ANOTHER FACE OF JUSTICE: INTERPRETATIVE DEBATES WITHIN THE CANADIAN TRIAL NOVEL AFTER 1970

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February 2004

A thesis submitted to McGill University in partial fulfilment of the requirements of the degree of Doctor of Philosophy.

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Your file Votre référence
ISBN: 0-612-98211-4
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ISBN: 0-612-98211-4

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Abstract

This study examines Canadian works of fiction that *contain* historical trial narratives and that *enact* an adversarial trial of their own for an implied reader who acts as 'appellate judge.' Included are four Canadian novels published after 1970 that fictionalize the circumstances leading to notorious criminal trials: Margaret Atwood's *Alias Grace* (1996), Lynn Crosbie's *Paul's Case: The Kingston Letters* (1997), and Rudy Wiebe's *The Temptations of Big Bear* (1973) and *The Scorched-Wood People* (1977). They represent commentaries on the justice or injustice done to convicted murderer Grace Marks (whose trial took place in 1843), to rebel Cree chief Big Bear and Métis leader Louis Riel (1885), and to serial rapists and killers Karla Homolka and Paul Bernardo (1993, 1995).

Each work reproduces excerpts from the original trial yet also represents a response to the historical trial's unfolding. This adversarial response takes the form of a trial-like narrative (or counternarrative) that engages with the original trial. Consequently each of these works is what I call a 'trial novel' that raises fundamental questions about justice and citizenship

Chapter One analyzes Atwood's *Alias Grace* and lays bare the fictional constructs included in a trial narrative. Chapter Two looks at Crosbie's *Paul's Case* and pits the judicial system's claim to sober neutrality against a more populist version of justice based on affect and revenge. Finally, Chapter Three , which is devoted to Wiebe's novels, studies the conflict of normative universes implicit in trials for treason and posits that rebel *nomoï* are as coherent as the dominant ones that quash them.

Three communities are implicit in these novels and enter into a debate with one another: at the core of each work is a historical community of persons (the accused, attorneys, the judge, jurors, and members of the Canadian public) mobilized around an actual crime. This *original* community and its judgment provide the inspiration for the *fictional* community of the novel, which grapples with its own version of the crime and trial. Finally, an *imaginative* community of readers deliberates upon the questions raised both by the original trial and by the 'trial novel'.

Résumé

L'auteur se penche sur des romans canadiens qui *contiennent* des récits historiques de procès et qui les *représentent*. Sont incluses quatres oeuvres publiées après 1970 et qui romancent les circonstances de causes pénales célèbres : *Alias Grace* (1996) de Margaret Atwood, *Paul's Case: The Kingston Letters* (1997) de Lynn Crosbie et *The Temptations of Big Bear* (1973) et *The Scorched-Wood People* (1977) de Rudy Wiebe. Ces romans offrent des commentaires sur la justice ou l'injustice des procès au criminel de Grace Marks (1843); du chef Cri Big Bear; du chef Métis Louis Riel (1885); et des violeurs et tueurs en série que sont Karla Homolka et Paul Bernardo (1993, 1995).

Chaque roman reproduit des extraits du procès original et constitue en même temps une réplique au dénouement du procès historique. Cette réplique contestataire prend la forme d'un récit (ou contre-récit) ressemblant lui-même à celui d'un procès et dont le but est d'entretenir un débat avec le procès initial. Par conséquent, chacunes de ces oeuvres se définit comme un 'roman-procès' soulevant des questions fondamentales quant aux idées de justice et de citoyenneté.

Le premier chapitre analyse *Alias Grace* et expose les constructions fictives des récits de procès. Le second chapitre se penche sur le roman de Crosbie et oppose les affirmations du système judiciaire quant à sa propre neutralité à une version plus populiste et émotive de la justice se basant sur la vengeance. Finalement, le troisième chapitre, dévoué aux romans de Wiebe, étudie le conflit d'univers normatifs qui émerge des procès pour trahison et suggère que certains *nomoï* rebelles sont tout aussi cohérents que ceux, dominants, qui les écrasent.

Trois communautés sont impliquées dans ces romans et entrent en débat les unes avec les autres : au coeur de chaque roman se trouve une communauté historique (accusé, avocats, juge, jurés et membres du public canadien) mobilisée autour d'un crime. Cette communauté *originale* et son jugement inspirent la communauté *fictive* du roman, à son tour impliquée par les mêmes événements juridiques. Finalement, une communauté *imaginative* de lecteurs délibère des questions soulevées à la fois par le procès historique et par le 'roman-procès.'

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Preface

Regulations of the McGill University Faculty of Graduate and Postdoctoral Studies provide that the following text be added to a preface where any of the following cases apply:

> Candidates have the option of including, as part of the thesis, the text of one or more papers submitted or to be submitted for publication, or the clearly-duplicated text of one or more published papers. These texts must be bound as an integral part of the thesis.
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The present dissertation includes substantial portions of an article I authored and that appeared in Volume 177 (Summer 2003) of *Canadian Literature*. The article was originally titled "Tales of a Nation: Interpretive Legal Battles in Rudy Wiebe's *The Scorched-Wood People*." Parts of it are reproduced with permission in Chapter Three of my dissertation.

Acknowledgments

First and foremost, my appreciation goes to my supervisor, Professor Nathalie Cooke, whose insights, quick intelligence, energy, and abiding belief in my work made it possible for me to pursue my dream of combining legal and literary passions within a single dissertation.

A number of persons helped me fine-tune my arguments as I developed this project. I am extremely grateful to: Professors Robert Lecker and Brian Trehearne, at the Department of English, and Professor Desmond Morton of the Department of History, at McGill, for their feedback, for their teachings, and for the inspiration they provided; Professor Colleen Sheppard, at the McGill Faculty of Law, for her generous advice on an embryonic version of a chapter of this dissertation; and Professor Gary Boire at Wilfrid Laurier University, for showing me that there is indeed an interest in the interdisciplinary study of 'CanLaw and CanLit.'

My gratitude extends to past and present Graduate Directors at the Department of English: Professors Maggie Kilgour, Dorothy Bray, and Berkeley Kaite, and to past and present Graduate Office Coordinators: Linda Figsby, Sina Troiano, and Maria Vasile.

I also wish to thankfully acknowledge those institutions and groups that funded and thus allowed me to work on this project relatively undisturbed: the McGill Institute for the Study of Canada, under the directorship of Professor Desmond Morton, offered me a doctoral fellowship at the start of my doctoral programme; the Social Sciences and Humanities Research Council of Canada followed suit with a doctoral fellowship of its own; and both the Department of English and the McGill *Groupe de recherche sur Gabrielle Roy* kindly funded the last year of my programme with a fellowship and

stipend, respectively. Both the Department of English and the McGill Faculty of Graduate and Postdoctoral Studies twice offered me travel grants to complete archival research. Finally, my thanks go to the Department of English under the Chairmanship of Professor Maggie Kilgour and the Acting Chairmanship of Professor Dorothy Bray, for providing me with teaching appointments that further helped me support myself through my years as a doctoral student.

A substantial part of Chapter Three of this study appeared in Volume 177 of *Canadian Literature* under the title "Tales of a Nation: Interpretive Legal Battles in Rudy Wiebe's *The Scorched-Wood People*" and is reprinted here with permission.

Finally, I would be nowhere without friends. I thank Julia Mindorff and Laurie Watson for proofreading my work; Dean Irvine, now at Dalhousie University, for the generous sharing of his knowledge; Christine Neufeld, now at the University of Eastern Michigan, for help with a hard-to-trace reference to neo-Pagan ethics; Tina Trigg, currently at the University of Ottawa, and Lorna Hutchison, at McGill, for conversations about *Alias Grace*; and Elan Netser, for his patience and wholehearted support. Thanks as well to Richard Aberle, Christophe Bedos, Luisa Biasutti, Ivana Djordjevic, Colin Hill, Kristin Lucas, Alexander MacLeod, and Wendy Roy, for their happy companionship, their invaluable help in things big and small, and their wise thoughts along the way.

Last but certainly not least I thank my parents from the bottom of my heart for believing that their daughter was perfectly justified in pursuing a doctoral degree in the Humanities rather than a legal career. Their encouragement, in this as in every other matter, will always mean the world to me.

INTRODUCTION

Many literary scholars typically contrast literature and law by pitting the nonconformity and creativity of literary endeavours against the generalities and control of the law.[1] I prefer to view these disciplines as two faces of the same coin; rather than being incompatible, law and literature may complement each other. Thus I grant literature some of the normativity of courtroom law and I argue that such a law's effectiveness and persuasive force derives at times from creativity, and even from a genuine concern for difference. The handful of Canadian critics who have written on the presence of law within Canadian literature have, in part, contradicted my position. Scholars Renald Bérubé, Peter Brigg, Karen McPherson, and, to some extent, Gary Boire, have compellingly pitted sentiment, desire, and resistance against the force and coercion of the law. In *Acts of Hope: Creating Authority in Literature, Law, and Politics*, James Boyd White observes that the literary community much prefers subversion and transgression to law and authority (xiii). Northrop Frye himself wrote that "[t]he oldest literary theme is probably the breaking of law" ("Literature" 74), thus emphasizing the division between the two disciplines: law forcefully demands obedience; literature

[1] Throughout this study I give the word 'law' the broad meaning ascribed to it by *Black's Law Dictionary*. It is "in its generic sense, a body of rules of action and conduct prescribed by controlling authority, and having binding legal force." The law of a state is prescribed in statutes and constitutional instruments; these are, in turn, interpreted by the courts and, "in absence of statute law, in rulings of [these same] courts" ("Law"). Later in this introduction I make it clear that my study, specifically, examines criminal courtroom narratives, which include verdicts and sentences. In Canada, the latter two are rendered by a sworn jury and by a judge, who are bound by the relevant provisions of the Canadian Criminal Code. Such verdicts and sentences have "binding legal force" in that they are prompted by statutory law and prescribe rules of conduct both for the accused and for potential criminals at large. Non-binding courtroom narratives, which include lawyers' opening and closing statements as well as witness testimonies, are normally presented by attorneys sworn in by their Bar association and by witnesses who vow before the Court to tell the truth. Although these narratives lack judicial authority and therefore the forceful and binding impact of a verdict or sentence, they are nonetheless framed by statutory authority and contribute in a vital manner to the proper and fair administration of criminal justice. They are therefore included in my study under the term 'law.'

celebrates transgression. Accordingly, the Canadian critics who have examined legal issues mostly from New Critical and postcolonial perspectives present the world of law and literature as polar opposites.

Peter Brigg, for instance, suggests that Robertson Davies's *The Manticore* contrasts law and humanity. Although Davies's character, David Staunton, seeks refuge in his legal practice to shield himself from a capricious father, he realizes through the course of Jungian psychoanalysis that emotions—which he believed to be outside the purview of the law—are indivisible from an integrated personality. Brigg thus attributes to Davies's work the fullness and complexity of the human mind, unlimited by law's practical concerns. For her part, Karen McPherson traces in her "Letter of the Law" the subtle interweaving of law and language in Anne Hébert's *Kamouraska*. In this novel (in which a French-Canadian *bourgeoise* from Kamouraska plots with her lover to kill her husband), the weight or burden of the law is articulated through two languages. While the language of the law is the Queen's English, the language of desire, passion, and crime is that of the French heroine. As McPherson points out: "it is clear from the start that since an English authority is condemning a French-Canadian transgression, any law-abiding citizen's allegiance to that authority might understandably be weakened in response to the 'colonizing' nature of British rule" (19). A similar interpretation of Yves Thériault's *Agaguk* is offered by Bérubé. In Thériault's novel, White law is opposed not only to Inuit practices but, once again, to love.

An exception to the above studies, which pit law against the central impulses of literature, is Gary Boire's thorough examination of John Coulter's play, *Riel*. Boire claims in "*Ratione Officii*" that in Coulter's play, the literary Riel appropriates the

lawmaking discourse of the colonial authority and thus heralds its inevitable downfall. Although Boire relies on the binaries of Old and New World, empire and colony, and law and subversion, he is a sophisticated writer well versed in legal theory who is careful to sidestep rigid intellectual constructs in his own writing in order to look at the hybridity produced by the contact between law and literature. In his article, for instance, postcolonial resistance occurs not in a language radically opposed to that of the law, but "within the fissures of Authority's own ambivalences" (212). Yet his postcolonial view of Coulter's work fails to entirely transcend the binaries he raises, so that his own literary study ultimately stands in opposition to the legal machinery described in the play. Similarly, in "Language of the Law: The Cases of Morley Callaghan," Boire argues that for Callaghan the law is a "grammar of control." It represents "every State's mother tongue, every citizen's first 'sentence,'" an "unconscious interpellative force" (80). Although he notes that, in his short stories, Callaghan explores the omnipresence of law "sometimes ironically, *sometimes approvingly*" (85; emphasis added), Boire himself interprets the presence of the law in Callaghan's works as the opposite of desire (84). It is instead "an interpellative force that necessitates continual resistance" (85).

Even though some, like Boire and McPherson, clearly tackle the somewhat legal issue of membership in a complex, multicultural, and bilingual nation, the Canadian critics mentioned above are mostly locked into a mode of thinking about law and literature that recalls Michel Foucault's trope of the law as sovereign[2] and Hayden

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[2] In both *Discipline and Punish* and the *Introduction* to *The History of Sexuality*, Foucault views law as an institution that stands for the old power of the sovereign over his subjects' life and death. Following the French Revolution, eighteenth- and nineteenth-century rhetoric succeeded in equating monarchical rule with abuses of power and with arbitrariness. Thus the general principle of the rule of law dictates that legal decisions must be made according to established norms rather than through a monarch's discretion. But, Foucault warns, "this is to overlook a fundamental historical trait of Western monarchies: they were constructed as systems of law, they expressed themselves through theories of law, and they made their

White's Hegelian statement that desire is opposed to law (12). They hold a largely exclusive view of legal and literary texts (be they fictional or critical), a stance that I fail to share unreservedly, for if it is clear that literature may indeed be critical of law, I claim as well that when the two disciplines focus on the same subject they form a communal debate about justice and citizenship that merges these binaries into a more comprehensive and potentially constructive meaning.

There are, of course, diverse opportunities to compare the separate realms of law and literature. Both disciplines, for instance, depend upon interpretation. Both resort to rhetoric. Both are concerned with authority, agency, responsibility, and intention. Boire and McPherson, mentioned above, contrast each discipline's use of and approach to language. Within my own study, the point of contiguity between law and literature lies in each discipline's reliance on narrative, and notably on the narratives that emerge from trials. I base my definition of the word "narrative" on Gerald Prince's own. It is above all: "[t]he recounting (as product and process, object and act, structure and structuration) of one or more real or fictitious events communicated by one, two, or several [. . .] narrators to one, two, or several [. . .] narratees" (58). The legal and literary narratives I examine here recount the same events, at times differently, and at times similarly.

More precisely, I discuss Canadian works of fiction that *contain* Canadian historical trial narratives and that *enact* an adversarial trial of their own for a contemporary readership. I examine four Canadian novels published in the quarter-century between 1973 and 1997. Margaret Atwood's *Alias Grace* (1996); Rudy Wiebe's *The Temptations of Big Bear* (1973) and *The Scorched-Wood People* (1977); and Lynn

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mechanisms of power work in the form of law." Law is therefore "the monarchic system's mode of manifestation" (*History* 87).

Crosbie's *Paul's Case: The Kingston Letters* (1997) all fictionalize the circumstances leading to actual criminal trials. They represent commentaries on the justice or injustice done to convicted murderer Grace Marks (whose trial took place in 1843); to Cree chief Big Bear and Métis leader Louis Riel (1885); and to serial rapists and killers Karla Homolka and Paul Bernardo (1993 and 1995).[3]

Each of the works of fiction listed above confronts *ex post facto* both the viciousness of crime and the matching intensity of the legal machinery that challenges transgression. Each refers directly to a historical trial which ended with a guilty verdict and a sentence that turned the accused into an outcast or a pariah within Upper-Canadian or Canadian society. Each reproduces within its pages verbatim excerpts from the original trial. Each novel also represents an argument, a response to the historical trial's unfolding, verdict, or sentence. This adversarial response takes the form of a trial-like

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[3] My search for novels that contain references to actual trials and that enact them was limited to a period of thirty years that lasted roughly from 1970 to 2000. I was above all interested in relatively recent fictional reworkings of Canadian trials, in large part because recent Canadian fiction constitutes my area of expertise, but also because Canadian law itself has changed a great deal during these last thirty years. In 1982, the Canadian Constitution was patriated and I suspected that much of the discussion about Canadian cultural nationalism that began in earnest with the publication of Margaret Atwood's *Survival* in 1972 might have led a decade later to the conviction, under the Trudeau regime, that our constitutional instruments ought to be our own. Moreover, the 1982 Constitution includes the Canadian Charter of Rights and Freedoms, which promotes a multicultural nation and the respect of distinct collectivities within Canada. I would argue that a wave of tolerance for difference and for those in the 'margins' has emerged as much in literary circles as it has in legal jurisprudence and in Canadian legislation such as the Charter. Law, after all, is part of our culture. I was therefore interested in seeing how contemporary Canadian authors view their legal past and how they do so through a contemporary consciousness that is aware of recent and extensive cultural changes.

This search yielded the few results already mentioned, along with two additional novels, which I rejected in order to adjust the focus of my study. I was tempted, first, to add to my list George Bowering's *Shoot!* (1994), a novel which revisits the events leading up to the historical trial of the McLean Brothers and of Alexander Hare in the British Columbia of 1880. It would have complemented the novels above perfectly, but I finally decided against it in order to avoid repetitiveness in my study, since Bowering's novel covers some of the same issues found in Wiebe's novels, namely those of the Canadian treatment of the Métis (in *Shoot!*, The McLean Brothers are English halfbreeds) and of the ways in which minorities within Canadian soil express themselves when faced with the Queen's legalistic language. I also left out Merilyn Symonds, *The Convict Lover* (1996). Although it is based on the historical correspondence between a Canadian convict and a woman by the name of Phyllis Halliday, Symonds's novel is more heavily concerned with the hardships of prison life than it is with the adversarial trial process.

narrative (or what I call a 'counternarrative')[4] presented by a narrator who acts as 'attorney' to one of the fictionalized parties of the historical trial, or that of several narratives that recall a trial's examination phase, during which several witnesses offer their own narratives of what happened in the past. Consequently, every one of these fictional works is what I would call—and what other readers and critics of these novels have so far neglected to call—a 'trial novel' best understood in reference to the trial's adversarial format, which it enacts.

Furthermore, at least three types of communities are implicit in every one of these novels. Each community narrates the same problematic event in a distinct way, and its narrative is acknowledged and revised by a subsequent community. At the core of each novel is a historical community of persons (the accused, attorneys, the judge, jurors, and members of the Canadian public) mobilized around an actual crime. This *original* community and its judgment of the accused provide the inspiration for the *fictional* community of the novel, which grapples with its own version of the crime and trial. Finally, an *imaginative* community of readers, collectively embodied in the generic implied reader, acts as a bench of appellate judges who reopen the case (as each member cracks open a novel) and deliberate upon the fictional apprehension of the events as well as upon the questions the original trial and the 'trial novel' raise.[5] These questions concern the nature of justice (be it divine, institutional, popular or, to a certain extent,

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[4] Throughout his "Storytelling for Oppositionists and Others," legal scholar Richard Delgado uses the term "counterstories" to describe oppositional narratives that address juridical issues, although they are unauthorized by the legal system. I prefer to use the word 'counternarratives' here to avoid any confusion that might arise in relation to the narratological concept of 'story.'

[5] As Gerald Prince explains, every literary text counts several "real readers" yet presupposes an imagined or ideal audience specifically shaped by that text's central values and cultural norms (42). It is indeed to be expected that a 'trial novel' is addressed to an audience of judges. Throughout my work I refer to this imaginative audience as the "implied reader."

poetic).[6] They also attend to the definition of citizenship and the conditions of belonging or rejection that flow from the commission and punishment of crime.

The notion of the implied reader as a juridical player is hardly innovative. In 1964, Ian Watt likened readers to jurors who need to know "all the particulars" of a given "case," or novel (31). I am inspired by Watt's trope, but I also modify it for the purposes of my study. To cast the implied reader as juror in the case of novels that refer back to a historical trial would make little sense. A juror is a member of the public who knows as little as possible about a case before it is tried. Prior knowledge assumes bias, which is contrary to the juror's idealized role as a largely 'virgin mind' who enters the courtroom without preconceived ideas about the accused. In reality, the trials have already taken place. The defendants were historically convicted and sentenced. The implied reader cannot claim ignorance of, say, the Riel or Bernardo trials; these cases are to a large degree familiar to him or her, and he or she almost certainly holds strong opinions about them. Furthermore, in criminal trials, jurors are held to a standard of proof known as proof beyond a reasonable doubt; it aims to protect the life and liberty of the accused, whose guilt must be proven with a high degree of certainty. A literary reading fails to warrant such a stringent standard. No person's life or freedom is immediately at stake following the reading of a novel. Finally, a jury is often presented with visual and

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[6] The notion of "poetic justice" (defined in Baldick's *Concise Oxford Dictionary of Literary Terms* as "the morally reassuring allocation of happy and unhappy fates to the virtuous and the vicious characters, respectively, usually at the end of a narrative or dramatic work" [172]) is problematic within this study since the implied authors of the works of fiction listed above are bound by a historical verdict and sentence. (Of course, an argument could be made that they are free to imaginatively rewrite or evade history, yet they all respect the parameters of historical fiction and abide by historical endings.) The concept of poetic justice must therefore be redefined for the purposes of this study as the fictional supplement to a historical trial of narratives meant to perceptually (but not legally) redress a moral wrong committed during the original trial. In the case of Crosbie's work, specifically, poetic justice can be viewed as a 'fantasy' of a different ending to the historical outcome of the trial that is, however, recognized as such and that fails to effectively replace such an outcome.

acoustic evidence, along with real defendants, witnesses, lawyers, and judges. In this sense, a trial is more theatrical than it is dependent upon a written text. Its jurors are audience members rather than readers.

Like a judge at a court of appeal, the implied reader in my study pores over an old case that has already been tried. Appellate judges re-examine past trial transcripts and also consider new arguments related to these trials. They do so to determine whether errors of fact or law were committed during the trial itself. I submit that this appellate process of revision is close to that which takes place within these four novels penned by Atwood, Crosbie, and Wiebe. The implied reader (who in these referential novels is also idealized as a citizen familiar with the nation's history) ponders both the facts and the 'law' of the historical and fictional worlds with which he or she is presented and determines whether these respective representations and interpretations of events are credible, sound, or flawed. Even so, distinctions must be drawn between an actual court of appeal and a literary one. Again, the implied reader's possible 'verdict' has no direct or immediate impact on the defendant's life and liberty since, historically, the accused has been declared guilty and sentenced in an effective court of law. The implied reader merely looks through the oppositional narrative within each novel for additional evidence that may cast doubt upon the soundness of the original judgment, but also upon the workings of our judicial system as it has dealt with the crimes described. Thus, through this verdict-oriented reading, the novels can be said to contribute to a new communal apprehension of past criminal events and of courtroom justice.

The aim of my study is therefore twofold. Firstly, my work represents an original and previously unattempted vision of various communities' reflections on Canadian

crimes and on the norms inherent in judging them, and one that uses a reading model inspired by courtroom rituals. Secondly, the effect of this reading model is to make these four works of fiction known to my audience (a fourth community, the *academic* community) not only as contemporary and largely canonic Canadian novels[7] but, more uniquely, as Canadian *trial* novels that inspire new, interdisciplinary readings based equally upon legal and literary concepts.

Theoretically this study is located at the intersection of ongoing debates among (a) communitarian scholars such as Martha Nussbaum and James Boyd White; (b) postmodernists such as Jean-François Lyotard and Richard Rorty; and (c) members of the branch of the law-and-literature movement called "legal narratology,"[8] who have also been labelled proponents of the politics of difference. Each camp underlines the instrumental nature of narrative and describes the communities it produces.

To this day, Nussbaum and White continue to support the metanarratives which Lyotard declared moribund twenty years ago. Narratives, they insist, stimulate the imagination and persuade readers to seek truth, objectivity, and justice (which White defines in his *Acts of Hope* as a balance between the claims of self and those of the world on self [303-305]). Both Nussbaum and White advocate conversation, debate, and dialectic between a text and its readers, who then become capable of naming common human ideals, hopes, and aspirations (hence their name—communitarians).

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[7] Many would dispute my suggestion that Lynn Crosbie's *Paul's Case* forms part of the Canadian literary canon. As I myself note in my Chapter Three, almost no critical work has been produced on *Paul's Case*. The novel, however, has been (and continues to be) taught at McGill's Department of English and Crosbie's works, generally, are interpreted in papers showcased at Canadian literary conferences like the 2003 Social Sciences and Humanities Congress. If Crosbie presently does not occupy a position at the very centre of the Canadian literary canon, she is, at least, setting up camp in its margins.

[8] The term was first used somewhat sardonically by Richard Posner in an article on the subject, but it has since been appropriated in all seriousness by the members of the group. Posner's objection to legal scholars' study of narrative was, initially, that such scholars knew little about literary narratology (741).

In *Cultivating Humanity*, for example, Martha Nussbaum laments that old-fashioned, rigorous Socratic questioning is "on trial" as diverse interest groups vie for political attention and favours (2). Nussbaum argues that citizens ought to be able to debate "differences, whether professionally or simply as a voter, a juror, a friend" (8). One of the tools she finds lacking in today's citizens is what she calls "narrative imagination" or "the ability to think what it might be like" to be, as she explains, "[i]n the shoes of a person different from oneself, to be an intelligent reader of that person's story, and to understand the emotions and wishes and desires that someone so placed might have." She adds that the first step of understanding the world from the viewpoint of the other "is essential to any responsible act of judgment" (10-11). Nussbaum's association of juridical terms and concepts ("trial," "juror," "judgment") with an expression more closely reminiscent of creative writing and literature ("narrative imagination") is hardly fortuitous. This form of propinquity is appropriate, I would argue. Reading novels can be similar to the act of judging in that it requires that the reader focus on intention, motive, context, and the subtleties of language in order to 'do justice' to the impulse behind a literary work or its characters. Similarly, within the constraints and rules of the judicial system, legal acts require creative empathy, or else they are merely mechanical and devoid of wisdom. Ordinary literate citizens, lawyers, jurors, and judges thus participate in connected activities which form part of their obligations within a democracy that requires empathetic imagination and judgment (understood here as both "discernment" and "decision") if it is to endure. What both Nussbaum and White add to these ideas is an insistence on debate. As White remarks, what grants respected authority to the law is not its coercive power, but rather the "conversation processes" it entails (for

example, during an adversarial trial or in legislative debates), for these processes hint at the law's commitment to understanding, openness, fairness, and truth (43). Within the pages that follow I claim as well that trial novels, as defined above, partake in some of law's normativity for the same reasons that they foster a critical, albeit passionate, debate between past and present, and between procedural law and substantive justice.[9]

The aims of postmodernist thinkers such as Lyotard and Rorty appear, at first glance, to be diametrically opposed to those of the communitarians above. Unlike Nussbaum and White, who believe in the possibility of justice rendered by way of truth attained, Lyotard posits that broad ideals like truth or justice can no longer depend on universal consensus. As Lyotard argues, there cannot be common rules for a social collectivity. Consensus can only be local and subject to reconstitution and eventual cancellation. Narrative is therefore subversive and oppositional. Metanarratives are replaced by micronarratives that challenge dominant discursive norms and put in their place a myriad of minoritarian discourses which bring to the fore the various communities they represent (60-67).

Legal narratologists such as Robert Cover and Richard Delgado follow in the footsteps of Lyotard when they point out that, in law, meaning arises not solely from legal institutions, but from ordinary citizens and minoritarian communities. Debates about competing values and interests are therefore worthless unless the lessons to be drawn from personal narratives of hardship or discrimination are heeded by the legal community. In his "Storytelling for Oppositionists and Others," Delgado also starts from the premise that the law and human lives will change only when the voices and stories of

[9] Indeed, legal procedure may stand in the way of the kind of justice that a lay person would describe, instinctively, as being 'fair.' For example, evidence that the same lay person would consider perfectly admissible at a trial might be deemed inadmissible for procedural reasons, which may appear to be unjust.

ordinary and disadvantaged citizens are heard by those in a position of power within the legal establishment. As he explains, "[a]n outgroup creates its own stories, which circulate within the group as a kind of counter-reality." Thus, "[t]he dominant group creates its own stories, as well. The stories or narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural. The stories of outgroups aim to subvert that ingroup reality" (2412-13). These outgroups' counternarratives defy the legal status quo and stretch the bounds of majoritarian norms to accommodate variants, or to allow for the co-existence of a plurality of normative orders. Similarly, although he warns that legal meaning "never exists in isolation from violence" and "coercion," Cover believes that communities may "create law and [. . .] give meaning to law through their narratives and precepts, their somewhat distinct *nomos*" ("Nomos" 40).

Yet communitarian concerns and those put forth by postmodernists and by the proponents of the politics of difference can be partly reconciled, especially where matters of justice are involved. For instance, the need for oppositional narratives is already recognized and embedded in institutional trial practice, which in turn mirrors Nussbaum's and White's endorsement of democratic debate. Indeed, the defence's version of events exists in opposition to that of the Crown. Similarly, there is no glaring contradiction between White's belief, in *Heracles' Bow*, that the reader's awareness of and engagement with rhetoric gives shape to a community thought of as "we" (42), and Rorty's request that readers make the effort to include in their particular communities "people [. . .] previously thought of as 'they'" (192). I contend, then, that the politics of difference arising from postmodernist concerns narrows down and sharpens the conditions of

communitarianism. Communitarian humanism, postmodern subversion, and the politics of difference thus converge to create a constructive perceptual outcome.

In my study, a vision of successive communities open to opposition, debate, and the possibility of change replaces that of a monolithic community or nation rooted in unchanging shared values. Furthermore, within the larger historical and fictional communities described in this study dwell sub-communities that might be described as "outgroups." In *Alias Grace*, the Irish poor struggle amidst well-to-do Tories. In Wiebe's novels, Native and Métis characters are at war with Canadian government forces. In Crosbie's *Paul's Case*, crime victims and the public find themselves shut out from the processes of institutional justice. Yet as fictional Upper-Canadian and Canadian communities revisit actual legal events, these outgroups regain an imagined life and dignity that they were partly denied.

That literature is inclusive of outgroups comes as no surprise, of course. What perhaps does is the law's own inclusiveness along with its capacity for revising past errors. Whereas historical judges may have been nearsighted or bigoted, modern jurisprudence (or the theory or philosophy of law) attempts to make amends for the law's old sins and, notably, for the lack of status and recourses of the historically disadvantaged. Today's jurisprudence therefore aligns itself with the novel's tolerance and sympathy for the margins. Like its literary counterpart, legal theory is, after all, influenced by the theoretical trends described above. One of the purposes of this study is to analyse four relatively recent Canadian novels in light of legal history *and* legal theory. I am naturally influenced in this aspect of my work by a scholarly movement known as the law-and literature movement.

In 1931, American judge Benjamin Cardozo wrote an article titled "Law and Literature" in which he compared the two disciplines. But it was not until 1973 that James Boyd White published a textbook for his law students entitled *The Legal Imagination*, which transformed the interdisciplinary study of law and literature into a field of scholarly inquiry in its own right.[10] Years before Nussbaum, White asked readers to exercise a certain literary creativity in imagining what their future clients might feel, what prompted these clients to act as they did, and what arguments would best serve their legal needs. Literary excerpts from novels and poems were included and helped illustrate White's pedagogical points and empathetic exercises. Aside from perhaps making a generation of attorneys somewhat more inventive in the practice of the law, White's work launched a movement.

In the United States, in particular, other legal scholars soon began to examine the similarities between legal and literary processes. In the late 1970s and throughout the 1980s, conferences and issues of legal periodicals were dedicated to this comparison[11] and were soon followed by monographs on law and literature written by legal scholars.[12]

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[10] As legal scholar Maria Aristodemou writes:

> [The law-and-literature movement's] proponents [. . .] found friendly prompting and encouragement from those dissatisfied with the present state and aims of legal education and of legal theory in general; soon its advocates became confident of their place in legal scholarship, to the extent that today it has become possible, and even common-place, to refer to those studies as a "movement," competing with, or at least complementing the more established "Law and Economics," "Law and Social Sciences" and "Law and Philosophy" movements. (157-58).

See also Gewirtz, "Narrative": "As with so many young movements, political or scholarly, it remains an open question whether the participants in this one really have a common purpose. But for now, there is a group of scholars who at least do not disclaim the common label" (3).

[11] See, *inter alia*, Smith, J. Allen, ed., "Law and the Humanities: A Symposium," *Rutgers Law Review* 29 (1976): 223-316, and "Symposium: Law and Literature," *Texas Law Review* 60 (1982): 370-586.

[12] See Weisberg, *The Failure of the Word* (1984) and *Poethics and Other Strategies of Law and Literature* (1992); Dworkin, *A Matter of Principle* (1985); James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (1985) and *Acts of Hope: Creating Authority in Literature, Law, and*

In the 1990s, these were followed in turn by anthologies that featured both recent essays and revised versions of periodical articles[13] and by new pedagogical works meant to assist those lecturers who teach the now-ubiquitous law-and-literature course in Law faculties across North America.[14] The next step was predictable enough. Whereas the law-and-literature movement was meant initially to instil a certain sensitivity into the legal profession,[15] literary scholars too became interested in the movement, in part because the law's authoritative discourses are of interest to the literary community's own attempt to theorize authority, and in part because readers are, after all, citizens ruled by law. The literary community thus followed suit and began publishing on the subject as well.[16]

Critics of the movement would argue, however, that true interdisciplinarity is absent from the literary and legal branches of the movement. Throughout her

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Politics (1994); Posner, *Law and Literature* (1988 and 1998); and Klinck, *The Word of the Law: Approaches to Legal Discourse* (1992).

[13] See, for instance, Papke, ed., *Narrative and Legal Discourse: A Reader in Storytelling and the Law* (1991); Turner and Williams, eds., *The Happy Couple: Law and Literature* (1994); Heinzelman and Wiseman, eds., *Representing Women: Law, Literature, and Feminism* (1994); Brooks and Gewirtz, eds., *Law's Stories* (1996); and Myrsiades and Myrsiades, eds., *Un-Disciplining Literature: Literature, Law, and Culture* (1999).

[14] See, *inter alia*, Heald, ed., *Guide to Law and Literature for Teachers, Students, and Researchers* (1998); Gemmette, ed., *Law in Literature: An Annotated Bibliography of Law-Related Works* (1998); and Binder and Weisberg, *Literary Criticisms of Law* (2000).

[15] In *Poetic Justice*, for instance, Martha Nussbaum addresses the legal profession directly when she writes that "it would be extremely dangerous to suggest substituting empathetic imagining for rule-governed moral reasoning [. . .]." She also pleads the cause of the Humanities' role in a legal education when she adds that "an ethics of impartial respect for human dignity will fail to engage real human beings unless they are made capable of entering imaginatively into the lives of distant others and to have emotions related to that participation" (xvi).

[16] See, for instance, Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literature and Legal Studies* (1989); Swain, ed., "Legal Fictions," *New Formations* 32 (1997): 5-171; Freeman and Lewis, eds., *Law and Literature: Current Legal Issues 1999*; Dolin, *Fiction and the Law: Legal Discourse in Victorian and Modernist Literature* (1999); Brooks, *Troubling Confessions: Speaking Guilt in Law and Literature* (2000); and Moddelmog, *Reconstituting Authority: American Fiction in the Province of the Law, 1880-1920* (2000).

"Interdisciplinary Legal Scholarship as Guilty Pleasure: The Case of Law and Literature," for instance, Jane Baron notes that within the Humanities the law continues to be perceived as a dry, duty-bound, and purely coercive discipline. The legal branch of the movement, meanwhile, pays lips service to interdisciplinarity while at the same time paying tribute to the law's fierce autonomy and impermeability from outside influences. Baron frowns upon these foundationalist views. Literature, she points out, can be "heady," dry, and abstract in its own right (she cites as examples of literature's occasional lack of juicy emotionalism "the works of authors such as Frederick Barthelme or Roland Barthes"). I would follow in Mark Cohen's footsteps and add, for example, that the literary canon and the process of canon formation can be coercive as well, in that it excludes a number of works for reasons that are often arbitrary and unfair.[17] In *Law and Literature: Possibilities and Perspectives*, Ian Ward too rebels against the foundationalist and resistant elements within the movement when he makes a passionate plea for greater integration of the disciplines.

As Ward explains, the "stronger defences" for the law-and-literature movement justify the comparison between the disciplines "by asserting [this comparison's] value as a form of jurisprudence in its own right." Ward bases his views on the belief that the law is not merely rule-oriented. Legal rules are, instead, indicative of larger societal debates about ethics and the social contract. Like Nussbaum and James Boyd White, Ward values what he calls society's "participatory dialogue" in its own self-recognition and organization, and he sees the work of the law-and-literature movement as jurisprudence

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[17] See Chapter Five of Cohen's *Censorship in Canadian Literature*, in which he argues that "our society's practice of granting something the status of art or culture is a practice of censorship in which something else is denied that status; [. . .] it is the disadvantaged (by class, gender, race, etc.) segments of society that usually experience this censorship" (120).

that relates to what a given society wants for its members and for itself. Thus, as he writes:

> The strongest defence [in favour of the law-and-literature movement] is that law is a part of life and plays an integral role in the determination of the human condition. This is not, however, a purely legal condition. Once this is understood, then political, social and philosophical texts will be admitted to jurisprudential discourse. At that point there is also no reason why narrative texts should not be included in the discourse. Once a narrative text is understood to be a piece of fiction, and once it is appreciated [for instance] that Kafka['s *The Trial*] never intended to instruct us with regard to the nature of Austro-Hungarian criminal procedure, then the narrative can be understood as contributing to the general debate on the nature of the human condition." (154)

In my own study I align myself with Ward on two points. Like him, I see works that emerge from the law-and-literature movement as 'jurisprudential' in that they foster a dialogue between a given community's history and present, and ask the members of that community to define the possible meanings of the term 'justice' for themselves. Like him, too, I believe that literary texts belong to this expanded definition of jurisprudence. As it enters the realm of jurisprudence, literature acquires some of the normativity of law, in that its lessons can be of use to jurists as well as to ordinary citizens. This normativity is as limited as that of any form of jurisprudence. It may well influence the law, but lacks the force of the law because it is not legitimated by the state.

I disagree with Ward on two points, however. I disagree, firstly, with his restriction of the word 'narrative' to literary texts. Secondly, I must quarrel with his apparent belief in literature's utter lack of authority in legal matters, which is made evident by his suggestion that we should feel reassured that Kafka's most famous novel never intended to instruct us with regard to the nature of Austro-Hungarian criminal procedure. These points—which, I believe, weaken Ward's apology of interdisciplinarity—give rise at the same time to a number of observations that bear on the findings contained in my own study.

Ward's characterization of literary works as "narratives" leaves the impression that the term can only be applied to such works. The possible confusion created by the imprecise use of narratological terminology is unfortunately rampant among the legal branch of the law-and-literature movement. Richard Delgado, for instance, refers to the narratives of the disadvantaged as "stories," but uses the word "narrative" interchangeably with "story" (2413) and refers to the narrativization of disadvantage as "storytelling" (2414).[18] Throughout my study I consistently use the term 'narrative' rather than 'story' in order to avoid such confusion. In doing so, I refer to the telling of an event by at least one narrator to at least one narratee. In fact, a narrative may narrate a mere chronological sequence of events, or it may interpret such events causally. In the first case it is a story, in the second, a plot (Prince 91). Therefore, novels are narratives that contain stories and plots. I do not, however, restrict the term 'narrative' to literary works alone. During a trial, the prosecution's opening statement (which announces to the judge and jury that the accused is indeed guilty of a crime committed in a certain manner)

[18] See also Dennis Klinck's chapter on "Narrative" in his *Word of the Law*. Klinck writes, for example, that "it seems to have become trendy for intellectuals of diverse types to interlard their discourse with the word 'story'—as if to suggest that everything is narrative" (291).

is a telling or a retelling of past events. It is therefore a 'narrative,' along with an attorney's closing statement, when it summarizes the trial's unfolding, or the witnesses' testimonies, when they are allowed by the attorneys involved to proceed beyond mere 'yes' or 'no' answers. Trial narratives of the kind described above can contain stories (for e.g., the witnesses' chronological recounting of the day of the murder which in instances known as 'analepsis' may leap backward, or in instances termed 'prolepsis' move forward) as well as plots (for e.g., the prosecution's determination that a certain motive led the accused to kill). A legal narrative, however, may contain *neither* a story *nor* a plot. A forensic pathologist who tells of the progressive decay of a body left in water for days is merely detailing a natural temporal sequence of events that fails to require a deliberate or planned arrangement of such events in a certain order. My use of the term 'narrative' is therefore meant to cover all of the situations above.

This precision allows me at the same time to explain why I also go further than certain scholars in claiming that a trial in its entirety *can*, in fact, be conceived as 'a narrative.' The problem that several scholars have naturally identified in calling a trial, or a trial transcript, a narrative is that it lacks a mediating consciousness: a central narrator or an author. As Dennis Klinck puts it, a trial is "arguably not in its entirety a narrative," but only "a number of separate narratives 'tacked' together" (305). Steven Connor remarks that "[t]he trial is a way of dispensing with the mediating device of narration, and especially with the problems attaching to the authority of report" (67). For his part, H. Porter Abbott, in the *Cambridge Introduction to Narrative*, views a trial transcript as being "full of micro-narratives of these sorts that sprout out everywhere you look, pulling credibility from one overarching narrative to the other in a rhythm that

carries through the entire collective event" (141). Later, he goes so far as to concede that this sense of a "collective event" prevails in our perception of a trial's narrativity. "A trial," he allows, "can be described as a huge unpolished narrative compendium featuring the contest of two sets of authors [i.e., the lawyers for each party], each trying to make their central narrative of events prevail by spinning narrative segments for their rhetorical impact" (142). I would add to these descriptions of the trial as a genre that a trial can also be perceived as a cohesive narrative by the reader of the transcript (or the audience member at the actual trial).

In his Afterword to his *Narrative Discourse*, Gérard Genette suggests that the reader participates in and even contributes to the creation of a text (266). There is no reason to doubt Genette's opinion. All readers partake in the hermeneutic function of reading. Similarly, the reader of a trial transcript must also make sense of the events of the trial, give them meaning, or establish the *nomos* (or normative universe) that rules them. Hayden White thus claims that we narrativize events because we need to give them the "coherence, fullness, and closure of an image of life that is and can only be imaginary" (24). This demand for closure, White explains, is also a demand for moral meaning (21).[19] Thus, through the act of reading, the reader imposes order upon apparent chaos. As I read the transcript of The Queen v. Louis Riel, for instance, I translate the discrete stories that emerge from the trial into an ordered vision of what pits Louis Riel against the Queen's representatives in Canada. But this activity goes beyond mere deference to a trial's binary construction. As a reader, I bring the adversarial narratives

[19] White equates morality with ethics (11) and suggests that the set of rules or principles that lead us to conclude that something "is just or unjust" can be called moral or ethical (19-20). Morality, for him, is therefore not merely a set of standards for human conduct, but one that leads to the apprehension of the justice of a given situation.

together into a coherent moral whole by noticing contradictions or glaring rhetorical touches that may, for example, lead me to decide against the jury and find that the trial was actually a travesty of justice. The reader's role in reading a trial transcript is therefore akin to that of a judge, for only a judge has an educated vision of the trial that transcends even that of the jury. As readers, then, we understand trials as distinct narratives formed, as any novel, by what Abbott calls "micro-narratives" and by what narratologists like Genette and Prince call "metadiegetic" narratives, or narratives embedded within a primary one (Prince 50).

The above statement naturally begs the question: Are literary narratives perfectly equivalent to legal narratives? Rather than open a rather large can of worms I prefer to answer my own question in reference to the particular narratives contained within my study. The question must therefore be reformulated as follows: Are literary trial-like counternarratives similar to actual trial narratives? The question partly contains its own answer, for a 'trial-like' narrative surely differs from a real trial narrative. These literary counternarratives resemble trial narratives in that they enter into a debate with the general narrative that is the historical trial, and thus participate in a trial's adversarial format. Ward's contention above that literary narratives may not have the arguments and full authority of the law and thus cannot aspire to "instruct us" with regard to the nature of criminal procedure or evidence is therefore both disputable *and* true at once.

According to Ward, a novel such as Kafka's *The Trial* may not aspire to enlighten us on the fine points of Austro-Hungarian criminal procedure, just as Rudy Wiebe's *The Temptations of Big Bear* may not aim to teach us anything specifically 'juridical' about formal and substantive equality. But these literary works may nonetheless hint at

problems with procedure or, in the case of Wiebe's novel, at a lingering or unacceptable perception of Natives as being dissimilar and therefore unequal to the Canadian White population. Moreover, critics who pick up on these hints may choose, as I did, to look through *legal* documents and cases, or through conventionally legal jurisprudential texts, for evidence that their hunches are either correct or mistaken. This ability to look at novels in general—and at trial novels such as the ones in this study in particular—as potentially based in sound legal thought is, I would argue, what may in fact put literature on the map as a critical adjuvant to traditional legal jurisprudence. It may also establish, along with legal, political, or philosophical texts, the broader type of jurisprudence spelled out by Ward. If I partly disagree with Ward, then, it is largely because he undermines his own defence of interdisciplinarity by underestimating literary narratives.[20]

This is not to say, however, that the literary counternarratives I showcase in my study are entirely invested with the force and power of the law just because they elicit a legal interpretation. As Robert Cover reminds the legal community in "Violence and the Word," legal interpretation "is either played out on the field of pain and death or it is something less (or more) than law" (1606-607). As I have already reminded my own readers, criminal trial narratives often have at stake the life or liberty of a person. Cover echoes this thought when he writes that "[t]he experience of the prisoner [during the trial] is, from the outset, an experience of being violently dominated, and it is colored from the beginning by the fear of being violently treated" (1608). A literary narrative seldom has

[20] To be fair to Ian Ward, his remark about Kafka's *The Trial* may be taken to mean that literary texts do not *necessarily* aspire to instruct us on the fine points of the law, although they *may* do so. Trial novels such as the ones I cover in this study, of course, have greater chances of referring directly to detailed or specific legal points than metaphoric works such as *The Trial*.

that effect. Elaine Scarry draws a similar distinction between what she calls the "made-up" products of literary activity and the "made-real" world of law, which enforces imaginary concepts within society (286). Here, the difference between a trial narrative and a literary counternarrative is, I would argue, one of *degree* in that both address vital legal issues, yet one has consequences on human lives that the other fails to produce. At most literature can change one's consciousness, which, in turn, may alter the course of one's life. But except in rare cases when, due to censorship, the content of a novel can result in the imprisonment or death of its author, literary works rarely have a direct effect on the life or death of actual persons.

Legal and literary narratives also exhibit differences in *kind*. Trial narratives in particular are enabled and constrained by procedural and evidentiary rules that are absent from literary works. This is made clear in the trials discussed in this study. The historical Grace Marks failed to testify at her own trial, which is a defendant's prerogative. In *Alias Grace*, however, Grace speaks at length in her own defence. Similarly, during the historical Big Bear trial, Big Bear's Cree words were filtered first through those of an English interpreter and then again through the ritualistic language of the law, which requires that certain standard answers be provided at certain times during the trial, regardless of whether the accused is ready or willing to provide such answers. In *The Temptations of Big Bear*, however, the Cree chief's trial is narrated in such a way that the reader is privy to his thoughts and idiosyncratic (Cree) way of looking at the trial. At the same time, the reader is made conscious of the violence done to Big Bear as he is forced to abide by the trial's rules. *The Scorched-Wood People* shows that a trial's chronology is different from that of a personal or literary narrative. Lynn Crosbie's

Paul's Case shows that even when the sentencing process aims to be merciful to the rights of the victims, and open to their emotions and pain, it is nonetheless bound by the rules of precedent that require that a victim-impact statement be only one among several factors in the determination of a sentence. The novel also illustrates the dangers of vigilante justice. Finally, another glaring difference in *kind* between trial narratives and literary counternarratives lies in the absence of an author in the case of the former, and in the clear presence of one in the case of the latter. A trial narrative can be seen to have *two* authors—namely, the lawyers for the prosecution and the defence—but can also be apprehended as a cohesive whole by the *reader* of the transcript.

