[81] PAO, RG 22, Series 372, Box 14, File 22, 23 January 1833.

The case, however, never went to trial. Magistrate Robert Dee wrote to Richardson that Robert Small and his son-in-law had come to "an amicable adjustment of their quarrel (and) as a convincing proof the daughter is this day returned to her husband."[82]

Pre-arranged settlements would pre-empt the embarrassment of citizens of social standing appearing before the magistrates as defendants. Benjamin Meddough, a district farmer, charged Alexander Gordon, a gentleman residing in Stamford, with assault. The magistrate who took the prosecutor's deposition, Daniel McDougal, wrote to Charles Richardson informing him that the matter was settled and that he was forwarding Meddough's deposition and the warrant against Gordon. If Mr. Gordon required testimony to that effect, McDougal went on, the trial would have to be put off until McDougal could attend, as he was subpoenaed to attend the assizes at York. The warrant had been served on Gordon by constable Chester Wadsworth but, upon an out-of-court settlement between Gordon and Meddough within the week, Meddough retrieved the warrant. The court ordered a judgment of *nolle prosequi* and discharged the prosecutor and defendant from their recognizances although it was not clear that Gordon had ever entered into them. As a gentleman, Gordon could well afford to settle out of court and, as a gentleman, he might well wish to avoid the scandal of appearing in court as a defendant. Men of property might also condescend not to prosecute. Magistrate John Clark wrote to the clerk of peace:

> I committed a prisoner to the common gaol of the district on Saturday the 12th instant named John Smith of Trafalgar for committing a violent assault on Major Merritt, Esq. when in the execution of his duty in quelling an affray. I have called on Mr. Merritt to know his sentiments on the subject and he agrees that the prisoner shall be liberated on the 17th instant by his procuring sureties for his future good

[82] PAO, RG 22, Series 372, Box 14, File 22, 24 March 1833.

> conduct in keeping the peace and not to be bound over for trial at the next quarter session. You will oblige me by having the business attended to.[83]

Although a case might still be settled out of court after a charge had been made to a magistrate, if the case went forward, though it resulted in a decision of "not prosecuted", one or both of the parties could still be assessed costs. In the case of innkeeper Aaron Helmer charged by Elizabeth Montuer with assault, even though the parties settled privately, Helmer was ordered to pay for the drawing of the verdict.

Pre-trial agreements entered into by prosecutors and defendants were not without risk. The Niagara quarter-sessions records make the case that such arrangements did not necessarily have final standing with the court. Magistrate David Thompson of Wainfleet wrote to the clerk of the peace: "The bearer Robert Buchanan is the prosecutor in the case of assault and battery against Thomas Foster and David Trotter. It would appear that they have made friends and wish the papers withdrawn, all the parties previous to said outrage was (sic) considered honest and deacent (sic) men. I have known particularly Robert Buchanan for four years and always found him so." Nevertheless, Trotter was found guilty of assault and fined 1s. plus costs. Shortly after fisherman John Foxe had innkeeper James Farman charged with assault, magistrate William Smith wrote to Richardson on the 19th of January, 1835, that Foxe now wished to settle with Farman without having to go to court. Conscious of the possibility of compounding a felony, Smith wrote "there appears no intention of malice nor felonious intention aforethought."[84] Charles Smith, responding on Richardson's behalf, declared that if it was an aggravated assault, it could be handled by a justice of the peace at summary court but if, upon the examination of witnesses, it turned

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[83] PAO, RG 22, Series 372, Box 13, File 4, 15 May 1832.

out to be a felony, it might still be dealt with in the same way or could be prosecuted by indictment at quarter sessions, *4 W. 4, Chap. li, clause 2* giving the justices the discretionary power to go either way as they saw fit. As it turned out, the magistrates sitting at quarter session permitted the parties to settle out of court upon payment of costs.

When a magistrate set recognizances for the defendant and prosecutor, each was required to produce two co-signers who would be assessed for the same amount, presumably as a guarantee that the principal parties would attend their court date. Justice Jonas Jones remarked that, prior to 1837, the lack of an effective procedure for collecting forfeited recognizances made it easy for unscrupulous defendants to seduce honest men to underwrite their bail, reasoning that, if forfeited, they would never be called upon to pay sureties. In that same year, the Legislature passed the Act for the More Convenient Recovery of Estreats, *7th W. IV, Chap. X*, to remedy this anomaly. The clerk of the assize, within twenty-one days after the adjournment of the Court, was required to make a list, upon oath, of all forfeited recognizances, and to send it with a writ of *Fieri Facias* to the sheriff of the district. The writ gave the sheriff authority to levy and recover the sum forfeited from the property of the sureties, or in cases where no property could be found, to take the body of the security and imprison him until the monies be found. The act provided for a parallel procedure for quarter sessions. The editor of the Bytown Gazette believed that this would put "good natured men" on their guard when there was any chance that an "undeserving character" might give them the slip. Although this might mean more prisoners, for want of procuring bail, awaiting their trial dates in gaol, it was, nevertheless,

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[84] PAO, RG 22, Series 372, Box 18, File 34.

thought to be a deterrent to crime: "The reckless character, knowing he cannot procure bail for his appearance so easily as heretofore, may for the future walk more circumspectly."[85]

7th W. IV. Chap. 4 had one unintended consequence. It might also prove disadvantageous to those putting up recognizances even when all parties were well intentioned and attempts were made to settle out of court. In the summer of 1839, George Hanson was brought before magistrate James Cummings and charged with feloniously stealing a quantity of cloth from James Macklin's store in Chippawa. Jesse Ketchum of Toronto posted bail for Hanson. In a letter to Charles Richardson dated August 20, Macklin explained that Ketchum had given Hanson an excellent character and seemed intent on having further proceedings quashed. Macklin consented: "We are not disposed to prosecute the said George Hanson further (as it {the theft} appears to have been done by some infatuation of the moment) should the authorities at Niagara in whose hands the case now rests, consent thereto."[86] An accompanying document from Cummings reported that Hanson had paid the committing magistrate's fees and those of the constable who escorted him to the Niagara gaol. On October 31, Ketchum wrote to Richardson expressing his dismay that the case (perhaps because it was a felony) had gone forward at the September quarter sessions. As Hanson, believing that the matter had been resolved, had not appeared in court, the recognizances that Ketchum had posted were to be estreated. Ketchum surmised:

> I thought that the thing had been settled with Mr. Markland (sic) so that he would not appear to give evidence against him (Hanson) and if he did not I supposed there would be no bill found against him and if no bill that the

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[85] Reported in The Upper Canada Herald, 10 October 1837.

[86] PAO, RG 22, Series 372, Box 35, File 28.

> recognizance would be free of cours (sic) as he was held to answer charges prefered (sic) against him.

On 13 December, Richardson instructed the Home District sheriff "to levy the goods and chattels, lands and tenements, of all and singular the debt and sum of money imposed and charged upon Jesse Ketchum, Esquire." And if the debt could not be levied, Ketchum was to be placed in gaol until the debt was paid or securities arranged for his appearance at the next quarter sessions[87].

Once a case had gone to court, a prosecutor might feel vindicated simply by the court finding in his or her favour. Henry Herdson was fined £2.5s. (to be paid to the prosecutor for damages), plus costs, for trespassing on the property of Captain Lesshor and barking[88] two of his trees. Lesshor might have felt the jury's finding in his favour constituted moral compensation for the harm done to his property. At his request, the fine was remitted, leaving Herdson to pay the costs only.

A stay of *nolle prosequ*[89]*i* (not prosecuted) might indicate that defendant and prosecutor had arrived at some pre-trial agreement. There were, however, cases in which one but not both parties were present at the trial date. In some, the defendant had chosen the path of least resistance and fled the district. In others, such as the above-mentioned trial of George Hanson, the defendant, believing that a pre-trial arrangement had been made,

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[87] It is unclear what happened—the court records for the Home District quarter sessions not having survived—although Ketchum, an affluent proto-industrialist, would have had no trouble paying the recognizances.

[88] "Barking" refers to the practice of shooting squirrels by aiming at the limb to which the animal is clinging. The squirell, having lost its support and/or paralysed by fear, would then fall, unwounded, to the ground. The hunter could thus enjoy his meal unencumbered by buckshot. The term apparently originated in the United States.

[89] A stay of *nolle prosequi* was granted by the Attorney General.

absented himself from court. The Niagara District quarter sessions' records suggest that some prosecutors, in the interval between swearing out a deposition and the trial date, experienced a change of heart. Henry Greenfield, an itinerant labourer, wandered on to the farm property of the Petersons and sexually assaulted their daughter. The Petersons chose not to attend the quarter-sessions trial. With no prosecutor in attendance, the defendant was discharged and the recognizances of both the prosecutor and prosecution witnesses were estreated. The local magistrate who had taken the depositions, John Mewburn, was also a doctor and district coroner. Mewburn conjectured that the Petersons did not want their daughter exposed to the trauma of giving testimony in open court on such a sensitive matter. He noted that the child had reacted emotionally to his post-assault medical examination. For Mewburn, this was an indication that Greenfield had touched her "private parts."[90]

As I have argued, all economic classes within the community initiated the pursuit and prosecution of criminals. Rather than viewing the court as an oppressive agency, the population of Upper Canada embraced the legal apparatus when it suited their purpose. The lower, magisterial courts attempted, in their fashion, to assuage rifts and bad feeling among litigious neighbours. If anything, the courts were used to the point of abuse. John Beverley Robinson expressed his concern that "it has been truly remarked that the best things when prevented become the worst; and when under the influence of a litigious disposition the forms and powers of the law are employed vexatiously and oppressively, it is difficult to conceive anything more injurious to the peace and welfare of the community."[91] Frivolous

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[90] PAO, RG 22, Series 372, Box 18, File 38

[91] The Canadian Emigrant, 25 August 1836.

disputes among neighbours and unwillingness to compromise, he warned a Western District grand jury, often engendered "a vindictive feeling that knows no bounds." Robinson was referring to civil suits but criminal cases could also create more community friction at the end of a trial than had been apparent at the beginning. The chairman of the court of quarter sessions for the London District observed that the friends of both the prosecutor and the defendant, when espousing the cause of their neighbours, could:

> create an excitement…which becomes subversive of the quiet and happiness of all concerned. This course is so natural, and occurs so frequently, that I have no doubt many persons who are striving to conduct themselves correctly and bring up their families for useful members of society, often detect themselves in joining too warmly the cause of another, which their more deliberate judgment afterwards disapproves.[92]

Yet what did the writer expect? First, with no court of appeal other than that permitted in summary cases, responses to perceived injustices or appeals for mitigation were by petition, and effective petitions, as the government itself frequently noted, required the support of the community, especially its more respectable members. Second, although single prosecutors conducted most cases they were frequently mere figureheads for larger forces or causes within their respective communities. As argued in the following chapter, religious, political and gendered interest groups often used the courts in an effort to retool a society that they believed had become morally unhinged.

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[92] Gore Gazette, 27 April 1829.

6

THE COMMUNITY AND MORAL REGULATION

In the fall of 1839, a man named Wilkinson decoyed an American soldier who had deserted to Upper Canada back to Morristown, New York. He surrendered his prisoner to the American authorities and, in exchange, received a reward assigned for the apprehension of deserters. The capture was not made under the umbrella of any particular criminal statute. In 1833, the Upper Canadian Legislature had entered into a reciprocal agreement with the United States for the exchange of fugitives from justice. However, this covered only those who had committed felonies. The Act did not extend to deserters. Wilkinson did not contravene statutory law. His "crime" was to breach customary morality.[1] The community, one opposed in principle to slavery, did not abide bounty hunting, another kind of trade in human flesh. For this, Wilkinson's Brockville neighbours tarred him; a humiliating punishment intended to deter others. The Cornwall Observer echoed community censure: "Served him right."[2]

Such was the power of a morally outraged community that it could even supplant religious convictions. Edwin Guillet writes that the Society of Friends was forced to take disciplinary action against a group of Quakers who had taken part in a charivari and,

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[1] Edwin Guillet observes that where a moral infraction occurred that was not, at the same time, a crime at law, the community would often dispense its own summary justice. Anyone tarred and feathered, or, in addition, forced to "ride the fence rail", was expected immediately thereafter to leave the district. [E. Guillet. Early Life in Upper Canada. Toronto: 1933, 301.]

[2] Cornwall Observer, 19 September 1839.

likewise, three Friends who had assisted "in tarring and carrying a woman on a rail."[3] The Society considered these events to be sinful worldly amusements.

Community sanctions in Upper Canada most often coalesced around aberrations within the institution of marriage: adulterous relationships, age or racial discrepancies between husbands and wives, and second marriages. Although each of these indiscretions fell outside existing legal statutes, they were within the realm of community disapproval. The frequency of moral censure, however, is difficult to gauge owing to oblique newspaper accounts and, when the offending party took legal action, the way in which court records were structured.[4] For instance, the Niagara District quarter sessions for July of 1836[5] records that Phillip Potter, Caleb Ingols, Ansel Ward, and others were convicted for riotous assault[6] on innkeeper Thomas McMahon and widow Joanna Donovan. Ingols and Ward were fined, the latter being given a further sentence of three months in prison. As was the case with most complaints of this kind, the court records were silent as to cause or provocation. Two other files, however, allow us to reconstruct this case. In April of 1828,

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[3] Edwin Guillet, Early Life in Upper Canada, 295.

[4] There is one case from the Niagara quarter-sessions records that illustrates how cases of riotous assault might easily be so misconstrued. According to the indictment, at eleven o'clock in the evening, a large party gathered outside the home of Henry Hendershot in the town of Niagara. They paraded back and forth making a riotous noise for more than half an hour. The lateness of the hour, the large number of participants and the "great noise" suggest a charivari. A close reading of the witnesses' depositions reveals, however, that it was otherwise. The defendants, having come to Hundershot's inn for an after-hours drink, were venting their displeasure at the innkeeper's refusal to reopen for them. [PAO, RG 22, Series 372, Box 26, File 24, January quarter sessions, 1837.]

[5] PAO, RG 22, Series 372, Box 24, Series 24.

[6] Under English common law, a riot was the use of force or violence—calculated to strike terror among the people—by three or more persons assembled for that specific purpose. Indictments for riot always named a minimum of three participants, concluding with the phrase "and numerous others." A riot became a felony when (a) the number of rioters was twelve or more, (b) the riot act [*1 G 1. St. 2, chap. 5.*] was read and (c) the party failed to disperse within one hour.

McMahon was prosecuted for keeping a disorderly (bawdy) house.[7] And in January of 1837, Elizabeth McMahon, the wife of Thomas, entered into recognizances for keeping the peace towards Joanna Donovan after attacking her with a dirk and on other occasions threatening her life.[8] From these fragments, we can extrapolate that McMahon, a man whose morality had already been questioned by the court, was conducting an adulterous affair with Donovan.[9] It is then more than likely that Potter, Ingols, Ward and party, or any combination thereof, were friends and relatives of Elizabeth McMahon. Acting out of a sense of both moral outrage and frustration, their extra-legality may have been prompted by the fact that, although adultery was condemned by proclamation, courts of quarter sessions did not speak directly to the issue.[10]

"Charivari Triumphant": Extra-Legality and Social Sanctions

One of the more conspicuously organized ways by which neighbourhoods enforced community mores was the charivari or, as it was more commonly referred to in Upper

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[7] PAO, RG 22, Series 372, Box 1, File 38.

[8] PAO, RG 22, Series 372, Box 26, File 8.

[9] We should not infer from this example that adultery necessarily evoked public disgrace, especially in a colony where it was impossible to dissolve a marriage. Perhaps, as E. P. Thompson suggests, it was the way in which McMahon and Donovan publicly carried on, their lack of discretion, that brought censure.

[10] This is not to say that cases of adultery never went before the magistrates at quarter sessions. In 1817, Rueben Mallory was charged with cohabiting with, in "an adulterous and lewd manner, Lavina Windouer the wife of one Stephen Windouer.... to the evil example of all the subjects of said Lord the King.... ". Mallory was discharged by proclamation. [PAO, RG 22, Series 31, Newcastle (Cobourg Quarter Sessions), Case Files 1814-1817, Box 2.] Likewise Elias Williams for his adulterous relationship with Hannah Moore. Although this last indictment was built around the adulterous affair, it is instructive that Williams was indicted "for a nuisance." The grand jury found no bill. [PAO, RG 22, Series 31, Case File 1814-1817, Box 2.]

Canada, the shivaree or chivaree.[11] On the evening of his marriage in the winter of 1833, Angus Black of Lancaster, in the Eastern District, was "tracked up"[12] by his glen neighbours. "They gathered all the things and cow bells and horns together with old frying pans that they could clang between Williamstown and the Gore and Glen and such serenade music never was heard in this part of the country. It continued two nights." The marriage was Black's second and to a young lady of about seventeen years of age. The marriage proposal was made by Rev. J. McDonald and Black himself did not set eyes on his intended bride until the contract was finalized two days before the ceremony. Even his closest relatives knew nothing of the marriage until after it took place. Nevertheless, the community lost little time in mobilizing a collective response.

The charivari was a ritualized form of popular justice that included, among other attributes, "rough music"[13] like that orchestrated by Black's neighbours. Edward Thompson has argued that the cacophony "played" on found instruments was a ritualized expression of community hostility.[14] In Black's case, the age discrepancy between bride and groom would be sufficient to trigger such community resentment. But if this had not

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[11] Allan Greer has argued that the charivari might also take a political turn. In the fall of 1837, Lower Canadian Patriots used the charivari to admonish former supporters who had broken ranks as the possibility of political revolution came closer to realization. It became commonplace for the charivari to demand that francophone militia officers renounce their commissions and live once again in political accord with their neighbours. [Allan Greer. "From Folklore to Revolution: Charivaris and the Lower Canadian Rebellion of 1837" in Chad Gaffield, ed. The Invention of Canada. Toronto: 1994, 334-55.]

[12] PAO, F - 966, Hay Family Papers, GAH, Roderick McGinnis to George Hay, Sandwich, 11 December 1833.

[13] The discordant noise, dating back to a time in which the charivari was almost exclusively directed at those marrying for a second time, was meant to signify "the jingling and confusion attendant on the assembling of the furniture of the widow and widower." [Levi Adams. The Charivari or Canadian Poetics. Montreal: 1824.]

[14] E. P. Thompson, "Rough Music," in Customs in Common, New York: 1993, 467-538.

been enough, he had committed two further transgressions. Bryan Palmer, E. P. Thompson and Natalie Zemon Davis[15] have all noted that in France, the charivari was often initiated by the young men[16] in the community resentful that one of their older fellows had married for the second time further reducing the size of an already small pool of marriageable females. This particular objection most likely extended to Upper Canada.[17] There are a number of references to the fact that the chivaree was introduced into Upper Canada from the lower province and an equal number of accounts of charivaris initiated by "idle young fellows,"[18] "the young beaux of the Town,"[19] and "a number of Boys."[20] Robert Gourlay's passing reference to the charivari identifies another extenuating cause that equally applied to Black's marriage: "Sometimes it is in consequence of the offence so frequently caused

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[15] Natalie Zemon Davis. Society and Culture in Early Modern France. Stanford, Calif.: 1965, 106-7.

[16] In the fall of 1837, 188 "young gentleman of Montreal" presented an "elegant" box to lawyer Duncan Fisher Esq. who had successfully defended one of their own who had been "recently prosecuted from malicious motives in having been supposed to be one of a charivari party who kept up that innocent and amusing Canadian custom opposite the house of Mr. Charles Geddes, in St. Urbain Street." The box contained a sum of money: "To show that the feeling in favour of the defendant and against the prosecutor was universal, the subscription was limited to fifteen pence from each individual." The inscription on the box read: "Charivari Triumphant". [By-Town Gazette, 18 October 1837.]

[17] Noting the fact that so many young females were leaving U.C. for L.C., an anonymous writer to the Kingston Gazette complained that the ensuing scarcity of females of marriageable age meant that young women, knowing the "market" to be "fearsome", were raising their demands. The disconsolate writer warned that the "table could soon be turned and you might die an old maid yet, a heart rendering (sic) thought." [Kingston Gazette, 15 July 1814.]

[18] Susanna Moodie. Roughing it in the Bush. Toronto: 1962, 145.

[19] Edith G. Firth. The Town of York, 1793-1815. Toronto: 1962, 247.

[20] PAO, RG 22, Series 372, Box 29, File 8.

by a neglect of invitation to the wedding."[21] It was not for nothing that Roderick McGinnis referred to his uncle as "Black Angus".

At nine o'clock on the evening of the first Tuesday in May, 1831, in the town of Brockville, a collection of between forty and fifty people, some wearing disguises, and many with horns, bells and other "instruments", moved slowly along Main Street toward the house of Billa Flint Sr. The Hallowell Free Press reported that they "had taken upon themselves to judge the propriety of a late matrimonial connection"[22] of the Brockville merchant. Eventually gathered outside of Flint's home, the assembly "fined" Flint for his breach of community morality. They demanded that he give something for improving the town's streets. Flint refused. At this point, it was reported, the mood of the crowd turned ugly: "Having exercised themselves with their instruments, and in making other noises, (they) worked themselves into such a feeling of recklessness that at length they commenced pelting the house with stones, by which they broke in the windows, at which they entered, and perpetrated a most wanton destruction of many articles of valuable furniture..." A later estimate put the damages at £150.

The elaborate staging of Flint's charivari was quite deliberate. The forms of "rough music", Thompson writes, were dramatic in the sense of being analogous to street theatre "adapted to the function of publicising scandal." The procession to Billa Flint's home was typical. On the one hand this was meant both to ape and satirize the pomp and ceremony

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[21] Robert Gourlay. Statistical Account of Upper Canada. Toronto: 1974, 118.

[22] Hallowell Free Press, 10 May 1831. This was Flint's second marriage. His first was to Phoebe Wells. Flint's oldest son, Billa Jr., was born in 1805 indicating that Billa Sr. was well into middle-age at the time of his second marriage to (as we would expect) a much younger woman.

associated with the opening of the assizes—the parading of the assize judges, sheriff, clerks and other civic officials to the courthouse. Yet if the charivari was a critique of authority it was at the same time, as Thompson notes, an endorsement of the coded traditions by which the establishment communicated its authority. By drawing upon the symbolic vocabulary of state occasions, the community transmitted its popular authority through analogous ritual, drama and procession. The very act of shivareeing was tantamount to a proven accusation that the intended target was guilty of having flouted community standards. Ritualization to the point of anonymity was a way of announcing to the victims that their breach of moral standards was more than an idiosyncratic dispute with their immediate neighbours. It was the judgement of the entire community. Except for identifying the ringleaders, witnesses to Flint's charivari had great difficulty (or reluctance) in picking individuals out of the crowd. It was only by the way in which some members of the crowd addressed each other that some witnesses were led to testify that several participants were Methodists.

The symbolic elements of the charivari have been interpreted as a means by which community hostility was controlled through displacement. Community conflict was contained and safely channelled through the charivari's ritual forms. Such, at least, was the theory. Thompson argues that the "orderly" European charivaris, "when they migrated across the Atlantic and were re-enacted with uncertainty in a society with general access to firearms,"[23] often took a more violent path. It was their often-riotous nature and lethal outcomes that gradually set the Upper Canadian authorities, and their vocal supporters within the populace, in opposition. As early as 1802, Ely Playter's diary documents that not

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[23] Thompson. Customs in Common. 486.

everyone who was said to have offended against social propriety was willing to accept the accusations of their community. The "old Esquire", Capt. Boiton of York, on the occasion of his second marriage, together with his son and Dr. Baldwin "came in a great Passion with their Guns and threatened to Shoot if the disguised Party did not disperse."[24] One year later, Playter relates that "old man" S. H., on the occasion of his marriage to Miss Fisk, shot three times at the shivaree party before charging them with his sword. In 1822, Joseph Nash of the Gore District was sentenced to be hanged for the malicious shooting of John Depew. Depew had been a member of a party that had assembled near Nash's house on the evenings of February 18 and 19 and grossly insulted him and his family on the occasion of the marriage of his daughter. Justice Campbell reported that Nash, "irritated by the outrageous and indecent conduct and language of (the) mob,"[25] had repeatedly warned them of his intention to repel them by force. Although a petit jury of Nash's peers believed differently, Campbell recommended mercy as did nine local magistrates and six other gentlemen who noted that Nash had no particular malice toward the man that he had wounded "with the view to protect his house and family from threatened insult."[26] On October 12, Nash was granted an unconditional pardon.

Criticism of the charivari continued to mount through the twenties and thirties. The Canadian Freeman, while no ally of the governing elite, nevertheless found the practice to be degrading and barbarous, a threat to the peace and happiness of society. The editor

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[24] Ely Playter's Diary in Edith Firth. The Town of York, 1793-1815, 247.

[25] NAC, RG 5, A 1, Campbell to Hillier, Vol. 57, pp. 29764-66, 9 September 1822.

[26] NAC, RG 5, A 1, Gore District Magistrates to Hillier, Vol. 57, pp. 29796-8, 16 September 1822.

wondered how, in all conscience, the York magistrates could tolerate "a vile practice which has led to the schedding (sic) of blood in every corner of the country."[27] One year later, a Kingston newspaper labelled the charivari disgraceful and uncivilized. Denying that the charivari represented the will of the entire community, the editor contrasted "peaceable neighbours" at odds with the "lawless mob, with their faces masked."[28]

Thomas Dalton, editor of The Patriot and Farmer's Monitor, was equally censorious. Two charivaris in the second week of July, 1831, one in Kingston and one in Point Frederick, both directed against second marriages, provoked Dalton to describe the perpetrators as "a disgrace to civilization and should have vengeance liberally dealt upon them."[29] In the case of one of the victims, a Mr. Chestnut of Kingston, the true intent of the "blackguards" to abuse and injure was said to be "irrefragable from the horrible facts that a gun loaded with buck shot was discharged at the bedroom window...and an attempt made by one villain to throw Mrs. Chestnut out of a window." While the charivarying party worked outside the law, Dalton commended Chestnut on seeking proper legal remedy by procuring warrants and making four arrests. Perhaps, advised the editor, "if our magistrates have proper regard for the peace of society, they will make most severe examples."

In April of 1830, Joseph Valant was arrested for killing his neighbour Robert Alexander Drummond while the latter was shivareeving Valant's home in the Johnstown District. Perhaps indicative of a growing intolerance on the part of government officials, a

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[27] Canadian Freeman, 2 August 1828.

[28] Kingston Gazette and Religious Advocate, 13 March 1829.

[29] The Patriot, 21 July 1831.

sympathetic Coroner's Inquest charged Valant with the lesser crime of manslaughter. Later that summer he would be acquitted by an assize petit jury. At nine o'clock on a Saturday evening, the charivari party, in disguise, had approached the mill where Valant was lodging. They returned Monday evening and, not satisfied with merely ringing bells and blowing horns, two of the party broke open the front door and rushed in. Valant had told a witness on Saturday, that if "they (the charivari) came again he would hurt them."[30] Valant fired what was described in court as a warning shot that wounded Drummond (who was standing just outside the door) in the leg. He died five days later of blood poisoning.

Adultery was the apparent cause of Valant's charivari. It was revealed in court that the party had come for a "woman of indifferent character."[31] Valant claimed that while the woman's husband was away, he was protecting her and would do so until the husband returned. Neighbour Matthew Hale, commenting on the incident in an editorial letter, offered that the charivari party was made up of envious or offended neighbours joined by boys and blackguards... stimulated by alcohol.[32] Although Hale did not sanction retaliatory acts, given the vulgar and illegal nature of the practice, he wasn't surprised by Valant's reaction. He reminded his readers that a few years before in the Newcastle District, another person acting in a charivari had been shot and killed. Valant, himself, implied that the charivari party was an imposing, bullying force. Regarding the shooting, he told a witness "there was not another man in Johnstown who had courage to do as much."[33]

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[30] Brockville Recorder, 31 August 1830.

[31] PAO, RG 390, J. B. Macaulay Benchbooks, Box 1, File 7, Johnstown District, August 1830.

[32] Kingston Gazette and Religious Advocate, 14 May 1830.

[33] Brockville Recorder, 31 August 1830.

In the fall of 1820, Justice William Dummer Powell reported on the case of John McIntyre. McIntyre had been sentenced to death for the rape of Nancy Dick. Powell could not recommend mercy[34]. In the absence of their husbands, fathers and brothers, Powell argued, the law must become the protector of "females whose occupation retain them alone in their houses."[35] In a patriarchal society, it fell upon husbands and fathers "to exercise both dominance and protection over the women and children of their households."[36] In the Nash, Blewett (found below) and (perhaps) Valant cases, the male head of household was deemed to have done just that. The jury in its turn, now came to their defence. Valorizing patriarchy and the role of masculine defender, it found all three not guilty[37].

There seems little doubt that at least some charivaris were motivated as much from envy and dislike as from any sense of moral superiority. A year before Billa Flint's charivari, several neighbours had prosecuted him at the Johnstown assize for creating a nuisance.[38] Flint had built a warehouse with an attached wharf in Brockville that was said to block cattle access to the river and dangerously obstruct the public street. Flint was fined 5s. and was ordered to remedy the nuisance. In the summer of 1832, his warehouse burned

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[34] McIntyre laboured in a Midland District mine. Among the petitions on his behalf was one from Nancy Dick praying for mitigation. McIntyre's sentence was later commuted to banishment from the province.

[35] NAC, RG 5, A 1, Powell to Hillier, Vol. 35, 24195-200, 22 September 1820.

[36] Cecilia Morgan. " 'In Search of the Phantom Misnamed Honour': Duelling in Upper Canada." The Canadian Historical Review 76.4 (December 1995), 533.

[37] Valant and Blewett were acquitted by jury. In the Nash case, it was the judge's recommendation of mercy that led to full exoneration. Why the jury found Nash guilty, and how his case differed in the minds of jurors from those of Valant and Blewett given that the cases appear somewhat analogous, can only be guessed at.

[38] See PAO, RG 390, J. B. Macaulay Benchbooks, Box 1, File 7, Johnstown, August 1830.

to the ground under what were reported to be suspicious circumstances.[39] Flint had certainly not endeared himself to his neighbours. In 1822, Philip Matheson, owing £30 pounds to Flint, was sentenced to gaol for debt. Matheson was granted a weekly allowance of 5d. as an insolvent debtor but when, because of neglect or oversight, it was not paid, the King's Bench discharged him. Provoked to anger, Flint now charged Matheson with horse theft "by forced means of proof of persons who had left this Province from disaffection to the government and perhaps thinking to avoid prosecution for traitorous communications with the enemy swore that they had seen (Matheson) with a horse in the United States which they believed had been stolen."[40] The sixty-eight-year-old Matheson had been in gaol fourteen months when he petitioned the lieutenant-governor for mitigation of his sentence on grounds of failing health, family distress and his belief that Flint had maliciously prosecuted him. In 1811, James Breakenridge, Samuel Wright, Ezekiel Glazier, James Livingston and John Taylor brought Flint to court on a charge of blasphemy. The indictment read:

> .... that Billa Flint of Elizabethtown in the District of Johnstown, Merchant, being a wicked scandalous, and evil disposed person, and not having the fear of God in his heart, but devising, contriving and intending as much as in him to bring the Christian Religion into great contempt, hatred, infamy and disgrace.... with a loud voice, did unlawfully, wickedly, maliciously and scandalously in the presence and hearing of divers number of His Majesty's liege subjects, utter and speak the following.... words to wit "I'll be damned if I'll take Jesus Christ's bond for the security of land".[41]

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[39] Hallowell Free Press, 7 August 1832.

[40] NAC, RG 5, A 1, Matheson to Hillier, Vol. 61, 32894-97, 9 October 1823.

[41] PAO, RG 22 Series 14, Leeds and Grenville United Counties Court of General Quarter Sessions of the Peace, Case Files, 1801-1819, Box 3, 1811. Flint appears to have been a thoroughly obnoxious man. In 1827, he had succeeded in alienating the affections of Billa Flint Jr., a respected community leader and temperance advocate. The son broke with his father in 1827. Billa Sr. had refused his son's request to stop

In their depositions, his neighbours also swore that they had heard Flint say "I defy God almighty to frustrate me in my plans" and that "he would sue God Almighty if he had a note against him as quick as any man if he make him mad". Blasphemy, coupled with Flint's propensity for drinking, would not have endeared him to the Methodists who engineered his shivaree. Having made obvious enemies, Flint's second marriage offered his adversaries the moral upper hand.

It was for good reason that many victims of the charivari used armed resistance. When John Carrigue of the Niagara District refused entrance to a charivari party, they beat down his door with clubs and, in the words of the indictment, "did enter into the said house and there continued making a great noise with bells, horns and other noisome instruments for a long space and time, to wit of the space of two hours, to the great damage of the said John Carrigue and against the peace."[42] Susanna Moodie reports a neighbour recalling that in one case, the crowd charged a home with clubs and staves and in another, dragged a black man, "charged" with marrying a white woman, from his bed and rode him on a rail until he died. Charivari violence, the neighbour related, was hardly a rare occurrence.[43] Electing to take the leaders of a charivari to court, however, could prove to be an even

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selling liquor. At the 1811 quarter sessions, Flint was charged with assaulting John Robinson. At the same sessions, Jesse Holmes, collector for the township of Elizabethtown, charged that he was beaten with an iron bar when he attempted, under warrant, to seize property in compensation for rates owed by Flint. The jury found true bills in both cases. In 1809, David Tessed requested that magistrate Solomon Jones proceed with charges against Flint for stealing two hundred and fifty dollars worth of staves and boults. Flint had "refused to deliver up the property and added some abusive language". [PAO, F521, Solomon Jones Papers, 10 July 1809.]

[42] PAO, RG 22, Series 372, Box 2, File 12, July quarter sessions, 1828.

[43] Moodie. Roughing it in the Bush, 145-7.

greater risk. The Brockville Recorder supported Billa Flint in his determination to punish those who had destroyed his home even though the editor had received the following anonymous letter addressed to Flint:

> Sir: I have understood by some of the persons who assalted your house the other evening that if you persisted pursuing the corse you intending taking against some inocent persons they have most solemnly promised one to the other not only to tare down your house but also to indanger your life—if you drop it they will also. Your future corse will sho you whither what I have stated is corect.
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> A frend to both parties[44]

Perhaps because he took the threat seriously, Flint waited until the summer of 1833 to sue three leaders of the charivari for damages to his home. The jury returned a verdict of £200 for damages against all of the defendants.[45]

A successful charivari was a dialectic; the band of revelers without, and the victim within, formed a complement, the respective roles of each being prescribed by custom. When the victim acknowledged his (or, infrequently, her) guilt by paying a "fine", resolution was achieved and the crowd returned to their homes.[46] Like state-sanctioned punitive performances—the pillory or public whipping—the charivari was a shaming ritual. For the performance to succeed, the victim had to express remorse. A donation to a charity or public work appeared to be the customary way by which one signified penance. If the victims complied, the community granted them absolution. If there was no sense of

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[44] Brockville Recorder, 5 May 1831. All spellings are as in the original.

[45] Brockville Recorder, 23 August 1833.

[46] John Long observed that the charivari was a custom that prevailed in different parts of Canada generally when the newly married husband was older than his wife or the parties had been married twice. "In those cases they beat a charivari, hallooing out very vociferously, until the man is obliged to obtain their silence by pecuniary contribution or submit to be abused in the vilest language." [John Long. Voyages and Travels of an Indian Interpreter and Trader. London: 1791, 35.]

moral reciprocity, if the victims were unwilling to subjugate themselves to the communal will, the charivari failed. To criticize the charivari by word or deed was to put oneself outside the community, to stand over and against it. It was as if one had committed secular heresy. And when the dialectic was ruptured, when the ritualized forms broke down, community hostility was unleashed.

Bryan Palmer insists on seeing the history of the charivari in North America as a fairly smooth transition from a patrician to a plebeian ritual that sputtered at mid-century, but never completely burned out, as its patrician supporters deserted it. Not only did members of the patrician faction abandon it, they became its most vocal opponents, as witnessed in the Nash case where the support for mitigation came not from the plebeian members of the community but from magistrates and other gentlemen. Palmer acknowledges the charivari's decline into violence, but his examples are almost all post mid-century[47]. And this he does because he wants to equate the loss of approval with a more general critique of working class culture that emerged in the second half of the nineteenth century. By emphasizing the victims rather than the practitioners of the charivari, I have attempted to demonstrate that resistance to the charivari in Upper Canada was there from the very beginning and that as its victims showed more resolve in resisting it, the charivari turned progressively more violent for reasons more complex than Palmer supposes.

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[47] Bryan Palmer. "Discordant Music: Charivaris and Whitecapping in Nineteenth-Century North America". Labour/Le Travail 3 (1978).

Of Billa Flint's charivari, the Hallowell Free Press asked those concerned whether they would like to live in a country where unrestrained mobs exercised such sway?[48] Newspaper accounts of charivaris appeared deliberately literal. Disencumbering the charivari of its carapace of cultural meaning allowed the newspapers to interpret it as a senseless infraction of the law. Those who supported charivaris argued that they were "necessary to correct certain improprieties of conduct, which are not within the reach of legal correction."[49] Rough music, as Thompson acknowledges, belonged to a way of life in which the law was not entirely delegated or bureaucratized, in which some customary law pertaining to moral conduct was the community's to enforce as tradition dictated. The government of Upper Canada thought differently. Riotous assault and charivaris were conflated. In the few cases that have survived in the criminal records, the word "charivari" is conspicuous by its absence, save for one case mentioned below in which the word appeared ironically underscored.

In Upper Canada, both in response to the War of 1812 and the later Rebellion, the government was sensitive to all things democratic, the charivari being only one case in point. To give a pointed illustration, in April of 1838, Fire Engine Companies Nos. 1 and 2 in the city of Toronto, by a two-thirds majority, vetoed a motion that would have had their members act as an armed city guard or militia patrol. An earlier act, *23 William 4th*, had exempted firemen from militia duty except in the case of invasion. The same act also directed the fire companies to elect their own officials. The members of the American Fire

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[48] Hallowell Free Press, 10 May 1831.

[49] 'The Prompter.' A Series of Essays on Civil and Social Duties. Kingston: 1821, 46.

Engine Co., more sympathetic to the proposal, questioned the loyalty of the dissenting firemen.[50] The city council equated the internal dissension with the lack of co-operation shown by the various fire companies when fighting Toronto fires. Seizing the opportunity to rationalize the system, the council appointed a chief engineer to oversee the collective operation of the various companies. On May 13, 1839, various members of the city's fire departments petitioned council. They disapproved that their traditional and legal right to elect their officials had been abrogated. The fire departments, they argued, could be effective, and their respective captains could maintain the respect of their men, only if the superior officers were elected by the firemen. On September 19, the council, to the "astonishment"[51] of the signatories, responded that "allowing the Fire department to elect their Engineers would establish and recognize a principle of democracy tending to subvert the Monarchical Institution of the country, and that it was necessary for the Common Council to appoint the Engineers (it not being safe to allow the Firemen to do so) in order to check such democratic tendency." Equally outside of government control, charivaris, as popular/community justice, were a vestige of a "democratic tendency" that officials progressively refused to tolerate. Unable or unwilling to "servilely do the drudgery of the Fireman's office under the surveillance of officers appointed by the common council, for

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[50] The American Fire Engine Company was formed in 1837 when the British America Assurance Company donated a new fire engine to the city. The company consisted of twenty volunteers. Formed on the eve of the Upper Canadian rebellion, the company's new recruits had not laboured under the traditional exemptions from statutory labour and militia duty that was the experience of much older companies and were thus more amenable to preempting these privileges given under statutory law.

[51] PAO, D - 22, Toronto City Council Papers, 1834-1896, Resolution of Many Members of the Fire Departments, 19 September 1839.

the avowed purpose of restraining democratic principles in the Fire department", ninety-nine firemen tendered their resignations.

If we are to believe Justice Macaulay that Joseph Valant was merely protecting the inmates of his home from the insult and violence of the crowd, we will miss the real significance of Valant's (and others') retaliatory violence. Joseph Valant had repeatedly told witnesses that he supposed the charivari had never intended to do him physical harm, although he had not expected that they would break down his door. When he discharged his rifle he was not only protecting his person but also defending his right to conduct his life in a way that he had chosen irrespective of the disapproval of some within his community. The court could not condone the right of the individual to choose a morally improper mode of behaviour. They could, however, support Valant's actions on the night of the charivari because Valant had resisted demotic justice that was little other than mob violence. The court had decreed, de facto, the legality of resistance to democratic impulse by force or threat of force.

Democracy, it was objected, gave unwarranted power to the uncouth and uneducated lower orders. A contemporary critic of the charivari wrote:

> If a mob of people in disguise are to be tolerated with impunity, in inflicting punishment.... and according to their sovereign will and pleasure, one or two sons of mischief, under the cover of the usage, may, from motives of malice or resentment, or for mere frolic and fun, raise a party of disguised black-guards, to disturb the peace, and wound the feelings of any family. Everyone has some enemies; and, under the dominion of such a capricious fashion, no one can be secure from insult.[52]

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[52] "The Prompter." A Series of Essays on Civil and Social Duties, 46.

This was more than mere speculation. In more than one instance, court records indicate that the charivari was used to sanctify an action that was not born out of a breach of community mores. In December of 1815, a party of disguised men broke into the home of John Blewett, "on the pretence of punishing him for having ill-treated his wife."[53] In defending himself and his family, Blewett shot and killed Thomas Vail. Commenting on the case, Attorney General D'Arcy Boulton wrote that he had recently learned that Blewett, a British immigrant, was located on a property in the township of Murray, Newcastle District previously occupied by a person without legal title. The squatter had been "removed from thence to make room for this new settler (Blewett) and that the offence offered to Blewett arose from that cause." Blewett was tried and acquitted at the August assizes.

On July 1, 1837, John and Charlotte Bran of Thorold, in the Niagara District, treated a number of boys and other "disorderly persons"[54] with whisky "and did persuade and incite them to form a Charivari Party." They assembled outside the home of David Black and disturbed the peace and quiet of his family by firing guns, ringing bells and blowing horns. The indictment does not specify the cause of the charivari but does cast doubt on the fact that it was anything but personal. For, on the third and fourth of July, Charlotte Bran assaulted and beat Mary, the daughter of David Black, with a wellpole. In addition to being fined, both husband and wife had to enter into securities of £10 each "to keep the peace and be of good behaviour" toward David Black and his family for the space of one year. The fact that no other rioters were indicted, and that the Brans were lawfully

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[53] NAC, RG 5, A 1, D'Arcy Boulton to Lt. Gov. Gore, Vol. 27, 12327-28, 20 March 1816.

[54] PAO, RG 22, Series 372, Box 29, File 8.

required to keep the peace for one year, suggests that the charivari had been used to disguise and justify a personal vendetta against Mary Black. As Thompson has argued, for some of the victims the ever-increasing domain of the Law and a bureaucratized police "must have been felt as a liberation from the tyranny of one's 'own'."[55] By the 1830s, the charivari appeared to be slipping from an exclusive tradition through which the community voiced its moral authority to an excuse or cover for personal vengeance.

The chariviari, however, was not the exclusive instrument of "the mob". Perhaps the most striking proof that personal animosity, in whole or in part, underwrote many Upper Canadian charivaris may very well be found in three examples of political violence perpetrated by members of the Upper Canadian social elite: the Types Riot of June 6, 1826; the tar and feathering of Gore District clerk of the peace George Rolph in 1826 and the outrage committed against Gore District magistrate Jacob Hagle in 1827. Carol Wilton has referred to these (and similar) incidents as examples of "lawless law"[56]—episodes of lawlessness that occurred inside the legal system. As Wilton defines it, "lawless law" is differentiated from private forms of lawlessness "by the complicity of law enforcement or judicial officials in activities that would normally be considered illegal." She argues that it was various challenges to the ideology of the dominant elite groups in Upper Canada, marks of disloyalty and the like, that elicited the "lawless law" of Upper Canadian

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[55] Thompson. "Rough Music". Customs in Common, 531.

[56] Carol Wilton. " 'Lawless Law': Conservative Political Violence in Upper Canada, 1818-41." in C. M. Wallace & R. M. Bray. Reappraisals in Canadian History: Pre-Confederation, 3rd. ed. Scarborough: 1991, 322-45.

conservatives (appointed officials) or their offspring[57].

The Types Riot appears to most approximate Wilton's thesis. In June of 1826, nine young men (including two junior barristers and five legal apprentices), disguised as Indians[58], paraded through the streets of York in the late afternoon, eventually setting upon and destroying the printing shop of William Lyon Mackenzie. Blaine Baker has argued that Mackenzie's stand on the need for a rights-based, secular rule of law flew in the face of a "providentially inspired and explicitly articulated hierarchy...the only guarantee of ordered, ascriptive liberty."[59] As anti-egalitarian as these sons of the Family Compact were (ironically retaliating for Mackenzie's revelations and ridicule of the modest beginnings of some of York's pretentious social and political elite as well as questioning the virtue of their mothers and other female relatives in his "Patrick Swift" columns), their deliberate use of the extra-legal means was both an indication of their moral resoluteness and an expression of their highest respect for community norms (at least as they conservatively interpreted them) that Mackenzie, they believed, held in low esteem. In making it his

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[57] In the case of George Rolph, for instance, the Gore District quarter-sessions grand jury indicted ten men among whom were found a district magistrate, the clerk of the Crown, the district sheriff and two attorneys.

[58] This is Blain Baker's characterization. [Blain Baker. " 'So Elegant a Web': Providential Order and the Rule of Secular Law in Early Nineteenth-Century Upper Canada". University of Toronto Law Journal 38 (1988), 201.] Chris Raible contests Baker's characterization: "They were not wearing masks or disguise of any sort." [Chris Raible. Muddy York Mud: Scandal & Scurrility in Upper Canada. Creemore, Ontario: 1992, 3.]

[59] Blain Baker. " 'So Elegant a Web': Providential Order and the Rule of Secular Law in Early Nineteenth-Century Upper Canada", 184-205. For an alternative interpretation see Paul Romney. "From the Types Riot to the Rebellion: Elite Ideology, Anti-legal Sentiment, Political Violence, and the Rule of Law in Upper Canada." Ontario History 79/2 (June 1897): 113-144.

mission to defame the province's "divinely" selected rulers, Mackenzie was denigrating "the most fundamental principles of the community in which they ruled."[60]

When Francis Collins issued his 1828 tirade against the charivari, it was most likely the Tory-inspired charivaris that he had in mind. Jacob Hagle was described by Collins's newspaper as a man "far advanced in life."[61] "The worthy and estimable man", a magistrate in the Gore District for twenty years, had just retired to bed with his new bride, when his front door was broken down and he was dragged outside by "lawless banditti of the reigning administration." Fearful that the rioters might drown him, Hagle was informed that " 'they were only about to give him a lesson on morality' for taking unto himself a wife when in their opinion he might have lived without one." When Hagle warned them that they would eventually be detected and punished, the rioters bragged that, as in the Rolph case, hiring Solicitor General Boulton to represent them as counsel could quite easily purchase their security. Collins, perturbed that the perpetrators of this outrage went unpunished, lamented that they received instead "promotion to office as the wages of their sin", hinting that this was a politically motivated crime.

More to the point was the attack on George Rolph. The Tory elite in the Gore District was unhappy with the way in which Rolph conducted himself in his capacity as clerk of the peace. He was thought to be too compliant in drawing up indictments against them. There was also a legal conflict, initiated by Rolph, over the stoppage of a

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[60] In his defence of the types-rioters, Christopher Hagerman characterized the defendants as righteous individuals defending public decency from an unprincipled man who hid behind the tradition of a free press.

[61] Canadian Freeman, 6 December 1827.

watercourse. And local Tories did little to disguise the fact that they wanted his position for one of their own. On a June evening in 1826, Rolph was dragged from his house by a gang of disguised men, and tarred and feathered. He was left gagged, blindfolded, naked and unconscious. As a charivari party, the perpetrators had been particularly vicious. The ostensible explanation for the assault was Rolph's supposed immoral behaviour. It was generally rumoured that he was living adulterously with a Mrs. Evans, who, having fled her abusive husband, had been offered asylum by Rolph. A year later, Rolph undertook a civil suit[62] against Col. Titus Simons (former sheriff of the Gore District), James Hamilton (medical doctor) and Alexander Robertson (an Ancaster merchant) for trespass and outrage on his person. George Rolph's brother John joined William Baldwin and his son Robert as counsel for the prosecution. The defendants hired lawyers Alexander Chewitt and Allan MacNab (both members of the charivari party) and Solicitor General John Boulton. The point of the civil case was to gather recorded testimony that would be used to establish a case for criminal assault. In his opening speech, John Rolph carefully itemized the aggravated nature of the charivari. First, it was done by combination. Any victim might repel a single attacker but no man could defend himself against a multitude, a multitude wherein "the hardened fortitude of one props the wavering of another, and all become equally hardened."[63] Second, the charivari occurred "under cloud of night." As many an

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[62] A transcript of the trial appears in the Gore Gazette, 24 August 1827.

[63] In an address to a Montreal grand jury, Justice Reid warned that it was impossible to foresee what outrages might be committed by a mob once put in motion. He also warned that "the assembling of it for a Charivari may also be used as a pretence by evil disposed persons to effect purposes of a very different nature, or more dangerous to the public security, and it is therefore to be hoped that by the vigilance and exertions of those charged with the administration and execution of the law, such disturbances will be repressed." [Quebec Mercury, 9 September 1823.] The irony was not lost on John Rolph. He reminded the petit jury that the age and social standing of the ringleaders was employed to manipulate the more

assize judge would lecture a grand jury, the dwelling house of any British subject was his castle. As a place of comfort and domestic security, the home was never to be violated unless for the good of the whole community.[64] But to invade it at night, when the occupants were likely to be asleep, and thus vulnerable, was to put their lives in jeopardy. Rolph was establishing the serious criminal nature of the charivari by equating it with burglary. His final point concerned the callousness of the act. He stipulated that it would be proven in evidence that one of the elder offenders had related the following detail to his brother. George Rolph, fearing for his life and despairing of mercy at the hands of his persecutors, had prayed to God to forgive his sins and receive his soul. The defendant was reputed to have said: "it would have done your heart good to have heard how he prayed."

Rolph appeared intent on proving that the defendants acted out of malice and revenge and that their stated motive was little more than moral posturing. A witness recounted how Col. Simons had exclaimed that it would have heartened him to hear how Rolph had begged for his life. The witness supposed that Simons's animosity was as a consequence of having been "harassed" by Rolph with two or three lawsuits. Prosecuting counsel's examination of Jane Stoddart, George Rolph's maid, in addition to confirming

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impressionable in the charivari party rather than, as Reid cautioned, to "repress" it. Rolph also suggested that the young men who took part might be viewed "merely as the tools in the hands of the older and more experienced plotters in the business."[Gore Gazette, 24 August 1827.] Thompson has argued that communities were apprehensive that the charivari could sanction youthful aggression. [Thompson. "Rough Music". Customs in Common, 530.] Charivaris, either orchestrated by young men, or at least significantly composed of them (e.g. the Bran and Rolph charivaris) were, perforce, driven by an unreflective sense of moral self-righteousness and a belief in the certainty of the cause that could only be associated with those untested by the ambivalency of life. This might be especially troubling in a Province where, in the 1830s, slightly less than fifty-percent of the population was under the age of sixteen. We are also reminded of John Beverley Robinson's observation that, as a rule in Upper Canada, the old were unable to restrain the young. [See Chpt. 1, 26.]

[64] Kingston Gazette and Religious Advocate, 19 September 1828. This was usually taken to mean the apprehension of a felon.

Rolph's physical condition after the assault, established that Mrs. Evans, on the evening of the trespass, was sleeping in Stoddart's room and not in Rolph's. Boulton's line of cross-examination appeared intent on proving that the relationship between Mrs. Evans and Rolph was both illicit and long-standing. Questioned by Justice Macaulay as to the point of this line of inquiry, which appeared to have nothing to do with the trespass, Boulton replied that he wished to disprove that the charivari party acted out of vindictiveness but rather "had gone there for the purpose of taking him (Mr. R.) out of the arms of Mrs. Evans who ought rather to have been reposing in those of her husband." Macaulay replied that even if a moral cause was admitted, "the motive of the Defendants, however it might justify the act in their minds, was no justification in Law, and that, therefore, he should not admit it in evidence upon this trial." In his summation, Boulton again reiterated that his clients were not driven by personal malice but rather out of concern for morality and public decency. He complained that "he had not been allowed to prove what was a matter of public notoriety (even Justice Macaulay had to admit to the jury that well before the trial he had heard of the "transaction" between Evans and Rolph) and what he was fully prepared to prove, that the plaintiff had been living in such a state of open and barefaced adultery with the wife of another man, as was a gross insult on the feelings of the community." It is perhaps noteworthy that nowhere in the court transcript was there any specific reference to the fact that Rolph's behaviour was unbecoming someone in public office. Boulton was careful to steer away from anything that would equate the assault with Rolph's public office. It was not his office that Rolph had disgraced but the community at large. "In this country," Boulton concluded, "where there is no other punishment for so gross a breach of public

morals and public decency, than public opinion, and public rebuke, the men who stood forward to vindicate the rights of an outraged community, deserved praise, rather than punishment." Boulton's choice of words warrants careful consideration. It was the community that was outraged but not the community at large that vindicated itself. Rather it was a small, conscientious group that had taken it upon themselves to right a social wrong. In his cross-examination of witnesses for the prosecution, Boulton unwittingly revealed that others, including witness John Paterson, had been asked to join the charivari but had refused. Furthermore, many of the witnesses who testified against the defendants were in their employ. Both facts imply, Boulton's claim to the contrary, that there were differing opinions as to the seriousness of Rolph's purported breach of public morality.

The jury in the tar-and-feather case was asked to accept one of two alternatives: either the trespass was prompted by moral outrage or it was an act of personal malice. In fact these two motives were not mutually exclusive; the dichotomy was false. On April 29, 1829 Rolph was forced from office by the magistrates in quarter sessions[65] and replaced by John Burwell. In retrospect, it appears that Rolph's charivari was conducted by a small group of Gore District Tories intent on destroying Rolph's moral reputation in order to make it easier for them to dislodge him from office. There appears little doubt that some among them felt, as various witnesses appeared to corroborate, a genuine sense of moral

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[65] Six charges were laid against Rolph for misconduct in the discharge of his duties as clerk of the peace. A number of witnesses brought before a select committee of the house of assembly, charged to look into the matter, testified that the magistrates neither supported the truth of their charges nor was Rolph permitted to answer to the same. One witness offered that the action by the magistrates arose from the tar and feathering "of Mr. Rolph by certain gentleman who were associates of the magistrates and they have since become leagued against him." [Anon. Report of the Select Committee of the House of Assembly on the Petition of George Rolph, Esq. Against the Proceedings of the Magistrates of the Gore District. Toronto: 1830, 34.]

outrage. But it is equally clear that this was no democratic exercise. Nor was this any ordinary charivari. No fine was asked for nor any given. Rolph was still sleeping when the party gained entry to his home. There was no discordant music. And the party had come prepared to punish Rolph, although the feathers had been left behind and they had to tear apart Rolph's pillow. Their assault on George Rolph was more instrumental than principled. As good Tories, they may have believed themselves to be societies' divinely appointed moral champions, but, irked as they were by Rolph's sense of moral superiority in his legal initiatives against them, their agenda was most certainly personal. Rolph's charivari did not follow out of a broadly based moral consensus but was rather meant to build, among the greater community, a backlash against him for his moral indiscretions. As Tory-functionaries-in-good-standing, they would scarcely have paused to reflect over the moral views of their subalterns. The charivari was but one way in which some within the community attempted to establish a fragile moral equilibrium. The use of the lower courts was another.

Using the Legal System

The same issue of the Upper Canada Gazette that published Simcoe's proclamation also included a notice from W. Huet announcing that he was building a brewery in the Niagara District, a brewery "under the sanction of His Excellency the Lieutenant-Governor". Although decrying intemperance, the provincial government actively promoted the production and consumption of "spirituous liquors". The sale of alcohol was a principal revenue generator and, as such, the province encouraged the construction of distilleries

while the districts cheerfully distributed tavern licences. The victims of this government duplicity were most often found among those working at the margins of society. Solicited, as she said, by many of the families in Crowland Twp., Lavinia Ferguson swore out a deposition against innkeeper Robert Doan for keeping a tippling house, a violation of the rules and regulations governing innkeepers as set out by the magistrates sitting in session the first week in January of each year. The regulations clearly stipulated that no innkeeper was to sell liquor to be drunk in his house on the Sabbath except to boarders and travellers, and strictly for their own use. Inns and taverns were licensed for the exclusive convenience of travellers. Tippling (drinking for the purpose of, and to the point of, inebriation) was forbidden (**Appendix 1**). Ferguson complained that Doan permitted the heads of families and the young men of the neighbourhood to drink on Sundays. These sessions commenced on Saturdays and often continued until Monday morning much to the distress of their families "to whom they look to for support."[66] These same families saw "the evil effects of want and ruin staring them in the face if Tavern Keepers (were) allowed to keep tippling houses and induce the neighbours to drink and remain away from their families." Ferguson reminded the magistrates that this, "(was) not the intention of the Legislature in granting licences to Innkeepers." Her complaint was neither frivolous nor excessive. She was simply asking the magistrates to enforce the rules and regulations that they themselves had drafted. Ferguson, a widow struggling to operate a farm, had gone to Doans on October 13 in

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[66] PAO, RG 22, Series 372, Box 15, File 10, 22 October 1833. Until the factory system introduced a regulated workday, pre-industrial workers often mixed periods of intense labour with bouts of drinking and idleness. The English custom of "Saint Monday"—the work week beginning with an extra (holi-)day of drinking and carousing thus relegating labour to the remaining four days—appears, at least in Crowland township, to have carried over into Upper Canada. [See Geoffrey Pearson. Hooligan: A History of Respectable Fears. London: 1983, 194-95.]

search of her brother, John Hardy, and found him so immobilized that she had to leave without him. Like the many families referred to in the deposition, Ferguson's success as a farmer depended on the reliable labour of her male relations.

On September 6, 1831, Isaac Van Fleet was brought before the Niagara District assizes for keeping a disorderly house. The case was prosecuted by Sarah Ann Kiff. At the time of the offence, Kiff lived "within call"[67] of the defendant. Unlike Ferguson's deposition, the trial transcript in the Van Fleet case gives us an uncommon insight into the dynamics of intercommunity relations. Kiff testified that Van Fleet kept an "illegal" house that attracted people who were accustomed to drinking and fighting "on Sunday and other days—more on Sundays." Kiff and her family lived within earshot of the tavern—close enough to be offended by swearing and indecent language. Van Fleet's customers were not travellers but neighbours. As would Ferguson after her, Kiff emphasized that a crowd regularly assembled on Sundays to drink, and although she never saw fighting she did hear rioting. Under cross-examination, Kiff denied that she had been "urged to complain" by Elijah Armstrong whose own tavern was 300 hundred yards from the defendants'. The defence counsel's accusation (or judge's—it is not clear whether Van Fleet had legal representation) was likely motivated by the fact that tavern licences were, unless local magistrates complained, liberally granted. Too many licences and too few customers meant fierce competition. Such was the objection of magistrate James Kerby to granting more licences in his neighbourhood:

> I am informed that numerous applications will be made at the sessions for licences to sell liquor which is ruinous to our men out on duty. As houses should only be

[67] PAO, RG 22, Series 390, Macaulay Benchbooks, Box 1, File 11, The King vs. Isaac Van Fleet.

> licenced for the comfort of the traveller, I feel, with all due deference to the bench, that leave should only be granted to two houses at this place, viz. Mr. J. W. Lewis and Mr. Campbell who have commodious houses for the purpose. We were overrun with grog shops last winter and if permitted, we shall equally be annoyed this winter.[68]

Under the pressures of competition, it was tempting for less-scrupulous innkeepers to ignore the rules under which their licences had been granted. It is perhaps logical then that one would believe that Armstrong had precipitated the case against his business adversary. Kiff, however, made it clear to the court that she was acting on behalf of her impartial community. The "defendant's house was a receptacle for men of family whose families were distressed by their escapes." This, as in Ferguson's complaint, was the gist of the charge. Kiff had gone, on a Sunday evening, to fetch her father from Van Fleet's, but "could not get him away." Kiff's father was too easily tempted by offers of whisky from his friend Van Fleet. Kiff found them "cursing, swearing, carousing and carrying on." Her father was a ruined man, "disorderly at home," a man who did what he pleased, to the detriment of his family. Other witnesses confirmed that the tavern was a nuisance. Neighbour Leo Clement, a somewhat reluctant witness, testified that, as he passed by the tavern on the Sunday in question, he noticed a group of abusive people, who were shooting off guns, coming in his direction. Clement was asked by Kiff to lodge a complaint but he refused. Another witness, Phoebe Haynes, testified that she had seen married men drinking at Van Fleet's, "there till their families (were) almost ruined." While the tavern was a haunt for "blackguards", she hinted at a more serious concern—she had "seen men in the bed with the defendant's wife." Like Kiff, she emphasized that the screeching and shouting that

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[68] PAO, RG 22, Series 372, Box 33A, File 1, James Kerby, JP to Thomas Butler, Chairman, quarter sessions, 2 January 1838.

came regularly from the tavern was "more on Sunday nights than others." Elijah Armstrong, Joseph Haines and Jacob Boyce all acknowledged that drinking, quarrelling and fighting were regular occurrences. It is noteworthy that the most condemnatory evidence was provided by the female witnesses while male testimony, if taken out of its specific context, appeared to be neutral. This actuality, and the testimony of character witnesses for the defence, saw Van Fleet as a decent man who did his best to quell the occasional row. For example, Clement had noted in his testimony that Van Fleet had forbade the party with guns from shooting at Clement's house. Kiff and Haynes deplored the debilitating effects on family stability. As Kiff testified, the disorder of Van Fleet's tavern had spilled over into her once-ordered domicile. Kiff told the court that she "never knew of women assembling there (Van Fleet's)." How were women to maintain the propriety of the home when their men were subject to the disorder of the tavern? Van Fleet was found guilty and fined £10.[69]

When innkeepers were in breach of their recognizances, they forfeited the same and could not apply for a renewal of licence for three years. Such was the case with William Forsyth of Stamford who was found guilty at the January quarter sessions, 1829. He forfeited the sum of £10, and his two securities, Adam Crysler and Joseph Wynn, £5 each.[70] Nevertheless, the system was open to charges of favouritism. In 1810, a subscriber using the name COMMUNICANT, complained to the editor of the Upper Canadian

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[69] Although it was unusual for cases of keeping a disorderly house to be heard at the assizes, it was not unusual for cases normally tried at the courts of quarter session to be heard at King's Bench when the date of the assize fell between quarter sessions and the defendants were in gaol because they could not post bail or find recognizances.

[70] PAO, RG 22, Series 372, Box 8, File 30, January 1831.

Guardian that although Charles Fields had lost his tavern licence, every person in the district knew that he continued to keep a riotous and disorderly house. Even though Fields had been rendered by law as unfit to keep a tavern for three years, the writer complained that the magistrates "have winked at the sentence of the law by again licencing Fields's House; but their cunning was so exquisitely pure, they would not have it said that they gave the licence in Field's own name. No, but they (got) Fields to name a person whom (sic) the magistrates well knew would have nothing to do with a Tavern."[71] The upshot was that Fields kept the tavern "in violation of all law and justice; the peace and quiet of the sober and industrious inhabitants are disturbed; the Holy Sabbath are spent in drinking, carousing, quarreling and fighting." Such haunts, the writer illustrated, sparked feuds between families and neighbours as evidenced by the gaoling of a brother and a son-in-law of "two of the oldest and most respectable merchants in the province" for attacking one Molly M'Bride. "So much," the writer concluded, "for conniving at the laws of our country."

Ferguson had travelled more than sixteen kilometres to Chippawa in the township of Stamford to lay her complaint before magistrate James Cummings.[72] Although Cummings ordered Doan to appear at the next quarter sessions, warning him that he was "not to fail as in the event you will be proceeded against as the Law directs", the issue appears to have gone no further. The fact that Ferguson chose not to initiate legal

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[71] Upper Canadian Guardian, 7 July 1810. As found in NAC, CO 42, Vol. 350, 252.

[72] To put this into perspective, a ten mile trip in this period would take up the better part of a day assuming that the roads were passable.

proceedings in her own township may be owing to the fact that Doan, as was true of many innkeepers, had privileged status within his community. For many years, the freeholders of Crowland held their January elections at his inn. In sum, magistrates appeared reluctant to find against innkeepers who, like Doan, were descendents of American Loyalists[73]. The fact that complaints against innkeepers were most commonly forwarded to the quarter sessions through a local magistrate suggests that Ferguson believed that hers would not receive a sympathetic reception. To their individual credit, there were a few magistrates who took licensing violations seriously. Elias Carter's complaint that innkeeper Joseph Oliver kept "a number of drunks about him and keeps a very disorderly house, people laying drunk there and their familys (sic) suffering at home,"[74] was forwarded to Charles Richardson by Bertie Township magistrate James Johnston. As Carter's complaint was but one of many, Johnston was requesting that Oliver's licence not be renewed. Magistrates also complained on their own initiative. William Duff was surprised to find three magistrates supporting James Farman's application for a licence at the 1838 January quarter sessions: "I beg to remark for the information of the court that this same person had last year a licence for selling beer and kept a very disorderly house."[75] Magistrate James

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[73] Robert Doan petitioned for his land grant in 1828. Sons and daughters of Loyalists petitioned for land when they came of age or married. This would have made Doan about twenty-six when Ferguson swore her deposition. [William D. Reid. The Loyalists in Ontario. New Jersey: 1973, 92.]

[74] PAO, RG 22, Series 372, Box 22, File 20, 4 January 1836. In the fall of 1839, Oliver (then a cooper) was convicted of selling liquor without a licence and fined £5. It appears that the prosecutors in the case were three local magistrates—Alexander Douglas, E. Riselay and William Duff. [PAO, RG 22, Series 372, Box 35, File 10]

[75] PAO, RG 22, Series 372, Box 33A, File 19, 19 January 1838.

Kerby seconded Duff's sentiments, adding that two taverns in the neighbourhood were quite enough.

Apparently no local magistrate was willing to take up the case against Doan. He was still operating an inn near Cooks Mill in 1837 when sixteen of his neighbours petitioned the magistrates at quarter sessions to revoke his licence. The complaint was essentially the same as that of four years earlier. "Doan has kept a bad house," the petitioners contended, "and still continues to do so allowing tipling (sic) and drunkenness on the Sabbath as well as on other days and there is (sic) a number of families in the neighbourhood which have suffered.... in consequence."[76] Among the signatories was Crowland farmer John Lemon. In the summer of 1838, Lemon prosecuted Samuel Currant, John Roberts, Henry Roberts, John McKinney and Aaron McKinney for profaning the Sabbath by mowing, cutting and carrying hay[77]. All were given 5s. fines and were assessed court costs. In the fall of the same year, Lemon prosecuted farmer James Morris and others for desecrating and profaning the Lord's Day by mowing and hauling hay[78]. Morris refused to accept the summons and was fined £1.5s.2d. in his absence. Lemon also prosecuted Edmund Rock, Elija Petitt and Elisha Currant for trespass and disturbing public worship in the Crowland meetinghouse[79]. None of the defendants answered the warrants and each was fined £2.5s. *in abstentia*. The presiding magistrate in all three cases was Stamford's John

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[76] PAO, RG 22, Series 372, Box 27, File 25, January 3, 1837. This complaint also appeared to fall on deaf ears.

[77] PAO, RG 22, Series 372, Box 33, File 24.

[78] PAO, RG 22, Series 372, Box 33, File 9.

[79] PAO, RG 22, Series 372, Box 33, File 9.

Mewburn. One of the defendants, Elisha Currant, along with three other members of his family, had been fined a year earlier by Mewburn for Sabbath-breaking[80]. It is likely that Lemon had travelled out of his township to prosecute these cases for the same reason that had motivated Lavina Ferguson—to find a responsive magistrate. Mewburn had a proven record. In 1836, he had fined farm labourer George Ness 15s. and costs for disturbing the service at St. John's church, Stamford. Later in that same year, Drummondville innkeeper Charles Nugent was brought before Mewburn by Dr. Robinson of the Falls. Robinson charged that Nugent had allowed drinking and tippling on the Sabbath having served beer and cider to his servant, George Venell, whereby Venell became intoxicated. Nugent was fined 10s. and costs[81]. While at Nugent's, Venell had witnessed an assault on Robert Wood. Wood, himself a notorious character (he had been convicted for assaulting his wife the previous year) had sworn out a deposition against Thomas Pickens for assault. The attack had issued out of a card game at Nugent's tavern. Intoxicated, the card players had charged each other with cheating and stealing. Mewburn appears to have sidestepped the assault charge and instead ordered the participants, including Wood, to appear (at the next quarter sessions) against the principal cause of the affair—Nugent for keeping a disorderly house. Mewburn was named as prosecutor in the indictment. On the 12th of October the grand jury found a true bill against Nugent for keeping "a much disorderly House frequented by persons of notorious character where gambling, drunkenness and stealing have been carried on to an extent much to the injury and annoyance of his neighbours and

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[80] See page 238-9.

[81] PAO, RG 22, Series 373, Box 25, File 7. At the same session, Nugent was also found guilty of trespassing (taking wood from) on the property of Collin Skinner.

against the peace...of our Sovereign Lord the King."[82] The case, for reasons unstated, was forwarded to April of 1837 when another grand jury found "no bill". The contradiction in the two juries' findings might be explained by the fact that the second indictment had been drawn incorrectly. The actual offence had occurred the last week in September, as verified by Wood's deposition. The jury bill, however, claimed that the offence had occurred on October 12 (the day of the last quarter sessions) "and divers other days and times between that day and the day of taking this Inquisition." In any event, Nugent once again escaped prosecution.

David Murray writes that the trial documents are silent on the motives for Lemon's prosecutions.[83] If Murray had dug deeper he would have found that John Lemon and his fellow co-signers, including Jonas Yokom and various members of the Buchner family, were Wesleyan Methodists.[84] Yokom's father, Jesse Yokom, was a class leader in the Crowland Methodist church, and Cpt. Henry Buchner, the family patriarch, was one of its founders. The Crowland Methodists were a single-minded group, united not only by religion but also by marriage. Lewis Buchner, for instance, was married to the sister of John Lemon Jr. The judicial records indicate that, in Crowland Twp., the prosecutions for Sabbath-breaking and the disruption of religious meetings were of a piece. Together they point to social tensions and divisive currents leading out of religious differences: Lemon,

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[82] PAO, RG 22, Series 372, Box 28, File 20, April 1837.

[83] David Murray. "Enforcing a Christian Moral Order: Sabbath-breaking in Nineteenth Century Niagara", unpublished paper, 10.

[84] Wilfred D. Warner, ed. The Accounts Register, Niagara Circuit Methodists, 1795-1823, private publication, no date. Murray goes no further than to suggest "Lemon may have been an Anabaptist." Murray. Colonial Justice, 83.

the Methodist, using the courts to prevent his non-Methodist neighbours, including the Currants, from farming on Sundays, the Currants, retaliating by disturbing the Methodist service.

As Neil Semple points out, "Methodism from its inception was religion in earnest."[85] Following personal conversion, each member of the church would "strive for a continuing growth in grace through the appointed means of the church and also through 'good works'."[86] Individually, and collectively, Methodists relentlessly struggled to craft a moral world. About six months before Lemon launched his first prosecution against his neighbours for Sabbath-breaking, the Christian Guardian, a Methodist newspaper, printed two successive articles on the profanation of the Sabbath. Sabbath-breaking, the writer maintained, prevailed to an alarming extent in every Christian country. This was not without consequence—"to do any unlawful act upon any other day is criminal, but to be guilty of violating the laws of God on the Sabbath is immeasurably more offensive in his sight."[87] Inebriation, especially on the Lord's Day, when so many others were lamenting the sin, was an especial affront to God and all good men. "How afflicting," the writer pontificated, "to the pious to discover the taverns filled, gaming and other evils perpetrated on this holy day." Sabbath-breaking, the Methodists believed, was associated with nearly every violation of civil and religious obligation. It was said to proceed from an "infernal

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[85] Neil Semple. "The Quest for the Kingdom: Aspects of Protestant Revivalism in Nineteenth-Century Ontario." David Keane and Colin Read, eds. Essays in Honour of J. M. S. Careless. Toronto: 1990, 96.

[86] Semple, 101.

[87] Christian Guardian, 7 February 1838.

disposition, capable of producing the blackest crimes." It was the duty of all magistrates, and other civic authorities, to enforce strict observance of the Sabbath—"civil authorities have power to prevent a great deal of profanity, the laws give them a right, and God requires it of them."[88] The writer reiterated that all who committed crimes, from petty to capital, began their criminal careers with the Sabbath sin. The remedy was simple enough—all taverns ought to be closed on the Sabbath. Furthermore, each and every Sunday, people should refrain from travelling, public conveyances should be shut down by public order[89] and man and beast should rest.

The records for the Niagara district reveal that district Methodists restricted their prosecutions of moral infractions to Sabbath-breaking. One might wonder why they were not equally intent on broadening their target. Lynne Marks has written that they, as well as their Presbyterian and Baptist neighbours, did just that. However, instead of working through the secular courts they brought those of their brethren who had violated moral standards before a church disciplinary body. Blurring the distinction between private and public, the evangelical churches readily intervened to regulate the sexual, family and business behaviour of their members. Those outside the church were considered to be part of the secular world while the converted occupied sacred space. "This clear division

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[88] Christian Guardian, 21 February 1838.

[89] This became a common complaint. In 1834, Robert Cartwright, assistant minister of St. George's Church in Kingston, complained to the proprietors and managing committees of the various steam boat companies docking at Kingston that they were violating the sanctity of the Sabbath. No matter that the owners pleaded public convenience, it was a flagrant sin, Cartwright maintained, for boats to operate on a Sunday. Such boats docking in the Kingston harbour resulted in crowds "of idlers attracted to the wharves, many of whom, let us hope, would perhaps but for this diversion, have been found in the House of God. I can safely say that the noise caused by letting off the steam has several times disturbed the congregation of St. George's Church and interfered with the efficient and solemn performance of the service." [British Whig, 8 April 1834.]

between sacred and secular," writes Marks, "left little room for a sense of private behaviour within the community of believers, since a primary imperative within this community was to keep its members separate from the world of sin around them. All behaviour could thus be subject to church regulation."[90] The glue that held Baptist and Methodist communities together was little more than religious belief. Consequently, it was necessary to both monitor and regulate internal conflicts lest the communities collapse under their weight. Adultery and wife abuse were but two examples of moral slippage that might come under the purview of the disciplinary committees. The common denominator that underscored these and other cases was the need to guarantee communal harmony. Although Marks argues that in this respect they stood in marked contrast "with the more individualistic and property-centred focus of the secular legal system"[91], as we witnessed in our study of the Niagara District, they appeared to share a commonality of purpose with the summary courts and with magistrates like John Mewburn, magistrates intent on reconciling disputes between neighbours for the sake of harmonious relations.

Lemon and his sabbatarian brethren were not the only Methodists to use the courts to combat moral transgressions in their denominationally dictated mission to create a decent neighbourhood. In April of 1828, Gershan Wright, a Grantham Township Methodist, twice prosecuted innkeeper Thomas McMahon, for keeping a disorderly

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[90] Lynne Marks. "Christian Harmony: Family, Neighbours, and Community in Upper Canadian Church Discipline Records." Franca Iacovetta and Wendy Mitchinson, eds. On the Case: Explorations in Social History. Toronto: 1998, 123,

[91] Lynne Marks. "Christian Harmony," 115.

house.[92] In both instances, Wright lost his case. On the whole, despite instructions from those like the Christian Guardian, there was a general reluctance on the part of magistrates to enforce sabbatarianism. Magistrate Bartholomew Tench only, and perhaps reluctantly, attempted to arrest Humberston carpenter Joel Skinner[93], after being pressured by one Jenner, a local miller and later, by innkeeper William Pawling. On a Sunday ramble along the Welland canal, Tench had noticed Skinner, Daniel Waterhouse, Robert Cram and others shingling the home of Thaddeus Smith whereupon Jenner addressed Tench: "have you not seen the King's Proclamation to prevent such work on the Sabbath?"[94] Thus incited to duty by Jenner, Tench, receiving only abuse for his efforts, unsuccessfully tried to persuade Skinner to stop working. Although Tench and Skinner both posted recognizances before magistrate Cromwell Wilson, there is no mention of this case in the summary or quarter-sessions records. Having been seen to do his duty in attempting to arrest Skinner, it is likely that Tench chose in the end not prosecute to the full extent of the law. Either that, or the case was privately settled.

William Hutton's observation that "there appears to be very little religious feeling and very little regard to the Sabbath in this country; the tone of morals is low, low indeed and almost frightening me for my children,"[95] summarizes the various traveller's reports cited in chapter one. There appears little or no evidence that would suggest that Sabbath-

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[92] PAO, RG 22, Series 372, Box 1, Files 38 & 39.

[93] Skinner was a descendant of United Empire Loyalists. He was a constable in 1836.

[94] PAO, RG 22, Series 372, Box 16, File 7, 26 November 1833.

[95] Gerald Boyce. Hutton of Hastings: The Life and Letters of William Hutton, 1801-61. Belleville: 1972, 14.

breaking was anything but endemic within the province. If Tench had taken a hard stand in the Skinner case, it would have proven generally unpopular. At the time, Tench had called upon Robert Cram and another man to aid and assist him in arresting Skinner but they "walked away without paying any attention."[96] As it was, when Tench swore out a deposition against Skinner, it was not for Sabbath-breaking. Skinner was ordered to appear at the January quarter sessions for "abusing, assaulting and obstructing (Tench) in the execution of his duty as a magistrate." We are reminded that when magistrate John Mewburn's neighbours petitioned against him for overstepping his authority, two of the cases involved Sabbath-breaking. One case involved the Currants and the other, John Darling's charge that his neighbour and fellow miller John Davis had laboured on Sunday. Magistrate John McGlashan had acquitted Davis, but Mewburn had retried the case and found Davis guilty. In neither case did the petitioners condemn those accused of Sabbath-breaking but rather Mewburn for hearing the cases. Perhaps what rankled the community in the Davis case was that Darling (assuming that he didn't work his own mill on Sundays) might have cynically exploited the law to prevent his business rival from gaining a competitive edge.