This matter of the existence of a literary counternarrative's author is worth revisiting insofar as it touches upon my interpretations of the novels covered in this study. If I write, for example, that *The Temptations of Big Bear* hints at a problem in the Canadian perception of First Nations, thus perhaps raising the legal spectre of formal *versus* substantive equality, I do not, in this study, mean to imply that it is Rudy Wiebe himself who hints at such legal precepts. In fact, Rudy Wiebe never did say such a thing, or at least never in such clearly juridical terms. Yet this reading of his novel was, in my mind, obvious once I compared the transcript of Big Bear's trial with the novel itself. Once I read the novel *as* a trial narrative, it was clear that the historical judge and lawyers had raised points about equality that they had failed to resolve and which the novel develops. Ronald Dworkin gives words to what I aim to explain here when he writes that there is "an experience familiar to anyone who creates anything, of suddenly seeing something 'in' it that he did not previously know was there. This is something [. . .] expressed in the author's cliché, that his characters seem to have minds of their own"

(156). There are of course two main schools of literary interpretation: one which considers the author's intentions and one which does not. My own study tends to be of the latter sort, although I would subscribe to the conciliatory wisdom of another law-and-literature scholar, Stanley Fish, who notes that one normally reads a literary text by reference to an intention, itself interpretatively produced according to the needs of one's interpretative community (*Doing What Comes* 303-304).

Throughout my study I therefore use the term "implied author" rather than "author" for both pragmatic and narratological reasons. Pragmatically, it would be unwise to claim, for example, that Lynn Crosbie herself advocates the avenging rape of Paul Bernardo in his Kingston penitentiary cell. The statement might be false and, even if it were not, it is potentially litigious. Narratologically speaking, the concept of implied author—defined by Prince as the author's persona "reconstructed from the text" and taken, in accordance with Wayne Booth's theory, to be "standing behind the scenes and to be responsible for [the text's] design and for the values and cultural forms it adheres to" (Prince 42)—is more precise, or less confusing than that of author.[21] The notion that there is one implied author per novel clarifies any confusion that might arise from the idea that Rudy Wiebe, for instance, exhibits a certain tolerant understanding of inter-tribal warfare in *The Temptations of Big Bear*, but is far less indulgent towards armed confrontation between Métis and Whites in *The Scorched-Wood People*. To paraphrase

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[21] See Booth:

> One sense of the implied author includes not only the extractable meanings but also the moral and emotional content of each bit of action and suffering of all the characters. It includes, in short, the intuitive apprehension of a completed artistic whole; the chief value to which *this* implied author is committed, regardless of what party his creator belongs to in real life, is that which is expressed by the total form. (73-74)

Booth adds that "in this distinction between author and implied author we find the middle position between the technical irrelevance to talk about the artist's objectivity and the harmful error of pretending that an author can allow direct intrusions of his own immediate problems and desires" (75).

Stanley Fish, I read this study's novels by reference to an intention (derived from an implied author), itself interpretively apprehended by me, *both* as scholar *and* as a member of an ideal, imagined community of literate readers endowed with enough discernment to perform as appellate judges (and represented by the implied reader). This readerly apprehension of literary narratives through the mechanism of the implied author thus brings literary narratives closer to courtroom ones, since I have already established that a trial narrative can be conceived as a coherent whole through the implied reader's critical effort.

There are, then, similarities between trial narratives and literary counternarratives, just as there are differences of degree and kind between them. I would, however, argue that currently, and due perhaps to our proximity to the unusual litigiousness of American society, legal discourses are culturally pervasive. Carol Clover writes that, "the basis of the Anglo-American form in an adversarial system and in oral presentation before a jury makes our [North-American] trials fundamentally more dramatic than the inquisitorial and professionally judged trials of the Continent" (98). Americans, Clover explains, "are said to be trial obsessed, and it is also the case that the courtroom drama of film and television is an overwhelming Anglo-American phenomenon" (97). Consequently, the adversarial structure of the trial keeps seeping into our Canadian cultural narratives, notably in the form of literary narratives that postulate that truth can be attained through conflicting narratives. This structure is all the more natural within a trial novel; it defines the genre. Thus, trial novels *both* highlight *and* muddy the differences between literary and legal narratives. The debate that ensues between the two types of narratives results in what I would call a communal narrative about the Canadian nation, and about citizenship,

degrees of criminality, and visions of justice. Despite the differences between law and literature, this communal narrative is already familiar to Canadians, in large part because of the pervasiveness of cultural references concerning the North American adversarial system.

The present study is uncommon, however, in that rather than being based—as law-and-literature studies tend to be—on British or American literary texts, it represents an examination of several works of Canadian fiction that refer directly to and engage historical Canadian legal documents. With this effort I contribute to the study of Canadian literature and culture through an interdisciplinary field that has so far been largely unexploited in this country. Those few scholars who have written on the interdisciplinary topic of law and literature before me have mostly underscored the superiority of literature over law. They have sundered the two disciplines by making them largely incompatible, rather than complementary. Instead of pitting literature against law, I emphasize the jurisprudential normativity of literary texts and the debate that they entertain with the legal community in an effort to enlighten readers on the meanings of justice and on matters pertinent to the inclusion and exclusion of citizens within the nation. I also redefine four Canadian novels as trial novels with conventions of their own. I express the hope, then, that in considering my claims, the 'Supreme Court' formed by the academic community chooses to reverse prior readings of those same novels and finds my own interdisciplinary study to be at once pertinent and timely.

CHAPTER ONE

In Her Own Defence: Margaret Atwood's *Alias Grace* and the Construction of a Trial Narrative

Introduction

Revision, or its possibility, is among the traditional components of the legal adversarial system. Not only does each of the parties of a trial challenge and reformulate the other's version of the facts, or the other's understanding of the law, but the trial verdict and sentence themselves may be contested at various levels of appeal, where the adversarial process begins anew in an attempt to further circumscribe communal standards and ideals. But the generic trial's revisory mechanisms also correspond to similar drives in other cultural areas. Both postmodernist perceptions of community (Richard Delgado's belief in the need for lay oppositional narratives to defy dominant legal discourses, for instance, or Jean-François Lyotard's *lack* of belief in the advantages, or even in the possibility, of a final consensus in the realm of justice), and James Boyd White's or Martha Nussbaum's communitarian trust in norms that can be fashioned out of an evolving dialogue between parties or disciplines are determined by a similar will to revise the status quo.[1]

According to *Black's Law Dictionary*, the legal adversarial system is also defined, more narrowly and less altruistically, as one ruled by agonistic and competing hermeneutic endeavours which cause "parties to contend against each other for a result favourable to themselves" ("Adversary system"). In Margaret Atwood's 1996 novel,

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[1] I refer in my Introduction to the theoretical work of Delgado, Lyotard, Nussbaum, and White. See pp. 9-13.

Alias Grace, Grace Marks (a woman historically convicted in Toronto for the brutal 1843 murders of her employer, Thomas Kinnear, and of his housekeeper, Nancy Montgomery) is given a chance to speak out against her conviction. As the novel's morally ambiguous heroine, Grace might well describe herself as a party to a battle she desperately needs to win. Indeed, *Alias Grace* resembles an adversarial trial during which historical narratives of Grace Marks as an accomplice to murder are challenged by the fictional Grace Marks's narration of events.[2] More precisely, the account the fictive Grace gives of her life, first, and then of the murders constitute a larger homodiegetic[3] 'counternarrative' to the novel's collected narratives of her arraignment, of her trial, of her post-trial confession, and of her conviction and incarceration.[4] By way of this counternarrative, the fictional Grace puts herself on the stand *and* acts as her own defence attorney. Thus, she (1) mocks and denounces the Tory society that judged her; (2) appropriates courtroom narrative styles for her own instrumental ends; and (3) confronts the implied reader with the dangers of narrative-based justice and courtroom sensationalism.

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[2] The novel does no more than *resemble* an adversarial trial in the opposition of its narratives. As I stated earlier in my Introduction, novels and trials differ. In *Alias Grace*, for example, Grace's narrative opposes certain opinion (rather than factual) testimonies concerning her state of mind or character. As *Black's Law Dictionary* explains, in any Western courtroom, opinion testimonies are admissible only from expert witnesses, or from lay witnesses on the condition that they be: "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of [the witness's] testimony or the determination of a fact in issue" ("Opinion evidence or testimony"). 'Trial novels,' so-called in my dissertation because they largely reproduce the courtroom's adversarial model, therefore subscribe to looser or more generous standards of proof. At the same time, some of the instances of spontaneity which are possible and permitted in a court of law are denied during the reading process. Unlike a real judge, for instance, the reader cannot interrupt a narrative to question the witness and is therefore restricted to an immutable 'testimony' that evades clarification.

[3] Gerald Prince defines a "homodiegetic narrative" as "a narrative the narrator of which is a character in the situations and events recounted" (41).

[4] My interpretation of *Alias Grace* is not dependent on a study of authorial intention. In writing her novel, however, Margaret Atwood relied heavily on court records and newspaper accounts of the trial. It would therefore not be entirely surprising if the adversarial format had found its way, consciously or subconsciously, into the novel's structure.

This particular reading of *Alias Grace* has the advantage of reconciling the novel's obvious postmodern and realist strands. The truth may never emerge entirely from a trial; it may be replaced instead by a constructed representation of the past that much resembles fiction. Yet by accepting this representation as an approximation of the truth, the judicial system also allows for its revision. Through the interplay of the sundry narratives that appear in the novel, the implied author both raises the spectre of postmodernist scepticism in relation to notions like truth or history and asks the implied reader to nonetheless gather and ponder evidence towards a revised 'verdict.'

Alias Grace and Its Critics: Realist or Postmodernist Novel?

Many of the articles published on Margaret Atwood's *Alias Grace* since the late 1990s reveal a measure of discomfort with what appears to be the novel's incompatible aims, namely those of providing a postmodernist critique of history within the framework of nineteenth-century realist conventions. By and large, critics have noticed these currents in Atwood's writing, yet have failed to bring them together into a coherent whole. Coral Ann Howells, Hilary Mantel, Burkhard Niederhoff, Alice Palumbo, Barbara Hill Rigney, and Margaret Rogerson, for example, acknowledge the postmodernist sensibility and techniques at play within *Alias Grace*. Mantel emphasizes the novel's fragmentation (4); Niederhoff classifies the novel as an example of historiographic metafiction and concedes that such a genre is "fundamentally sceptical, eroding the distinction between fact and fiction as well as undermining all claims to truth and knowledge" (81); Palumbo argues that Atwood makes it clear that "it is nearly impossible to expect one single 'true story' to emerge from the wealth of alternatives"

(85); similarly, Rigney states that Atwood's major thesis is "the inherent ambiguity of the nature of truth" (159); and Rogerson recognizes the novel's function as process rather than mere product when she refers to its central quilting metaphor and suggests that, in the act of reading and interpretation, the reader him- or herself becomes a quiltmaker (9). The same scholars, however, give voice to a certain malaise when they attempt to make sense of *Alias Grace*'s outcome. Despite the work's sceptical stance towards truth, the matter of whether the character of Grace Marks is guilty *or* innocent, a temptress *or* a victim, a liar *or* a paragon of integrity, is one which these critics are unwilling to abandon. Mantel raises the question: "with her background of deprivation, how likely is it that she had retained any innocence at all? Grace is a deceiver" (4). Niederhoff, in turn, concludes that Atwood is after all less interested in the truth value of historical reconstruction "than in its effects on people's lives" (82). In his reading of the novel, he accepts unequivocally that Grace was involved in the murders as 'Mary Whitney' (80).

Legal scholar Richard Sherwin would argue that these writers' unease is understandable. In *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture*, Sherwin contends that "in law as elsewhere in the culture we are becoming increasingly enmeshed in a futile and dangerous oscillation between two extremes." Sherwin identifies these extremes as "radical disenchantment (or 'skeptical postmodernism')," on the one hand, and, on the other, a "reactionary nostalgia" for the certainties offered by the Enlightenment (8). Among Atwood scholars, Magali Cornier Michael is perhaps the one whose reading of *Alias Grace* best resolves the cultural and intellectual extremes identified by Sherwin. Michael sees in *Alias Grace* a feminist, postmodern approach to the recovery of the past that deals a clear blow to the scientific

positivism that continues to dominate Western thought (423). *Alias Grace*, she argues, insists on the validity and importance of women's oral history. Grace's patchwork quilting itself stands as a metaphor for alternative forms of thinking about and narrating the past (427). Yet as Atwood herself comments in her "In Search of *Alias Grace*," human beings "are subject to error, intentional or not, and to the very human desire to magnify a scandal, and to their own biases" (32). The human endeavour that is narrative thus becomes both the key to times gone by and a fallible tool with which to recover the past.

Michael also briefly looks at the role of trial narratives. She asserts that *Alias Grace* presents a legal case with, as its focal point, a convicted murderess and notes once more that although "the legal process presents itself as an objective, positivist enterprise in its aim to uncover the 'truth,' its thoroughly discursive nature highlights the impossibility of accessing the past outside of narrative." Thus, the novel's references to the law become one more way to stress both the importance and the relative value and impact of narrative (425). Michael, however, stops short of outlining the ways in which *Alias Grace* as a whole can be viewed as trial-like.

Still, Magali Cornier Michael is right to point out that the trial process is hardly optimistic and reliable in its positivism. Even though two conflicting (and largely narrative) versions of a particular event are recounted at trial, each of these versions includes numerous testimonies. Attempts at contradicting these testimonies are, furthermore, generally made during cross-examination and raise doubts as to the possibility of a final, definitive, and unrevisable resolution. Somewhat like certain postmodern literary works, then, trials may be viewed as processes (rather than products)

received by and necessitating the participation of an adjudicating audience (judge or jury) to exist as such. To borrow and somewhat modify Linda Hutcheon's statement concerning the role of reading in textual production, the act of adjudication "participates in (and indeed posits and implies)" the production of courtroom narratives (*Canadian Postmodern* 61). Legal judgments therefore require that trial narratives *also* be concluded and grasped teleologically. Furthermore, adversarial trial narratives aim at one of two possible conclusions: in a criminal trial, for example, the defendant is either guilty or innocent. Truth-finding thus may be approximate, but it is also based upon procedural constraints and predetermined degrees of proof, which grant the process greater objectivity and aim at a resolution.

Alias Grace as a Trial Novel

Not all literary works require such stringent degrees of proof or manner of closure, of course. In this study, however, I argue that the implied author in *Alias Grace* negotiates her way between the poles of sceptical postmodernism and the intended objectivity of various quests for certainty precisely *because* she ventures into the realm of law or, more precisely, that of courtroom narratives.

Through the implied author, the fictional Grace casts two of her narratees, Dr. Simon Jordan and the implied reader, in the role of appellate judges who, several years after her initial trial, might reopen her case and listen to or read new testimonies. For Jordan, the matter of Grace's guilt or innocence remains very much at issue. The implied reader, in turn, pores over Grace's fictional 'defence' of her own case not to render a new verdict as to her guilt or innocence, but rather to revisit and reflect upon the precedent it

represents in order to evaluate the workings and weaknesses of courtroom justice since 1843 and the popular demands that feed it. Like the other three 'counternarratives' discussed in this dissertation, the fictive Grace's accounts of her life and of the homicides therefore link together a historical trial that took place within a historical community, a fictional retelling and revisiting of historical events, and an implied reader's understanding and possible criticism or judgment of both the novel and the original trial. Her fictional counternarrative as a whole thus functions as a hinge on which historical, imagined, and present-day communities turn and come into contact with one another. I therefore characterize *Alias Grace* as a 'trial novel' because Grace's narration of events, which is central to the novel, *opposes* fictionalized narratives to historical ones and asks the implied reader to take a second look at and perhaps *revise* the old acceptance of the sensationalist narrativization of notorious trials.

Trial Novel vs. (Anti)Detective Novel

Hilde Staels, however, prefers to qualify *Alias Grace* as an antidetective novel, or as "a parody of the traditional British detective genre in that Atwood uses the detective genre as subtext while challenging its conventions" (432). I disagree with Staels, yet her qualification bears scrutiny; after all, detection and courtroom justice are both branches of what is commonly called law enforcement.

Tzvetan Todorov defines the classic detective novel as one comprised of two distinct entities, namely a crime and its investigation. The crime story describes what really happened; the investigation surrounding the crime, however, constitutes a narrative which explains how the reader or the narrator came to hear of the crime (58).

Furthermore, Todorov postulates, various other rules previously defined by others apply: out of fairness and respect for the working classes, for instance, the culprit can never be a butler or a chambermaid;[5] everything in the detective novel must have a rational explanation; and a solution must be found to the crime, although this solution can never be too obvious or banal (62). To apply these canonical definitions of what constitutes a detective novel to *Alias Grace* is naturally a frustrating exercise. By the time the novel opens, the culprits, a stableman *and* a maid, have already been apprehended, judged, and sentenced (although the matter of Grace's possible innocence remains at issue). To characterize Dr. Simon Jordan as a detective would be equally futile since his seemingly rational or pseudo-scientific methods of detection never lead him to a definitive understanding of the crime. Based on these characteristics alone, Staels is possibly right to argue that, rather than being a detective novel, *Alias Grace* can be identified as antidetective fiction, or as a subversion or parody of detective fiction.

Staels implicitly bases her conclusion on Linda Hutcheon's now-famous definition of parody as "repetition with critical distance that allows ironic signalling of difference at the very heart of similarity" (*Poetics* 26) and, in part and more explicitly, on Stefano Tani's *The Doomed Detective: The Contribution of the Detective Novel to Postmodern American and Italian Fiction.* Tani explains, for instance, that in certain antidetective novels, "instead of a solution, there is a suspension of the solution" (43). This resistance of the antidetective novel to a rationally detectable solution to a mystery is explained in turn by Nancy Bjerring, who writes that:

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[5] I owe to Roxanne Rimstead the awareness that variants to this rule do exist. For instance, in "Household Spies," Anthea Trodd notes that in certain mid-Victorian fiction, "the householder's outraged sense of routine invasion of privacy by his domestic staff expressed itself in the production of crime plots in which servants [. . .] routinely play highly visible and sinister roles" (175). See also Rimstead 47.

> [p]ostmodern parodies of the detective story genre subvert the generic form in two crucial respects: they call into question the capacity of human reason and its traditional methods to explain and verify the events of experience, both past and present; and they continually remind the reader of the inevitable failure of fictional discourse either definitively to record experience itself or to propose convincing solutions, rational or otherwise [. . .]. (328)

Alias Grace offers no solution to the reader as far as the 'whodunit' at its core is concerned. Whether Grace is guilty or innocent remains a mystery by novel's end. Her true role in the murders remains anyone's guess.

Is *Alias Grace*, then, an antidetective novel? H. Porter Abbott, in the *Cambridge Introduction to Narrative*, notes that a trial (a criminal one, for example) is typically populated by what he calls "shadow stories." The narrative of the identity of the criminal and of the exact manner in which the crime was committed is "incomplete, missing key elements" and is "hidden in the shadows" (145). Unless direct witnesses and evidence are available, each party to a trial offers a speculative version of the truth and nothing more. I would therefore agree with Staels that a novel like *Alias Grace* does partly subvert the detective story genre defined, among others, by Todorov. I would, however, view detection as a sub-category of the trial novel, in that the collection of evidence is an essential component of any trial (and notably during criminal trials, the judge sometimes directly questions the witnesses and the accused in a quest for answers). But the adversarial clash of different versions of a same story is what best defines a trial, as opposed to mere detection. I claim, further, that in the case of *Alias Grace,* at least, this

opposition of narratives forces the implied reader to reflect precisely on the ways in which justice is tentatively meted out. Thus, rather than merely subvert or parody what some might perceive as humanistic arrogance, the trial novel builds upon the confusion brought about by opposing narratives and asks the implied reader to ponder and revise (I use this last verb here synonymously with "to revisit" or "to reconsider") juridical norms and legal epistemologies. More simply, it urges the reader to consider the 'case' of narrative-based justice. In *Alias Grace*, the fictional Grace Marks and her counternarrative constitute the media through which we conduct this inquiry.

The Trial of the Historical Grace Marks

The historical Grace Marks was born an Anglican in the North of Ireland in 1827 (Discharge Records; Walton 3). She was the daughter of a stone-mason, who landed with her in Canada around 1840, when she would have been about thirteen. Upon settling in what was then the Township of Toronto, in Upper Canada, she worked as a servant in various households (Walton 3). Her last employer was Thomas Kinnear, a Tory man of leisure whose house in Richmond Hill he shared with his housekeeper, Nancy Montgomery. In July 1843, the month of her sixteenth birthday, Grace was arrested in Lewiston, New York, for the violent homicide of both Kinnear and Montgomery. Kinnear had been shot and Montgomery bludgeoned with an axe and strangled. The twenty-one-year-old James McDermott, who had also been a servant at the Kinnear household, was arrested along with Grace. Both were tried in Toronto on November 3 and 4, 1843, respectively. There are no trial transcripts of the Marks or McDermott trials; transcripts did not exist in Canada before the 1860s. In the interest of justice, however,

the presiding judge at both events, Chief Justice Sir Beverley Robinson, a well-respected Tory jurist, ordered that a summary of the trials be put together by coroner George Walton and published.[6] The same summary was later published independently by the *Star and Transcript* as a fifteen-page document that included the two convicts' post-trial confessions and their etched portraits. Justice Robinson's benchbook also remains available today from the Ontario Archives in Toronto. In addition to Justice Robinson, a jury of twelve was also present in each case (Q.B. Criminal Assize 175-76). McDermott was charged with "murder against others with other counts" (Robinson 69). He was found guilty, received a death sentence, and was hanged eighteen days later (Walton 16). Grace was charged with being an accessory before and after the fact (Robinson 97). Her historical defence attorney, Kenneth MacKenzie, depicted her instead as an uneducated but honest hard-working girl, who found herself entangled in an unfortunate situation and who was then taken hostage by the real murderer, James McDermott. That she was arrested along with him was a grave error; she was McDermott's victim, not his accomplice (Walton 14). Justice Robinson seems to have never bought this version of events. His benchbook is blackened by notes that hint at pointed questions: Was Grace innocent, or did she aid and abet McDermott? Why did she never alert her employer, the authorities, or even the visiting butcher of McDermott's deadly plans? Why did she flee with McDermott? If forced against her will to flee with him, why did she wear one of the victims' clothes? The jury must have wondered about all this, too, for Grace was found guilty of murder and handed a death sentence (Robinson 111-13). The jurors, however, recommended mercy in her case (113), perhaps because of her young age and because

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[6] See "The Trial of James McDermott" and "The Trial of Grace Marks" in Toronto's the *British Colonist*, the *Patriot*, and the *Star, Transcript, and General Advertiser*.

several witnesses at her trial spoke well of her. Her death sentence was commuted to imprisonment for life at the relatively new Kingston penitentiary.[7] She left the penitentiary twice: between 1852 and 1853, when she was institutionalized at the Provincial Lunatic Asylum (Discharge Register),[8] and then again on the occasion of her pardon in 1872 (*Alias Grace* 465).

Grace Marks as a Canadian Literary Heroine

Although the 1885 trial of Louis Riel is often hailed as the most notorious trial in the history of Canada, the historical Grace Marks's contemporaries avidly read reports of her arrest and trial in Toronto newspapers like the *British Colonist*, the *Christian Guardian*, the *Patriot*, or the *Star, Transcript and General Advertiser*. Slowly but surely, she too, like Riel, began to capture the Canadian cultural imagination. Aside from being central to *Alias Grace* itself, she is the object of a chapter bearing her name and of

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[7] The penitentiary at Kingston was built in 1835 following repeated cries for criminal law reform, notably from Chief Justice Robinson himself. Penal legislation in the Upper Canada of the 1830s counted 127 criminal offences. Other offences for which jail was deemed necessary were just as numerous. Local gaols, however, were too small and too poorly equipped to hold prisoners and to deter them and others from a life of crime. The Chief Justice proposed that these problems be solved by reducing the number of offences for which death was the maximum penalty and by opening a penitentiary where non-capital offenders could both serve their sentences and be rehabilitated (Brode 174; McMahon 404-405). Furthermore, Robinson argued, the penitentiary would in no way tax the community. Besides being kept away from the society they had harmed, convicts would be put to labour:

> the proceeds from their work would help defray the cost of the institution and would lift a burden from the provincial treasury. Given the fact that the activities of the inmates were under the control of the legislature, their work would be prevented from unfairly competing with, or undercutting, free labour in the colony. (McMahon 399-400)

To a certain degree, when she came to serve her sentence eight years after the penitentiary first opened its doors, the historical Grace Marks became part of an Upper-Canadian experiment in law enforcement. Traces of one of the ways in which this exercise in progressive thinking was abused crop up in *Alias Grace*, notably when the fictional Grace is 'hired' to work as a servant at the Governor's mansion while still serving her sentence. "[A]fter all," the Governor's wife explains in the novel, "[Grace] was trained as a servant, and it's as well to keep them employed" (24). As a convicted felon, however, Grace works for free. The Governor, in turn, saves money by not having to hire and pay a more law-abiding worker.

[8] Kathleen Kendall's own research into Grace's institutionalization reveals that she was transferred from the penitentiary to the lunatic asylum for being disruptive of the "order" of the Kingston penitentiary (113).

another passing mention in Susanna Moodie's 1853 *Life in the Clearings Versus the Bush*. In 1974, Margaret Atwood herself anticipated the writing of *Alias Grace* when she wrote *The Servant Girl*, a CBC Television drama based on Moodie's narrative (Cooke 222). Grace is also the runaway culprit of Kinnear's and Montgomery's gruesome murders in Ronald Hambleton's 1978 'true-crime fiction,'[9] *A Master Killing*.[10]

Grace Marks has become a literary heroine, one suspects, for a number of reasons. The historical Grace was extremely young when accused of murder and, if one is to rely on a court drawing published in 1843 along with a summary of her trial, she was an attractive woman (Walton).[11] The pursuit of which she and McDermott were the objects on their way to the United States was, for a time, packed with suspense. The quadrangle formed by the two unmarried inhabitants of the Richmond Hill house, along with their equally unmarried servants, fanned rumours of scandal and was fraught with social tension. Capitalism and the industrial revolution brought with them new liberties along

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[9] In his recent "True Crime," Anthony Chase suggests, in accordance with Anita Biressi, whom he quotes, that true-crime fiction owes much to pornography in that, like pornography, it consists of a depiction of the somewhat marginal acts and suffering of real people for profit or entertainment (457). The genre is said to have acquired greater dignity and critical recognition with Truman Capote's *In Cold Blood*, which combines the narrative techniques of fiction along with those of journalism. "Whether [. . .] called the non-fiction novel," Chase writes,

> or the New Journalism and [. . .] produced by Norman Mailer and Gore Vidal, Ann Rule and Joe McGuiness, or lesser lights, it [soon] became clear that the true crime genre was flexible enough to include hard-boiled reporting, lurid pulp exposé, or literature which liberally mingled fact and fiction. It was the violence, the realism, the attraction/repulsion tension, the lurid detail and grotesque depictions, that made writing true crime.

True-crime fiction is therefore mostly known for its combination of genres (which form a genre in itself) and for its shocking content and venality.

[10] Unlike Atwood's *Alias Grace*, Hambleton's work is more concerned with the Township of Toronto politics involved in the homicide investigation and with the pursuit of the suspects than it is with either of the accused themselves.

[11] Susanna Moodie, however, was not entirely of this opinion. Although in *Life in the Clearings* she begins to paint Grace as a romantic heroine, with her "slight graceful figure," and her "hopeless" look of melancholy and sorrow, Moodie gives way to her own fright and repugnance when she ends the description by stating that though Grace's face "would be rather handsome" it is marred by a "long curved chin," an unfortunate defect which gives it a "cunning, cruel expression" (169-70).

with old forms of injustice. Women like the historical Grace (and her fictional friend Mary Whitney, in Atwood's novel) were untethered to a family or husband and needed to work in order to survive. They sometimes became prey to unprincipled employers and were forced to react in a variety of ill-advised ways. The fictional Mary Whitney, pregnant with her young master's child, dies following a botched abortion. In Atwood's novel, Grace, herself a victim of sexual harassment at the hands of Mr. Haraghy, one of her employers, reflects that "although [she] remembered Mary's advice about kicking between the legs, [she] thought it would not be right to kick [her] employer, and might also lead to dismissal without a reference" (199). She suggests, as well, that her last employer, Thomas Kinnear, might have also attempted liberties. We may ask ourselves whether the historical Grace Marks was a victim of sexual harassment on Thomas Kinnear's part. Did she lose her composure and her capacity to endure such treatment, and finally plot his murder? These questions remain unanswered by either history or fiction, but what is perhaps more certain is that female criminality and the social responses to that criminality typically make for absorbing prose.

Margaret Atwood herself hints at an emerging interest in the criminality of women when she writes in the Afterword to *Alias Grace* that:

> [a]ttitudes towards [the historical Grace Marks] reflected contemporary ambiguity about the nature of women: was Grace a female fiend and temptress, the instigator of the crime and the real murderer of Nancy Montgomery, or was she an unwilling victim, forced to keep silent by McDermott's threats and by fear for her own life? (463-64).[12]

[12] See also Kendall, who supports Atwood's observation (111).

Nathalie Cooke notes Atwood's suggestion that gender may determine perceptions of guilt: men are perhaps more readily deemed guilty than arraigned women, and this seems to have played a part in the commutation of Grace Marks's death sentence, as it did in the more contemporary responses to convicted murder Karla Homolka, who received a much lighter sentence than her ex-husband and accomplice, Paul Bernardo (325).[13] In her lengthy review of *Alias Grace* for the *New York Review of Books*, Hilary Mantel also touches upon common reactions to the problematic criminality of women when she writes that "[f]emale violence is still thought worse than male violence because it is 'unnatural': and women should be natural creatures" (8). Atwood's and Mantel's observations are not necessarily contradictory. As legal scholar Richard Sherwin explains, in a court of law, epistemological anxieties tend to generate legal outcomes that are shrouded in protective, and often publicly-shared, fantasies (75-76). In other words, it may be because we persist in thinking of women as biologically incapable of crime, and because we view female violence as rare, horrific, and "unnatural" that we shy away from dealing women harsher sentences.[14]

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[13] See Thomas, who alludes briefly to the parallels between the Grace Marks and Karla Homolka cases. As Alice Palumbo remarks, as well, Grace Marks was never tried for the murder of Nancy Montgomery (84) (just as Karla Homolka was never formally charged with the drugging, rape, and manslaughter of her own sister, Tammy). Since both McDermott and Grace were found guilty and sentenced to death for Kinnear's murder, there was no longer any reason to try them a second time (and, one might add, for the murder of a mere housekeeper). This juridical decision doubtless proved fortunate for Grace. Although it was clear at their trials that it was indeed McDermott who pulled the trigger and killed Kinnear, the evidence related to the death by strangulation of Nancy Montgomery might have implicated Grace more directly. Since she also wore Nancy's clothes upon her arrest in Lewiston, the jury might have proven more willing to believe her guilty beyond the shadow of a doubt, and might not have recommended mercy.

[14] H. Porter Abbott remarks that the constructed "masterplot" of the virtuous, gentle, and nurturing woman who is, by nature, "incapable of [. . .] base acts" is one often used in the legal defence of female defendants (148). Curiously, literature itself boldly rebuts this legal 'fiction' with a character like Shakespeare's Lady Macbeth who, as Abbott states, both kills men "and dominates her husband" (149).

The nature and origin of Grace's criminality, then, is quite obviously a matter for speculation and a source of inspiration for writers. Additionally, for Atwood, *Alias Grace*—along with other contemporary Canadian historical novels—is located at the junction of the twentieth-century's distrust of history and of the nineteenth-century's obsession with the remembrance of things past ("Search" 10-12). The pull of history is evident. "[B]y taking a long hard look backwards," Atwood writes, "we place ourselves" (27). At the same time, both modernism and postmodernism emphasize the unreliability of time and memory. The past can no longer be represented as "an evenly flowing river" and becomes instead "a collage of freeze-frames, jumbled fragments, and jump cuts" (12). The writing of a novel that takes place in the 1800s thus becomes problematic in the late 1990s. The representation of a character like Grace Marks, of whom so much contradictory information has been offered, turns into a motivating challenge for a contemporary author.

Finally, the historical Grace is above all an object of curiosity because of the absence of an unmediated, historical narrative of her own. Her inquest testimony and post-trial confession (which was possibly meant to save her from the noose)[15] were contradictory and her confession, at least, was doubtless delivered under the counsel of her attorney. She is intriguing because her historical words are few.

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[15] The post-trial "Voluntary Confession of Grace Marks to Mr. George Walton in the Gaol on the 17th November, 1843" included in Walton's summary of the *Trials of James McDermott and Grace Marks* consists of a brief, factual, exculpatory four-page narrative in which Grace admits that she was an accessory to the murders, but only because she feared for her own life.

Contradictory Narrative Accounts of the Historical Grace Marks

No doubt because of her historical silence, no two accounts of her role in the murders are alike; the historical Grace Marks remains 'on trial' in the Canadian cultural imagination as contrasting narratives of her actions and motives continue unproven. As an example of such contradictory narratives, Susanna Moodie's account of Grace can be contrasted with coroner George Walton's summary of the McDermott and Marks trials.

A baffling multiplicity of perceptions is present within Susanna Moodie's chapter on Grace Marks in *Life in the Clearings*, which constitutes a series of reports on the state of society in Upper Canada. Mrs. Moodie's retelling of the murders and her impressions of the historical Grace find their way into *Alias Grace* as narratives that the fictional Grace herself feels compelled to counter with her own. In Mrs. Moodie's chapter, Grace is introduced first as a wily, convicted murderess, next as a diligent and perfectly ordinary servant girl of whom one must nonetheless remain a bit wary, for her look is somewhat "stealthy" and "furtive" (170), and, lastly, as a pitiable, repentant woman haunted and rendered mad by her own crimes. Above and beyond these shifting characterizations of Grace, what is perhaps most striking about Susanna Moodie's chapter is its literariness, if one is to take the term as an antonym for that which is rigorously factual. Mrs. Moodie herself admits that she writes about Grace from memory and is "not very certain as to dates" (158). Neither was she certain about names, apparently, for those of Thomas Kinnear and James McDermott are misspelled, and Nancy Montgomery is rechristened Hannah.[16] She also discloses that she heard about the Kinnear and Montgomery murders "not only from the public papers," but from Kenneth

[16] To be fair to Mrs. Moodie, on August 1 and 2, 1843, respectively, the Toronto *Patriot* and the *Christian Guardian* mistakenly reported that the female victim's name was "Ann Montgomery" ("Horrible Murder").

MacKenzie, "the gentleman who defended [Grace Marks] upon her trial" (157-58). In fact, the narrative of the homicides that Mrs. Moodie relays to her readers consists essentially of her remembrance of the account MacKenzie gave her of James McDermott's first-person confession on the eve of his execution.

Susanna Moodie's hearsay narrative may be compared to another version of McDermott's post-trial or pre-execution confession, transcribed along with a summary of the Marks and McDermott trials by Toronto coroner George Walton. Also told in the first person, this "Voluntary Confession of James McDermott to Mr. George Walton, in the Gaol of the Home District at Four O'Clock on Monday, the Twentieth of November, 1843" differs from Mrs. Moodie's text on a few points. In the Walton document, McDermott merely asserts that Nancy Montgomery and Grace often quarrelled (although no reason is given for such clashes) and that the latter said to him one day that poison poured into porridge would effectively get rid of both Kinnear and Montgomery (15). Mrs. Moodie's chapter on Grace, however, makes no mention of poison and inexplicably ascribes the killing of Nancy Montgomery to an obsessive adolescent crush that Grace may have had on Thomas Kinnear, and to the jealousy she felt towards Montgomery, whom she perceived as her rival.[17] Walton's summary of the court transcript also

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[17] It is, of course, plausible that a servant girl of sixteen might become infatuated with her worldly and liberal employer. To a contemporary reader, however, Mrs. Moodie's account of Kenneth MacKenzie's narrative is highly melodramatic. It features a previously murderous, scheming, and manipulative Grace, who suddenly pleads for both her life and that of Thomas Kinnear while a so-far reluctant McDermott becomes a bloodthirsty incarnation of evil who threatens to kill them both. Grace "trembled like a leaf" upon realizing that McDermott had unexpectedly acquired a taste for murder. "'Don't kill me,'" Grace begs McDermott in *Life in the Clearings*,

> 'I swear that I will not betray you; and oh, don't kill [Kinnear]!'
> 'And why the devil do you want me to spare him?'
> 'He is so handsome!'
> 'Pshaw!'
> 'So good-natured!' (163)

The scene, which was almost certainly written to provide Victorian readers with a few thrills and chills, now invokes laughter rather than horror or pity.

contradicts Mrs. Moodie's report that the dead body of Nancy Montgomery was finally cut by McDermott "in four pieces" (Moodie 164). The testimony of coroner David Bridgeford at James McDermott's trial reveals instead that the body of Nancy Montgomery was found "doubled up under a tub, in the cellar" (Walton 11). Since Kenneth MacKenzie was McDermott's defence lawyer, as well as Grace's, he must have been more than familiar with this detail; it is doubtful that he would have lied about it to Mrs. Moodie.

Yet few complete and detailed accounts exist on the true nature of Grace Marks or on the Richmond Hill murders. Margaret Atwood herself reports that in researching the murders she found that "the witnesses—even the eye-witnesses, even at the trial itself—could often not agree [. . .]. For instance, one says the Kinnear house was left in great disarray by the criminals, another says it was tidy and it was not realized at first that anything had been taken" ("Search" 33). Consequently, we are left today with narrative odds and ends.

Alias Grace's Adversarial Narratives About the Fictive Grace Marks

The fragmentation of accounts, tone, and information outlined above is mirrored in *Alias Grace* itself, throughout which the fictional Grace is finally given a chance to speak in her own defence while countering distinct versions of her life, actions, and character. Indeed, Grace's counternarrative as a whole is not the sole narrative found in *Alias Grace*. Accounts of Grace Marks are offered notably in the novel's epigraphs,[18] which contain excerpts from Moodie's narrative along with nineteenth-century

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[18] For in-depth studies of the novel's epigraphs, see Michael and Delord.

newspaper quotes and excerpts from the Walton document. The fictional Grace's narrated effort challenges both the historical and fictional narratives which once defined and continue (in the time of the novel) to define her either as a temptress and murderess or as gullible girl devoid of luck or judgment. In *Alias Grace*, these narratives, in turn, may be viewed as distinct testimonial accounts. It is this very narrative challenge, this contestational quest for, if not truth, then plausibility and credibility that effectively turns the novel into a contest of adversarial positions resembling that of a trial.[19]

Within *Alias Grace* itself, Susanna Moodie's sensational version of the murders and her assessment of Grace's demeanour; George Walton's published document, which includes the confessions of McDermott and Grace; sundry newspaper reports of Grace's and McDermott's arrest and trial; the fictionalized Kenneth MacKenzie's account of Grace's trial to alienist Simon Jordan; the letters of lunatic asylum physician Samuel Bannerling; and various epigraphed entries to the Kingston penitentiary warden's daybook, constitute those narratives that are concerned with the signs of Grace as a problematic (because profoundly enigmatic) element of a particular society.[20] Most of

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[19] Magali Cornier Michael, for example, suggests that such an adversarial process is indeed at work in *Alias Grace* when she observes that "the biases of each of the novel's epigraphs become apparent as each piece forcibly enters into conversation with the other piece." Michael, however, comes to the conclusion that "[o]ne result of the dialogue in which the epigraphs are implicitly engaged is a questioning of the validity or truth value of the documented sources themselves" (432). Since I claim in this chapter that these epigraphs (and other narratives located within the body of the novel itself) may be regarded as opinion testimonies of Grace's character, I would argue, rather, that these competing narratives offer, as in any court of law, complementary accounts of a problematic event or character. Bias is, after all, a reality of any trial since each of its two parties presents and narratively represents the same event differently.

[20] More specifically, these accounts include: attorney Kenneth MacKenzie's account of Grace's trial (chapter 45); Dr. Bannerling's letters to Simon Jordan and to Reverend Verringer (chapters 9 and 50, respectively); epigraphed excerpts from Mrs. Moodie's chapter on Grace in her *Life in the Clearings* (sections I, III, IV, VIII, IX, XI, XII); epigraphed excerpts from newspaper accounts in the *Toronto Mirror*, *Newmarket Era*, and *Chronicle & Gazette* of Grace's or McDermott's arrest and trial (sections II, VII, XI, XIV); epigraphed excerpts from entries in the Kingston penitentiary warden's daybook (section XIV); and epigraphed excerpts from Grace's and McDermott's post-sentencing confessions, made available in Walton's document (sections V, VIII, IX, X).

these are historical narratives, written by actual writers, reporters, coroners, and wardens, or produced under duress by the historical Grace Marks and James McDermott. The exceptions are the novel's account of the trial given by a fictionalized Kenneth MacKenzie (the historical attorney for the accused) to the fictional character of Simon Jordan, and the equally fictional letters of Dr. Bannerling to Jordan. Ironically, these prove no different than those historical records that damned her.

Bannerling writes that, in his estimation, Grace is "devoid of morals" (71) and possesses a "strongly developed" propensity to murder (435). The fictionalized MacKenzie also never hesitates to declare—privately and several years after the trial—that, in his opinion, she was "guilty as sin" of at least Nancy Montgomery's murder (*AG* 378); so do various historical sources epigraphed in the novel. Similarly, in his pre-execution confession reproduced in the novel as an epigraph, the historical James McDermott hints at Grace's motive for premeditated murder when he declares that Grace was "very jealous" of the housekeeper, "whom she hated" (*AG* 235). Susanna Moodie, whose words also find their way into the novel's epigraphs, hopes that Grace's guilt "may be attributed to the incipient workings" of madness (*AG* 44) and reports that, as a bloodied Nancy Montgomery pleaded for her life, McDermott remembered Grace saying, "'God has damned me for this,'" which could be construed as an admission of guilt (*AG* 285). Mrs. Moodie also has Grace saying to her lawyer, Kenneth MacKenzie, that she did indeed help strangle Nancy and that she is now haunted by the latter's bloodshot eyes. Meanwhile the Toronto *Chronicle and Gazette* notes that, when she was arrested, Grace was merely interested in having Nancy's stolen clothes returned to her (*AG* 347). Finally, the warden of the Kingston penitentiary writes in his daybook in April 1863 that "[t]he

convict Grace Marks has been guilty of a double or [. . .] (Bible) Murder" and adds in August of that same year that he fears she will yet show everyone what she is capable of doing (*AG* 417). Negative or damning opinions of Grace therefore abound throughout these narratives.

At the same time, in Atwood's novel, several persons believe firmly enough in Grace's innocence (and loathe the old Tory establishment enough) to take her on as their hobby and cause. A group of liberal-minded men and women led by the Reverend Verringer attempt to obtain a pardon for Grace, along with her release. The fictional Dr. Jordan is finally enlisted in this mission by Verringer, who is impressed by Jordan's progressive, scientific ideas. Jordan's own goal, meanwhile, is to begin a study of the criminal lunatic. Verringer suggests to him that "[a] diagnosis of latent insanity at the time of the murders, for instance [. .]" might bear looking into (80), especially since it was neglected at trial. Within *Alias Grace*, then, various characters take the stand and testify for or against the fictive Grace.

Courtroom Players in Grace Marks's Fictive Retrial

(a) Grace Marks as Witness and Her Own Defence Attorney; Dr. Jordan and The Implied Reader as Appellate Judges

Of course, actual trial narratives, and the narratives of criminal trials in particular, are equally and explicitly biased, since they serve the clear and predetermined aim of either convicting or acquitting the accused. They are therefore not mere descriptions of events, but teleological narrative constructs. Their content and organization are set by the party or side which they assist. In *Alias Grace*, the incarcerated Grace's own narration of her early years and of the events surrounding the Richmond Hill murders is meant both to

denounce the community that labelled and judged her, and to ensure that she is granted a pardon. In order to achieve this, she not only puts herself on the stand but also acts as her own defence attorney as she pleads before not one, but two types of judges. Aside from Jeremiah the Peddler (under the alias of Signor Geraldo Ponti), a tertiary narratee to whom she writes a single letter (XIV, 425-28), her counternarrative as a whole is addressed, at times simultaneously, to two narratees: Dr. Simon Jordan, her main narratee and somewhat benevolent judge, and the implied reader, her secondary narratee and a contemporary appellate judge. She addresses the implied reader along with Jordan, but also separately and differently, through her interior monologue.[21] She does so notably when she wishes to describe and comment upon her present circumstances; when she criticizes the Upper-Canadian Tories who condemned her; when Jordan is away; when she wishes to keep her thoughts or wry observations from him; or when she needs to "play dumb" in order to have an advantage over him and control the situation. For instance, when Jordan meets Grace for the first time, he presents her with an apple and asks, "What does Apple make you think of?" Grace tests his patience by providing him with a number of simple-minded answers ("A is for Apple," "Apple pie") before she admits to the implied reader that "[t]he apple of the Tree of Knowledge, is what he means. Good and Evil. Any child would guess it. But I will not oblige" (40).

[21] I take it for granted here that a monologue, whether it be interior or not, is more often than not addressed to somebody: to the narrator herself, or to a real or an imagined audience. See pp. 81-82 of this chapter for a longer discussion of this matter.

(b) The Implied Author as Court Clerk

One may ask, of course, why it is that the implied reader becomes privy to certain remarks and information not made available to Jordan. Among *Alias Grace*'s critics and interpreters, Barbara Hill Rigney has so far best described Margaret Atwood's relationship as author to her own work. "[W]e are still puzzled," she writes, "by Atwood's refusal to distinguish, let alone choose, between author and narrator, and who to hang in the end, since there is never, strictly speaking, an 'end' anyway. It is almost we, the readers, who are left hanging, bereft of answers, and condemned to imagine our own." Atwood, Rigney argues, attempts to disappear from much of her story by allowing Grace to speak for herself and take on much of the novel's space. But "how," Rigney asks, "do we know about Dr. Jordan's secret life?" (160-61). Other similar questions may be raised. Who assembles the epigraphs found before each of the novel's sections? Who deliberately causes some of these epigraphs to oppose and contradict one another, perhaps as the different versions of a same event oppose one another at trial? In these epigraphic segments, who juxtaposes criminal confessions and poetry, newspaper reports and literature, as if perhaps to suggest that there is little difference between the two forms of narrative? In the general opposition of such fragments, who echoes Grace's own binary vision when she tells Jordan that all quilts are similar in that their subjects and patterns change depending on whether we look at the dark or light pieces (162). In short, how to reconcile the notion that Grace acts as the novel's central narrator with the idea of an implied author who, behind the scenes, clearly lays out the novel's additional material for her implied reader?

In his study of contemporary Canadian fiction, Glenn Deer studies Atwood's *The Handmaid's Tale* and underlines the implied author's tendency to rather heavy-handedly intrude upon her heroine's narration by making it rhetorically proficient and powerful where artlessness and powerlessness might have been truer to circumstance. Deer justifies this intrusion by pointing out that the implied author's commitment to "an essentially *romance* novel genre" suggests that "she cannot help but make her 'heroine' into a figure of compelling existential fortitude" (128). I argue in the pages that follow that, in *Alias Grace*, the implied author sustains this commitment to the broad lines of the romance novel, although Grace Marks's need for strong rhetorical skills is justified. She needs, after all, to secure her own freedom.

I would add, however, that in *Alias Grace* the implied author is especially intriguing in that she acts somewhat like a mischievous clerk or officer of the court who might decide to file records according to her own sense of meaning or purpose. This clerk denies Jordan certain narratives and allows the implied reader additional information, yet categorically refuses to cross a line and write that reader's extratextual judgment (which prompts Rigney to state that the reader is "condemned" to do so on his or her own). Her arrangement of the extensive number of epigraphs used throughout the novel mirrors the binary structure of a trial and thus lays the groundwork for an understanding of Grace's account as a whole as a *counter*narrative to that which has already been written about her. She documents Jordan's secret life, but his life away from Grace is but a variation on Grace's story. Given the choice to kill Major Humphrey, his mistress' husband, he chooses to flee. What is the implied reader to deduce from this? Are the two 'cases' alike? Does one necessarily illuminate the other? Must the

reader, like a competent jurist, draw relevant distinctions between them? I claim that this surprising, but deliberate authorial *evasion* gives Grace's narration of her life and of the events surrounding the Richmond Hill murders additional weight as a trial narrative, the construction of which the implied reader, who acts as an appellate judge, needs to understand and assess carefully and responsibly for him- or herself.