Given the general reluctance of magistrates to enforce the observance of the Sabbath, initiatives in this direction proved to be, for the most part, voluntary. Such was the case of the barbers of Kingston who bound themselves together "under a heavy penalty not to perform any professional labour.... on Sundays, unless when called upon to exercise their

[96] PAO, RG 22, Series 372, Box 16, File 7.

functions upon steam-boat (sic) travellers, or upon the dead."[97] The Kingston Chronicle assured its readers that this would cause no inconvenience as their respective establishments would now remain open until a late hour on Saturday night "to enable them to become divested of their superfluous physiognomical excrescences, without committing any breach of Sabbatical reverence."

Permitting drinking on Sundays was not the only violation of the rules governing the proper maintenance of an inn. On the 5th of January 1836, carpenter James Conger and farmer David McAspin came before magistrates Tench and McGashan to swear out a deposition against Pelham Twp. innkeeper Eber Rice. Conger claimed that he had more than once seen raffles for bridles, whips, money and liquor at Rice's establishment. He had seen a number of persons taking part in these raffles but was quick to qualify "they generally conduct themselves in a peaceable manner."[98] Although "words" had sometimes passed between the gamblers, they were never of any consequence. Conger also knew that Rice kept an alley for playing skittles or ninepins. Wagers of liquor were made on these games. He recalled that:

> sometime last year there were some females at the house of the said Rice whom common reports in the neighbourhood said were from Buffalo and that they were woman of bad fame and he had heard it reported that woman of the same character had been in Rice's before and deponent believes that the said Eber Rice knew these women to be improper characters.

McAspin added that, on January 4, he witnessed several people playing cards for money in Rice's mill near the tavern. Having heard Rice's voice at one point, McAspin inferred that

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[97] Kingston Chronicle, 2 June 1832.

[98] PAO, RG 22, Series 372, Box 22, File 11.

Rice was present. He also repeated a neighbourhood rumour that the women present at Rices were "of bad character from Buffalo and that their conduct was such by running about by day and by night that (the) deponent did not think them decent girls and may have expressed himself to others to that effect."

The following day, farmer George Phelps, examined by Tench alone, offered that "the way the Inn is kept, it is an injury to some." He believed that Rice was well aware that unlawful games were played on his property. Phelps added that from his own observations of their conduct, that the women staying at the inn were "bad characters and....that the said Rice knew that they were Prostitutes and brought them there for that purpose."

On January 7, Tench included the depositions in a letter to the clerk of the peace. He expressed his concern that:

> in the case of Eber Rice, I found great reluctance on the part of the witnesses to disclose anything to (their) prejudice particularly James Conger[99]. The prosecution will have to be conducted with great ingenuity to insure a conviction.

Rice had been prosecuted one or two sessions before and, even though "the entire of this settlement complain against him, at least most of the respectable farmers do so," he was found not guilty. Although concerned that the witnesses might hedge their testimony once in court, Tench, nevertheless, "on a careful perusal of the evidence," believed that Rice might be indicted for gambling, keeping a bawdy house and a breach of the tavern

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[99] Francis Ann Thompson has noted that Rice was from Loyalist stock and had fought with the 2nd Lincoln Militia in the war of 1812. He had also been a constable for Pelham in 1829, 1830 and 1833. Pelham Township had a large Quaker population with radical leanings. It would thus have been politically unwise for potential witnesses to alienate the Loyalist Rice "in a township where the authority of the magistracy was tenuous." [Ann Thompson. Local Authority and District Autonomy: The Niagara Magistracy and Constabulary, 1828-1841. Ph.D. thesis, University of Ottawa, 1977, 55.]

regulations. In the end, even Tench's reservations appeared overly optimistic. The case appears never to have been tried.

Complaints against irresponsible innkeepers were principally of two types: they were either precipitated by those who felt that ill-governed taverns were responsible for weakening the moral fortress that was the Upper Canadian home and endangering the economic security of Upper Canadian farms by undermining the work force upon which they depended for their success or by religious zealots who believed that establishments or individuals operating or working on Sunday were religious transgressors. Complaints were also subject to historical contingency. By 1838 it was believed that some taverns, especially those operated by ex-Americans, were venues for seditious meetings. In January of 1839, Lieutenant-Governor George Arthur ordered that all district magistrates suspend the licences of any innkeeper who was not a citizen of the province. This proved opportune to those who would prevent a neighbour from being granted a licence or would have an existing licence revoked. Rumours were spread and petitions were got up against particular individuals. A few local magistrates attempted to counteract these charges, fearing that they would only lead to further divisiveness within their communities. One St. Catharines' magistrate, upon learning that objections were made to giving licences to William Kitch and Jacob Turner because they were born in the United States, wrote to Charles Richardson: "I fear it will destroy the really and trully (sic) good feeling which so happily exists in this district between the magistrates and inhabitants."[100] William Woodruff wrote to quarter session's chairman, Thomas Butler, in support of Mrs. Clement of St. Davids

[100] PAO, RG 22, Series 372, Box 33A, File 19, 18 January 1839.

Township. Clement hoped that her application for a licence would not be refused because of information that she had no opportunity of rebutting: "She has heard that information was laid that she has had radical meetings in her house which is false—no meeting of that nature was ever held there since kept either by her or her late husband."[101] Clement's licence was granted. Not all magistrates, however, were as supportive. Jingoism dictated John Clark's objection to the granting of a licence to Matthew Hawing of Louth: "he ought to be refused—altho he rents a house from me I believe him an unfit person—he is a foreigner come from Buffalo last fall and not entitled to much consideration."[102]

Tavern owners were not born to the profession. Francis Thompson has argued that many inns in the Niagara District were owned by prosperous Loyalist families (fully 65% were owned by first families) intent on expanding their commercial interests[103]. What Thompson fails to notice is that many others gravitated to innkeeping because they had failed in some other profession or, at the very least, were not generating a sufficient income. Some, like Margaret Hart of Thorold, began by opening up a dram shop without a licence. Having witnessed her illegal operation, magistrate George Keefer interfered with her request for a licence in 1831. An incensed Mrs. Hart wrote to magistrate James Black the following year: "I am certain that if I had justice I should been able to keep a deasent (sic) house as would need to be kept at law but say that I have been deprived of a deasent living for the sake of others and they are not the beter (sic).... I have not over leaped the

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[101] PAO, RG 22, Series 372, Box 33A, File 19, 12 March 1839.

[102] PAO, RG 22, Series 372, Box 31, File 13, 12 March 1838.

[103] Ann Thompson. Local Authority and District Autonomy, 158.

line of rectitude why shall I be deprived of a living."[104] Black was not impressed. He wrote to the chairman of the quarter sessions that Mrs. Hart had put himself and Keefer "at defiance."[105] Because first families were much more likely to be favoured by the magistracy in obtaining licences, I would speculate that lesser social types like Margaret Hart, were forced, if they wished to take up the trade, to open illegal grog shops. Hart may not have believed that those who received licences were her moral betters—the quarter sessions records would certainly support her—but, in the end, it was class standing that won the day. Simply put, the magistracy preferred to grant licences to those with loyalist connections.

A tavern licence could guarantee a quite profitable living and so the competition for them was sometimes fierce. Certainly such competition could bring rifts and tensions within the community to the surface. In 1831, Nelson Swayze operated a tavern at the Beaver Dam, Township of Thorold, a business once owned by William McClellan in a house now rented from Obadiah Hopkins. At the end of that year, carpenter Joseph Badgley made it known that he intended to apply for a licence to keep a public house in a property owned by Jacob Keefer, also at the Beaver Dam. Swayze petitioned the magistrates at quarter sessions to withhold the permit to obtain the licence on the grounds that the number of "travelling custom (was) scarcely sufficient enough to support one Publick house decently as it ought to be kept"[106]. This suggested that Badgley would

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[104] PAO, RG 33, Series 372, Box 13, File 32, August 1832.

[105] PAO, RG 33, Series 372, Box 13, File 32, 3 January 1833.

[106] PAO, RG 22, Series 372, Box 11, File 44, quarter sessions January 1832.

almost certainly be forced to operate an unlawful establishment if he were to turn a profit. Fourteen of Swayze's neighbours, including former publican McClellan, constable George Lacy and George Marlatt, supported Swayze. Their concerns were precisely expressed: "it would be an injury to the place and neighbourhood by incouraging (sic) dram drinking and tippling." Badgley was well known to Lacy. In the spring of 1829, Sarah Badgley assaulted Lacy when he attempted to serve an order from the Court of Requests to seize the goods and chattels of the Badgley's.[107] Lacy had lost the case. Now Badgley had lost his. On September 19, 1832, Badgley swore out a deposition against Swayze before Jacob Keefer's father George. Badgley stated that on the evening of June 28, while he was at Swayze's establishment, he heard the innkeeper swear: "God damn God Almighty, I am not afraid of his sending the Cholera to me, by Jesus Christ I ain't."[108] Swayze was summoned to answer to the charges and ordered to give sureties to appear at the next assizes. Having just missed the assizes for that year, the case would not be heard before the fall of 1833. In January, magistrate James Black wrote to the chairman of the quarter sessions, James Muirhead, that as he was confined to bed with a bad leg and George Keefer was at the point of death, neither would be able to attend the January session. Black was therefore writing in respect to a number of applications for tavern licences. He believed that Swayze's licence should be suspended pending the outcome of the trial "and if the allegation is proven he should not have a licence at all."[109] He also noted that Badgley had

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[107] PAO, RG 22, Series 372, Box 3, File 46.

[108] PAO, RG 22, Series 372, Box 15, File 11.

[109] PAO, RG 22, Series 372, Box 13, File 32.

neglected to enter into recognizances. On April 18, Badgley appeared before a recuperated George Keefer and posted £20 to guarantee his appearance at the next assizes. The charge against Swayze for blasphemy appears to have been settled before the court date, and in 1834 Badgley received his licence. Although scarcely providing a complete picture of the dispute between Badgley and Swayze, court documents indicate that both men used the legal system in support of their own cause and that their animosity reflected undercurrents of division within the community originating in the past and radiating into the future.

Jacob Keefer was both a magistrate and a Wesleyan Methodist. Although Bruce Curtis described Keefer as an active sabbatarian who consciously attempted "to regulate his own comportment according to Methodist tenets and (hold) similar standards for others,"[110] this did not prevent the magistrate from renting his property for Badgley's tavern. As in so many of the cases cited above, when business and religion conflicted, the former usually won the day. George Marlatt had been a signatory to Swayze's petition. In October of 1835, Jacob Keefer, a Thorold Township magistrate, would find Marlatt's brothers Hiram and Israel guilty of interrupting and disturbing the order and solemnity of a Methodist camp meeting near Peter Warner's property in the Niagara Township. The brothers had made "a noise and us(ed) indecent and profane language."[111] They were fined and assessed costs.

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[110] Bruce Curtis. "Mapping the Social: Notes from Jacob Keefer's Educational Tours, 1845", Journal of Canadian Studies 28:2 (Summer 1993): 58. Keefer's religious convictions didn't prevent him from celebrating his wife's 37th birthday by drinking champagne. He later wrote in his diary "too much champaign (sic) and no Tea or Coffee."

[111] PAO, RG 22, Series 372, Box 21, File 9, October 1835.

Afterword

Thomas McIlymogh was forty-three years a warden in the Episcopal Church at Edwardsburg when he wrote to Lieutenant-Governor Bond Head complaining of the "many species of profaness (sic) and immorality in the country."[112] McIllymogh singled out the old favourites; fornication, profanation of the Lord's day, swearing and drunkenness. Although it must have appeared otherwise, there were in fact laws already in place. *1 Eliz. c. 2,* for one, addressed the profanation of the Lord's Day although it addressed itself in historically specific rather than more useful general terms. The law that McIllymogh envisioned would not occur for another nine years. *8 Vic. c. 45* would prohibit any labour or calling on Sunday and any intoxication, brawling or use of profane language in the public streets. Anyone found at fault for the above or the following—tippling, playing at games or sports, hunting and fishing on Sunday—would be subject to a fine not exceeding £10. Because it must have appeared to him that no legislation addressed these offences, McIllymogh suggested that Bond Head recommend to the legislature that it pass such laws as the lieutenant-governor might think best would punish immorality and thereby "promote the practice of virtue." For its part, the government of Upper Canada appeared to signal its disapproval not with new, tougher legislation but with patterns of sentencing. When James Kennedy, an Irish labourer working on the Welland Canal, was sentenced to six months in gaol for manslaughter, his wife, Margaret, implored the lieutenant-governor to consider her incipient impoverishment and that of her twin babies. Reporting on the case to the Executive Council, Justice Charles Hagerman emphasized that Kennedy had met the

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[112] NAC, RG 5, A 1, McIllymogh to Bond Head, Vol. 173, 94683-84, 12 December 1836.

deceased at a tippling house near the Welland Canal "on a Sunday."[113] What began as a quarrel borne out of intoxication had ended in a fight. The deceased was knocked down and an unidentified man (who had since absconded) kicked him several times in the side of the head, blows supposed by the court to be the immediate cause of death. Finding no malice on Kennedy's part, Hagerman advised the jury to find him guilty of manslaughter. Although, Hagerman explained to the council, the deceased did not die by the hand of the prisoner, nevertheless, "his death was the consequence of gross outrage, and profane conduct, in which he (Kennedy) was a principal actor." After considering Hagerman's report, the Executive Council was unable to recommend any mitigation of sentence. Whether "profane conduct" was indictable or not was never the point. It was enough that it explained Kennedy's crime and, as such, garnered him no favour. Reacting after rather than before the fact effectively meant that the government turned a blind eye to irreverent behaviour. Rather than attempt to forge a new moral consensus by passing more restrictive laws, the government—its legislators, judges and magistrates—appeared to be more comfortable (with a few noted exceptions) in following popular sentiment.

[113] NAC, RG 1, E 1, Hagerman to the Executive Council, Vol. I, 5 December 1828.

7

COMMUNITY AND PENAL REFORM

In his biography of physician, lawyer and politician John Rolph[1], Charles Godfrey recounts the following incident. Two men, Carr and Smith, unsuccessfully defended by Rolph, were sentenced to be executed for stealing an ox. Determined to intercede with the lieutenant-governor on his clients' behalf, Rolph borrowed the fastest horse in the village and, after giving instructions to delay the execution to his brother-in-law, the Wesleyan circuit rider John Ryerson, raced off to York. At the appointed time of execution, Reverend Ryerson prayed from the scaffold for an hour and a half despite complaints from many of the impatient spectators who had been amassing outside the gaol over the previous three days. At last "there was a shout of elation and a man ran to the scaffold shouting, 'Here comes the Doctor.' Rolph, dusty and covered in sweat, rode to the foot of the scaffold and held up the reprieve."[2]

Less biography than hagiography, this narrative has the hallmarks of self-serving antiquarianism. Like a myth, fable or folk memory, it appears as a story which has been purposely honed by many retellings over a convenient period of time. There are certainly too many false notes for it to be taken as a serious historical account. The absence of dates and location suggest its compilation long after the fact. When read against archival records, the errors of the telling become apparent. It is Kerr not Carr. A horse was stolen, not an ox.

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[1] Charles Godfrey. John Rolph: Rebel with Causes. Madoc, Ontario: 1933.

[2] Godfrey, John Rolph. 46.

Rolph's sister was married to George Ryerson not John. Daniel Freeman attended to the prisoners' spiritual needs, not Ryerson. But perhaps most of all it is Rolph's "Yankee" bravado that rings false. In a patriarchal colony, reprieves were not rationalized on a face-to-face basis but rather followed strict and obsequious written protocol.

What narrative then did this example of local revisionism usurp? Not only does the official story of Kerr and Smith, as told in state records, vilify Rolph[3], more importantly it will be found to illustrate the failings of the criminal justice system in Upper Canada, at least prior to the reforms of 1833 and the building of Kingston Penitentiary.

On August 25, 1823, at the London District assizes, James Kerr and Asa Smith were sentenced to death for horse stealing. Immediately upon conviction, Justice D'Arcy Boulton respited the execution (most likely at the urging of the petit [trial] jury) to the 18th of September, in order to give time for the convicted felons to petition the lieutenant-governor for clemency. Detained some days beyond expectation at the Gore District assizes, and apprehensive that not enough time had been allotted for the application to the lieutenant-governor, the judge dispatched a second respite by way of John Harris[4], the treasurer for the London District, forwarding the execution to October 14. Harris placed the document in the hands of Sheriff Abraham A. Rapelje on Monday the 15th of September. As the new date of execution drew near, Boulton prepared a further respite, now extending the execution to November 14. Indisposed, he asked a friend to put the letter in the post,

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[3] This would not be the last time that Rolph would mend a tattered reputation. The "white flag of truce" fiasco in 1837 would prove to be an even greater embarassment.

[4] Harris was the treasurer for the London District from 7 January 1821 to 25 August 1850.

requesting him to personally communicate to postmaster William Allan[5] the importance of the document and to oversee that it was put into the proper bag. As an added precaution, John Rolph, the prisoners' counsel, was furnished with a hand-delivered duplicate addressed to Sheriff Rapelje. It was understood that, out of concern for his clients, Rolph would be anxious to see that the letter reached its designated party. Neither respite was to reach the sheriff before the day of execution.

On October 14th the gallows was raised "...by the exemplary bodily exertions of the magistrates amidst sounds expressive of public opinion against the disproportion of the punishment to the crime"[6]. Kerr and Smith, toffed in white caps, halters adjusted about their necks and in company with their coffins, were conveyed by wagon to the execution site. On arrival, the convicts were joined in a hymn by several hundred ladies and gentlemen gathered from various parts of the London and Gore Districts. Addressing the spectators, the prisoners commended their own souls to Almighty God, declaring their hope for a joyful resurrection. The Reverend Daniel Freeman, spiritual advisor to the prisoners during their confinement in the Vittoria gaol, offered a prayer of intercession after which the halters were adjusted to the superincumbent beam and the prisoners, at their own request, were permitted to draw their caps down over their eyes "as a prelude to that total darkness which death was about to bring upon them".[7] Kerr remained passive while Smith raised his hands to heaven and implored Jesus to have mercy on his soul. Ralpje, reportedly

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[5] Allan was the postmaster for York from 1808 to 1828.

[6] Canadian Courant & Montreal Examiner, 14 November 1823.

[7] Canadian Courant & Montreal Examiner. 19 November 1823.

paleface and barely able to support himself, was about to give the order to move the wagon from under the feet of the prisoners, when Boulton's respite was made known to him. After a psalm of thanksgiving, The Reverend Mr. Freeman led the prisoners back to their cell while the large crowd dispersed, "half pleased and half displeased with His Excellency, the lieutenant- governor for the 'great disappointment'."[8] On the same day, three petitions were sent to the lieutenant-governor; the first from the grand jury at a court of General Quarter Sessions of the Peace, London District, the second from twelve magistrates of the London District in General Quarter Sessions, and the third from Daniel Freeman. Each petition emphasized the sincere repentance of Kerr and Smith, the petition from the grand jury adding the concurrent wishes of the inhabitants of the District for the extension of mercy.[9] For several days after, a traumatized Smith was laid low by feverish attacks. Another respite was issued extending the date of execution to December 18.[10] However, by the time it arrived, the prisoners had already effected their escape.

On December 3, Rolph wrote to Lieutenant-Governor Maitland that Kerr had voluntarily delivered himself back into custody claiming that he could not escape from himself and did not want to bring censure on the gaoler from whom he had received much kindness during his imprisonment. Rolph expressed his fear that on the basis of having escaped, the twenty-seven-year-old Irishman might have forfeited any further claim to clemency.[11] Rolph's concerns were to prove groundless; the lieutenant-governor had

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[8] Montreal Herald, 18 October 1823.

[9] NAC, RG 5, A 1, Grand Jury et. al. to Hillier, Vol. 63, 33769-71, 14 October 1823.

[10] NAC, RG 5, A 1, John Harris to D'Arcy Boulton, Vol. 62, 33357, 26 November 1823.

[11] NAC, RG 5, A 1, Rolph to Hillier, Vol. 63, 33433-35, 17 December 1823.

already instructed Attorney General John Beverley Robinson to prepare a free pardon for Kerr.[12] Presumably Smith would have begun a new life in the United States, his probable destination in any case. Had things been left to run their predictable course, Smith and Kerr would have been banished for either seven years or life.

After pardoning, capitally-convicted criminals are wont to disappear from the historical record unless, of course, they turn out to be recidivists. James Kerr may be an interesting exception. Residents of the town of London woke on Thursday morning of January 29, 1829 to find a slanderous effigy of Lieutenant-Governor John Colborne gracing their town-square. It was supposed that supporters of newspaper owner Francis Collins, who was the accused in a government-sponsored libel trial, were responsible. A number of citizens of the London and Gore Districts took up a subscription and offered a reward to anyone who could give information leading to the arrest of the "midnight perpetrators". One name among the long list of subscribers was that of James Kerr pledging £5. Also among the list of contributors was his one-time nemesis, Sheriff A. A. Ralpje. Although there is some probability that there was more than one James Kerr living in the London district at this time, it is salutary to the argument of legal officials of the day to believe that this James Kerr was one and the same. Reporting from the Perth assizes on the conviction of several men for riot at an immigrant camp and sentenced to two months in gaol and a fine of £10, Justice Campbell reasoned that if the fines were remitted "this will have the affect of attaching those men to His Majesty's Government from a principle of gratitude for

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[12] NAC, RG 5, A 1, Hillier to Robinson, Vol 63, 33597, 17 December 1823.

an act of grace so important to people in their situation."[13] How much more grateful was a man whose life had been spared.

Bringing convicted criminals to the brink of death was not peculiar to the case of Kerr and Smith. At the Niagara assizes for 1826, Judge Sherwood passed sentence of death on William Corbin and Adam Grass for horse stealing and on David Springstead for purloining sheep. Sherwood notified the lieutenant-governor of such, without commentary, in his assize report.[14] At the time he recorded the sentence, Sherwood respited the execution to October 25 for the usual reason of permitting the convicts adequate time to make their case for mitigation of sentence. On October 6, the Niagara District sheriff, Richard Leonard, wrote that both Grass and Corbin had been convicted on circumstantial evidence and since being confined to gaol, had conducted themselves in an exemplary manner.[15] However, no petitions from any of the three prisoners can be found among the state records[16]. Under the banner, "A Great Disappointment," the Niagara Gleaner noted that "numbers came into Town, to witness the execution of the law particularly, from the United States—but was happily for those beings, disappointed, His Excellency, having previously suspended the execution till a distant period, if it ever takes place."[17] As if to verify the fact that the last-minute respite had taken the community by surprise, the Gleaner

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[13] NAC, RG 5, A 1, Campbell to Hillier, Vol. 68, pp. 36010-13, 31 August 1824.

[14] NAC, RG 5, A 1, Sherwood to Hillier, Vol. 79, pp. 42699-700, 25 September 1826.

[15] NAC, RG 5, A 1, Leonard to Hillier, Vol. 79, pp. 42813-15, 6 October 1826.

[16] The fact that Sheriff Leonard's letter was sent under separate cover suggests, for reasons that we may never know, that the prisoner's petitions were never sent, it having been the usual practice for a sheriff or gaolers to append their comments to the prisoner's petition.

[17] The Niagara Gleaner, 28 October 1826.

added that a wagonload of cakes and gingerbread transported to the execution site had to be sold at reduced prices. The prisoners were to spend six more months in gaol before conditional pardons were finally issued.[18]

On September 18, 1829, Michael Mason was convicted for horse stealing at the Niagara assizes. He was sentenced to hang on Tuesday, October 20. With an assembled group of spectators looking on, he was led to the platform and the rope was placed around his neck. What Mason did not know was that his sentence had been commuted. David Murray writes that sheriff Richard Leonard had "participated in a cruel and elaborate farce designed to intimidate a horse thief and deter horse theft across the Upper Canadian-United States border."[19] Leonard wrote to the lieutenant-governor's office that the hoax was meant to make Mason "feel as much as possible for the crime he had committed."[20] However, it is also possible that this was a bit of subterfuge designed to get Mason to admit to his crimes and perhaps divulge the names of accomplices[21]. Given the opportunity to make a dying confession, he acknowledged having stolen eleven horses for which he had received pay. The St. Catharines Farmers Journal reported that a local cavalry troop, in full uniform, was present to quell any disturbance, but their service was not required. At the last moment,

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[18] NAC, RG 5, A 2, Draft Correspondence of the Lieutenant-Governor's Secretary, 1804-1840, Hillier to Robinson, Vol. 6, 27 April 1827. On the draft pardon, the space where the number of years of banishment would normally be recorded has been left blank.

[19] David Murray. Colonial Justice, 47.

[20] NAC, RG 5, A 1, Leonard to Mudge, vol. 97, 54314-15, 28 November 1829.

[21] What makes my interpretation more likely is that three weeks prior to the "execution", sheriff Leonard reported that Mason's bravura "created an impression that it was not the first time he had committed such a crime." St. Catharines Journal, 30 September 1829.

Mason was reprieved. "What," the paper rhetorically queried, "is to be done in such a case?"[22]

A hundred wagons were purported to have come into Kingston on the forenoon of Robert Watson's execution scheduled for the end of October 1835. The steamer Commodore Barrier disgorged three hundred passengers in the morning, all bound for the scene of the execution. However, at the last moment the execution was respited until the 4th of November. The Executive Council had received petitions in Watson's favour "the merits of which could not be decided on in the absence of His Excellency the Lieut. Governor."[23] A temporary absence from office, as in the Watson case, or a less than reliable system of colonial communications[24] might help explain how a few prisoners might be brought back form the brink of oblivion by a last-minute stay of execution. Not so, however, Kerr and Smith. Their near-death experience was a calculated act.

Early in the new year, John Rolph wrote an extraordinary postscript to Lieutenant-Governor Maitland confessing that he had, on his own initiative, orchestrated a mock

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[22] Farmer's Journal, 11 November 1829, (reprinted from the Niagara Herald). In similar fashion, The British Colonist: Stanstead, L.C. referred to a last minute reprieve in Quebec as a "strange and truly singular proceeding." As Obediah Sherwood and Moses Emerson were about to step onto "the fatal platform" the sheriff informed them a respite was now in hand "but that he could not acquaint them on the length of time which the clemency of the Governor would allow them to remain in suspence." [The British Colonist, 20 October 1825.]

[23] Dundas Weekly Post, 27 October 1835. There were other close calls. Edwin Merritt was to be executed for murder on an October Saturday, 1838. The Cobourg Star reported that several hundred persons, mostly females and some travelling over thirty miles "for the treat", assembled that morning outside the Cobourg courthouse unaware that late Friday evening Merritt had been notified that his sentence had been commuted to transportation for life in one of the penal colonies. [Cobourg Star, 24 October 1838.] In cases of murder (and treason), eleventh-hour commutations might be explained by the fact that petitions for mercy had to be dispatched to the Home government for approval and back again.

[24] From the long lists of unclaimed mail regularly reported in many Upper Canadian newspapers, it appears that for many, the mail was playing catch-up with them or they with their mail.

execution and kept the sheriff in ignorance of the respite until the preparations for execution had been permitted to proceed almost to completion. Rolph had learned from an undisclosed source close to the prisoners that "from their confident expectations of a pardon, (they) continued in a frame of mind quite incompatible with that change which the Reverend Freeman was laboring to work upon them." Considering deathbed repentance better than none at all, Rolph took it upon himself to "bring Death so near to their contemplation as to dispel, as it were, by the force of a concerted action, their ruinous infatuation."[25] Imposing secrecy on others so that the sheriff might do his duty—thereby creating a full and credible effect on the prisoners' psyches—it was Rolph who finally produced the respite at the eleventh hour. We can only speculate that Rolph's confederate and informer was the gaoler, William Parke, who would have both overheard the prisoner's conversations (unrepentant and confident of mitigation) and been in a position to intercept the sheriff's copy of the respite posted by Boulton's friend. Rolph admitted that he deserved Maitland's displeasure and promised to find some way to compensate Kerr for the injury that he had done him.

Undoubtedly, the above incident had sounded an alarm. In the fall of 1825, Justice Campbell, in compliance with instructions from the lieutenant-governor's office, forwarded a respite (in duplicate and by post) to the London district sheriff on behalf of Ebenezer Allan, capitally convicted for horse and cattle stealing. Most likely conscious of Boulton's misplaced trust in John Rolph, Campbell took the added precaution of sending yet a third

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[25] NAC, RG 5, A 1, Rolph to Hillier, Vol. 65, pp. 34273-76, 27 January 1824

copy by "private conveyance to prevent the possibility of miscarriage or mistake so far as depends on me."[26]

Rolph was reacting to a situation of which the judiciary was fully cognizant. Capitally-convicted criminals in Upper Canada knew very well that, except in cases of murder or treason, there was very little likelihood that they would hang. In other words they knew what many contemporary historians have failed to recognize. The position taken by British penal historians, that the pre-reform period required frequent and bloody didactic example, has been taken up by a small number of Canadian acolytes. Jack Choules has argued that social order necessarily required the periodic example of the gallows[27]. Accordingly, the government deliberately choreographed executions according to a timetable calculated to forever keep the image of the dangling convict before the collective mind's eye[28]. However, if Kerr and Smith's "dramaturgy" was at all typical, executions in Upper Canada were makeshift affairs cobbled by reluctant public officials. Certainly narrative props were employed to enrich the meaning and give a proper solemnity: the scaffold address, hymns and prayers. As we will see below, the period from 1838 to1839, which witnessed frequent raids by patriots crossing from the United States, created a

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[26] NAC, RG 5, A 1, Campbell to Hillier, Vol. 74, p. 39262, 14 September 1825.

[27] Jack Choules. The Periodic Necessity of Example: Deterrence and the Dramaturgy of Public Executions in Ontario, 1792-1869. Unpublished M. A. Research Paper. York University. n.d.

[28] **Table 7.0** illustrates that executions appeared to by anything but timetabled. For example, in the periods from 1804-8 and 1816-20, there was not a single execution. **Appendix 3** shows that there was only one conviction for murder in this period, that of ten-year-old Negawanawsing. Negawanawsing had been playing with a loaded pistol, which discharged, fatally wounding his companion. Justice Campbell argued that although the youth intended the outcome there was no malice, which, together with the youth of the criminal and the fact that he did not understand the legal consequences of his action, led to a recommendation for mercy. Negawnawsing was banished. Campbell may also have taken into consideration that the public would not countenance the execution of a ten-year-old. In 1827, there were two executions. Both were for premeditated murder.

demand among the Loyalist population for repressive measures—namely executions—to deter these seditious incursions. But this was a blip on the judicial screen and scarcely typical of the period as a whole. Executions, when they did occur, took as their principals those individuals who had committed premeditated, cold-blooded and atrocious homicide.[29] Many of these Upper Canadian murders were vicious crimes of male violence turned into journalistic melodrama: Leslie McCall[30] who, in the middle of the night, smashed in his wife's skull while he forced his young step-daughter to hold the light; Thomas Easby[31] who murdered his pregnant wife and four of his children and then attempted to burn their bodies in order to cover his crime; Henry Sovereene[32] who hacked his wife and children to death with a splitting tool used to make shingles. These exceptional characters were scarcely those who would enjoin public sympathy. Yet when it came to any capital crime less than murder, Upper Canadians, as we noted in chapter two, did not appear to conscience execution. The signatories to a petition on behalf of convicted felon Olmstead Hightower were "convinced that the awful punishment of death is not a preventative to crime—that its frequent occurrence has an injurious and demoralizing effect on society…"[33]

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[29] We are reminded that only four executions in Upper Canada were for crimes other than murder. See **Table 7.0**.

[30] Thirty-year-old McCall was executed in 1827 at the Niagara District gaol.

[31] Easby was executed in 1829 after being found guilty of murder at the Bathurst assizes.

[32] Sovereen was tried in 1829 for the capital crime of horse theft. Although found guilty, his sentence was later reduced to a free pardon. In 1832 he was executed after being found guilty of murder at the London assizes.

Table 7.0 Executions in Upper Canada, 1800-1840

Year	Name	District	Offence
1800	Humphrey Sullivan[34]	Home	Forgery
1801	Mary London (Osborn)[35]	Niagara	Murder
1801	George Nemiers[36]	Niagara	Murder
1803	John Connor[37]	Western	Murder
1803	Joseph Cournman[38]	Western	Murder
1809	Terrance Waters[39]	Western	Murder
1813	David Micker[40]	London	Arson
1815	John Dexter[41]	Home	Murder
1815	George Beaver (Bevier)[42]	Midland	Murder
1821	Edward McGarry[43]	Eastern	Murder
1821	John Masters[44]	Eastern	Murder
1821	Thomas Kelly[45]	Eastern	Murder

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[33] NAC, RG 5, A 1, Inhabitants of Picton to Joseph, Vol. 193, 107262-68, 2 May 1838.

[34] For each execution, I have noted the archival source in which it is either noticed and/or described. Notice of Sullivan's execution appears in the Upper Canada Gazette, 17 May 1800.
[35] Upper Canada Gazette, 29 August 1801.
[36] Upper Canada Gazette, 29 August 1801.
[37] PAO, RG 22, Series 134, Assize Minute Books
[38] PAO, RG 22, Series 134, Assize Minute Books
[39] Baldwin Room, Metropolitan Toronto Reference Library, Powell Papers, B87, Sheriff's Returns.
[40] Noted in James Beverley Robinson. Upper Canada Statute 3d. Wm. IV. Chap. 4. Relating to Capital Offences. York, U.C.: 1833, 37.
[41] E. C. Kyte, ed. Old Toronto. Toronto: 1954: 168-9.
[42] Kingston Gazette, 15 September 1815 & NAC, RG 5, A 1, Vol 24, 26 September 1815, 10552-5.
[43] Canadian Courant, 15 August 1821.
[44] Canadian Courant, 15 August 1821.
[45] Canadian Courant, 15 August 1821.

1821	Jeremiah Harrington[46]	Eastern	Murder
1821	John Murdock[47]	Johnstown	Murder
1821	Michael O'Connor[48]	Johnstown	Murder
1827	Leslie McCall[49]	Niagara	Murder
1827	John Qualls[50]	Western	Murder
1828	Michael Vincent[51]	Gore	Murder
1828	Charles French[52]	Home	Murder
1828	John Christie[53]	Home	Murder
1829	Thomas Easby[54]	Midland	Murder
1830	Cornelius Burley[55]	London	Murder
1830	William Kain[56]	Midland	Murder
1831	Tobias Speck[57]	Eastern	Murder
1831	Alex Lennon[58]	Home	Murder
1832	Henry Sovereene[59]	London	Murder
1835	Robert Bird[60]	Western	Murder
1835	Robert Watson[61]	Midland	Murder
1836	Aaron Seeley[62]	Niagara	Murder

[46] Canadian Courant, 15 August 1821.
[47] The Montreal Herald, 11 September 1821.
[48] The Montreal Herald, 11 September 1821.
[49] Niagara Gleaner, 10 Septembere 1827.
[50] Gore Gazette, 7 August 1827.
[51] Gore Gazette, 6 September 1828.
[52] Gore Gazette, 25 October 1828.
[53] Farmer's Journal and Welland Canal Intelligence, 26 November 1828.
[54] The Canadian Freeman, 16 September 1830 and NAC, RG 5, A 1, Vol. 95, 53724-77.

[56] Anonymous. The Life William Kain, Who Was Executed at Kingston, Upper Canada. Kingston: 1830.
[57] PAO, RG 22, Series 134, Assize Minute Books
[58] Hallowell Free Press, 15 November 1831 & The Colonial Advocate, 3 November 1831.
[59] The Canadian Emigrant, 29 September 1832.
[60] Frederick Neal. The Township of Sandwich. Windsor, Ontario: 1909, 113.
[61] Kingston Spectator, 19 May 1836.
[62] The Cobourg Star, 12 October 1836 & St. Catharines Journal, 6 October 1836.

1836	Michael Connel (Cornell)[63]	Eastern	Murder
1837	Julia Murdock[64]	Home	Murder
1837	Thomas Morgan[65]	Western	Murder
1837	Patrick Fitzpatrick[66]	Western	Rape (of a child under ten)
1837	William Brass[67]	Midland	Rape (of a child under ten)
1839	Robert Perry[68]	Home	Murder
1839	Arthur Ledlie (Laidly)[69]	Gore	Murder
1840	Philip Huffman[70]	Western	Murder
1840	Chauncey Skinner[71]	Home	Murder

Note: this table excludes executions for treason.

A petition from the Newcastle District on behalf of Nathan McLean[72] argued for clemency not because they believed that McLean was unjustly convicted but because they believed that the punishment did not fit the crime:

> We the undersigned Magistrates, Clergy and other inhabitants of the District of Newcastle beg leave humbly to represent to your Excellency that at the last assizes held for this District, a man named Nathaniel MacLean was tried and the proof being clear and positive against him was condemned to death for horse stealing. That whatever may in other cases and societies be the necessity of the expediency of visiting with capital punishment offenders of this description, your

[63] St. Catharines Journal, 8 September 1836.
[64] Christian Guardian, 20 December 1837.
[65] Frederick Neal. The Township of Sandwich. Windsor, Ontario: 1909, 113. (Note: Neal places Morgan's execution "about 1843".)
[66] Frederick Neal. The Township of Sandwich. Windsor, Ontario: 1909, 113.
[67] British Whig, 8 December 1837.
[68] The British Colonist, 12 June 1839.
[69] The British Colonist, 6 November 1839.
[70] St. Catharines Journal, 21 May 1840.
[71] The Patriot, 9 June 1840.

[72] McLean's conviction for horse theft was later reduced to banishment.

petitioners (tho' they will not presume and perhaps could not if they wished say a word in the convict's favour) nevertheless conceive that in this instance the ends of justice would not be counter-acted, but on the contrary equally well answered, were your Excellency graciously to exert the royal prerogative and to mitigate the punishment of the condemned.

That the only reasons which your Petitioners have to offer on his behalf are as follows; that in a country abounding as this does in the means of life and where the habits of the people are simple, the temptation to crime in general is small; that accordingly few instances of enormous guilt have yet occurred in this District and that the annals of our courts are not blackened with a single execution; that where a law, whether in reality such or not, yet according to the prevailing and established habits of judging in the people thought sanguinary, is carried into effect, the sense of justice in their breasts, gives way to pity and men instead of venerating shudder at such solemnities; that while this defeats the intention of the Magistrates in punishing it at the same time diminishes in the breasts of the vulgar the terrors of the infliction, which may afterwards be extended to the highest degree of guilt; that this principle of our nature has been so well understood that His present Majesty as well as his Royal Ancestors, have with great glory to themselves and benefit to their subjects from time to time and in particular applications, softened the rigours of a law which it was not found expedient totally to abrogate; that your Excellency in your public conduct has, as occasion required, imitated these illustrious examples; that the crime of which MacLean was convicted, whatever degree of heinousness may be justly attached to it, is nevertheless one which some of the wisest of British Legislators have hesitated to stigmatize as deserving of extreme severity; that the peaceful inhabitants of this happy region yet unaccustomed to the sterner inflictions of the law, run violently into that idea; that the danger (deprecated by every Magistrate) is, that were the sentence executed they would forget the crime in the punishment, and pitying the offender, would abate in their hatred of the guilt; that these prejudices and feelings will here have unchecked operation as in MacLean's conduct there appears to have been no circumstances of peculiar aggravation; that of all parts of Upper Canada, Newcastle seems that quarter where the least is to be apprehended from offenders of this description, being retired from the frontier, having (?) one side of it and otherwise affording little facility for escaping undetected; that is, contrary to those anticipations, which may be indulged from the general good habits and prosperity of this District, the extension of mercy in this instance should not be found to produce the useful effects intended, the case of MacLean cannot be pleaded as a precedent by any subsequent offender, the prayers of Your Petitioners being only grounded on its being a first-conviction on his head and yet a rare offence in this portion of the colony; that whether fruitful in wished for effects or not, it will still evince to the country the paternal solicitude with which our Sovereign in the person of Your Excellency watch over the welfare of his people and the benevolence with which he would train them in every winning way to a just affection for his Government.

> Your Petitioners on these grounds humbly entreat your Excellency to take the case of MacLean into your gracious consideration and in your wisdom to mitigate his punishment in any way compatible with the general welfare of the community. And Your Petitioners, as in duty bound, will ever pray…

Justice Campbell informed lieutenant-governor Maitland that, as a private individual, he concurred "in the greater part of the humane sentiments"[73] expressed by the signatories to the MacLean petition. Maitland had other thoughts. He wrote to Hillier: "The petition from Newcastle is very objectionable."[74] Nevertheless, he relented, MacLean must not suffer capital punishment but must submit to banishment. The primary complaint of reformers in Upper Canada, Gerald Craig has argued, was that public opinion was ignored.[75] Robert Gourlay's information sessions in 1816, a series of public meetings throughout the province in 1832, which debated the issue of an elected legislative assembly, and the responsible government meetings of 1839, all chafed the paternalistic administration. It is tempting to interpret these actions as examples of what Jürgen Habermas calls the public sphere[76]: "A portion of the public sphere comes into being in

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[73] NAC, RG 5, A 1, Campbell to Hillier, Vol. 62, 32942-44, 17 October 1823. Campbell was always careful to differentiate between his private and judicial selves. His judicial persona, like Maitland's, would have respectable signatories restricted to giving character references. In 1824, John McDonell pleaded guilty to manslaughter and was sentenced by Campbell to 12 calendar months and a fine of £40. Twenty-five supporters, including Sheriff Donald Macdonell, six magistrates and a priest, suggested that neither the young McDonell nor his father were in a financial position to pay the fine adding that the local gaol was ruinous and no place for prisoners. Campbell implied that they had overstated their case. Instead of imploring mercy, he suggested, "it would be more becoming the liberality and candour of those respectable persons to contribute towards his (McDonell's) immediate extrication from such embarrassment—a measure in which I should be happy to bear part." [NAC, RG 5, A 1, Campbell to Hillier, Vol. 69, 37188-90, 29 January 1825.]

[74] NAC, RG 5, A 1, Maitland to Hiller, Vol. 257, 139683-86, n.d.

[75] Gerald M. Craig, Upper Canada: The Formative Years. Toronto: 1963, 201. As I have hinted in chapter 2, this (the reformers, not Craig) overshoots the target. Public opinion, as I argue below, was of major importance in effecting penal reform.

[76] Both Jeffrey McNairn ["Towards Deliberative Democracy: Parliamentary Intelligence and the Public Sphere in Upper Canada, 1791-1840", Journal of Canadian Studies 33:1 (Spring 1998): 39-60.] and

every conversation in which private individuals assemble to form a public body. They then behave neither like business nor professional people transacting private affairs, nor like members of a constitutional order subject to the legal constraints of a state bureaucracy."[77] Through norms of reasoned discourse inclusive of the widest possible demographic base, the public sphere established that rational, critical argumentation, and not status or tradition, would arbitrate public decision-making. The first and third (last) paragraph of the MacLean petition offered cap-in-hand deference and respect to the office of the lieutenant-governor. The main body of the text, however, threw status and tradition to the wind effectively negating the otherwise supplicatory timbre of the petition. This is, no doubt, what Maitland found objectionable. Logically threading proposition to proposition, the collective of magistrates, clergy, farmers and others argued rather than pleaded for a pardon. While the tone of the Newcastle petition was atypical, the communities' critical position on capital punishment was not. Petitions, as I will argue below, were one of the few but, I believe, effective ways in which communities in Upper Canada came to influence penal policy.

The belief that executions were disproportionate to any crime less than murder or sedition found its way into a number of petitions as well as judge's reports. The Colonial Advocate knowing, like Kerr and Smith, that there was little likelihood that anyone in Upper Canada would be executed for stealing horses, advised that a more effective system

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Allan Greer ["Historical Roots of Canadian Democracy", Journal of Canadian Studies 34:1 (Spring 1999): 7-26.] build their analyses of the development of democracy in Upper Canada around the idea of the "public sphere".

[77] Jürgen Habermas. "The Public Sphere: An Encyclopedia Article (1964)." New German Critique 1.5 (Fall 1974), 49.

of punishment needed to be implemented, one "far more judicious and effectual as a preventive, than confining them a few weeks in a county prison, passing a sentence of death never meant to be enforced, and then after a few months more confinement at the public expense, again letting them loose upon the good people of Upper Canada."[78] What the public could not know was that the judiciary was well aware of the problem and was responding in an *ad hoc* fashion. Justice Campbell reported that convicted horse thief, Ebenezer Allan[79], while in gaol "evinced a lamentable degree of audacious turpitude and impenitence ill suited to his situation."[80] Campbell endeavoured to subdue this "incompassion for his immortal fate" by a method that the judge sometimes adopted in such cases, always, he added, successfully, a method somewhat less extreme than that used by Rolph. In passing sentence, Campbell appointed a short period for the execution rather than the usual practice of setting the date a month or two distant. In Allan's case, it had the desired effect: "His manner instantly altered and I was afterwards told by the sheriff that he employs much time in prayer and acts of devotion." Justice Archibald McLean employed a similar calculus. On September 20, 1837, Patrick Fitzpatrick was found guilty of raping a girl under the age of ten. The execution was set for October 9: "A day so distant...," McLean instructed the lieutenant-governor, "proper to give the prisoner a reasonable time to prepare for his execution without at the same time giving so long a period as should

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[78] Colonial Advocate, 13 December 1829.

[79] Allan was convicted in 1825 at the London assizes for stealing horses and cattle. Although he was not executed, the nature of his commutation is uncertain.

[80] NAC, RG 5, A 1, Campbell to Hillier, Vol. 73, 39104-06, 23 August 1825.

induce a hope that the sentence will not ultimately be carried into effect"[81] yet also long enough to give the lieutenant-governor the opportunity to review the case and extend clemency if he saw fit. It is unlikely that McLean expected that Fitzpatrick would be executed. Nevertheless, in passing sentence, McLean (as he would in similar situations) admonished the prisoner to make good use "of the time allowed him and urged him not to hope for or expect the Royal Clemency." Although a number of petitioners writing favourably on the prisoner's behalf believed that the punishment was disproportionate to the crime,[82] Bond Head disagreed and Fitzpatrick was executed. McLean wasn't always so niggardly in his allotment of days between passing sentence and execution suggesting that his timetables were set by his anticipating the reaction of the lieutenant-governor and/or an indirect comment on how seriously he took the case-in-question.

Justice William Dummer Powell exercised a different, but equally satisfactory, strategy. In the case of Thomas Mason, convicted of larceny in a dwelling house[83], Powell respited the execution in order to afford Mason the opportunity to petition for clemency. Powell wrote the lieutenant-governor that example and public opinion suggested that banishment alone would be an insufficient punishment in this particular case. "Perhaps if his Excellency withheld even a conditional pardon until the report of the Hon. Rev. Strachan gave reason to hope that his trial and sentence had made a favourable impression

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[81] NAC, RG 5, A 1, McLean to Joseph, Vol. 178, 98157-68, 26 September 26, 1837.

[82] NAC, RG 5, C 1, Inhabitants of the Western District to Lieutenant-Governor Sir Francis Bond Head, File 892, 26 September 1837.

[83] Twenty-eight-year-old Mason was capitally convicted at the Home District assizes. His sentence was later commuted to banishment for life.

on the mind of the culprit"[84] the ends of justice might be served[85]. With the public demand for a more effective system of punishment gaining momentum, "the ends of justice" were certainly not to be equated with implementing the full extent of the law. Instead, a pragmatic judiciary seemed intent in focusing on what was within the realistic range of their powers. Given the reluctance to use the noose, judges were reduced to employing subterfuge in an attempt to effect a change in the moral conscience of convicted prisoners. Powell preferred to allow recalcitrant prisoners gaol time to chew over the moral enormity of their criminal behaviour. Twelve-year-old Jacob Pier, capitally sentenced by Powell for arson, spent over two years in a York gaol cell before the under-sheriff, George Playter, could confirm that Pier was "very sensible of the heinousness of (his) offence."[86] Powell would be pleased to learn from Pier's father that, during those two years, his teen-aged son lived in the shadow of the gallows never knowing at what moment the "awful Sentence"[87] might "be carried into execution."

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[84] NAC, RG 5, A 1, Powell to Hillier, Vol. 42, 20713-15, 27 March 1819.

[85] Assize judges often had to juggle their personal conviction that an execution should go forward with their respect for the petitioning process. Convinced of "the clearness of conviction" in the case of Jack York for burglary, Powell was reluctant to order a respite. To do so would raise the prisoner's hopes for a commutation where Powell believed the crime to be both atrocious and "without any circumstances of doubt or alleviation." ["Jack York" in Robert Fraser, ed. Provincial Justice. Toronto: 1992, 358.] Knowing that a petition on behalf of York was forthcoming from deputy superintendent of Indian affairs Thomas McKee, and not wanting to withhold the opportunity for soliciting mercy but unwilling to respite the execution of the sentence, Powell found a way around the problem. He deferred the execution until the sheriff could procure an assistant executioner thus giving York "weight without hope". [NAC, RG 5, A 1, Powell to Hunter, Vol. 1A, 502-4, 22 September 1800.]

[86] Edith Firth, ed. The Town of York, 1815-1834: A Further Collection of Documents of Early Toronto. Toronto: 1966, 264.

[87] Edith Firth, ed. The Town of York, 1815-1834. 264.

In 1840, at the Western District assizes, a sentence of death was recorded for James Brown. Brown had been convicted for rape. On October 10, Provincial Secretary Richard Tucker forwarded instructions from Lieutenant-Governor Arthur to the deputy sheriff J. A. Ray. Ray was to communicate to the prisoner that he had received a respite but was to understand "that the vacancy of the office of sheriff was the circumstance upon which this reprieve was wholly grounded and… that consequently it would be unsafe for him to build upon it any hope of a further extension of mercy."[88] Under chapter 9 of the penal reform act of 1833, any person nominated as sheriff had to post securities and have them certified by a majority of the magistrates at the court of quarter sessions before he could be appointed. George Foote was nominated at the July quarter sessions to replace the deceased Raymond Baby but would not received his certificate until his security was approved on the 23rd of October. In effect, this meant that the Western District was without a sheriff during the fall assizes. Chief Justice Robinson doubted the competency of the deputy sheriff to carry out Brown's capital sentence. On October 28, Tucker informed the Executive Council that the lieutenant-governor was now unwilling to permit the execution without these circumstances being presented to the Council "with a view to obtaining their opinion upon the line of conduct which ought to be pursued under them."[89] On the back of the letter a council member scribbled: "The Council are respectfully of opinion that it would not be right to leave the prisoner for execution if there is the slightest doubt of the legal authority of the sheriff to carry the sentence into effect." Whether calculated or not,

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[88] NAC, RG 5, A 1, Ray to Tucker, Vol. 248, 134969-71, 10 October 1840.

[89] NAC, RG 1, E 3, Tucker to the Executive Council, Vol. 9, 79-82, 20 October 1840.

the net effect of these deliberations and the warning not to expect "that his life would ultimately be spared" was to force Brown to confront the enormity of his actions as he faced a now impeding execution. Perhaps Brown believed himself immune from hanging. He would have known that six months previously (April 30), William Farnsworth, also of the Western District, had been granted a conditional pardon for the same crime. It is impossible to calculate whether these cat-and-mouse games suffered a change of heart in condemned prisoners. We can only be sure that they invariably ended in the mitigation of sentence. Brown's own punishment was reduced to transportation.

The Petitioning Process

Petitions from, and on behalf of, Kerr and Smith were examples of one way in which ordinary people attempted to influence judicial decision-making. Historically, the power of pardoning offences rested exclusively with the sovereign. With colonization, it might also, with qualification[90], operate under the hand and seal at arms of any governor acting as the sovereign's representative. The monarch's power (or that of his/her delegate) to pardon was, however, circumscribed by common law. He or She could "spare those only whose case (could it have been foreseen) the law itself would have excepted out of its general rules, which the wisdom of man cannot make so perfect as to suit every particular case."[91] This 'mis(sed)-information', or mitigating circumstance(s), might later be brought to the King's attention in a petition of grace—a personal request that could be indulged or

[90] The viceregal prerogative did not extend to cases of treason or murder. These had to be referred back to the Colonial Office for review.

[91] Quoted in W. C. Keele. The Provincial Magistrate. Toronto: 1835, 498-99.

refused according to the royal pleasure[92]. Petitions, in addition to following obsequious protocol, were subject to other considerations, foremost being the question of veracity. Under common law, the discovery of any suppression of the truth or suggestion of falsehood in the charter of a pardon—it being thus presumed that the sovereign had been misinformed—would void the document. In the spring of 1835, Mary Ryan, a prisoner in the Toronto gaol, petitioned Lieutenant-Governor Francis Bond Head for a reduction of sentence. After misrepresentations were detected, Bond Head wrote of the matter to Mayor George Gurnett. Gurnett responded: "His Excellency's determination to withhold the exercise of the Royal Prerogative from all those who make false statements of their cases to Him hereafter I have caused to be communicated to all the prisoners in jail and to the jailor for the information of all future convicts."[93]

In Upper Canada, petitions were received by the lieutenant-governor's office although a supporting document might also be sent to the presiding judge and/or the chief justice. The lieutenant-governor, normally under no obligation[94], might ask the trial judge to submit a report on the case and/or seek the advice of the Executive Council. Once a pardon was granted, the attorney general was requested by the civil secretary to prepare a

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[92] J. K. Johnson. " 'Claims of Equity and Justice': Petitions and Petitioners in Upper Canada 1815-1840". Histoire Sociale/Social History 28.55 (May 1995): 220. Mitigating factors, as we will see below, were also outlined in judge's reports and, less frequently, in sheriff and gaoler's reports.

[93] TA, RG 7, B 2, Mayor's Letterbook, Gurnett to Joseph, Box 1, 5 May 1837, 66.

[94] Legislation in 1826 (see below) allowed justices to record rather than pronounce sentence for most felonies. This meant that submitting a report was no longer optional.

fiat of pardon[95]. The draft was then sent to the provincial secretary who prepared a patent of pardon, engrossing, enrolling and applying the Great Seal.[96] It was then returned to the attorney general for verification and his signature and, in turn sent, along with a warrant of pardon, to the lieutenant-governor for his signature. Both warrant and patent were forwarded to the trial judge whose responsibility was to see that they ended up in the hands of the sheriff. The warrant of pardon was the sheriff's authority for releasing the prisoner. If the petition was a collective appeal from relations, friends and/or neighbours, the civil secretary would communicate the decision of the lieutenant-governor to the first-named signatory.

Petitions for the repeal of a sentence, in whole or in part, were issued sometime after conviction. In capital cases, where the jury recommended mercy or the judge needed to consult with the other judges (or the attorney general), *25 G 2 c. 37*[97] permitted the assize judge to respite the sentence and designate an execution date weeks away, a period which allowed the prisoner, and/or his family and neighbours, time to draft an appeal. Legislation, *7 G 4. c. 3, (30 January 1826)*, allowed the court to record rather than

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[95] It was in the colonies fledgling years that it became established practice to have the attorney general draw any instrument, which was to pass the Great Seal. In 1799, lieutenant-governor Peter Russell ordered that copies of a letter sent from his office to the office of the chief justice be forwarded to the attorney general and the provincial secretary for their guidance. In addition to drawing up every instrument requiring the Great Seal, it was the duty of the attorney general "to send the secretary a full, fair and accurate copy of the draft of every such instrument together with a fiat or direction to that officer to engross the same and it is the duty of the secretary on receiving the copy and fiat to engross every such instrument and to offer the Great Seal thereto dating the same of the day on which the Great Seal is so affixed." [NAC, RG 1, E 1, Hunter to Elmsley, O 28, 402, 13 July 1799.]

[96] In respect to murder or treason, unless otherwise specified, pardons were issued under the Privy Seal.

[97] The Murder Act provided for respites under s.4, but only in cases of murder. This was necessary because of the provision in the Act that murderers were to be executed the next day but one, unless a Sunday (s.1). In other capital cases, respites were possible under common law.

pronounce sentence of death in all convictions of felony (except murder) where the offender was believed to be a fit and proper subject to be recommended for royal mercy. This amounted, in effect, to a reprieve. But even in cases of murder, if the assize judge found fault with the verdict, he could respite the execution until he could consult with this fellow justices and/or the attorney general or, on a point of law, refer the case to the home authorities. Although James Moody[98] was guilty of murder, Justice James Macaulay did not pass sentence because he believed the indictment insufficient to sustain such a conviction.[99] Moody was left in custody while Macaulay conferred with his brother judges. Henry Hamilton[100] was sentenced to be hanged for murder at the Johnstown assizes in August of 1825. Immediately afterwards, Justice William Dummer Powell was apprized by two of the jurors that the petit jury had been divided on whether the crime was murder or manslaughter. Growing impatient after having been empanelled for thirty-two hours, they had drawn lots to decide the verdict, agreeing in advanced that when polled they would give unanimous assent to their verdict. Powell believed that "should this unanimity have been obtained by illegal means, it should not be enforced."[101] The execution was stayed to October 7 and it was ordered that there would be an enquiry into the allegation of improper deliberation.

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[98] Although Moody was convicted at the 1833 Western assizes by a jury of his peers and later pardoned, there is no record of mitigation. See "James Moody" in **appendix 3**.

[99] NAC, RG 5, A 1, Moody to Colborne, Vol. 133, 73422-28, 21 September 1833. The note from Macaulay was found on the back of the petition.

[100] Hamilton died in gaol while his sentence was under review. See "Henry Hamilton" in **appendix 3**.

[101] NAC, RG 5, A 1, Powell to Hillier, Vol. 74, 38291-93, 21 August 1825.

Many of the petitions received by the lieutenant-governor's office came directly from the prisoners. Petitions, at the prisoner's expense, were most likely forwarded to the lieutenant-governor's office by messenger. John McIntyre hired David Smith to deliver his petition. Smith explained: "McIntyre sent an earlier petition by messenger about a month ago—with no answer he fears it never got there and now sends it by me, a professional man, to his Excellency or yourself as his private secretary for the answer to the first or to get information if it has yet come in the Government's hands."[102] The authorship of these petitions remains shrouded although it is likely that many were written by the prisoner's counsel[103]. A note appended to the petition of John Henderson for a non-capital crime states that it was written by lawyer James Small and Henry Latham, a law apprentice. Upon completion, the petition was read to Henderson who then made his mark.[104] The petition from convicted horse thief Michael Mason was most likely written by the Clerk of the Peace for the Niagara District, lawyer Charles Richardson. Richardson first read and explained the petition to Mason before witnessing the illiterate felon's mark.[105] Attorney

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[102] NAC, RG 5, A 1, David Smith to Mudge, Vol. 102, 58290-91, 27 October 1830.

[103] Many prisoners signed their petitions with their mark, a clear indication that at least these were incapable of drafting their own documents.

[104] See J. K. Johnson. "Claims of Equity and Justice": Petitions and Petitioners in Upper Canada 1815-1840", Histoire Sociale/Social History 28.55 (May 1995), 219-40. Johnson incorrectly concludes that this is the only such petition to have come to light.

[105] NAC, RG 5, A 1, Vol. 101, 57617-18. Mason confessed to stealing at least eleven horses (See page 267). On the day of his capture, Mason had crossed to the United States to sell a stolen horse. It is likely that Richardson, understanding that banishing Mason would have no effect on his trade as a cross-border horse thief, convinced him that he ought to petition for transportation to Bermuda.

Daniel Jones Esq. crafted a petition for horse thief Philip Matheson.[106] John Thompson, an Edinburgh trained notary public, most likely wrote Chauncey Skinner's petition when Thompson and Skinner shared a cell in the Home District gaol. It is equally obvious that some prisoners crafted their own memorials. Ezra Brockway, a convicted rapist[107], wrote to Chief Justice Powell from his Johnstown District cell:

> My lord tho I am utterly unworthy of the notis on compasion of my fellow men and especably of my superors being now bouond in chains and under sentence of death yet aginst hope I wold believe in hope and humbly sue for mercy prayng your lordship that if anything can be done consistant with the law or dignity of the law by change of the sentence or mitigate of my punishment that it may take place and if your lordship can feal any compashion for a wrch like me or make any faverable representation of my case of his Exelcny francsis gore Esgn. Lieutenant govner that my life be spaird I besack thee forgod sake let me find mercy in they sight. I am now weaping and in chains and imprisenment from your humble petishener. Ezra Brockway.[108]

Although the gaoler or sheriff may have supplied the concepts, the sentiments were most certainly those of the prisoner. Brockway's plaintiff appeal was to the humanity of the pardoning authority. Douglas Hay has argued that in England at this period condemned prisoners were saved from the gallows less by compassion and more by the claims of class[109]. The success of a pardon, Hay contends, turned on the interventions of a small, but respectable, section of the population. Any consequent act of mercy fashioned a debt to

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[106] NAC, RG 5, A 1, Matheson to Lieutenant-Governor Maitland, Vol. 61, 32894-97, 9 October 1823. This was Matheson's second petition, sent after he had spent fourteen months in gaol, wherein he states that Jones authored his first petition sent the year before.

[107] Brockway was sentenced in 1810 at the Johnstown assizes. His sentence was later reduced to banishment for life.

[108] Metropolitan Toronto Reference Library, L 16, Powell Papers, Brockway to Powell, Vol. B85, Circuit Papers, 24 September 1810. All spellings are those of the writer.

[109] Douglas Hay. "Property, Authority and the Criminal Law." D. Hay, et. al. Albion's Fatal Tree: Crime and Society in Eighteenth-Century England. New York: 1975.

those in authority by those who were pardoned thereby reinforcing lower class deference and upper class hegemony.

Upper Canadian judges often favourably reported that petitions for mitigation of sentence carried the names of respectable members of the community. Commenting on the case of Abraham Gilbert, Chief Justice Robinson wrote: "I am happy, however, to see that the intercession of so many persons whom I have no reason to suppose otherwise than respectable will warrant some remission of the punishment..."[110] After Sampson Catlett's capital sentence was reduced to banishment, a second wave of petitions begged a free pardon. Robinson commented that, although only a few magistrates had signed the petition, "there are some very good names to it, and such as would warrant an act of clemency if his Excellency should think it right to grant the prayer of the petitioners."[111] Although certainly of some consideration, I believe that the support of respectable signatories carried less weight in Upper Canada than in England.

Joseph Cole and Jacob Shaver were among a group of young men convicted for riot. Justice Campbell reported that Cole gave the appearance in court of an idle, disorderly person "without character, connections or property."[112] He was sentenced to stand one hour in the pillory and two months imprisonment. Shaver, Campbell reported, played an equal role in the crime "and would have shared the same punishment but that he is a young farmer of the country of decent and perhaps respectable connections." The petition in

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[110] NAC, RG 5, A 1, Robinson to Rowan, Vol. 134, 73975-77, 2 November 1833.

[111] NAC, RG 5, A 1, Robinson to MacMahon, Vol. 107, 61330-32, 7 July 1831.

[112] NAC, RG 5, A 1, Campbell to Hillier, Vol. 74, 39361-66, 29 September 1825.

favour of Shaver contained the names of the heads of many prominent families in the Niagara District including that of Clench, Crysler, Crooks, Dickson and McBride who vouched for Shaver's good character and general orderly conduct. Shaver's crime had been an "unprovoked, unmanly and disgraceful attack" on Jane Hopkins, a poor, elderly widow, and her children. Campbell was incensed that part of the sentence which dictated time spent in the pillory—the publicly humiliating part of Shaver's punishment—had been pardoned and his sentence had been reduced to a £12 fine, wrote:

> I am aware, My dear Sir, that I have been more diffuse on the subject of this petition than necessary on its own merits, but my views are to explain to you the principles upon which I uniformly proceed in all such cases—I am sorry to see a few respectable names to the Petition, but I am told by a Gentleman lately from Niagara that others of equal respectability, and as appears of greater firmness of integrity, have spurned the application for their signatures. It is lamentable and doubtless injurious to the Police of this country that groundless petitions of this kind are so frequently got up and supported by persons of any respectability, to the manifest tendency of practicing imposition upon and abuse of the merciful disposition of His Majesty's Representatives—many years of experience has convinced me that there lives not so guilty and degraded a criminal but many obtain signatures to such petitions. By this I do not mean to say that such applications are in all cases improper. On the contrary, many cases occur in which I would most willingly join in emploring (sic) His Excellency's merciful interference to save those whom my judicial duty compels me to condemn.

It is doubtful if Campbell was ever of the mind that having respectable connections was, in itself, enough to merit mercy[113]. Reporting on the trial of Henry Robins, Campbell informed the lieutenant-governor that no circumstances appeared in evidence which could

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[113] However, Campbell did believe that having no respectable connections, when combined with other unfavourable factors, might be enough to discredit a petition for mitigation of punishment. When Andrew Gallager was sentenced to seven years banishment for "attempting" to rescue his son from gaol, Gallager's wife Mary petitioned for mitigation. In his report, Justice Campbell emphasized that the entire family were equally criminal and that Mary Gallager had falsely stated in her petition that the gaol break was "attempted" (by statute, Campbell reasoned, it was completed). Campbell then noted that the space allotted for signatories on her petition remained blank. It would be desirable, he concluded, to rid the country of the entire family. [NAC, RG 5, A 1, Campbell to Hillier, Vol. 70, 37263-66, 5 February 1825.]

justify him in recommending Robins as deserving of mercy. "I feel the more regret," he added, "in making this report as I understand he has some respectable connections in this Province."[114] A letter from Thomas Coleman to Lieutenant-Governor Arthur suggests that "respectable members of the community" were neither as cavalier nor indiscriminate in putting their names to petitions as Campbell believed. Coleman complained that a petition for Eliza Mott containing his name "was neither seen or signed by me, or with my consent and that it is not the first time my name has been gratuitously made use of."[115] While not exactly giving James Hunt a good character, eighteen inhabitants of the Eastern District, acknowledging that they believed him to be guilty as charged, based their case for mitigation "solely from the considerations of his being friendless and that the punishment…in their opinion (was) too severe for the offence."[116] Hunt was convicted of horse stealing. On October 4, 1822, two days before he was to be executed[117], he and a fellow prisoner filed through their irons and made their escape. Although eventually recaptured, Hunt had committed several robberies while free. The lieutenant-governor was informed that Hunt had also faced one other charge of horse stealing and one for burglary and that during the War of 1812, had made his living as a horse thief. Hunt was a practiced criminal or so it must have seemed to the signatories who had drafted the petition on his behalf. On November 28, Sheriff Donald Macdonell informed Secretary Hillier: "The

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[114] NAC, RG 5, A 1, Campbell to McMahon, Vol. 30, 13596-98, 2 September 1816.

[115] NAC, RG 5, A 1, Coleman to Tucker, Vol. 248, 135069-82, 17 October 1840.

[116] NAC, RG 5, A 1, Inhabitants of the Easter District to Maitland, Vol. 58, 29908-11, 8 September 1822.

[117] A respite to the 18th of October was issued on the day of execution.

Gentlemen who made an application to His Excellency for mercy in his behalf are so well convinced that he has been guilty of these crimes that they intend recalling their application in his favour."[118] Six months later, Hunt attempted to escape for a second time by burning a hole in the gaol wall. With all evidence pointing to the fact that Hunt was a hardened criminal and the memorial for an extension of mercy rescinded, Hunt was, nevertheless, granted a pardon on October 16, 1823 conditional on his leaving the province for life.

In the spring of 1839, the Executive Council informed the lieutenant-governor's office that "it was extremely questionable how far the interest made by individuals in favour of prisoners undergoing sentence should be permitted to influence the opinions of the Government in the granting of mercy."[119] Although, they argued, it would be difficult altogether to disregard the "merits and respectability" of those petitioning in favour of prisoners, the cause of justice and mercy required impartiality. The influence of the respectable ought thus to be withstood rather than encouraged in order that friendless criminals should not suffer more than those who possessed relations and friends interested in their welfare. The council need not have worried about capital convictions. The judicial records indicate that those without the support of their neighbours, respectable or not, fared just as well as those who had the support of numerous signatories. Rubin Hutchins[120] worried in his petition for clemency that "being in a land of strangers, and knowing of no person near at hand with whom he has been formerly acquainted, and not being possessed

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[118] NAC, RG 5, A 1, Macdonell to Hillier, Vol. 58, 30369-70, 29 November 1822.

[119] NAC, RG 1, E 3, Executive Council to Arthur, Vol. 64, 13 March 1839.

[120] Fifty-five-year-old Hutchins was convicted at the 1819 Johnstown assizes for stealing from a dwelling house. Upon petition, his sentence was reduced to banishment from the province.

of the means of sending to a distance," he was "unable to procure such testimonials of his former good character as might be satisfactory to Your Excellency..."[121] In that same year (1819), Charles Seaton was convicted for a similar crime. Eleven subscribers, seven of who were magistrates, recommended Seaton to the royal mercy. That Seaton was with connections while Hutchins was without appears to have made little difference. Both Seaton and Hutchins received conditional pardons and were banished for life. We might then ask that if the number and social status of signatories carried little weight then what, if anything, did? What if any role did petitions play in the pardoning process?

At the court of King's Bench, prisoners were not permitted to give testimony in their own defense. The prosecutor and his or her witnesses, subject to cross-examination, made the case against the defendant. Testimony in favour of the prisoner came last and almost always spoke to their good character. Defendants were not permitted to give testimony in their own defence.[122] It was expected that, in capital cases, one or more petitions for mercy would then follow a verdict of guilty. It was not uncommon for petitioners to acknowledge that the crime had been fully proven.[123] More typically, petitions reiterated the former good character of the condemned prisoner and/or alluded to

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[121] NAC, RG 5, B 28, Hutchins to Maitland, 2 October 1819.

[122] Nor was the defendant's spouse. Isabella Dean, wife of convicted murderer John Dean, argued in her husband's defence that had she "been allowed by law to give her testimony, your petitioner would have disclosed some facts which would have gone far to shew some extenuation of the prisoner's crime." [NAC, RG 1, E 3, Isabella Dean to Lieutenant-Governor George Arthur, Vol. 22, 132-132A, 14 September 1839.]

[123] A petition from the magistrates and inhabitants of the Niagara District on behalf of John Silverthorn is quintessential: "...conviction was upon the strongest evidence under the most humane and tender charge from the presiding Judges and that the convicted had the most fair and impartial trial." [NAC, RG 5, A 1, Inhabitants of the Niagara District to Lieutenant-Governor Francis Gore, Vol. 10, 4278-82, 29 September 1809.]

their youth—the two most frequently cited 'mention factors'—before speaking to elements of the case which were not raised in court—the "missed-information."(**Table 7.1)** The two were logically related. Where a condemned felon had, in the past, presented a good character, it was incumbent upon the petitioner(s) to explain how such a person had come to deviate from the straight and narrow, and if young, how innocence had been corrupted. Patents of pardon made oblique reference to these and other mitigating factors—a backhanded acknowledgment that aspects of the case had now come to light, which tempered the severity of the punishment allotted by law. Youth, as documented in Chapter Three, were often, like Pinocchio, seduced by the wiles of their elders, those already given to a life of crime. Often petitions would point out that the prisoner was now contrite and/or gave some indication of reformability.

That many petitions referred to the previous good character of the felon in question speaks to the fact that he or she was known to the community. Both James Gibson and Moses Winters, cases studied at length below, were long-standing members of their communities. The forty-two signatories to Lewis Lyons' petition stated "the undersigned have known Lyons for several years."[124] Chief Justice Thomas Scott added that Mr. Hall, the prosecutor in the case, had known Lyons for eighteen or twenty years[125]. The twenty-seven signatories to David Catcher's petition had "known him for several years"[126] while

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[124] NAC, RG 5, B 3, Vol. 6, 36.

[125] NAC, RG 5, A 1, Vol. 21, 9994-97.

[126] NAC, RG 5, B 3, Vol. 8, 861-62.

Table 7.1 Factors Favourable to the Accused Affecting Judicial Decision-Making In Capital Cases: Upper Canada, 1800-1840

	Number of Cases in which factor is mentioned	
	Petitions for Clemency	Judge's Reports
1. Previous Good Character	29	5
2. Youth	28	13
3. Post-Crime Destitution	21	0
4. Contrite/Penitent/Conscious of Guilt	20	0
5. Previous Military Experience	19	4
6. Mental Incompetence/Drunk	17	6
7. No Previous Conviction	16	8
8. Claim of Innocence or Malicious Prosecution	13	2
9. Drawn into Crime by Others	12	3
10. Needs Time to Make Amends/Future Atonement for Past Iniquities	9	0
11. Prisoner from a Respectable Family	9	4
12. Indications of Reformability	7	0
13. Non-Aggravated Crime	5	2
14. Shame to Self/Family/Community	5	0
15. Employer/Master Gives Favourable Character Reference	4	1
16. Physical Illness	4	1
17. Old Age	1	1

Note: Sedition cases are not included in this table.

David Ellsworth was said to have borne an excellent character among his neighbours "from his infancy till the charge of his unnatural crime."[127] The magistrates and inhabitants of the Niagara District noted that John Silverthorn was "one of the earliest inhabitants of the colony."[128] William Stoutenborough, representing himself as an honest and industrious man, wrote on behalf of his son who was accused of a felony that the family had resided "in this province nearly twenty-years."[129] Nancy Dick, petitioning on behalf of the man charged with raping her, Robert McIntyre, wrote that they had sailed from Britain on the same ship and had subsequently "been acquainted upwards of seven years."[130] And so it went. In all but a few cases, it was overtly stated or implied that capitally convicted criminals were established residents of their respective communities. Thus could their supporters vouchsafe their good character. This spoke against the conventional wisdom that placed the onus for such crimes on an itinerant criminal class.

Pardons for capital crimes typically began by itemizing the minutiae: the assize, presiding justice, prisoner, their occupation and crime (a copy of the indictment)[131] and

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[127] NAC, RG 5, B 3, Vol. 8, 873.

[128] NAC, RG 5, A 1, Vol. 10, 4278-82.

[129] NAC, RG 5, A 1, Vol. 42, 20174-76.

[130] NAC, RG 5, B 3, Vol. 6, 119.

[131] If conviction for a felony was by verdict, common law required that the pardon recite both the indictment and conviction. Exceptions were made although their legality was questionable. In 1839, the Lieutenant-Governor-in-Council ordered that the patent of pardon for John Dean omit the description of Dean's crime. Dean was to be transported to Van Diemen's Land aboard the H.M.S. Buffalo along with a number of political prisoners. The turnaround time was such that the judge in the case would not be able to transmit the indictment before the ship set sail. In his memorandum to the Executive Council, Lieutenant-Governor Arthur wondered if this could be done "without affecting its (the pardon's) validity." The next day John Dean's name appeared on an appended warrant to the Captain of the Buffalo to receive "certain prisoners" [NAC, RG 1, E 3, Vol. 22,136-41, 20 September 1839 and NAC, RG 68, LIBER G, 21 September 1839.]

date of execution, before coming to the operative statement: "Now know ye that we having taken the premises into our Royal consideration for divers good causes us then unto moving of our special grace have pardoned, remitted and released and by these our Letters Patent do Pardon, remit and release…. "[132] Or again: "And whereas His Majesty in consideration of some favourable circumstances humbly represented to him on (his/her) behalf inducing us further to extend our mercy and grace unto (him/her)…."[133], the proposition now read: "And whereas for certain reasons us thereunto moving we have been induced to extend our Royal mercy and grace unto him and to grant him our (free or conditional) pardon for his said crime." Only rarely was a patent of pardon more specific. The pardon for Jacob Pier was untypically candid—"…we being willing on account of the youth of the said Jacob Pier to extend our mercy and grace unto him, have resolved to grant him our free pardon for his said crime."[134]—untypical because the grace of the sovereign (or viceregal), like the grace of God, was inscrutable.

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[132] This wording was typical of the patents of pardon that Attorney General Robinson was drafting for Lieutenant-Governor Maitland between 1818 and the early 1820s. By 1823, the wording had changed to: "… and whereas some favourable circumstances have been humbly presented to me in his behalf inducing me to extend His Majesty's mercy and grace unto him, and to grant him His Majesty's (free or conditional pardon) for his said offence." [found in a number of pardons and warrants for pardon in Metropolitan Toronto Reference Library: Baldwin Room, L16, Powell Papers, B 94 and in NAC, RG 5, B 28.]

[133] NAC, RG 5, B 28, Upper Canada: Fiats of the Attorney General, 1805-1863, Fiat for the Pardon of Simon Kemp, 1 July 1824.

[134] NAC, RG 5, B 28, Upper Canada: Fiats of the Attorney General, 1805-1863, 20 April 1821. Explicit reasons for the pardon were more common in non-capital cases. William Smith had petitioned for the remittance of his sentence. His pardon specified that the lieutenant-governor was "graciously pleased to remit the last mentioned punishment (a public whipping) in consideration of the prisoner's service as a soldier in the Regiment of Glengary Light Infantry Fencibles during the late war." [NAC, RG 5, A 2, Upper Canada: Draft Correspondence of Lieutenant-Governor's Secretary, 1804-1840, Vol. 3, 22 January 1816.]

Occasionally, petitioners would proclaim their innocence while others argued that they had been maliciously prosecuted[135]. Having already spent two months of "depravation in jail in a gloomy cell with mental and bodily suffering," a despondent Robert Graydon, sentenced to six months in the provincial penitentiary for larceny, complained that criminal trials were weighted in favour of malicious prosecutors who imposed their evidence on judge and jury. Nevertheless, Graydon waxed enthusiastic for a just remedy:

> The petitioner rejoices that under the unrivalled code of British laws there is a remedy…there is a prerogative of pardon for offence and mercy to penitent transgressors lodged in his Majesty the King and through him in his various representatives in the different colonies of his dominions. To the highest earthly court not seduced by prejudice or overcome by perjury or misrepresentation, the unfortunate can apply with confidence of success.[136]

We can best understand why many petitions were written as they were if we understand that they were extensions of the trial itself. Juries may have been instructed to find on the basis of fact but individuals and community used the petition to place the crime within a broader framework, which might include a combination of factors discussed below. The trial—and aftermath—of James Gibson, found below, is a case in point. And it is exactly this that made petitions necessary to the pardoning process. The lieutenant-governor could not be seen to be giving in to the general will, which argued that punishments, in general, were too severe. Rather, his was seen to be a reasoned response (although these reasons were seldom specified) to additional information provided by the petitioners. In reality, however, the deliberations of the lieutenant-governor and his

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[135] See **Table 7.1**

[136] NAC, RG 5, A 1, Graydon to Lieutenant-Governor Colborne, Vol. 146, 79912-15, 27 October 1834.

executive council were driven more by a pragmatic calculus and less by considerations of justice and equality.