The Fictive Grace Marks's 'Counternarrative': Trial Narrative or Confession?

(a) Traditional vs. Feminist Theory of Confession

One may, however, raise the objection that, rather than being a *trial narrative* addressed to different judges, the counternarrative offered by Grace is a *confession*. But what is a confession? In 1978, Michel Foucault defined it as "one of the West's most highly valued techniques for producing truth" (59). More precisely, Foucault wrote,

> [t]he confession is a ritual of discourse in which the speaking subject is also the subject of the statement; it is also a ritual that unfolds within a power relationship, for one does not confess without the presence (or virtual presence) of a partner who is not simply the interlocutor but the authority who requires the confession, prescribes and appreciates it [. . .]. (61-62)

Foucault further explained that the "agency of domination" between confessional partners resides not in the narrator or confessant "(for it is he [or she] who is constrained)" but in the listener or narratee, the confessor, "the one who questions and is supposed not to know" (62). Far from being merely "the judge who condemn[s] or acquit[s]," the confessor weaves a more general discourse of truth out of the particular confession

offered (67). A number of critics and theorists have since reacted to Foucault's assertions. Some, like Peter Brooks and Jeremy Tambling, have offered variations on Foucault's theme of the confession as a ritual of power.

Tambling brings the confession into our postmodern age and views it as the "triumph of the norm over the margins." The history of confession, he writes, "is that of power at the centre inducing people at the margins to internalize what is said about them" (6). Thus, Tambling sees in this process of subjugation the death of the speaking subject as well as that of difference and plurality. Brooks, in turn, looks upon both criminal confessions and autobiographical practices with suspicion. What if, he asks, the monologue these imply were in fact dictated suggestively by skilled confessors (detectives or readers) whose wishful narratives the confessing subject merely affirms or denies? This situation, he warns, "is called entrapment" (40-41). Others still, such as Rita Felski and Irene Gammel, have preferred to rebel against and diverge from Foucault's seminal description of the confessional process.

Felski, who studies specifically feminist confessions, defines the concept as an "intention to foreground details of the author's life," or as a form of personal history that communicates the essential nature and truth of the self (87). She therefore takes a stand against Foucault's definition of the confession in that she empowers the narrator, or confessant, rather than the narratee, or confessor. She adds that the more historical or literary (i.e., the more linear, chronological, organized, formal, self-conscious, or aestheticized) the confession, the less genuine or authentic it will appear to be on reception (97-98). Spontaneity (or the appearance, at least, of spontaneity), then, is essential to a credible confession (101). In her 1999 introduction to *Confessional*

Politics, which she edits, Irene Gammel argues in turn that confessants may at times bypass the ritual of power outlined by Foucault. Gammel, who writes about women's sexual self-representation, suggests that women are extremely creative in the ways in which they

> manipulate the confessional framework [. . .] through humor, parody, and satire; through fictionalizing strategies; through outrageous masquerades; through play and subversion; through various degrees of distance, ultimately struggling against the entrapment of patriarchal confessional paradigms. (9)

Gammel, in other words, sees at the heart of women's confessional strategies a "desire to create their own safe space in which to articulate their personal and sexual lives" (2). Safety is secured not only by way of the "manipulation" outlined above, but also, for example, by an "ideological rejection of shame, as shame is a central feature of the traditional confession" (8). Ironically, then, manipulation and evasion of the old Foucauldian pattern of confession according to which one almost abjectly 'tells all' empowers women to reveal what they wish to tell with greater dignity, and without anxiety about the narratee's real or perceived demands and expectations.

In view of the above brief review of relatively recent studies on confession, I would maintain that the counternarrative Grace delivers to Jordan and to the implied reader is a *trial* narrative rather than a confession. Grace addresses Jordan as she might address a judge who has the power to help her directly by writing a report that might secure her release. When Jordan leaves town in a hurry, his report unwritten, she admits that she is "unhappy," for "[t]here is nothing so discouraging as hopes raised and then

dashed again, it is almost worse than not having the hopes raised in the first place" (422). While alive, these hopes determine the content of her revelations to Jordan, yet she maintains a lawyer's strong focus and control over her own narration. "As long as I say something, anything," Grace notes, "Dr. Jordan smiles and writes it down, and tells me I am doing well" (69). Contrary to Foucault's assertions that the narratee is, in a confession, in control of the narrative process itself, here Jordan is in control only of his 'judgment.' Peter Brooks might add that through her narrative, Grace attempts to anticipate Jordan's expectations. Yet Jordan systematically and paradoxically expresses both his frustration over and his understanding of Grace's lack of compliance. Ultimately, she refuses to bestow authority of judgment upon him. Not only is she unwilling to play the associative games he sets up for her, and which involve various fruit and vegetables; not only does she challenge him by suggesting that she may end up telling lies; but he later comes to understand that anyone in her position might wish to deviate from "the pure, entire, and unblemished truth" (*AG* 322). Grace herself admits through one of her interior monologues that she has little enough of her own, "no belongings, no possession, no privacy to speak of [. . .] and therefore needs to "keep something" for herself (101).

Irene Gammel may object that Grace's account as a whole constitutes a manipulation of the Foucauldian confessional dynamic, and that her very distance and control over Jordan, her narratee, makes her a confessant that is particularly adept in the art of safe, dignified, and authentic self-representation, but I would contend that we cannot judge whether authenticity forms part of Grace's narration, for whether due to deceit or amnesia, she reveals too little about the murders themselves or her role in them.

Moreover, in between Jordan's visits, Grace has a great deal of free time to consider and construct her counternarrative. Aside from authenticity, if one thing is lacking from Grace's speech it is spontaneity and even its appearance; this is evident, notably, in her recalcitrance to Jordan's pseudo-scientific inquiries and in her comments to the implied reader, in which she sometimes mocks Jordan and wonders what she might tell him next. What Grace produces, then, is an elliptical and self-conscious narrative that is also of a teleological and instrumental nature. It responds directly to earlier, damning narratives, and its point is to attain a specific juridical result, namely, a legal pardon. It is useful to remember as well that, in a court of law, witnesses are sworn to tell 'the whole truth,' but that this so-called truth is always strictly limited to those questions asked and allowed during direct, cross-, and redirect examinations. As in the counternarrative presented by Grace, then, neither full disclosure nor spontaneity is invited into the courtroom.

(b) Grace Marks's Address to Dr. Jordan

Above all, Grace's narration of her life and of the brutal homicides takes place within an adversarial format. Rather than being a confessor, Jordan is a judge who has already heard those damning testimonies that placed Grace in a penitentiary cell. Jordan may well attempt to reassure Grace and others that he is merely a doctor and that he is less interested in the murders (41) and her guilt and innocence "than in..." (85), but he finds himself disturbingly incapable of finishing his sentence. Soon, Jordan begins to think like an appellate judge who might reopen a case to ponder its errors of fact and law. Was Grace possibly insane when she committed the murders? Insanity is, after all, a legal defence, which was shunned by Grace's attorney at her trial (373). What's more, as

he listens to Grace, Jordan notes that, apart from an unexplained hiatus in her recollection of her early days in Canada, "every button and candle-end seems accounted for," but then remarks that Mary Whitney, "the only witness who would corroborate her testimony [of those years]—if this were a court of law" is, in 1859, dead (185). Later, as he comes back from a fact-finding journey to Richmond Hill and to the cemeteries where Kinnear, Montgomery, and Mary Whitney were buried, he tells himself that "[n]othing has been proved. But nothing has been disproved either" (388). Part, at least, of the reason Jordan thinks of Grace's counternarrative as a courtroom narrative rather than as a confession or as a mere conversation between physician and patient is that he becomes aware that the accounts she puts together for him are but a version of events. Grace's version stands in relation to other versions and, like them, must meet certain standards of proof.

Rather than "telling all," then, and rather than being concerned with truth, authenticity, or spontaneity, Grace's counternarrative to Jordan is subject to careful self-censorship and to a great deal of self-control, for she seeks to convince her judges of her good faith, of her sterling reputation, and even of her innocence. As she begins to speak to Jordan, her sarcasm lessens somewhat. Stephanie Lovelady notes that "[t]he blistering, mocking anger disappears from [Grace's] tone once she adopts Simon as a permanent narrative audience" (40). Lovelady attributes Grace's softening to the comfort and empowerment brought about, respectively, by the act of speaking both intimately and publicly to Simon Jordan. Yet the alienist himself complains that in his presence Grace is a "marble Madonna [. . .] all the while exerting her passive stubborn strength against him" (362). Aritha van Herk, in turn, writes in her review of *Alias Grace* that "Grace is [. . .] more concerned with exercising a day-to-day caution that enables her to enjoy the

small liberties she is permitted than with the larger concealment of her infamous crime" (111). I would argue, rather, that while Grace is certainly concerned with cooperating with Jordan and preserving the small privileges granted to her despite her incarceration, she is also fighting for her release and freedom through her very words. Though she herself is apparently calm and certainly courteous, her mind is consistently active. As she tells the implied reader:

> If I am good enough and quiet enough, perhaps after all *they will let me go*; but it's not easy being quiet and good, it's like hanging on to the edge of a bridge when you've already fallen over; you don't seem to be moving, just dangling there, and yet it is taking all your strength. (5; emphasis added)

While confined both by her incarceration and in her speech and behaviour, Grace's outlets are her sewing, her thoughts, and her imagination. When she is not busy carefully learning to construct a persuasive counternarrative to those narratives which got her incarcerated, she fills her time in judgment of those who have taught her those narratives and of those who judged and attempted to define and classify *her*. Her audiences vary, however.

(c) Grace Marks's Address to the Implied Reader

The implied author's Grace addresses the reader not as a confessor, but as a judge from another generation, who might look upon her case as a precedent that merits consideration. The implied reader can do nothing for Grace; he or she can merely study the details of her life for lessons to be drawn from the past, and which may apply to the

present or future. It is generally in those passages addressed to an audience other than Jordan that Grace is least "good" and "quiet," that she is most observant and frankly critical of those on whom she must rely since her arrest and that she seems most spontaneous. She comments that her attorney "was not pleading" at her trial "but trying to make all of the witnesses appear immoral or malicious, or else mistaken" (23). During her arrest and trial, she protests, the newspapers printed lies about her (27). The Governor's wife, she notices, collects crime reports like other women of her social rank collect pleasant pictures from magazines or press flowers: "she is a lady [. . .], and so she must collect something [. . .], and in any case she likes to horrify her acquaintances" (26). Yet even here, Grace refrains from 'confessing' that she was either innocent or guilty.

In their *Literary Criticisms of Law*, Guyora Binder and Robert Weisberg paraphrase a passage in legal scholar and historian Robert Ferguson's "Story and Transcription in the Trial of John Brown" when they note that "a trial by or in a community is also a trial *of* that community" (Binder 290; Ferguson 55; emphasis added). As she narrates her life and the gruesome murders, Grace not only denounces the alleged lies and exposes the suppressed rage of the community that sentenced her, but she also exposes its biases. Upper Canadians in the mid- to late-1800s were preoccupied with keeping immigration and criminality in check Among those immigrants most targeted for their alleged propensity towards crime were the Irish (McMahon 398). The historical trials of Grace Marks and James McDermott took place within such a context. Grace's narration thus lays bare these prejudices along with the harm they inflicted upon the lives of Irish and poor women such as herself. Rather than being of a confessional nature, the parts of her account addressed directly to the implied reader are recriminatory and

remarkable for their eloquent outrage. Again, then, Grace addresses her two main narratees differently. She speaks to Dr. Simon Jordan as if he were an appellate judge who has the power to secure her release, and she approaches the implied reader as a latter-day judge who might possibly condemn (and learn from) the society and times in which she lived, and the kind of justice they produced.[22]

Modes of Courtroom Address in *Alias Grace*

Whether, as a narrator, she addresses Jordan or the reader, Grace favours the first person ("I"). "Sometimes, when I am dusting the mirror [at the Governor's mansion]," Grace tells the implied reader, "I think of all the things that have been written about me—that I am an inhuman female demon, that I am an innocent victim [. . .], that I was too ignorant to know how to act and that to hang me would be judicial murder" (23). Here, as in other similar passages, she uses the first person because she needs to reflect on the events and circumstances which affect her directly or upon her immediate surroundings. Margaret Rogerson (whose study of *Alias Grace* delineates the ways in which patchwork-making functions throughout the novel as a metaphor for both the "literary artefact" [5] and for the reading process itself) points out that a variation on this pattern of narration occurs during Grace's account to Jordan of the murders themselves. "The voice that she uses on this occasion is not her own," Rogerson writes.

> Not only does she speak in third-person dialogue, but, in addition, the words that she utters were scripted by others. They are those that were provided for her by her lawyer at the trial or by the newspaper reports of

[22] This is not to say, however, that Jordan is spared Grace's social criticisms; he is not. But in his presence she is more reserved and less abrasive.

> the time: the words that appeared in the governor's wife's album collection of "famous criminals" (p. 26). The reader is [. . .] presented with a distanced, elusive narrative, rather than a direct address. (14)

Parenthetically, Coral Ann Howells makes a similar point when she notes that within the "pre-existing discourses" provided by historical records, Grace's own carefully crafted narration of the events that happened to and around her "goes almost unnoticed" (151). Rogerson's observation partly illustrates her claim that *Alias Grace* itself is constructed as a patchwork made of disparate scraps of material and, in this case, of narratological variations. An example of Grace's third-person narration occurs, for instance, as she recounts to Dr. Jordan the moments leading up to Thomas Kinnear's murder. James McDermott, she maintains, obtained gunpowder for a double-barrelled shotgun "across the way at his friend John Harvey, although Hannah Upton, the hard-faced bitch—she was the woman who lived with Harvey—had told him he couldn't have it" (319). Certainly, as both Rogerson and Howells might point out, this fact came out at the trial of James McDermott (Walton 12) and at that of Grace (Robinson 107).

My own reading of this narratological variant, however, differs from that of Rogerson, and I disagree with Howells that, in Atwood's novel, Grace's own account of events is almost entirely drowned in history. Aritha van Herk notes, I believe accurately, that *Alias Grace* "is about listening and hearing" (110). Come closer; listen carefully. It is true that, in her narration of the murder and trial, specifically, Grace resorts to second-hand voices. But in order to convince Jordan that she is telling the truth, in order to persuade him to write a favourable report on her behalf, Grace must stay close to the facts of the trial, since those were corroborated by a number of witnesses. Yet even when

using the reports of others, Grace editorializes; she sews in her own commentaries and shapes the garment, so to speak. Although the origin of the gunpowder that killed Kinnear was established at trial, McDermott's attitude as he commandeered it was not. It is Grace who tells Dr. Jordan that by the time he had the gunpowder in his possession, "he was very excited and nervous, and swaggering, as well, and proud of his own daring."[23] In doing so, she points the finger at McDermott and keeps the attention of her judges away from her own possible criminality (319). Similarly, she follows the chronology of events presented at trial when she relates to Jordan that "Mr. Kinnear came back on the morning of the Saturday. He'd meant to return on the Friday, but had been delayed by business in Toronto, *or so he said"* (248; emphasis added). Here again, Grace stitches her own comments to the official trial narrative as she hints at motives less than businesslike for Kinnear's delay. Whether she uses the first or third person, Grace acts like a skilled lawyer; the implied author has her add rhetorical flourish to hard facts in hope that the former tempers the latter. But it should come as no surprise that the fictional Grace is an adept litigator.

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[23] Hannah Upton's testimony at James McDermott's trial is summarized by Walton as follows:

> [. . .] prisoner came to borrow powder, at ten o'clock on Saturday morning, the 29th of July; he asked for John [Harvey], said that Mr. Kinnear sent him over to know if he could let him have a little powder to kill some birds—he took about two pipes full of the powder with him; witness [i.e., Upton herself] told him he must see John before he could get it, but he insisted on it, and took it himself. (12)

Chief Justice Robinson's notes on that same testimony are similar in content:

> [McDermott] said [to Upton that] he was in a hurry, that Kinnear was waiting for him—W[itness] told him to go and ask her husband in the fields—W. had some powder in a closet in the house—in a bag—he took pipes full—a pipe head was in the bag—put it in something and carried it away—he laid down six pence and said Kinnear sent it. (90)

In short, apart from the suggestion that McDermott might have been in a hurry, the historical legal and paralegal records are silent as to McDermott's state of mind or demeanour when or after he took the powder from the Harvey-Upton household. Only the fictional Grace supplies us with such details. Rogerson's contention that Grace's words during her third-person narrative are not her own is therefore somewhat unsubstantiated.

The Fictive Grace Marks's Apprenticeship as a Lawyer

(a) Elusiveness as to Guilt or Innocence

Mary Whitney describes Grace as being "bright as a new penny" (149) and a quick study (156). While working with Nancy Montgomery in Richmond Hill, she comes across the apocryphal story of Susannah, "a young lady falsely accused of sinning" because she refused to give in to the lecherous elders who watched her bathe naked. When asked by Thomas Kinnear what the moral of the story might be, Grace offers a rather innocent answer, but Kinnear laughs and replies, more cynically, that perhaps "the moral was that you needed a clever lawyer" (223). Grace soon learns that cleverness, in law, is dependent on narrative skills. When accused of murdering Kinnear, she is told by the fictionalized MacKenzie that the best litigation strategy is to avoid telling her story as she remembers it, for it might confuse the jury, "but to tell a story that would hang together" and which is both credible and plausible (357). Grace may have taken the advice to heart.

As Barbara Hill Rigney notes, rather perceptively, Grace tells the reader, "[t]his is what I told Dr. Jordan, when we came to that part of the story " (*AG* 6) and not "'[t]his is what happened'" (Rigney 157). In an effort to obtain her own release from incarceration, Grace goes even further in her narration: MacKenzie explained to her that, in a court of law, a well-crafted narrative always trumps genuine, but disordered, recollections; now Grace offers Jordan a long and well-ordered account of her life, yet insists that she is unable to recall the crucial moments and details of the murders themselves. Whether it be true or not, this, of course, keeps her from proving her own innocence beyond a

reasonable doubt. Howells remarks, also quite pertinently, that "forgetting is not the same as innocence" (153). As she speaks to both Jordan and to the implied reader, Grace is thus profoundly ambiguous about her role in the murders. Until the novel's very end—or until Jamie Walsh reappears to recant his damning courtroom testimony against her and to marry her, thus apparently championing her innocence[24]—both Jordan and the implied reader are essentially dependent on what Grace tells them, and what she tells them may be interpreted both in support of her possible innocence and in light of her possible guilt. For her judges, then, rendering a verdict as to either guilt or innocence based on her account alone becomes unfeasible.

For instance, it is in a closing narrative (meant as a letter) to Jordan specifically but aimed as well at the implied reader that Grace is perhaps least dependent on an audience. She has at last obtained her pardon, has married, and has moved away from the community that judged and attempted to interpret her.[25] Still, she refrains from speaking

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[24] The historical and the fictional Jamie Walsh were not eyewitnesses to the crimes themselves; no such eyewitnesses existed apart from McDermott himself and, most probably, Grace. Walsh revealed at trial that Grace was wearing Nancy's clothes, but in the novel Grace suggests that this information in itself is merely circumstantial and not of great probative weight, for she would "no doubt have been put in prison anyway, even if he hadn't mentioned Nancy's dresses" (452). Yet if uncertain of Grace's innocence, Walsh would be taking a rather serious risk in marrying her. If once guilty, might she kill again? The implied author, however, lets her implied reader make up his or her mind about this too. Grace's account of her late marriage at the end of the novel reveals that the adult Walsh has a certain penchant for sado-masochistic fantasies. As Grace tells it: "after I have told him a few stories of torment and misery he clasps me in his arms and strokes my hair, and begins to unbutton my nightgown, as these scenes often take place at night; and he says, Will you ever forgive me?" (457). Walsh's own clear-headedness in relation to his new wife's innocence is therefore raised, through Grace, by the implied author. Was she truly innocent, or is Walsh merely attracted to and aroused by suffering and danger?

[25] Interestingly, once she obtains her pardon (no thanks, certainly, to Jordan) and is able to enjoy whatever freedom her marriage to Jamie Walsh affords her, Grace likens Jordan to a "woman friend" she can trust and who will keep her confidence (456). This characterization is, of course, surprising given that Grace herself agreed earlier in the novel that she needed to resist certain of Jordan's inquiries and keep details and secrets to herself. Whereas friendship is not dependent upon absolute disclosure, it is of the essence of confidences that secrets and important matters be entrusted to another being. To the very end, the implied author eludes us.

of her culpability or lack thereof, although she drops hints that may be interpreted either way.

When she describes her accommodation of her husband's need to be forgiven for having once testified against her at her trial, Grace concludes, "I suppose it isn't the first lie I've told; but as Mary Whitney used to say, a little white lie such as the angels tell is a small price to pay for peace and quiet" (458). The "little white lie" to which Grace refers at the end of her sentence is that she routinely acts out a ritual of forgiveness toward her husband when she believes, instead, that "[i]t is not the culprits who need to be forgiven; rather it is the victims, because they are the ones who cause all the trouble" (457). As she brings up Mary Whitney, Grace also reminds her narratees that she once lied to her early employer, Mrs. Alderman Parkinson, about the identity of Mary Whitney's lover, Mrs. Parkinson's son. But as she begins the sentence above Grace does not say "it isn't the first *little white lie* I've told;" she merely mentions having lied before, and Jordan and the implied reader are left wondering whether she has lied as well about not remembering the Kinnear and Montgomery murders. Similarly, when she explains that in the garden to her new house in the State of New York are aphid-infested roses that could benefit from a dusting of arsenic and adds, "but I do not like to have such a thing about the house" (453), we wonder whether to attribute this passing remark to prudent domesticity or to a woman who, after all, was once proven guilty of murder in a court of law.[26] Finally, what does Grace mean when she assures her narratees that her "secrets" are safe with Jeremiah, just as his are safe with her? What does a woman who was incarcerated for

[26] The implied reader, who, like Jordan, might be familiar with McDermott's pre-execution confession transcribed by Walton and published by the *Star and Transcript* would remember as well that the convicted stableman accused Grace of having wanted to poison both Montgomery's and Kinnear's porridge (Walton 15).

twenty-nine years mean when she says, "I have done all the *running away* I have time for in this life" (456; emphasis added)? These evasions and instances of ambiguity have led Rigney to call Grace "[t]he most duplicitous of Atwood's female protagonists" (157). The questions, however, remain: If her counternarrative neither explicitly states nor definitively proves her innocence, what then is Grace's narrative strategy in relation to both Jordan and the implied reader? And is this strategy necessarily the same at both levels?

(b) Evasion Tactics When Neither Facts nor Law Favour the Accused

In his *When Law Goes Pop*, Richard Sherwin quotes American Senator Heflin to the effect that, in any courtroom, one may argue the facts of the case and the law, if those are in one's favour, but if neither is, the solution is to raise a reasonable doubt in the minds of judge and jury by evading the issue and drawing attention to another matter entirely (127). As legal scholar D.N. MacCormick explains, among other possible courtroom tactics, flaws in the official version of the facts may be probed "to show either that the story is only weakly coherent because there are other possibilities than those implicating the accused [. . .] or that at some key point or points it depends on untrustworthy or honest but inaccurate witnesses" (50).[27] Grace herself knows that the facts are against her, and that the Crown's evidence, although merely circumstantial, sufficed to convict her. Even though she had opportunities to do so, she never attempted to denounce James McDermott to the authorities either before or after the murders. She

[27] This strategy was adopted, notably, by O.J. Simpson's "Dream Team" of defence attorneys during his criminal trial. Attention was diverted from incriminating evidence by allegations of racism and corruption within the Los Angeles Police Department. See Baynes and Weiss.

fled the crime scene with him and, upon her arrest, was found wearing one of the murder victim's clothes. Finally, she changed her story several times between arrest and trial. To plead her innocence by relying on the facts corroborated during the trials would be practically impossible. Hence Grace hints at her innocence without proving it, and prefers, instead, to 'evade the issue' in two ways. First, she attacks the righteousness (and denounces the hypocrisy and prurience) of those who employed her, put her through the court system, and finally judged her. Second, she also denies any recollection of the acts of murder themselves, yet, surprisingly, she adorns her narration to Simon Jordan and to us with such emotionally charged details that she manages to raise a reasonable doubt as to her culpability.

A somewhat comparable strategy was initially adopted by Grace's fictionalized attorney, Kenneth MacKenzie. Grace's accounts of her young life and of the Kinnear and Montgomery murders *both* attempt to oppose the content of his narrative *and* model themselves on his own litigation tactics. MacKenzie too was aware that the facts were against Grace. The local political climate was equally unfavourable to her. Canada had just begun to recover from the effects of the 1837 Rebellion inspired by American republican ideals. The ruling Tories associated the Rebels with disgruntled Irishmen, or with sympathizers of the working-class Irish. Although there was no link between the rebellion and the murders, Thomas Kinnear was a Tory gentleman, and Grace was an Irish immigrant. Sensibly, Grace's lawyer feared that such extrinsic factors might influence the outcome of the trial. Since he also believed in his client's guilt, he mounted a two-pronged attack on the prosecution. First, he tried to blacken the reputation of the two victims, whose scandalous sexual liaison was a subject of gossip within the

community, then he implied to no avail that someone other than Grace might have been involved in the murders (374). Next, perhaps because "feeling ran high" against the Rebels and "that alone could have put a noose around Grace Marks' neck" (372), he painted a compassionate albeit unflattering portrait of Grace as a motherless, directionless child, an illiterate orphan, "very ignorant and uneducated," and "little better than a halfwit," thus suggesting that she was too helpless and feeble-minded to plot even a single murder (361).

The memory is a bitter one and, several years later, Grace continues to resent her attorney's description of her. "That's what it was like at the trial," she tells the reader, while Jordan is absent for the day. "I was there in the box of the dock but I might as well have been made of cloth, and stuffed, with a china head; and I was shut up inside that doll of myself, and my true voice could not get out" (295). Grace's disappointment with her trial is twofold.

First, rather than having addressed and confronted local anti-Irish prejudice, MacKenzie's construct—that of the soft, illiterate, amoral, immigrant orphan "cast out upon the world with nobody to teach [her] any better" (361)—tends to confirm it. When she reads in a newspaper that the accused were "*from Ireland by their own admission,*" Grace protests to Jordan that this makes being Irish sound like a crime (103). Second, MacKenzie's strategy required that Grace remain "voiceless" or, more precisely, that she never be allowed to speak of the events surrounding the murders in her own words. As she remembers it, "[w]hen my turn came, I said what Mr. MacKenzie had told me to say, and my head was all in a turmoil, trying to remember the right answers [. . .]" (361).[28] In

[28] Although in Atwood's novel both Grace and Reverend Verringer (78) mention her having taken the stand at her own trial, neither George Walton's summary of the trial nor Sir Beverley Robinson's benchbook

her own two-pronged counternarrative to Jordan and to the implied reader, simultaneously, Grace seeks to correct each of these failings. Having perhaps recalled as well her attorney's earlier warning about the importance of well-crafted narratives in the courtroom, her narration of the events leading to the murders unfolds as a marvel of coherence, plausibility, and detail. It is also, like most trial narratives, precisely chronological. It begins with an account of her childhood. Furthermore, the fictional Grace posited by the implied author displays a certain amount of contemporary legal knowledge when she portrays herself as someone triply disadvantaged by her being an Irish, working-class woman.[29]

Grace's 'Early-Years and Employment Narrative'

Politics, religion, employment, gender, and love are indeed inextricably linked in the small and divided colony of pre-Confederation Canada depicted by Grace, and they also happen to divide society in half. For instance, Grace overhears Thomas Kinnear call his housekeeper and mistress, Nancy Montgomery, a "fiery little Rebel," because she bears the same last name as one of the famous Rebels of 1837 (251). Far from being merely a sign of endearment, the branding of Nancy as "Rebel" by her Tory employer and lover confines her further to the margins, where she is already relegated as woman,

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show any indication that she did testify on her own behalf. Protection against self-incrimination is one of the fundamental tenets of criminal law. It is therefore probable that Grace may have indeed been silent during both her trial and that of James McDermott, since in testifying against him she might have also incriminated herself.

[29] Here the fictional Grace aligns herself with legal scholars like Kimberle Crenshaw, who coined the legal concept of "intersectionality" in her description of African-American women at times doubly prejudiced by their being women and Black, or triply disadvantaged by their being women, Black, and poor. See Crenshaw's famous "Demarginalizing the Intersection of Race and Sex."

sinner, and servant.[30] Just before his murder, Grace claims to suffer an episode of somnambulism during which she may have been attacked by a man who may have been Kinnear, and who allegedly said to her: "I pay good wages but I want good service in return" (295). Of course, by then Grace has already witnessed the demise of her best friend, Mary Whitney, another servant and a vocal Rebel sympathizer, and she begins to fear that she might find herself in a similarly vulnerable position. Yet throughout this early account of certain prejudice and probable abuse of power, Grace never relinquishes her poise. She plainly denies being uneducated, illiterate, or pliable. She is not only able to read and write but, up until the murders, she had managed to survive on her own, to find employment, and to fend off sexual harassment with a measure of dignity.

Consequently, in this early part of her narration to Jordan and to the implied reader, Grace manages to dismantle her attorney's stereotypical depiction of the Irish as she lays bare instead the chauvinism, the sexism, and the power relations which, in her time, made life arduous for a young woman such as herself. Ironically, or strategically, her nuanced account is corroborated by MacKenzie's typecasting. She manages at once to confront Tory anxieties about Irish criminality, and to accuse Upper Canadians of the triple fault of bias, discrimination, and hypocrisy. The land promised to Irish settlers before they arrived in Canada never materializes; instead, the immigrants must survive on low-paying, urban jobs and suffer hardship and harassment. This gripping narrative of discrimination, however, brings up events too far removed from the murders themselves

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[30] Thomas Kinnear himself was originally from Scotland and, in mid-nineteenth-century Upper Canada, Scots were at times lumped in with the Irish as Rebel sympathizers. Yet according to the fictionalized Grace, James McDermott, who professed to hate all Englishmen, viewed a lowland Scot like Kinnear as "the same thing [as the English . . .] all thieves and whores, and stealers of land, and ground down the poor wherever they went" (257). Nancy herself expresses bitterness over Kinnear's Tory allegiances and over his playful, yet no doubt disconcerting, labelling of her as a Rebel (251).

to raise a doubt as to Grace's criminal guilt. Its only possible value in a court of law would be to establish Grace's good character as a diligent, upright woman and, possibly, to prepare the way for further revelations. Her narration of the events immediately preceding the murders both deviates slightly from this early, righteous strategy and deepens it.

Grace's 'Murder Narrative'

In the second part of her account, which I might call her 'murder narrative'[31] as opposed to the 'early-years and employment narrative' that precedes it, Grace learns, very much like MacKenzie himself, to use her audience's weaknesses and predilections to her advantage. From the start she scrutinizes and takes the measure of Simon Jordan, her main narratee, judge, and possible ticket out of jail. When she realizes that her denunciation of Tory society leaves him cold (he himself describes Grace's heart-wrenching account of discrimination as nothing "very far from the ordinary—the usual poverty and hardships, etc." [133]), but that her recollections of sexual humiliation and her brushes with rape never fail to perk him up, she begins to play in earnest by MacKenzie's litigation rules and tailors her narration to her audience. Since Jordan likes to hear about "such things, and always writes them down," she announces, she will feed his prurience (355). She becomes aware, too, that Jordan is representative of the society in which they both now live.

[31] The term, of course, is a convenient misnomer since Grace in fact reveals very little about the murders themselves.

(a) Scandal, Sensationalism, and the Cause Célèbre

From novels to newspaper accounts, to conversations that take place in ladies' parlours, in kitchens, and in the presence of prison guards, all that Grace reads and hears are accounts of illicit carnality and violence that belie Victorian propriety. Miss Lydia, the Governor's daughter, tells Grace that her woes cast her as a romantic figure (25). The Governor's wife holds among her fashion catalogues and keepsake albums a scrapbook of famous murderers. Grace overhears the matron and her friends discuss her behind her back: "Oh well [. . .] we are virtually prisoners ourselves, you know" (24). Grace indeed views them as prisoners, their ladies' legs trapped within the birdcages that are crinolines (22). The price they pay for relative safety and respect is repression. Not surprisingly, the sulphurous scent of crime must be appealing to such a stifled and stifling world. The prison guards who accompany Grace to and from the Governor's house jokingly portray her as a temptress who leaves behind her a trail of men, "smitten by [her] dazzling charms, knocked on the head like lambs at slaughter" (63). At the same time, the newspapers report that she was McDermott's paramour. As Grace herself puts it,

> [t]hat is what really interests them—the gentlemen and ladies both. They don't care if I killed anyone, I could have cut dozens of throats, it's only what they admire in a soldier; they'd scarcely blink. No: was I really a paramour, is their chief concern, and they don't even know themselves whether they want the answer to be no or yes. (27)

Grace therefore begins to cater to Jordan's and to the local appetite for scandal and sensationalism. At the centre of her account is the contention that she feared for her own life as McDermott went on a murderous rampage. Her terror was such that she was

hardly conscious or in possession of her faculties through most of the horrific events. Yet where Grace had claimed to have blocked out crucial details of the murders, she now helpfully attempts to fill in *some* of the gaps for Jordan. "What should I tell Dr. Jordan about [the] day [of the murders]?" she asks the reader (295).

Here, the ellipses and instances of dissociation caused by the kind of trauma brought about by possible sexual assault and extreme violence give way to Biblical references and to the archetypes of romance. Grace, in other words, fills in the blanks with literary allusions with which she and her audience are accustomed. She is, after all, literate. She proves on more than one occasion that she knows the Bible well, and she has read Sir Walter Scott. When, upon meeting her, Jordan playfully borrows Satan's words in the Book of Job, Grace at first pretends to Jordan that she is illiterate and even less than bright. "I have a good stupid look which I have practiced," she tells the implied reader. Yet she instantly gets the Biblical allusion: "I know it in the Book of Job," she informs the implied reader, "before Job gets the boils and running sores, and the whirlwinds" (38). One evening, too, she overhears Nancy Montgomery read from Scott's *Lady of the Lake* (a work Grace and Mary Whitney used to read together) to Thomas Kinnear. The passage, as remembered by Grace, is worth quoting at length:

> The poor madwoman [of *The Lady of the Lake*] had just been shot by mistake, and was expiring, while speaking several lines of verse; and I thought it a very melancholy part; but Mr. Kinnear did not agree, for he said it was a wonder anyone could move an inch in romantic landscapes such as those of Scotland, without being accosted by madwomen, who were always jumping in front of arrows and bullets not intended for them,

> which had the virtue at least of putting an end to their caterwauling and misery [. . .]. Then Nancy said he lacked a proper feeling; and Mr. Kinnear said no, he did not, but it was well known that Sir Walter Scott had put so many corpses in his books for the sake of the ladies, because the ladies must have blood, there is nothing that delights them so much as a weltering corpse. (277)

Grace, then, is acquainted with the pitiful madwomen who may serve as foils to romantic heroines, and with the darkness into which both Biblical and lay heroes are plunged before they are saved, reborn, or redeemed. She knows, too, that her contemporaries delight in such shocking tales.

(b) The Quest as a Trial Narrative Template

She structures her counternarrative according to those literary conventions and characters as soon as she begins to recount her life to Jordan and to us. Her inauspicious start in Canada, for instance, conforms to the first phase of the romantic hero or heroine's development in Northrop Frye's study of myth-seeped romance. The infant hero, Frye writes, is often cast at sea in an ark or a chest. "Psychologically," he adds, "this image is related to the embryo in the womb, the world of the unborn often being thought of as liquid" (*Anatomy* 198). Grace herself was a pubescent girl when she left Ireland and crossed the Atlantic in a ship to land in Canada, but it is on Canadian soil that her adventures as a young woman responsible for her own welfare begin, and it is significant, as well, that her mother perishes at sea; as MacKenzie himself puts it, Grace thus comes

into the New World a practical orphan. Her alcoholic and abusive father is plainly unable to protect or nurture her; it is she who looks after him for a while.

She labels the next period of her life in Canada the happiest time of her life (180). Still according to Frye, the second phase of the romantic hero's development, is that of youthful innocence spent in a prelapsarian ignorance of sin (199-200). Although Grace comes from a large family, it is Mary Whitney, her best friend, who acts most like a sister to her. Before Mary's death, Grace's time as a servant at Mrs Alderman Parkinson's household is so filled with warmth, camaraderie, and relative security that Jordan himself admits, a little nostalgically, that it reminds him of "his own happier days and the memories of them, and they too contain pictures of clean sheets and joyful holidays, and cheerful maidservants" (185). But Mary's early demise forces Grace to seek employment elsewhere and to become personally acquainted with sexual harassment. Thus she begins her steepest fall into strife and misfortune.

Her final hiring at the Richmond Hill household provides her with the material to depict the events surrounding the Kinnear and Montgomery murders as the third and most critical phase of her development as a romantic heroine. What follows through Grace's narration of the murders is what Frye describes as the quest, which features in part a marked descent from ease into difficulty and includes "the *agon* or conflict" and "the *pathos* or death, often the mutual death of hero and monster" (192). Conflict, for Grace, begins when she starts to interact with the characters who populate Kinnear's property. The violent deaths of three of these characters (Kinnear, Montgomery, and later McDermott) is naturally followed by the death of Grace's dream of a better life. She recounts her descent into a living hell with a storyteller's confidence. Her own

lawyer, Kenneth MacKenzie, warns Jordan that Grace is to be compared with Scheherazade. "[D]id Scheherazade lie?" he asks, rhetorically. "Not in her own eyes; indeed, the stories she told ought never to be subjected to the harsh categories of Truth and Falsehood" (377).

Here, MacKenzie seems to be drawing a comparison between the imprecision of narrativity and the trenchant positivism of law in general. Yet MacKenzie himself is the one who taught Grace how to construct a persuasive courtroom narrative. He knows what a number of lawyers and contemporary legal scholars know and have commented upon, namely that, more often than not, the truth of a past event can only be approximated (rather than objectively demonstrated) by lawyers and witnesses in a court of law.[32] Courtroom testimonies, especially under direct examination, are delivered narratively, and so are attorneys' opening and closing statements. Their hypotheses and conclusions concerning a particular event are, in turn, supported by multiple testimonies and may carry diverse stories within them. As Laura Hanft Korobkin remarks, "it is simply not possible *not* to tell stories in court. Even the dullest civil negligence suits necessarily generate recognizable stories whose persuasive power derives more from 'literary logic' than from 'hard data'" (228). In a similar vein, American attorney Alan Dershowitz bemoans the hold that narrative has on a courtroom. Life, he argues, is known for its randomness and chaos; the narrative "attempt to derive purpose from purposelessness" can therefore only distort reality (100). Yet like most attorneys, he concedes that "[j]urors, like most people, are not good at thinking statistically or

[32] See, *inter alia*, Bernard Jackson's "Narrative Models in Legal Proof."

probabilistically. They are much more comfortable thinking literarily, teleologically, religiously, narratively" (104).[33]

Like MacKenzie, then, contemporary attorneys and scholars are somewhat uncomfortable with the potential slipperiness of narrative, which, as Jane Baron and Julia Epstein note, tends to stray from the conventional models of inductive and deductive logic generally used in the realm of law (670). Narrative, however, is inevitable in the courtroom, and the 'murder narrative' presented by Grace not only satisfies Jordan's sexual curiosity, but seems conveniently customized to his hoped-for insanity verdict and is at least partly inspired by those Biblical stories and references to the madwomen of nineteenth-century literature with whom Grace was once so impressed.

Before the murders, Grace foresees doom in a "dream" or a sleepwalking episode during which she is sexually assaulted by a man whom she fails to identify clearly, and who might have been Jeremiah the Peddler, James McDermott, or Thomas Kinnear. "And then," she tells her narratees, "I felt it was not any of these three, but another man, someone I knew well and had long been familiar with, even as long ago as my childhood, but had since forgotten; nor was this the first time I'd found myself in this situation with him" (280).[34] Grace's dream culminates in the apparition of Death riding the pale horse of the apocalypse, and of angels "whose white robes were washed in blood as it says at

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[33] Like Dershowitz, feminist legal scholar Catharine MacKinnon admits, albeit begrudgingly, that "[w]hy the stories behind facts [. . .] are not taken as real when presented as data is the other side of why narrative has a peculiar capacity to make them real" (237).

[34] Hilde Staels is the only critic so far to have noted that this reference to a fourth man known from childhood is indicative of Grace's sexual abuse at the hands of her father (436). Staels may be either partly or entirely right. Grace herself tells the implied reader that until the murders, "nobody [had] ever taken advantage of [her] although they tried" (27). This comment suggests that perhaps Mr. Marks never succeeded in sleeping with his daughter. Of course, Grace could also be lying or in denial as to what happened to her.

the end of the Bible" (281). She then loses consciousness. Later, she dreams of Mary Whitney, her red heart visible through her nightgown as she carries her own soul in the shape of a trapped and released firefly (312). Just as Nancy is brutally killed, Grace sees God covered in "a film of silver" and blocks out details of the murders themselves (316-17). Following the gruesome murders, which Grace attributes solely to McDermott in her narration to both Jordan and the implied reader, she is dragged from room to room as the latter seeks the best place to rape her and as she desperately attempts to outwit him (330-32).

(c) The Disqualification of Crucial Witnesses

Yet if we pay close attention to her words we notice that violence, despair, and incipient or episodic madness may have been part of her experiences at the Richmond Hill house, but Grace's present account of it is more carefully assembled, and less frantic than her story appears. She has, after all, already reported to Jordan a loss of consciousness that occurred shortly after Mary Whitney's death (179), and no doubt remembers that this tidbit was of visible interest to Jordan. She is therefore assured of his attention as she adds further details of this type to her murder narrative. She also weaves into her account the apocryphal story of Susannah, falsely accused of sinning because she refused to give in to the lecherous elders who watched her bathe in the garden (223). Later, as she tries to explain away the damning testimony of young Jamie Walsh at her trial, she exposes his love for her, and his belief that she had betrayed him with McDermott (320). Her earlier reference to Susannah further discredits Walsh's testimony. Although a teenage boy, he is no better than the lustful elders who sullied the

character of the bathing beauty. Finally, when Jordan confronts her with trial testimonies, she casts them in a new light. Jefferson the butcher testified that he spoke to Grace on the morning of the murders. "I know he did, Sir," Grace replies,

> "[b]ut I cannot remember it."
>
> "He says he was surprised as it was not you who ordinarily gave the orders, but Nancy; and he was further surprised when you said that no fresh meat was wanted for the week. He found it most peculiar."
>
> "If it was me, Sir, and acting in my right mind, I'd of had my wits about me, and ordered the meat as usual. It would have been less suspicious." (317-18)

Not only does she deny having been "in her right mind" on that terrible day (and thus opens the door to the insanity defence Jordan is looking for), but she offers the alienist a scenario of possible criminal collusion with McDermott of which she claims she would have been incapable had she been of sound mind at the time.

(d) Insanity as an Alternative Trial Narrative

Grace's evocative murder narrative features God, angels, Death itself, dreams, visions, and instances of somnambulism, but also ordinary witnesses, whom she soberly needs to disqualify or disprove. By the time she finally mentions the murders, she has peppered her account with enough apocalyptic visions, visitations, and lapses into unconsciousness to raise the spectre of the nineteenth-century literary madwoman for whom she once had a penchant. What her murder narrative suggests is that if her judges refuse to believe in her innocence, they should, in the alternative, understand that she

may have been involved in the murders in some way, but that she was certainly not herself during their commission.

The "madwoman motif" that Grace weaves throughout her narration of the homicides sees its culmination in her hypnosis session at the hands of Jeremiah the Peddler, *alias* Jerome DuPont, during which it is revealed that it was in fact "Mary Whitney" who was McDermott's murder accomplice. Stephanie Lovelady outlines three degrees of agency that may be attributed to Grace, depending on the manner in which one interprets such revelations. Grace, Lovelady explains, would be practically devoid of agency if "possessed" against her will or knowledge by the soul of the dead Mary Whitney (56). She would have "slightly more agency" if suffering from multiple personality disorder, "since the psyche of a multiple personality splinters in order to shield the original personality from painful knowledge." Lastly,

> [a] final possibility, and one in which she retains the highest degree of agency, is that Grace is faking everything [during the hypnosis session]. This option is open but improbable since even in her own interior monologue she never admits to the murders or even hints that she has any memory of them. (57)

Lovelady's conclusion is based on the characterization of part of Grace's narrative as an interior monologue to which Jordan is never privy. What Lovelady fails to consider, however, is that the implied reader is also a narratee. Grace's thoughts, in other words, are never completely shielded from scrutiny. Even beyond such narratological considerations, I would argue that although she never addresses the implied reader directly (she never addresses him or her as a 'dear reader,' for instance), Grace is aware

of an audience beyond Simon Jordan. "This is what I told Dr. Jordan, when we came to that part of the story" (6) is a sentence that sets up future statements and not something one normally says to oneself. Likewise, if left momentarily unexplained (as it is in Grace's account), a sentence like: "it's the same doctor, the same one, the very same black-coated doctor with his bagful of knives" (29) raises questions or creates expectations in a narratee. There are therefore reasons why Grace would wish to not give the implied reader a negative impression of herself. I have been arguing throughout this study that she addresses the implied reader as she would an appellate judge; what he or she thinks of her character is of some importance to her if she is to succeed to raise a doubt as to her criminal responsibility and counter-charge her contemporaries with hypocrisy, discrimination, and sensationalism.

Lovelady is nonetheless right to remark that Grace's hypnosis session might be qualified as truth (mental illness) or fiction (faking). If truthful, then the outcome of her hypnosis changes nothing to the careful way in which she crafts her narrative to Jordan and the implied reader. If fictional, I would argue that her possession by Mary's soul, or even her double personality, takes the occasional signs of madness and the visions she introduced in her murder narrative to Jordan a step further. Here, finally, is proof of her unsound mind at the time of the murders.

In the event that the content of Grace's hypnosis session is a fabrication, an argument can be made that Grace creates 'her' madwoman (in the 'shape' of the vengeful soul or incarnation of Mary Whitney) very much as nineteenth-century female writers created fictional madwomen as a "double, an image of [the author's] own anxiety and rage" (Gilbert 78). As authors Sandra Gilbert and Susan Gubar explain: "it is [. . .]

through the violence of the double that the female author enacts her own raging desire to escape male houses and male texts, while at the same time it is through the double's violence that this anxious author articulates for herself the costly destructiveness of anger repressed until it can no longer be contained" (85).[35] The Kingston penitentiary, after all, certainly represents a "male house" in which Grace is effectively locked up, and a large proportion of male narratives convicted and sentenced her to imprisonment therein.

(e) Conclusion

That Grace is inspired by the works she and others read in those days should thus be clear by now. Her understanding of both Biblical and romantic narratives, and her acquaintance with the romance-reading Miss Lydia, no doubt allow her to understand what Northrop Frye explained so well, namely that in any romance, identification with a heroine necessitates in part that she reach an unfortunate, albeit thrilling, point in her postlapsarian adventures when "she is often a sacrificial victim or near victim, threatened with rape or death, if not both" (*Scripture* 80). Through her evasive account of the murders, Grace therefore casts herself both as an object of desire, and as a casualty of sheer, *maddening* (taken literally, as *enraged*, and figuratively, as *insane*) terror.

It is, of course, no coincidence that Grace addresses two narratees, Jordan and the implied reader. Quite aside from his libidinous fantasies, Jordan (as appellate judge) is concerned with the facts of the case in that they may hide evidence of insanity which was

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[35] Very much along these lines, Stephanie Lovelady observes that as she addresses Jordan, Grace "always uses the cover of her friend Mary" whenever she needs to utter words or thoughts that are less than ladylike. "Mary," Lovelady writes, "becomes a crutch to say what Grace cannot while Simon is listening" (40). The startling hypnosis session suggests that Mary Whitney was also used as a crutch to do what Grace herself would not do, or would never admit to doing.

missed at the original trial. At the same time, a verdict of insanity would finally exonerate Grace from criminal culpability. Guilt, innocence, and possible insanity are naturally enmeshed in criminal law. Unfortunately, Jordan proves a less than competent judge and flees the country, his verdict unrendered.

As a contemporary judge who reopens the case more than a century after Grace obtained her pardon, the implied reader follows Jordan's line of thinking and searches for similar evidence of insanity, yet notices, too, an additional narrative to which Jordan was not privy. As she addresses posterity through her interior monologue, Grace lays the emphasis on the factitiousness of trial narratives themselves, which, on occasion, and especially if the trial is of a notorious nature, have less to do with truth and evidence (which, at best, may be merely circumstantial) than they do with the narrative skills of the attorneys involved. If (through the implied author, of course) she can shape a narrative to persuade her judges of her good faith and to denounce those who once condemned her while offering scant new evidence, then it is possible as well that her own, original trial may have been equally more dependent on narrative skill than on tangible proof. That her characterization of herself is a clever construction targeted to a specific audience and meant to obtain a coveted goal is suggested by some of Grace's comments to the implied reader and to Jordan both before and after delivering her account of the murders.

Whereas in her murder narrative she brings up the Bible to suggest that God's wrath befalls sinners and that she survived apocalyptic events, her personal opinion of the Holy Book is hardly an approving one. "They want you to be able to read the Bible, and also tracts, " she tells the reader, "as religion and thrashing are the only remedies for a depraved nature and our immortal souls must be considered." But she is also quick to

add that "[i]t is shocking how many crimes the Bible contains. The Governor's wife should cut them all out and paste them into her scrapbook" (27). Similarly, though Grace was once moved by Scott's *Lady of the Lake*, incarceration has possibly robbed her of all sentimental illusions, and she makes fun before the reader of the Governor's daughters' love of romantic narratives (25). Still, her own murder narrative is strewn with intertextual fragments and suggests to us, the implied reader, that these references were added in precisely because they made for a rhetorically compelling narrative given her audience. As Jordan thinks to himself, "[t]hat such configurations are banal does not rob them of their power" (365).

In *Alias Grace*, the fictional Grace's courtroom strategy ends up resembling that of her fictional attorney, who portrayed her as a helpless orphan in need of compassion while making concessions to local prejudice against the Irish. As she speaks in her own defence, and due in large part to the implied author's positioning of Jordan and of the implied reader as addressees, Grace arouses both the pity of her audience over the unfairness and danger of her predicament, and the lust of those for whom the appeal of forbidden sex is far more interesting than murder and theft. She manages, at the same time as she adds to the historical trial narratives, to counter and deflect the impression left by her accusers and detractors, and notably by Susanna Moodie's own graphic narration in her *Life in the Clearings*. Mrs. Moodie produced what Jordan refers to as a "salacious melodrama" (190) according to which Grace instigated the murders out of desire for Thomas Kinnear and jealousy towards Nancy Montgomery. By resorting to romantic conventions and characters, as well as to Biblical allusions, Grace responds that it was the *men*, Kinnear and McDermott, who lusted after her and attempted to assault her. Thus

she partly indulges local fantasies of desire for and aggression against women. This portion of her account titillates at the same time as it attempts to exculpate; in her role as the once-voiceless yet upright and virtuous victim of Nancy Montgomery's illegitimate jealousy, of Thomas Kinnear's lust, of James McDermott's diabolical impulses, of Jamie Walsh's vindictiveness, of a possibly abusive father, she points the finger at a number of wrong-doers and raises a reasonable doubt as to her own guilt. She was unconscious during at least one of the murders. She failed to denounce McDermott to the authorities, but then he was holding her captive. If Jordan wants to see her vindicated (322), it is in part because he is effectively searching for signs of insanity in her testimony and, in part, because he is attracted to the composed yet mysterious Grace.

Conclusion

Richard Sherwin's *When Law Goes Pop* covers a number of notorious American trials that were turned into what he calls "fantasies" through the narratives of the prosecuting or defence attorney. In his 1994 "Story and Transcription in the Trial of John Brown," Robert Ferguson also shows that during his 1859 trial for treason, American abolitionist and rebel John Brown "used his constitutional right to be heard at a public trial to dramatize a central contradiction in the culture around him, that of slavery in a society where all men were declared to be equal" (43). Ferguson further explains that this larger narrative was carried forth on the back of a specific literary genre:

> [s]imultaneously, [Brown] activated an affinity to the literary modes of the [American] Romance, where good and evil battle toward inevitable conclusions in a narrative freighted with symbolism and exaggeration.

> The mixture of legal and religious frames of reference with the elements of the Romance proved explosive in awakening sympathy for Brown and in magnifying his cause. Thereafter, whether as diabolical invader of the peace or as first martyr of republican freedom, he was always larger than the life he led, always above the legal decision to take that life, always somewhere beyond the facts. (45)

Brown, in other words, did what the fictional Grace does in *Alias Grace*. At her trial, the fictional Grace herself was defended by her attorney in a rather different fashion. What Kenneth MacKenzie emphasized was the shabbiness of her life, her limited opportunities, and the meekness of her character. Throughout her narration of the events leading to the murders of Thomas Kinnear and Nancy Montgomery, however, Grace reconstructs herself as a prouder, more fascinating archetypal romantic heroine and elevates herself in her own eyes and in those of her judges.

In her comments strictly reserved for the implied reader, she hints that her doing so is at least in part due to her acute awareness of what her audience finds most fascinating about her. Sex and violence being of the essence in the Upper Canada with which she is familiar, she delivers sex and violence, but paints herself not as the instigator of crime, but rather as its righteous and unwilling victim, driven by resistance to the point of madness. Thus she satisfies expectations at the same time as she leaves herself unsullied by crime or guilt. To quote Jordan, "[a]nyone in her position would select and rearrange, to give a positive impression" (322). In this, Grace illustrates Sherwin's likening of lawyers to advertisers and marketers, who know that

> effective persuasion requires gaining control over reality, and that the reality that counts most is the one the prospect (the would-be consumer) carries around in his or her own head. The persuader therefore must know what's there: what stock stories and character types, what familiar plot lines and scenarios, what storytelling genres and conventions. (38)

Indeed, the fictional defence narrated by Grace, which she addresses to two categories of narratees and judges, begs the question: What kinds of fantasies are woven into and fulfilled by trial narratives, especially when the hard evidence presented to the court is thin and circumstantial? What narratives work? How do they capture the attention and the imagination of an audience made out of judge, jury, the press, and the public? Throughout *Alias Grace*, both the implied author and the character of Grace Marks invite the implied reader to ponder these questions and to come up with a verdict. In the wake of the relatively recent and notorious O.J. Simpson, Karla Homolka, and Paul Bernardo trials,[36] a review of such questions could indeed prove valuable and further literature's auxiliary role in jurisprudential studies.

Not coincidentally, my next study examines a novel—Lynn Crosbie's *Paul's Case: The Kingston Letters*—that constitutes an assessment of, and a meditation on the Karla Homolka and Paul Bernardo cases (1993 and 1995), generally. The novel represents the public's perplexity with the intense emotions stirred, notably, during the Bernardo trial, and with its historical judge's stern (and seemingly paradoxical) admonition that the jurors reach a verdict through use of their reason alone. The emotions surrounding the Bernardo case were of two kinds. Not only was the videotaped

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[36] Nathalie Cooke observes in her biography of Margaret Atwood that *Alias Grace* "coincided, coincidentally, with the media frenzy surrounding the O.J. Simpson trial in the United States and the Paul Bernardo trial in Canada" (352).

evidence and the surviving victims' testimonies profoundly horrifying, but the narratives produced by the main witnesses, Paul Bernardo and his ex-wife, Karla Homolka, manipulated emotion with skill. This next study, then, begins where the present one ends and asks how justice can be rendered when a trial is, by necessity, fraught with emotion but the judicial system insists that its adjudication be rational.

CHAPTER TWO

Trial by Public: Courtroom Emotions and the Determination of Justice in Lynn Crosbie's *Paul's Case: The Kingston Letters*

Introduction

Lynn Crosbie's work of "critifiction,"[1] *Paul's Case: The Kingston Letters* (1997) has so far failed to engage scholars, perhaps because the fictional representation of the crimes and lives of sex slayers Paul Bernardo and Karla Homolka has proven distasteful to certain reviewers, or because the work is intensely fragmented and difficult to interpret. Difficulty and controversial material, however, have never inhibited scholars before. The actual reason for the absence of scholarly articles on Crosbie's *Paul's Case* therefore remains speculative. What is certain is that critical writing about the novel has appeared mainly in book reviews. In this study, I unequivocally support the analysis of *Paul's Case* as a serious and important work of fiction. I argue that Crosbie's work can be seen as a (traumatic) meditation on both the notorious trial as a cultural phenomenon and on the public's (emotional) sense of justice as it differs from that of the judicial system.

Crosbie, a native Montrealer who obtained a doctoral degree in English from the University of Toronto (Charbonneau), has commented upon her own work and is, to date, its most articulate defender. Her novel[2] partly borrows the title of Willa Cather's famous

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[1] "Critifiction" is a term attributed to Crosbie herself by Stephen Smith and Nicolle Charbonneau. The back cover of the Insomniac Press edition of *Paul's Case: The Kingston Letters* describes the work as "out-post literature / critical fiction / true crime." The term critifiction is therefore clearly a neologism that refers to fiction of a critical nature. In its Preface, Crosbie also characterizes her *Paul's Case* as "a critical enterprise," and as "a work of historical fiction," and of "imaginative investigation" (viii).

[2] I use the word 'novel' loosely throughout this study since Crosbie's work is extremely fragmented and includes poetry, cartoon strips, and images of various sorts, as well as long passages of prose. It represents a work of creative and critical fiction that refers to legal events. Whether it belongs generically to the

short story, *Paul's Case: A Study in Temperament* (1906). Cather's work features a maladapted and somewhat narcissistic boy who despises his surroundings, longs for beauty and glamour, and finds both fleetingly in Manhattan after stealing a sum of money from the Pittsburgh bank that employs him. In an interview with Eva Tihanyi, Crosbie reveals that she borrowed the American writer's title because, as she explains:

> I realized just how much on one level the character of [Cather's own work] resembled Paul Bernardo, with the furtiveness and the twitching lips, for example. I thought there was something interesting in his absolutely doomed delusions of grandeur. The Paul in Cather's story is nothing like Bernardo. However, he is fighting against who he is, and quite tragically so. I saw that in the early life of Paul Bernardo, someone who is directly ashamed of the way he lives. (3)

What Crosbie suggests with this quote is that she fictionalizes the historical Paul Bernardo; throughout her *Paul's Case*, she infuses the fictional Bernardo with a psychology and a destiny that are lacking from the neutral or negative depictions of the rapist and killer found in Canadian newspaper reports of his arrest and 1995 trial. Although it appears at first glance to be outrageously provocative, her claim that the novel contains "[references] to persons living and dead [that] are purely fictional, and designed as imaginative and analytical responses to extant portraits of these individuals" should have been taken seriously by her reviewers and readers alike (*Paul's Case* viii). Yet a number of them failed to take Crosbie at her word.

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category of the novel is something I leave open to debate. I would submit that it *is* a novel because it is both fictional and cohesive enough to constitute a sound and serious exploration of certain ideas. Its plot is based not on a causal arrangement of events but, as I claim throughout my study, on the moral development of its central narrator, who struggles, notably, with the idea of revenge as a form of justice. As such, Crosbie's work also emphasizes character and agency.

Canadian Reception of Crosbie's *Paul's Case: The Kingston Letters*

The most notorious among the unbelievers is undoubtedly *Toronto Star* columnist Rosie DiManno, who conceded that fiction may help us understand horrendous crimes, but who felt so deeply offended by what she described as Crosbie's cannibalization of "the emotions of everyone involved with the trial," by her "looting the graves of the dead," and by her "gnawing on the bones of murder victims and spitting at the survivors" that she threatened to "rake [her] fingernails across [Crosbie's] face" if she ever ran into her (DiManno, "*Paul's Case*").[3] DiManno's then *Toronto Sun* counterpart, columnist Christie Blatchford (who now writes for the *National Post*), was cast and named in Crosbie's novel as Bernardo's closet sexual fan. She threatened to sue Crosbie's publisher, Insomniac Press (Donham).[4] Crosbie's troubles hardly ended with these irate reactions. Despite their enthusiastic purchase of journalists' 'true-crime' works on the Bernardo affair, a number of buyers at the Canadian Booksellers Association refused to carry copies of Crosbie's *Paul's Case* on their shelves because its cover features a close-up of Paul Bernardo's characteristic pout and vacant blue-eyed stare. That *Paul's Case* is labelled a book of fiction, yet inflicts a likeness of Bernardo on its readers, was deemed

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[3] The threat was uttered by DiManno upon the release of Crosbie's novel in the Fall of 1997. Crosbie complained to the police and was referred to a Justice of the Peace who, a month after the publication of DiManno's article, issued a peace bond against the journalist. DiManno retaliated with another column in which she denied that her threat had been rhetorical or hyperbolic and accused Crosbie *de novo* of having written "a cheap piece of sexploitation." See DiManno, "Words," and Donham.

[4] During the Bernardo trial, Blatchford complemented the more neutral reports of *Toronto Sun* colleagues Scott Burnside and Alan Cairns with highly subjective accounts of courtroom events. She not only expressed her contempt for Bernardo and Homolka openly, but added impressions of Bernardo that seemed at times shocking and inappropriate. Given that Bernardo had described himself as ambidextrous, she wondered, for instance, with which hand he masturbated ("Bernardo Untouched") and wrote that Bernardo's tongue "mov[ed] in and out of his mouth with lizard-like speed and regularity" ("Icy Bernardo"). These sexualized comments attracted Crosbie's attention. *Paul's Case* features a journalist named Christie Blatchford in a section titled "The Journalist and the Murderer." It describes the fictional Blatchford's unacknowledged desire for the sex slayer (77-78).

unacceptable by these booksellers (Cole).[5] Next, in April 1999, a Toronto fundraiser for PEN Canada included a reading from *Paul's Case* during which audience members heckled the reader and left the hall in protest.

In his *Censorship in Canadian Literature* Mark Cohen attributes the angry reaction of certain audience members to three factors. First, the sex slayings of two of Bernardo's victims had taken place within only a few miles of the fundraising event. "Thus," Cohen writes, "the proximity (both in time and place) of the audience to the painful circumstances of the Bernardo crimes may have contributed to the offence felt" by those in attendance (161).[6] The reading also included a chapter titled "Pornography," which describes—in what is obviously meant to be a revenge fantasy—the sexual humiliation of Paul Bernardo at the hands of a female prison guard. To Cohen, the pornographic nature of the piece may not have been as offensive as the fact that audience members were "captive" while subjected to the graphic material. Cohen notes that the excerpt was lifted acontextually from the novel and thus embarrassed listeners unfamiliar with the work as a whole (164). Finally, a chapter from the novel titled "Mahaffy," after one of Bernardo's and Homolka's murdered victims, was also read. It portrays the young

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[5] See above, p. 40, note 9. In my study of *Alias Grace*, I define true-crime fiction as being known both for its combination of genres (since it mixes fiction and reportage), and for its shocking, gruesome depiction and subsequent promotion of the suffering and misery of actual persons. Although the back cover of *Paul's Case* describes Crosbie's work as being, in part, an exposé of a "true crime," I would argue that the work fails to fit into that generic category. *Paul's Case* is concerned not with the systematic coverage of Bernardo's criminal deeds, but rather with an implied author's and a narrator's fragmented exploration of their *reactions* to such deeds.

[6] Cohen's observation is worth pondering. Quite aside from their respective merits, one of the reasons why some critics have claimed to dislike Crosbie's literary effort when, only a year earlier, many had heaped praise on Margaret Atwood for her *Alias Grace* may be that Atwood wrote in 1996 of a horrendous double murder for which a young man and woman were convicted in 1843. Albeit loosely, Grace Marks and James McDermott resemble Homolka and Bernardo, but the dates of their trials and deaths allowed Atwood's readers to look upon the pair's crimes with a measure of equanimity. In 1997, the 1991 and 1992 Mahaffy-French murders were, however, still fresh in the collective memory of Crosbie's readers, and Crosbie herself made no effort to hide the historical identities of her novel's fictionalized constructs.

girl as a rebellious transgressive teenager, and some may have felt that this was disrespectful to her memory (163).

Most of the above responses to *Paul's Case*, then, generally fail to distinguish between fact and fiction, or they acknowledge the distinction, but find the work's claim to fictionality provocative and in bad taste. A number of reviewers and critics, however, have distanced themselves from such reactions and prefer to express their doubt as to the work's actual literary merit.

For instance, Marlene Blanshay accuses Crosbie of having written a book the sole interest of which lies in its sensationalism. "Unless you like being shocked, titillated or grossed out," Blanshay writes, "you won't be inclined to stick with [*Paul's Case*]." Even though he hardly makes an effort to describe the novel, Wade Hemsworth, for his part, manages in as little as eighteen lines to dismiss it as uninformative, unenlightened, an affront to both truth and fiction, a shame, and "a stain" on the literary canon. In her own review, Canadian poet and novelist Susan Musgrave makes a greater intellectual effort at presenting the novel to readers. She finds, however, that Crosbie's work fails because "[j]udgments, [. . .] on the writer's part, get in the way of the reader coming to his or her own conclusions." (As I argue later in this study, Musgrave's assertion that *Paul's Case* intrudes upon the reader's ability to draw his or her own conclusions is the result of a misinterpretation of the import of Crosbie's work.)[7]

Besides Musgrave, whose review is at least thoughtful, several critics have paid Crosbie the respect of considering her novel critically. They can be divided, roughly, into those who view *Paul's Case* as a formal experiment, and those who see it is a work concerned with moral issues. Philip Marchand belongs to both categories at once since

[7] I pick up and elaborate on Musgrave's point on p. 154 below.

he distinguishes himself with three articles devoted to Crosbie's work, generally, and to *Paul's Case* in particular. Marchand outlines the novelist's techniques in two of these. In a newspaper piece on the kind of recent Canadian literature that may offend canonical mores, he describes *Paul's Case* as a narrative that "tosse[s] literary genres into a salad bowl, dresse[s] them with terrible ironies and serve[s] them raw to the reader" ("Canadian Literature"). In his book review of *Paul's Case*, Marchand defines the novel as a difficult postmodernist work that surprises readers with its extreme fragmentation, the density of its intertextual allusions, its mixing of high art and popular culture, and its absence both of a fixed perspective and of a modernist belief in an "order" that might help organize the novel's flotsam and jetsam of disconnected narratives. Yet although Marchand also praises Crosbie's courage in tackling "evil," he not only raps her on the knuckles for her fictional, albeit cavalier, treatment of Christie Blatchford, but expresses his frustration with the very techniques he describes. He finds above all that the open-endedness of the work leaves the reader without "resolution of conflicting feelings" ("Frustrating"). Nicolle Charbonneau views *Paul's Case* as a 'found novel' that includes prose, poetry, illustrations, as well as footnotes and a bibliography of literary quotes and allusions.[8] She explains in her profile of the author that the novel was originally conceived as "a critical essay" that "swelled into [fifty-two] letters to the imprisoned Bernardo from a narrator who occasionally assumes the identity of several real or invented people involved in the case, including the victims." Ronald Epstein warns readers that "Bernardo gets the full postmodern treatment as the author uses poetry, prose, puzzles, and pornography to seek an inner truth." In a review written for *Books in*

[8] I use the expression 'found novel' to describe a novel that derives its meaning from juxtaposed or collaged fragments (that may include such 'found' and often non-literary material as newspaper clippings, art, advertising slogans, bits of songs, illustrations, and so on).

Canada, Eva Tihanyi also notifies readers that *Paul's Case* is devoid of moral answers and lacks a "straightforward narrative"; it represents instead a "collage of quotations, from newspaper articles and literary works, song lyrics, poems, script-formatted dialogue—even a cartoon strip" reminiscent of a "kaleidoscope," the patterns of which keep being reconfigured.

In a third article, this one on Crosbie's oeuvre for *Essays on Canadian Writing*, Marchand joins the ranks of those who have preferred to focus upon Crosbie's views on matters of evil, morality, and retribution. According to Marchand, Crosbie wrote *Paul's Case* to create "a voo-doo doll, a [fictional] stand-in, for the person [i.e., Bernardo] to be neutralized, [. . .] its construction [. . .] an act of vengeance" (147). Cultural critic Geoff Pevere, in turn, defends Crosbie when he writes that the questions Crosbie asks about Bernardo's criminal actions and trial, namely: "Why did it happen? How could they have done this? What did the victims feel? What are the courts and police not telling us? And, perhaps most disturbingly, what should be done to the killers?" are questions "of morality and emotion" that journalists are perhaps unequipped to address. "[W]e need," Pevere continues, "to turn elsewhere, to the subjective depths of the human imagination," a project which Crosbie obviously takes on. Finally, in his own review, Kenneth Harvey also rises to Crosbie's defence and calls her novel "a creation of heartbreaking and disturbing beauty, a biting commentary, infused with sarcasm, outrage and revenge theories" and a "poignant elegy to the victims" whose voices are magnified through Crosbie's "eloquence and poetry." Above all, Harvey concludes, "this book offers unflinching truth" in that it represents a "sound moral exploration of our killer culture."

For the most part, these reviews are written not for an audience of seasoned scholars, but for lay newspaper and magazine readers and, true to form, they attempt to grab their audience's attention with words and expressions that evoke emotional responses: "spitting at the survivors," "titillated," "grossed out," "affront," "shame," "stain," "raw," "victims," "pornography," "vengeance," and "outrage." Yet except perhaps for Geoff Pevere, who comes close to saying it, none of the above critics concludes, as I do, that Crosbie's work might be interpreted as a meditation on the role of emotions in the determination of justice. Moreover, although some critics do hint at a purposeful conflation of form and content, with the possible exception of Marchand in his article for *Essays on Canadian Writing*, none pursues this line of thinking with anything that resembles careful or sustained analysis.

Paul's Case as a Trial Novel

My own study stands precisely at the junction of the novel's techniques and content. It also examines the way in which the novel's fifty-two short and seemingly disjointed sections function as bits of shocking evidence, harrowing testimony, and collective or personal fantasies with which the public (the lay audience at any trial, as well as those Canadians who rely on the media for information) must grapple during a trial. In my study of Atwood's *Alias Grace*, I presented the novel's narrator and implied author, respectively, as a lawyer (who spoke in her own defence) and a court clerk. Both appropriated courtroom strategies and narratives for their own fictional ends and appealed for the final judgment of the implied reader. Thus, the implied author of *Alias Grace* alerted the implied reader to the dangers of sensationalism in the courtroom. In

light of her warnings, I pursue this investigation of sensationalist trials by introducing a narrator who, as a member of the general public, is emotionally and psychologically affected by the hyped coverage of an unusually infamous criminal's trial. This narrator has her own views of the way in which justice ought to be conducted when the defendants are unredeemable. I present as well an implied author who behaves as an attorney this time, and who respectfully requests that the shrill and distressed public have standing (or a voice) in the fictional re-trial of serial rapist and killer Paul Bernardo. The request is especially meaningful given that the public was kept from access to crucial information during both the 1993 Karla Homolka and 1995 Paul Bernardo trials. Since the judicial system relies for its accountability on the transparency of its activities, the request is also *not* without legal weight.

In short I claim, first, that *Paul's Case*'s formal fragmentation mirrors and enacts the middle section of a trial, the examination of witnesses.[9] Second, I argue that what the implied author is to gather from Crosbie's work is that emotions—which the usual courtroom players (the judge, lawyers, and jury) always struggle to keep out of court in the interest of an institutional (and 'purely rational') understanding of justice—have a role to play in the public's apprehension of justice. A literary narrative, however, rarely shies away from affect. As Martha Nussbaum writes, much of "[l]iterature is in league with the emotions" since the very structure of, say, novels, short fiction, or plays requires that the reader or audience feel something in order to continue reading or watching

[9] Rather fortunately—albeit non-coincidentally—this study is, itself, sandwiched between the 'opening' and 'closing' narratives of three narrators-as-attorneys, namely those of *Alias Grace* and of Wiebe's two novels. Thus these narrators present their statements to the appellate judge (the implied reader) as the implied author in Crosbie's novel brings forth a series of witnesses and allows them to speak.

(*Poetic Justice* 53).[10] Crosbie's *Paul's Case* therefore delves into matters frowned upon in legal circles (even though these matters clearly have legal import and implications). Meanwhile, the implied reader, who through this study continues to act as an appellate judge, must ultimately decide whether the narrator of *Paul's Case* is justified in her insistence that emotions are essential to matters of justice. *Paul's Case*, then, is a trial novel. Accordingly, the Bernardo trial to which the novel alludes—and fragments of which it contains—must be revisited to understand how the novel departs from it. Since the historical Bernardo had an accomplice (his wife, Karla Homolka) an inquiry into both trials is necessary.

The Historical Karla Homolka and Paul Bernardo Trials

(a) The Cost of Access to Justice in Canada

Surprisingly, my journey into the Homolka and Bernardo trials proved more difficult than I had anticipated. It also proved that, currently in Canada, access to information about justice can be costly. Whereas historical archival material of a legal nature on the Grace Marks, Big Bear, and Louis Riel trials turned out to be relatively easy to find, obtaining a copy of the Bernardo trial transcript—which contains a summary of the evidence presented at the Homolka trial, testimonies by both Homolka and Bernardo, the surviving victims' statements to the court, and information as to what was contained in the infamous sex videos made by the couple—became impossible. Copies of contemporary trial transcripts are provided not by the courthouse that hosts a trial, but by

[10] Noël Carroll points out, however, that art or literature that is self-reflexive and meta-creative "may be articulated in such a way [as to] address cognition exclusively." Although clearly critical and influenced by the tenets of postmodernism, Crosbie's *Paul's Case* is in fact steeped in emotion and provides a commentary on the role of affect in the courtroom. It also asks the implied reader to rule in this particular matter.

the individual court reporters involved. One of the Toronto High Court reporters present at the Bernardo trial, Ms. Mary Hew, informed me that the transcript of the trial (which lasted four months and generated roughly 200 pages a day) could not be borrowed and consulted, but had to be purchased instead at the fixed rate of $0.55 a page. In her estimation, reading the transcript of the Bernardo trial would cost me between $6,000 and $10,000, a sum which most employed Canadians cannot disburse.[11] Ms. Hew further notified me that even if I were able to afford the photocopies, she would certainly not enjoy the assignment. As she explained, her voice breaking from the memory of the trial, the material is contained in boxes that she had hoped never to open again. "I don't even like to hear the name [Bernardo]," she added.[12]

Although clearly distressing to both Ms. Hew and myself, this conversation was hardly unexpected. An earlier telephone call to the St. Catharines courthouse where Karla Homolka had been tried revealed that her much shorter trial transcript might cost approximately $1,500, an amount substantially lower than that of the Bernardo trial, but one which most people might be unwilling or unable to spend for the privilege of access to information about a criminal case prosecuted—like all criminal cases that go to trial—in the name of the public. On the whole, this information was not without reminding me of Lord Justice Sir James Mathew's comment that "[i]n England [as, apparently, in Canada], Justice is open to all, like the Ritz Hotel" (qtd. in Megarry 254). Financial access to the Canadian records of justice is prohibitive. I therefore had to resort to

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[11] The rate of $0.55 per page mentioned by Mary Hew is a bargain considering that it is available only if a judgment has been appealed (as was that of Justice Patrick LeSage, who presided at the Bernardo trial). The transcript of an unappealed trial costs $3.20 per page. In my own estimate, which takes into account Mary Hew's daily quota of 200 transcribed pages, as well as the short break allowed jurors so that they may have a semblance of a summer holiday, the Bernardo trial transcript would cost approximately $9,000.

[12] Telephone conversation, 4 Nov. 2002.

newspaper reports of the Homolka and Bernardo trials, and was fortunate that these proved remarkably thorough in their coverage.[13]

It is ironic that the transcripts of the Bernardo and Homolka trials should be financially inaccessible to ordinary citizens, for the lives and crimes of the infamous Canadian rapists and killers are almost too well known by now. The historical Karla Leanne Homolka, a veterinarian's assistant, met Paul Kenneth Bernardo, an accountant, at the restaurant of the Howard Johnson East Hotel in Scarborough on October 17, 1987. Homolka, a resident of St. Catharines, was then seventeen and had been invited to attend a Hagen pet supplies convention in Toronto. She was staying at the hotel with a girlfriend. Bernardo was twenty-three years old. A University of Toronto graduate, he had found a job as a junior accountant with Price Waterhouse and lived in Scarborough with his parents. As true-crime writer Stephen Williams reports, Homolka knew when she first laid eyes on Bernardo that she would marry him (46). The couple eventually wed on June 29, 1991 in Niagara-on-the-Lake. But although, on the surface, the story of their first meeting and the details of their marriage are so banal as to be, in Frank Davey's words, "utterly undistinguished and unmemorable" (*Karla's Web* 122), Homolka and Bernardo would prove to be anything but that.

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[13] For the purposes of this study, those newspapers which most thoroughly cover the Homolka and Bernardo trials are the Toronto *Globe and Mail*, and the *Toronto Sun* and *Star*. Each newspaper printed over 600 pages on the Bernardo trial alone. Reporters for each paper reported daily on the trials' highlights and at times provided readers with excerpts from the previous day's transcripts. In discussing the trials in the pages that follow, I have relied exclusively on reports published by the well-established and respected *Globe and Mail* and by the more populist *Toronto Sun* since the *Star's* readership fails to differ greatly from that of the *Sun*. Although the reporters of the *Globe and Mail* and *Sun* covered the same material, their tone and focus differ greatly. Where the *Globe and Mail* soberly explains legal terms, for instance, the *Toronto Sun* reproduces the rather outrageous words of the last few minutes of defence attorney John Rosen's closing statement. Where the *Globe and Mail* provides commentaries on how the Homolka trial's publication ban might affect freedom of expression in Canada, the *Sun* interviews those ordinary citizens who lined up outside the Toronto courthouse during the Bernardo trial. The two newspapers therefore complement one another perfectly.

(b) The Historical Homolka Trial

On May 18, 1992, Karla Homolka was charged under section 236 of the Canadian Criminal Code with manslaughter in the deaths of two teenagers: fourteen-year-old Leslie Mahaffy of Burlington, and fifteen-year-old Kristen French of St. Catharines.[14] A day later, Bernardo was not only accused of having kidnapped, confined, sexually assaulted, and killed both Mahaffy and French in 1991 and 1992, respectively, but of having raped about thirteen women in the vicinity of Scarborough between 1987 and 1989. On May 10, 1994, he was charged as well with the death of his fifteen-year-old sister-in-law, Tammy Homolka. Home videos taken from the couple's residence would determine that the young girl had been drugged by Karla Homolka and sexually assaulted by the husband-and-wife team. On February 25, 1994, Homolka was granted a divorce from Bernardo. She subsequently testified against her ex-husband at his 1995 trial in Toronto. But first she would undergo her own trial for manslaughter in St. Catharines.

i) <u>The Kovacs Publication Ban</u>

Homolka's trial began on June 28, 1993 amidst a flurry of controversy. Justice Francis Kovacs of the Ontario Court's General Division presided. The Crown, represented by attorney Murray Segal, moved to ban the details of the trial from being

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[14] Section 236 of the Martin's edition of the Canadian Criminal Code provides that "[e]veryone who commits manslaughter is guilty of an indictable offence and liable [. . .] to a minimum punishment of imprisonment for a term of four years [or] to imprisonment for life." Manslaughter, the broadest definition of an unlawful killing, is then defined in sections 222, 234, and 263(3) of the same code. For the purposes of the Homolka case and of this study, manslaughter can be defined quite simply as an unlawful killing that was not, however, intended to happen and that may have been provoked. As Alan Young explained to the readers of the *Globe and Mail* on July 6, 1993, the charge carries a maximum sentence of life, but judges have latitude in the sentencing and may, for instance, hand out as little as a suspended sentence if the accused acted in self-defence ("Background/Manslaughter").

divulged by the media on grounds that the fairness of Paul Bernardo's subsequent trial might otherwise be compromised. The prosecution feared that it would prove impossible to find jurors willing to assess Bernardo's case impartially if too many details of the Homolka affair were divulged to the public. Segal argued that "[s]ometimes [. . .] freedom of expression may clash with other rights—which are also protected" (Abbate, "Homolka Deal" A5).

Several parties either supported the Crown's motion or opposed it. Homolka's defence lawyer, George Walker, pleaded that a ban was imperative if Homolka's family, the families of the victims, and the St. Catharines community (amongst which the murders had taken place) were to be spared further "psychological harm" (Abbate, "Shield" A1, A4). Surprisingly, Bernardo's defence co-counsel, Timothy Breen, declared that his client waived his rights in the matter, opposed the ban, and wanted all details of his ex-wife's trial made public. The *Globe and Mail*'s Timothy Appleby and Gay Abbate reported on June 29 that Breen argued against the publication ban because it would mislead the public. Breen went on to declare to the press that "[y]ou don't have to be clairvoyant to realize that [Homolka] has plea-bargained with the Crown and will plead guilty. The public has interest in the plea-bargaining and how it works... and why it happens" ("Press Ban"). Until then, the public had been unaware of the existence of a plea bargain between Homolka and the Crown. Faced with the likelihood of one, the media also went to court and moved against the publication ban.[15] Nevertheless, on July

[15] See Abbate, "Shielded" and "Homolka Deal."

5, 1993, Justice Kovacs ruled in favour of a rather comprehensive ban that Toronto lawyer Edward Greenspan described as a "90-per-cent gag order" (Platiel).[16]

The ban was ordered pursuant to subsection 486(1) of the Canadian Criminal Code.[17] It excluded from the courtroom the "foreign media" as well as anyone, including members of the public, who failed to fit into one of six categories of persons: accredited Canadian journalists, the families of the victims, the family of the accused, all attorneys involved (including Bernardo's own lawyers), a total of three police officers, and the court's law clerk. Those journalists admitted were forbidden from publishing or broadcasting anything related to "the circumstances of the deaths of the persons referred to during the trial" and from divulging banned details to the "foreign press." Canadian reporters were then given a list of items they were allowed to cover during their assignments. This list was reproduced in the *Globe and Mail*. The media could only report on:

1. The contents of the indictment;
2. Whether there was a joint submission as to a sentence;
3. Whether a conviction was registered, but not the plea;
4. The sentence imposed;
5. That part of the court's reasons under the following headings:

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[16] Greenspan added, however, that although the ruling installing the ban was uncommon, it was "'not so exceptional as to be put in the *Guinness Book of Records*'" (Platiel).

[17] Subsection 486(1) of the Martin's Canadian Criminal Code provides that:

> Any proceedings against an accused shall be held in open court, but where the presiding judge, provincial court judge or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice [. . .] to exclude all or any members of the public from the court room for all or part of the proceedings, he or she may so order.

(a) The prosecutorial discretion (as referred to in the court's reasons on sentencing only);

(b) The principles of sentencing applied by the court;

(c) Only the remarks of the court in passing sentence on the issue of whether the accused is a danger to the public. ("Text")

Justice Kovacs offered his reasons for the ban. His main goal, he told the Court, was "to protect the integrity of the court system for both the accused and the right to a fair trial for Mr. [Bernardo]."[18] He added that every trial normally balances freedom of the press and the right of the accused to a fair process, and pointed out that fairness also ensures expeditiousness. According to the *Globe and Mail*, the judge concluded "with some regret," that he could not consider "as a factor what is a real factor—the psychological harm [to the families involved and to the community]" ("Reasons"). The ban, however, effectively shielded both.

Karla Homolka's trial proper followed on July 6, 1993 and was, by all accounts, swift. The next day, the *Globe and Mail* covered those details of her conviction and sentence permitted under the terms of the publication ban. At the trial, the Crown had described to the Court "the circumstances of the two girls' deaths and the mothers of the two victims [had] read statements outlining the impact [of] the murders [. . .] on their families." Karla Homolka was then found guilty of two counts of manslaughter in the deaths of Mahaffy and French. She was sentenced to a twelve-year prison sentence for

[18] Paul Kenneth Bernardo and Karla Homolka formally changed their names to Paul Jason Teale and Karla Teale after their wedding. See Williams 282. Although the Court during the Homolka trial referred to Bernardo as Paul Teale, I use the name Paul Bernardo throughout my study to avoid confusion.

each count, but the sentences would be served concurrently (Abbate, "Homolka Found Guilty" A1-2).

ii) Responses to the Kovacs Ban

As several journalists reported, the effect of the Kovacs ban was to fan rumours among the general public, members of which felt excluded from the juridical process. In its aftermath, the *Globe and Mail*, for example, published news and editorial headlines titled "Public Excluded from Homolka Trial," "A Weak Excuse to Close a Courtroom," "It Casts a Pall on the Law," "Ruling Expected to Encourage Gossip," and "Gag Order Won't Stop Tongues from Wagging." Yet Frank Davey (who departed from literary analysis to write a book on the Homolka case titled *Karla's Web: A Cultural Investigation of the Mahaffy-French Murders*, and who is, to date, the only literary scholar—along with Crosbie herself—to have seriously investigated the cultural implications of the media's coverage of the psychopathic killers), argues persuasively that if rumours were fanned by anything, they were fanned by the media itself.[19] As Davey notes:

[19] The main focus of Davey's work is the threat posed by the broadcasting and general propagation into Canada of American news coverage, which he equates with American cultural and economic imperialism and views as a clear invasion of Canada's moral and physical boundaries. Thus, Davey laments that Justice Kovacs's ban was broken with impunity both by the American media and by frontierless electronic means like the Internet, and that this coverage of the banned trial material then became accessible to Canadians. Davey also concludes that "the Canadian state [. . .] apparently lacked the power or will to enforce its own rule" (238).

Like Davey, I write about the effect on the Canadian public of the Kovacs ban (and of the subsequent LeSage ban, which Davey never covered). Unlike Davey's, however, my study focuses on the content and emotional tenor of the Bernardo trial (as it was covered by the media) and on that trial's relation to Crosbie's fictional work. In my own work I therefore avoid any analysis of Canada's lack of impermeability to American influence. Davey also wrote *Karla's Web* before the Bernardo trial took place, and Crosbie's work is centred almost entirely on the Bernardo case. Davey's understanding of the emotionalism fostered by the media is nonetheless extremely pertinent to my own study.

> A darker aspect of the media's coverage [of the Homolka affair] [. . .] was their repeated slipping past the mere reporting of information, or investigation of purported leads, to the reporting of non-events in emotional terms that seemed designed far more to stir the feelings of readers than to convey information. (18)

Davey has a point.[20] Once the ban was declared, the media printed articles that were both elusive and emotional.

On July 9, for instance, in an article titled "Tears for Kristen, Tears for Leslie" ironically published in the "Facts and Arguments" section of the *Globe and Mail*, CBC rookie reporter Lisa Gabriele addressed her readers. "I am 26 now," she began,

> a few years older than Karla Homolka and her two victims, the same age as the women who were raped in Scarborough. And here was the accused 10 feet away from me. I tell you it was weird, just looking at him.
>
> And on Tuesday I stared at the back of Karla Homolka's head and listened to the most terrifying things I have ever heard in my life.
>
> And I watched hard-nosed journalists, veterans of street reporting, men and women hardened by 15 years on a police beat. I watched them all break down and cry.

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[20] Davey's point applies to his own work, of course, and in this he partly disproves his theory concerning Canada's lack of efficiency in the enforcement of the Kovacs ban. *Karla's Web* was published in 1994 and was directly affected by the publication ban. Davey revealed proscribed details about the Homolka trial and his publisher, Toronto's Viking, an imprint of Penguin Books Canada, was ordered either to delete those passages entirely or to blacken them out. Viking chose to print the book along with (at times extensive) blackened sections, a move that had the effect of generating even greater speculation about the trial, as did the marketing decision to guarantee that once the ban was lifted, and upon returning to Penguin Books a postcard included in every copy of *Karla's Web*, readers would receive the text of the censured sections.

Gabriele's statement that she listened to "the most terrifying things" she had ever heard in her life follows a description of the "travelling carnage show" to which she was subjected along with her fellow journalism students in the last year of their training. According to Gabriele, student reporters were made to watch a videotape of "scorched bodies in Montreal, a group of teenagers playing soccer with some Sandinista's head, [and] a firing-squad montage" as an instructor told them that if they were unable to withstand those images, they were "in the wrong business." Rhetorically sandwiched between her memories of the hard old days of journalism school and the unusually expressive reactions of reporters much more experienced than herself, Gabriele's piece hints at horrors that the national newspaper's most hardened readers could only begin to imagine. Save for a fleeting reference to the Mahaffy and French families' victim-impact statements (which are themselves described as being highly disturbing),[21] it offers no factual information about the trial itself.

iii) The Public's Lack of Standing in a Criminal Trial

But although Frank Davey rightly asserts that the "transformation of the case into a melodramatic mechanism for selling newspapers and attracting television viewers was so strong that it was difficult to measure actual public dismay at [Justice Kovacs's] ban" (81), the ban gave way to an important societal debate about the role of the public in a criminal trial. As they attempted to lift the ban, the media argued in court that they represented a democratic society's vital link between the public and the halls of justice. In his judgment on the ban, Justice Kovacs banned the public from the courtroom, but

[21] As Frank Davey reports, Justice Kovacs's ban was extended to the content of the victim-impact statements at the end of Homolka's trial (78).

allowed accredited Canadian media to remain, thus suggesting, as Davey writes, that perhaps the media acted as the public's surrogate (79). The public itself, however, has no standing in a court of law; it is represented solely by the Crown which, in turn, represents the Queen and, through Her Majesty, the interests of the general population. During the Homolka trial Canadians, and the inhabitants of Burlington and of St. Catharines in particular, found themselves wondering how their interests were protected by a secret deal arranged by the Crown that was then shielded from their scrutiny.

At the height of this debate, Ontario Attorney-General Marion Boyd spoke to the *Globe and Mail*'s Martin Muttelstaedt and stated, somewhat condescendingly, that she doubted that Canadians understood the way in which the justice system operates "and what some of the issues for us as citizens are." Those issues, she added, have to do with the constitutionally entrenched independence of the judiciary, which aims to guarantee impartiality and fairness regardless of the presence or absence of the public in court. They have to do as well with the importance of Canadians understanding "that cases are judged on the basis of the facts that are brought forward in court, [and] not [on that of . .] rumours or emotions [. . .]." But that was precisely the point of the media: rumours and emotions existed only because Canadians were kept from most of the facts of the Homolka case.

(c) The Historical Bernardo Trial

Those facts would be revealed two years later during the Bernardo trial. Bernardo was finally charged with a total of nine counts that included two counts each of kidnapping, aggravated sexual assault, unlawful confinement, and first-degree murder in

the deaths of Leslie Mahaffy and Kristen French, as well as with committing an indignity on a human body (the murdered Leslie Mahaffy was dismembered with a power saw and her body parts encased in cement blocks that were later thrown into Lake Gibson, near St. Catharines). Bernardo pleaded "not guilty."

His trial by jury[22] began on May 18, 1995 in Courtroom 6:1 of Toronto's University Avenue courthouse before Ontario Court General Division Justice Patrick LeSage. The *Toronto Sun* reported that the courtroom was the largest in the country and counted 210 seats. Ninety-two of those seats were reserved notably for the families of the accused and of the victims, as well as for the media. The remaining 118 seats were made available to the public. Daily passes or tickets were handed out every morning to those persons who lined up in order to attend the trial (Burnside and Cairns, "Crown Opens"). Because the Canadian public wanted closure on the Mahaffy-French murders, and because the Bernardo trial effectively lifted the ban on the evidence presented during the Homolka case, people began lining up before dawn for a seat in Justice LeSage's courtroom. They attended, as well, because they had heard that this evidence took the form of a series of videotapes of a pornographic nature recovered by Paul Bernardo's first

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[22] During the Homolka case, the Kovacs ban had meant to avoid difficulty in the selection of a jury for the Bernardo trial. Mr. Justice Kovacs had worried about the public's perception of Paul Bernardo in the aftermath of Homolka's case. His Lordship's fear was that no juror would be impartial to Bernardo before his trial. Jury selection in the Bernardo trial, however, was completed within only two and half days. *Globe and Mail* reporter Michael Valpy explained that "[t]he speed with which it has occurred [. . .] is likely to be viewed in [one of] two ways":

> One, it might be presented as evidence of the salutary effectiveness of court-ordered publication and broadcast bans on certain information that might be relevant to the trial.
>
> Two, it might be presented as evidence that the bans were never needed. The latter judgment is more appealing.

Valpy, however, failed to elucidate or substantiate this last sentence; presumably, he had hoped the media's motions against Justice Kovacs's ban would one day be validated.

defence attorney (Ken Murray) from the Bernardos's rented house in St. Catharines.[23] The tapes, shot alternately by Bernardo and by Homolka, not only showed the couple using and abusing Mahaffy and French as 'sex slaves,' but included footage of the drugging and rape of Karla Homolka's sister Tammy and of an adolescent girl who survived the couple's sexual abuse and to whom the Court referred as "Jane Doe" to protect her identity. These two young women were the "persons referred to during the [Homolka] trial" whose names were kept from the public by Justice Kovacs's ban.[24]

i) The LeSage Video Ban

The Crown described the videotapes as being "worth 'a million words.'" Two weeks into the Bernardo trial, however, Justice LeSage decreed that members of the public would be banned from seeing the videotapes, although they would be able to hear the audio portions. The tapes were to be viewed only by Bernardo, all lawyers involved, the jury, and Mr. Justice LeSage himself. In his reasons for denying public access to the video portions, Justice LeSage invoked the need to balance the principle of "open justice" and the harmful effects of exposure to the violent pornographic images. "The public pictorial display of [the] videos," Justice LeSage explained, had "virtually no redeeming societal value" (Cairns and Burnside "Tapes"). Still, day after day, Canadians lined up

[23] Because he himself was in custody, Bernardo directed Murray to retrieve the videos from his home in May 1993 and ordered him not to view them. Once Karla Homolka received her twelve-year sentence a resentful Bernardo asked Murray to look at them. Once familiar with the tapes' contents, the lawyer not only failed to inform the police or the Crown that he possessed them, but made VCR copies and kept them at his farm. Fifteen months later Murray asked another attorney, John Rosen, to take over the Bernardo case. Only then did he admit to having the videotapes. John Rosen disclosed the tapes to the Crown (Williams 497-507). Murray was charged with and then cleared of criminal wrongdoing. He was then investigated by the Law Society of Upper Canada for professional misconduct. The investigation was withdrawn in late November 2000. As the *Toronto Sun*'s Alan Cairns reported, a spokesman for the Law Society stated that "'the public interest' would best be served by the 'clarification of professional responsibilities' rather than [by] continued disciplinary action against Murray" ("Bernardo's Lawyer").

[24] See p. 104 above.

outside the courthouse and then invariably complained of feeling nauseated and haunted by the voices of Mahaffy and French crying or pleading for their lives (MacDonald). One man told *Toronto Sun* reporter Jean Sonmore: "You come out [of the courtroom] feeling depressed and dirty."

Those citizens who either refused or failed to find a seat in Justice LeSage's courtroom were able, instead, to read Christie Blatchford's uniquely disturbing and cunningly sensationalist coverage of the trial. Yet Blatchford *did* keep her readers informed of details left uncovered by more traditionally neutral reports of the trial. It was Blatchford, for instance, who told the public that Karla Homolka (who portrayed herself during the Bernardo trial as one of her ex-husband's victims) was at times "the woman who kept the camcorder rolling on Leslie Mahaffy during Bernardo's anal assault on her and kept it, by [defence attorney John] Rosen's description, moving too, now in there for a better angle, now around here for another shot" ("A Heart of Cold Steel"). Blatchford editorialized as well. She delighted in insulting Bernardo and described him as a "Valley Girl on steroids, all blond banality on the surface, violence seething just below" ("He's the Valley"). Through Blatchford's almost daily dispatches from the courthouse, the public was kept informed of the case's most sordid details and kept in a state of perpetual outrage.

ii) The First-Degree Murder Charge

Aside from the video ban and from the unsavoury nature of the evidence presented, the trial itself unfolded relatively smoothly. Its focal point was Bernardo's

double first-degree murder charge.[25] Forensic evidence failed to reveal whether Mahaffy and French had been killed by Bernardo or by Homolka, and the deaths themselves were never videotaped. As she testified for the Crown (against her ex-husband), Karla Homolka told the jury that Bernardo had strangled Mahaffy and French with a black electric cord that had been recovered from the couple's residence. The Crown, represented by attorney Ray Houlahan, insisted that although it was clear that the young women had been kidnapped, forcibly confined, and then beaten as Bernardo raped them, the jurors needed to infer that Bernardo was, additionally, guilty of first-degree murder because he was a "meticulous planner" and the "orchestrator" of his videotaped sexual fantasies (Makin, "Bernardo a Killer" A1, A10). During his trial, Bernardo admitted to dismembering Mahaffy, but accused Homolka of the *killings* and claimed that Mahaffy and French had died under his ex-wife's custody as he stepped out briefly to run errands. Houlahan, however, reminded the jury that in the videotapes Bernardo always spoke in the first-person singular as he terrorized his young captives. When threatening the girls, for instance, he would repeatedly say "I'll kill you" without mentioning Homolka (Cairns and Burnside, "Accused").