We can best assess the effectiveness of petitions by examining the published deliberations of the executive council. From March 8 to June 30, 1820, Samuel Smith, senior Executive Councillor, acted as provincial administrator during Lieutenant-Governor Maitland's temporary absence from office. During Smith's administration, all petitions were forwarded to the Executive Council. A month after Maitland's return to office, his secretary instructed John Small, clerk of the Executive Council, to read the following letter in council: "The indiscriminate reception of petitions at the Executive Council office for some time past having occasioned material inconvenience, I have received the command of His Excellency the Lieutenant-Governor to acquaint you that in future the petitions are to be presented at this office for which all those his Excellency shall think require the advice of Council shall be regularly referred for its consideration."[137] As Patricia Kennedy has pointed out, from this point until 1838, although the lieutenant-governor might routinely seek "technical advice on legal points from the Law Officers of the Crown and the judiciary"[138], only occasionally did he confer with the Executive Council concerning requests for remission of capital punishment.[139] *1 Vic. c. 10, 1838* was to mark a turning point in practice. The statute specified that anyone suspected of treason could petition for clemency before they were arraigned. If mercy was extended, it was to be conditional upon

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[137] NAC, RG 1, E 3, Hiller to Small, Vol. 61, 57-58, 31 July 1821.

[138] Patricia Kennedy. "In Pursuit of Rebels at the National Archives of Canada: Beyond the Usual Round Up of Suspect Sources." unpublished paper, January 2000, 13.

[139] See for instance "Charles French" in Robert Fraser, ed. Provincial Justice, Toronto: 1992, 392-95.

banishment or transportation[140]. More importantly, it required the lieutenant-governor to take the advice of the Executive Council in each and every case[141]. "Paradoxically," Kennedy observes, "prosecution of the rebels facilitated an expansion of the Council's influence and thus the progress toward responsible government."[142]

As the Executive Council Minute Books make clear, cases for clemency quickly extended beyond those for treason alone to include other capital cases although it must be kept in mind that the lieutenant-governor was not hand-cuffed by council recommendations. In the case of John Hamlin[143], convicted for robbery, the council, because the key witness in the trial was soon afterwards himself convicted of conspiracy to defraud the public, argued for mitigation. They wrote that they would feel gratified if the sentence was commuted to three years in the provincial penitentiary.[144] Arthur did not concur. He explained that the reason offered by the council for its generous

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[140] Akin to modern plea bargaining, the act was purposely drafted to allow the government to deal with the very large number of prisoners charged with treason through the discretionary power of the pardon without going first through the expense of a trial and holding, guarding and feeding more prisoners than the district gaols were capable of handling. State documents reveal a number of petitions from local sheriffs asking that their overpopulated gaols be relieved of political prisoners. See Barry Wright. " 'Harshness and Forbearance': The Politics of Pardons and the Upper Canada Rebellion." Carolyn Strange, ed. Qualities of Mercy: Justice, Punishment and Discretion, Vancouver: 1996, 77-103.

[141] Lieutenant-Governor Arthur acknowledged this is in a letter to Governor General Durham noting that the Act of the Provincial Legislature "which has received the Royal approval, authorized the Lieutenant-Governor to extend Mercy to petitioning prisoners, only with the advice of the Executive Council..." Arthur, however, qualified that, notwithstanding the terms of the Act, in the absence of the Governor General "I have no doubt the Officer administering the Government might extend pardon independently of the Council; but, when it is considered that they are all Gentlemen of great experience in the Canadas, and are extensively informed, as to its political relations, I have considered it prudent, that my proceedings should, if possible, be, in every important particular, supported by their unanimous advice." [The Arthur Papers, Vol. 2, August 29, 1838, 265.]

[142] P. Kennedy, "In Pursuit of Rebels at the National Archives of Canada", 13.

[143]Twenty-year-old Hamlin was convicted at the Home District assizes, 1839.

recommendation appeared to be based on the questionable nature of the evidence. Arthur entertained no such doubts. Hamlin's sentence was reduced to seven years imprisonment.

In the winter of 1839, the Executive Council received a letter from the civil secretary, John Macaulay, noting that Lieutenant-Governor Arthur, pressed by growing petitions for the remission of prison sentences, was "desirous to lay down some rule with regard to applications for the mitigation of the sentences of imprisonment in the Penitentiary."[145] On the one hand, Macaulay speculated, it might be unreasonably severe to allow each prison sentence to run its full term. On the other hand, if remissions of a portion of the term of imprisonment were too frequent, this might tend to diminish the "salutary dread of the Penitentiary which it is in accordance with the true interests of the community to keep alive among its vicious classes" creating an even greater evil. Macaulay also noted that prison terms in the province were comparatively shorter than those in the United States where longer sentences were deemed necessary to allow for the reform of the criminal. What circumstances, then, "upon a general view of the subject" would be proper for the mitigation of sentences imposed by the provincial judges? In their response, the Executive Council reiterated that the right of pardon was exclusively that of the lieutenant-governor. It was the council's opinion that it was the duty of the judges of the land, above popular influence and independent of the executive government, to apportion penalty in cases where the law permitted or otherwise to hand down sentences for which the law was explicit in terms of punishment:

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[144] NAC, RG 1, E 3, Vol. 36, 159-71.

[145] NAC, RG 1, E 3, Lee to the Executive Council, Vol. 64, 321, 23 February 1839.

> The general rule must therefore constitutionally be that the measure of penalty affixed by the law or the Judge should be carried into effect—to act on any other principle would be to set the Executive Government above the law and instead of the power of shewing mercy in special cases—properly entrusted to the Sovereign—the course of pardoning upon general principles would be an usurption of the powers of Legislation and an assumption of the right to repeal or suspend the Law.[146]

The extension of mercy that was contrary to the sentence of the court ought to be rare and founded "upon very plain and palpable distinctions"—good behaviour under punishment or bringing forward, after trial, matters not known to the judge. The Executive Council failed to acknowledge that, in respect to capital cases short of treason, nearly all cases were "special" insofar as nearly all ended in mitigation.

While it is clear that they were addressing the issue of prison sentences respecting the cases of political prisoners, the principled stand of the council extended to its deliberations in respect to capital cases. In July of 1839, Robert Baldwin Sullivan, William Allan, Augustus Baldwin, William Draper and Richard Tucker reviewed the case of George Powlis, a Mohawk of the Six Nations reserve, sentenced to death at the Gore assizes for the murder of Susannah Doxtader. The council had been supplied with a transcript of the trial, four petitions for mercy and the presiding judge's report on the case. Powlis' counsels, O'Reilly and Tiffany, stated that the evidence was "so vague that it was a matter of instant surprise…that he was found guilty by the jury" further clarifying that "the evidence did not show even a probability of guilt."[147] Arguing that although the evidence presented in court was sufficient for establishing the verdict, Justice Levius Sherwood

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[146] NAC, RG 1, E 3, The Executive Council to George Arthur, Vol. 65, 326-27, 13 March 1839.

[147] NAC, RG 1, E 3, Miles O'Reilly to Col. Kerr, Vol. 65, 112-3, 13 February 1840.

believed that there were grounds for mercy. His argument for mitigation was predicated on two considerations. First was the fact that the evidence was circumstantial (it was Powlis' ring, found at the crime scene which showed evidence of struggle, which tied him to the murder). Second, to make the case against the prisoner conclusive, several unspecified facts were wanting. Draper indicated that there was want of clear proof as to how the deceased had come to her death. However, Powlis had not offered any explanation as to how he had come to lose his ring nor had he established his whereabouts on the evening of the murder. "Feeling it to be necessary that a crime of this description committed by an Indian should be visited with a punishment calculated to produce a deep impression on the minds of those of his own race"[148], Draper recommended transportation for fourteen years. Sullivan, Allan, Baldwin and Tucker unsure, for want of distinct proof, of the extent of Powlis' involvement and in virtue of the absence of details of fact "by which to measure the precise extent of the guilty of the prisoner," recommended seven years hard labour in the penitentiary. Allan added that a protracted term in prison would be more salutary and felt to be more severe "by the Indians than if the prisoner and his punishment were removed out of the notice and memory of his tribe by transportation." Arthur agreed with the majority and Powlis' sentence was commuted to seven years at hard labour.

When the case of Philip Huffman and daughter Mary[149] came before a specially-summoned council for discussion, the only considerations that they could find for mitigation were the recommendation of the jury to mercy and their belief that perhaps the

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[148] NAC, RG 1, E 3, Minutes of the Council Meeting 13th July 1839, Vol. 65, 105-141.

[149] In 1840 at the Western assizes, Philip and Mary Huffman were found guilty of murdering the child of their incestuous relationship.

execution of one of the criminals might be sufficient for public example.[150] Yet the council could find nothing which would allow them to reclassify the crime as aggravated as opposed to deliberate. Concluding that no satisfactory reason could be found to extend mercy to either criminal, "nevertheless, the council being most anxious to confine the infliction of capital punishment within the narrowest limits" commuted the sentence of the young Mary Huffman to transportation for life.

Although they had petitions for mercy in hand, never, from 1838-1840, did the council refer to them except critically. On November 9, 1838, the council reviewed the case of Job and Enos Scott. The Scotts had been members of a party that had successfully prevented a constable in the London District from arresting Duncan Wilson on suspicion of treason. For their part, the Scotts had disarmed the law officer and were subsequently arrested, charged and convicted of robbery and sentenced to hang. The council entertained a petition from sundry inhabitants of the London District and a letter from George Duggan, the Scotts' lawyer, both of which argued that the crime, in reality, was a political offence insofar as the Scotts were rescuing a person thought to be a political subversive. It was also noted that Wilson was later discharged on proclamation. "I trust" protested Duggan, "that the real and not the nominal offence will be brought fully under the notice of His Excellency and that the like magnanimity and forbearance will be extended to those as to other political offenders."[151] Duggan was alluding to the fact that the Scotts were juveniles and that the government had made an unofficial policy of extending free pardons to most of

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[150] NAC, RG 1, E3, Vol. 36, 223-31, 3 February 1840.

[151] NAC, RG 1, E3, Duggan to Macaulay, Vol. 84, 163-164, 20 October 1838.

the young Patriots charged with sedition. The council thought otherwise [152]. Refusing to interpret the crime in a broader political context, they chose instead to narrow in on the theft of the firearms, arguing that the evidence at trial showed that the Scotts intended "to convert the pistols to their own use."[153] But even if the assize judge had presented to the jury "the possible construction of the evidence now suggested" by the petitioners, the council believed that it would not have altered the verdict. The crime, in their estimation, was so heinous as to nullify the petitioners' prayer for a free pardon.

It is clear that the council made every effort to tailor punishments to fit the crime. In twenty-one capital cases (excluding those for sedition) between 1838 and 1840, nine were commuted to transportation, one to life imprisonment, three to fourteen years in the penitentiary, four to seven years, two to three years and two were free pardons. Taking up the case of Grace Smith for arson, the council, taking into consideration the deliberate manner in which the crime was committed, the fact that she had attempted the same crime earlier and, most importantly, as we saw in Chapter Three, the prevalence of the crime within the province, disagreed with Justice Jones' recommendation that the sentence be reduced to seven years in the penitentiary. Putting the matter succinctly, George Arthur agreed with his council: "At this particular crisis it is of great importance to strike terror into criminals of this kind. Such a crime must, if possible, be suppressed. Therefore, I

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[152] The situation had been somewhat different two months earlier. In August of 1838, the council had written to the Attorney General's office in response to a petition from Scott Sr. Here they pointed out as a further incriminating factor, that the Scotts had "formed a part of a body of conspirators, about twenty in number, who engaged to take up arms against Her Majesty and, if possible, effect a Rebellion in the London District in the month of June last." [NAC, RG 1, E 1, Vol. L, 86, 30 August 1838.]

[153] NAC, RG 1, E 3, Vol. 84, 148, 9 November 1838.

concur with the Council."[154] Leniency, the council reasoned, must be measured against the safety of the community. Smith's sentence was commuted to life imprisonment. The council also reviewed two of the four cases in which the capital sentence was allowed to take its course. Justice Macaulay's report on Robert Perry, convicted of killing his wife, was read at a council meeting on 6 June 1839. Perry had been confined in gaol upon a complaint from his wife previous to the 9th of April, the day on which he was liberated with her assent. Later that same day, the drunken Perry bludgeoned his wife with an axe. When a rooming-house tenant took the weapon from him, Perry took up an iron pot and used it to break most of his wife's teeth and her lower jaw. Perry offered in his own defence that ever since he had fallen on his head from a horse years before, his intellect and temper had been affected especially after drinking. Justice Macaulay countered that this did not seem to amount to a proof of mental infirmity which would palliate the murder: "there is reason to apprehend that the prisoner was impelled to the crime for which he is condemned to suffer under the influence of intoxication but there is no grounds upon which any doubt of the legality of the conviction can in my opinion be rested."[155] After deliberation "it was considered by His Excellency the Lieutenant-Governor, by and with the advice of the Executive Council, that the sentence of the law passed upon the convict Robert Perry be carried into execution."

In the summer of 1838, the Executive Council took up the question of how to deal with the immense number of prisoners charged with treason. That the government was

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[154] NAC, RG 1, E 1, Vol. M, 262, 7 November 1839.

[155] NAC RG 1, E 3, Vol. 65, 101-04, 6 June 1839.

concerned here with political crime notwithstanding, the broader points of the debate disclose something of the many pragmatic factors that drove the decisions about who was to live and who was to die, who was to receive a conditional and who an unconditional pardon. *1 Vic. c. 10* transferred the royal prerogative of mercy in respect to acts of high treason from the home government to the governor general or, in his absence, the lieutenant-governor, a measure intended to expedite the processing of hundreds of political prisoners in custody. Banishing Canadian prisoners to the United States was inexpedient. The resulting concentration along the border of men hostile to the British government and driven by a desire to regain their homes was an invitation to ongoing subversion. Transportation would signify the government's sense of the seriousness of the offence but transportation was expensive and, when there were potentially hundreds of prisoners, logistically problematic. Many convicted of treason might have their sentences reduced to transportation but not all would go. Barry Wright has argued that during the Upper Canadian rebellion, the government elected to deal with disaffection by legal manoeuvring rather than military violence thus lending "greater legitimacy to repression and stigmatiz(ing) the insurrectionists as criminals."[156] Many rebels would be charged with sedition, but with neither mass execution nor extensive transportation as a tactical or practical consideration, most would eventually receive free pardons after posting securities for their future good behaviour. Transporting all convicted rebels might appear unduly severe but making subtle distinctions where there was the "mere shadow of difference" would open up the pardoning process to charges of caprice and favour. Lord Glenelg

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[156] Wright. " 'Harshness and Forbearance'," 78-79.

recommended that these further commutations should appear to the public to turn upon information, which the council did not possess at the time of the original mitigation, and "upon views to which the Legal Tribunals could not advert."[157] We might extrapolate that the greater proportion of such information would come to the government's attention through petitions for mitigation.

Jacob Beamer, the captain of a group of patriots implicated in a series of robberies in the Niagara District, was recommended for hanging by the Executive Council. Beamer, circumventing the lieutenant-governor, applied directly to Governor General Durham for a pardon and received a respite while his petition was taken under consideration. The council objected arguing that respites were "always looked upon as a precursor of a commutation of the sentence of death"[158] and should be avoided where commutation was not intended. A respite in this case would only inflame the feelings of those living on the frontier. The militia that had pursued and captured Beamer and company had refrained from taking the law into their own hands because of assurances by the lieutenant-governor that the offenders would face certain justice. "Their confidence in the law," the council argued, "may not merely be shaken but altogether destroyed if by the respite of execution of the most notorious offenders, reason is given to suppose that they may finally escape the penalty attached to their crimes." Any perceived cracks in government resolve, any weakness of will, would be a recipe for future vigilantism.

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[157] NAC, RG 1, E 1, Glenelg to Arthur, L 26, 12 July 1838.

[158] NAC, RG 1, E 1, The Executive Council on Those Convicted of High Treason, 76-77, 29 August 1838.

The council argued that it was necessary to allow time for the temperament of the more zealous loyalist population to soften "thus making the extension of Royal Mercy popular in all quarters and proving that all the Executive Government were desirous of from the beginning was the exercise of the utmost clemency whenever the opportunity should offer." If appeals to the Governor General were permitted to overturn the judgments of council, it would appear to the public that the lieutenant-governor's decisions were unduly severe.

If the population's thirst for retribution was the concern of the above moment, for the greater part of the period, 1800-1840, it was otherwise. Generally speaking, neighbourhoods in Upper Canada had, with the exception of particularly brutal crimes, little interest in execution as an answer to capital crime. More importantly, it was, I believe, the communities' strategic reaction to the imminence of public execution that pushed the government to the legal reforms of 1833.

The Community and Legal Reform in Upper Canada

Throughout the 1830s, there was an undercurrent of opinion that questioned the effectiveness of public hangings. The execution of Aaron Seely provided an opportunity for the editor of the St. Catharines Journal to grumble: "We are not among those who place much faith in the last words of convicts, or the effective scenes sometimes got up at executions."[159] Those who defended them believed that public executions inspired lawful obedience by both demonstrating the awful retributive power of the justice system and by

[159] St. Catharines Journal, 6 October 1836.

ignominiously labelling those on the scaffold. Its critics were less enthused. The Kingston Chronicle and Gazette wrote: "The notoriety and sympathy which has obtained for the culprit, has deprived the sacrifice of his life of the terrors with which divine and human justice has surrounded it."[160] Rather than shocking the public into an awareness of its communal obligation to respect the law, executions were instead providing a platform for the criminal to play out the last scene of a tragedy, to die a martyr's death "wept by a mob." This change in public sentiment provoked one Upper Canadian newspaper to suggest that the province follow the example then being proposed in New York State to move the execution site to within the privacy of prison walls.[161] As for scaffold speeches, the critics of public executions argued that they generally created sympathy for the criminal, which palliated any effect intended to prove their crimes abhorrent. More often than not, dying criminals failed to make even the slightest allusion to their victims, so wrapped up as they were in "beatific expectations" that the expiating gallows was "only a passport to Heaven." Special censure was reserved for religious representatives who officiated at executions. When an honest man was told that he was in the grip of iniquity, but a villain with a rope around his neck was offered to the crowd as a prime candidate for heavenly mercy, crime lost its terrors and religion and morality were stood on their heads.

A greater commission of sympathy resulted from the unreformed criminal code that operated in the province until 1833. In 1800, the government of Upper Canada adopted the criminal code of England as it existed on September 17, 1792. John Beverley Robinson,

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[160] Kingston Chronicle and Gazette, 7 September 1833.

[161] The Colonial Advocate, 5 September 1827.

taking into consideration that some capital crimes subdivided, that some crimes were not capital until the second or even third offence, and that some crimes made capital in Britain were extended to the colonies, calculated that the list of capital crimes in Upper Canada extended to about 165.[162]

The government of Upper Canada recognized that there was little public support for the fact that so many offences had been made capital. Reporting on the case of James Oily,[163] capitally convicted for highway robbery in 1817, Samuel Smith, administrator of the government of Upper Canada, wrote that "the public sentiment revolts at Capital Punishment in this young colony unless for very great atrocity."[164] The Newcastle District neighbours who argued in favour of mitigating Nathaniel MacLean's capital sentence were not alone in confirming Smith's observation. When John Thompson[165] of York was sentenced for forgery, his counsel, William Baldwin, was of the opinion that this particular capital offence, no matter its frequency, did not require "the rigid execution of the law."[166] The editor of the Niagara Gleaner supported Baldwin, arguing that if Thompson were executed, it would be tantamount to murder.[167] The public could be likewise informed.

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[162] John Beverley Robinson. Upper Canada Statute 3d. Wm. 4. c. 4 Relating to Capital Offences. York: 1833.

[163] Oily was convicted at the Home District assizes. His sentenced was later reduced to transportation. See "James Oily" in **appendix 3**.

[164] NAC, RG 5, A 1, Smith to Governor-General John Sherbrooke, Vol. 34, 16242-44. 30 October 1817.

[165] Thompson worked as a notary public. He was convicted for the crime of forgery at the Home District assizes. Although it is clear that he was not executed, the nature of this mitigated sentence is unknown.

[166] NAC, RG 5, A 1, Baldwin and others to Mudge, Vol. 97, 54712-14, n.d.

[167] Niagara Gleaner, 31 October 1829.

When Patrick McGee[168] was sentenced to be hung for forgery, over one hundred and fifty of his Midland District neighbours petitioned for the mitigation of his sentence. Although, they noted, "the crime of forgery (was) but seldom mitigated in England where such offences may prove so injurious to the interests of great commercial transactions," they hoped, "that the precedents in that Country may not be rigorously applied in this instance"[169] where the crime proved less injurious. When placed in this context, Lieutenant-Governor Maitland's claim to the Colonial Office in 1828 that no one in Upper Canada had ever contested the law or its administration, further concluding that "the people are content with both"[170], appears disingenuous.

Prior to 1833, circuit judges periodically complained of the reluctance of juries to convict. Justice Campbell regretted that at the Niagara assizes for 1823, "some acquittals have taken place, I am sorry to say, contrary to law and evidence—a thing of too common occurrence in small communities where local feeling overpowers all other considerations."[171] Two years later at the Western assizes, he wrote of the large number of acquittals "not infrequent in all small communities—and therefore not a proof of innocence in all cases of acquittal."[172] Having sat court under *3 Wm. 4, c. 4, 1833* for five years,

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[168] McGee's 1819 sentence was later reduced to banishment for life.

[169] NAC, RG 5, B 28, Fiats of the Attorney General, 1805-1863, Inhabitants of the Midland District to Sir Peregrine Maitland, 14 October 1819.

[170] Quoted in Robert Fraser. Provincial Justice. Toronto: 1992, 197.

[171] NAC, RG 5, A 1, Campbell to Hillier, Vol. 61, 32781-82, 18 September 1823.

[172] NAC, RG 5, A 1, Campbell to Hillier, Vol. 74, 39295-97, 19 September 1825.

Justice Levius Sherwood would look back to the pre-reform period and comparatively reflect:

> The adoption of a more humane and equitable scale of punishment has already secured the full approbation of the public, and has done away that strong commiseration to the accused, which capital punishment for inferior offences naturally produced and which so frequently prevented the conviction of hardened offenders under the old system of criminal jurisprudence.[173]

Before 1833, even grand juries were admonished for failing to send cases, in which there was a presumption of guilt, forward to the petit jury for trial. Justice John Beverley Robinson scolded a Niagara District grand jury: "Our concern is rather with their [the grand jury] duties, since it is obviously our proper business to administer the law as it is, than to reason ourselves into a conviction of its wisdom or to censure its defects."[174] Campbell himself intimated that the judiciary shared the jurors concern with the harshness of the law even though it disagreed with their remedy.[175] In the case of Jane McGuire[176], convicted under *9 George 1, c. 22, 1722* of maliciously shooting at her husband and severely maiming him, Campbell wrote that "this has always been considered so highly penal that few executions have ever taken place under it."[177] That the unreformed criminal code was believed too harsh never seems to have been contested. At issue was the question of who

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[173] The Bytown Gazette and Ottawa Advertiser, 26 September 1838.

[174] Niagara Gleaner, 26 September 1829.

[175] S. R. Mealing writes that Justice William Dummer Powell "expected the letter of the law to be tempered with mercy; but mercy was properly a matter of prerogative discretion, not for the sympathy of juries." [In Fraser. Provincial Justice. Toronto: 1992, 148.]

[176] Thirty-six-year old McGuire was convicted in 1824 at the Midland assizes. Her sentence was later reduced to banishment for life.

[177] NAC, RG 5, A 1, Campbell to Hillier, Vol. 68, 36177-79, 5 October 1824.

ought to wield the discretionary power to pardon—juries or the Crown? Petit jurors appeared unwilling to risk the possible public hanging of their neighbours for crimes in which this ultimate punishment was believed to be without justification. In cases of murder, juror discretion allowed them to reduce the charge to manslaughter. Judge's Benchbooks contain numerous examples that demonstrate that juries were not disinclined to put theory into practice[178]. The fact that this privilege was not extended to other capital crimes left reluctant juries little room to manoeuvre. When juries did find their neighbours guilty, they more often than not recommended the guilty party to the mercy of the lieutenant-governor. This would be noted in the judge's report as a factor favourable to the condemned prisoner.

Despite all of this, John Blackwell has proposed that the penal reform act of 1833 "was not a *de jure* recognition of alterations already implemented *de facto* by the court."[179] Blackwell operates under the mistaken belief that, in the period before the criminal code was reformed, felons were regularly hanged for offences later made non-capital. He completely overlooks both the recommendations for mercy by the petit jury and/or the presiding assize judge, and the discretionary power wielded by the lieutenant-governor. In his study of the London District, Blackwell contends that, in 1833, eight men found guilty of offences including perjury, counterfeiting, grand larceny and bigamy would have been hanged had the law not been reformed in that year. If this were the case, then between 1800

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[178] In England, the possibility of finding a lesser verdict also applied to many forms of capital theft, most often, property cases. I have nothing in the archival records that would confirm that this was similarly the case in Upper Canada.

[179] John Blackwell. "Crime in the London District, 1828-1837: A Case Study in the Effect of the 1833 Reform in Upper Canadian Penal Law." J. K. Johnson ed. Historical Essays on Upper Canada: New Perspectives. Ottawa: 1989, 581.

and 1833, given the significant number of felons convicted of these and other capital crimes, there would have been an inordinately high number of executions in Upper Canada. As it was, excessive implementation (if we are to judge in terms of hard numbers of the death penalty (except, perhaps, in cases of sedition) never appeared to be an issue in Upper Canada. This was duly recognized as early as 1810 when John Lambert observed:

> The laws are severe, but tempered in their administration with so much lenity and indulgence for human failings, that it has occasioned a singular proverbial saying among the people that "it requires great interest for a man to be hung in Canada"; so few in that country ever meet with such an ignominious fare."[180]

Only four persons were executed for crimes other than murder during the period 1800 to 1833 (**Table 7.0**). In theory, the unreformed penal code may have been thought to be "bloody"; in practice, it appeared anything but.[181] Between 1800 and the penal reform act of 1833, there was, on average, less than (.79) criminal executed each year. To a large extent, this is explained by the fact that circuit judges instituted *de facto* reforms before 1833, contrary to Blackwell's belief.[182] This was not accomplished through sentencing but

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[180] John Lambert. Travels Through Lower Canada and the United States of North America. London: 1810. Twenty-years later, the claim was repeated by another visitor to Upper Canada, John MacTaggart. Commenting on an ethically motivated mudrder in the Ottawa District, MacTaggart quoted Lambert: "The saying is, that 'it takes great interst to hang a man in Canada,' which is indeed, true." [John MacTaggart, Three Years in Canada. London: 1829, 291.]

[181] We must bear in mind that Upper Canada had a very small population. When we compare the percentage of capitally convicted prisoners who were pardoned, especially between 1821 and 1840, with that of England and Wales, an interesting picture emerges (See **Table 7.2**). From 1821 to 1840 we may observe that the percentage of the capitally convicted which was pardoned was consistently smaller in Upper Canada than in England and Wales. The period 1826-40 witnessed the execution of 25% of all capitally convicted criminals in Upper Canada, all but two for murder.

[182] Blackwell is also under the mistaken impression that the abolition of benefit of clergy in 1833 "probably marked only the formal removal of another outmoded aspect of the old English criminal law." Blackwell apparently predicates his opinion on the fact that he was unable to find any evidence of the use of benefit of clergy in Upper Canada. In fact I have found many such cases. The assize minute books contain a number of examples such as that of Mary Swayze for bigamy. Having prayed benefit of clergy, Swayze was burnt on the hand and given three months in gaol. [PAO, RG 22, Series 134, Niagara District, 12 September

Table 7.2 Capital Convictions and Executions: Upper Canada—England & Wales, 1816-1840

	UPPER CANADA			ENGLAND & WALES[a]		
Year	Capital Convictions	Executions	% pardoned	Capital Convictions	Executions	% pardoned
1816-20	25	0	100	5853	518	91
1821-25	44	4	91	5220	364	93
1826-30	33	8	76	6679	307	95
1831-35	36	5	86	4984	207	96
1836-40^	38	10	74	1181	51	96

[a] Taken from V. A. C. Gatrell. The Hanging Tree. Oxford: 1994, Appendix 2.
^This period excludes executions for treason.

through appeals and advice to the lieutenant-governor.[183] In 1813, Justice William Dummer Powell recommended that William Moody, convicted of killing cattle with intent to steal the carcasses, be granted a conditional pardon. While recognizing that the crime had been "recently"[184] made a capital offence in England, Powell argued that "in this country (it)

1817.] Newspaper accounts also cited benefit of clergy. Jeremiah Callaghan and Isaac Ducket, both convicted of grand larceny at the 1829 Niagara assizes, were granted benefit of clergy by the court. Their sentences were reduced to time in prison plus a public whipping. [See Niagara Gleaner, 26 September 1829.]

[183] No matter what their personal feelings, judges were, as they often reported to the lieutenant-governor, required by law to pass sentence of death in cases where the petit jury had found a defendant guilty of a capital offence.

[184] Powell was off the mark here. The statutes in question dated from 1741 and 1742.

does not seem to require such severity."[185] In the case of William Hollis[186], convicted of stealing from a shop to the value of 15s., Powell, sensitive to changes in English criminal law, noted that the offence, made capital in the province in 1800, had "since been repealed in England except where the larceny amounts to fifteen pounds."[187] Hollis was granted a conditional pardon.

When fifteen-year-old William Jones of Scarborough was convicted of killing a cow, sixteen York luminaries came to his defence. In their petition for mitigation of the death penalty, the signatories argued that the statute under which Jones was sentenced had been recently repealed in Great Britain "so far as to reduce the punishment to transportation."[188] No doubt the petitioners knew their law. Three of them—George Ridout, George Duggan and Simon Washburn—were attorneys and William Jarvis, who drafted the petition, was the newly appointed sheriff for the Home District. Most of these men could be loosely described as moderate reformers and as such were part of Justice John Walpole Willis' circle. In 1827, the Colonial Office toyed with the idea of bringing Upper Canada into line with legal reforms recently introduced in Britain by Robert Peel. puisine justice. Commenting on the Jones' case, Willis wrote:

> This (killing a cow), according to Mr. Secretary Peel's Amendment of the Criminal Law of England, is now only a transportable Offence… I took occasion, shortly after this occurred, to give Mr. Peel's Acts, which I brought

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[185] NAC, RG 5, A 1, Powell to His Honour the President, Baron Francis de Rottenburg, Vol. 18, 7578-80, 23 September 1813.

[186] Twenty-two-year-old Hollis was sentenced at the 1824 Home District assizes.

[187] NAC, RG 5, A 1, Powell to Hillier, Vol. 66, 34844-46, 30 March 1824.

[188] NAC, RG 5, B 3, William Botsford Jarvis and others to Lieutenant-Governor Maitland, Vol. 7, Interim 293, 445-46, n.d.

> from England with me, to Mr. Attorney General Robinson, and suggested him the Propriety of assimilating the Criminal Law of Upper Canada altogether to that of England, or at least giving the Province the Benefits of Mr. Secretary Peel's improvements. I at length discovered that any proposition that did not originate with himself was not generally attended with his Approbation.[189]

Despite Willis' reservations concerning Robinson's obstinacy, Jones was pardoned.

The case (1823) of twenty-two-year old Mary Thompson, capitally convicted of infanticide, demonstrates the degree to which the Upper Canadian judiciary was often out of step with English penal reforms.[190] Two doctors who had immersed the infant's lungs in water, and had found them to float, gave the most-condemning witness testimony. This was taken as proof that the child had breathed, and thus had been born alive, contrary to the mother's testimony. Having forwarded details of the trial to the Colonial Secretary, Lord Bathurst, for review, Justice Dummer Powell, who had presided over the trial, was to learn that, in England, such evidence had been for many years considered "hypothetical and all circumstantial."[191] He would also learn that since 1803, the concealment of a birth was no longer accepted as a presumption of guilt in cases of infanticide. Concealing a birth, in England, had been reduced to a misdemeanor. Upon reflection, Thompson was granted an unconditional pardon. In 1831, *2 Wm. 4, c.1* received royal assent. The Upper Canadian Act specified that cases of infanticide were to be prosecuted just as any other case of murder.

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[189] Quoted in Barry Wright, " 'Harshness and Forbearance': The Politics of Pardons in the Upper Canada Rebellion" in Carolyn Strange. Qualities of Mercy. Vancouver: 1996, 81.

[190] In 1832, capital punishment in Great Britain was abolished for stock-theft. In Upper Canada, seven individuals were capitally convicted for this crime in that same year. The trials would have occurred in the early fall. Nowhere in the surviving judge's reports was there any mention that this crime was either under review in Britain or that it had actually been made non-capital.

[191] NAC, RG 5, A 1, Powell to Hillier, Vol 62, 32954-55, 25 October 1823.

Juries were empowered, upon acquittal for the murder of a newborn, to convict for concealment, a lesser crime which carried a two-year sentence.

The first public expression of a need to reform the existing penal code came in 1826 when the Niagara Gleaner and the Kingston Chronicle both published a presentment from the Grand Jury for Montreal. The jurors pointed out that Canadian legislation had not kept pace with the additions and alterations in English penal law. Moreover, the geography and other unspecified circumstances in the Canadas made it impossible to adopt various forms of subsidiary punishments employed in the United Kingdom, most notably, transportation and the employment of convicts on public works. All of this was aggravated by petit juries who, because of the harshness of the unreformed law, sentenced with their hearts rather than their heads, by offended parties who refused to prosecute, by a provincial executive, and other influential persons, reluctant to enforce a severe law, and by the lieutenant-governors who regularly exercised the Royal prerogative of mercy. Consequently:

> Impunity is enjoyed by the most atrocious and hardened offenders under the present relaxed laws; and instances will readily occur to this court of persons having in a few years been several times tried for capital crimes, condemned to death, pardoned, and having, exclusive of their depredations, caused a public expense of hundreds of pounds; they are, nevertheless, permitted to go at large, and resume their career of crime.[192]

A frustrated public, the jury concluded, was receptive to amendments to the penal code and especially to the need for a penitentiary. The editor of the Kingston Chronicle agreed. Under the mild administration of the criminal code of Upper Canada, a sentence of death

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[192] Niagara Gleaner, 29 September 1826 and the Kingston Chronicle, 29 September 1826.

for any crime short of murder might be expected to be commuted to banishment from the province. In nine out of ten cases, the editor claimed, the mitigated punishment was entirely disregarded. Yet even when the convicted felon did leave the province, some critics still found it difficult to construe this as adequate punishment, let alone a deterrent to further crimes. The editor of the Niagara Gleaner considered horse stealing to be the most grievous offence in the province. He wrote:

> The sentence, when conviction takes place, is generally (what is termed) *Banishment*—that is, leave the Province, and go home to your own country, or anywhere, but do not appear in Canada! We have little doubt but further depradations (sic) on that valuable property by the hands of those banished culprits and their agents, will continue to be made, so long as such lenient sentences are pronounced.[193]

The United States, the editor offered, took a more sensible line with horse thieves: ".... as it is, these enterprising individuals can migrate to the United States, and still carry on a lucrative business in that line.... till such time as Uncle Sam shall, in his wisdom, give them more permanent situations, where they can wear striped shirts, and grind their own corn, by authority." Such sentiments would resonate in the Upper Canadian press until the penal code was eventually reformed. The editor of the Kingston Herald, H. C. Thomson, complained that crimes, which in England would be punished with transportation to hard labour, were scarcely punished in the Upper province.[194] Persons capitally convicted might

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[193] The Niagara Gleaner, 14 September 1833.

[194] Section 5 of the 1800 code recognized that transportation was either inapplicable to Upper Canada or could not be carried out without "great and manifest inconvenience." Soldiers convicted of crimes meriting banishment would be the rare exception. As Samuel Smith argued in the case of James Oily, capitally convicted for highway robbery, if Oily were banished to the United States it "would operate as encouragement to soldiers to commit crimes in order to be released from service." [NAC, RG 5, A 1, Smith to John Sherbrook, Vol. 34, 16242-44, 30 October 1817.] Rather than risk imprisonment for desertion, a soldier might simply commit a serious felony (larceny or better) in order to safely accomplish his initial goal. Oily was to be transported either to Africa or the West Indies where he would spend the remainder of

be banished or spend a few months in prison while those committing "trifling offences" were subject to more severe punishment—those selling liquor without a licence might spend up to six months in gaol or pay a £20 fine while those tempting soldiers to desert, six months. "It is evident, therefore, if we have no means of awarding a punishment more corresponding to the crime, our state will soon be deplorable indeed" and the community "in constant danger of their lives and property."[195]

On Friday, January 8, 1830, Lieutenant-Governor John Colborne advised the members of the Legislative Council and the House of Assembly that, as part of the business of the new session, their attention would be drawn to the frequent cases of capital conviction where, "through the dispensing power of the Crown, it is thought advisable to arrest the sentence of the law, notwithstanding the evils that may arise from repeated mitigation without a system of secondary punishment or any means of disposing of offenders."[196] As speaker of the Legislative Council, John Beverley Robinson would support this agenda. He advised his colleagues to give their utmost consideration to his concern that "the exposure of property and the facility of depredation"[197] in certain districts required an effective system of secondary punishment. The Farmer's Journal congratulated Colborne on his recommendation to modify the "barbarous criminal code."[198] The present

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his life in an army corps chosen by the King. Smith was as much as admitting that banishment was not commensurate with transportation at hard labour.

[195] From the Kingston Herald, republished in the Hallowell Free Press, 19 June 1832.

[196] NAC, RG 5, A 2, Draft Correspondence of the Lieutenant-Governor's Secretary, 1804-40, Vol. 8, 8 January 1830.

[197] Farmer's Journal and Welland Canal Intelligence, 20 January 1830.

[198] Farmer's Journal and Welland Canal Intelligence 13 January 1830.

severity of the law, the editor argued, was a protection rather than a punishment to offenders. "Worthless vagabonds" were escaping prosecution and those found guilty of any crime short of shedding blood were being reprieved. "This order of things, which must continue until the punishment is proportioned to the guilt of the offender, is an encouragement instead of a check to the commission of a crime".

In 1831, a legislative committee was struck to inquire into the expediency of erecting a penitentiary. The committee received a letter from an unidentified "gentleman whose practical knowledge of the subject entitles his opinion to a respectful consideration."[199] When one reads the charge to the Home District grand jury, October 17 of the same year, it is evident that the unidentified gentleman was none other than Justice John Beverley Robinson, the two addresses being uncommonly parallel.

Justice Sherwood, in a moment of uncustomary candour, admitted to a Midland District grand jury that he had:

> ...not the least expectation that a charge to a Grand Jury could produce any considerable effects in a dense population, even if such charge were the production of the most eminent man, and written in a manner best calculated to secure attention.[200]

Despite Sherwood's disclaimer, the fact that grand jury addresses were, with some regularity, published in provincial newspapers makes it clear that the information therein was meant for the edification of the general public. It is also clear that Robinson intended to wage his public campaign for penal reform through the grand jury charge.

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[199] Journal of the House of Assembly, 1831, Appendix, 211.

[200] Kingston Gazette and Religious Advocate, 19 September 1828.

In 1829, he hectored a Niagara grand jury on the consequences of executing legal processes in a "loose and negligent"[201] manner. Such casualness discredited the administration of justice and weakened "the arm of the law." Robinson emphasized a prompt and careful rather than a severe execution of the laws. But this was just the problem. The unreformed law was a vicious circle. It was because the laws were severe that they were not being promptly and carefully executed.

On October 4, 1830, Robinson made the same complaint to the Home District grand jury. This time he added:

> I have no doubt you will agree with me in thinking that we shall find the tendency to such crimes as I am now alluding to very much be restrained whenever it can be placed in the power of the courts of justice to sentence offenders to punishments more effectual than banishment from the Province or mere confinement in prison.[202]

Robinson made it clear to which effective punishment he was referring. The focus of his address had been property crimes. Such crimes were growing in number as the province's population increased. The example and the punishment that a penitentiary would set for those committing larceny and related offences were wanting. A penitentiary would "give that legal protection to property which is necessary in populace communities." Robinson had acknowledged that reform of the existing penal code was contingent on a workable secondary punishment, namely a penitentiary. One required the other.