John Rosen, for the defence, asked that the jurors find Bernardo guilty of two counts of manslaughter instead, since the murders could indeed have been carried out by Homolka while Bernardo was out (Burnside and Cairns, "Is There Reasonable Doubt?").

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[25] Section 231 of the Martin's edition of the Canadian Criminal Code provides under subsection 2 that "[m]urder is first degree murder when it is planned and deliberate." For the purposes of this study and of the Bernardo trial, subsection 5 then adds that [i]rrespective of whether a murder is planned and deliberate [. . .], murder is first degree murder [. . .] when the death is caused [. . .] while committing or attempting to commit an offence under one of the following sections: [. . .] (b) section 271 (sexual assault); (c) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm); (d) section 273 (aggravated sexual assault); (e) section 279 (kidnapping and forcible confinement) [. . .]." Sexual assault involves an assault of a sexual nature during which the victim's sexual integrity is violated. Aggravated sexual assault is defined as a sexual assault during which the complainant is wounded, maimed, or disfigured, or during which her life is endangered.

Rosen added that Homolka's testimony at her ex-husband's trial (during which she portrayed herself as a battered woman who feared for her life) was untrustworthy; Homolka, Rosen insisted, was "a malingerer" (Makin, "Bernardo Can Be Called" A1). Bernardo would certainly go to jail for kidnapping, sexual assault, and unlawful confinement, he may even "in some respects be the devil incarnate," Rosen argued, "but even the devil deserves the benefit of the law" (Burnside and Cairns, "Giving the 'Devil' His Dues"). In what the *Globe and Mail*'s Kirk Makin describes as "a style reminiscent of rap music," Rosen ended his closing argument to the jury with a long and rather astounding list of names and epithets used at one time or another by Homolka, by Mahaffy and French during their ordeal, by Homolka's parents, or by the media to describe Bernardo ("Bernardo Can Be Called" A1). The *Toronto Sun* reports that Rosen told jurors that "[i]t has been said of Paul Bernardo":

> that he has been the Best Boyfriend in the World. Big Bad Businessman. Master. Prince. King. Most Powerful Man in the World.
>
> Son. Brother. Our Weekend Son. Philanderer. Two-Timer. [. . .]
>
> Predator. Prowler. Pervert. Peeping Tom. Nighthawk. Late Riser. Cool. Manipulative. Unctuous. [. . .]
>
> Infantile. Penile. Scatological. Insatiable. Ingratiating. Ungrateful. Grating. Self-Gratifying. Self-Aggrandizing. Minimizing. [. . .]
>
> Contradiction. Mystery. Puzzle. Enigma.

"But what he is not, members of the jury," Rosen ended dramatically, "is a murderer [. . .]" ("Almost Every Name").

Faced with a four-month trial, with details of Homolka's plea bargain, with Rosen's showy litigation style, with contradictory testimonies by Homolka and Bernardo, with distressing videotaped evidence, and with the affecting reactions of the victims' families, who were present in the courtroom, the jurors might have been forgiven for responding viscerally. They were, however, cautioned against this temptation by Justice Patrick LeSage.

iii) Justice LeSage's Address to the Jury

The magistrate began by warning jurors against giving undue weight to expert testimony concerning Homolka's battered-woman syndrome, and told them that theirs was a trial by jury, not a trial by expert; jurors should therefore make up their own minds about what they had heard and seen (Makin, "Bernardo Jury"). He added that the direct videotaped evidence required that jurors find Bernardo guilty of kidnapping, forcible confinement, and aggravated sexual assault. Bernardo's own testimony about Leslie Mahaffy's dismemberment must lead as well to a guilty verdict on the count of having committed an indignity on a human body. It was now up to the jury to determine whether Bernardo was guilty of first-degree murder or manslaughter. Both the *Toronto Sun* and the *Globe and Mail* reported Justice LeSage as saying that the jurors must "approach [this] task with an open, clear, logical mind and arrive at a decision without being influenced by the very extreme emotions that this case evokes" (Burnside and Cairns, "Only the Evidence"; Makin, "Bernardo Jury"). He then reiterated this last message in different words: "You will put aside any prejudice or preconceived views you hold or harbour," he told the jury of twelve, "this is particularly important in this case. Not only

has it attracted wide attention, but so many aspects of this case have been inherently disgusting and perverted" (Makin, "Bernardo Jury"). With these curiously emotion-laden words, jurors were led out of the courtroom to ponder 'rationally' the fate of Paul Bernardo.

On September 1st, 1995, after almost ten hours of deliberations, the jury pronounced Paul Bernardo guilty of first-degree murder in the deaths of Leslie Mahaffy and Kristen French. On November 3, 1995, Mr. Justice Patrick LeSage sentenced Bernardo to life in prison for first-degree murder. He also declared Bernardo a dangerous offender in light of the remaining seven counts for which he was tried and of the thirty-two additional charges related to the rapes of thirteen Scarborough women, the rape of Jane Doe, and the manslaughter of Homolka's sister Tammy. Although Bernardo was not tried for these crimes, he admitted to committing them and Justice LeSage considered them in his sentence.

iv) The Victim-Impact Statements

Because the victim-impact statements of so many of Bernardo's surviving victims were heartrending, the sentencing process proved to be even more affecting than the trial itself. Whereas newspaper reports of the audio portions of the videotaped evidence evoke disbelief and a kind of horror that is difficult to grasp for an ordinary and law-abiding citizen, the reading of the substance of the Bernardo trials' victim-impact statements is so permeated with a sense of worlds lost, lives shattered, bodies hurt, and souls broken as to be unbearable. Leslie Mahaffy's younger brother, Ryan, testified that as a result of Leslie's death he had become an only child, that his parents argued ceaselessly, and that

they had lost their sense of humour. Kristen French's mother told the court that she had seen her husband age instantly upon hearing of their daughter's death. Several of the Scarborough rape victims told Justice LeSage that they suffered from depression, suicidal thoughts, and persistent night-time insomnia due to fear. Although their testimonies were not part of the trial per se, a visibly stirred Justice LeSage attempted to console and empower these latter victims by asserting forcefully that Bernardo was indeed guilty of their rapes and trauma even though he had never been tried for them (Makin, "Bernardo Judge"). This detail is relevant for, as I show later in my study, victims traditionally have no power of their own in the delivery of a verdict.

v) Wanted!: Closure For All

There was hope that sentencing would finally bring much-needed closure to the Bernardo affair. In 1999 Bernardo tried to appeal his sentence on grounds that he was treated unfairly by the Court (Fine).[26] The appeal was rejected. Bernardo then appealed to the Supreme Court of Canada. In September 2000, the highest court in the land withheld its reasons for refusing to even hear the appeal (Dunn). In December 2001, the originals and all copies of the videotapes shot by Bernardo and Homolka were destroyed in an undisclosed manner in Niagara, although the Ontario Court of Appeal holds a

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[26] According to the *Globe and Mail*'s Sean Fine, Bernardo argued that Justice LeSage

> [had] improperly and repeatedly undermined his only chance for an acquittal: to show that his ex-wife Karla Homolka [had] killed teenagers Leslie Mahaffy and Kristen French.
>
> By letting experts on battered woman's syndrome testify [. . .] Justice Patrick LeSage [had] made a major error, which he compounded when he failed to warn jurors against being unduly influenced by any sympathy for Ms. Homolka [. . .].

The last part of Bernardo's claim is clearly preposterous. Given the nature of the evidence presented in court, Bernardo never would have been acquitted. At best he might have been convicted of manslaughter. Furthermore, Justice LeSage did warn jurors to use common sense in assessing expert claims that Homolka was a battered woman. His Lordship also cautioned jurors in a general manner against letting their emotions take over during their deliberations. See above, pp. 115-16.

transcript of the tapes. Along with the Bernardo trial's evidentiary items, photographs from the murder scenes and autopsies were destroyed by order of Ontario Attorney General David Young (Cairns and Artuso). Earlier in March 2001, the National Parole Board denied Karla Homolka parole and ruled that she suffers from a personality disorder and might "kill again" (Cairns, "Homolka Stays"). Under the terms of the deal she struck with the Crown, however, Homolka will be released in 2005.

It seems, in fact, that Paul Bernardo's life sentence and Karla Homolka's parole denial hardly brought a sense of closure to Canadians. The controversial reception of Crosbie's *Paul's Case* suggests instead that the wound is still raw and that the Canadian public has yet to get over the events surrounding the Ontario rapes and sex slayings. Since too few critics have managed to provide in-depth studies of *Paul's Case*, Crosbie herself has been outspoken as to the meaning with which she infused her work. Although any work of literature ultimately escapes its author and becomes the subject of multiple interpretations, her thoughts are worth investigating; she remains after all the most articulate defender of her novel.

Good vs. Evil: The Binaries of the Bernardo Affair

In a 1997 piece for the *Globe and Mail* in which she contextualizes *Paul's Case*—a "letter in fifty-two sections" addressed by an anonymous female narrator to an incarcerated Paul Bernardo (15)[27]—Crosbie explains that she attended the Bernardo trial

[27] As several reviewers point out, the number fifty-two is a reference to the number of weeks in a year. See Marchand, "Frustrating," and Musgrave. There are also fifty-two cards in a traditional deck of cards, as Philip Marchand notes in his "Frustrating Courage." In *Paul's Case* the narrator explains to a fictional Bernardo that her letter in fifty-two sections constitutes "[s]imple cartomancy between a fair-haired man who is the Jack of Spades [and] a young dark-haired woman" (15).

and later realized that true-crime writers like Stephen Williams had based their books largely on trial material. The problem with subsequent journalistic accounts of the trial, Crosbie argues, is that nobody really knows what happened within the Bernardo household as the victims were killed. True-crime writers, however, went on to pen their works "under the aegis of Truth and Fact." What Crosbie suggests and what reports of the trial bear out, is that the trial itself turned out to be a truth-seeking exercise that failed to bring out the whole truth. Beyond the girls' sexual defiling, which was videotaped, the identity of the killer, or killers, remains a mystery. Paul Bernardo was convicted for his victims' direct murders; Homolka was instead found guilty of manslaughter. But their examinations at Bernardo's trial were contradictory; they failed to provide a complete picture of what happened and this led to a polarization of emotions surrounding the events left unreconstructed.[28] Crosbie complains that, as a result, accounts of the psychopathic couple are entrenched in "the binaries of good and evil" (Crosbie, "Lynn's Case").

These binaries, however, originated with the adversarial trial itself. Although the court attempted to keep emotions in check so as to provide Bernardo with a fair trial, the Kovacs and LeSage bans (which encouraged speculation and gossip), the witnesses' conflicting testimonies, and the harrowing nature of the evidence fostered such binaries. American evangelist Billy Graham himself felt compelled to comment to a *Toronto Sun*

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[28] A little over a month after Bernardo's conviction, forensic pathologist David King told the *Globe and Mail* that Homolka's allegations that Bernardo had strangled Kristen French were inconsistent with post-mortem records. According to King, French's death more likely occurred from injuries to the head caused by contact with a hard object. The Crown, King claimed, had deliberately refused to put him on the stand because his insistence that strangulation was not the cause of death might have led to a mere verdict of manslaughter against Bernardo (Makin, "Homolka Testimony" A10). Despite the evidence presented in court and Bernardo's conviction and sentence, Homolka's and Bernardo's full roles in the Mahaffy and French murders therefore remain unknown.

reporter during a visit to the city in June 1995 that the evidence at the Bernardo trial was "'about the worst thing'" he had ever heard, that it showed "the depth of depravity in the human heart," and that although God may forgive the accused, the victims' families might not (Schaffeler). Bernardo's own defence lawyer strategically picked up on the demonization of his client when he told the court that Bernardo might well be "the devil incarnate" (Burnside and Cairns, "Giving the 'Devil' His Dues").[29]

Not surprisingly, Crosbie tells Eva Tihanyi that *Paul's Case* reveals, among other things, "flaws in the whole treatment of the case by the law [. . .]" (2). In *Paul's Case*, Crosbie anticipates and counters her critics' contention that her literary effort is despicable and obscene by solidly demonstrating that a trial and, for that matter, true-crime works themselves, are equally problematic, especially when they pretend to strict rationality and factuality. *Paul's Case*, however, does not subvert the adversarial trial as a postmodernist work would; like the other novels in this study it offers a non-legal perspective on justice and asks the implied reader to deliberate on the wisdom of that surrogate vision.

The Form of *Paul's Case*: Fragmentation and the Examination Phase of the Trial

The very form of *Paul's Case* is trial-like. In "Law and the Order of Popular Culture," Carol Clover explains that any trial is "neatly tripartite" in that opening and closing statements bookend a middle section: the examination of witnesses, which she describes as a paratactical "stretch of textual bits and pieces without coordinating conjunctions [. . .]". It is at this point, she writes,

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[29] But, Rosen added, "even the devil deserves the benefit of the law."

> that the "text" collapses into a jumble of physical items and arrested moments: weapons, carpet fibres, testimony about drug reactions, behavior at the funeral, and so on. As if in freeze-frame close-ups, these fragments now become the object of our investigation, but disarticulated and disordered, as though unrelated to one another or to any larger story. (103)

Many of Crosbie's reviewers have described *Paul's Case* as being made of seemingly disconnected fragments.

These fragments (which in *Paul's Case* allow the killers a voice unprompted by lawyers; resuscitate the victims; and present information rendered inadmissible at the historical trial) *formally* resemble those of the examination phase of a trial. Within an actual courtroom, the Court and the public are faced with the jumble of physical and narrative items suggested by Clover and must make sense of it by forcing such items to fit "neatly" within the ordered and teleological narratives of either the Crown or the defence attorneys. If such items fail to fit within those narratives, a third interpretation of the trial's events—neither the Crown's nor the defence's—emerges. This is precisely what happens in Crosbie's novel. Its narrator embraces an assortment of factual yet highly emotional information, mixes it freely with fantasies of desire and retribution as well as with a form of empathetic understanding, and arrives at an epistemology that diverges from that of the usual courtroom players: the judge, the attorneys for and against the accused, and even the jury, whose members are equally bound by the trial's adversarial nature and by the judge's instructions. As a counternarrative to the narratives produced in court and echoed by the media, *Paul's Case* speaks *for* the public (and, by

implication and more generally, *to* the public). It speaks, above all, for the feelings with which members of the public grapple as they attempt to understand both the crimes committed and the trial process itself. As a counternarrative, then, it directly confronts legal discourses about the practically non-existent role of the public in the courtroom and, I argue, about the judicial system's lack of belief in the positive influence of the emotions during adjudication.

The Courtroom Players in *Paul's Case*

(a) The Implied Author as Attorney

Because the implied author of *Paul's Case* is combative, persuasive, and well read (she includes in her work epigraphs and learned allusions with which an ordinary reader, as a member of the general public, might be unfamiliar), she may be characterized as an attorney who takes on the case of a representative member of the general public. Her 'client,' the anonymous female narrator (*Paul's Case* 15), demands a voice in the Homolka-Bernardo affair.

(b) The Implied Reader as Appellate Judge

As in Margaret Atwood's *Alias Grace*, the narrator of *Paul's Case* addresses a main narratee (who, in this case, is the fictional or imagined Paul Bernardo), yet the implied reader is also the novel's narratee and 'appellate judge.' In *Alias Grace*, the character of Grace Marks addresses the implied reader through her interior monologues, which she denies her main narratee, Dr. Simon Jordan. Similarly, most of the sections of *Paul's Case* are addressed to Paul Bernardo, to whom the first-person narrator refers as

"you." The implied reader, however, is equally present as a narratee in the implied author's text because of the novel's preface and because of introductory sections titled "A Good Deal of the Incidental Symbolism" (x), "Map" (xi), and "Key" (xii), all of which precede the long letter addressed to the fictionalized Bernardo. Although these sections are not narrated and consist instead of a series of epigraphic quotes, they are addressed to the implied reader rather than to the fictional Bernardo. They function, in fact, as the implied author's trial-like 'opening statement.' The "Legend/Appendix" that follows the narrator's letter to Bernardo describes the major players in, and sites of, the historical Homolka-Bernardo affair and act, in turn, as the implied author's 'closing statement' (167-60). The fictional Bernardo would be in no need of this introductory and final information; only the implied reader, as appellate judge, needs to be reminded of such details.

The implied author begins her case with what might be characterized as an opening statement. She offers the implied reader six eclectic epigraphic quotes. Four of them (from the works of Elliott Leyton, Gaston Bachelard, Willa Cather, and Leopold van Sacher-Masoch) introduce the subject of evil (a subject which naturally arouses various emotions such as fear, anger, or scorn), and suggest that criminals and murderers are visibly different from other members of society and should therefore be shunned from their midst. One courtroom quote by the historical Paul Bernardo himself certifies that he deserves punishment for his actions. Finally, an excerpt from a poem by Audre Lorde (x) refers to the implied author's 'ingestion' of difficult trial material and to her reworking of that material into a vision of justice that differs from that of the court.

The page that faces these six quotes features an illustration of two children (a boy and a girl) at sea and standing upon a book titled "The Book of Knowledge," which keeps them afloat. On the shore before them lies the world, with its skyscrapers, pagodas, cathedrals, power plants, and tribal totems (xi). Although the two children who use the Book of Knowledge as a raft may be symbolic of Bernardo and Homolka (who have acquired a dangerous form of knowledge of the world through their murderous activities), they may refer as well to (the male and female) members of the public at large (a category that includes the narrator) adrift in child-like ignorance of true evil, and about to be rudely shocked by what lies ahead in the 'real world.'

(c) The Narrator as a Representative of the Public

By her own admission, the narrator of *Paul's Case* is, first of all, a member of the public during the Bernardo trial; she is one of those persons who lined up for a seat in Justice LeSage's courtroom. She "watch[ed] Homolka testify," and she stared at the back of Bernardo's head as she sat in the public's section of the Toronto courthouse where his trial unfolded (*PC* 14). She is also "Sybiline" (sic).[30] She largely processes facts and emotions by "borrow[ing] voices, [speaking] through others. To recover, what is unsaid"[31] (166). Yet although she borrows Karla Homolka's, Kristen French's, Leslie Mahaffy's, or even attorney John Rosen's voice, among many others, she sometimes speaks in her own voice and describes her various personae as narrator. Like the implied

[30] The adjective "Sybiline" refers of course to "Sybil," the 1977 based-on-a-true-story television movie that depicted a teenager affected with multiple-personality disorder. The film was directed by Daniel Petrie and featured Sally Field. The narrator is also 'sibylline' in that she receives a "[r]evelation" in the course of her investigation of the Homolka and Bernardo court cases (163).

[31] The comma that follows "to recover" signals that the narrator needs both "to recover" from the shock of the crimes themselves and "to recover [. . .] what is unsaid" in courtrooms, generally.

author, she is well-read, worldly, and capable of taking on various masks. She is a forensic scientist-cum-executioner (21); a "student of psychoanalysis" (45); a "journalist" (35) conscious of the blurring of fact and fiction (26); and an overwrought correspondent (125).

She also expresses a wish to be "the entire chorus [of the "Senecan drama" that is the Homolka-Bernardo affair]" (19-20). The narrator thus expresses her wish to take on the role of observer *and* commentator, a role akin to that of the public, whose members have no standing in the courtroom and are not bound by the procedural rules of the trial.[32]

Emotions and the Law

Above all, the narrator's manifestations as scientist, psychologist, writer, letter-writer, and chorus oscillate between the poles of rationality (forensic science, clinical psychology) and emotionalism (victimization, the horrors inherent to Senecan tragedy) that took hold of the historical Homolka and Bernardo trials and with which judges, lawyers, and jury struggled to the end. Implicit in Justice Kovacs's ban of the evidence presented at the Homolka trial and in Justice LeSage's exhortation to the jury to "approach [their] task with an open, clear, logical mind and arrive at a decision without being influenced by the very extreme emotions of the [Bernardo] case" (Burnside and Cairns, "Only the Evidence," Makin, "Bernardo jury") is the idea that emotions cannot be appropriate adjuvants to justice.[33] Susan Bandes, for instance, writes that the legal world

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[32] Of course, trials are *public* to ensure their transparency. In this sense alone does the public play a vital role within the courtroom.

[33] Literary and legal scholars who write on the subject of the emotions agree that they are difficult to define. According to legal scholar Susan Bandes, emotions:

> do not fit easily into categories such as: active or passive; essentially physical processes or psychological states not reducible to physical processes; rational, nonrational, or

"generally subscribes to the formalistic belief that reason can be neatly separated from emotions" ("Empathy" 366-67). As Martha Nussbaum and others point out, the view that the emotions are untrustworthy and irrational is as old as philosophy itself.

In her *Poetic Justice*, Nussbaum in particular notes that one of the crudest objections to emotions is that they are blind animal forces linked to instinct and therefore antithetical to mind and reason. Emotions "seem to be a threat to good judgment," Nussbaum writes, "and their dominance in an individual would indeed seem to call into question the fitness of that individual for the functions of citizenship" or, some might add, for those of jury duty (56). Less basic objections arise among philosophers who recognize, for instance, that emotions are related to cognition in that they depend on and change according to personal beliefs, but who nonetheless distrust them because they are, as Nussbaum puts it, "hostages to fortune" and not "fully controlled by [a] person's virtue or rational will" (56-57).[34] This reliance on untested beliefs was precisely what Justice Kovacs' ban sought to manage during the Homolka trial. The Court feared that the facts of that trial might predispose the public against Paul Bernardo. If too many persons *believed* that Bernardo was a malignant pervert who had coerced his young wife into deviant sexual practices, and if they allowed themselves to express and manifest anger as a result of this belief, the criminal justice system, which is rooted in the presumption of

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> irrational; voluntary or involuntary; motives, attitudes, character traits, moods, or feelings; subjective or objective; reasonable or unreasonable. ("Empathy" 366)

In this study I rely essentially on Jerrold Levinson's own attempt at solving some of the complications outlined above with a brief working definition of his own. An emotion can be defined, then, as "a bodily response with a distinctive physiological, phenomenological, and expressive profile, *one that serves to focus attention in a given direction* [. . .]" (21; emphasis added). Examples of emotions include fear, pity, anger, and joy. Like Levinson and several others I argue, further below, that emotions are indissociable from cognition.

[34] See also Carroll 193-200.

innocence, would have been discredited and Paul Bernardo would have been deprived of his right to a fair trial.

Closely related to the proposition that emotions are dependent upon personal beliefs is that which provides that they also "bind the moral imagination to particulars that lie close to the self. They do not look at human worth or even human suffering in an even handed-way" and are not "sufficiently [concerned] with larger social units [. . .]" (Nussbaum, *Poetic Justice* 59). Naturally, such propositions apply to the legal realm. Legislation, for example, generally binds a collectivity, be it a nation and its members or a smaller group of similarly situated persons whose rights or obligations are spelled out. Even the sentencing process, which takes into account mitigating and aggravating circumstances such as the convict's prior record and level of remorse, is based upon norms and sentences previously established by precedent in order to ensure consistency and predictability. It would seem, then, that the law is a kingdom that would ban emotions from its territory. It is, after all, for this very reason that Plato also condemned literature for its deleterious effects on the public realm. Plato viewed literary works as harmful because they stir the emotions and thus divert the attention of the people from the common good (54).[35]

Predictably, then, judges routinely caution juries against letting their sympathies for the parties of a trial overtake their ability to rationally assess the evidence presented. Yet a court case is filled with emotion, in part because a trial (and a criminal trial, in

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[35] See Plato, *Republic* XXXVI:

> We have, then, a fair case against the poet [. . .]: his creations are poor things by the standard of truth and reality, and his appeal is not to the highest part of the soul, but to one which is equally inferior. So we shall be justified in not admitting him into a well-ordered commonwealth, because he stimulates and strengthens an element which threatens to undermine the reason. (329)

See also Carroll 194 and van Peer 216-17.

particular) is generally an unpleasant event during which traumatic circumstances are revisited, but in part also because much of a trial is based on narrative, and some trial narratives, like literary works, are deliberately and strategically constructed to evoke emotions in their audience.[36] Trial narratives are either explicitly constructed by the witnesses and attorneys involved, or they are put together by the audience (the judge, jury, or members of the public), who assemble the bits and pieces of evidence and testimony presented during the trial into a coherent whole, a retelling of what must have occurred. During the historical Bernardo trial, for example, hundreds of people lined up before the Toronto courthouse for a seat in Justice LeSage's courtroom because they wanted to be told or to understand for themselves what had happened to the murdered victims. They hoped as well to comprehend what had led a seemingly normal young couple to behave criminally. If so many people later reported being nauseated or moved, it was because the courtroom narratives they heard from attorneys and witnesses were permeated with emotion, something that is common to most criminal trials.

Daily reports from the courtroom underline the stirring content of the evidence presented. During her testimony, for example, the historical Karla Homolka told the jury that Bernardo physically abused her. "He was kicking me and punching me," she explained. "I fell to the ground. He was kicking me while I was on the ground. I was apologizing all the time." At the same time, Homolka clarified, "[she] was afraid of [Bernardo], but part of [her] still loved him" (Makin, "Homolka Describes" A4). This rather upsetting narrative of cyclical abuse would have been familiar to those jury and audience members aware of a battered woman's plight. Yet revulsion and disbelief must

[36] Of course, a novel's affective 'strategy' does not normally aim to deprive a person of life or freedom; the novelist's tactical choices are generally far more benign in their consequences than those of a criminal lawyer.

have followed pity as Bernardo's defence attorney cross-examined Homolka and showed that she could have easily warned her younger sister Tammy of her husband's plans to drug and rape her, yet refused to do so (Makin, "Bernardo to Testify" A4).

During his trial, the historical Paul Bernardo himself seems to have noted the dangerous link between narrative and the emotions. Following Karla Homolka's testimony against him, Bernardo claimed that his ex-wife's "tale" of abuse at his hands had been a pure fiction "borrow[ed] heavily from movies, popular songs and true-crime cases" (Makin, "Ex-Wife"). In *Globe and Mail* reporter Kirk Makin's words:

> [Bernardo] said her tale of being driven on a rainy day to a secluded parking lot where Mr. Bernardo punched and kicked her was 'startlingly similar' to a scene in a movie they once saw together, *Wall Street.*"
>
> And a memorable line Ms. Homolka testified was uttered by Kristen French shortly before her death was also lifted, he said—this time from a special song they related to their wedding. The line, from a song by Bryan Adams, was: "Some things are worth dying for."[37]

Paul's Case too is strewn both with direct quotes from the historical trial and with allusions to the literary, theoretical, cinematic, and songwriting works of, among others, Shakespeare, Beaudelaire, T.S. Eliot, Jean Genet, Sylvia Plath, Michel Foucault, Jerry Lee Lewis, the Rolling Stones, and the Doors. When asked about her novel's intertextuality, Crosbie replies: "It's just the way my mind works. [. . .] One thing triggers a memory of another" (Tihanyi, "Shapeshifter" 3).

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[37] Naturally, that both Bernardo and Homolka were familiar with the film and song should lead the implied reader to wonder which of the two accomplices was most influenced by them.

Although it may be sincere, her answer seems almost careless in light of the kind of allusiveness that also existed during the historical trial. In her *L'intertextualité : Mémoire de la littérature*, Tiphaine Samoyault refers back to Aristotle to distinguish between discourses that speak of the world-at-large (philosophy, history and, presumably, law, for example) and discourses that refer self-reflexively to themselves, or to their own world. Fiction and literature, generally, belong to the second type of discourse. A fictional narrative may underline similarities with the world-at-large, but it will never belong to that world. Thus, allusions to other worlds reinforce literature's exclusivity and difference. They delineate the literary text *as* literary; the 'islands' of allusions to the world-at-large within it are surrounded, territorially, by the literary world itself (78-79).

Similarly—as illustrated by the historical Bernardo's complaint that his ex-wife's narrative was riddled with fictional elements—courtroom narratives are said to be about events that take place within the world. When the historical Bernardo underlines Homolka's gift for fiction (and for plagiarism), he stresses the law's need for impermeability from outside influences. Yet, here, despite their respective forms of insularity, the disciplines' boundaries are nonetheless clearly 'invaded' by each other's narratives.

That criminal trial narratives, then, are affective, either because various forms of trauma are involved or because they contain affect-laden references to fictional or creative worlds, cannot be doubted. Emotions, however, remain proscribed from the courtroom when it comes to the delivery of a verdict or judgment. As mentioned above, jurors are asked not to let sympathy or other emotions for particular witnesses, victims, or the accused cloud their deliberations. (Any other act or tendency such as empathy and

identification would be considered equally suspect in the courtroom, since both lead just as surely to feeling and intuition rather than to pure logic and analysis.) Furthermore, both jurors and the surviving victims must act within the courtroom as if vengeance (a desire for retribution fuelled by distressing emotions) had never crossed their minds. In *Paul's Case*, through the fragmented and trial-like nature of its multiple narratives and through the narrator, who embodies or gives voice to several key 'witnesses,' the implied author confronts these conventions and investigates any lay person's natural tendency toward sympathy, empathy, or vengeance.

Sympathy and Empathy in *Paul's Case*

(a) The Victims

First, several of the novel's sections—or fragments of the larger 'letter' sent by the narrator to the fictional Bernardo—evoke both sympathy (the capacity to share the emotions of these characters) and empathy (the capacity to identify mentally with certain fictionalized characters). Rosie DiManno might have been right to declare that *Paul's Case* feeds upon the lives of those involved in the historical trial, but she was, I believe, wrong to state that the work necessarily disrespects the dead and the survivors (DiManno, "*Paul's Case*"). Literary reviewer Kenneth Harvey is, for his part, closer to the truth when he writes that the novel constitutes, among other things, an "elegy to the victims."

The victims of a crime play a limited role in a trial. The Crown takes over the work of prosecuting the accused in the name of both Queen and public; surviving victims are called in only as witnesses during the trial itself or, during sentencing, to offer their statement as to the impact of the crime on their lives. During direct and cross-

examinations, victims generally respond to cues provided by the attorneys involved. Victim-impact statements, in turn, are but one among several factors considered during the sentencing process, along with the convict's remorse, his willingness to shorten the duration of the trial with a guilty plea, his prior criminal record, his age, and the nature of, and premeditation involved in his crime. Victims are therefore denied significant input into the trial itself; they cannot convict or sentence the accused by themselves. Considering that they are the ones most affected by the crimes attributed to the accused, to deny them the overt and determinative sympathy of the jury seems cold and even cruel.[38]

Throughout *Paul's Case*, the narrator feels the victims' pain to such an extent that she takes on their voices. Thus, Leslie Mahaffy; Leslie's mother and father, Debbie and Dan Mahaffy; Kristen French; French's father; an adult Scarborough rape victim named "Jane Doe #13"; and another "Jane Doe," the girl drugged and raped by the historical Homolka and Bernardo in their home, speak through the narrator, who also invokes sympathy for all young girls who might become victims of a serial rapist and killer. Finally, the narrator alludes to Tammy Homolka, Karla's sister, and reserves a terrifying section for Spike, the historical Homolka's pet Iguana, which the real Bernardo stabbed repeatedly, decapitated, and barbecued because it had bitten him.[39]

These fictionalized crime victims are presented in sympathetic and empathetic ways by the narrator, who nonetheless avoids their mythicization. Indeed, Frank Davey

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[38] Naturally this analysis would apply only in cases when there is no doubt as to the identity of the accused and it has been conclusively proven that the victims were wronged by that particular individual, as was the case with Paul Bernardo.

[39] The event is reported in Williams 291-93. Cf. *Paul's Case* 50-53.

writes in *Karla's Web* that "[b]y the time [the historical] Karla Homolka came to trial on 28 June 1993 [. . .],"

> [t]he victims [in this instance, Leslie Mahaffy and Kristen French] were rapidly ceasing to be the actual young women they had been and were becoming as innocent as their attackers had been depraved. Their lives were becoming saintlike as their killers' lives had been evil. Mr. Justice Kovacs, in sentencing Homolka, described Mahaffy and French as "two young girls who lived beyond reproach." (29)

As Davey suggests, both the law and the media looked upon the victims and the accused in rather simplistic Manichean terms. The narrator in *Paul's Case* avoids this temptation.

She attempts instead to give the fictionalized victims back their voices, yet she also bestows upon their owners flaws and weaknesses, or offers crude and unappetizing details of their ordeal in order to avoid turning them into saintly creations. Jane Doe #13, the adult rape victim whose voice the narrator appropriates, is far from tame or passive; she is, instead, often enraged and vengeful. Following her rape, and after her daughter brings home sewing patterns for a ballet skirt and leotard, she enrols the child in a Tae-Kwon-Do class instead. What she needs to know, she tells her daughter, is that she "can disable someone with [her] bare hands." (*PC* 56), which is more useful to a girl than ballet lessons. The younger Jane Doe speaks of herself as "just a plain Jane" (119). Leslie Mahaffy describes herself as something of a sinner; she admits to "reek[ing] of dope" on the night of her kidnapping and to having been drunk and hung over on previous occasions (62). Finally, a dead Kristen French speaks from the side of the road where her killers left her: "I have no hair left or clothes" (94).

Yet despite their anger, their plainness, their delinquency, or their moribund hideousness, these fictive victims' words remain poignant. Jane Doe #13 recalls walking home from church in "[her] only black dress" following her mother's funeral and being accosted by a stalker, her soon-to-be rapist. When he pays her a compliment on her dress, Jane Doe feels shame. Since the rape she finds everything menacing. She admits that she now sleeps with a can of mace by her side yet reveals her fear that the rapist will take it from her (56). Her swaggering declaration that her daughter will become a martial arts warrior is softened considerably by this brief acknowledgment of hopelessness. Bernardo has taken everything from her: her confidence, her trust, her sense of security, her modesty, her dignity. He could just as easily take her can of mace. Also heartrending is the fictional victim's elusive sense of safety derived from her daughter's current age. After he raped her, Jane Doe #13's fictional attacker stole her wallet, which contained a picture of her young daughter. The child is now fourteen and "Jane" likes to think that her rapist would no longer be able to recognize her (57). But the implied reader knows that the historical Bernardo has a predilection for adolescent girls. Historically, his murdered victims, Tammy, Leslie, and Kristen, were fourteen and fifteen. Jane Doe #13's daughter is hardly safe.

Likewise, the fictionalized Leslie Mahaffy may describe herself as a drug user, but she is also a mere girl who delights in unusual candy; who mourns a friend who just died by carving a heart on a tree (62); who wears a mood ring and a full set of braces; and who worries that boys will find her unattractive (63). When, in the midst of her ordeal with Bernardo and Homolka, she screams that she wishes to return to her home and kid

brother (63),[40] Leslie the defiant dope fiend is replaced by Leslie the child, who in times of trouble turns to a memory of the comforts of her family. The fictionalized Kristen French's torment may be painful to read, but it is hard not to empathize with her when she worries about her parents and summons up the courage to tell her kidnapper, rapist, and torturer that she hates him (93).[41] The narrator also pays an indirect tribute to the historical Tammy Homolka in a subsection of *Paul's Case* titled "My Little Sister," during which she remembers her own mild sibling rivalry. The narrator recollects that her first boyfriend was physically abusive (138). Her little sister "Mary," however, is smarter than her, for "[a] man has never hit her." Although she admits to being envious of her sister, the narrator is content to suggest that, unlike Karla Homolka, she never allowed her own abusive boyfriend to touch her kid sister (138-39).

The narrator of *Paul's Case* is also compassionate towards the murdered victims' parents. Leslie's historical mother, Debbie Mahaffy, was perhaps one of the hardest hit of Bernardo's extended victims. The real Bernardo managed to kidnap Leslie only because Mrs. Mahaffy locked her daughter out of the family home to teach her to respect her curfew. In a subsection of *Paul's Case* titled "Debbie," the horror of Mrs. Mahaffy's 'tough love' is forgiven, albeit not forgotten. The subsection begins with an epigraph from Julian de Norwich that informs the reader that a mother "can never suffer any kind of peril to come to her child, because of her love." What follows this gentle reminder of Mrs. Mahaffy's motherly failing is the fictional Debbie Mahaffy's lyrical first-person

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[40] The *Toronto Sun*'s Burnside and Cairns report that, as she testified against Bernardo, Homolka told the Court that Mahaffy "said she wanted to go home and see her little brother again" ("Leslie's"). Stephen Williams, in turn, reports that Mahaffy said: "I want to see my family and my brother and my friends" (119).

[41] Williams mentions French calling Bernardo a "bastard" (262).

elegy to her child, remembered initially as an infant (64) and then, in the horror of death, coming to her (65). Mrs. Mahaffy's husband, Dan, is also fictionalized and offers an elegy of his own, even if it lacks his wife's slim sense of hope. He too remembers Leslie as an infant. On the day of her funeral, however, he sits on the floor to their house and rips apart the blooms delivered by flower shops (66).

Paul's Case also considers *potential* victims and asks that the implied reader extend his or her sympathy for their current openness to future hurt, a request that flies in the face of the law's insistence that only actual victims be considered. In a subsection titled "Little Playtoys" (an obvious wordplay on the term 'playboy' and perhaps even a reference to singer Madonna's infamous self-description as a 'boy toy'), the narrator mentions a small girl, "Sophia," who might be her child. She imagines that Sophia, too, is vulnerable to predators. As a mother, the narrator must be vigilant and attempt to protect her daughter. Her mouth, she warns the fictional Bernardo, "is filled with knives." (137).

(b) The Probative Weight of Suffering

In the above cases, the narrator portrays herself as a woman possessed by the voices, or moved by the latent vulnerability of the victims. She feels their pain, their suffering, their hope, their regrets; only this could explain her "Sybiline" faculties. Through her, victims regain their voices as well as their power within the courtroom of public opinion. Quite aside from their victim-impact statements, these female victims (along with Spike the Iguana, whose sad tale is told through the traumatized voice of an

unnamed character [50-53])[42] acquire a say in the trial process itself. They intimate Paul Bernardo's guilt. Evidence, after all, is rarely direct and material. It can be circumstantial, and surely such suffering, such wrecked lives ought to carry greater probative weight on the scales of institutional justice than circumstantial evidence. Naturally, despite judicial warnings against verdicts rendered non-rationally, any juror at the Bernardo trial would have felt the same cringing sense of compassion that the narrator evokes. What the narrator suggests here is that sympathy and empathy are practically impossible to ignore in matters of justice; any member of the public instinctively knows this as she—one of the public's representatives—does. The narrator in fact proposes that there is such a thing as a public sense of justice and that it differs in its tenor and its priorities from those of the judicial system.[43] Yet the narrator goes further: she also attempts to understand, to sympathize, empathize, and identify with her main character, Paul Bernardo.

(c) Empathy for the Perpetrator of the Crimes

As Susan Bandes suggests, if it is to be at all useful in the courtroom, empathy must be felt for all parties. It is, after all, easy to feel sorry for the victims: "[i]n order to decide [as well] whether to exercise mercy, the jury [or public] must attempt to put itself

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[42] The unnamed voice who tells the horrendous tale of Spike's demise in *Paul's Case* is historically that of Joann Fuller, the girlfriend of a friend of Bernardo's. See Williams 292. The iguana incident was deemed inadmissible evidence at the historical Bernardo trial, perhaps because it was too prejudicial to the accused (Cairns and Burnside, "Evidence"). The narrator of *Paul's Case* revives it as a relevant and significant story.

[43] My suggestion that there is a public sense of justice that differs from that of the judicial system should hardly shock my readers. Almost every Canadian *cause célèbre* is invariably met in the 'Letters' section of major newspapers with a flurry of missives criticizing the law for its incomprehensible leniency or severity. What I am arguing here is that, as a well-read and intelligent member of the public, the narrator of *Paul's Case* attempts to circumbscribe for herself the possible reasons for lay discomfort and discontent with the historical trial itself and with the juridical system's way of arriving at a judgment about, in this case, the unforgivable.

at least briefly in the shoes of the defendant" (403). The anonymous narrator oscillates throughout *Paul's Case* between contempt for the fictional Bernardo and a genuine need to fathom what made him act as he did. She needs above all to know that "what is broken can be fixed" (67). Therefore, even though she regularly insults Bernardo and calls him, among other things, "[a] cold seed" (25), she nonetheless wonders whether his acts can be explained by something other than pure evil. She mentions a spot that appeared on Bernardo's face at birth: "It made your mother sick to look at you" (95). The narrator continues: "Your mother claims to have had an affair. You think of her as a whore. And wonder about what is learned, what is encrypted (The Bad Seed)" (22). Perhaps, then, Bernardo had no choice but to lash out as he did against numerous women. Rather than being evil, perhaps he was merely unlucky, or pushed to unthinkable limits, or even genetically predisposed to criminality. As she dwells on Bernardo's difficult childhood, the narrator ventures where lawyers failed to tread. Beyond guilt, she looks for explanations and humanizes the fictionalized Bernardo where the law and the media had attempted to demonize the historical killer.

(d) Emotions in Literature

What *Paul's Case*'s narrator suggests through her use of sympathy and empathy is that the emotions these impulses call to mind, such as fear, horror, pity, or tenderness can be valuable in judicial and jury deliberations. Literature, of course, places no hold on the emotions or on sympathy, and literary theorists or scholars even find such reactions purposeful. In his *Poetics*, for instance, Aristotle was of the opinion that the emotions

stirred up by tragedies were cathartic. Scholars, however, disagree as to the meaning of the Greek word *katharsis*. As Keith Oatley and Mitra Gholamain explain, the term

> has [. . .] had a confusing career with the translators. It is generally translated in English either with a quasi-religious sense of "purification" or with a quasi-medical sense of "purgation." In either case, the implication is that when people go to the theater, they experience emotions that can either be improved (purified) or eliminated (purged), so that, on return to real life, these unfortunate elements will no longer have the effect of disturbing rational thought and judgment.

Yet as both authors note, Martha Nussbaum shows that the word *katharsis* has been used, rather, to signify a kind of clear and unhindered understanding. Nussbaum herself notes that the clarification "(or illumination)" induced by a play is of a cognitive order (*Fragility* 391; qtd. in Oatley and Gholamain 267).[44] As Oatley and Gholamain continue, "[i]n the theatre or in a novel, we can concentrate on our emotions and reflect upon them in a safe place away from the ordinary world; this being so, we can come to a better understanding of their relation to our beliefs, desires, and actions" (267). In a somewhat similar vein, Willie van Peer adds that the emotions are generally known for "guiding and sustaining our attention, while at the same time interrupting our actions." According to van Peer, literature therefore temporarily assists in the suspension of action (which might

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[44] In Nussbaum's own words:

> *Katharos* cognition is what we have when the soul is not impeded by bodily obstacles [. . .]. *Katharsis* is the clearing up of the vision of the soul by the removal of these obstacles; thus the *katharon* becomes associated with the true or truly knowable, the being who has achieved *katharsis* with the truly or correctly knowing [. . .]. Thus we even find expressions such as *kathar*ō*s apodeixai*, meaning 'demonstrate clearly' [. . .]. (*Fragility* 389; citations omitted)

include judgment) as "we contemplate and undergo the process of coming to terms with our emotions" (221).

Yet whereas it is generally accepted that literature's encouragement of the human capacity for sympathy and empathy may be a tool for the greater understanding of self and others, legal scholar Toni Massaro, who writes specifically about the role of empathy in law, declares that "[a]s [a legal] analytical tool, the term 'empathy' is not very helpful" (2106). Empathetic understanding "presupposes a setting in which law rarely operates: one person feeling the distress of another" (2107). A trial, after all, never allows anyone the time to know all the parties well enough to be able to step into their shoes and truly feel what they do. The judicial system also fails to emphasize the importance of empathy; it privileges logic instead, along with procedural rules that enable the admissibility of data or testimony, and proof of guilt or innocence by way of pertinent evidence.

(e) The Narrator's Verdict

The narrator of *Paul's Case*, however, never suggests that empathy alone be used as an adjudicative tool. Her inquiries into Bernardo's nature having ceased, she comes to a decision. Bernardo is not a Manichean construct; her attempts at sympathy have led her to believe that he is complex, complicated, "inscrutable" (*PC* 121). "[G]enerally," she tells the fictive Bernardo, "after surrounding you, with bright little flags, I never found you on the map" (165). Yet her efforts have not been in vain and her 'verdict' is rendered. "You ruined everyone you touched," she announces, "you are hated and I hate you" (166). By then, her 'hatred' is not merely of an emotional nature. After all, in her

initial investigation of the fictional Paul Bernardo, she advocated both the reason and logic associated with science and the sentiments associated with literature. What she does suggest is that without sympathy or empathy, justice becomes Manichean and risks demonizing the accused while never fully vindicating his victims. Moreover, if—as van Peer suggests above—the role of emotions in literature is indeed to allow readers to ponder serious matters that may affect their lives, there must be something wrong with the criminal justice system if, at the moment of adjudication, it consistently stirs the jury's emotions, yet discourages affect, along with the understanding, clarification, or illumination that comes with the processing of emotions.

(f) Law and Literature Reconciled in Paul's Case

But whereas law and literature seem polarized in their appreciation of the value of sympathy, empathy, and emotions in general, a solution is offered by Massaro herself. The law's general reluctance to embrace sympathy or empathy as an adjudicative tool tends to lead to public cries for a kind of justice that is individualized. The law, however, typically operates according to general principles for the sake of collectivities. Most jurists would agree that chaos can only ensue from the kind of discretionary justice that is tailored to each individual who comes before it. Massaro therefore proposes that empathy be viewed not as a tool to particularize justice, but rather as a means to a stronger community. "The psychological phenomenon of empathy," she writes,

> demonstrates that people can, and do, understand and react to each others' experiences. This is an important observation for a political theory that stresses the intersubjectivity of meaning, the significance of our communal

> identity to our personal identity and the interrelationship of people, rather than their autonomy, detachment, and antagonism. (2121)

In other words, empathy can be beneficial in the courtroom and to the community, but only subject to the understanding that it is meant to assist a *group* of people, or a collectivity: the disenfranchised, for example, or the victims.

Yet, as the narrator of *Paul's Case* suggests, the victims may at times go undetected by the justice system itself, especially when the law views crime only according to categories such as act (*actus reus*) and intention (*mens rea*), without considering context. What Crosbie asks is this: Were not the odds, to a certain extent, stacked from the start against a man like Bernardo? He may not have wished to become a serial killer, but may have been pushed into criminality both by nature and by lack of adequate nurturing. The narrator, however, draws a clear distinction between the character of Bernardo and that of Homolka, whom she loathes without measure. Her fictionalized Homolka *is* evil; she is a sharp and scheming manipulator whose conventional middle-class background simply fails to explain her deviant behaviour. "I would never write to Karla," she writes to the fictive Bernardo, "because she might write back" (25). Bernardo would not write back because he is an absence, a mystery. His complexity and inscrutability are underlined by the narrator's momentary inability to make a decision as to whether he should be held entirely accountable for his crimes given the context of his life. But despite her empathetic efforts, the narrator comes to a decision that also takes into account those factors most common in a courtroom: the hard facts. Bernardo "ruined" everyone he touched (166). Empathy, then, serves those groups

who deserve it, and it does not preclude a fair judgment, if matched with an intelligent assessment of the available evidence.

Vengeance in *Paul's Case*

(a) Introduction

Of course, yet another reason why emotions are suspect in the courtroom is that they might lead to vengeance. On that basis, even victim-impact statements become questionable. Legal scholar Susan Bandes, for instance, argues that "victim impact statements are narratives that should be suppressed because they evoke emotions inappropriate in the context of criminal sentencing. Specifically, victim impact statements appeal to hatred, the desire for undifferentiated vengeance, and even bigotry" ("Empathy" 365). At the same time as she gives Bernardo's and Homolka's victims a forum, the narrator of *Paul's Case* devotes nine full sections of her fifty-two-section letter to the theme of vengeance.[45] Shorter passages in other sections also refer to the need for retribution of an extra-juridical kind. For instance, in a section titled "At the Courthouse Last July," which begins with a description of "Cassette Tape Exhibit Numbers 352 and 353," the narrator describes her vigilante fantasy of attacking Bernardo in the courtroom with a razor (35)

This avenging daydream can be explained by the narrator's belief that justice has not been rendered after all. She tells Bernardo that she knows that he has been punished "to The Full Extent of the Law" (18). Yet incarceration hardly seems a fitting punishment for three murders and countless rapes. The narrator also receives a revelation

[45] These nine sections are titled "Pornography" (54-55), "Tales from the Crypt" (61), "Paul's Current Affair" (104-105), "Surveillance" (106-107), "The Revenger" (111-13), "Sucker-Punch" (127), "The Avenger" (129), "Hell of a Woman" (132-33), and "Necromancy" (161).

that suggests that even after Bernardo and Homolka have been duly prosecuted, convicted, and sentenced, other predators will come (and Homolka will be freed) (163). Divine retribution, then, is also limited in its effectiveness. A more radical solution is perhaps required.

In her *Fragility of Goodness*, Martha Nussbaum notes that vengeance (or the retribution exacted for a wrong inflicted to oneself or to a meaningful other) seeks to right an imbalance (410). For his part, philosopher Robert Solomon lists its metaphors. Vengeance, he explains, can be perceived as the "paying back" of a debt (140). It can also be seen as the "cleansing" away of a form of pollution. "[O]ne of the oldest concepts of retribution," he writes, "involves the domestic metaphor of 'blood washing away blood'" (141), which brings him to the allegorical scales of justice and back as well to Nussbaum's notion of balance restored. "The idea of 'like for like,'" Solomon writes, "[. . .] is as old as civilization (and perhaps much older). It is, one might say, a nasty version of the Golden Rule" (140).

To return like for like is exactly what the narrator of *Paul's Case* has in mind when she realizes that neither the law nor God can come to her community's help to exact a precise and effective sort of retribution. Thus, she imagines appropriate forms of punishment for the fictionalized Bernardo and Homolka. In the section titled "Pornography," the narrator has the fictional Paul Bernardo sexually humiliated by a dominant prison guard named "Lynette" (a deliberate variation on the name 'Lynn' [Crosbie], no doubt), whose voice she takes on, and who then relates the incident in "Lusty Letters" (55). In "Tales from the Crypt," an unpunctuated, unconventionally

spelled stream-of consciousness passage tells the Gothic tale of a man haunted by the ghosts of the girls he murdered (61).

Furthermore, in "Surveillance," the fictional Bernardo is described in his four-by-eight Kingston penitentiary cell (106). In a moment that parodies both Foucault's description in *Discipline and Punish* of the Panopticon as a progressive change in the effective meting out of coercive discipline (216-22) and the historical Bernardo's obsession with the filming of his victims, the incarcerated fictional Bernardo is watched on camera by a guard who gives him directions as if he were being featured in a pornographic film (106).

Other sections concerned with vengeance are similar to the ones above. In her "Paul's Current Affair," the narrator has the fictional Paul Bernardo fellated by a fellow inmate who pities him (105); in "The Revenger" Bernardo claims to have opened his heart to Christ only to be rejected by a nun named Catherine, who was raped when she was younger (111). In "Sucker-Punch," the fictional Bernardo is attacked by an inmate he had befriended and is left crying and wondering why others are mean to him (127-28). Finally, in "Necromancy," the narrator makes a voodoo doll of Bernardo and sticks a pin into it "each time a little girl suffers" (161).

The fictional Karla Homolka is also the target of the narrator's retributive fantasies. In a section titled "The Avenger," Homolka is visited by the narrator under the guise of the iconic Emma Peel, who befriends and then tortures and mutilates the sex offender (131). In "A Hell of a Woman," Homolka finally confesses to killing both Mahaffy and French while Bernardo was out running errands (132-33). A balance or harmony of sorts is thus restored in *Paul's Case*; the killers meet with the same kind of

treatment that they inflicted upon their victims. After having pleaded for the right to 'feel' the horror of the case, the narrator effectively lets the implied reader know that here, at last, is justice rendered. The historical judges may have ordered the defendants' incarceration but this, now, this talionic quest for physical and psychological agony is truly what a member of the public, like the narrator, would consider just.

As Robert Solomon suggests, the Mosaic *lex talionis* (or "law of retaliation") is after all a *lex*, a law or normative vision.[46] Philosophy and legal scholar Jeffrie Murphy would add that it would be hypocritical to pretend that vengeful impulses are absent from our criminal justice system. "Speaking very generally," Murphy tells us, "we may say that the criminal law institutionalizes certain feelings of anger and hatred that we typically (and *perhaps* properly) direct toward wrongdoers" (3; no emphasis added). Murphy finds the root of retribution in resentment. We feel resentment towards offenders of various sorts because we respect ourselves (and thus feel the need to defend our attacked selves and the society we have built with like-minded others) (5). The law codifies these feelings and devises sanctions against those who offend us.

(b) Vengeance and Retribution in the Law

Retribution and vengeance, however, are generally perceived to be different concepts altogether by those swayed by Judeo-Christian teachings concerning love and compassion. As Murphy notes, "most of us do not feel comfortable talking about the criminal law as institutionalized vengeance" ("Forgiveness" 3). In his own article,

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[46] Generally speaking, the law of retaliation "requires the infliction upon a wrongdoer of the same injury which he has caused to another. It dates back at least to the Old Testament" (*Black's* "*lex talionis*"). See Exodus 21:23-25: "And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe."

Solomon illustrates with remarkable clarity the ways in which vengeance and retribution are sundered and cast as a negative desire and a constructive impulse. To most people, Solomon writes, "[v]engeance is a species of retribution, but not all forms of retribution are vengeful" (131). Retribution, which is generally associated with institutional justice, is linked as well to the worthy double goals of deterring future offenders and perhaps even rehabilitating the accused. Once locked up in their respective cells, then, the historical Paul Bernardo and Karla Homolka might reflect on their crimes, feel remorse and contrition, and even go on to lead enlightened or useful lives. Courtroom sentencing is therefore imbued with legitimacy because it is supported by noble societal ideals. The unlawfulness of vengeance comes from the perception that it is a personal, visceral, unthinking, and purely punitive impulse (133).

(c) Vengeance as a Cognitive and Deliberate Emotion

In short, personal vengeance is viewed as an emotional reaction, while institutional retribution is accepted as a carefully considered act. But Solomon is right that there is something to the saying that "revenge is a dish that is best served cold"; vengeance, he adds, rather wryly, is "a long-term investment" (130). It is premeditated rather than instantly retaliatory; it therefore requires thought and planning. Moreover, while rehabilitation may not be one of its immediate goals, deterrence in the teaching of an unforgettable lesson is. Thus, in *Paul's Case*, the implied reader may perhaps begin to understand Sister Catherine's seemingly devilish need to get down on the floor with a fictional and repentant Bernardo and whisper to him that he will go to hell despite his sudden evangelical conversion. As a rape victim, she waited a long time for this moment,

and whether or not she has the authority to decide where Bernardo goes after his death becomes irrelevant. Her act of verbal vengeance displaces both legal and divine justice and replaces it with a lay sense of justice—which, of course, is ironic given Sister Catherine's vocation. That the fictional Bernardo turns "ashen" as he hears her words leaves her feeling vindicated at last (111). Similarly, the fictional Carl Bradley Hiltz, the inmate who sucker-punches Bernardo at the Kingston penitentiary, had to befriend Bernardo first and then wait for a moment of vulnerability before he assaulted the sex slayer.[47] As Murphy would suggest (5), Hiltz's resentment is felt not on behalf of himself, personally, so much as it is experienced on behalf of a population of inmates who traditionally abhor those whose crimes consist of preying on women and children.[48] Vengeance, then, is not always strictly personal, just as institutional retribution may be exacted rather 'selfishly' in the name of a particular community, the norms of which the accused rejects.

(d) The Popular Figure of the Avenger

The above fiction-bound belief in the cognitive and quasi-juridical function of vengeance is taken one step further by cultural critic William Miller, for whom the act of

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[47] The epigraph to the section titled "Sucker-Punch" consists of an excerpt from a *Toronto Sun* article dated December 7, 1996 about an assault on the historical Bernardo by a man named Carl Bradley Hiltz. The narrator then embroiders upon this particular event and imagines how the disappointed friendship with a fictionalized Hiltz must have broken the fictional Bernardo.

[48] See Solomon: "The shocking truth is that many rapists are indeed requited with officially ignored if not sanctioned rape once they enter the obscene halls of our correctional institutions [. . .]" (139). Bernardo is extremely well protected at the Kingston penitentiary, so that rape of a retributive or vengeful kind is unlikely. See the *Toronto Sun*'s Cairns, "He's 'Stir Crazy.'"

avenging a wrong supplements rather than supplants the role of the judge.[49] "It is not so much that the law will get it wrong," Miller writes, "as that the law, even when working as it was meant to, only gives second-rate or second-best justice" (175). Imprisonment is dissatisfying to both the victim and to society-at-large; it is, in Miller's words, a mere "stay, a promise of closure." We are left looking over our shoulder, waiting for the day when the incarcerated criminal will be released. It also makes for bad stories. "Imagine," Miller argues, "a tragedy in which the protagonist or the villain went off to prison rather than to death. It is comedy and romance that hold the prospect of return, rebirth, and reintegration, the formal demands of revenge stories, like tragedy, require something more than a weak climax of prison" (176). Here, then, Miller analyzes and supports the role of the heroic avenger as portrayed in works of literature and art, generally. He never advocates that actual persons proceed to avenge their relatives and friends on grounds that vigilante justice ideally complements the law's lame efficiency. But he does build a strong case for the normativity of the avenger's role.

So does Crosbie. When the narrator takes on the voice and identity of the iconic television character Emma Peel in a section of her letter titled "The Avenger," she carefully plans her course of action, dresses for the part, approaches the fictional Karla Homolka, befriends her, disables her, strips her down, hog-ties her, slices off her vagina, and stuffs it into Homolka's own mouth, firing off a last, "Lick that, darling" (130-31)—a reference to Homolka's bisexual acts in the infamous videotapes shown in court—before she leaves. In this rather short section alone, Crosbie illustrates Solomon's and Murphy's contentions that vengeance transcends mere impulsive emotion and that it rights a wrong

[49] Miller illustrates his study on the role of the avenger with examples drawn from the Hollywood Western genre and, even more specifically, from Clint Eastwood's *Unforgiven*.

in a 'like-for-like' manner. William Miller is careful to argue that "the avenger does not allow us to fulfill our worst fantasies. He plays an edifying role [. . .]. He will meet our demands for justice, but not our desires for cruelty" (179). Although the genital mutilation and gagging of the fictional Homolka seems unusually and unnecessarily cruel, the narrator almost certainly alludes here to an event disclosed at the actual Bernardo trial. The historical Homolka performed cunnilingus on her own drugged sister, Tammy, and then turned to the camera held by her husband, wiped her mouth, and said that what she had just done had been "disgusting." At trial, Bernardo's attorney was able to show conclusively that Homolka's sister, Tammy, had been menstruating at the time and that Homolka's comment referred not to the disgust she felt at the oral rape of her own sister, but to her having disliked the taste of her sister's menstrual blood (Makin, "Bernardo to testify" A4). Throughout *Paul's Case*, the narrator is convinced that one of the Homolka-Bernardo case's greater injustices was Homolka's twelve-year sentence, which in no way accounts for the depth of her evident guilt. Here "Emma Peel" avenges the historical Tammy's oral rape in an equally bloody way. Her act of mutilation also avenges Leslie Mahaffy's dismemberment since the historical Bernardo mentioned during his trial testimony that Homolka helped him cut the murdered girl's body (Cairns and Burnside "Homolka Suggested").

William Miller would add that the fictional avenger acts within rigid normative constraints in that he "accepts much of the substance of the law" (176). He does not deny the law, but shifts, rather, to a parallel system, which is that of equity, and delivers substantive 'solutions' where the law's hands were tied due to its own procedural

principles,[50] such as the battered-woman defence, the law's focus on offending acts rather than on character, or the hierarchization of criminal acts according to a predetermined set of standards (murder is worse than rape, for example) (179-80). Typically, in *Paul's Case*, the narrator derides the diagnosis of battered-woman syndrome from which Homolka allegedly suffered. She suggests to the fictional Bernardo that he 'had it coming' and that it was predictable that Homolka would heal from her alleged syndrome and turn against him in court (135). She also hints at the fact that the fictionalized Homolka is much stronger and more calculating than she appears, which in turn justifies "Emma Peel's" avenging act.

(e) The Dangers of Vigilantism

Yet this constant rotation or relay in the act of getting even is precisely what is wrong with extra-juridical vengeance, and the narrator of *Paul's Case* knows it. When "Emma Peel" returns from her mission, her boss "claims he hasn't any idea what [she's] talking about" (131). Could it be then that she acted without the avenger's noble mandate? Could it be that rather than being an avenger who 'does equity' she is but a mad lone vigilante whose actions must be condemned? Similarly, in a section titled "Necromancy," the narrator tells the fictional Bernardo that she has made a voodoo doll of him and that she will prick it with a pin whenever a girl, somewhere, suffers. He will feel the sting, she promises, but adds: "I will feel it, three times harder" (161). There are reasons why she might feel the pain of her vengeful 'prick' along with the fictionalized

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[50] *Black's Law Dictionary* defines equity as "[j]ustice administered according to fairness as contrasted with the strictly formulated rules of common law" and as "a system of jurisprudence collateral to, and in some respects independent of, 'law'; the object of which is to render the administration of justice more complete, by affording relief where the courts of law are incompetent to give it [. .]" ("Equity").

Bernardo. First Bernardo is a character in her many narratives (19). She also tries to empathize with him for a brief moment. Naturally, she 'feels for' him. But she feels his pain "three times harder" because, as a witch or voodoo practitioner, she is bound by the neo-Pagan Threefold Law, according to which any spell, good or bad, comes back to affect the one who casts the spell three times over.[51] According to the rules of contemporary witchcraft, then, the Mosaic *lex talionis* would therefore apply (with interest) to the avengers themselves.

Whether the Threefold Law is verifiably factual remains to be seen. What is certain is that there are moral implications to vengeance, which is precisely what the principle of the Threefold Law implies. Jeffrie Murphy, Martha Nussbaum, and Robert Solomon, three thinkers who have written on the subjects of vengeance and the emotions, recognize this as well. Indeed, they cite several aphorisms to that effect, from Nietzsche's "[w]hoever fights with monsters should take care that in the process he does not become a monster" (*Beyond Good* 89; qtd. in Murphy, "Moral Epistemology" 161) to an ancient Chinese proverb: "When you seek vengeance, dig two graves" (qtd. in Solomon 143). In other words, vengeance is exponential in its effect. As Nussbaum explains, our *nomoï* and the order of the world depend upon a precarious balance that any crime threatens to upset. Vengeance risks destroying this balance entirely. It can produce, she writes, "the utter loss of human relatedness" and even that of "human language itself" since justifying vengeance necessitates a persuasiveness that is antithetical to open communication and truth (417).

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[51] As Chas Clifton explains, the Threefold Law, also known as the "Law of Threefold Return" or "Law of Three," restates the maxim "[a]s you sow, so shall ye reap." Clifton adds that "[i]ts 'threeness' could well derive from a line in the Gardnerian second-degree initiation ritual: 'Learn, in witchcraft, you must ever give as you receive, but ever triple' [. .]. From this line derives the concept that whatever good one does—or evil—returns in triplicate" (272).

Conclusion

The narrator of *Paul's Case* hints at the dangers of vigilantism when, in her fantasy, "Emma Peel" returns from her vengeful mission without her boss's support, or when she realizes that she too would be affected by her acts of voodoo magic. Still, she tells her psychopathic narratee and the implied reader: "I believe that any imaginative act is valuable" (124). The imaginative act that is the narrator's long letter to Bernardo allows her, as a member of the public, the time to sift through her emotions about Homolka, Bernardo, and Bernardo's trial, in order to finally adjudicate in the matter of Homolka's and Bernardo's 'evil' nature.

The implied author herself supports this imaginative act. In her 'closing argument' to the implied reader titled "Legend/Appendix" she includes an epigraph taken from *Gray's Anatomy*, which states that the "vermiform appendix" tends, in time, to become "a functionless organ" (167). What follows is a factual list of names, institutions, and locations associated with the historical Homolka and Bernardo cases. With the "Legend/Appendix," then, the implied author suggests is that a good adjudicator must at some point take leave of the facts of the case (those facts upon which the law itself relies) and look within instead.

Thus, the narrator speaks in favour of giving victims a greater voice because they are generally denied the power to adjudicate the criminal's fate on their own. Their pain, the narrator suggests, should carry greater probative weight in the determination of a verdict than it does at present. She then endorses the principle of revenge but, in the end, she condones only fantasies of revenge. Such fantasies are, to borrow Aristotle's term, cathartic, and to borrow Nussbaum's gloss on the term, clarifying. They tell us (at times

rather graphically) whether institutionalized justice has been effective, or whether it has been too lenient or too harsh. The narrator also finally rejects any lasting sympathy for the fictionalized Bernardo. He may have been a victim once but, when he began raping and killing girls and women, he lost his status as victim and became a perpetrator. To sink to *acts* of vigilante justice risks turning the avenger into a creature worse perhaps than Bernardo himself. Thus, through the narrator, the implied author ultimately suggests that in cases of psychopathy and extreme deviance, literature is as powerless as the law to fully 'do justice' to the public's thirst for justice.

In closing, I must come back to those critics and reviewers who have complained about the readers' inability to come to their own conclusions either because the writer is too intrusive (Musgrave), or because the work is too open-ended (Marchand, "Frustrating"). I have submitted throughout this study that *Paul's Case* consists in an exploratory journey into a few of the emotions that arise in the courtroom. As a rather brave member and representative of the public, the narrator allows herself to feel such emotions. She feels the victims' pain to such a degree that she takes on their voices. She even acts out, through vicarious fictional means, several forms of revenge against the fictional Paul Bernardo and Karla Homolka. It is true that as a member of the public who is critical of the juridical system, she comes to her own conclusions about these matters. As appellate judge, the implied reader must do the same and decide whether the narrator is right in her criticism of the law's institutional lack of sensitivity towards the victims and occasional incomprehensible leniency towards the accused.

Paul's Case, then, may be graphic and, as some have argued, sensationalistic and even in bad taste. Yet as a work of 'critifiction' it makes use of a creative endeavour to

generate a societal debate. Sadly, the work's early reception has had the effect of (somewhat vengefully) shooting the messenger while leaving the message unheeded.

In Lynn Crosbie's *Paul's Case*, the narrator acts as a member of the public who, through the intervention of her 'lawyer,' the implied author, is given standing in the fictional re-trial of the Bernardo trial. She speaks not only in the name of the public, whom she represents but, as "Sybil," she allows various victims (or witnesses) to speak through her, unprompted by an attorney's cues, during the examination phase of the fictional retrial of Paul Bernardo.

My next study, which analyzes Rudy's Wiebe's *The Temptations of Big Bear* and *The Scorched-Wood People*, returns to the counternarratives of two fictional 'defence attorneys.' The narrators of these works defend characters who, like Bernardo, were viewed as marginal and problematic persons. The marginality of Cree chief Big Bear and of Métis leader Louis Riel is, however, of a type unrelated to Paul Bernardo's and Karla Homolka's psychopathy. Each novel represents a re-trial of two late nineteenth-century cases of treason against the Queen. Each novel's trial-like counternarrative also asks how imaginative narratives take on the authority of law and become compelling narratives about the nation and the communities that reside within it. As such, Wiebe's novels close my study of Canadian trial novels after 1970. As these works ask about the place of Natives and of the Métis within the nation that is Canada, they echo in turn the fictional Grace Marks's question as to the place of the Irish in Upper Canada, or the queries raised by the implied author and narrator of Crosbie's *Paul's Case* about the place of victims and of the public in the halls of justice of this country. In short, then, each study speaks for various "outgroups" (to borrow Richard Delgado's phrase [2413]) within the nation.

In addition, this next study in particular focuses on the matter of what composes a nation. It suggests, as well, that a trial narrative may foster new norms for a community. Like Crosbie's work, however, it raises particular emotions and, like Atwood's novel, it relies on fictional narratives to displace legal fictions.

CHAPTER THREE

A Nation on Trial: The Destruction and Re-Creation of Normative Worlds in Rudy Wiebe's *The Temptations of Big Bear* and *The Scorched-Wood People*

Introduction

Margaret Atwood's *Alias Grace* and Lynn Crosbie's *Paul's Case: The Kingston Letters* feature central characters who are homicidal criminals. It is therefore easy to view these protagonists (and the historical convicts on whom they are based) as coming under the purview of the criminal law. Most criminal codes, however, also contain a number of provisions related to crimes that are rarely tried, and about which ordinary citizens seldom hear. Treason, for example, remains a crime under the Canadian Criminal Code.[1] In 1885, in the Prairies of Canada, Cree chief Big Bear and Métis leader Louis Riel were accused of different types of treason. Big Bear was accused of treason-felony. Louis Riel was accused of the more serious charge of high treason. Generally, in Canada, a charge of treason implies that the accused betrayed his own nation either by plotting to overthrow one of its governments or by violently attacking the nation's very foundations or Her Majesty the Queen herself.

With this last study, then, I move away from homicide into a different sort of crime, one which affects not only a smaller community (such as the Tory or Irish community of *Alias Grace*, for example, or the imagined community of readers), but also the larger community that is the nation. Within this nation reside smaller communities whose norms may be at odds with those of the state. Rebel leaders Big Bear and Louis

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[1] See, for e.g., Section 46 of Martin's edition of the Canadian Criminal Code, which lists eight treasonable acts that range from killing or attempting to kill Her Majesty the Queen to conspiring to spy against Canada.

Riel thus headed distinct, minority communities within the Canadian Confederation, namely the Cree and Métis communities. respectively. Their historical trials and fictional retrials therefore raise questions about the composition and the meaning of citizenship within a larger entity. Still, in Rudy Wiebe's *The Temptations of Big Bear* and *The Scorched-Wood People*, the fictive Big Bear and Louis Riel are retried before the implied reader, much as the fictive Grace Marks and Paul Bernardo were in my earlier studies. But the main question raised by the fictional retrials of Big Bear and Louis Riel is that of whether—through trials for treason, for example—the nation itself (by way of its courts) does justice to all of its citizens.



In his "*Nomos* and Narrative," the late Robert Cover stated that we grant legal documents authority because they are both normative and located in narrative. "Every prescription," he wrote, "is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose" (5). Certainly, we tend to regard legal instruments and precedents as nation-founding and nation-building texts. Sections 3 and 4 of the British North America Act, 1867, for instance, provide that the Act itself constitutes the Dominion of Canada. Yet in the Act's preamble, the Dominion is said to have been established for "the Welfare of the Provinces and [to] promote the Interests of the British Empire." In short, the British North America Act spells out the duties and powers of provincial, federal, and imperial players without

providing in a comprehensive manner for the rights, freedoms, and obligations of those populating the territory. It is a document devoid of a secular awareness of community or nation, in the sense given to this last word by French historian Joseph Ernest Renan, for whom a nation is a spiritual principle constituted of a people's stance towards past sacrifices, defeats, or victories, and of a clear commitment to a communal future (904). In other words, legislation (or, to use Cover's own terminology, prescription) is not narrative in itself; it relies on narrative to acquire a larger purpose or destiny.

Common sense dictates, and scholars have argued, that literary narratives too may provide readers with a sense of nation.[2] What Canadian literary narratives impart community, a sense of the normative universes inhabited by citizens, along with a comprehensive view of the past and a particular understanding of a collective future? How do they do this? How do they differ in this from legal narratives?

In this study, I address such questions by examining two literary works that look at communal norms within our imagined nation: Rudy Wiebe's *The Temptations of Big Bear* (1973), a novel about the Saskatchewan Natives' involvement in the North-West Rebellion of 1885 and about the predicament and trial of Cree chief Big Bear, and *The Scorched-Wood People* (1977), which traces the adult years, trial, and execution of Métis leader and rebel Louis Riel, and describes the plight of the Prairie Métis. Both novels contain excerpts from the two leaders' historical trials for treason. Both also effectively

[2] Among them are Benedict Anderson, for whom nations are not born but constructed through the imagination of their inhabitants, and American legal scholar Robert Ferguson, whose study of post-revolutionary 'lawyer-writers' maps out the aesthetic shaping of American national identity.

retry Big Bear and Louis Riel before an implied reader who represents an imagined community of contemporary readers familiar with the nation's history.

Wiebe's Novels and Their Canadian Critics

(a) The Temptations of Big Bear

An extensive number of Canadian scholars have written about *The Temptations of Big Bear*. Fewer have turned their attention to *The Scorched-Wood People*. Generally, critics have expressed discomfort with the categorization of these novels. Frank Davey, for example, views *The Temptations of Big Bear* as a realist political novel (43); a postmodernist "found novel" (that incorporates various seemingly random documents and genres such as letters, the text of a treaty, autobiography, and courtroom testimonies and narratives) (50); and a poetic "utopic" presentation of the character of Big Bear that supersedes possibly unreliable historical records in order to remain branded in the reader's memory as "everlasting" (54-55). To Sherrill Grace, the novel constitutes a revisionist and occasionally didactic work that rediscovers and redeems the stereotypical "bad Indians" of North American literature; it is a novel about the despised or forgotten 'Other' ("Western Myth" 147); a "polyglot meditation" on a complex historical situation (148); an intertextual work written in the paratactical mode[3] ("Structuring Violence" 12-13). Terrence Craig sees *The Temptations of Big Bear* as a realist work, although he worries that "[i]n emphasizing the religious instead of the ethnic functions of Native people in his

[3] M.H. Abrams defines "paratactical style" as "one in which the members within a sentence, or else a sequence of complete sentences, are put one after the other without any expression of their connection or relations except (at most) the noncommittal connective 'and'" (304). By implication, *The Temptations of Big Bear* can be said to be paratactical because it assembles narrative fragments without explanation as to their relation to one another.

work, Wiebe substitutes one type of potentially stereotypical characterization for another and endangers realism as a result" (111). Throughout her discussion of Wiebe's novel, Jutta Zimmerman argues that it resembles a postmodernist work, although it "goes beyond a mere deconstructive endeavor" in that the author aims to "replace history with eschatology"(392-93). Penny van Toorn, in the most thorough analysis of voice in Wiebe's novels to date, looks upon *The Temptations of Big Bear* as a "tension-filled empire" that incorporates hybridized and multi-voiced "found texts" ("Bakhtin" 100) which de-colonize the Prairies of the nineteenth century at the same time as Wiebe's Mennonite pacifist vision recolonizes the territory and the Natives depicted (*Historicity* 133).

As I have shown in my previous studies, this recategorization, at times within the same article, is also characteristic of novels like *Alias Grace* and *Paul's Case*. It is due not to confusion or lack of focus among Canadian scholars, but to the nature of these novels themselves, which are representative of much of contemporary Canadian fiction. Linda Hutcheon, for instance, observes that Canadian postmodernism typically involves works of fiction that take realism seriously and then subvert the genre (21). In short, then, *The Temptations of Big Bear* has thus been viewed by critics as a formally avant-garde novel that is nonetheless rooted in the tradition of historical realist fiction and endorses a mythico-religious moral.

(b) The Scorched-Wood People

Wiebe's *The Scorched-Wood People* is situated within the same interpretative currents as *The Temptations of Big Bear*. Wolfgang Kloos has characterized it as "a novel

dealing with the rise and fall of a nation," namely the Métis nation (207). For Sam Solecki, the novel opposes Eastern and Western ideologies in a contestational narrative (5). Allan Dueck, for his part, goes further when he claims that "Wiebe's perspective on history *affirms* the cultural heritage and identity of a demoralized and oppressed people" (198; emphasis added). Dennis Duffy, however, fears that in our "days of post-colonial enlightenment" we might too easily lapse into "flabby sentimentality about underdogs" and thus overlook the demanding form (and underlying message) of a work such as *The Scorched-Wood People* (211). Duffy follows Linda Hutcheon's lead in viewing Wiebe's novel as a metafictional work. At the core of this metafiction lie both the endorsement and the subversion of language's authority. Duffy grants Riel's vision the power of Scripture itself, of "things unseen [. . .], drifting about in the air like flocks of birds, until they nest among the hearts of men" (206), yet cautions that in the world of British-inspired law, where "vision that results in action will be judged on the basis of action alone," Riel's hopeful words are without effect. If any moral is to be identified at the end of the novel, Duffy adds, it lies in our understanding of the incompatibility of differing cultural discourses (more explicitly, that of secular law and that of vision and divine justice) in our society (210). In the end, Duffy asserts, no univocal discourse can claim hegemony in either our Western world or in our understanding of the past. Duffy's denial of univocality is echoed in Marie Vautier's reading of *The Scorched-Wood People* as a postmodernist work that "prevents the myth of Louis Riel from crystallizing into a fixed element in the reader's historico-mythical imagination" (83).

The Temptations of Big Bear and *The Scorched-Wood People* as Trial Novels

Like these scholars, I agree that Wiebe's two novels fulfill moral, pragmatic, and oppositional functions. I would add, however, that they also grant access to communal thinking about the possible place of minorities within the Canadian Confederation. More broadly, these novels ask the reader to reflect on the meaning of citizenship and nation. Moreover, *The Temptations of Big Bear* and *The Scorched-Wood People* achieve this not by deriding and turning away entirely from law (as one might expect a contestational creative work to do), but by the seemingly paradoxical appropriation of a legal genre known after all for its narrativity. Like the fictive Grace's narration of events in *Alias Grace*, each of Wiebe's novels in itself may be looked upon as a counternarrative that challenges the integrity of a historical court judgment by bringing to the fore those facts and testimonies disallowed at the trial. In other words, rather than dismiss trial narratives, these novels are trial novels; they enact trials, for they bring into play adversarial narratives—a historical court case, parts of which appear verbatim in Chapter Six of *The Temptations of Big Bear* and in Part Three, Chapter Four of *The Scorched-Wood People*—and the counternarratives to the historical trials. These counternarratives fictionalize the events leading to Big Bear's and Riel's trial at the same time as they present Native and Métis grievances somewhat differently than did the original judgments; they also provide a critique of White justice, particularly under the Macdonald government of 1885. Because trial narratives are essentially teleological, I endorse those studies that view *The Temptations of Big Bear* and *The Scorched-Wood People* as realist defences of the underdog. But the adversarial trial format is far from being univocal. Indeed, it provides a forum for various and dissenting voices. Moreover, rather than claim that the

novel both installs and subverts such voices, I maintain that in a courtroom all voices and complementary versions of events are heard, although a final verdict must be reached. Like the literary critics above, I too wish to avoid a simplistic reading of Wiebe's novels. Yet my conclusions vary somewhat from theirs. My position, therefore, is situated at the intersection of what might be called realist and postmodernist readings of Wiebe's novels. At the same time, pitting historical trials against their fictional reworking necessarily opens the door to discussions about justice, legality, and legitimacy.

More precisely, I argue that by way of postmodernist techniques like the juxtaposition of opposing narrative testimonies or a vision of the margins in relation to the centre both *The Temptations of Big Bear* and *The Scorched-Wood People* ask their readers to attain greater enlightenment as well as a 'verdict' concerning two related matters. The novels ask us, first, to revisit the justice of the historical trials of Big Bear and Louis Riel through a critique of their various elements. Perhaps even more importantly, as counternarratives, Wiebe's works demand reflection about the normative biases found in every defence attorney's trial narrative. The question becomes: What *nomos*, what *normative* universe is implicitly or explicitly manifest in the implied author's *narrative* universe? Naturally, questions arise as to the normative biases of the communities involved in this fictional retrial: the fictional community of the novel and the community of readerly and critically minded 'judges' embodied in the implied reader and now faced with a fictional representation of historical documents pertaining to the development of the Confederation. Thus these novels are not merely realist *and* subversive postmodernist works typical of recent Canadian fiction. They *also* invite the reader to come to a concrete conclusion about moral, historical, and political issues of

importance to Canada as a nation, and they ask, further, that the reader carefully consider the norms from which he or she draws these conclusions.



The Temptations of Big Bear

The Historical Trial of Cree Chief Big Bear

The historical Big Bear (in Cree, Mistahahmusqua) succeeded his father Black Powder (Mukatai, in his native Ojibwa) as Cree chief of the Plains People in 1865. For years he was known to Natives for his bravery, his military and leadership skills, his ability to relate to and provide for the members of his community, his sense of humour, and his strong spiritual powers (Miller 35). To non-Natives, however, he was first infamous for his stubborn refusal to sign Treaty Six in 1876. He would later become doubly ill-famed as one of the Native leaders involved in the 1885 North-West Rebellion.

In 1876, a number of Saskatchewan Cree and Chipewyan chiefs faced both with starvation due to a decrease in buffalo and with the dire effects of White colonization signed Treaty Six without consulting Big Bear, who was strategically opposed to such acquiescence. The treaty promised reserved land, farming and carpentry tools, cattle, ammunition funds, money, liquor prohibition, and life annuities for each member of every band. Some of the Native chiefs who signed Treaty Six were converted Catholics and Methodists who had already learned to farm and more readily accepted White ways than

the shrewd and more traditional Big Bear. As historian Hugh Dempsey explains, Big Bear knew that "the day would come when the buffalo would be exterminated, but with careful management they could last for many years. He was also aware that the Indians were giving up valuable hunting grounds and were getting little in return." Furthermore, those Natives who had earlier signed Treaties One and Two had since found out that the government was not adhering fully to its original promises. Still, Big Bear was not entirely opposed to signing a treaty with the White man as much as he was holding out for better terms for his people (76).

By 1882, Big Bear's band was starving (Dempsey 109) and members of his own family urged him to sign Treaty Six. He did so reluctantly (111), but persisted in his refusal to choose a reserve. He attempted instead to unite Cree bands in the hope that they might form a cluster of contiguous reserves in North-West Battleford in order to intimidate the government into responding to their claims. The government, however, not only disallowed adjoining territories but refused rations to reserveless bands (Miller 96-102). Faced once again with starvation, prominent members of Big Bear's band threatened to abandon their chief and join other Cree groups (102). Big Bear lost influence notably with his band's warriors, some of whom, like his own son Imasees or one of his braves, Wandering Spirit (Kapapamahchakwew), began to insist on a more forceful resolution to their problems. On April 2, 1885, a week after armed confrontation began at Duck Lake between the Saskatchewan Métis (themselves fighting for land rights) and the mounted police, warriors within Big Bear's band raided the Hudson's Bay Company stores at Frog Lake despite their chief's orders that they stop. Resistance on the part of White Indian agent Thomas Craig led to the massacre of nine White settlers,

including two priests. Prisoners were taken as well (Dempsey 159). Two weeks later the same warriors attacked Fort Pitt, the site of a Hudson's Bay Company post. More prisoners were taken. A third battle occurred at Frenchman's Butte on May 28, during which a number of prisoners managed to escape. Faced with fatalities on the Native side, Wandering Spirit chose to surrender. Big Bear's son, Imasees, fled to Montana. Along with remaining members of his band, Big Bear, who throughout these events had pleaded for peace and attempted to ensure the prisoners' safety, made his way to Fort Carlton and was captured as he begged for food (Miller 115).

The North-West Rebellion quelled, both Louis Riel (the acknowledged leader of the Métis rebellion) and Wandering Spirit were tried for treason, sentenced to death, and executed. On September 11, 1885, Big Bear was put on trial. His trial transcript was published in the Parliament's 1886 Sessional Papers. He was charged with four separate counts of treason-felony, a crime that carried a possible maximum sentence of life imprisonment or "any lesser term that the court [thought] proper to inflict" (Queen v. Big Bear 174).[4] He was accused specifically of conspiring with "other evil disposed persons" to "raise, make and levy insurrection and rebellion" against the Queen at Frog Lake, Fort Pitt, and Frenchman's Butte, as well as during the dictation of a letter to Louis Riel on April 21, 1885 (172-73). Despite a strong defence, during which some of the prisoners

[4] As Regina barrister and Crown attorney David L. Scott explained to the jury during the historical Big Bear trial,

> [t]he difference between the crime of treason-felony and the higher crime of treason is this: that in treason it is necessary to show that the prisoner charged with such a crime actually levied war; in treason-felony it is only necessary to show that he designed and intended to levy war—that is, it is not necessary to show that he levied war, but that he merely intended to do so. (QvBB 174)

In Wiebe's *The Scorched-Wood People*, narrator Pierre Falcon derides the way in which that distinction is used to the Crown's advantage against Louis Riel. See p. 217 below.

taken by Big Bear's band testified to his responsible character and peaceable behaviour,[5] he was sentenced to three years in prison. In his pre-verdict address to the jury, magistrate Hugh Richardson, who had also presided at Louis Riel's earlier trial, stated that Big Bear's pacifist conduct during the rebellion failed to fully exonerate him from the charges brought against him. As the magistrate made clear, the presence of anyone in any character aiding and abetting or encouraging "the prosecution of [. . .] unlawful designs must involve a share of the common guilt." F.B. Robertson, for the defence, repeated the judge's last words, to make sure that jurors heard them well: "Aiding, abetting, and encouraging, Your Honour. I wish the jury to understand distinctly." Naturally, Robertson wished to emphasize that according to defence witnesses Big Bear had done no such thing. The jury retired but returned only fifteen minutes later with a verdict of "guilty" to which was attached a recommendation of mercy (QvBB 233).

The Temptations of Big Bear's Thematic Binaries

The Queen's case against Big Bear's trial concludes Wiebe's novel; relatively large excerpts from the historical trial find their way into the novel's sixth and final chapter. Yet the novel as a whole is also trial-like, or adversarial. In "Structuring Violence: 'The Ethics of Linguistics' in *The Temptations of Big Bear*," Sherrill Grace announces that "[t]he subject of [Wiebe's novel] is the clash between the plains Indians and the Whites, who

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[5] For instance, trader William Bleasdell Cameron, who survived the Frog Lake massacre and was taken prisoner, wrote in his 1926 account of the Native rebellion, *The War Trail of Big Bear*, that he testified "fervently" on the Cree chief's behalf (222). At the trial Cameron mentioned a number of instances during which Big Bear earnestly attempted to avoid greater bloodshed and to keep prisoners safe (221; QvBB 218-20; *TBB* 363-64). It is therefore clear that some at least of the White persons who suffered directly from the rebellion were aware of Big Bear's efforts to keep them unharmed.

represent law, order, and eastern government" (11). Other critics have similarly emphasized the dichotomous nature of the novel. Beyond the primary thematic schism outlined by Grace, their studies tend to focus on secondary sets of conflicting aesthetic elements within the novel. Grace herself sees Wiebe's work as a "crossfire" (11) between the "parabolic" language used to describe the Natives and the "propositional" language of White discourses (14-15). Frank Davey writes, among other subjects, of the "collision between contending discourses" (44) and "meaning-systems" (45) produced by the novel. Robert Lecker mentions *The Temptations of Big Bear*'s "conflict of temporal viewpoints," according to which sequential historical time is contrasted with the circular timelessness of Native existence in order to oppose objective and subjective viewpoints (333-35).[6] Words such as "clash," "crossfire," "collision," and "conflict" refer purposely to the days of the 1885 Rebellion, but are also suggestive of the war of words that takes place during a trial, as two parties to a conflict battle it out for what Laura Hanft Korobkin calls the ability to persuade a judge or jury that "this isn't a story about *that*, it's a story about *this*" (228).

In her "*Troppo Agitato*: Writing and Reading Cultures," Diana Brydon does indeed submit that *The Temptations of Big Bear* "takes the form of a public inquiry or trial" (16). I would hone Brydon's contention and state that the novel takes the form of a *lawyer's* trial narrative. It confronts the implied reader not with the representation of an entire trial, complete with extensive dual narratives delivered by warring parties, but rather

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[6] See also, *inter alia*, Deborah Bowen's analysis of the novel's "languages of contrasting ideologies" (62); Coral Ann Howells's look at the "counterpoint" between history's chronology and the transgressive anachronology of many of the narratives that haunt the novel ("History" 163); and Glenn Meeter's study of the contrast between the novel's instances of sequential chronology and what he calls "spatial form" or the ability to ensure that the reader grasps the work "spatially, in a moment in time, rather than as a sequence" (43).

with a *defence* lawyer's narrative that refers to the historical trial's injustices. Almost nine decades after Big Bear was tried and sentenced, *The Temptations of Big Bear* attempts to explain what was never debated or heard at the trial due either to a somewhat careless performance by the Crown or to a legal system so predictably faithful to the letter of the law and of its indictments that it kept the motives for the North-West Rebellion of 1885 from coming before a judge or jury.

During the historical trial, for instance, Crown attorney David Scott announced *only weeks* after the end of the Native rebellion that it was unnecessary to "mention any of the circumstances connected with [the 1885 North-West] rebellion, because the whole matter from beginning to end [was] now almost a matter of history" (QvBB 175). Scott nonetheless called two witnesses to the stand to testify to the existence of a rebellion. Inexplicably, they spoke last and their statements addressed the Métis uprising, not that of the Natives (200-203).[7] Moreover, defence attorney F.B. Robertson was bound by the case's indictment; he needed to persuade the jury that Big Bear had not conspired against the Queen. What might have prompted the Native rebellion was neither material to his case nor apparently useful to it, since he merely aimed to show that Big Bear was innocent of the charges laid against him. Yet the reasons behind the armed uprising might have been strategically valuable to demonstrate, first, that Native grievances were legitimate (even if the Frog Lake massacre was obviously unlawful) and, second, that despite this Big Bear had displayed remarkable restraint and responsibility when he ordered his warriors to stop the carnage. The trial achieved neither purpose. No attempt was made to document

[7] The first witness, William Tompkins, testified that he had been taken prisoner not by the Cree, but by armed rebels under Louis Riel's command (200). The second, Baptiste Fontaine, swore under oath that he had been taken to Cree chief Poundmaker's camp after having been captured by "[a] halfbreed" (202).

Native complaints for the jury and Big Bear was found guilty despite his unwillingness to associate himself with his braves.

Courtroom Players in *The Temptations of Big Bear*

(a) The Omniscient Third-Person Narrator as Defence Attorney; The Implied Reader as Appellate Judge

The Temptations of Big Bear challenges the historical trial's methodology and findings. It documents Native distress in the face of White greed and seeks to prove that Big Bear was not a rebel, but was instead a diplomat, a man who tried by verbal means to keep his band safe and fed while attempting to live in peace with White colonizers. In the novel's rendering, when his plan fails and his band stops heeding his leadership, he endeavours to at least keep White prisoners unharmed. As a 'counternarrative' to a historical trial, the novel includes various forms of 'evidence' and 'testimony' that include first-person accounts, legal documents, diary entries, and a 'defence attorney's' lengthy address to the 'Court' represented by the implied reader. At the centre of this presentation lies the novel's hetero- and extradiegetic[8] third-person narrator. He neither tells his own story nor is part of the events recounted, although he functions as an omniscient narrator.[9] To say that this narrator is—to use Michel Coupal's own term—"inconnu" or unknown (31) is somewhat inaccurate. Actually, he is anonymous, but it is possible to grasp certain rudimentary things about him. Robert Lecker describes him as

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[8] Gerald Prince defines the heterodiegetic narrator as one "who is not part of the diegesis [. . .] s/he presents" (40). An extradiegetic narrator is one who, as a narrator, stands outside of the text's diegesis (or outside the fictional world in which the events recounted take place) (29).

[9] There is no indication in the novel as to the gender of the narrator; throughout this study I therefore refer to 'him' in the masculine for convenience's sake.

"sympathetic with Indian life" (340) and Susan Whaley as subjective and therefore unworthy of our implicit confidence (136). As I argue later in this study, it is also possible to venture a guess as to his ethnic origin. Finally, Whaley further describes the narrator as an unreliable journalist and a poet (134).

Like a journalist, the narrator does report facts. Sherrill Grace calls him a "chronicler" when he merely presents to the reader factual material and "general information necessary to the understanding of the historical and public events" ("Structuring Violence" 12). Thus, he may present the actual text of Treaty Six (*TBB* 127, 143), offer unmediated dialogue, or merely list names and dates in an impartial manner. Yet Whaley is right to observe that he also discards his neutrality and moves us—rather strategically—in two ways.

First, his omniscience allows him both to observe details unnoticed by the characters he describes, and to comment upon these characters' actions and motives, at times with irony and a degree of sarcasm. For instance, he notes that the cost to the Canadian government of the treaties is "a [$53,000] down payment, actually, but complete with rivers, valleys, minerals, sky—everything forever. Rotting buffalo" (66). The word "rotting" here is ironic since, for the narrator, it is the extinction of the buffalo as a species that allows the government to acquire Native land in return for such a paltry sum. The buffalo's rotting carcasses, then, are a blessing to the government, rather than a nuisance. Second, the narrator also exhibits his bias by focalizing through the eyes of diverse characters some of the smaller narratives within his larger counternarrative.

Furthermore, his sympathetic (or, at times, sardonic) focalizations allow him to act as a passionate and persuasive 'orator.' For example, in the following passage he manages

to convey a sense of the way in which Big Bear himself views buffalo and its imminent extinction:

> at last before [Big Bear] again, sixteen [buffalo] only and hardly more than one belly-stretching meal yet everything for life and this moment that could ever be asked, everything for this moment while the iron road crawled steadily between him and where he was born, nailing another straight line behind the Grandmother's straight police to fence him in, square him in against the innumerable bluecoats whose fires and patrol hazing kept the few buffalo south of the Missouri [. . .], surrounding them against the iron already nailed down straight there, devouring the last of them in the final moments of all their savage summers. But these sixteen he would surround and devour. He felt that cow's round heart beat, the calf licked so beautifully creamy thumping against her udder, the bird's beak slip a grub from her hide and the relief of cool air brushing that infernal itch [. . .]. (122)

As he paints this scene, the narrator uses his rhetorical skills to usher the implied reader into Big Bear's mind. The harshness and linearity of the White world is contrasted with the soft circularity of the Cree's empathetic universe.[10] Always a great hunter, Big Bear might be about to kill a buffalo cow and her calf, but he does so out of strict necessity, because years of hunting, combined with White men's expansionism, have driven buffalo away and thus deprived the Cree of steady sustenance. Yet, as he is rendered by the

[10] See Lecker for a more detailed analysis of the contrasting imagery used throughout *The Temptations of Big Bear*.

narrator, the old chief is still able to pause and notice the beauty and sacredness of the life that surrounds him. Moreover, the narrator as 'attorney' not only rallies the implied reader to the Native side (since it is easy to sympathize with both the Natives' hunger and lyrical worldview), but manages as well to provide important information. Through his words the implied reader experiences the political and cultural clash of two normative worlds and systems. The reader is also offered insights into the character of the 'accused.' Big Bear's sense of responsibility towards his people, his ancestral love of the hunt, his appreciation of the landscape to which he was born, and his distress in the face of the events that are to come are clearly rendered.

As a lawyer, then, the third-person narrator is both elegiac *and* bound by dry facts. Chapter One of this study showed that a trial strategy is successful when it weaves hard facts into a persuasive narrative. In Laura Hanft Korobkin's words, through narrative, "[m]ountains of bewildering evidence, conflicting testimony, and seemingly unconnected detail suddenly become not just coherent but morally inflected, logically connected, and thus judgeable" (227). Yet as Catharine MacKinnon warns, in a court of law, narrative can be perceived as entertainment or as something 'less real' than reality itself, something that distances the jury from or occludes the facts. "This may be embarrassingly non-postmodern," MacKinnon writes, "but reality exists. Of this the law, at least, has no doubt. Something happened or will be found to have happened" (235). In *The Temptations of Big Bear*, the narrator as attorney knows this and carefully frames his morally charged narrative with factual details that show that "something happened."

(b) First- and Third-Person Eye-Witnesses

Critics have rightly noted, however, that the third-person narrator shares the telling of the events of 1876-1888 with a number of independent first-person narrators. These include John McDougall, Edgar Dewdney, Robert Jefferson, Teresa Delaney, George Stanley, Kitty McLean, and the "Canadian Volunteer." [11] Except for the occasional italicized 'announcements' that the above characters are 'speaking,'[12] their narratives are presented outside the third-person narrator's account. Each of these narratives functions instead as an eye-witness testimony of events.

For the most part the novel's first-person narratives are sympathetic to the Native cause. For a White woman of that period, and one taken prisoner by the Cree, Kitty MacLean is unusually sensitive to her captors. Although she admits that she was terrified at first (264), the first four weeks of her ordeal "weren't uncomfortable" (260). It is Kitty who takes over from the omniscient third-person narrator and conveys to the implied reader Big Bear's plea to his warriors to have pity on their White prisoners (273). It is she who also passes on Big Bear's last council words. By then the old chief knows that he will never regain his authority over his braves, yet he tries one last time to appeal to their capacity for reason and warns them that there will be consequences to their actions (277).