In his address of October 17, 1831, Robinson directed most of his ire towards the

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[201] Niagara Gleaner, 26 September 1829.

[202] PAO, L 44, MU 5905, John Beverley Robinson Papers, 4 October 1830.

failure of banishment[203] as an effective secondary punishment. In theory, banishment was to hurt most those who had numerous friends and relations within their district.[204] In 1832, Daniel Kemp and Mitchell Robins had been sentenced to death for stealing livestock. Justice Macaulay, reporting on the case, wrote that both men had "connections in the country" and therefore "banishment would be felt as punishment."[205] This was said to be especially true of Kemp who was apparently the better connected. But when sent to a friendly foreign state, Robinson regretted that banishment, designed for "culprits who have been found unworthy to live among ourselves…scarcely amount(ed) to any punishment at all."[206] Some believed that those who were left behind unfairly felt the greater force of the punishment. When sixty-year-old Andrew Gallager was sentenced to banishment for attempting to assist his sixteen-year-old son Anthony to escape from gaol, Gallager's wife wrote that they were now "a ruined family." The loss of their father had deprived his eight children "of all comfort and render them, tho' innocent, the greatest sufferers."[207] After spending five years in the United States under sentence of a life-long banishment, Nicholas

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[203] Banishment remained on the statute books until 1842 when it was formally replaced by imprisonment.

[204] This may go some way in explaining why some escaped prisoners were not pursued nor rewards offered for their apprehension. When Cyrus Badgerow, charged with attempted rape, escaped from the custody of the arresting constable, Sheriff William Jarvis conjectured that he had probably absconded to the United States. Jarvis inquired whether the government would post a reward to bring him back. The response was noted on the back of the letter: "Does not deem it expedient to offer a reward for his apprehension—as it is probable he will quit the province to which it is not desirable he will return." [NAC, RG 5, A 1, Jarvis to Mudge, vol. 108, 61751-56, 27 August 1831.] Banishment de facto would save the province the expense of both reward money and a trial.

[205] NAC, RG 5, A 1, Macaulay to Hillier, Vol. 120, 66741-44, 16 August 1832.

[206] PAO, L44, MU 5907, John Beverley Robinson Papers, Grand Jury Charges, 17 October 1831.

[207] NAC, RG 5, A 1, Mary Gallager to Hillier, Vol. 68, 36311-14, 28 October 1824.

Tillabagh (Dilabough)[208], a convicted horse thief, wrote to Lieutenant-Governor Bond Head from the state of New York requesting that he be permitted to rejoin his family: "Your petitioner was born and brought up in the Province of Upper Canada and was the son of a United Empire Loyalist and has a family consisting of a wife and eight children without any means of support."[209] According to Joseph Alleyn's wife, her husband's sentence of banishment had taken him by surprise. The eight days of grace before he was to leave the province were taken up with writing and filing an application for a pardon recommended by the judges who had reviewed his case. His petition for mitigation was refused. Having little time left to put his affairs in order, Mrs. Alleyn claimed that her husband was unable to make adequate preparations for her support and that of their two children. Leaving the province on short notice also meant leaving oneself open to the possibility of exploitation. Such was the complaint of Mrs. Alleyn: "undue advantage has been taken of his difficult situation and landed property which he holds has been in a shameful clandestine measure resold by the person from whom he purchased thereby depriving him of leaving the means necessary for them."[210] Because of the impracticality of sentencing Upper Canadian felons to transportation, banishment had been employed as a substitute. Yet, as Attorney General Robert Jameson reminded the lieutenant-governor, because transportation involved hard labour during such term (as did time spent in a penitentiary), banishment offered no effective parallel.[211] In England, transportation was

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[208] The forty-one-year-old labourer was convicted at the Johnstown District assizes in 1832.

[209] NAC, RG 5, A 1, Dilabough to Bond Head, Vol. 178, 97864-66, 3 September 1837.

[210] NAC, RG 5, A 1, Alleyn to Lady Sarah Maitland, Vol. 86, 74087-10, 7 November 1827.

[211] NAC, RG 5, A 1, Jameson to Rowan, Vol. 148, 80897-98, 16 December 1835.

considered to be commuted by imprisonment at hard labour in the penitentiary. In Canada, imprisonment at hard labour would be considered commuted by banishment from the province.[212]

Besides being almost expense-free and requiring the minimum involvement of state officials, banishment had one saving grace. From the point of view of the victim, it put a comfortable distance between themselves and the criminal, especially important in cases where the crime was aggravated. John Standish, a twenty-six-year-old labourer in the Gore District was successfully prosecuted for rape in 1831. Varshti Waterhouse was looking for strawberries on the plains near Brantford when the offence occurred. When Waterhouse saw Standish on the street the next day she obtained a warrant and had him arrested. In October of that year, John and Varshti Waterhouse wrote to Lieutenant-Governor Colborne that they had learned "with unfeigned satisfaction"[213] that the capital part of the sentence had been remitted. They had, however, heard it rumoured that Standish had been given an unconditional pardon and would soon "be set loose without restraint on the society of Upper Canada." Standish had maintained his innocence throughout, arguing that he had been falsely accused. "If this is true (the pardon)," they worried, "we fear his

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[212] That, in Upper Canada, time spent in the penitentiary was considered a more severe punishment than banishment was born out by the decisions of Justice Macaulay. In the summer of 1834, at the Gore district assizes, he sentenced three men convicted of petty larceny to seven years banishment but sentenced two men convicted of grand larceny to five years in the penitentiary. [NAC, RG 5, A 1, Macaulay to Rowan, Vol. 144, 78808-12, 20 August 1834.] This proved to be the pattern in sentencing subsequent to the opening of the Kingston facility. In the same year he wrote to Rowan concerning the case of John Douglas convicted for larceny: "It must remain for His Excellency considering the case in all its leanings to decide how far it may be expedient to commute the punishment so as to relieve the convict from the pains and ignominy of the Penitentiary by the substitution of imprisonment and banishment." [NAC, RG 5, A 1, Macaulay to Rowan, Vol. 148, 81292-93, 1834.]

[213] NAC, RG 5, A 1, John and Varshti Waterhouse to Colborne, Vol. 109, 62203-04, 17 October 1831.

violence and temper and threats against us which we have no doubts he will carry out; thus, banishment out of the province or transportation beyond the Seas will effectually prevent his endangering the lives and property of your petitioners as well as divers others of His Majesty's subjects resident in the same vicinity who have also been threatened for taking an active part in bringing him to justice."[214] Although Justice Sherwood believed that it would be expedient to transport Standish he was, instead, banished for life. Justice Campbell had presided over the case of Jane McGuire who had been convicted of maliciously shooting her husband. Evidence entered at the trial had convinced Campbell that it was McGuire's "own misconduct and ungovernable disposition (which) was too frequently, if not originally, the cause of their domestic broils."[215] If McGuire was to be pardoned, he recommended banishment. Because of her "extraordinary assertions" before and after the attempt on her husband's life, Campbell was convinced that murder would be "the consequence of their living in the same country."

With his access to trial records, Robinson would surely have been aware that many convicted felons, rather than leaving the province within a set number of days (even

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[214] John Weaver incorrectly maintains that the Waterhouses petitioned against Standish's banishment because they feared that he would return and seek revenge. It should be clear from their petition that what they feared was a free pardon. [John Weaver. Crimes, Constables and Courts. Montreal: 1995. 61.] Standish spent sixteen months in the Gore District gaol before he was banished in the fall of 1832. It appears that Standish's time in gaol was meant to cool him out. A note from the lieutenant-governor's secretary to the sheriff of the Gore District appended to the back of a petition from Standish in October of 1832 asked whether the prisoner could now be sent out of the province "without the risk of endangering the lives of the persons whom he has menaced?" [NAC, RG 5, A 1, Standish to Colborne, Vol. 122, 67822-24, October 1832.]

[215] NAC, RG 5, A 1, Campbell to Hillier, Vol. 68, 36177-79, 5 October 1824.

when the court stipulated the posting of securities), were ignoring the court's directive.[216] Of greater consequence, this necessitated and was occurring with the complicity of the community. Many sentenced to banishment were being harboured by their neighbours. One month before Robinson's charge to the Home District grand jury, the grand jury for the Gore District complained to the lieutenant-governor that they were "bothered" by the fact that many had returned early[217] from banishment:

> ...for instead of crime being put down and prevented so far as it can be by example —those criminals being at large and being allowed to continue so, without punishment for their contempt of the laws must have the effect of encouraging the vicious and unprincipled to go on in crime with a hope of impunity.[218]

This was no exaggerated claim. On May 23, 1837, a jury of his peers found James Gibson of the London District guilty of committing arson. Although the court transcript is missing, Justice Jonas Jones' report gives us a snapshot of what transpired. According to Jones' account, it was proved to the satisfaction of the jury that Gibson had burned Samuel Elliott's barn and contents. At the time of the fire, the barn was filled with grain and hay belonging to George Elliott, Gibson's son-in-law. Up to three weeks prior to the fire, Gibson had lived with his daughter and son-in-law when, in consequence of some unidentified misconduct, Elliott had removed him from his home. A short time after, Elliot

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[216] The earliest recorded case was that of Robert Franklin who returned from banishment in 1804 but was later discharged from custody by proclamation. It should also be noted that courts of quarter sessions sometimes banished criminals, especially hardened criminals and recidivists. Patrick McEwan had been sentenced to seven years banishment for petty larceny by the Brockville quarter sessions. When he was arrested after having returned early, he was sentenced by the assizes to six months imprisonment. Reviewing the case, Chief Justice Robinson expressed his doubt as to the power of the court of quarter sessions to banish. [NAC, RG 5, A 1, Vol. 234, 128159-63, 4 December 1839.]

[217] "Returned early" from banishment was how such cases were formally worded. However, we must not infer that in all instances the person in question had literally left the province to which he or she had later returned. This same charge applied even to those whose sentences were reduced to banishment but who, in fact, had never left the province.

sold the property to his brother Samuel and moved to a farm purchased from one of Gibson's sons. Gibson alleged (Jones' emphasis) that his son and son-in-law had conspired to cheat him out of this latter property. Shortly after Elliott moved to his newly-acquired premises, Gibson maliciously and wilfully set fire to the barn in which Elliott had stored his grain and hay all of which was consumed. On May 29, 1837, Justice Jones wrote that seventy-year-old Gibson was in failing health. He recommended a commutation of his sentence to banishment for life. The lieutenant-governor concurred and on the twenty-first of June, Attorney General Hagerman was instructed to prepare a patent of conditional pardon. Here the case stood for the next two and one-half years.

In the fall of 1839, the lieutenant-governor's office received a petition praying for a free pardon for Gibson.[219] What is clear is that Gibson's neighbours were, from the first moment, prepared to protect him in the eventuality of his being banished. As I will argue below, like many others sentenced to banishment before him, Gibson would never leave the province. Yet, unlike many of those cases, Gibson's failure to comply with his sentence was never in any danger of being compromised by any ill-willed informant. Instead, Gibson's neighbours were desirous that he should be able to sue his son David Gibson. If it were not for this fact, it is doubtful that the government would ever have learned that Gibson had failed to leave the province. As a convicted felon, Gibson Sr. was "civilly dead

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[218] NAC, RG 5, A 1, Gore District Grand Jury to Colborne, Vol. 109, 62205-7, 11 September 1831.

[219] Upon Gibson's conviction in 1837, his neighbours petitioned for mitigation arguing that he had been driven to desperation and virtually to the point of insanity by the unnatural conduct of his children. Even before the petition reached the lieutenant-governor, Gibson's sentence had been commuted to banishment for life on the basis of Justice Jones' report. This speaks to the importance of judge's reports in the determination of grounds for mercy. It should be noted, however, that Jones' report admitted that a wealth of community sentiment favoured Gibson, that he, Gibson, "invite(d) the commiseration of all who witnessed the trial..."

in all places under English law"[220]. In law, it was as if his execution had taken place. While a conditional pardon might "remit, release and restore" to the felon his "goods and chattels, land and tenements which he might have forfeited…or which might be legally forfeited…and all and every matter and thing which legally he might lose and suffer by reason of the said offence,"[221] it could not restore his legal identity. The effect of a free pardon was "to make the offender in all respects a new man.[222]" Thus it was that Gibson's neighbours were seeking an unconditional pardon. While not wishing to diminish the enormity of the crime, the petitioners considered Gibson's great age (seventy at the time of the offence), his defective education and "his irritated feelings at the time excited by the treatment and unnatural conduct of his nearest relations"[223] to be factors warranting the ultimate extension of mercy. Under the influence of temporary derangement triggered by the despair of being financially ruined, Gibson had taken "an improper revenge upon his son-in-law Elliott." However, it was argued, the true malfeasants were Gibson's family:

> Your Petitioners cannot entertain a doubt but that your Excellency being made acquainted with the case, you will feel great indignation against the guilty authors of such atrocious conduct,—and sympathy and commiseration for the hardship and privations the poor old man is now suffering from the wrong inflicted on him by his inhuman offspring.

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[220] Beverley Boissery. A Deep Sense of Wrong. Toronto: 1995, 191.

[221] Quoted from a standard patent of pardon as found in NAC, RG 68.

[222] W. C. Keele. The Provincial Magistrate, 501. In August of 1826, Elizabeth Haw (Maxwell) and her husband were found guilty of infanticide. They were subsequently granted a conditional pardon. In 1840, having complied with the conditions of the pardon, Haw wished to remarry. However, like Gibson, she was considered dead in law and now petitioned for a free pardon. It was granted on 24 December 1840. [NAC, RG 68, Liber K, 60, 24 December 1840.]

[223] NAC, RG 1, E 3, Freeholders and Inhabitants of Moza in the London District to Lieutenant-Governor Arthur, Vol. 33, 162, 28 November 1839.

Magistrate William Hatelie, the first signatory to the petition, appended a five-page letter which fleshed out these various points. Gibson had immigrated to the United States from Ireland about 1800. Tens years later, he and two of his sons, William and James, took up residence in Moza Township. James Gibson drew lot no. 22, 100 acres on the Longwood Road. His son William drew lot no. 25. Some years later, Gibson and his son exchanged properties. Gibson received the transfer deed for lot 25. However, the patent deed for lot 22 could not be drafted because the settling duties had not been paid in full. Sometime afterwards, Gibson Sr. gave one half of lot 25 to one of his daughters upon her marriage to George Elliott.

In the winter of 1835, Gibson's son David came from the United States to live with his father. In April of that year, Gibson resolved to visit Ireland. In his absence "it would seem that his children came to the determination to defraud him of his property."[224] David received the original (patent) deed for lot 25 from his brother William. William had never turned it over to his father. They then conspired to destroy Gibson's transfer deed that had, unfortunately, never been registered. Both it, and the patent deed, had been entrusted to William for safe keeping before his father's departure. David also arranged with his brother-in-law, George Elliott, to purchase his wife's half of lot 25. Gibson learned of the fraudulent transaction upon his return from Ireland in the spring of 1836. Threatening legal action, he refused to sign a transfer for the deed on lot 22 to his son William, the patent for which had been taken out in his name during his absence in Ireland. To avoid legal proceedings, David proposed to purchase his father's half of lot 25.

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[224] NAC, RG 1, E 3, Hatelie to Lieutenant-Governor Arthur, Vol. 33, 163-67, 28 November 1839.

Referring the price to arbitration, the arbitrators ordered that David should pay out £25 immediately and give his father promissory notes for £25 each, one to be paid in each of the next four consecutive years. Thus guided by these provisos, Gibson signed a transfer deed for lot 22 in favour of his son William. David now resolved upon another scheme to defraud his father. He placed advertisements in various newspapers advising the public not to take the notes if put into circulation by his father as he, David, had granted them "without receiving value for them." He then made a "pretended" sale of lot 25 to his brother-in-law George Elliott, before returning to the United States.

James Gibson was said to be "much irritated" by his son and son-in-law's attempt to defraud him. In August, Samuel Elliott's barn was burned. Hatelie had issued the warrant for Gibson's arrest. Sometime between Gibson's imprisonment and his trial, David Gibson returned from the United States. Elliott, having given up the pretence of owning it, had turned the farm on lot 25 over to David. "It would seem," wrote Hatelie, "that these unnatural persons entertained the hope that they would get rid of the old man and keep his farm without paying the price by getting him condemned to death for arson." Both men threw themselves into the task of collecting evidence that would ensure a conviction. Their zeal to have Gibson hanged, Hatelie wrote, "was viewed in this neighbourhood with horror and disgust." When Gibson was released from prison in preparation for his banishment, he was described as so weakened from his stay in gaol that he required to be lifted in and out of the stage wagon that was to take him from the province. By the time the wagon reached Moza Township, it had become apparent that Gibson was too ill to proceed any further. Continuing deterioration of his health and the misconduct of his family combined to create

a wave of sympathy for Gibson. The community, noted Hatelie, "found it expedient to shew some contrition." William took his father into his home where he was left to recover over several months. Believing that Gibson had only been rescued by his family for the purpose of acquiring the four promissory notes, Gibson was cautioned to place them in a safe place. He entrusted the notes to Hatelie. After a full recovery, Gibson once again set out to leave the province but was pursued and prevailed upon by David to return. In the presence of Hatelie, David promised his father that he could live with him and that he would be paid the promissory notes which were owed as well as the others as they fell due. Gibson was to live in the house on that part of lot 25 formerly farmed by George Elliott. Shortly after accepting the offer, the scheming resumed. This time David pretended to sell the farm on lot 25 to another brother-in-law, Jacob Inglis who had arrived from the United States two years earlier. Hatelie described Inglis as a common day labourer with no visible means to pay for the property now valued at £900. Despite his avowed intention to pay his father the money owing, David never made good on his promise. Instead, he left the province. Meanwhile, Inglis had several times made promises to Gibson that if we would hand over the promissory notes that he, Inglis, would take care of the old man for so long as he lived. When Gibson refused, Inglis ordered him off the property. Although he was now anxious to leave the province, Gibson was in no financial position to support himself in the United States. Hatelie noted that he was "supported chiefly by the charity of his neighbours." Stalemated—impoverished and with no legal recourse—it was recommended that Gibson apply for a free pardon. For his part, Hatelie had played the role of magistrate cum reconciliator:

> I have more than once interposed my good offices for reconciliation betwixt the parties and mutual forgiveness on the old man being paid what is justly due to him and as I feel much for the cruel barbarous manner in which the old man has been used; and as from various reasons I am well acquainted with the facts above warranted, that have occurred within the last five years since David Gibson first came to this neighbourhood I can vouch for their accuracy.

Hatelie also believed that it was his duty to comply with the wishes of his constituents to draft a petition requesting a free pardon.

The supplication by Gibson's neighbours reveals, among other things, how different was the community's notion of mercy from that of the viceregal and his advisors, both judge and Executive Council. The latter, their decisions made *in camera*, were driven by pragmatic considerations and less by simple compassion. In issuing a conditional pardon for an atrocious crime like arson, the government was flexing its beneficent authority while demonstrating that it had tight control of the reins of state. The powers-that-be could well afford to temper violence with mercy in so far as the secondary punishment was believed to have deterrent value. Communities, on the other hand, were less concerned with the principles and practicalities of mercy than with the merits of the individual case in question. Traditional notions of the family and the duties of children to parents were foremost in the minds of Gibson's neighbours. Gibson, the community believed, had suffered enough both through his ordeal in gaol and the continuing injustice perpetrated by his family. Gibson merited contrition, he had suffered enough for his crime and his community had accordingly sheltered him. They had, de facto, accorded Gibson a free pardon. Even magistrate Hatelie had so ordered. Gibson was the community's own and that community had exercised its notion of communal justice.

Gibson's children had been variously described as "heartless and inhuman", "extremely cruel and undutiful" and "barbarous." This type of behaviour might better be described of an American family ruined by excessive democracy where "subordination is trampled upon in its own house by sons who wanted their independence too soon."[225] The Canadian family, by contrast, was "a virtuous and mutually attached household."[226] The family, as David Gagan has synthesized from period texts, was said to draw its strength from the equality among its children, the identification of the aspirations of the children with that of their parents, and the subordination of one to the other. Success in the backwoods of Canada dictated an integrated family with a commonality of purpose. Gibson's family had violated both the actual and the ideal. It was neither Joseph Kett's collection of individuals bound together by duty and property nor was it a rightly conducted, all-encompassing moral collective. Gibson's progeny were the criminal types discussed in chapter one. To drive home the point, Hatelie denigrated William and David Gibson as "Freethinkers," David Gibson going "the length to disbelieve in a Supreme Being, or a future State." "One ceases then," Hatelie continued, "to be surprised at their atrocious behaviour to their Father." The two mentioned sons and Jacob Inglis, he noted, were "strongly disaffected to the British Government." Hatelie had taken depositions in July of 1838 wherein it was charged that all three were implicated in having joined the rebels and were sworn members of the Hunter's Lodge.

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[225] David Gagan. " 'The Prose of Life': Literary Reflections of the Family, Individual Experience and Social Structure in Nineteenth-Century Canada". Journal of Social History 9.3 (Spring 1976): 369.

[226] John Carroll, quoted in Gagan, 369.

The conviction of seventeen-year-old Moses Winters (for bestiality) was likewise contested by his family and neighbours. Arguing that a just conviction must be based on the testimony of at least one credible witness, Moses Winters' father Jacob proceeded in his petition to Chief Justice Robinson to discredit each of the principal witnesses for the prosecution using information most likely premised on neighbourhood gossip but information, nevertheless, which he had been prevented from entering into evidence: "Your lordship could not be acquainted with them nor could the jury and as Petitioner was the greater part of the time shut up with the other witnesses, he had no opportunity except in one case of aiding his counsel."[227] Isaac Devins, the informant in the case, "has been always noted in the country as a person not remarkable for speaking the truth, in short there are many persons in the country who would not believe him on his oath." Winters offered in support of his accusation that two years previous, Devins was charged "with this character" in court and unsuccessfully counter-sued for slander. Mrs. Hinds was for some time a member of the Methodist Society but was "lately turned out for a defamatory, scandalous tongue." Winters painted Nathan Martin, Devins' son-in-law, as an acknowledged American deserter[228]. Devins' brother-in-law, John Chapman, was denigrated as a notoriously worthless character: "He one day took a solemn oath on his Bible that he would drink no more spirituous liquor, and the next day was drunk." Fifty-four neighbours, in a separate petition, swore that Winters' characterizations of the

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[227] NAC, RG 5, A 1, Jacob Winters to Chief Justice John Beverley Robinson, Vol. 109, 62357-61, 26 October 1831.

[228] This was surely a counter-accusation. At the trial, Nathan Martin had been called as a crown witness. He testified that John Strong, a witness for the defence, was an American deserter.

witnesses for the prosecution were correct. Winters narrated a long-standing quarrel between his son and Devins originating in Moses Winters calling Devins' son a (unspecified) nickname. Winters claimed Devins Sr. had since frequently declared that he would "drive (Moses) out of the country or hang him." Winters' most telling point concerned the fact that the charge against his son was made three years after the alleged offence, "three years under the lash of Devins'" slander, and only then because Moses Winters had threatened to sue Devins for defamation of character. The Canadian Freeman questioned the appropriateness of a trial for an alleged crime committed years before.[229] Suppose, editor Francis Collins wrote, that one of the grand jurymen was charged with rape three years ago. How could he defend himself? How could he prove where he was? Although the witnesses for Moses Winters did testify to the long-standing feud between the boy and Isaac Devins, none of the information contained in Jacob Winters' petition was offered into evidence.[230] In his report on the case scribbled on the front of the petition, Robinson acknowledged that delaying the complaint for three years did leave the case subject to doubt and suspicion. Nevertheless, he did "not in the slightest degree question the justice or propriety of the verdict, which was fully warranted by the evidence." Robinson's ultimate take on the case was not guided by the sufficiency or insufficiency of evidence but rather by a strictly pragmatic consideration. Referring to the infrequency of the crime in question, he "strongly recommended" that Winters' sentence be commuted to banishment because he did not believe that "the circumstances of this country render it

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[229] The Canadian Freeman, 10 November 1831.

[230] See Rex vs. Moses Winters, PAO, RG 22, Series 134, J. B. Robinson Benchbooks, Home District (2), October 1831.

necessary that it should be carried into execution." There is no indication whether the banishment was for seven years or life. Nevertheless, two years after his banishment, Moses Winters illegally returned home where he was protected by those neighbours who had protested his innocence at the time of his trial.[231]

Many of those charged with returning early from banishment[232] had been found out only after neighbourhood enemies acting out of spite had informed on them[233]. In 1825, Nathan Osborne—a.k.a. Darius Forbush—was banished for life for horse stealing. In 1832, he wrote the lieutenant-governor that his family and friends residing in Pickering had induced him, upon his discharge from prison, to return to his home rather than removing himself to the United States. Now, even though Forbush was a reformed man (as confirmed in annexed testaments to his character), a certain Solomon McBaugh was threatening to turn him over to the authorities. His neighbours were urging him to flee the province, leaving behind his wife and seven small children as well as the property that he had accumulated by his industry. Osborne was asking for a free pardon. On the back of the

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[231] Winters was arrested in 1838 (See below). A comparison of the two petitions from Winters' neighbours in 1831, and the petition supporting Winters on his arrest for return from banishment, reveals that the majority of the signatories were the same.

[232] The charge, "returning early from banishment", was applied even to those who had never left. To establish guilt, the previous indictment, conviction and judgment had to be duly proved. In addition, the accused had to be found at large within the province, and without any apparent lawful authority, before the expiration of the banishment. [Brockville Recorder, 19 August 1836, J. Macaulay's address to the Johnstown District grand jury.]

[233] Army deserters who had returned to Canada ran a risk of being similarly detected. Dennis Seally had "desisted his Major" during the War of 1812 and remained in the United States. Homesick, he later returned to Upper Canada and purchased fifty acres in Pickering. "Last November," he wrote to the civil secretary, "by reason of a person coming into the neighbourhood that was knowing my crime I escaped to Rochester." Seally was now requesting a pardon so that he might return to his wife and family. [NAC, RG 5, A 1, Seally to Hillier, Vol. 175, 96091-94, 13 April 1827.]

petition, Attorney General Boulton pointed out that Osborne had been convicted of two felonies within a twelve month period—for counterfeiting at the Home District assizes in 1823 and for horse stealing at the Midland assize in 1824. Boulton added: "under the circumstances affording no grounds for mitigation in either case I cannot say that I consider his having behaved peaceably from the time he has remained in the country in violation of the condition of his pardon should be viewed as a reason for acceding to (his) prayer."[234]

Osborne had lived seven years in the province protected by his neighbours. But his was not an exceptional case. Having been banished "some years ago"[235], Alexander Camp returned before the expiry of his five-year sentence. It was only when Camp "had a law suit with a neighbour who out of malice has given information of the fact of the said A. Camp's return from banishment" was he again compelled to leave the province in order to avoid the legal consequences. Eighty-six of Camp's neighbours (those among a larger group who had presumably harboured him) testified to his exemplary conduct and, on the basis of his subsequent good behaviour, petitioned for the remittance of the remainder of his sentence.

In 1820, Thomas Yarns (a.k.a. Hearns) was sentenced to be hanged for horse stealing. Yarns' neighbours petitioned for a reduction in sentence claiming that Yarns:

> Has been for many some years back in a state of insanity and filled with visionary ideas that his country abounds with hidden species even in the remotest part of the wilderness which he has often transversed till compelled by hunger to return and has also been frequently seen going about with a little forked stick which he called a mineral rod. His not having been committed soon after the alledged crime, it was generally considered in this vicinity that no prosecution was to take place. If it had been known that he was to be tried for the felony we have no doubt (though far

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[234] NAC, RG 5, A 1, Osborne to Colborne, Vol. 115, 64395-98, 6 March 1832.

[235] NAC, RG 5, C 1, Provincial Secretary, Canada West Correspondence, Eight-Six inhabitants of Beverley Township, Gore District, to Francis Bond Head, Vol. 7, 3933-34, 1837.

> from wishing crimes to pass unpunished) but sufficient evidence could be found to convince your Lordship and the jury that he was not of sound mind.[236]

Yarns was banished for the duration of his natural life although it is doubtful that he complied with the patent of pardon. Four years later, Justice Powell wrote to the lieutenant-governor in favour of a free pardon for Yarns. Powell had found the charge "too equivocal"[237] to merit a capital conviction. It is not clear what motivated Powell to write at this late date but we may speculate that those who felt a sense of communal responsibility for protecting the insane felon were apprehensive that Yarn's failure to meet the conditions of his pardon was to be made known to the authorities. At the time of the conviction, Powell had given "his friends hope for a pardon and under the circumstances now represented, respectfully submit that it should become a free pardon if such be the inclination of His Excellency."

The court of quarter sessions for the Niagara District banished George Martin on March 30, 1833. Seven months later he was confined to the Niagara gaol. Martin had never left the district. In his petition for mitigation of sentence, co-signed by thirteen prominent citizens including Clerk of the Peace Charles Richardson, Martin implored the quarter-sessions magistrates to impute his behaviour "to almost anything rather than a disrespect to the laws of his country."[238] He could not persuade himself, he added, to leave a country "an alegiance (sic) to which he has ever held since he knew what alegiance (sic) was nor ever

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[236] Baldwin Room, Metropolitan Toronto Reference Library, L 16, Powell Papers, Inhabitants of the townships of Fredericksburge, Adolphhuston, Ernestown, Richmond, Kingston, Camden in the Midland District to Powell, n.d.

[237] NAC, RG 5, A 1, Powell to Hillier, Vol. 65, 34277-79, 24 January 1824.

[238] PAO, RG 22, Series 372, Box 14, File 34, 9 July 1833.

knew the shadow of a desire to know any other." Patrick McEwen had also been sentenced to banishment. The Johnstown District quarter sessions had convicted him of petty larceny in 1836[239]. In 1837, he was convicted at the Johnstown assizes for returning from banishment. In a note to himself, Chief Justice Robinson wondered if a prisoner could be banished by the court of quarter sessions for stealing. This might account for that fact that McEwen was neither banished again nor sent to the penitentiary. He was instead sentenced to six months in gaol, it being noted that he had already spent nine months in prison on the charge.

Moses Winters (see above), then a juvenile, had been banished from the province in 1831. After the penal reforms of 1833, he had heard it rumoured that these included a pardon to persons in his situation (persons whose crimes were no longer deemed capital offences) and that he might safely return to Upper Canada.[240] Here "he continued unmolested by the public authorities for the last six years and a half." In 1838, he was arrested for returning from banishment and placed in the Home District gaol. His neighbours wrote that until he was apprehended, he had conducted himself as a peaceable farmer and orderly citizen. His resistance to those who would have had him take part in the late Rebellion was taken as proof that he was now a loyal and law abiding citizen. Attorney

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[239] PAO, RG 22, Series 390, John Beverley Robinson Benchbooks, Box 23, File 3.]

[240] Peter Van Every of the Gore District was sentenced to fourteen years banishment for forgery in August of 1833. He was, as his father stated, "so infatuated as to return again" the following year. Van Every was apprehended by the sheriff and ordered to post £500 recognizances at the 1834 assizes where he was ordered to appear the following year at which time he was sentenced to five years in the provincial penitentiary. Given that the penal reform act was six months old at the time of Van Every's initial conviction he, unlike Winters, could not argue that he had mistakenly believed that the act had stipulated amnesty. [NAC, RG 5, B 3, Andrew Van Every to Colborne, Vol. 9, 01115, n.d.]

General Hagerman suggested that granting a free pardon to Winters would be "attended with many disadvantages and would be establishing an exceedingly mischievious (sic) precedent." Likewise, John Brown of Kingston. Brown had been committed to gaol on August 18, 1825, and put in irons for seven months before he was eventually tried[241] and sentenced to seven-years banishment for having stolen a musket worth 20s. Brown requested that he be allowed a few days (beyond the five granted to him) before he left the province in order to dispose of his property and tend to his ailing wife[242]. On September 12, 1826, he was found guilty of returning from banishment. Thirteen Kingstonians petitioning on his behalf argued that Brown was tempted to disobey the sentence by his desire to reunite with his wife who, of necessity, he had left behind "and to (return to) some property in the vicinity of Kingston."[243] Commenting on the petition, Justice Campbell wrote that he had reason to believe that Brown was not sufficiently aware of the serious consequence of disregarding the order of banishment.[244] He futher noted:

> I therefore thought it my duty in passing sentence to explain to him and to the public at some length the particular nature and consequences of that crime as

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[241] Trials for return from banishment were unusually short, lasting only a number of minutes. In each case the original record of conviction was read into the record. In the case of those sentenced to banishment by a court of quarter sessions, the clerk of the peace presented the documentation. Usually the examining magistrate related the circumstances under which the defendant had been arrested while a second witness would confirm the prisoner's identity.

[242] Twenty-year-old John Bell, convicted of larceny at the 1836 Home District assizes, was charged with returning from banishment later that same year. Arrested on a Toronto street, he too argued that the five days given by the court to put his affairs in order were insufficient. Although it is not clear whether he had ever left the province in the first place, Bell stated that he had returned to collect an outstanding debt. He was sentenced to three years at hard labour in the Kingston Penitentiary. [PAO, RG 22, Series 390, John Beverley Robinson Benchbooks, Box 23, File 1.]

[243] NAC, RG 5, B 3, Upper Canada: Petitions and Addresses, 1792-1841, The Venerable Archdeacon Stuart & Other Inhabitants of Kinston to Lt. Gov. Peregrine Maitland, Vol. 6, 242-45.

[244] Both Campbell's wording, and the fact that Brown had noted in his original petition that his wife was ill, suggest that Brown never left the province.

> differing in some respects from all others in regard to the difficulty of obtaining the Governor's pardon or any mitigation to the sentence of death and therefore strongly impressed upon his mind the necessity of preparing for execution at the appointed time.[245]

Of course this was a bluff. In this same letter, Campbell outlined his position. He believed that an extension of mercy in Brown's case would have no ill effect on the public administration of justice "nothwithstanding the singularity of the case." Brown's sentence was commuted to perpetual banishment.

In 1819, Patrick McGee was sentenced to death for forgery. His sentence was commuted to perpetual banishment. In 1823, he petitioned Lieutenant Governor Maitland from Cape Vincent, New York for permission to return to the province. McGee was desirous of pursuing money owing to him. Forty-seven of his old neighbours recommended him as worthy of clemency. In March, McGee's request was granted. Four months later Sheriff John McLean informed Hillier that "it is certainly within my knowledge of a report that Patrick McGee had come into the Province since his banishment but whether matter of fact I do not know… I have every confidence his case is a hard one and if he loses the advantage of His Excellency the Lieutenant Governor's humanity by his own folly and imprudence he has only to blame himself."[246] It is not clear whether McGee had made periodic incursions into the province, whether he had returned for protracted periods or whether he had returned permanently. In any case, his free pardon was now in jeopardy.

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[245] NAC, RG 5, A 1, Campbell to Hillier, Vol. 80, 430445, 13 November 1826. The fact that Campbell notes that his explanation was directed "to the public" suggests that he was well aware of the community's complicity in protecting those sentenced to banishment.

[246] NAC, RG 5, A 1, McLean to Hillier, Vol. 61, 32306-67, 18 July 1823.

Even after 1833, the sentence of banishment was still being disregarded as noted in the Gibson case above. Early in the year 1835, Daniel McDougall was sentenced to five years in the provincial penitentiary for horse stealing.[247] Because the penitentiary was not yet ready to receive prisoners, McDougal was instead banished for fourteen years. He failed to comply. Nine months later, he was made a prisoner again and returned to the Hamilton gaol. Shortly after his capture, he would offer as an excuse that he was emaciated, his health broken by many months in gaol: "I could not think of leaving my home and the care of a fond mother in so fit a condition as I was then in."[248]

One might wonder how it could be that so many of those banished had never left the province. Justice Macaulay pointed to an answer. In 1834, John Rooney and James McCarthy were convicted of murder. Many within the Irish community believed the charge ought to have been manslaughter. Threatening to further strain sectarian tensions within the Gore District if executed, their sentence was reduced to banishment. Prior to the date that this was to take effect, both men complained of increasing physical abuse by gaol officials. It was also rumoured that a gaol rescue was imminent. For any or all of these reasons, Macaulay may have felt it important to guarantee that these men did not remain within the province. If they were to leave directly by steam vessel, he felt that a peace officer should conduct them to the point of embarkation and see them off. If they were to first travel overland to Niagara where they would then cross the border, they should be escorted to the

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[247] McDougal's name appears among a list of prisoners who failed in a bid to escape from the Hamilton gaol while awaiting trial. It was reported that the prisoners later declared that they had intended to take a knife which the turnkey hung in the hall outside the cells and murder the gaoler's wife and the female servant in order to avoid detection. [British Whig, 31 July 1835.]

[248] NAC, RG 5, A 1, McDougall to Bond Head, Vol. 162, 88339-42, 6 February 1836.

provincial line either by the sheriff or someone deputized to "see the terms of the commutation so far complied with."[249] Each prisoner was to be bound by a magistrate for £500 and two sureties of £250. What was left unresolved was the question of who was to pay the bill—district or province? Until this was resolved, Macaulay suggested that the prisoners remain in gaol. What this suggests is that, until 1835, there was no clearly stated policy on who was to pay the costs of turning out prisoners because no public official had ever accompanied a banished prisoner to the border. Until the Rooney-Owen case, prisoners had seen their own way to the border, or not.[250]

If banishment was a failure, so too were other secondary punishments. Seldom if ever used in cases of capital crimes, corporal punishment and the pillory appeared to have an ever-decreasing appeal as proper and effective criminal deterrents for lesser offences. In 1829, the editor of the Canadian Courant reported on the punishment of Belmsley Davis. Davis had been sentenced to one hour in the pillory for passing a counterfeit bank note. The editor questioned the effectiveness of the pillory in deterring crime. The culprit, exposed in an ignominous manner before an immense crowd, "too often considers himself as thereby sunk beyond recovery, and on his return to society, finds himself degraded and exposed to such an extent, that he is obliged to have recourse to his former evil practices, and of course goes on from one degree of guilt to another till, in many instances, his life becomes

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[249] NAC, RG 5, A 1, Macaulay to Rowan, Vol. 151, 83032-4, 27 March 1835.

[250] It appears that having a banished prisoners enter into recognizances was believed to be sufficient to guarantee their leaving the province. The warrant of pardon for William Stoutenborough ordered gaoler Ridout "that upon the said William Stoutenborough entering into recongizance for the performance of the said conditions you forbear longer to detain him in your custody and do suffer him to go at large." [PAO, F43, Thomas Ridout Papers, Chief Justice Powell to Ridout, 18 November 1822.]

the forfeit of his crimes."[251] The editor called for a more effective substitute—hard labour[252]. In 1832, the same newspaper described the public flogging of three young criminals in the market square: "It is certainly a disgrace to our laws and to the country, that this brutalizing punishment is yet permitted to be inflicted."[253] The editor of the Hallowell Free Press echoed this concern. Reporting on two men flogged[254] in the market square at Adolphustown, the editor chastized: "It is to be hoped that the salutary effect of these disgraceful exhibitions may be sufficiently great to overcome the horror and disgust excited in the minds of the inhabitants of our quiet town whose houses are unfortunately near the spot where they take place."[255] This disgust, it was understood, pertained to the punishment not the crime, which was not even mentioned. The shift in the content of these complaints between the earlier (a simple inventory of ineffectiveness) and the later (to what the British called 'humanity-mongering') is noteworthy. It was seldom argued that corporal

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[251] Canadian Courant, 12 September 1829.

[252] William Lyon Mackenzie believed that the penal system in Upper Canada might be improved if criminals were put to work on the province's public roads. Mackenzie proposed having convicts wear a 32lb. weight fastened by a chain to one of their legs. Using a wheelbarrow, they could roll their weight backwards and forwards allowing them enough mobility to labour at their tasks. "Labour," wrote Mackenzie, "is valuable in Canada and the roads bad." [The Colonial Advocate, 17 November 1832.] True to his principles, Mackenzie introduced a regimen of stone breaking at the Toronto gaol during his tenure of office as Mayor.

[253] Canadian Courant, 7 April 1832.

[254] Although Peter Oliver writes that Upper Canadian women were subject to public whippings, gaol records indicate that the procedure for whipping women was different than that for men. Women were usually given ten lashes. The flogging itself was not public but performed in the privacy of the gaol with a minimum of two witnesses, at least one being female. The gaol return for Midland District, 1826, clearly illustrates this difference. Although Isaac La Plant was sentenced to twelve months imprisonment and a public whipping, Margaret Rowley was sentenced to twelve months imprisonment and a private whipping for the same crime. Justice Macaulay preferred to prescribe thirty-six lashes for males and ten for females. [NAC, RG 5, B 27, Quarterly Gaol Returns 30 September 1826.]

[255] Hallowell Free Press, 5 March 1833.

punishment was not a universal deterrent. As a shaming ritual it had the desired effect. Lydia Evans, wife of John Evans, the latter convicted of petty larceny and sentenced to two months imprisonment and two public whippings, petitioned to have the corporal punishment remitted: "That your petitioner feels confident that the disgrace attending the latter part of this sentence will compel her husband to leave the country immediately upon his liberation from prison..."[256] Ironically, such petitions were often self-defeating. Shortly after William Stoutenborough was imprisoned for larceny in 1818, it was reported that he broke gaol in order "to escape the ignominy"[257] of an additional sentence of thirty-nine lashes. Reporting on the case, Justice Powell argued that "from the nature of this application it is evident that the whipping is the most exemplary part of the punishment and likely to have the most effect in deterring others from similar crime."[258] In other words, the more that petitioners spoke to the social stigma attached to flogging, the more the effectiveness of this punishment was demonstrated and thus the less likely the request for mitigation would be successful.[259]

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[256] NAC, RG 5, A 1, Evans to McMahon, Vol. 27, 12460-62, 3 April 1816.

[257] NAC, RG 5, A 1, Luke Stoutenborough to Hillier, Vol. 42, 20174-76, 11 January 1819.

[258] NAC, RG 5, A 1, Powell to Hillier, Vol. 50, 24327-38, 3 November 1820.

[259] Nevertheless, a petition from Stoutenborough's parents for the remittance of their son's public whipping was granted. A fine was substituted for the flogging. Stoutenborough gave himself up to the authorities and was sentenced to remain in gaol until the fine was paid. His parents now repetetioned: "That your humble petitioners having lately experienced your Excellency's clemency in favor of their son, in saving him from public ignominy and themselves and their children from the foul stain which would otherwise attach to their family, humbly begs leave, once more, to approach your Excellency in favor of that unfortunate youth who is now suffering in confinement, in consequence of his inability to pay the sum of twenty pounds agreeable to the sentence of the court." [NAC, RG 5, B 3, Luke and Elizabeth Stoutenborough to Maitland, Vol. 6, 370, n.d.]

Nevertheless, by the late 1820s public sensibilities were changing. It is a chicken-and-egg question whether changing sensibilities instigated a movement for penal reform, or, as V. A. C. Gartrell would have it, the penal reform movement was responsible for changing sensibilities. What is clear is that in Upper Canada a growing urban population was rapidly becoming a more anonymous population. Shaming rituals worked well in situations in which the spectators knew the victim and the spectators were known to each other, and in which the opinion of one's neighbours served as a brake on anti-social behaviour.[260] It was less effective when the community was progressively becoming more a community of strangers. Yet public whippings and the pillory did survive the penal reforms of 1833. This is because both punishments were over-determined; a point often missed by penal historians. The pillory continued to be used in the Niagara District well into the 1830s but almost always in situations in which, as the quarter sessions records indicate, the criminal was a stranger (usually an itinerant) in the community[261]. In 1834, the Cobourg Reformer reported that Thomas Nichols, a notorious thief, was ordered by the Mayor's Court to be placed in the stocks on two consecutive Saturdays during the height of market activity. But he was not so placed for purposes of shaming. Rather "the magistrates, having vainly endeavoured to induce him to quit the city, took the opportunity of setting him in the stocks in order that the citizens, by seeing him, might be on their guard."[262] As more and

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[260] See Weaver, "Crime, Public Order, and Repression", for a similar argument. Weaver writes that newer forms of punishment like the penitentiary were reactions to "a diminution of acquaintanceship and deference as bases of order." [Weaver, 43.]

[261] See, for instance, PAO, RG 22, Series 372, R. vs. James Smith and Benjamin Abbott, File 24, Box 28, July 1836. Both accussed thieves were described by the court as transients and were unknown to the prosecutor.

[262] The Reformer, 16 December 1834.

more strangers moved among the town neighbourhoods, partly due to the increasing number of immigrants in transit and partly due to those looking for work, the stocks and pillory were prescribed for transient criminals. Communities, once alerted to the identity of these criminals, could take appropriate precautions to protect themselves from further alien malignities.

Before the opening of the Kingston Penitentiary, it was time spent in a local gaol that carried the brunt of effective secondary punishment in Upper Canada. Long periods of time lived out in the shadow of the gallows were, as argued above, meant to effect a sense of remorse. After 1835, protracted gaol time was no longer necessary. The Auburn system, under the umbrella of "moral architecture", was designed to engineer a change in conscience. Consequently, there was incentive to transport prisoners to Kingston as quickly as possible. **Table 7.3** compares the periods 1800-1833 (pre-penitentiary) and 1835-1840 (post-penitentiary) in respect to the average number of days spent in gaol between the time a capital sentence was passed and the receipt of a conditional pardon. Before the building of the Kingston facility, the average number of days spent in gaol—discounting the days, weeks or months of incarceration while waiting gaol delivery—was 149.3. For the period 1835 to 1840, it was 37.8. Although long gaol sentences were seldom meted out for non-capital crimes, it proved, *de facto*, otherwise for those capital. Banishment effectively disappeared after 1835.[263] Only two capitally-convicted criminals, Patrick McKenna and

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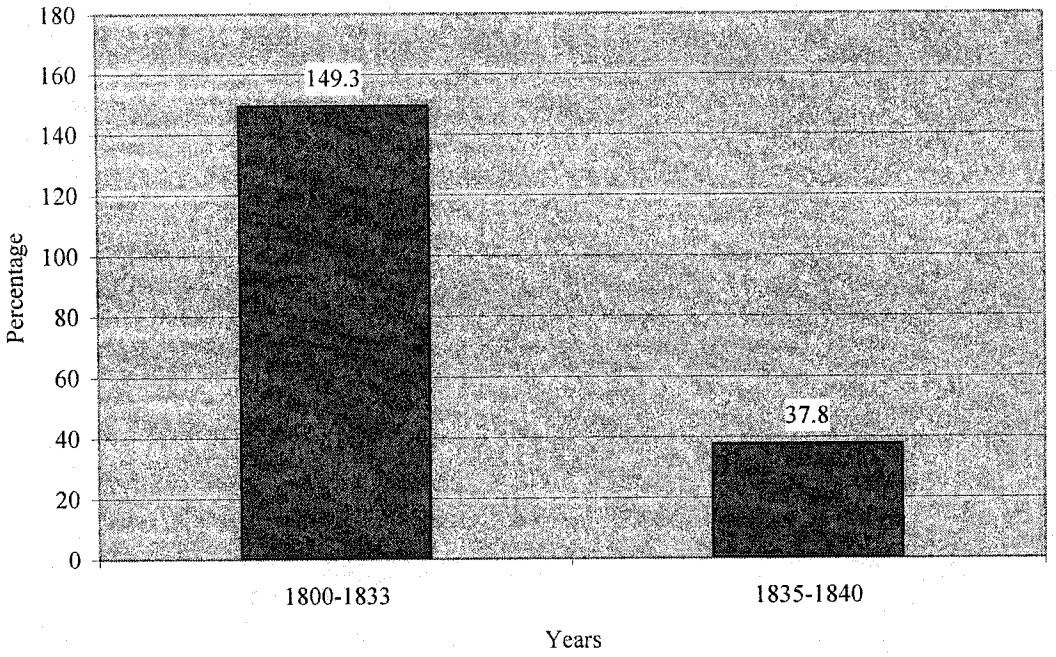
[263] Following the Rebellion, a number of prisoners (Merritt, McManigale, Dean and Huffman) were transported out of the province. See **Appendix 3**. This was more a matter of serendipity than government policy. It proved expedient to place these prisoners on the ship that was, in any case, taking political prisoners to the penal colonies.

James Gibson, were banished after the penitentiary began to receive prisoners. In both cases, age was the determining factor: neither, it was believed, would survive the harsh regimen of the penitentiary. Gibson was seventy-five. "After 1835," Weaver postulates, "judges could ration mercy in a more exact and less controversial form, by reducing the years with hard labour at Kingston."[264] The point was to get convicts out of local gaols and into the penitentiary as quickly as possible. The penitentiary significantly lessened community discretion. There was now little or no chance that a prisoner whose capital sentence had been mitigated would be "rescued" by his or her community. It was these rescues, as itemized above that partly account for longer gaol sentences in the period up to 1835. Traditionally gaols functioned as holding facilities between capture and trial. **Table 7.3** suggests that they served another function. Capitally-convicted prisoners could expect to spend four times the number of days in a local gaol before the opening of the penitentiary as after. If we add the time spent before trial, it was not uncommon for prisoners, whom would eventually have their sentences reduced to banishment, to spend upwards of a year in gaol. For example, Robert Brown (1833) spent three months in gaol before he was convicted of arson and fifteen months after before his sentence was commuted to banishment. Edward McSwiney (1813), convicted for murder, spent two years in gaol after sentencing, before he received a free pardon while Francis Morgan (1831) languished fifteen months after receiving the death sentence for a malicious

[264] Weaver, "Crime, Public Order, and Repression". 43.

Table 7.3 Average Number of Days Spent in Gaol Between Sentencing and Mitigation: Upper Canada 1800 - 1840



shooting. It took a doctor's report stating that prolonged imprisonment would prove fatal before Morgan was finally banished for life. Before 1835, these cases were the rule rather than the exception.[265] This, in fact, made capital crimes equatable with grand larceny. The calendars of criminal prosecution from both Justices Campbell and Macaulay reveal that they regularly appointed twelve months imprisonment for this crime.[266] So considerable was gaol-time that, in my opinion, the community believed that justice had been so served. In the fall of 1824, Darius Forbush was sentenced to be hanged for horse stealing. In April

[265]After 1835, cases like that of Patrick McKenna (1836) became the exception. McKenna spent twenty months in the Eastern District gaol before his sentence was commuted to banishment.

[266] Macaulay would often recommend mitigation for non-capital crimes. A gaol return from the Home District, 1840, carries notations in Macaulay's hand. He reduced all three-month sentences to three weeks and two-month sentences to two weeks. [NAC, RG 5, B 27, Home District, 6 June 1840.]

of 1825, eighteen of his neighbours petitioned for mitigation. The petitioners pointed out that Forbush had been confined in gaol for fifteen months and had been sick much of that time. Forbush was now contrite "and that he hath promised in the presents (sic) of a part of us and the almighty god if he is spared never to violate the law of his country or of his creator any more."[267] Furthermore, restitution had been made to the owner of the horse. Of greater consequence, however, was the fact that the community had now forgiven him and prayed that the lieutenant-governor would do likewise: "we are inhabitants of the Town of Richmond and members of A Christian Society. The first name (James Vance) is the man that lost the property—I freely forgive him—and we believe that God has forgiven him and we pray your excellency will be most graciously pleased (sic) to forgive him." Capital and lesser crimes were crimes against the community as a petition from Samuel Flanders makes clear. Flanders under a sentence of twelve months imprisonment when he wrote that he was "desirous of making some atonement for the injuries he may have been the means of inflicting upon the community."[268] As recipient of the offence, it was the community's privilege to assess forgiveness and time retributively spent in gaol was an important consideration in such a calculation. Many prisoners believed that it should be an equally important consideration in the lieutenant-governor's deliberations. Philip Matheson wrote that he had already spent fourteen months in gaol, months that at the age of sixty-eight had

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[267] NAC, RG 5, A l, Inhabitants of the town of Richmond to Lieutenant Governor, vol. 71, 38122-27, 18 April 1825.

[268] NAC, RG 5, A 1, Samuel Flanders to the Lieutenant-Governor, Vol. 68, 36277-8, 20 October 1824.

taken considerable toll on his health.[269] Abraham Weldon felt it important enough to mention that he had been in the Kingston gaol for seventeen months[270] while Francis Morgan (as we saw above) still lingered in gaol some fifteen months while the lieutenant-governor's office figured out what do to with him. Appended to Morgan's petition was a note from the prison doctor to the effect that a lengthy imprisonment would prove fatal[271]. John Standish had spent sixteen months in gaol, in which "during the inclemency of the last winter (had) suffered severely from the cold from which proceeded sickness so that his life was endangered"[272], when he again petitioned for mitigation. Robert Brown had already spent eighteen months in the York gaol when he demanded to be either hanged or "set at liberty."[273] It is clear in all of these cases that the prisoners believed that the amount of time spent in gaol under conditions that often had a deleterious effect on their health had expiated their crimes.

If their communities shared these sentiments, as I believe they did, this would have created a vicious circle. Because communities sheltered banished prisoners, government officials deliberately extended time in gaol. Because of the length of time exposed to unbearable gaol conditions, communities believed that time served constituted

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[269] NAC, RG 5, A 1, Philip Matheson to the Lieutenant-Governor, Vol. 61, 32894-97, 9 October 1822.

[270] NAC, RG 5, A 1, Abraham Weldon to the Lieutenant Governor, Vol.102, 58264-66, 23 October 1830.

[271] NAC, RG 5, A1, Francis Morgan to the Lieutenant-Governor, Vol. 116-17, 65179-83, 12 May 1832.

[272] NAC, RG 5, A 1, John Standish to Colborne, Vol. 122, 67882024, October 1832.

[273] NAC, RG 5, A 1, Robert Brown to the Lieutenant-Governor, Vol. 134, 73827-31, 25 October 1834.

adequate retribution. Structurally unsound buildings mandated that prisoners be shackled. Sheriff Donald MacDonell of the Eastern District complained that the criminal cell in his gaol was so insecure that it was necessary to use irons "for the safekeeping of the prisoners."[274] Inmates, shackled and non-shackled alike, were left idle. The yearly gaol returns for the 1830s included the findings of a government questionnaire. Among other questions, district sheriffs were asked to describe the manner in which prisoners were employed at hard labour. Uniformly, the answer was "none". John McLean of the Midland District reported that "nothing in the existing regulations of the gaol authoriz(es) the employment of prisoners."[275] Sheriff Henry Ruttan cryptically concurred: "No Legislative provision therefor"[276] as did Adiel Sherwood: "No order has ever been issued or regulations made for their employment."[277] Sheriff Donald MacDonell of the Eastern District explained that there was "no work house or other means of employing prisoners."[278] Before 1835, it was time spent in district gaols, often over-crowded, always cacophonous, foul-smelling and unsanitary, unbearably cold in winter and stifling hot in summer, that constituted true secondary punishment for capital offences even though this was never mandated in fiats of conditional pardon. Peter Oliver asks: "Was it possible that criminal justice in pre-penitentiary Upper Canada had worked more effectively than we had

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[274] NAC, RG 5, B27, Upper Canada, Quarterly Gaol Returns, Vol. 2, Eastern District, November 1834.

[275] NAC, RG 5, B 27, Vol. 1, Kingston, 7 January 1832.

[276] NAC, RG 5, B 27, Vol. 1, Newcastle District, 31 December 1831.

[277] NAC, RG 5, B27, Vol. 1, Brockville, 31 December 1831.

[278] NAC, RG 5, B 27,Vol. 2, Eastern District, November 1834.

hitherto realized?"[279] If we acknowledge that government authorities knew very well that banishment was not working and that, therefore, long periods of time spent in gaol were necessary, then the answer is yes. Still, this was not ideal. Oliver recognizes that as part of their local communities, gaols never effectively separated prisoners on the inside from life on the outside. Prisoners wore their own clothes and often received their food, including alcohol, from their relations. The penitentiary would more effectively separate prisoners to the point where they were kept totally *incommunicado*.

On April 19, 1832, Robinson congratulated the Home District grand jury on the first steps being taken toward the foundation of a provincial penitentiary, steps, he argued, necessary for mitigating "the apparent rigour of our criminal code."[280] Following the example of England, the province, he pointed out, now had the means to "punish really, and not nominally". The proposed carceral facility was multi-penal. At the same time as hard labour in the penitentiary served as just retribution and acted as a deterrent to anyone contemplating furthering his or her career in crime, it was also meant to be redemptive. In the fall of that year, Robinson reiterated to the Home District grand jury that the present system of district gaols merely exposed convicts to "unmixed misery". There was little in the culture of the gaol system that might lead to the reform of prisoners. Spending their days in "profitless and unwholesome inactivity" only reinforced their idleness (it being the

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[279] Peter Oliver. "From Jails to Penitentiary: The Demise of Community Corrections in Early Ontario." Correctional Options 4, 1984: 3.

[280] Canadian Freeman, 19 April 1832. It is supposed that an earlier Home District Grand Jury had publicly supported Robinson's proposal, as had the Niagara grand jury: "The grand jury beg leave to present their entire concurrence in opinion with your Lordship of the benefit likely to result from a Provincial Penitentiary which, under judicious regulation might not only have the effect of punishing vice, but, what has been neglected too much in our code of laws, of reclaiming those who have erred." [NAC, RG 5, A 1, Niagara District grand jury to Robinson, Vol. 121, 67224-28, 14 September 1832.]

parent of crime) that had put them in prison in the first place. The penitentiary was meant to combat idleness, reform prisoners and thus lessen their chances of returning to a life of crime upon release:

> By compelling them to labor, against the bent of this natural inclination, they are most sensibly and effectually punished, and in such a manner that they receive no permanent injury, while they are made to contribute, in some degree to the public good. When a convict finds himself engaged in hard labor within the walls of a prison, and under the compulsion of a legal sentence, it is scarcely possible but his situation must force upon him the obvious and salutary reflection that he had much better have been applying the same exertion in gaining an honest living for himself.... Policy and humanity both concur to recommend the course upon which we are about to enter.[281]

Robinson saved his most severe words for the criminal code of 1800 until after the enactment of the reforms of 1833. In 1834, before a Brockville grand jury, he praised the reformed legal code as the most just and rational "as (had) yet been produced by the wisdom of mankind." The province, he argued, had been rescued from the "indiscriminate severity"[282] of the old system. Justice Jonas Jones likewise lauded the provincial penitentiary, which "has allowed to confine (sic) prisoners to hard labour, instead of their being allowed to range abroad and plunder the public with very inadequate punishment when convicted."[283]

Peter Oliver has argued that nineteenth-century Ontarians were generally indifferent to criminal justice issues. They were no more preoccupied with concerns over a possible rising crime rate than they were with "efforts to shape and refine the instruments

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[281] Hallowell Free Press, 6 November 1832.

[282] Brockville Recorder, 5 September 1834.

[283] The Upper Canada Herald, 3 October 1837.

of punishment."[284] They preferred to leave such things to the efforts of "small groups of elected and appointed officials." As Oliver would have it, penal reform, including the building of the Kingston penitentiary, was the work of a small but dedicated Tory elite. This was certainly the case, but only in part. Robinson and Colborne were not dewy-eyed altruists in the John Howard style. If the system of secondary punishments prescribed by the 1800 legal code had worked, it is doubtful whether the code would have been over-hauled in 1833. But they didn't work. Local communities sheltered those who were sentenced to banishment. For almost every capitally-convicted criminal, there was, as **Appendix 3** makes clear, a petition for mitigation of sentence from the community, bearing numerous signatures, sometimes in the hundreds. In a political system that was neither participatory nor consultative, the general population was showing its displeasure with the extremes of the criminal justice system in the only way it could. Many, if not most petitions, outrightly stated, or at least strongly implied, that the community believed that execution was too severe a remedy. It was this pressure from below that would eventually convince Robinson of the need for penal reform. Even one of its most important innovations—making the punishment commensurate with the crime—would itself be guided by what the public was willing to bear. Instead of shaping public sentiment, the government was forced to follow it. In order to win back respect for the law lost due to the severity of the 1800 code, Robinson, and the Tory elite he fronted, had to bend to the popular will.

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[284] Peter Oliver. 'Terror to Evil-Doers', xx.

Shortly after the reformed penal code was introduced, Robinson wrote: "We are about to enter upon the administration of a system of criminal law, more lenient in the letter, and therefore more congenial to the feelings of those whose duty it is to enforce it."[285] Lenience, as understood here, was a matter of degree—lenient only in the sense that all but fourteen crimes any longer carried the death sentence.[286] Robinson had remonstrated with many a grand jury on the importance of the certainty of conviction rather than the severity of punishment. Yet as the 1849 Brown Commission pointed out, the system of punishment instituted in the Kingston penitentiary "was one of the most frightful oppression", its discipline "harsh, cruel and degrading."[287] In effect, being sentenced to the penitentiary was being concomitantly sentenced to banishment, hard labour and corporal punishment with its attending shame and humiliation. This new banishment did what the older had failed to do—it effectively separated criminals from their home communities. Friends and relations (including correspondence by mail) were denied access to the prisoners as were magistrates and community officials. Located in the countryside, and surrounded by high walls, Oliver notes that the Kingston facility "systematically obliterated (any) sense of communal familiarity."[288] The Auburn, or silent/congregate system, was designed to minimize any chance of prisoners forming their own sub-communities within the prison or maintaining lines of communication with those on the outside. Shrouded in

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[285] Robinson. Upper Canada Statue 3d. Wm. Iv. c. 4., 37.

[286] See W. C. Keele under 'Capital Offences'. The Provincial Justice, or Magistrate's Manual. Toronto: 1835.

[287] J. M. Beattie. Attitudes Towards Crime and Punishment in Upper Canada, 1830-1850. Toronto: 1977, 156 & 173.

[288] Oliver. "Terror to Evil-Doers", 125.

complete isolation, prisoner William Carrell's situation was typical. The Prince Edward Gazette observed that the former Kingston innkeeper had become unmindful of serious problems arising in respect to property which he still owned in town. Nonetheless, the editor added, this was but a small price to pay: "In this utter seclusion consists the chief benefit of the Penitentiary system, for slight indeed would the punishment be, if the inmates could hold communication with one another, or with the rest of the world."[289] Punishment had been distilled to a philosophic posture. In a society in which identity was inextricably tied to the idea of community, prisoners were condemned to solipsism.

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[289] The Traveller or, Prince Edward Gazette, 16 September 1836.

CONCLUSION

In 1840, the newly elected Wardens of Mountain, in the Eastern District of Upper Canada, petitioned both Lieutenant-Governor George Arthur and Governor-General Charles Poulett Thomson to extend the Commission of Peace to their township. They called the government's attention to the fact that their population of 1265 "British freemen" must "travil (sic) from 15 to 30 miles to obtain even the signature of a Magistrate". The time and labour consumed, they complained, had "a tendency to prevent the Laws of the province being duly enforced."[1] The Wardens, speaking on behalf of their community, divided their population into two principal groups; a permanent, law-abiding and loyal community settled within the township, and an unsettled, mobile, amorphous group of "others" who threatened its stability. Communities without legal fortress were magnets to disreputable types seeking "asylum". Having contributed to driving "the base invader from our Shores" in the recent Rebellion, the community was now requesting sanctions to repel a different threat. The Wardens called for "a remedy against all such loose and idle characters who are usually not only freebooters themselves but who by their bad example and pestilential influence are the means of encouraging felony in others, not only felony but corrupt perjury, fornication and adultry (sic), and until this evil is removed, the inhabitants

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[1] PAO, RG 8 - 23, Provincial Secretary's Pre-Confederation Correspondence, Box 2, Wardens White, Liddle & Caughy to George Arthur, 26 March 1840. Such a request was not unique. A petition from the inhabitants of the Township of Whitchurch acquainted the lieutenant-governor with the township's need for magistrates "so much so that glaring outrages against person and property go unpunished from the heavy expense and difficulty of obtaining redress." [NAC, RG 5, B3, Upper Canada: Petitions and Addresses, 1792-1841. Vol. 8, 944, n.d.] See also a similar petition from the Township of Williamsburg, same volume, page 953. The editor of The Emigrant reported on numerous complaints "of the total want of Magistrates" in the townships of Camden, Dawn, Zone, Sombra, Brooke and Enniskillen, all in the Western District. The resulting difficulty in bringing offenders of the law to justice, the article noted, led to their going

of the Township of Mountain must suffer amazingly." It was imperative that "the perpetration should be arrested immediately by making an example..." Until this was done, the Wardens warned, "moral reformation" of the township would be in abeyance.

The Wardens' petition is important on a number of counts. First, it demonstrates that more than religion, ethnicity and patterns of intra-family settlement, constituted community identity in Upper Canada. Geographically, the idea of "township" contributed in its own way. The township was the legal theatre in which, after 1834, victims of lesser crimes sought restitution through the summary courts. As the petition makes clear, travelling even fifteen miles outside the township was considered arduous. Just as the inhabitants of Mountain saw themselves "at a remote distance from the seat of...government", they viewed themselves distanced from other townships. Vulnerability to lawless elements might only be a matter of "15 to 30 miles" of separation. This leads to the second point. Townships could not rely on being protected from without. They required their own magistrates and their own constabulary, laws being only as good as the communities' ability to enforce them. Thirdly, as I have attempted to demonstrate throughout, implicit in this petition was an eager willingness on the part of the community, as voiced through its elected representatives, to use the apparatus of law to protect its own self-interests. Minorities such as blacks, as well as working people and property owners— farmers and merchants— were not averse to prosecuting those who had acted illegally against them. In many cases the justice process was set in motion when victims of crime first pursued, then arrested, those responsible for criminal acts. This is not to suggest that rural communities in Upper Canada were idyllic and consensual. The surviving Quarter,

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unpunished. The editor believed that this must be as a result of oversight or from "a misconception of the

Summary and King's Bench session records mirror fractious communities, more so if we include civil cases. Serious and lesser crimes often issued out of seemingly trivial matters like internecine quarrels, arguments between neighbours over property lines and road rightaways, bad debts, failure to pay wages, stray livestock and so on. Sometimes, as in the case of Sabbath-breaking, sectarian groups who received no remedy in their own townships were forced to travel to one in which magistrates were more receptive. Nevertheless, as so many petitions for clemency demonstrate, most criminals (or at least those capitally convicted) were considered the communities' own. At first blush, chapters five and seven appear antithetical. The very communities which ran criminals to ground and then prosecuted them were the same communities that so often sheltered criminals whose capital sentences were reduced to banishment. When we subtract the factors favouring mitigation enumerated in judge's reports from those in petitions for clemency from the public-at-large, it is clear that the community felt that issues such as post-crime destitution and claims of innocence or malicious prosecution figured significantly even though judges apparently did not. In respect to the first, it would be the community, after all, who would be responsible for supporting a family in the absence of the head of household and in respect to the second, the community had a clearer appreciation of how specific criminal behaviour evolved within context. Familiar with both prosecutor and prosecuted, it must have appeared to the community-at-large, (as some cases studied in chapter seven indicate) that the prosecutor was often as "guilty" as the accused or more so. While it might be objected that these same factors applied after the opening of the Kingston Penitentiary when banishment was virtually eclipsed as a secondary punishment, we must remember

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growth and population of these interesting Townships." [The Emigrant, 19 July 1834.]

that the Penitentiary was ushered in with the penal reforms of 1834. The capital offences left on the books, e.g. murder, arson and robbery, were in effect crimes, more often than not, abhorrent to the community and garnered perpetrators little sympathy. In respect to these latter crimes, one would be hard pressed to demonstrate that the victim/prosecutor was somehow implicated in their own victimization—that in some way they deserved what they got.

Finally, the Mountain Wardens imply that incidents of crime within their township were perpetrated by outsiders, a perception, as I have shown, shared by many within the province. Chapter seven has made the case that Chief Justice Robinson's take on crime was essentially the correct one. By 1840 it had become clear that the Irish and black immigrants in Upper Canada had proven their loyalty, that most were at least attempting to find their place in the bedrock of a conservative and industrious population. As the Warden's petition makes clear, the idea of a criminal class now pointed in a new direction. "Criminal class" was being emended to include an amorphous group of vagrant and disaffected individuals a notion that would be picked up a developed in the second half of the nineteenth-century. I have contended that even these new fears were misplaced. Court, and other documents, point to the fact that most serious crimes in Upper Canada were committed not by transient "others" but rather by the settled or nearly settled members of the community, that is, by soldiers on tours of duty, gentlemen, mechanics, farmers and resident labourers or—not infrequently—their children.

Recent studies in respect to the application of, and changes to, criminal law and institutions in Upper Canada have emphasized social control. The position that I have taken argues otherwise. The Penal Reform Act (1833), the Summary Punishment Act (1834) and

the opening of the Kingston Penitentiary were less an exercise in coercion than in neutralizing the demotic influence of local communities. The Mountain Wardens, after all, were not asking for less legal interference. Communities rather than viewing the law as some oppressive weight saw it, imperfect as it might be, as something that could be retributively calibrated so as to bring offenders safely back into their neighbourhoods. Prior to the opening of the provincial penitentiary, communities often took this role upon themselves as noted in chapter seven. Understanding the why and when of penal reform entails integrating it within the broader history of political reform. To stave off democratic incursion, the political elites in Upper Canada rationalized punishment, effectively taking it out of the hands of communities without, at the same time, subverting popular compliance.

Appendix 2

Traditionally, argue John Walsh and Steven High, historians have relied on a "common sense"[1] meaning of 'community' which equates it with a geographically specific shared place in the sense of "the township" or "the neighbourhood." Consequently, one's domicile is used to determine whether one is included or excluded. According to Walsh and High, this static definition fails to recognize power relationships that critically influence community membership and come to regulate the morality of its members. "Community" then is better understood as a social network, a process that is constantly making and remaking itself including and excluding those who share the same geographical space. As forms of punishment changed from 1800 to 1840 so too did the notions of who was and who was not a part of the community. Early in the period, the ignominy of punishment could itself lead to self-exclusion. The shame associated with corporal punishment was enough to psychologically distance the recipient from his or her neighbourhood. Catharine Kavanagh, after spending five months in goal during which she received a whipping for stealing some article of small value, decided by a "fixed determination to retrieve her character by her future good conduct; to retire to some part of the country where herself and her misfortunes and disgrace are alike unknown."[2] John Evans was sentenced to two months in gaol and two public whippings for petty larceny.

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[1] John Walsh & Steven High. "Rethinking the Concept of Community." Historical Sociale/Social History 32:64 (November 1999).

[2] NAC, RG 5, A 1, Kavanagh to the Lieutenant Governor, Vol. 82, 44260-63, 15 January 1827.

His wife wrote "that the disgrace attending the latter part of this sentence will compel her husband to leave the country immediately upon his liberation from Prison..."[3]

The shame associated with punishment might also lead to the exclusion of the immediate family. William Stoutenborough avoided the ignominy of a public whipping by escaping from goal, a punishment "which would eternally stigmatize not only him but stamp disgrace on his brothers and sisters... ."[4] At the same time, those convicted of capital crimes would often be reabsorbed into their communities after doing penance spelt out in the number of days, weeks and months in gaol. It is my understanding that communities in Upper Canada were driven by communitarian values where the good of community, especially in respect to social justice, took precedence over individual rights and freedoms. This becomes especially apparent in my examination of the charivari where community values were often in conflict with individualistic values.

[3] NAC, RG 5, A 1, Lydia Evans to the Lieutenant Governor, Vol. 27, 12460-62, 3 April 1816.
[4] NAC, RG 5, A 1, Luke Stoutenborough to Maitland, Vol. 42, 20174-76, 11 January 1919.

Appendix 3

Capital Convictions—Upper Canada, 1800-1840
Petitions and Pardons

Year	Name	District	Age	Occupation	Crime	No. of Petitions	Outcome
1800	William Newberry	Niagara	20	Soldier	Highway Robbery	1[1]	Ban. Life[2]
1800	Jack York	Western		Slave	Burglary	1[3]	Escaped[4]
1800	Humphrey Sullivan	Home			Forgery		Executed[5]
1801	Mary London (Osborn)[6]	Niagara	28	Femme Couvert	Murder		Executed
1801	George Nemiers	Niagara	28	Labourer	Murder		Executed
1803	Jabez Mosher (Dumont)	Johnstown		Farmer	Horse Stealing		Ban. Life[7]
1803	John Connor	Western			Murder		Executed
1803	Joseph Cournman (Countryman)	Western			Murder		Executed
1804	Robert Franklin	Home			Return from Ban.		Discharged by Proclamation[8]
1804	Joseph Colville	Western			Horse Stealing		Free Pardon
1809	John Silverthorn	Niagara		Farmer	Malicious Shooting	1[9]	Free Pardon[10]

[1] NAC, RG 5, A 1, Vol. 1A, 20 August 1800, 474-5.
[2] NAC, RG 68, Upper Canada: General Index of Commissions, Liber A, 25 August 1800. 181.
[3] See Robert Fraser. "Jack York", Robert Fraser, ed. Provincial Justice. Toronto: 1992, 355-58.
[4] Ibid.
[5] See Table 7.0 for this and other execution references.
[6] Mary London was one of only two women executed in Upper Canada, the other being Julia Murdock in 1837. Both women poisoned their victims, London her husband and Murdock her female employer. Poisoning could be done in the home and required ingenuity rather than brute strength. Until advances were made in forensic detection, poisoning might go relatively unnoticed. This might explain why in England, between 1807 and 1899, 48% of the 50 most notoriously accused murderesses [as ranked by Judith Knelman] chose this method of dispatching their victims. [See Judith Knelman. Twisting in the Wind: The Murderess and the English Press. Toronto: 1998.]
[7] AC, RG 68, Liber C, 25 November 1803, 80-84.
[8] PAO, RG 22, Series 134, Assize Minutebooks, 1792-1848.

1809	Terrance Waters	Western		Murder		Executed
1810	Ezra Brockway	Johnstown		Carnal Knowledge	1[11]	Ban. Life[12]
1810	Benjamin Watkins	Eastern		Stealing from a Dwelling House		Ban. Life[13]
1810	John Montreuil	Eastern		Stealing		Ban. Life[14]
1811	George Wyndecker	Niagara	Labourer	Cattle Stealing		Ban. Life[15]
1812	William Crittendon	Niagara		Felony		Free Pardon
1813	Thomas Cummins	Western	Soldier	Bestiality		Unknown[16]
1813	David Micker	London		Arson		Executed
1813	James Moody	Western		Killing Cattle		Free Pardon[17]
1813	Edward McSwiney[18]	Johnstown	Militia Clerk	Murder	12[19]	Free Pardon[20]
1814	Duncan Campbell[21]	Johnstown	Gentleman	Forgery	5[22]	Free Pardon[23]

[9] NAC, RG 5, A 1, Vol. 10, 29 September 1809, 4278-82.
[10] NAC, RG 68, Liber D, 6 October 1809, 141-2.
[11] Baldwin Room, Metropolitan Toronto Reference Library, Powell Papers, L16, Vol. B85, Circuit Papers, 24 September 1810.
[12] NAC, RG 68, Liber D, November 1810, 213-4.
[13] NAC, RG 68, Liber D, 19 November 1810, 215-6.
[14] NAC, RG 68, Liber D, 19 November 1810, 217-8.
[15] NAC, RG 68, Liber D, 6 Nember 1811, 270-2.
[16] Justice William Dummer Powell noted a "technical deficiency of the evidence" against Cummins. Powell allowed that if Cummins' officer could give him a good character reference as a useful soldier, this, and the fact that Cummins was a young man, would be enough to justify a conditional pardon. Powell recommended removing him from his corps to a less desirable service. Whether Powell meant transportation or simply moving the prisoner to another Upper Canadian regiment is unclear.
[17] NAC, RG 5, A 1, Vol. 18, 2 October 1813, 7602-3.
[18] McSwiney's efforts to exonerate himself took over two years and consisted of six cleverly constructed petitions. Each of these was accompanied by a petition from sundry inhabitants of the Johnstown District including several militia officers and other local notables. McSwiney's case demonstrates that the grounds for mitigation were often historically contingent. Publicly, the government of Upper Canada extolled the patriotism of its citizenry. Privately, it was acknowledged that the War of 1812 demonstrated that disloyalty was rampant. McSwiney played the loyalty card arguing that the man he had killed was a traitor. [See Robert Fraser. "Edward McSwiney." R. Fraser, ed. Provincial Justice, Toronto: 1992, 310-13.]
[19] NAC, RG 5, A 1, 7741, 8859-930, 10596-97, 10678-79, 10860-61.
[20] NAC, RG 68, Liber E, 30 October 1815, 126-7.

1814	Lewis Lyons	Home	21	Labourer	Stealing	1[24]	Free Pardon[25]
1815	John Dexter	Home			Murder		Executed
1815	William Moody	Home		Farmer	Cattle Stealing		Ban. Life[26]
1815	William Osborn	Niagara	15		Horse Stealing	1[27]	Ban. Life[28]
1815	Michael O'Connor	Midland		Soldier	Burglary		Ban. Life[29]
1815	James Bunker	Johnstown		Farmer	Highway Robbery		Ban. Life[30]
1815	John Shank	Johnstown		Farmer	Robbery		Free Pardon[31]
1815	David Champagne	Midland		Soldier	Burglary		Free Pardon[32]
1815	Joseph Fava[33]	Eastern			Murder		Unknown
1815	George Beaver (Bevier)	Midland			Murder		Executed
1816	Nathan Vanoy	Johnstown		Labourer	Stealing from a Dwelling House		Ban. Life[34]

[21] Campbell escaped from the Brockville gaol in September. Attorney General Robinson worried that the lieutenant-governor might "be induced by that consideration (escape) to alter his gracious intention of extending mercy to Campbell." [NAC, RG 5, A 1, Robinson to McMahon, Vol. 21, 8832-5, 4 October 1814.]

[22] NAC, RG 5, A 1, Vol. 21, 8 September1814, 8752-68 & 8 September 1814, 8778-80 & 9 September 1814, 8796-7 & 9 September 1814, 8798-9 & 10 September 1814, 8798A.

[23] NAC, RG 5, A1, Vol. 21, 4 October 1814, 8832-5. Also NAC, RG 68, Liber E, 14 May 1815, 67-70.

[24] NAC, RG 5, B 3, Vol. 6, 36.

[25] NAC, RG 5, A 1, Vol. 21, 26 November 1814, 8994-7 & Vol. 22, 2 January 1815, 9193-4. Also NAC, RG 68, Liber E, 31 December 1814, 84-5.