On a slightly different register, in his own first-person narrative, Missionary John McDougall may announce that his loyalties lie with the Methodist Church, with the

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[11] See, for e.g., Grace's "Structuring Violence" and Whaley. In her discussion of the novel's first-person narratives, Grace omits those of Teresa Delaney and George Stanley, perhaps because they are quite short compared to the other five. To my own list of seven first-person narratives, Whaley adds Big Bear's first-person speeches to Natives or Whites. I prefer to omit these for the simple reason that they occur within the narrator's account of events, whereas the other seven stand out on their own as separate narratives altogether.

[12] For e.g.: "*Teresa (Mrs. John) Delaney:*" (223) or "*George Stanley (Mesunek-wepan):*" (224).

Canadian Confederation, with the Queen (42), and with White law (40). He may lament that the Natives' faith in The Great Spirit is "tragically limited." But he also expresses doubt that treaties will truly benefit Natives (35) and that Ottawa politicians know much about the North-West. Furthermore, he draws a distinction between Native chiefs and their warriors that is crucial to Big Bear's 'case' before the reader. Band warriors only "wanted glory." The chiefs, he explains, were wiser; they understood among other things that only White Canadians "could protect them from the American whisky runners" (36). Farming instructor Robert Jefferson, in turn, discloses that conditions on reserves are dismal as the starving Cree grow more resentful daily of even those White men who hope to help them. Warriors, he tells us, were not raised to eat bacon and trim rails to fence in gardens (162). "I'm tired and depressed," he 'testifies,' and adds "[t]his game is not worth my candle, nor anyone's" (169). Thus through the first-hand account of a White man the implied reader sees that conditions on reserves were antithetical to the Cree's spirit and heritage.

Finally, witnesses most hostile to Big Bear's cause like, for example, Indian Commissioner Edgar Dewdney, nonetheless manage to utter positive comments about Natives. In his 1879 letter to Prime Minister John A. McDonald, Dewdney agrees rather reluctantly that the government-appointed rations of flour and bacon are debilitating to Natives used to "an almost pure fresh meat diet" (106) and, further, that in argument the mind of Big Bear "seems as logical, almost civilized as any Oxford debater" (109). At the same time, his 'testimony,' which is for the most part contemptuous of the Natives' position, loses its credibility in its last lines. The Cree, he tells Macdonald, "have two notable reputations, one concerning their low intelligence and the other their beautiful

modest but by no means intractable women and from the evidence you will know I have with some pain gathered this summer [. . .] I would judge both evaluations absolutely correct" (118). With these words, Dewdney exposes himself to the eyes and minds of contemporary readers as, at best, a braggart and, at worst, a shameless and corrupt exploiter. Likewise, Teresa Delaney's characterization of the Cree as capable of "deep treachery and wicked guile" (224) is undermined by previous first-person testimonies which clearly show that most White persons were cognizant of Native discontent and that the Cree's grievances were legitimate.

Whether hostile or helpful, these testimonies fail to deny the reality of Cree violence against Whites, yet they also imply that Big Bear's warriors might have had serious motives to rebel. To these distinctive narratives should be added the third-person diary entries of the fictionalized mounted police inspector (and son of novelist Charles Dickens) Francis J. Dickens, and newspaper articles from *The Globe*, the *Saskatchewan Herald*, and the *Toronto Mail*, all of which are either damaging to the Native cause or report upon the ultimate quelling of the 1885 uprising.

(c) The Implied Author as Senior Attorney

But if the above eye-witness accounts are separate from the omniscient third-person narrator, *who* has included them into the novel? Who has managed to make the implied reader understand the ironic way in which some of these accounts must be read? It is, of course, the implied author. I would contend that because of the nature of the above separate testimonies, he functions in the novel as a kind of 'senior partner' to the third-person narrator/attorney. Strategically, the implied author supplies his 'junior

partner' with witnesses, none of whom testified at the historical trial, but most of whom can say something (however reluctantly) positive about the Natives or their position. He is also responsible for the organization of the counternarrative that is *The Temptations of Big Bear*. Yet the role of the implied author does not merely consist of organizing textual material, however strategically. Here strategy is allied with sympathy for the Native cause. As Wayne Booth declares, the function of the implied author is also a moral one; it is through the implied author that one grasps a novel's values or cultural norms (73).

The Crux of the Fictional Retrial of Big Bear: Substantive vs. Formal Equality

(a) Legal Definitions

If Michel Coupal is right to assert that the heart of the novel lies in the sixth chapter's complex narration of the trial (which is sifted through both Big Bear's and Kitty MacLean's perspectives and is interspersed with excerpts from the historical trial transcript) (27), then a great deal of the novel's normative values must be included within those passages.[13] At first glance, the novel's trial scenes and the original trial transcript appear to contain mostly instances of White bigotry, for Natives are repeatedly portrayed as being indistinguishable from one another.[14] On closer inspection, however, it becomes

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[13] Although transcript excerpts in the novel are mostly quoted verbatim, minor revisions were made to the original for dramatic purposes. The only significant addition to the transcript occurs when the fictional Justice Richardson refers to the lawyers before him as his "juniors." The fictional F.B. Robertson interjects that he is, in fact, thirty-five and has been practicing law for eleven years (*TBB* 373). Although it brings a bit of levity into the otherwise tragic prosecution of an old Native chief, this passage also underscores the vanity of the members of the bar as they deal with another man's fate.

[14] During Big Bear's fictional *and* historical trials, examples of White blindness to Native differences crop up notably when W. J. McLean, the Hudson's Bay Company factor at Fort Pitt, a prisoner of Big Bear's band, a witness for the defence, and, in Wiebe's novel, the father of liminal character Kitty McLean, declares to the Court that some might say that the only good Indians are "dead Indians" (*TBB* 355; QvBB 205) and that "[a] characteristic of Indians is grumbling" (*TBB* 356; QvBB 207). Historically, Crown

obvious that beyond crass stereotypes lie issues that continue to be of relevance today. These issues divided the Court during the trial; and their ramifications illuminate the novel as a whole.

More precisely, matters related to equality, difference, and the way in which these legal categories permeate national debates about conformity, dissent, and pluralism were central to the original trial; they are also vital to Wiebe's *The Temptations of Big Bear*. In the past, courts tended to endorse a view of equality under the law that could be prejudicial to those it presumably benefited. The historical Justice Richardson was certainly in good faith when he declared, during his address to the jury, that

> [i]t is true [. . .] that [Big Bear] is not a white man [. . .], but although he is an Indian, I cannot give any other view—put it in any other way to you than to say that between white people and Indians there is no distinction whatever. The law is there and it is binding upon the Indian, or at least the law is there and the Indian is entitled to as much protection from Her Majesty, and receives as much protection from Her Majesty as the white man; and the converse is also true [. . .]. (QvBB 230; cf. *TBB* 372)

The notion that all persons—be they White or Native—are subject to the protection and binding force of the law is known as a 'formal' view of equality. As legal scholar Patricia Hughes explains, formal equality "is a *sine qua non* of a regime purporting to operate in

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attorney Scott eagerly utilized this latter comment during his closing argument, when he inferred that Big Bear's typical and continual "grumbling" against the government was a sign of the motives that led him to take "the course he did in connection with the rebellion" (QvBB 228; cf. *TBB* 370). During both the fictional and historical trials, defence attorney Robertson rebuked his opponent by declaring that no White man would think twice about "grumbling" against a government that kept him in dire straits (*TBB* 370-71; cf. QvBB 224).

accordance with the rule of law. The glory of this principle lies in its ostensible neutrality: the 'sovereign,' no less than you or I, must abide by the law and be answerable to it" (32). Even though such a statement presupposes a dominant set of normative principles at least implicitly adopted by those who populate a common territory (which was hardly the case as White settlers began to colonize the Canadian North-West and tried to force their normative universe upon both Natives and Métis), formal equality was meant to insure that justice be rendered onto all subjects. Yet as legal critics in recent decades have pointed out, blatant injustice in the form of discrimination can flow from such a concept. Blindness to difference can result in unfair outcomes since all citizens of a nation do not benefit from equal opportunities or access to justice.

Big Bear's historical defence attorney, F.B. Robertson, was acutely aware of this problem when he cautioned the jury against a rash verdict. "Gentlemen," he began, "I feel that I need hardly say a word as to the difference between a white man and an Indian to you, except in so far as this, that the conduct of an Indian cannot be judged or estimated in exactly the same manner as the conduct of a white man, and Indian ideas are not the same as ours." With this, Robertson began to delineate the main difference between the two cultures as it was relevant to his client. "An Indian," he expounded, "looks very differently at society, while a white man looks at society at large [the] Indian looks to his own little band; apart from them he can do nothing; apart from them he cannot live; he must remain with his band; he cannot get away from them [. . .]." (QvBB 221; cf. *TBB* 366-67)

What the historical Robertson hoped to show was that despite the threat of prosecution, Big Bear's "Indianness" afforded him no choice but to remain with his band

when he realized that his pacifist views were at odds with those of his warriors. A White man might have taken a responsible moral stance and distanced himself from his errant associates, but no Native would ever feel free to make such a move. Therefore, the historical Robertson pleaded, Big Bear ought not to be prosecuted to the full extent of the law; an exception should be devised in his case, otherwise he would be found guilty by mere association with those more bellicose elements within his band. Despite his somewhat patronizing assessment of the Native's life amidst his "little band,"[15] Robertson invoked novel parameters for the Court's understanding of equality under the law.

Known today as 'substantive equality,' the notion according to which context (rather than blind neutrality) is important in the examination of a claim, right, or obligation, was introduced into the Dominion notably through the British North America Act in 1867.[16] Today's courts continue to recognize this principle. In 1989, the Supreme Court of Canada declared in the Turpin case that "[i]t is only by examining the larger context that a court can determine whether differential treatment results in equality, or whether [. . .] it would be identical treatment which would in the particular context result in inequality or foster disadvantage" (1331-32). Patricia Hughes, however, laments that substantive equality is sanctioned piecemeal by various legislatures and legitimated by

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[15] Robertson introduced his argument by asking the jury to look at Big Bear, that "poor old man, tottering now almost on the brink of the grave" thus severely downplaying if not discounting the Cree chief's greatness as a leader and a Native diplomat (QvBB 221).

[16] Section 93 of the British North America Act, 1867 provides that the legislature of each province holds the exclusive power to make laws in relation to education. Susbsection 93(1) provides in addition that "[n]othing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union." In other words, the Constitution, 1867 allows for exceptions in that it protects religious education and the language of education that were understood as rights or privileges of denominational schools within a given province at the time of Confederation or upon admission into it (Hogg 1220).

courts on a case-by-case basis. In "Recognizing Substantive Equality as a Foundational Constitutional Principle," she claims that substantive equality is of such vital importance in a multicultural nation and a bicultural state such as Canada that it ought instead to be looked upon as an "underlying constitutional principle" along with federalism, democracy, free speech, judicial independence, and the rule of law (8).

(b) Tzvetan Todorov's Three-Pronged Substantive Equality Test

Non-jurists might agree with Hughes. In his *La conquête de l'Amérique*, a study that proposes a tripartite model to reach an ideal understanding of the colonized 'Other,' theorist Tzvetan Todorov explains that what jurists call formal equality comes dangerously close to a desire to assimilate others by projecting dominant values upon them.[17] Yet Todorov also sees a threat in too careless a focus on distinctions. Embracing difference, he warns, can easily lead to the inferiorization of the other (48). Todorov therefore favours what he calls "la différence dans l'égalité" (253). One may approximate such an ideal through at least one branch of a three-pronged model. The axiological branch demands that the worth of those different others be determined according to their standards. The praxiological branch, in turn, requires that a majority be able to identify

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[17] I am much indebted to Diana Brydon for introducing me to Todorov's work in her own "*Troppo Agitato.*" Brydon's study constitutes an inquiry into imperialistic modes of thinking within Rudy Wiebe's and Australian writer Randolph Stow's works. She does not, however, explicitly delve into legal questions as I do in mine.

Although he does not use the juridical expression, Todorov views the concept of formal equality as the conquering Spaniards' tendency to look upon Latin American Native populations as equal *before God* rather than before the law. This substitution of a higher authority and source of justice for a secular one changes nothing to my argument. In fact, it bolsters it. As I suggested above, one of the problems with the legal version of formal equality is that it assumes, as did Christians in 1492, that every man within a given territory has agreed to adopt the conquering and dominant norm.

with minorities and avoid assimilating those minorities to the majority's habits and practices. Finally, the epistemological branch dictates that an open-minded dialogue be carried out with others about their lives and beliefs while avoiding the temptation to objectify them (191, 253).[18] Only through at least one of these three models can differences be respected and true equality achieved.

Todorov's non-juridical approach to what might be called substantive equality therefore comes close to the legal requirement that context (the other's circumstances or values) be considered carefully before a dominant norm is forced upon them. Differences between the legal and the Todorovian approaches lie in their respective emphases. Whereas the courts examine the outcome of a particular form of treatment on a group of people (in the workplace, for example, or under legislation), Todorov prefers to root his broad vision of equality in the sentiments, actions, and cognitive abilities of the dominant group. A respectful acknowledgment of difference might take place when members of that group succeed in conquering the temptation or will to put down, reify, and assimilate those who are visibly dissimilar. Todorov's 'test' for "difference within equality" is therefore more onerous than the legal one since outcomes are typically easier to assess than what is in men's hearts, minds, and consciences. Yet it complements Canadian law in that the outcome of discrimination against a group succeeds the intent—however unconscious it may be—to discriminate unwisely.

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[18] Epistemology, of course, stands for the theory of knowledge. Axiology is defined as the theory of ethical and aesthetic values. Praxiology refers to that of practices and customs.

(c) Applying the Todorovian Test to the Historical Trial of Big Bear

In the historical Big Bear trial, the Court failed both tests. Certainly, despite admonitions that all are equal under the law, Justice Richardson acknowledged that he had bent certain evidentiary rules in order to accommodate the Cree chief's situation as an elderly Native man who had never before set foot in a White courtroom and who could address the Court but through an interpreter. "I thought and felt," Richardson told the jury, "that in a case of this sort with the class of man who stands there, the widest possible limit should be given to anything that he had to say, or that any witness who might be called for the defence or for him might have to utter [. . .]" (232). As he appeared to display a compassionate understanding of Big Bear's cultural predicament and to incarnate the Todorovian ideal, Richardson referred to the admission of evidence that was considered inadmissible at Cree chief Poundmaker's earlier trial for treason-felony.[19] In short, evidence of Big Bear's conduct and attitude before rebellion broke out was admitted as proof of his lack of intent to cause trouble, whereas similar evidence was kept from the jury during Chief Poundmaker's trial (QvBB 214-15; Bingaman, "Trials" 89). The historical Richardson justified his decision in the Big Bear trial by saying that "[t]his unfortunate man is an Indian and I have allowed an unreasonable stretch now, simply because he is an Indian [. . .]" (QvBB 217). Yet Chief Poundmaker too was "an Indian," albeit a younger, prouder, and guiltier one. Richardson's tentative and short-lived venture into the realm of substantive equality seemed motivated by reasons other than his awareness that Natives were an insular and disadvantaged group. Both Poundmaker and

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[19] See The Queen v. Poundmaker.

Big Bear received three-year sentences. Although Big Bear's sentence may appear to be mercifully light next to that of certain of his warriors, who received death sentences, one commentator has noted, rightly, that far greater evidence of treason-felony was presented by the Crown in Chief Poundmaker's case. Sandra Bingaman suggests in her 1975 article comparing the trials of Poundmaker and Big Bear that "if Poundmaker's punishment is considered just, then Big Bear's similar sentence must be regarded as excessive" ("trials" 93).[20] As he closed his address to the jury, the historical Justice Richardson concluded that even though "the Indian, as a rule, [had] not the amount of enlightened education and [. . .], perhaps, so much civilization as white men," he had "yet to see the Indian in the year 1885 who [did] not know the difference between right and wrong" (QvBB 230; cf. *TBB* 372). With this statement, the historical (and the fictional) Hugh Richardson closed the door on the Court's potential endorsement of substantive equality.

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[20] Bingaman elaborated on this point in her 1971 Master's thesis in History, "The North-West Rebellion Trials, 1885." "The paradox," she wrote,

> arises in the results of the two trials. In spite of all the differences, the sentences given the two chiefs were exactly the same. These sentences were handed down although Big Bear's jury had recommended mercy, while Poundmaker's had not. One is led to suspect that [Justice] Richardson had decided that three years was the proper sentence for chiefs found guilty, and that sentence was passed with little regard to other factors. Certainly, if Poundmaker's punishment is considered just, then Big Bear's similar sentence must be regarded as excessive. This is particularly true when one realizes that the younger man served only eight months, while the older remained incarcerated for over two years. (93)

In her 1975 "Trials of Poundmaker and Big Bear, 1885," Bingaman ventures that perhaps this obligatory three-year sentence was viewed by the magistrate as an adequate deterrent against future Native rebellions (91).

The Cree *Nomos*

(a) Martha Minow: Marginal Nomoï

The magistrate's address to the jury did, however, open the door to contemporary concerns as to whose sense of right and wrong was at stake at the time of the trial. In her "Pluralisms," legal scholar Martha Minow warns that in neglecting the perspective of insular or marginal groups, official authorities fail to understand that "they themselves seem peripheral to those minority groups that seem peripheral to the majority" (971). In other words, different and insular groups within a larger homogeneous association may live according to a perfectly coherent normative universe of their own and view that of the dominant group as being marginal by comparison. An example of this can be seen during Big Bear's pre-sentencing speech in *The Temptations of Big Bear*. In that address, although he has been found guilty of treason-felony, the old chief challenges the Queen's law and pits it against concepts of Cree justice that he believes to be more merciful.

(b) Big Bear's Few Historical Words

The historical Big Bear's recorded words are unfortunately few. Among his most famous speeches to White Canadians, however, his pre-sentencing address to the Court stands out. On that occasion, Big Bear spoke through sworn Cree interpreter Peter Houri (or Hourie, as his name is sometimes spelled). Although he requested that his words be published for posterity (Cameron 224), his speech was never included in the parliamentary sessional papers that contain the transcript of his trial. Various second-hand accounts of the event exist but reveal little of the full content of his address. The *Manitoba Free Press*, for example, merely reports that Big Bear spoke "nearly two hours" but that all of

the accused Natives "asserted their innocence in speeches more or less laughable" ("Numbers"). William Cameron, who had been made prisoner by Big Bear's Cree yet testified for the defence at the trial, noted in a later account that the Cree leader spoke with "the earnestness, the eloquence and the pathos that never failed to move an audience" (222). The historical Big Bear's words were typically exculpatory. He assured the Court that he had done his best to stop his warriors' actions, but that by then he had lost his authority over his band (223). He also appealed for clemency for those members of his band who awaited a resolution to the conflict in the woods where they were hiding and suffering from hunger. He ended by emphasizing that the North-West belonged to him and lamented that he would perhaps not live long enough to see it again (224). In its own short description of the speech, the *Regina Leader* mentioned as well that Big Bear "frequently used such language as, 'when we [the Native people] owned the land,'" but that Richardson had replied that "they never owned the land, that it belonged to the Queen, who allowed them to use it" ("Sentence").

(b) The Fictive Big Bear's Normative World and Cosmology in Clashes with White Law

In *The Temptations of Big Bear* the narrator recounts the pre-sentencing speech that Wiebe reconstructed from the historical sources above. For the fictive Big Bear and his Cree, the land is a symbol of an entire cosmology and distinct normative order, very much as the 'Queen's law' represents a secular normative system for Whites. "This land belonged to me," he emphasizes in his final address. Yet the land is not the mere object of an ownership right, but the People's "great inheritance." It descends from the great spirit,

"That One," who "spread it out for [all aboriginals] like a big blanket" (381). From this "Great Spirit" issue both gifts and obligations. Big Bear thus tells the Court that "it pleased the Great Spirit for men to do good." The notion of "goodness" encompasses an obligation of pity and mercy for those who have erred. This obligation, in turn, is radically opposed to a punitive White *nomos* mandated by the "Grandmother," Queen Victoria. Governor Morris, Big Bear explains, "said there is only one law. I know about that law now, but I never wanted to know what I know because I never needed it" (380). Far from being satisfied with his rejection of White legal norms, the fictional Big Bear spells out the parameters of Native justice. "Have you no children?" he asks the Court as he attempts to negotiate an amnesty for those members of his band whose fate remains uncertain:

> Is there nothing but punishment in the Grandmother's law? When a young man of the River People leads other young men rashly into a bad raid and one of them is left on the plain, that leader returns to camp and falls down before that father, that mother, and he cries for forgiveness. Then the mother touches him, the father lifts him and holds him to his breast and there is a son again in that empty lodge to make them happy, to care for them when they are old. [. . .]. (381)

Beyond its utilitarian purpose, his speech sketches the outlines of a *nomos* at variance with that of the "White law."

As the fictional Cree chief explains earlier to his son, Kingbird, trials are necessary in the White world because "Whiteskins are liars" and therefore need a complex system of testimony and corroboration to shed light on the truth of a tense situation. But, Big Bear reminds his son, Natives have no reason to lie about their deeds (322). In his fictive pre-

sentencing speech he makes it clear that there is no need for falsehood and evasion of responsibility in a system that recognizes the interconnectedness and interdependence of all beings. Within such a tight-knit system, along with sins against others comes repentance, and with repentance, forgiveness and re-inclusion within the communal circle. Thus Big Bear lends credence to his fictionalized attorney's assertion that whereas a White man is free to abandon his unlawful community because the law protects him, individually, Natives cannot live "apart from [their] little band" (366). Yet whereas both the historical and the fictional defence attorney viewed this Native trait somewhat condescendingly, Big Bear turns it into a virtue. Interdependence insures cohesion, which fosters a more merciful sense of justice based on apology and forgiveness, which in turn aims at greater cohesion. From Big Bear's perspective, the White man's law, by comparison, merely judges and punishes. It leaves out the value of contrition and the healing power of absolution; in short, it is pitiless and inhuman.

Faced with such a challenge to his own values and sense of fairness, the fictional Justice Richardson can but strengthen Big Bear's suspicion that the Queen's law is harshly punitive. Much as he dislikes to punish anyone, Richardson explains to the accused, he would be wanting in his duty to the public and to the Crown if he did not sentence Big Bear in such a way as to "make other Indians of the country know what would become of them if they followed a bad example." Thus the two normative orders, the two senses of justice—Native and White—come to a deadlock. Yet Justice Richardson addresses one more point in Big Bear's speech. "I have no objection to what you have to say," he tells the fictive Big Bear, "but on one point you must be corrected":

> This land never belonged to you. The land was and is the Queen's. She has allowed you to use it. When she wanted to make other use of it, she called you together through her officers and let you decide which of the choicest parts of the country you wanted, to reserve them for yourself. Your people can live there because the Queen has graciously given it to you.

"The land," the fictive Justice Richardson repeats at the end of this passage, "belongs to the Queen" (382). It is unclear whether the magistrate means to ensure that Big Bear understands him perfectly or whether he is trying instead to believe in his own claims.

As constitutionalist Peter Hogg explains, without irony, "[w]hen an uninhabited territory was settled by British subjects, the rule of the common law was that the first settlers were deemed to have imported English law with them. In the absence of any competing legal system, English law followed British subjects and filled the legal void in the new territory" (30). Unlike the territory now comprised of Quebec and Ontario—which belonged to New France and was subsequently conquered by the British—Saskatchewan was "settled." Evidently, in the eyes of the British, the Natives who populated the territory hardly counted as its first inhabitants. The Western legal world thrives on a number of self-serving fictions. In *The Temptations of Big Bear*, Justice Richardson's claim that the land had always belonged to the Queen constitutes an ironically fictive but significant example of this. His claim is also revealed as a blatant lie since the anonymous third-person narrator tells us, in a passage focalized through Alexander Morris's perspective, that signed treaties "finally and forever extinguished, as the Prime Minister liked to say it, all native rights" to the land.

The fictional Richardson's contention also underscores dominant European views about the land. To Morris, the settled territory exists only by analogy to the Mother Country; it lacks an identity of its own and is merely "larger than the entire British Isles" (*TBB* 9). To the settlers it is something to be colonized, measured, allotted, tamed, farmed, or turned into pasture in order to yield various forms of benefits. John McDougall relates a conversation he once shared with "[a] man named Shaw," a cattle rancher who offered him a business partnership. "This land's all empty [. . .]," Shaw told McDougall, "I see nothing but progress here from now on, so let's work together in the stock business" (46). Shaw was referring to livestock, yet the word "stock" may allude as well to a company's outstanding capital or shares. McDougall declined the offer, but the implied reader is led to understand that he is less than characteristic of White views since the Cree regard him as one of their own (44). Big Bear's vision of the land is naturally at odds with that of Shaw and others like him.

Throughout the novel, Big Bear counters White utilitarian notions of ownership, investment, and profit with claims to the sacredness and generosity of the land which he anthropomorphizes and calls "Mother Earth." The Cree are nomads and live off the land as they roam it, leaving enough behind for those who follow. "What can it mean that I and my family will have a 'reserve of one square mile'?" he asks in disbelief. "What is that?" (28). To Big Bear there is little fairness in a system that assimilates others to its norms. "I have never liked treaties," he exclaims, "I let the eagle go in his own way, and the bear in his!" (142). Philosophically, Big Bear thus embraces the principle of substantive equality in that he respects difference, as long as it harms no one.

Treaties are also suspicious to Big Bear because he views them as unreliable. The Cree chief is a man who believes in the authority of words. The problem with the words on treaties, however, is that they *seem* immutable (30), yet their meaning shifts as soon as the government changes its mind about its goals or its capacity or willingness to fulfill promises. At a council Big Bear tells the People (the narrator's name for all Natives) that chiefs once trusted Whites and signed their names on treaties. "[T]hen," he explains, "we found that the words no longer said the same thing; then we found that half the sweet things were taken out and all the sour left in" (191-92). Governor Morris may tell Big Bear that the law is "the same for red and white," but the Cree chief now knows that "itself, [the law] is only white" (31). Far from representing a true meeting of the minds, contracts with the government and the promises they contain are easily and unilaterally broken. By the time he is tried, Big Bear has lost all faith in the words of the White law, the monotonous and, to him, morally inconsequential drone of which he characterizes as a "long snore" (341).

If White officials are known in Wiebe's novel for the written legal texts they utilize to manipulate Natives into compliance, the Cree are notorious for the oral expression of their needs, doubts, spirituality, and feelings. Big Bear himself stands for Cree orality. Throughout the novel several characters and narrators comment upon his memorable voice. Edgar Dewdney, for instance, writes to John A. Macdonald that Big Bear's voice "would be unbelievable in Parliament. The deep rich timbre alone [. . .] would devastate any opposition [. . .]" (108). The narrator further remarks that whereas "every Cree had sounded the same" to the character of Lieutenant-Governor Alexander Morris, the "enormous, strange depths of [Big Bear's] incomprehensible voice" suddenly causes the

Canadian official's head to turn "into blackness" (*TBB* 19). It is not merely that Big Bear speaks poetically, through metaphors, that stuns Governor Morris. Because it carries the weight of the Cree's oral heritage, Big Bear's very voice brings the Cree's distinct character into prominence and unexpectedly leaves Morris stranded, without familiar bearings of his own. Not surprisingly, Gregory Alexander explains that 'voice' has in recent years become a metaphor for the empowerment of "those whose difference has been the basis of their lack of political and economic power" (1364). In other words, according to today's proponents of the politics of difference, the disadvantaged must fight discrimination by making their voices heard. Only once such voices are collectively raised can social change occur. Only then will the marginal acquire a certain normativity in the eyes of the majority. Because of his thundering voice, which speaks for his people, the fictional character of Big Bear both denotes difference in all its exoticism and expresses the confident normativity of the marginal.[21]

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[21] John Ralston Saul would certainly argue that Big Bear's orality is representative of Canada's founding and of its subsequent development. "Our northern marginal status," he writes, "legitimizes the oral." Saul goes on to comment that "[t]he most obvious element in this orality is the aboriginal community, which remains as one of the three pillars on which the society was originally constructed" (210). Yet it is perhaps worth pausing to remember that contemporary Canadian courts have generally refused to admit oral histories such as ancestral Native songs as evidence of land title. Precedents have classified oral history as being hearsay, although they have allowed exceptions to the hearsay rule on the basis of necessity when a particular Native band's exclusively oral tradition rendered strictly impossible the production of written evidence. Clay McLeod observes, however, that courts nonetheless tend to invoke other rules of evidence to devalue the necessity exception (1282). In the relatively recent Supreme Court case of Delgamuukw v. British Columbia (1997), Chief Justice Antonio Lamer, as he then was, stated that the laws of evidence must be adapted in order that this type of evidence "be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consist of [written] historical documents." Chief Justice Lamer added that the process "must be undertaken on a case-by-case basis" (para. 87). Critics have since complained that in the absence of precise guidelines as to how to proceed, Justice Lamer's ruling hardly constitutes a breakthrough (see Palmer).

Although *The Temptations of Big Bear* presents no instances of oral history as evidence of land title, it is nonetheless somewhat revolutionary in the space it grants within its pages to descriptions of Native traditions such as the famous Thirst Dance of Chapter Three.

In *The Temptations of Big Bear*, the Cree chief's voice is also symbolic of his spiritual leadership. He is legendary among the Cree for his shamanic visions. James Miller mentions that people viewed even the historical Big Bear as a "man possessing that all-important ability to mediate between them and the natural world about them" (28). As both visionary and intermediary between world and spirit, the fictive Big Bear's voice is endowed with unusual power when he warns his own people against the forces that may crush them. More precisely, in *The Temptations of Big Bear*, the Cree chief's gift for visionary prophecy is contrasted by both the implied author and the narrator with the prescriptive short-sightedness of the Queen's law, which serves immediate political needs without foresight. White officials urge Natives to sign treaties yet fail to anticipate ensuing difficulties. They see clearly that Natives are disgruntled on their reserves and that flour and bacon proves a debilitating diet, yet hardly lift a finger to remedy the situation. European law is therefore viewed in the novel as concerned only with short-term goals. But if White officials and settlers are blind to the upshot of their desires, Big Bear himself is acutely responsive to what the future may bring.

In *The Temptations of Big Bear* prophetic vision is aided by myth; together, vision and myth are, to Natives, as cautionary and prescriptive as White legislation. During what may be described as his mystical or spiritual journeys, the Cree leader is able to 'see' not only the outcome of White actions, but also his braves' reactions to them. Three revelations are given him through the course of the novel. In the first and last he envisions six Native hanged men.[22] In the third vision these men are unclearly revealed; they are as

[22] On his deathbed the fictional Big Bear sees the same men again (393-94), but that vision cannot be considered prophetic since by then the warriors have already been hanged.

"blackness strung aloft like heads and bodies," which come apart and spout "black words" (158). In the first vision, however, their faces are "swollen thick full of blood" and it seems to Big Bear that he knows each of the men (63). His second vision consists of blood gushing out of the ground "like a prairie lily." He manages initially to put out his hand to stop the flow, but soon it bursts up between his fingers and into his face as the sky itself and then "the whole world" turns red (124-25). The first and third visions are brought to him by a white wolf and by the mythical Thunderbird, respectively. These guiding spirits show him the execution of the hanged men, those six rebel Cree who were sentenced to death, and whom William Cameron, in his *War Trail of Big Bear*, identifies as "Wandering Spirit, Miserable Man, Paypamakeesi, Manichoos, Napaise and Apischiskoos" (230).[23] Big Bear is led to the second vision by Coyote, the laughing trickster, who confronts Big Bear with the blood about to be spilled during the rebellion. The novel confirms that during the Frog Lake rebellion, Big Bear tried to no avail to stop the carnage by shouting "*Tesqua, tesqua*! Stop! STOP!" but his commanding voice is suddenly thin amidst "the Rattler warcries of River People" (247). Thus, to Native seers like Big Bear, myth invites vision, which unveils a plausible future. Very much like the law itself, which is omnipresent in any modern society, myth and vision, in Wiebe's novels, form part of the Native world and are overlooked at Natives' peril. Together they are similar to White law in that they help guide Natives' actions and determine their future. At best, this form of Native 'law' is admonitory. James Miller writes that a leader's

[23] In *The Temptations of Big Bear* the men are identified chronologically as Miserable Man, Bad Arrow, Round the Sky, Wandering Spirit, Little Bear, and Iron Man (393). The Little Bear who was tried and hanged is not to be confused with Big Bear's son Imasees, who later takes on the same name (Dempsey 199)

visions and spiritual powers could "keep the forces of nature in balance." Knowledge of how to please the spirit of the buffalo was essential to the enjoyment of successful hunts; knowing how to avoid offending the spirit of the rapids in a river might ward off fatal misadventure" (26). At worst, however, these visions are fatalistic and dictate the definitive outcome of a situation regardless of any action taken.

Throughout *The Temptations of Big Bear*, then, differences between White and Native *nomoï* are consistently compared and contrasted. Above all, by way of passages like the ones just described, the implied author suggests to the implied reader that Big Bear and the Cree were never law*less*. Their own normative order and cosmology proscribed violence of an unchecked and gratuitous kind. As the novel draws to a close and Big Bear dies of old age and, no doubt, of a broken heart, the destruction of a bygone world is made clear. Bloodshed, chaos, capture or surrender, and death or imprisonment follow the Cree's refusal to heed Big Bear's visions. The implied reader is thus made to understand that although they were entirely justified in their distrust and resentment of White officials and settlers, the Cree were at fault in that they failed to obey one of the rules of their own normative system. Despite being led by a wise and spiritually powerful chief who foresaw their downfall and could have perhaps saved them from it, they gave in to baser instincts and chose the way of violence and devastation.

The Fictive Big Bear's Moralistic 'Defence Team'

(a) Acts 17

This final and highly moralistic interpretation of historical facts is presented to the implied reader not only by the third-person narrator, as Coral Ann Howells claims ("Rudy

Wiebe" 194), but also by the implied author, through his scriptural epigraph taken from Acts 17, which commences and illuminates the novel and is, in fact, a modernized and edited version of scriptural material taken from Acts 17:24,26,27,28:

> God who made the world and all that is in it, from one blood created every race of men to live over the face of the whole earth. He has fixed the times of their existence and the limits of their territory, so that they should search for God and, it might be, feel after him, and find him. And indeed, he is not far from any of us, for in him we live and move, and have our being.

In her "Rudy Wiebe," Howells offers an interpretation of the Biblical passage's function. Above and beyond the historical judgment of Big Bear and what Howells identifies as the narrator's "[j]udgment a hundred years later," the novel's epigraph suggests that "only in the unknowable wisdom of God can impartiality and truth exist" (197). Howells' point has a certain validity. The novel's concluding passages, for instance, would seem to substantiate it: seconds before his death Big Bear prays to the "Only Great Spirit, Father" and asks for His pity. As the Cree leader dies, the third-person narrator tells us, "[s]lowly, slowly, all changed continually into indistinguishable [. . .] and everlasting, rock" (397-98). One reading of the novel's conclusion is that only God can provide mercy and true justice. Yet this begs the question: What justice? As Brigitte Bossanne puts it, *The Temptations of Big Bear* "does not deal with the hero's success as a messiah character." There is no Promised Land for Big Bear, no final redemption of self, tribe, or humanity. "On the contrary," Bossanne continues, "where Moses triumphs, Big Bear fails in a most pathetic way, falling into disrespect and mockery. [. . .] If he shares in Christ's miseries and suffering, he does not partake in the glorious" (230). Furthermore, if

true justice were only to be found in the hereafter that is God's 'territory,' why would the narrator, with the implied author's blessing, bother to persuade the implied reader that Native grievances against the government were indeed legitimate? Can the novel not be binding, as a precedent would be, on both contemporary White and Native persons? After all, the injustices committed against Natives hardly ended with Big Bear.

(b) The Implied Author and Narrator's Non-Native Background

Howells assesses the novel's import more accurately than she does above when she writes that "[h]owever close in sympathetic identification he gets, Wiebe's narrator reads the patterns of prairie Indian story through the patterns essentially (European and Biblical) of his own culture" (194). There is truth and depth to Howell's observation.

Tomson Highway's relatively recent *Kiss of the Fur Queen*, for instance, features a third-person narrator who consistently allows his characters to speak the Cree language, which he renders phonetically, during conversations between characters. It thus becomes clear that this particular narrator is himself of Cree origin. A glossary of Cree terms is then provided at the end of the narrative and invites (or forces) the White reader to learn at least a few Cree words and expressions.[24] Wiebe's main narrator, however, keeps Cree terms to a minimum. He tells the implied reader (who is undoubtedly also White) that "*moos-tus-wuk*" means 'buffalo' and that "*tesqua*" means 'stop,' yet fails to inform the reader that the name "Big Bear" is but an English translation of "Mistahahmusqua" (337),

[24] The implied author of *Kiss of the Fur Queen*, however, dedicates the novel in Cree yet provides no translation for the dedication, thus splitting his 'implied reader' into a Cree reader and a non-Cree one.

a simple obligation and courtesy of which the historical trial acquits itself (QvBB 172). It is therefore conceivable that the novel's narrator is meant to hold a European perspective.

But the ethnic origin of the implied author is even more obvious than that of the narrator. Big Bear never testified at his own trial; he spoke up only after he was declared guilty of treason-felony. *The Temptations of Big Bear* reconstructs his last address and gives his other words and speeches more space than the original trial ever did, but these words are always either framed by the narratives of White homodiegetic narrators (aside from the third-person narrator, both Edgar Dewdney and Kitty McLean report or paraphrase Big Bear's thoughts and words during his trial) or translated by interpreters like Erasmus or Houri. During those instances, the old leader may be allowed to speak in the first person, but he never benefits from a separate first-person narrative as do the other first-person narrators; his thoughts remain framed by White words, just as, in the novel, railroad tracks frame and then claim Native land (122). The implied author's refusal to grant Big Bear a forum of his own is somewhat reminiscent of D.A. Miller's characterization of any novel's interpretative center as essentially panoptic (25).[25]

(c) The Implied Author's Strategic Courtroom Alternative

Yet, why would the implied author *not* take on panoptic traits? If I am right to insist that *The Temptations of Big Bear* constitutes a trial-like counternarrative to the

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[25] In *The Novel and the Police*, Miller argues that the realist novel works hand in hand with the institutions of law enforcement. To Miller, the realist novel's 'policing' omniscience (among other literary techniques) is reminiscent of Foucault's description of the Panopticon—the architecturally circular prison that allows guards to monitor each prisoner's every move—as the modern metaphor for Western society's disciplining impulses. Thus, Miller's larger thesis is that the novel fails to really transgress social control and deepens it, instead.

historical trial, and that Big Bear's 'defence lawyers' are the novel's implied author and main narrator, then however sympathetic the former may be to the Native cause, he remains aligned (*professionally*) with society's disciplinary institutions. Accordingly, as Howells suggests, the novel's epigraph may be viewed as an attempt to bring the Cree and Big Bear before God, a higher judge even than the reader. It may also represent what I would call a trial tactic and offer an alternate way of viewing *both* Big Bear and the Cree. Unlike literary scholars, for example, lawyers are known for presenting alternate readings of a case and then asking the judge to consider the best argument amongst those proposed.[26] One possible explanation for the novel's epigraph is that the implied author cannot trust the implied reader, his 'judge,' to buy into the novel's thorough presentation of a sound normative Cree universe that deserves as much respect as that of the White settlers. Thus, the epigraph offers a second possible way of looking at Big Bear's predicament. The implied reader is asked to see Big Bear, along with his Cree, as being similar to those people who inspired the Holy Book. They are like the Biblical prophets and their followers. As Brigitte Bossanne explains, Big Bear himself is constructed in the novel as a cross "between a Christ and a Moses figure," endowed as he is with both Christ-like pacifism and a Mosaic sense of territory and destiny. The Cree, then, are a spiritual people driven by their love of a territory, the limits of which God fixed. This reading would also explain the novel's title, of course. Like Biblical prophets and

[26] To present alternate arguments (or alternate narrative interventions) to a judge or jury when a first argument or narrative lacks strength and persuasiveness is a common litigation practice that is rarely viewed as a breach in the careful and logical development of a trial. A plurality of arguments does not necessarily negate logic. In a criminal case, especially, the defence may both refute the Crown's accusations and counterattack with distinct allegations of its own.

messiahs, Big Bear fights and conquers various temptations: of violence, for instance, or of abject surrender to the careless will of others.

Conclusion: Applying the Todorovian Test to *The Temptations of Big Bear*

The implied author's 'trial tactic' gives rise to a final question. Given that Todorov (like most of today's jurists) promotes substantive rather than formal equality, and given that he supports knowledge of the 'Other' that is free of objectification and careless assimilation, how, the implied reader may ask, does the implied author's counternarrative fare under Todorov's three-pronged test to determine whether a dominant culture effectively respects its own minorities?[27] Moreover, according to Todorov's model, how does this counternarrative fare in comparison to the historical trial as a whole? Generally speaking, *The Temptations of Big Bear* does well. It certainly attempts, and largely manages, to represent the Cree according to their own normative standards. Unlike the historical trial, during which the Crown attempted to present all Natives as malcontents, the novel never ojectifies the Cree or any other Native tribe and it understands and respects their beliefs. It therefore succeeds on both axiological and epistemological levels. The implied author's attempt to assimilate Big Bear to a Biblical figure does, however, cause the novel to fail on a praxiological level. Ultimately, it tends to absorb Natives into the norms of a spiritual (and political) majority. By comparison, with very few exceptions (such as the historical F.B. Robertson's attempt to portray the Cree as having different ways of understanding community), the original trial fails on all

[27] See pp. 182-83 above.

levels since it determines Big Bear's worth according to White standards, tends to objectify Natives, and forces Big Bear to conform to European norms.

The Temptations of Big Bear thus constitutes what Bossanne calls an "explorative" work (226). It forces the implied reader to investigate the norms according to which majoritarian groups judge, tolerate, embrace, or reject difference and dissent. Because it features junior and senior attorneys (the main third-person narrator and the implied author, respectively) who—for strategic reasons—fail to completely embrace and support Cree difference, the novel also urges the implied reader, as appellate judge, to look within and question his or her own biases in relation to those 'Others' within his or her society and nation.

The next novel in this study, Wiebe's *The Scorched-Wood People*, also constitutes a counternarrative to a historical trial—namely that of Louis Riel—and examines related issues. Due in part to an attorney who is largely and unabashedly partisan to the Métis cause, its purpose as a nation-founding text differs slightly from that of *The Temptations of Big Bear*. Whereas the latter asks how a community judges those visibly dissimilar from its members, *The Scorched-Wood People* asks whether quashed dissent can in fact claim the status of a moral (and therefore normative, jurisgenerative) victory within the imagined nation.[28]

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[28] Here I give the word 'moral' the meaning I already ascribed to it in my introduction. See p. 20, note 19 above. This meaning, which I borrow from Hayden White, connects ethics and justice. A 'moral decision,' for example, is synonymous with one that leads to a 'just' outcome. Similarly, a 'moral victory' is to be understood here as one that carries a sense of justice rendered or restored despite the actual historical reality of a situation.



The Scorched-Wood People

Introduction: Louis Riel's Historical Trial

The Métis rebellion of 1885 began a few days before the Native rebellion. Louis Riel led a final series of Métis rebellions at Duck Lake, Fish Creek, and Batoche in the current province of Saskatchewan against the Conservative government of John A. Macdonald. At issue were democratic and land rights for which the Métis of the North-West had been fighting for some time (Stanley 291). On May 15, 1885, Riel, himself both a Métis and a Conservative M.P. who had been elected more than once to Parliament, surrendered peacefully to government forces and was charged with high treason under the British Statute of Treasons, 1352. The mandatory sentence for high treason was death by hanging. Riel had hoped to bring his case all the way to the Supreme Court of Canada in order to publicize and denounce the government's role in the injustices suffered by the Métis (*Queen v. Louis Riel* ix). Criminal trials, however, are held close to the location of the crime, and Regina was chosen as a convenient forum instead. Moreover, the North-West Territories Act of 1880 authorized the trial of capital cases by a stipendiary magistrate, the highest judicial official in the North-West at the time, and only six jurors. Rather than being tried before an appointed provincial judge and the usual jury of twelve, the historical Louis Riel finally came to justice before magistrate Hugh Richardson (who would soon also preside over Big Bear's case), and six white,

English-speaking farmers. Moreover, although Riel was able to expound the economic and political helplessness of the Métis during two emotional and somewhat erratic speeches delivered at the end of his trial, Crown and defence attorneys generally limited themselves to arguing the charges brought against him. The historical trial, in other words, was concerned not with the government's alleged crimes against the Métis, but with Riel's alleged crimes against the Queen.

The jury found Riel guilty, but recommended mercy. Riel was nonetheless hanged on November 16, 1885 despite stays of execution during which his Liberal lawyers lost one appeal to the Court of Queen's Bench in Manitoba,[29] while the second one, to the Judicial Committee of the Privy Council, was denied (Stanley 362). Described by historian Desmond Morton as "the most famous trial of Canadian history" (*QvLR* xv), *The Queen v. Louis Riel* was undoubtedly the most sensational trial of the emergent Confederation; it illustrated rather dramatically the way in which the new Dominion of Canada dealt with dissent.

The trial proved disastrous for the historical Riel. Morton explains in his introduction to the 1974 edition of the trial that Louis Riel was above all a man of words who had hoped for a public trial to explain himself and denounce his enemies (vii). But during his trial Riel lost any authority he might have perhaps held in a different forum. To begin with, crucial witnesses who Riel had hoped would testify in his favour were absent from the courtroom. These witnesses included Gabriel Dumont, his military commander

[29] This change of forum is provided by section 77 of the North-West Territories Act, 1880, according to which anyone convicted of an offence punishable by death could appeal to the Manitoba Court of Queen's Bench to confirm or overturn the sentence (*The Queen v. Riel*, *Manitoba Law Reports*, 322-23).

during the rebellion (who was to testify that the rebellion might easily have been avoided had the government been more receptive to Métis claims), and the Deputy Ministers of Indian Affairs and of the Interior (who would have been asked to confirm that the Métis' rights had indeed been denied). The court refused to summon government officials (*QvLR* xv; Stanley 346). For their part, as Morton points out, the Métis witnesses had fled to the United States in fear for their lives. Because they were active participants in the rebellion, they would have been prosecuted had they testified (*QvLR* xv).[30]

The defence's strategy was, furthermore, less than successful. After a few days of lengthy and incriminating evidence introduced by the Crown, Riel's Liberal lawyers—identified monolithically throughout *The Scorched-Wood People* as "Lemieux, Fitzpatrick and Greenshields" (317ff.)—decided to plead their client's insanity on the basis, notably, of Riel's claim that he was the prophet of the Métis nation. Riel himself opposed that defence, but, against his wishes, his attorneys called Dr. Daniel Clark of the Toronto Lunatic Asylum to the stand. Unfortunately, Clark admitted during cross-examination that, despite being prey to delusions that led him to think of himself as a prophet, Riel most likely had the mental capacity to distinguish right from wrong at the time of the rebellion (*QvLR* 257) . Since the test for legal insanity was a cognitive one devised in 1843 known as the M'Naghten Rule, which required that the accused prove that he was

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[30] The Court was unwilling to grant such witnesses immunity. As Crown attorney Christopher Robinson put it during the trial:

> [. . .] we have no power whatever to give to any of those persons who have fled from justice anything approaching protection or safe conduct, if they choose to enter this province. If they enter it in innocence, they can prove their innocence. If they enter it guilty, they must take the chances of all others who are guilty. (*QvLR* 54)

Naturally, what Robinson suggests is that only a full-fledged trial could adequately determine these men's guilt or innocence.

unable to tell right from wrong when the crime was committed, the jury had to find Riel guilty. According to historian George Stanley, the damning testimony of Charles Nolin—a cousin and rival of Riel's, and the Crown's star witness—also weakened the defence's case (351).