[26] NAC, RG 68, Liber E, 10 July 1815, 100-1.

[27] NAC, RG 5, A 1, Vol. 25, n.d., 11409-10

[28] NAC, RG 68, Liber E, 13 October 1815, 124-5.

[29] NAC, RG 68, Liber E, 21 November 1815, 129. The Upper Canada Gazette noted that O'Connor, Bunker, Shank, Champagne & McSwiney had all been granted pardons. [U.C. Gazette 25 November 1815.] It was otherwise uncommon for Upper Canadian newspapers to publish notices of pardon.

[30] NAC, RG 68, Liber E, 21 November 1815, 131.

[31] NAC, RG 68, Liber E, 27 October 1815, 133.

[32] NAC, RG 68, Liber E, 31 October 1815, 135.

[33] Justice Powell reported that Fava was found "obstinately mute" by the jury. Judgement of death was passed without their conviction or Fava's confession. As this was the first case of its kind, Powell respited the execution so as to give time to submit the case to the other justices for their approbation "but without any view to ultimate Grace." [NAC, RG 5, A 1, Powell to Gore, Vol. 24 10552-55, 26 September 1815.] No record could be found indicating whether Fava was executed or pardoned.

[34] NAC, RG 68, Liber E, 27 November 1816, 223.

1816	Nathaniel Wright	Johnstown		Labourer	Stealing from a Dwelling House		Ban. Life[35]
1816	Henry Robins	Midland	22		Stealing from a Dwelling House	2[36]	Ban. Life[37]
1816	Caleb Wilson (Swayze)	Niagara	17		Horse Stealing	1[38]	Ban. Life[39]
1817	Angelique Pilotte	Niagara	20	Servant	Infanticide	1[40]	1 Year Impris.[41]
1817	James Oily[42]	Home		Soldier	Highway Robbery	1[43]	Transportation[44]
1818	Daniel Bowen[45]	Niagara		Farmer	Horse Stealing	1[46]	Ban. Life[47]
1818	Joel Stoddard	Midland		Labourer	Horse Stealing		Free Pardon[48]
1819	Henry Sovereene	London	30	Farmer	Shooting a Horse	2[49]	Free Pardon[50]
1819	Rueben Hutchins	Johnstown	55	Labourer	Stealing from a Dwelling House	1[51]	Ban. Life[52]

[35] NAC, RG 68, Liber E, 27 November 1816, 223.
[36] NAC, RG 5, B 3, Vol. 6, 61-2 & NAC, RG 5, A1, Vol. 30, n.d., 14212-13a (this file includes two copies of the same petition).
[37] NAC, RG 68, Liber E, 11 November 1816, 224-6.
[38] NAC, RG 5, A 1, Vol. 30, 19 October 1816, 13754-7.
[39] Noted on front of petition (see supra note 35) "commuted to perpetual banishment."
[40] NAC, RG 5, A 1, Vol. 34, 15 September 1817, 16126-28.
[41] Kingston Gazette, 21 October 1817.
[42] Soldiers charged with felony were tried in civil court. The terms of Oily's conditional pardon required that he enlist to serve his King in one or more of His Majesty's regiments or corps in Africa or the West Indies during his natural life. (NAC, RG 68, Upper Canada: General Index of Commissions, Liber F, 28 May 1818.]
[43] NAC, RG 5, A 1, Vol. 34, 16242-44.
[44] NAC, RG 68, Liber F, 227.
[45] The government recognized that banishing horse thieves to the United States was unlikely to prevent or deter them from continuing in their criminal behaviour, especially those who sold stolen horses across the border. Bowen's banishment was made contingent on his friends and neighbours raising a sufficient subscription "to carry him beyond the United States". Niagara District magistrate Thomas Dickson communicated to the civil secretary that Dickson had been successfully "set on foot by his friends in the township of Bertie." [NAC, RG 5, A 1, Dickson to Hillier, Vol. 41, 19568-70, 19 November 1818.]
[46] NAC, RG 5, A 1, Vol 41, 20026-29,
[47] NAC, RG 68, Liber F, 223-4.
[48] NAC, RG 68, Liber F, 224-5.
[49] NAC, RG 5, A 1, Vol.44, 21680-82 and 21677-79.
[50] NAC, RG 68, Liber F, 422.

1819	Patrick McGee	Midland		Farmer	Forgery	1[53]	Ban. Life[54]
1819	Charles Seaton	Johnstown	22		Stealing a Heifer	2[55]	Ban. Life[56]
1819	Richard Keaton	Midland		Labourer	Cattle Stealing		Ban. Life[57]
1819	Thomas Mason	Home	28	Labourer	Larceny in a Dwelling		Ban. Life[58]
1819	Jacob Pier	Home	12	Apprentice	Arson	2[59]	Free Pardon[60]
1819	Philip Turner	Home		Labourer	Cattle Stealing		Ban. Life[61]
1819	John Martin	Niagara		Cordwainer	Forgery		Free Pardon[62]
1820	Thomas Evans	Home			Horse Stealing		Ban. 7 years[63]
1820	Robert McIntyre	Midland		Miner	Rape	2[64]	Ban. Life[65]
1820	Negawanawsing	Newcastle	10	Servant	Murder	1[66]	Ban. Life[67]
1820	Peter Deucalan	Johnstown	10		Horse Stealing		Ban. Life[68]
1820	Michael Conway	Midland	27	Servant	Horse Stealing	2[69]	Ban. Life[70]

[51] NAC, RG 5, B 28, Fiats of the Attorney General, 1805-1863. Vol. 1, 2 October 1819.
[52] NAC, RG 68, Liber F, 421.
[53] NAC, RG 5, B 28, Vol. 1, October 1810.
[54] NAC, RG 68, Liber F, 418.
[55] NAC, RG 5, B3
[56] NAC, RG 68, Liber F, 420.
[57] NAC, RG 68, Liber F, 417.
[58] NAC, RG 5, B 28, Vol. 1, 2 October 1819.
[59] NAC, RG 5, B 3, Vol. 7, 439-41.
[60] NAC, RG 68, Liber H, 158.
[61] NAC, RG 68, Liber H, 2-3.
[62] NAC, RG 68, Liber H, 5-7.
[63] NAC, RG 68, Liber H, 131.
[64] NAC, RG 5, B 3, Vol. 6, 132-3 &
[65] NAC, RG 68, Liber H.
[66] NAC, RG 5, A 1, Vol. 49, 24240-43.
[67] NAC, RG 68, Liber H, 249.
[68] NAC, RG 68, Liber H, 130.
[69] NAC, RG 5, A 1, Vol. 49, 24143.
[70] NAC, RG 68, Liber H, 132.

1820	Thomas Yarns (Hearns)	Midland			Horse Stealing	2[71]	Ban. Life[72]
1820	John Scharf	Eastern			Cattle Stealing		Free Pardon[73]
1820	John Reese	Johnstown			Horse Stealing		Ban. Life[74]
1821	John Rody	Home			Robbery	2[75]	Free Pardon?
1821	William Stoutenborough	Home	26		Horse Stealing	2[76]	Ban. Life[77]
1821	Edward McGarry	Eastern			Murder		Executed
1821	John Masters	Eastern			Murder		Executed
1821	Thomas Kelly	Eastern			Murder		Executed
1821	Jerimiah Harrington	Eastern			Murder		Executed
1821	Asa Lucas	Gore			Burglary		Unknown
1821	John Murdock[78]	Johnstown			Murder		Executed
1821	Michael O'Connor	Johnstown			Murder		Executed
1822	Shawanakiskie	Western			Murder	1[79]	Unknown
1822	Simon Kemp	Home		Merchant	Malicious Shooting	2[80]	Free Pardon[81]
1822	John Brown	Home	22		Cattle Stealing	3[82]	Ban. 7yrs.[83]
1822	Richard Jeffers	Niagara			Wounding an Animal	1[84]	Free Pardon[85]

[71] Baldwin Room, Powell Papers, L16, B95, 22-23.
[72] NAC, RG 68, Liber H, 133.
[73] NAC, RG. 68, Liber H, 134.
[74] NAC, RG 68, Liber H, 135.
[75] NAC, RG 5, A 1, Vol. 52, 25692-96.
[76] NAC, RG 5, A 1, Vol. 50, 24620 and Vol. 41, 20026-29. Note: The sundries contain other petitions for Stoutenborough who was gaoled for theft (non-capital) in 1819. One must be careful, as the Sundries are not, in sorting these petitions out.
[77] PAO, Thomas Ridout Family Papers, F 43, Powell to Ridout, Keeper of the Goal, Home District, 18 November 1822.
[78] Murdock was executed for the murder of his brother James. Murdock left behind a wife and a daughter Julia who would herself be executed in 1837 for poisoning her mistress.
[79] NAC, CO 42, Colonial Office Papers, 370, 25-42.
[80] NAC, RG 5, B 3, Vol. 6, 224 and 225-8.
[81] NAC, RG 68, Liber I, 55-6.
[82] NAC, RG 5, B 3, Vol. 6, 83 and RG 5, A 1, Vol 56, 3 April 1822, 28365 (lst petition) & 28363-4 (2nd petition).
[83] This is extrapolated from the fact that Brown was charged with returning early from banishment in 1826.

1822	James Hunt	Eastern			Horse Stealing	2[86]	Ban. Life[87]
1822	Dennis Sullivan	Eastern	17	Labourer	Horse Stealing	1[88]	Escaped[89]
1822	Philip Matheson (Mattison)	Johnstown	68		Horse Stealing	4[90]	Unknown
1822	Joseph Nash	Gore		Farmer	Malicious Shooting	1[91]	Free Pardon[92]
1822	William Burchel	Midland			Cattle Stealing	1[93]	Unknown
1823	Martin Murphy	Johnstown		Miner	Sheep Stealing	1[94]	Free Pardon[95]
1823	Nathaniel McLean	Newcastle			Horse Stealing	1[96]	Banished
1823	Mary Thompson	Home	22	Servant	Infanticide	2[97]	Free Pardon[98]
1823	Asa Smith	London			Horse Stealing	4[99]	Escaped[100]
1823	James Kerr	London	27		Horse Stealing	4[101]	Free Pardon[102]
1824	Jane McGuire	Midland	36	Femme Couvert	Malicious Shooting	1[103]	Banished[104]

[84] NAC, RG 5, A 1, Vol. 58, 30320-1.
[85] NAC, RG 68, Liber H, 394.
[86] NAC, RG 5, A 1, Vol. 58, 30369-70
[87] NAC, RG 5, A 1, Vol. 61m 32930-2.
[88] NAC, RG 5, A 1, Vol. 57, 29741-42.
[89] NAC, RG 5, A 1, Vol. 58, 29928-29.
[90] NAC, RG 5, A 1, Vol. 57, 29759-61 and Vol. 60, 31921-23 and Vol. 61, 32894-7
[91] NAC, RG 5, A 1, Vol. 57, 29796-8.
[92] NAC, RG 68, Liber H, 367-8.
[93] NAC, RG 5, B 3, Vol. 6, 87.
[94] NAC, RG 5, A1, Vol. 61, 32837-9.
[95] Baldwin Room, Powell Papers, L 16, B 94, 5-6.
[96] NAC, RG 5, B 3, Vol.6, 336-9.
[97] NAC, RG 5, A 1, Vol. 62, 32948-51 and 32952-3.
[98] Fraser, Provincial Justice, Toronto: 1992, 353,
[99] NAC, RG 5, A 1, Vol. 63, 33769-79.
[100] NAC, RG 5, A 1, Vol. 63, 33433-35.
[101] NAC, RG 5, A 1, Vol. 63, 33769-79.
[102] See chpt. 7, 341.
[103] NAC, RG 5, B 3, Vol. 6, 255-6.
[104] Extrapolated from a letter written by Justice Campbell, NAC, RG 5, A 1, Vol. 68, 36117-9, 5 October 1824.

1824	William Hollis	Home	22		Shoplifting		Ban. Life[105]
1824	John Dunnery (Dunnehey)	Gore	28	Farmer	Rape		Ban. Life[106]
1824	Darius Forbush (alias Nathaniel Osborne)	Midland	37		Horse Stealing	2[107]	Ban. Life[108]
1824	George Furrow (Farrow)	Midland	22	Teacher	Cattle Stealing	2[109]	Unknown
1825	William Gavin	Midland	19		Burglary		Escaped[110]
1825	Ebenezer Allan	London			Horse & Cattle Theft	1[111]	Unknown
1825	Lewis Lavigné	Midland	35		Burglary		Escaped
1825	John Hite (Hyatt)	Niagara	37		Robbery		Free Pardon
1825	Phoebe Actley	Gore			Malicious Shooting	1[112]	Free Pardon[113]
1825	Eli Swayze	Gore	19		Horse Stealing	2[114]	Unknown
1825	Archibald Lewis	Western			Malicious Shooting	1[115]	Free Pardon[116]
1825	Richard Arkland	Midland	32		Malicious Shooting	2[117]	Banished[118]
1825	William McDonnell	Niagara	17	Servant	Horse Stealing	3[119]	Free Pardon
1825	John Dougherty	Bathurst	34		Maiming a Cow	1[120]	Unknown[121]

[105] Baldwin Room, Powell Papers, L 16, B 86, 104.
[106] Baldwin Room, Powell Papers, L 16, B 57, 57.
[107] NAC, RG 5, A 1, Vol. 68, 36281-3 and Vol. 71, 38122-27
[108] NAC, RG 5, A 1, Vol. 115, 64395-98.
[109] NAC, RG 5, A 1, Vol. 68, 136272-4.
[110] NAC, RG 5, B 27, Upper Canada: Quarterly Gaol Returns, Midland District, 20 November 1825.
[111] NAC, RG 5, A 1, Vol.75, 40355-57.
[112] NAC, RG 5, A 1, Vol. 73, 39156-60.
[113] NAC, RG 68, 25 November 1823. Actley's pardon was contingent upon posting sureties. See chpt. 2, 108-9.
[114] NAC, RG 5, A 1, Vol. 73, 39161-8.
[115] NAC, RG 5, A 1, Vol. 74, 39203-06.
[116] NAC, RG 68, 24 November 1823. Like Actley, Lewis's pardon was contingent upon posting sureties.
[117] NAC, RG 5, A 1, Vol. 74, 39223-26.
[118] Although I could find no record of pardon, it is likely that, at the very least, Arkland was banished given the similarity of his crime to that of Lewis, Actley and Ausman.
[119] NAC, RG 5, B 3, Vol. 6, 331-2 & RG 5, A 1, Vol. 75, 40358-60 (2 petitions).
[120] NAC, RG 5, A 1, Vol. 74, 39317-20.
[121] NAC, RG 5, A 1, Vol.76, 40673-5. Dougherty had escaped from the Perth gaol but was recaptured soon after.

1825	François Poison	Johnstown	21		Horse Stealing	2[122]	Unknown
1825	Charles DeRoot	Midland	21		Horse Stealing		Unknown
1825	Henry Ausman	Home		Farmer	Malicious Shooting	3[123]	Free Pardon[124]
1825	Henry Hamilton	Johnstown	23		Murder	1[125]	Died in Gaol[126]
1825	King Haw	Western	65		Infanticide	1[127]	Pardoned[128]
1825	Elizabeth Maxwell (Haw)	Western	45		Infanticide	1[129]	Free Pardon: granted 1840[130]
1826	Thomas Weldon	Home			Sheep Stealing		Ban. Life?
1826	John Brown	Midland	30		Return from Ban.	1[131]	Ban. Life[132]
1826	William Corbit	Niagara	23		Horse Stealing		Banished[133]
1826	Adam Grass	Niagara	22		Horse Stealing		Banished[134]
1826	David Springstead	Niagara	44		Sheep Stealing		Banished[135]

[122] NAC, RG 5, A 1, Vol. 74, 39521-24.
[123] NAC, RG 5, A 1, Vol. 75, 39720-5
[124] Ausman's unconditional pardon was contingent upon his giving securities to keep the peace for the term of seven years to the amount of £100. [NAC, RG 5, A 1, Government House to Attorney General Robinson, Vol. 75, 39932-33, 23 November 1825.] Like Ausman, Actley and Lewis are found in RG 68 under conditional pardons. From what I have been able to extrapolate from other sources, all three were granted free pardons conditional upon their posting securities. This may have been a precaution to prevent a renewal of hostilities.
[125] NAC, RG 5, A 1, Vol. 73, 39148-55.
[126] Hamilton died while his case was under review. Two of the petty jurors had informed Justice Powell that the jury had been divided on whether the crime was murder or manslaughter. Empanelled for thirty-two hours, they drew lots to decide their verdict. Powell informed the lieutenant-governor that "should this unanimity have been obtained by illegal means it should not be enforced." (NAC, RG 5, A 1, Powell to Hillier, Vol. 74, 39291-93, 21 August 1825.)
[127] NAC, RG 5, A 1, Vol. 74, 39331-4.
[128] Extrapolated from the fact that his wife, charged with the same crime, was living in Upper Canada in 1840 and further, that Justice Campbell wrote of their crime: "...the evidence upon which those persons were convicted was merely presumptive and that of so slight, indirect and unsatisfactory a nature as to have induced me in my charge to the Jury to lean strongly to a verdict of acquittal." [NAC, RG 5, A 1, Vol. 75, 40115-7, 10 January 1825.]
[129] NAC, RG 5, A 1, Vol. 74, 3933104.
[130] NAC, RG 68, K 60, 24.
[131] NAC, RG 5, B 3, Vol. 6, 242-45.
[132] NAC, RG 68, Liber I.
[133] NAC, RG 5, A 2, 27 April 1827. On the fiat of pardon, the number of years of banishment was left blank. This was also true for Grass, and Springstead.
[134] NAC, RG 5, A 2, 27 April 1827.
[135] NAC, RG 5, A 2, 27 April 1827.

1826	George Scroggins	Gore			Sheep Stealing		Ban. Life?
1826	Daniel Bacon	Gore	21		Horse Stealing		Unknown
1827	William Jones	Home	15		Killing a Cow	2[136]	Pardoned
1827	Leslie McCall	Niagara	30	Soldier	Murder		Executed
1827	John Qualls	Western			Murder		Executed
1828	Dennis Russell	Midland	29	Labourer	Carnal Knowledge	1[137]	Ban. Life[138]
1828	Michael Vincent	Gore		Farmer	Murder		Executed
1828	Charles French	Home	20	Printer's Assit.	Murder	1[139]	Executed
1828	John Christie	Home		Farm Labourer	Murder		Executed
1829	Michael Murtough	Gore			Rape		Unknown
1829	James Grant	Johnstown	26	Labourer	Horse Stealing		Ban. Life[140]
1829	John Thompson	Home		Notary Public	Forgery	2[141]	Unknown
1829	David Ellsworth[142]	Niagara	27	Labourer	Bestiality	5[143]	Free Pardon[144]
1829	Michael Mason	Niagara	20		Horse Stealing	1[145]	Transportation[146]
1829	Thomas Easby	Bathurst			Murder		Executed
1829	Benjamin Ward	Western			Murder		Banished[147]
1829	Chauncey Skinner	Home	24	Trapper	Rape	2[148]	Unknown[149]

[136] NAC, RG 5, B 3, Vol. 7, 445-6 and RG 5, B 27, Vol. 1
[137] NAC, RG 5, A 1, Vol.90. 49924-6.
[138] NAC, RG 68, Liber I, 392.
[139] French's petition is found in Anonymous. Confessions of Charles French, York, U.C.: 1828.
[140] NAC, RG 68, Liber I, 565.
[141] NAC, RG 5, A 1, Vol. 97, 54712-4 and Vol.98, 55771-3.
[142] Ellsworth's sentence was initially lessened to banishment and later to a free pardon.
[143] NAC, RG 5, B 3, Vol. 8, 872 and 873 and Vol. 12, 1573. NAC, RG 5, A 1, Vol. 97, 54960-62 and Vol. 98, 55031-2.
[144] NAC, RG 68, Liber I, 609-10.
[145] NAC, RG 5, A 1, Vol. 101, 57617-18.
[146] Mason's patent of pardon read that he would "be with all convenient speed transported to the Island of Bermuda to be there confined and kept at hard labour during the term of his natural life and he shall not refuse to accept the conditions of this pardon and should not escape or try to escape from confinement or our Letters patent should be utterly void to all intents and purposes." [NAC, RG 68, Liber I, 556, 22 June 1830.]
[147] See NAC, CO 42, Colonial Office Papers for 1829.
[148] NAC, RG 5, A 1, Vol. 98, 55090-3 and 55771-3.

1829	Abraham Weldon	Midland	25	Labourer	Horse Stealing	2[150]	Ban. Life[151]
1830	Conesco	London			Horse Stealing	1[152]	Free Pardon[153]
1830	David Utter	Gore	47	Labourer	Malicious Shooting	4[154]	Free Pardon[155]
1830	Benjamin Babcock	Midland	23	Labourer	Sheep Stealing		Free Pardon[156]
1830	George Harpell	Midland	19	Labourer	Sheep Stealing		Free Pardon[157]
1830	Henry Woods	Midland	23	Labourer	Horse Stealing		Free Pardon[158]
1830	Richard Gent (Jent)	Home	50	Labourer	Horse Stealing	1[159]	Ban. Life[160]
1830	John Wilson	Johnstown	45	Labourer	Horse Stealing		Ban. Life[161]
1830	Cornelius Burley	London	26	Blacksmith	Murder		Executed
1830	William Kain	Midland	21	Labourer	Murder		Executed
1830	Samson Catlett[162]	Western	26	Labourer	Shooting a Cow	2[163]	Free Pardon[164]
1831	Francis Morgan	Bathurst		Pensioner	Malicious Shooting	2[165]	Transportation changed to Ban. Life[166]

[149] Although there is no record of Skinner's mitigated sentence, he was not banished for life. Skinner was executed for murder in 1840.
[150] NAC, RG 5, A 1, Vol. 100, 56759-61 and Vol. 102, 58264-6.
[151] NAC, RG 68, Liber I, 572-3.
[152] NAC, RG 5, A 1, Vol. 101, 57571-2.
[153] NAC, RG 68, Liber G, 12.
[154] NAC, RG 5, A 1, Vol. 102, 58069-71 and 58072-73(j) and Vol. 107, 61207-9 and 61330-2.
[155] NAC, RG 68, Liber I, 612.
[156] NAC, RG 68, Liber I, 556-7.
[157] NAC, RG 68, Liber I, 556-7.
[158] NAC, RG 68, Liber I, 568-9.
[159] NAC, RG 5, B 3, Upper Canada, Petitions and Addresses, 1792-1841. Vol. 7, 614-6.
[160] NAC, RG 68, Liber I, 570-1.
[161] NAC, RG 68, Liber I, 605.
[162] Catlett's sentence was at first reduced to banishment (NAC, RG 68, Liber I, 584-5.) and later to an unconditional pardon.
[163] NAC, RG 5, A 1, Vol. 102, 59259-63.
[164] NAC, RG 68, Liber I, 607-8
[165] NAC, RG 5, A 1, Vol. 109, 61934-37.
[166] Morgan, a private in the late 99th Regiment of Foot, was ordered by the Chief Justice (September, 1831) to be reprieved contingent on his consenting to transportation. However, Morgan's patent of pardon—NAC, RG 68, Liber G, 46-47, 24 May 1832—states that he was to be banished for life on or before June

1831	James Scott	Midland	30		Horse Stealing	2[167]	Ban. Life[168]
1831	Jacob Tewskbury	Midland	36	Labourer	Horse Stealing	1[169]	Ban. Life[170]
1831	John Standish	Gore	26	Labourer	Rape	3[171]	Ban. Life[172]
1831	Moses Winters	Home	17		Bestiality	3[173]	Banished[174]
1831	Bernard Reilly	Bathurst	26	Labourer	Arson		Free Pardon[175]
1831	James Davis	Newcastle	22	Labourer	Horse Stealing		Ban. Life[176]
1831	Joseph Liquers[177]	Gore	17	Labourer	Cattle Stealing		Free Pardon[178]
1831	Alex Lemon	Home	22		Murder		Executed
1831	Tobias Speck	Eastern			Murder		Executed
1832	Richard Burt	Johnstown	32		Sheep Stealing	1[179]	Ban. Life[180]
1832	David Cutcher	London		Labourer	Cattle Stealing	3[181]	Ban. 7 yrs.[182]
1832	Jonathan Dyes (Deyo)	Home		Labourer	Cattle Stealing	2[183]	Ban. 7 yrs.[184]

20. Morgan had languished in gaol for fifteen months after his initial sentence. On May 12, 1832, he wrote to Lieutenant-Governor Colborne that he was heavily ironed, worn out from want of fresh air, "a perfect shadow." An appended doctor's note stated, "A long imprisonment will prove fatal." This may have forced the government to come to a quick resolution.

[167] NAC, RG 5, A 1, Vol. 109, 61985-7.

[168] NAC, RG 68, Liber G, 40.

[169] NAC, RG 5, A 1, Vol. 109, 62039-42.

[170] NAC, RG 68, Liber G, 39.

[171] NAC, RG 5, A 1, Vol. 109, 62208-10 and 62211-2 and Vol. 122, 67822-4

[172] NAC, RG 68, Liber G, 44-5.

[173] NAC, RG 5, A 1, Vol. 109, 62357-61 and Vol. 110, 62798-01 and RG 5 B 3, Vol. 8, 959-961.

[174] I extrapolate that Winters was banished from the fact that in 1838 he was arrested for returning early from banishment. See chpt. 7, 411-3.

[175] NAC, RG 68, Liber G, 603.

[176] NAC, RG 68, Liber G, 36.

[177] On September 2, 1836, at the Gore District assizes, Liquers was sentenced to five years in the provincial penitentiary for horse stealing.

[178] NAC, RG 68, Liber G, 38.

[179] NAC, RG 5, A 1, Vol. 127, 70338-40.

[180] NAC, RG 68, Liber G, 96.

[181] NAC, RG 5, A 1,Vol. 115, 64939-41 and RG 5, B 3, Vol. 8, 798-99.

[182] NAC, RG 68, Liber G, 49.

[183] NAC, RG 5, A 1, Vol. 115, 64923-4.

[184] NAC, RG 68, Liber G, 49.

1832	Mitchell Robins	London		Labourer	Horse Stealing		Ban. 7 yrs.[185]
1832	Simon Kemp	London		Labourer	Stealing Pair of Oxen		Ban. Life[186]
1832	James Logan	Niagara	25	Labourer	Sodomy	1[187]	Ban. Life[188]
1832	Nicholas Tillabagh (Dilabough)	Johnstown	41	Labourer	Horse Stealing		Ban. Life[189]
1832	Henry Sovereene[190]	London	44	Farmer & Shingle Weaver	Murder		Executed
1832	Lawrence Redmond	Midland	31		Larceny		Ban. Life[191]
1832	James Murphy	Eastern		Labourer	Horse Stealing		Ban. Life[192]
1832	Francis Yarns (Yarno)	Eastern	25	Labourer	Horse Stealing		Ban. Life[193]
1832	Richard Burt	Johnstown	32	Labourer	Sheep Stealing		Ban. Life[194]
1833	James Moody[195]	Western			Murder	2[196]	Unknown
1833	Robert Brown	Home		Labourer	Arson	2[197]	Ban. Life[198]
1833	Alex. O. Petrie	Midland			Robbery		Unknown
1833	George Smith	Eastern		Dishonourably Discharged	Robbery		Unknown[199]

[185] NAC, RG 68, Liber G, 32.
[186] NAC, RG 68, Liber G, 58.
[187] NAC, RG 5, A 1, Vol. 124, 68741-2.
[188] NAC, RG 68, Liber G, 71-2.
[189] NAC, RG 68, Liber G, 98.
[190] This was Sovereene's second capital offence. He received a free pardon in 1819.
[191] NAC, RG 68, Liber G, 95.
[192] NAC, RG 68, Liber G, 99.
[193] NAC, RG 68, Liber G, 87.
[194] NAC, RG 68, Liber G, 96.
[195] There is no record of any mitigated sentence for Moody. Fred Hamil believes that he either received an unconditional pardon or his sentence was reduced to manslaughter because he was later reported living in Essex County. [Hamil. The Valley of the Lower Thames, 1640-1850, Toronto: 1951.]
[196] NAC, RG 5, A 1, Vol. 133, 73422-8 and 73426-8.
[197] NAC, RG 5, A 1, Vol. 134, 73827-31.
[198] NAC, RG 5, A 1, Vol.134, 73827 noted on cover of petition: "banished for life."

1834[200]	John Rooney	Gore		Soldier Innkeeper	Murder	3[201]	Ban. Life[202]
1834	James Owen McCarthy	Gore	51	Tailor	Murder	3[203]	Died in Gaol[204]
1834	Joseph Blophet (Joshua Bossette)	Newcastle	16	Servant	Arson/Larceny		Penit. 5 yrs.[205]
1835	James Smith	Home	38		Burglary		Penit. 1 year[206]
1835	Michael Murphy[207]	Home		Labourer	Burglary	2[208]	Penit. 7 yrs.[209]
1835	Basil Amyott[210]	Home			Burglary	2[211]	Penit. 7 yrs.[212]
1835	Robert Bird (alias Isaac Bell)	Western			Murder		Executed
1835	Robert Watson	Midland			Murder	1[213]	Executed
1835	John McAuliff	Midland	32	Soldier	Murder	1[214]	Transportation[215]

[199] Justice Macaulay wrote to Secretary Rowan that he "would not recommend anything to be done short of actual transportation..." [NAC, RG 5, B 27, Macaulay to Rowan, Vol. 2, Cornwall, 25 August 1833.]

[200] After the law reforms of 1833, approximately 12 crimes remained capital including homicide, sedition, arson, burglary, robbery, rape and carnal knowledge of a child under ten.

[201] NAC, RG 5, A 1, Vol.143, 785812-6 and Vol. 144, 785817 and Vol. 149, 81796-99.

[202] Fraser, Provincial Justice, Toronto: 1992, 308.

[203] NAC, RG 5, A 1, Vol. 143, 785812-6 and Vol. 144, 785817 and Vol. 149, 81796-99.

[204] Fraser, Provincial Justice, Toronto: 1992, 308-9.

[205] Appendix to the House of Assembly of Upper Canada, 1837, No. 10, Report of the Penitentiary Inspectors.

[206] Appendix to the House of Assembly of Upper Canada, 1837, No. 10, Report of the Penitentiary Inspectors.

[207] Murphy was a practiced criminal. In 1834, after spending time in the Toronto gaol, he was convicted at the Mayor's court for "aggravated theft." Mackenzie described Murphy as "a very bad character." [Colonial Advocate, 26 June 1834.] In September of 1834, he was found guilty of stealing from a dwelling house and sentenced to six months in the provincial penitentiary.

[208] NAC, RG 5, A 1, Vol. 158, 86719-20 and 86726-8.

[209] Appendix to the House of Assembly of Upper Canada, 1837, No. 10, Report of the Penitentiary Inspectors.

[210] Jstice Macaulay noted in his report on Murphy and Amyott that they were "boys." [NAC, RG 5, A 1, Macaulay to Rowan, Vol. 158, 86724, 2 November 1835.]

[211] NAC, RG 5, A 1, Vol. 158, 86719-20 and 86726-8.

[212] Appendix to the House of Assembly of Upper Canada, 1837, No. 10, Report of the Penitentiary Inspectors.

[213] NAC, RG 1, E 3, Vol. 96, 51-95.

[214] NAC, RG 5, A 1, Vol. 158, 86448-9.

1836	Patrick McKenna	Eastern			Arson	2[216]	Banishment[217]
1836	Andrew Peterson	Gore	17	Labourer	Carnal Knowledge	2[218]	Penit. 5 yrs.[219]
1836	Aaron Seeley	Niagara			Murder		Executed
1836	Michael Connel (Cornell)	Eastern			Murder		Executed
1837	James Gibson	London	75	Labourer	Arson	1[220]	Ban. Life[221]
1837	Julia Murdock[222]	Home	21	Servant	Murder		Executed
1837	Thomas Morgan	Western			Murder		Executed
1837	Patrick Fitzpatrick	Western			Carnal Knowledge	2[223]	Executed
1837	William Brass	Midland	45	Merchant	Carnal Knowledge	1[224]	Executed
1837	William Sims	Niagara		Labourer	Riot	1[225]	Free Pardon[226]
1838	Horace Cooley	Western	23	Labourer	Burglary	2[227]	Transportation[228]
1838	Charles Bowerman (Louis Burnham)	Western	24		Burglary		Escaped[229]
1838	Edwin Merritt	Newcastle	31	Publican	Murder	2[230]	Transportation[231]
1838	Patrick Doran[232]	Gore	23	Labourer	Burglary	1[233]	Penit. 14yrs.[234]

[215] NAC, RG 5, A 2, Vol. 8, 17November 1836.
[216] NAC, RG 5, A 1, Vol. 166, 90889-90 and Vol. 172, 94065-7
[217] NAC, RG 5, A 1, Vol. 172, 94065-7.
[218] NAC, RG 5, A 1, Vol. 169, 92641-7 and 92641-7.
[219] Appendix to the First Volume of the Journals of the Legislative Assembly of the Province of Canada, 1841, Appendix M.
[220] NAC, RG 1, E 3, Vol. 33, 162-7.
[221] NAC, RG 68, Liber G, 21 June 1837, 315.
[222] John Ross Robertson puts Murdock's age at "about 21." [J. Ross Robertson. Landmarks of Toronto, Vol. 3, Toronto: 1898, 258.]
[223] NAC, RG 5, A 1, Vol. 178, 98245-55.
[224] NAC, RG 5, A 1, Vol. 178, 98362-5.
[225] NAC, RG 5, C 1, File 1115.
[226] Although I could find no official record of a free pardon, the fact that Sims turns up again in 1838, and after, in the archival records as a member of the black militia would suggest an unconditional pardon.
[227] NAC, RG 1, E3, Vol. 19, 49-60.
[228] NAC, RG 1, E3, Vol. 19, 49-51.
[229] See Charles R. Sanderson, ed. The Arthur Papers, Vol. 1. Lt.-Gov. George Arthur to Colonel Chichester, File 584, p.467, 19 December 1838.
[230] NAC, RG 5, A 1, Vol. 209, 115300-02 and RG 1, E 3, Vol. 51, 215-16.
[231] NAC, RG 68, Liber G, 3 November 1838, 402.

1838	Olmstead Hightower	Prince Edward	19		Rape	2[235]	Unknown
1838	Job Scott	London	19	Labourer	Robbery	2[236]	Penit. 3 yrs.[237]
1838	Enos Scott	London	20	Labourer	Robbery	2[238]	Penit. 3 yrs.[239]
1838	William MacKenzie	Western	42	Labourer	Burglary		Penit. 7 yrs.[240]
1839	George Powlis	Gore	22	Labourer	Murder	4[241]	Penit. 7 yrs.[242]
1839	Noah Powlis[243]	Gore	30		Rape	1[244]	Penitentiary[245]
1839	John McManigale	Home		Labourer	Murder		Transportation[246]
1839	Grace Smith[247]	Home	16	Apprentice	Arson	5[248]	Penit. Life[249]
1839	John Hamlin	Home	20		Robbery		Penit. 7 yrs.[250]
1839	John Dean	Bathurst	60		Murder	2[251]	Transportation[252]
1839	Robert Perry	Home			Murder		Executed

[232] Doran was pardoned 27 February 1847.
[233] NAC, RG 1, E 3, D8 (not found).
[234] NAC, RG 68, Liber G, 9 November 1838, 403-4.
[235] NAC, RG 5, A 1, Vol. 193, 107262-8 and 107269-73.
[236] NAC, RG 1, E 3, Vol. 84, 161.
[237] NAC, RG 68, Liber G, 27 November 1838, 405.
[238] NAC, RG 1, E 3, Vol. 84, 161.
[239] NAC, RG 68, Liber G, 27 November 1838, 405.
[240] NAC, RG 68, Liber G, 24 November 1838, 444.
[241] NAC, RG 1, E3, Vol. 65, 105-141.
[242] NAC, RG 1, E 3, Vol. 65, 105-141.
[243] Powlis was pardoned, 14 July 1841.
[244] NAC, RG 1, E 3, Vol. 65, 17 October 1839, 253-73.
[245] Appendix to the First Volume of the Journals of the Legislative Assembly of the Province of Canada, 1841, Appendix M.
[246] NAC, RG 68, Liber G, 12 July 1839, 521-2.
[247] Grace Smith spent only thirteen weeks in the Kingston Penitentiary. She was granted a free pardon 27 August 1840.
[248] NAC, RG 5, A 1, Vol. 232, 127244-52, RG 1, E 3, 4 November 1839, 16., RG 5, B 3, Vol. 10, 1341-43 & 1344-45 & 1346-49
[249] NAC, RG 68, Liber G, 15 November 1839, 548.
[250] NAC, RG 68, Liber K, 15 November 1839, 33-4.
[251] NAC, RG 1, E 3, Vol. 22, 132-132A.
[252] NAC, RG 68, Liber K, 21 September 1839, 26.

1839	Arthur Ledlie (Laidly or Lealey)	Gore		Shoemaker	Murder		Executed
1840	Mary Court	London	14		Arson		Free Pardon[253]
1840	William Walsh	Home	19	Unemployed-Dishonourably Discharged Soldier	Burglary		Penit. 14 yrs.[254]
1840	John Young	Home			Burglary		Penit. 14 yrs.[255]
1840	Jesse Tillotson	London	53	Labourer	Murder		Transportation[256]
1840	James Brown	Western			Rape		Transportation[257]
1839	John Cooper	London		Labourer	Felony		Free Pardon[258]
1840	Jacob Briggs	Western	36		Carnal Knowledge	1[259]	Transportation[260]
1840	Eustache Coté	Midland	14		Arson	1[261]	Penit. 7 yrs.[262]
1840	Mary Huffman	Western			Murder	2[263]	Transportation[264]
1840	Philip Huffman	Western			Murder		Executed
1840	William Farnsworth	Western	20	labourer	Arson	1[265]	Transportation[266]

[253] This is extrapolated from a letter written by Justice Jonas Jones in reference to the Grace Smith case. See chpt. 3, 137-8.
[254] Appendix to the First Volume of the Journals of the Legislative Assembly of the Province of Canada, 1841, Appendix M.
[255] Appendix to the First Volume of the Journals of the Legislative Assembly of the Province of Canada, 1841, Appendix M.
[256] Tillotson, Brown, Briggs and Farnsworth were placed in the Kingston Penitentiary where they were to await transportation. The sentence, however, was never carried out. Tillotson was released from the Kingston Penitentiary in 1856. Jacob Briggs died in prison on February 6, 1845. The fate of Farnsworth and Brown is not known.
[257] See note for Jesse Tillotson above.
[258] NAC, RG 68, Liber K, 3 February 1840, 35.
[259] NAC, RG 1, E 3, File B, Vol. 11, 43-5.
[260] NAC, RG 68, Liber K, 6 August 1840, 40-1.
[261] NAC, RG 1, E 3, Book M, Vol. 57. (not found).
[262] NAC, RG 68, Liber K, 6 August 1840, 42-3.
[263] NAC, RG 1, E 3, Vol. 36, n.d. & 3 February 1840, 223-31
[264] NAC, RG 68, Liber K, 8 August 1840, 44-5.
[265] NAC, RG 1, E 3, File B, Vol. 11, 43-5.
[266] NAC, RG 68, Liber K, 6 August 1840, 46-7.

1840	Chauncey Skinner	Home	35	Murder	Executed

Note: This table does not include those capitally convicted for sedition.

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