The Crown's narrative characterization of Riel as a traitor and a man of violence proved more consistent than that of the defence. Towards the end of the trial, for instance, Quebec defence attorney Charles Fitzpatrick cross-examined Crown witness Dr. Frederick Jukes in an attempt to prove that his client was of unsound mind. If Riel had laboured under a delusion, Fitzpatrick asked, would he be responsible for his own actions? Unexpectedly, Juke replied:

> Well, take Mahomet, for instance [. . .]. He believed and few believed with him, even his own people, that he was divinely inspired, but he acted upon this belief and he carried his whole belief with him. He believed it and he carried it out at the point of a sword and [. . .] he convinced the people of what, if he had failed, would have simply been regarded as a delusion of his own mind. (*QvLR* 273; cf. *SWP* 330)

Jukes's parabolic narrative about Mahomet's success constitutes a metadiegetic (or embedded) narrative within the larger, institutionally defined matter of Riel's delusions and responsibility. Much to Fitzpatrick's distress, Jukes's intervention bears a strong thematic connection to the Crown's own description of Riel. It creates an interpretive trope (Riel is like Mahomet) that furthers the larger, juridically constructed story of Riel's criminal responsibility in a damning way. If Mahomet managed to convince the world of his prophethood through violent action, Riel might have done the same. Later during his

cross-examination Jukes suggests that Riel, an educated man, took advantage of other Métis' religious naïveté and passed himself off as a prophet to lead them into a self-glorifying battle (*QvLR* 273). Jukes's Mahometan analogy also marginalizes Riel. To any self-respecting Christian at the time, Mahomet, like Riel, was an outsider. Indeed, Riel, as a visionary, a lapsed Catholic, and a French-speaking Métis whose knowledge of English failed him in moments of great emotion, was a conspicuous oddity in the cramped Regina courtroom.

Having failed to show that Riel was insane during the rebellion, the historical Charles Fitzpatrick attempted during his closing argument to redefine the Métis leader's actions. While the Crown portrayed Riel as neither patriotic nor insane (327), but a treasonous rebel who incited both Natives and Métis to take up arms against the government, Fitzpatrick admitted that acts of violence had been committed; however, he tempered this admission by attacking the government itself. In Fitzpatrick's words, "no one of any nationality, of any creed [. . .] can justify the rebellion." The government, however, was not entirely without fault. Riel, Fitzpatrick argued, had acted in self-defence in the name of the Métis, whom the government had neglected and left to die of starvation while it granted land to white settlers and busily developed the rest of the country's infrastructure. Institutional greed affected not only a minority but all Canadians, who needed to avoid complacency and remain vigilant; thus, Fitzpatrick continued, as he addressed the jury: "we are made the guardians of each other's rights" (287). Riel's illegal action was not to be characterized as an attempt to destroy the nation but as a plea to be included in it. Yet despite Fitzpatrick's closing attempt to rouse the jurors' sympathy and republicanism, his characterization of the Métis came too late in the trial and

was, moreover, disturbingly patronizing. Fitzpatrick presented an alternate narrative to the Court: that of the Métis as noble victims (297) always "on the side of civilization and [. . .] on the side of humanity" despite their grievances against an unfeeling government (289). Riel was depicted as a descendant of those Natives "of whom the poet [. . .] said that their untutored minds see God in the clouds and hear His voice in the wind" (295). Actually, as Stanley explains, only a paternal grandmother of Riel's was herself a Métis (3), and Riel's mind was far from untutored since he had acquired a rigorous classical education at the petit séminaire of the Collège de Montréal (24-30). Unlike Big Bear, then, who was visibly different from, say, the judge or jurors, Louis Riel possessed the appearance and the literacy of a White man. Furthermore, prior to the prosecution's final argument, when Riel was finally afforded a chance to speak for himself, François-Xavier Lemieux, another of Riel's Quebec attorneys, warned the jury that the defence could not be held accountable for Riel's statements (*QvLR* 311), thus underlining the defence team's lack of belief in and identification with the accused.

The Chronology of the Historical Trial vs. the Anachronology of Vision

Ineffective litigation strategies aside, the trial was a confining format to a man such as Riel. Dennis Duffy remarks that "[p]olitical criminals appealing to God and History can entertain us in courtroom drama." But, he asks, "how can one accommodate unearthly visions within the range of our discourse on the nature of a criminal act?" (210). One of the problems raised by Riel's spiritual vision is that of the time-frame used to locate his actions. In any trial, attorneys' questions to witnesses normally elicit responses that situate the defendant or the accused within a clear chronological framework. In their

attempts to refute the insanity defence and to prove that Louis Riel intended to destabilize the government, Crown attorneys in the Riel trial launched into a laborious chronological recounting of events. More often than not, at trial, the acts of commission or omission leading to an actionable event are examined in the order in which they occurred, both to determine causality and to avoid confusing the jury.[31] How Riel behaved in January, February, and then in March suggests to the jury whether he is criminally responsible or insane. The chronology of the trial itself is equally governed by strict rules. When in mid-trial Riel asks Justice Richardson if he may speak and cross-examine Charles Nolin, whom he has known for most of his life, the historical magistrate replies: "In the proper time, I will tell you when you may speak to me [. . .]." When Riel insists, Richardson requests that he direct his concerns to his counsel, not to the jury. Even then, Charles Fitzpatrick, one of Riel's attorneys, snaps: "I don't think this is the proper time, Your Honor [. . .]" (*QvLR* 205). What is at stake here is more than the defence attorney's unhelpfulness. Every criminal trial unfolds in accordance with a conventional formula that includes, in the following order, a plea, opening statements, direct and cross-examinations, closing statements, a verdict, and a sentence; there is no question here of succumbing to anachrony.

As Gérard Genette notes, chronology is atypical of our Western narrative tradition. (36). Ian Watt, in his *Conrad in the Nineteenth Century*, explains why this is so: "though the mere forward progression of the story may hold the reader's immediate attention

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[31] I do not wish to imply that a trial cannot begin *in medias res*; it usually does. Criminal trials open with the charge warranted by a specific crime. From there, a prosecutor guides both judge and jury back to the events that led to the crime in order to lay out the facts of the case and to determine, among other things, motive, opportunity, or intention. To avoid confusing the jury, however, these retrospections are then presented chronologically up to the point of the trial's cause.

through suspense, it cannot satisfy the reflective mind when it comes to ask why an event occurred or what is the moral significance of a character" (286; qtd. in Sternberg 915). What might be called 'legal narrative chronology,' of course, is established not to create suspense, but to record precisely each and every circumstance that might help a judge or jury arrive at a final verdict. Time, here, is used as a thread upon which the beads, or elements, of a contentious or actionable event are strung causally. Watt suggests that 'literary anachrony' takes the reader *out* of the progressive march of time and, paradoxically, gives him or her *time* to reflect. Albeit differently, then, both legal chronology and literary anachrony employ time as a vehicle for cognition. Emile Benveniste, however, anchors the person in the eternal present tense of the act of speaking, which he distinguishes from an "objective chronology" that shuts out subjectivity (227). Quite possibly, then, by denying him the chance to speak either for himself or in his capacity as leader and prophet of the Métis at inopportune moments during his own trial, the Regina court objectified Riel, and created an accused that merely fit the purposes of the trial format itself.

When the historical Riel finally rose and addressed the jury prior to sentencing, his speech (which, unlike Big Bear's, was recorded and included in the transcript of his historical trial) was ineffective. He apologized for not speaking English well due to the excitement caused by the trial; interspersed his address with French words; prayed aloud to God and Christ; began to describe the state of deprivation in which he had found the Métis of Saskatchewan; returned to the trial's many testimonies; remembered that his personal papers were never returned to him following his surrender; revisited the Red River Rebellion of 1869; reiterated that he was the prophet of the new world; and

continued in this ragged, tattered way until Justice Richardson asked him, "Are you done?" (*QvLR* 324; cf. *SWP* 325). But Louis Riel had been vanquished. The legal process had failed to meet his expectations. Not only was he deprived of the assistance of witnesses he believed were essential to his case, but, confined by the strict, linear chronology of the trial, and awash in the narrative constructions of professionals, Riel, who invoked a timeless, ahistorical God throughout his trial, was, in the end, incapable of finding the appropriate timeline and context for an authoritative narrative of his own. The next and last time he was allowed to speak was after the jury declared him guilty of high treason. When on this occasion Riel began to address the room, Richardson cut him off and reminded him that the jurors had been discharged (*QvLR* 350). With a portion of his narratees gone, what authority could Riel's pre-sentencing speech have held? Still, the historical Métis leader continued: "Who starts the nations?" he asked defiantly. "The very one who created them, God" (*QvLR* 358; cf. *SWP* 324). But by the time he uttered this momentous statement, his trial was over. Sentence would soon be passed: mercy denied; Riel would be condemned to hang.

The Scorched-Wood People, however, ends with the words of a fictionalized Gabriel Dumont, also a Métis leader, and one of the witnesses on whom the defence was unable to count during the trial due to prosecutorial threats: "You think Riel is finished? He said a hundred years is just a spoke in the wheel of eternity. We'll remember. A hundred years and whites still won't know what to do with him. The smart whites will say [. . .] it's judicial murder; Riel was mad. But it wasn't, and he wasn't mad" (351). The fictive Dumont unambiguously challenges both the insanity defence and the trial's outcome, at the same time as he rewrites history. Although hanged, pronounced dead,

and buried, Louis Riel is hardly "finished." In addition to suggesting that the fictive Riel might be a transcendent Christ-like figure, Dumont also alludes to those Métis who survived exile, poverty, and the rebellion itself, and whose struggles will be passed on to future generations.

The Scorched-Wood People as Counternarrative to the Historical Narrative of Métis Defeat

According to legal scholar David Luban, traditionally "[t]o the victor goes the right to infuse a constitutional clause, or a statute, or a series of prior decisions with the meaning that it will henceforth bear by recounting its circumstances of origin and assigning its place in history" (2152). Richard Delgado, another legal writer, asserts that court battles hardly end with a verdict and a sentence. Alternative narratives that disclose what was left out of a trial can provide much-needed, revisionist footnotes to such marks of victory (2429). Here, Delgado's New Historicism displays affinities with Jean-François Lyotard's postmodernism; for Lyotard, justice depends not on a final, consensual acknowledgment of victory and defeat, but on an inevitable and continual reconstitution of events and consequences (65-66).[32] In *The Scorched-Wood People*, this "reconstitution" of legal history is achieved through the words of narrator Pierre Falcon, a Métis bard historically dead in the late 1870s, who addresses the reader from beyond the grave.

[32] One need not, however, be a New Historicist or even a postmodernist to endorse justice's capacity to revise its own judgments; judicial review is built into the juridical system, although the revision must be warranted on points of fact or law.

Pierre Falcon: Narrator and Implied Author of *The Scorched-Wood People*

Falcon, whom the fictive Riel calls "grandfather," no doubt to signal the bard's status as an elder within the Métis community (*SWP* 35-36), makes up songs that help the Métis remember their origin, their struggles, and their victories. Addressed, first to sympathetic narratees identified as "you" (348), and who might be of either Métis or non-Métis origin—but addressed also to the more critical implied reader who judges the retrial of The Queen v. Louis Riel that is *The Scorched-Wood People*—Falcon's narration of the Métis plight is not one of his usual God-inspired songs.[33] It is, instead, a more prosaic account of the rise and fall of the Métis nation envisioned by Riel. Although he prays to God throughout *The Scorched-Wood People*, Falcon regrets that for that brief and bright moment between 1870 and 1885, when the Métis accepted Riel's vision and launched a final rebellion against an unjust government, God has given him "nothing" (141). Because God seems to deny him this last song, Falcon tells the implied reader that he "must leave the words to stand in all their unmemorable bareness," in the hope that "their unearthly power [. . .] [may] be seen in the effect they had on Riel, on our people, and on Canada" (141). Falcon thus reports what he and a number of fellow Métis viewed as Louis Riel's Moses-like prophethood in his efforts to found a nation in the North-West based on God's word (140). At the same time, he prays that future generations derive from his account both strength and faith.

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[33] The epigraph to *The Scorched-Wood People* asks, "[. . .] who has made this song?" and answers, "[w]ho else but good Pierre Falcon. / He made the song and it was sung / To mark the victory we had won [. . .]." *The Scorched-Wood People* essentially represents the narrative of a valiant struggle that ended in a historical defeat. The epigraph clearly refers to the victorious Red River Rebellion of 1869-70, and not to the final rebellion of 1885, which Falcon describes in greater detail. The epigraph thus merely introduces Falcon as narrator; it does not imply that *The Scorched-Wood People* is one of Falcon's songs.

Falcon's contradictory status both as the fictive Riel's contemporary and as a post-historical, omniscient narrator who speaks from beyond the grave has been the object of much scholarly attention. W. J. Keith writes in his *Epic Fiction* that "Falcon's narration is [. . .] the crucial aesthetic issue in the novel" (96). In her Bakhtinian analysis of *The Scorched-Wood People*, Penny van Toorn shows with remarkable clarity that Falcon's account may appear at first glance to be monologic, but "either obviously or in subtle ways, contains multiple 'other' voices embedded in it" (147). According to van Toorn, these include Wiebe's own voice, that of Falcon (who not only narrates, but appears as a character within his own narration), and, among others, of Riel, Christ, and John A. Macdonald. Falcon is able to carry these multiple voices, van Toorn argues, because of his dual narratorial status, which allows him to speak of historical events from the immediacy and contingency of "ground-level" while simultaneously authorizing spiritual truths "which Wiebe believes to be absolute and eternal" (162). In the end, van Toorn claims, the novel represents a parable against violence that is consistent with Wiebe's own Mennonite pacifist views (160).

Yet van Toorn sees in Falcon's words more than a mere showcase for Wiebe's personal views. *The Scorched-Wood People*, she writes, "reopens a court case closed officially many years ago." Thus, she suggests that an injustice was perhaps carried out. She adds, however, that the novel asks the reader to "judge Riel's and the Government's actions and words in the light of Mennonite morality, not Canadian law" (140). This assertion is puzzling. Aside from the fact that Wiebe himself is of Mennonite background, there is no historical reason why Mennonite morality ought to have greater authority over either Riel or the Canadian government than Canadian law or the Métis' own cultural and

spiritual traditions. Presumably, van Toorn's proposition is to be interpreted in two ways. Not only do Mennonites (including Wiebe) advocate non-violence (a position that neither Riel nor the Canadian Government was able to sustain), but, like the Métis themselves, they represent an insular community within Canada and thus pose a challenge to the state as a unitary source of authority. Thus, I argue, Falcon's narration accommodates both what van Toorn describes as Wiebe's intrusive authorial voice in relation to spirituality and non-violence (144), and Falcon's own communal devotion to the Métis as a distinct community within the Confederation. Because he is, after all, an identifiable, historical Métis bard, Falcon is therefore not entirely assimilable to Wiebe, although he may at times speak like Wiebe.

I therefore look upon Falcon's dual status somewhat differently. The embedding technique used throughout *The Scorched-Wood People* that van Toorn describes might also apply to Falcon's status in the novel. Falcon's occasional homodiegetic narration[34] is embedded within the utterances of Falcon, the "transcendent" and extradiegetic narrator. Moreover, as a manifestation of Wiebe's intellect that extends, however, beyond Wiebe's personal realm of experience, Falcon's "ghostly" and all-embracing voice acts as the implied author (to use Wayne Booth's term). From it can be derived *The Scorched-Wood People*'s "extractable meanings but also the moral and emotional content of each bit of action and suffering of all the characters." Thus, the implied reader may reach "the intuitive apprehension of a completed artistic whole" described by Booth (73).

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[34] In Part One, Chapter One of *The Scorched-Wood People*, Falcon appears within his own narration as Riel's elder and sings a narrative song of his own composition titled "The Sad Ballad of King Muck" (38-39).

Traditionally, the implied author and the narrator are distinct voices, but Falcon acts as both. Even as a mere narrator, Falcon is idiosyncratic. To grant Falcon a hybrid role as an implied author who also rolls up his sleeves and narrates does away both with the awkwardness of what has so far been described as Rudy Wiebe's intrusions and with the perplexing matter of Falcon's ghostliness. Throughout my study, then, the name "Falcon" alludes to this hybrid status.

Within this framework, I argue that *The Scorched-Wood People* might be labeled a counternarrative to the historical trial. In this counternarrative, Falcon guides his narratees (who include the implied reader) through the events of the 1885 rebellion; investigates the historical defence lawyers' contention that high treason "can *never* be justified" (*SWP* 319); casts doubt upon the ultimate relevance of the issues brought up at trial; insists upon presenting evidence and witnesses denied by the original court; submits that the fictive Riel was both a prophet and a fallible human being; and champions the cause of an entire people, something that the historical Riel was kept from doing at his own trial. The dialogic nature of Falcon's account only lends credence to his advocacy. Like any attorney, Falcon introduces and cross-examines a number of witnesses whose narratives may contradict one another. Yet the tenor of the counternarrative as a whole is unambiguous: it grants dissent a voice ninety-two years after being silenced and offers to present-day and future Métis a record of a political and spiritual vision that may give them a sense of their heritage and a reason to endure.

(a) Pierre Falcon as the Fictive Riel's Conventional Attorney

At times, the Métis bard acts as a legitimate and conventional attorney. Throughout the novel, Riel's fictionalized lawyers (Lemieux, Fitzpatrick, and Greenshields) are too dismayed by their client and perhaps too concerned with their own future political careers to be successful. They rap Riel on the knuckles as if he were a child and scold him for having failed to respect Her Majesty's laws (319). Their loyalty to their client seems so tenuous that Falcon remarks that the Macdonald government obtained the guilty verdict it needed in the Riel trial "confidently assisted" by the three attorneys (322), thus suggesting not only that the impartiality of the historical tribunal was corrupted by the political agenda of the executive branch of government but also that the Liberal defence lawyers were inept. Falcon, however, occasionally draws upon sound and forceful legal arguments. He objects to the Crown's indictment of Riel on points of fact and law. Riel himself never fired at Canadian soldiers. Strangely, those Métis who did are charged not with high treason, but with the lesser count of treason-felony, which requires that the accused intended to levy war against the Queen without actually doing so. "I know of no historian," Falcon remarks, "who has commented on this [. . .] strange legal distinction that the men who shot and killed Canadian soldiers only *intended* to wage war while Riel, whom no witness had ever seen with anything more than a cross or a pen in his hand, [. . .] had actually waged war" (316-17; emphasis in the text).

(b) Falcon as Maverick Attorney

Falcon, then, is quite capable of arguing the Queen's law. But although his goals are clearly those of an attorney in that he hopes to defend Riel's reasons for rebelling

against the government and to present evidence unconsidered during the historical trial, his narration through parts of *The Scorched-Wood People* differs from that of a traditional courtroom discourse. Falcon is a maverick lawyer. First, rather than circumscribing and ascertaining facts by way of corroborating testimonies, Falcon at times freely reconstructs documented episodes. Early historical events that took two months to unfold are, as W.J. Keith puts it, "contracted into a single day" (88) through Falcon's narration. The fictive Dumont meets Riel much earlier than he actually did.[35] Riel's sister Sara calls him Louis "David" Riel after King David. According to historian Thomas Flanagan, however, the historical Riel first gave himself the name "David" as a pseudonym to throw his pursuers off track (*SWP* 129; Flanagan, *Louis "David" Riel* 43). Keith argues that these and other factual liberties within the novel heighten dramatic tension and thus better capture "a crucial turning point in the history of the nation" (88). In a similar vein, Georg Lukács notes that what draws successive generations into the past is "not the retelling of great historical events, but the poetic awakening of the people who figured in those events" (42).[36] *A fortiori*, a prophecy needs to be a forceful narrative if it is to make a lasting impact and attract followers; the painstaking details and accuracy required in a courtroom would stand in the way of such a compelling narrative. Despite Métis defeats, Falcon attempts to 'name' and establish the Métis community arisen from prophecy in order to

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[35] George Stanley traces Louis Riel's first meeting with Gabriel Dumont to 1884, when the latter visited Riel in Montana to ask him how the Saskatchewan Métis might fight for their rights (250). In *The Scorched-Wood People*, however, Riel and Dumont are already comrades in 1869, during the Red River rebellion (33).

[36] Of course, what Falcon stresses, and what Delgado and Lukács point to, is the inescapable ideological function of narrative, be it legal, historical, or fictional (Hutcheon 74; White 36-37). In the courtroom, however, narratives and ideologies clash until a verdict is rendered. That trial narratives are biased is not shocking; it is expected.

give it a place in national consciousness. In doing so, he adopts a strategy in accord with Delgado's contention that, in order to install a counternarrative to the victor's version of events, the "outgroup" or vanquished minority must stay clear of the confining discourse of law, which, after all, rewarded the victor in the first place (2413-15). Thus, Falcon appeals to his appellate judge's revisory and overturning impulses.

(c) Circularity and Anachronology of Pierre Falcon's Narration

Beyond what Keith identifies as a selective "concentration and telescoping" of events (89), the destiny of the Métis and a cyclical understanding of history thus merge to challenge the trial's emphasis on individual responsibility and on chronology. The account Falcon presents is anything but temporally straightforward. He peppers his account with ironic returns to the past and premonitory visions. The fictive Lief Crozier, the first white man to tell Gabriel that Métis law is now invalid and has been replaced by the Queen's law, turns out to be the last man to whom Dumont speaks of Riel's timeless influence (350-51). Rather than surrender to Canadian forces in 1885, Dumont flees to Montana (313), where only a few months earlier he had convinced Riel to cross over into Saskatchewan to fight for Métis rights (182). Riel's institutionalization at the Beauport asylum in 1877 (153-67) comes back to haunt him during his trial (321). His hanging is announced twice: when Canadian soldiers hang him in effigy (120), and in a revelation seen by both Riel and Dumont once the former makes the decision to return North in 1884 (188). Falcon, then, relies heavily upon the notion that time and history are circular. Like the Israelites to whom the fictionalized Riel compares his people, the Métis must never forget the crimes committed against them. "Oh God," Falcon prays at the very end of his

narrative, "[g]ive [our people] that faith again" (351). Yet the aim of Falcon's anachronological and cyclical recounting is not merely to confront the reader with a subjective appreciation of a Métis sense of time. Falcon also opens the door to the fictive Riel's inspired understanding of constitutional politics.

(d) The Normativity of the Minoritarian World

Between 1869 and 1885, the poor and largely uneducated Prairie Métis lived in a world where grassroot demands and the religious vision of their leader commingled to oppose the Queen's law. Legal theorist Robert Cover makes a strong and eloquent case for the role of nonofficial players in the production of constitutional meaning. Judges, lawyers, and legislators may interpret or "make law," but others are involved as well. Not only do the minoritarian norms of insular communities like the Amish or the Mennonites co-exist with those of the majority, he writes, but the dissenting hermeneutics of, say, civil liberties groups may also lead to transformational politics that eventually push the often narrow limits of majoritarian rule. Resistance to the laws of the state becomes "paideic," "world-creating," or normative (12) when the dissenters are united in a committed vision of the future. Yet because courts of law are themselves committed to the state, and because this commitment demands that conflicting *nomoi* be quashed, resisters must entrench their norms, communal identity, and commitment in a founding narrative (27). They at times need also to speak their commitment "in the medium of blood" or of "time in jail" (47). Seen within this framework, Falcon uses narrative to entrench the fictive Riel's revolutionary and visionary hopes, themselves rooted in Biblical narratives.

(e) The Fictive Riel's Vision

Throughout *The Scorched-Wood People*, Falcon's Riel wavers between the combative prophethood of the Old Testament and the peaceable tolerance of Christ. By the time he is arrested and tried, Riel's political understanding has grown broader and more egalitarian. No longer concerned only with Métis rights, he envisions a North-West apportioned equally among wandering Jews and "the landless believers" of Europe and French Canada (352). But generally, for Riel it is God who directly inspires man to found nations; God trumps constitutional, judicial, and even ecclesiastical law. As Riel notes, the Catholic priests who live among the Métis have no qualms about fusing worldly and spiritual interests. One such priest, the fictional Father Fourmond, tells the restless Métis that "to rebel against [. . .] civil authorities is as great a crime against God as to rebel against the Holy Mother Church, or the Holy Father!" (221). Falcon's Riel fights fire with fire; his God is not the God of the French priests who tend to the Métis' spiritual needs. Just as he opposes the Queen's laws, Riel rejects "the mathematical legalism of a calculable God" who metes out pardon and punishment according to a person's capacity for meek endurance under economic hardship (52). Riel remembers what happened in Manitoba, which he helped turn into a province after he led the Red River rebellion of 1869-70. Soon after, Canadian settlers and speculators moved in and drove the Métis further West, where they were forced to start over as the buffalo became scarce, and where reserve Natives tried, and failed, to farm under adverse climatic conditions. Canada is likened by Riel to Babylon (187). He parodies the priests' immutable instructions: "If the [Hudson's Bay] Company pays you ten cents for a ratskin and sells it for a dollar, don't complain. Your reward is in heaven" (201). Far from being the origin of a nation of

people united by a common vision, the new Dominion is depicted in *The Scorched-Wood People* as a mere economic venture established to the detriment and disadvantage of its weakest elements.

Both politicians and priests contribute to the impoverishment of the Métis but, in *The Scorched-Wood People*, Riel brings to the Métis a religious vision that is both spiritually and politically empowering. As prophet he has but one goal: "we will build community here, community," he tells the fictive Gabriel Dumont. The right to land is "a simple human right," and so is the self-sufficiency that results from it (201). Since God, after all, preceded the Queen, His word supersedes the Queen's laws; defying such laws in order to obey God's will is therefore a risk worth taking. Walter Benjamin has noted that the tension inherent in social protest and revolution may lead to what he calls a "Messianic cessation of happening," in that such tensions momentarily arrest the progress of time and allow for a "revolutionary chance in the fight for the oppressed past" (254). Riel's God-inspired rebellion also affords the Métis a chance to divert the march of history and to name both the land they inhabit and its customs. For a brief moment, Riel is triumphant. First, the Métis rename the days of the week (*SWP* 281) in imitation of French revolutionaries. Soon after, they proudly decide to wage a defensive Holy War against the advancing Canadian forces. With Riel as their leader and prophet, they momentarily regain authority over themselves, although they appear to have none in the eyes of the Canadian government. Falcon warmly recalls the Métis heading for their second armed confrontation of 1885, at Fish Creek. It was "the greatest army we ever had," he exclaims, "to see our people ride like that: excitement, pride, brotherhood, and ceremony all together are not easily found on earth, especially not by the poor [. . .]" (261).

(f) The Production of Witnesses

Yet as van Toorn remarks, this fictional account of Riel is hardly monologic. She notes cleverly that Falcon's utterance itself is "métis" because it represents a site of social struggle (141), notably between violence and pacifism, vision and secular interests. Not only does Falcon refer to and oppose the narrative of Riel's historical trial, but within the retrial that is *The Scorched-Wood People*, he invites 'witnesses' to speak up against Riel. Through their own resistance to Riel, these characters reflect historical characterizations of the Métis leader as both occasionally violent and despotic and as an embodiment of Christian values. Charles Nolin, Riel's cousin, dreams of living like an affluent white man; Métis struggles for recognition are therefore suspect to him, and he soon becomes Riel's victim as the latter accuses him of being a traitor and calls for his trial and execution (227). Gabriel Dumont, in turn, doubts the effectiveness of non-violence and prayer. Although momentarily won over by Riel's faith, he finally launches into a desperate shooting rampage when the rebels are defeated in 1885 (307). These 'testimonies' also signal to Falcon's narratees that Riel remains on trial (although here, through Falcon's account, Riel's actions are reviewed not as crimes against the Queen, but for their effect on the Métis and their legacy in time). In addition to such dissenting voices, Falcon allows Riel to 'testify' in his own defence. As the rebellion of 1885 begins, Riel warns Gabriel that the Métis' demands for justice need to be obtained without bloodshed; the mere threat of violence, followed by negotiation, must suffice. Still the inevitable occurs; when Canadian

troops fire first at Duck Lake, Riel, holding up a large, visible crucifix, orders his men to return their fire in the name of God (237).[37]

(g) The Historical Magistrate's Emphasis on White Material Welfare vs. Falcon's Emphasis on Lawfulness

When Justice Richardson delivered his sentence during the historical trial, he was merciless. "You have been found [. . .] guilty of a crime the most pernicious and greatest that man can commit," he told Riel. "You have been guilty of high treason. You have been proved to have let the flood-gates of rapine and bloodshed, you have [. . .] brought ruin and misery to many families whom if you had simply left alone were in comfort, and many of them were on the road to affluence" (*QvLR* 371). The historical Court catered to majoritarian standards and fulfilled what Cover calls its "jurispathic" or "killing" function (40) when it suppressed Riel's vision in favour of values (comfort, affluence) already dear to the White inhabitants of an expanding nation. More particularly, the historical Richardson thus referred to some of the local White merchants and farmers whom Riel and his Métis followers had made prisoner, and whose stores and cattle the insurgents had used as their own during the rebellion. The magistrate's concern, in other words, lay above all with the material welfare of the White community, members of which were victims of the rebels (although no prisoners were actually killed in 1885 [Stanley 329-38]).

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[37] Both sides of the North-West conflict sustained casualties. As implied author and wise 'attorney,' Falcon makes concessions to the Canadian troops' humanity, notably when Colonel Williams explains the Métis' Roman Catholicism to his curious men and concludes ("gruffly," Falcon adds) that "[t]hey're Christians, you know [. . .]" (279).

In contrast to this historical judicial narrative, in *The Scorched-Wood People*, Falcon depicts Riel as an inspired prophet and a well-intentioned but troubled and fallible man who may have occasionally lapsed into autocracy and violence. He also shows the Métis to be victims of an insensitive government that has failed to look after the disenfranchised, has violated its own rules of representation by excluding an elected Riel from Parliament, and has taken on the role of aggressor. In the novel, as in history, not only did Canadian troops fire first in 1885, but Riel was more than once elected to Parliament as a representative of Provencher, and finally expelled from it. Although John A. Macdonald had agreed to make a province out of Manitoba according to Riel's demand during the earlier 1869-70 uprising, the Canadian Prime Minister refused to grant Riel an amnesty for his insurgent activities (*SWP* 136-37) and, according to Stanley, members of the House of Commons would not sit with Riel in Parliament (203). Later, in Saskatchewan, Riel's petition to the Canadian government for equality, land grants, and democratic rights is ignored (*SWP* 205). In *The Scorched-Wood People*, Falcon thus presents readers with a string of legitimate grievances rendered inadmissible at trial due in part to the absence of crucial Métis and government witnesses. When lawful solutions fail, rebellion in the name of divine justice becomes a conceivable reaction to cumulative instances of institutional discrimination and negligence.

(h) The Scorched-Wood People *and the Future of the Métis Nation*

I have argued so far that *The Scorched-Wood People* may be looked upon as an effort by Falcon in his roles as implied author, narrator, and iconoclastic "attorney" to counter the official narrative of Riel's trial, during which Métis rights, interests, and

concerns went unheard for reasons of community ideology and of legal procedure. One of the ways to understand *The Scorched-Wood People*, then, is as a narrative effort to grant authority to the Métis people by pitting their spiritual vision against secular law *and* to offer a plea for a Confederation which not only unites the provinces, Ottawa, and the Empire but also attempts to accommodate those whose beliefs may appear different and insular, but whose insularity is partly a product of life-long institutional exclusion. I disagree with Marie Vautier's claim that because the Métis are defeated and the Queen's law wins, this project is futile (59). When Falcon closes his narration with the words of Gabriel Dumont to the effect that a hundred years is but a spoke in the wheel of eternity and that Riel is hardly defeated (*SWP* 351), he raises the possibility that the fictive (and historical) Riel's prophecy of a recognized Métis nation may yet be accomplished.[38] The British North America Act, 1867 does not contain a narrative that gives Canadians a sense of their nation's past, purpose, and destiny. In *The Scorched-Wood People*, Falcon defends the Métis' commitment to a sense of belonging of their own. If every prescription necessitates narrative to give it life and meaning, Cover explains, "every narrative is insistent in its demand for its prescriptive point, its moral" (5). Falcon's moral is that without justice, the law loses its claim to normativity.

[38] Debates concerning Riel and the Métis persist to this day. Despite support from a majority of Canadians, and though at least two private members' bills were introduced in Parliament to exonerate Riel and declare him a Father of Confederation for his role in the founding of Manitoba, the Métis themselves claim that a pardon would merely underscore Riel's status as a criminal (Daly 3).

Conclusion: The Implied Reader's Role as Appellate Judge

Yet while this counternarrative is compelling in its defence of the vanquished minority, the implied reader is encouraged as well to consider a number of critical questions concerning Riel's actions: Can treason and armed violence ever be justified? Is treason the only possible characterization of Riel's actions? Should immunity from prosecution be granted to the active participants of an armed rebellion? Was Riel in fact insane when he declared that he was the Métis' prophet? These inquiries arise from a consideration of *both* sides of this dispute, for the reader is equally bound by the existence of the original trial to consider and deliberate upon *all* arguments in this case. Each side of this debate refers to the other, casts light upon its weaknesses, yet also demands that its merits be considered seriously. From the clash of such conservative and oppositional positions, or from what Robert Cover calls the "jurisgenerative process" (or the balancing of such forces) (40), norms tailored to a community (even to a community of readers such as the implied reader represents) can ultimately arise.[39] Thus new norms and interpretations emerge that allow a community to define itself and perhaps even to endure.

In his "Theses on the Philosophy of History," Walter Benjamin reminded his readers that "every image of the past that is not recognized by the present as one of its own concerns threatens to disappear irretrievably" (247). The adversarial model within both *The Temptations of Big Bear* and *The Scorched-Wood People* attempts to make its "image of the past" a concern for the implied reader. It follows Ernest Renan's

[39] It is perhaps worth noting here that *The Scorched-Wood People* was published only five years prior to the entrenchment of the *Canadian Charter of Rights and Freedoms*, the aim of which is, precisely, to ensure that the rights of individuals or collectivities are balanced (by way of a number of judicial tests) against the potentially crushing interests of the state.

prescription for a nation: it tells a people at once where its ancestors have been, and what they themselves may hope to become. The official trial narratives ask who is guilty of unforgivable violence, of crimes against others or against both Queen and nation, and who must consequently be excluded from citizenship. As fictional counternarratives to historical trials, *The Temptations of Big Bear* and *The Scorched-Wood People* finally ask whether the integrity of a community (of readers or others) and the survival and greatness of a nation depend, in Richard Rorty's words, upon trying to "extend [a] sense of 'we' to people [. . .] previously thought of as 'they'" (192). As seen in my study on *The Temptations of Big Bear*, this sense of "'we'" consists not in the reification of others, or in their assimilation to majority standards, but rather in a debate that takes note of decisive differences, and which respects them.

CONCLUSION

"Like love," W.D. Auden wrote in 1939, "we don't know where or why, / Like love we can't compel or fly, / Like love we often weep, / Like love we seldom keep" (58-61). The speaker in Auden's "Law like Love" compares natural law[1] to love, as various characters in the poem compare it to the sundry commandments, rules, principles, and dogmas that hold sway over their lives. To gardeners, natural law "is the sun" (1); to elders it is "the wisdom of the old" (5); to the priest it is the gospel and the symbols of religious authority: the "pulpit" and the "steeple" (9-12); to the judge it is, quite simply, "the Law" (19); to scholars it is relative and contingent upon "places" and "times" (23); to some it is "Fate" (27), to others, "our State" (28), "We" (34), and even "Me" (35).

For the reader, one of the most remarkable poetic features of Auden's "Law Like Love" is the speaker's effortless shifts from simile ("[law] [l]ike love") to metaphor ("[l]aw is our Fate"), to synecdoche (law as both "pulpit" and "steeple"). Normally, this movement from one trope to another might prove potentially slippery, for to say, for instance, that "law *is* literature" is quite different, surely, from saying that "law is *like* literature." Yet by way of similar figures of speech, Auden successfully conveys his message about the omnipresence of natural law. Perhaps less adroitly than Auden, I have, throughout this study, used a broad metaphor and an equally broad simile to highlight the ubiquity of courtroom narratives in what I call trial novels, or novels that not only contain references to historical trials, but that enact a trial's adversarial process within their pages.

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[1] In "A Poet's Concept of Law," Sandra Petersson demonstrates that in "Law Like Love," Auden writes about the pull and power of natural (rather than man-made) law over mankind (132-35).

I have claimed, first, that trial narratives *are* often literary in that, upon close inspection, they are revealed as fictional constructs. Like a novel based on a notorious true crime, a criminal trial is, after all, a representation of a criminal occurrence that took place in the past.[2] As I have argued throughout my study, this representation may also rely on literary conventions such as genre, theme, motif, or emplotment or, for example, on its capacity to trigger both emotion and identification in the judge, jury, and public.[3] In her *Criminal Conversations*, for instance, Laura Hanft Korobkin ponders the role of sentimentality in nineteenth-century legal cases of adultery. "A *literary mode* like sentimentality," she remarks, "provides a shared interpretive system that both lawyers and jurors can rely on as lawyers encode past factual experience into forensic narratives and jurors decode those narratives back into facts that now carry strong evaluative inflections" (13; emphasis added). That lawyers might make use of literary conventions or techniques to create what Korobkin calls "a shared interpretive system" for a legal community is hardly surprising. Legal historian Robert Ferguson, in *Law and Letters in American Culture*, notes that many of the American lawyers from the Revolution to the Civil War were also creative writers. As Ferguson explains, "the broad cultural responsibilities of the professional man and the writer's imperatives could be made to appear the same" in that both happened to serve the needs of a local legal community

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[2] See Korobkin:

> Even "real" evidence—the bloody socks or the black bag—must be translated into verbal narrative, introduced through the testimony of one witness and then explained, often through the testimony of another. It is important to remember that the disputed events that triggered a lawsuit are always utterly, inaccessibly gone. All we have to prove them with, to make them real for juror-listeners, are the representational capacity of language and the emotional impact of theater. (12)

[3] For legal scholars' views on the literariness of courtroom narratives, see, generally, the works of Ferguson, Korobkin, and Sherwin.

(25). Indeed, literary skills and rhetoric helped shape the laws and precedents of the young nation that was the United States of America at that time (21).

Among the historical Canadian cases seen in this study, examples of literary influences on criminal trials can be found in defence attorney Charles Fitzpatrick's attempt to characterize the classically educated Louis Riel as a 'noble savage' (*QvLR* 295), a motif also used by the historical Justice Hugh Richardson in his apprehension of the character of Big Bear (QvBB 217). According to the historical Paul Bernardo, the fictionality of his own trial was confirmed by Karla Homolka's alleged plagiarism of film plots and song lyrics during her testimony (Makin, "Ex-Wife"). As I have shown as well, Canadian trial novels emphasize the ease with which literary conventions and motifs insert themselves into trial narratives and debates about justice. In Margaret Atwood's *Alias Grace*, Grace Marks opposes the narratives of her fictionalized trial by inserting into her own counternarrative Biblical stories as well as references to the archetypal heroine and to the madwoman of nineteenth-century romances. In Lynn Crosbie's *Paul's Case*, the anonymous narrator relies on the theme of revenge to argue that justice was perhaps unrendered in the historical Homolka and Bernardo cases.

But I have also argued that *like* literary narratives, trial narratives (and those of criminal trials in particular) generate moral parables and raise moral questions that 'create community' largely because they address events that happened in the past but that may continue to be of concern today and possibly re-emerge in the future. In Austin Sarat's words, an area like the criminal law "materializes memory in documents, transcripts, written opinions; it re-enacts the past, both intentionally and unconsciously, and it is one place where the present speaks to the future through acts of commemoration" (365).

These acts of commemoration speak to those collectively concerned by the "memory" gathered. Although it would be natural to assume that only the *legal* community might be interested in courtroom narratives, common sense, experience, and scholarship demonstrate that this is simply not so. After all, crimes and their punishment exist in relation to particular communities. The Decalogue's injunction against adultery, for instance, now goes uncodified in most of the Western world. In the Canada of 2003, high treason is no longer punishable by death.[4] Criminal transgression is therefore always a transgression against the mores of a given community and, as such, it tends to generate debate about right and wrong and about the nature of good and evil. Members of other cultural domains are therefore concerned as well by a criminal trial's narratives, by those narratives' parables, and by the questions they raise.

Kieran Dolin, for instance, suggests that a court case may be a "*cultural site* where legal ideology, social conflict and the participants' memories all seem [. . .] to demand that the trial be recorded or revisited in written narrative form" (145; emphasis added). Thus, a trial is made available through its transcript first (as in the cases of Big Bear's and of Louis Riel's trials) and, when that transcript neither exists (as in the case of the Grace Marks's trial) nor is easily accessible (as in the cases of Karla Homolka's and Paul Bernardo's trials), its content reaches us through newspaper accounts. But beyond courtroom transcripts and reportage, the discussion about the events surrounding a historical trial is furthered through literary renditions of that trial. In his now-canonic work detailing the rise of the modern nation-state, Benedict Anderson reminds us that the nation itself is a cultural artefact (4)—an "imagined political community" (6) constructed

[4] Subsection 745(a) of Martin's edition of the Canadian Criminal Code provides that "a person who has been convicted of high treason [. . .] [is to] be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence."

as much by political texts, histories, newspaper articles, and legislation as it is by novels, for example (26-36). Transcripts, newspaper accounts of trials and, in turn, trial novels carry within them (by way of the adversarial process) what Kieran calls "ideological conflicts" (146), or what I would prefer to call, perhaps more constructively, 'communal debates' about differing versions not only of events so fraught with passion that they led to the commission of crimes, but of diverse views concerning justice within the larger community that is the nation.

I therefore align myself with legal scholar Jeremy Webber, who writes that "[w]hen we work with the concepts of nation [. . .], we slip into the language of singleness of purpose, implicitly assuming that a nation should be based on some kind of uniformity" (222). Yet, as Webber continues, "the core of any democratic community is not ethnicity or language or some catalogue of shared values. It is *the commitment to a particular public debate through time*" (223; emphasis added). Thus the debate between law and literature, generally, and between the legal and literary narratives of this study, form what I call communal narratives concerned with the same subjects, namely, those of lawfulness, of crime, of its nature, of justification for unlawful behaviour, and of justice as it deals with particular types of crimes and criminals.

Rather than merely and categorically opposing law, literature supplements it. It supplements it in this study by enacting the trial format, but also by offering a perspective on criminality and justice that is softened by what Nussbaum calls the "narrative imagination" (*Cultivating* 10-11). Yet this 'softening' perspective is not the sole aim of literature. Although the implied authors of Wiebe's novels beg us to consider substantive justice and to use this concept to temper the law's harsh proceduralism, Atwood's *Alias*

Grace and Crosbie's *Paul's Case* ask the legal world to reconsider the dangers in sensationalistic trials and the assumptions that justice is unvengeful. Literature can temper or admonish law. But to do so is different from *radically opposing* law. Debate necessitates exchange rather than slammed doors. I hope to have introduced this nuance in my study and to have stayed away from exclusive binaries that portray literature as being mainly transgressive and law as mostly oppressive. As it enters a debate with the world of law, literature accepts a seat at the table of jurisprudence; it thus contributes to an expanded jurisprudential canon which, in Ian Ward's words, includes philosophical and political texts, as well as novels (154).

Trial novels, then, tend to blur the differences between literary and legal narratives in order to further what Webber calls a "debate through time." Thus, works such as *Alias Grace, Paul's Case: The Kingston Letters, The Temptations of Big Bear*, and *The Scorched-Wood People* are not merely postmodernist novels that subvert the original trial; and neither are they, for example, Bakhtinian constructs through which intertextual discourses and dialogic voices enter into a dynamic and ideological conflict with the monologic voice of the author or with various forms of institutional power.[5] If I express ambivalence towards the "ideological conflict" posited by Kieran Dolin above and by Bakhtin, generally, it is because precedents are more often modified and fine-tuned by new judgments than they are radically overturned by them. Similarly, the trial novels studied here do not seek to effect a revolution in the judicial system. They attempt, rather, to raise greater awareness about the principles and techniques of that system and perhaps even to encourage adjustments in the definition and handling of

[5] See, generally, Bakhtin's *Dialogic Imagination* and *Rabelais and His World*, and Penny van Toorn's Bakhtinian reading of Wiebe's fiction, *The Historicity of the Word.*

certain criminal situations. Thus *Alias Grace* asks the implied reader whether our society is right to trust a form of courtroom justice that relies as much on fictional constructs as it does on factual evidence. Lynn Crosbie's *Paul's Case* concentrates on popular concepts of justice and on the ways in which these clash with the tenets of institutional justice. *The Temptations of Big Bear* posits justice as a cultural paradigm and demands that, in the future, parallel forms of justice among those minority cultures who live amongst the majority be heeded and respected. Finally, *The Scorched-Wood People* questions the idea of a central or dominant form of normativity and brings attention to marginal *nomoï* which deserve attention.

None of these novels attempt to topple the legal establishment. They merely further a debate that began when an original crime was committed and the legal establishment, the media, and the public reacted to that crime in, at times, dissimilar ways. This debate is furthered "through time" by the novels' fictional communities, which stand for an implied author's imagined representations of past historical communities. They are fostered, finally, by our understanding of the role of the implied reader and by our commitment to discuss critically, judiciously (if not exactly judicially), and even passionately these very same issues.

This debate extends back into the past and addresses our present and future. Through it, communities—and beyond them, a nation—come into focus with their hopes, defeats, victories, acts of remembrance, and acts of oblivion. Indeed it was Renan who wrote that the essence of a nation is that its citizens have as much in common as they have chosen to forget (891, 903-904). Benedict Anderson, for his part, notes that Renan's somewhat disingenuous emphasis on oblivion as one of the conditions of

nationhood points in fact to a veritable "pedagogical industry" that specializes in nation-building by bringing to the foreground that which we conveniently and embarrassedly forget (201). Novels such as *The Temptations of Big Bear*, *The Scorched-Wood People*, and *Paul's Case* could certainly be characterized as efforts to ensure that we—the members of that larger community that is the nation—forget nothing of the way in which our ancestors treated the Natives and the Métis, or of the prurient glee with which our own generation stood in line to hear courtroom atrocities and perhaps dreamt up scenarios of revenge equal in their savagery to the crimes committed by a psychopathic defendant. It is in this refusal to forget, too, that the debate exists among the past, the present, and the future.

If I were to name a Canadian novel that is *not* a trial novel yet which illustrates my thesis that differing yet complementary representational acts enter into a dialogue with each other and reflect the community that produces them, I would have to choose Michael Ondaatje's *Anil's Ghost* (2000). The novel takes place not in Canada, but in Sri Lanka. It features a central character by the name of Anil Tissera, a Sri Lankan-American forensic pathologist who revisits Sri Lanka on behalf of a human rights agency to investigate the political murders that have taken place there as a result of a lengthy and bloody civil war. Confronted with the hastily buried remains of several unidentified victims, Anil wonders whether they were killed by government forces and figures that if she can identify at least one skeleton, whom she temporarily names "Sailor," she might understand what happened in that particular region. In order to identify Sailor, she hires Ananda Ugudama, an alcoholic and an "artificer" whose occupation consists in painting the faces of stone Buddhas during a ceremony called

Netra Mangala. But Ananda merely reconstructs Sailor in the image of his beloved wife, Sirissa, who is one of the 'missing' persons so typical of war (184-85). The 'fictional' reconstruction, however, heals him somewhat. Towards the end of the novel he is asked to restore a vandalized statue of Buddha. He fuses the pieces of the broken statue's face together, quilt-like, and readies himself for the painting of the Buddha's face (302). Traditionally, during the *Netra Mangala* ceremony, the eyes of the Buddha must be painted backwards, with the help of a mirror that reflects the Buddha's face, for "[n]o human eye can meet the Buddha's during the process of creation" (99). When the eyes are finally painted, the stone Buddha, scarred, sad-looking, and "now with human [rather than godlike] sight" in turn gazes back at the local landscape around him, and, it is implied, at its tumultuous history (307).

With this parable, the narrator of *Anil's Ghost* suggests what I have been outlining myself in this study, namely that very often where law (and, to a certain extent, trauma) is concerned, varied cultural acts of representation may attempt to deal with the same reality and end up entering into a debate with one another. Faced with forensic science's attempt at representing the horrors of the past, Ananda-the-artificer responds both historically and fictionally: he shapes the collective past in accordance with his own personal grief and endows it with his missing wife's features. "Sailor's" skull is unlikely to be that of Ananda's wife, yet she too, like other victims of the war, surely lies buried somewhere; for this reason, Ananda's representation is not *un*truthful. Later, when healed, he in turn attempts to heal his community by restoring one of its Buddhas, symbolically shattered by violence, in the image of the nation that is Sri Lanka. By refusing to smooth out the lines of its fused face, yet giving it eyes to see both the beauty

and the ugliness of its surroundings (307), Ananda gives his community an image of itself and asks that same community to, in return, understand and process what has happened in its midst, and to look at its past in order to gaze towards the future. Similarly, I have argued that acts of representation, be they legal or literary, aim at only one thing: to allow readers to imaginatively and judiciously grasp the past and to build the future of their community from the debate produced by these successive representations.

Although Ondaatje's *Anil's Ghost* does not refer to a specific court case, it does represent a historical situation that constitutes a clear violation of international human rights. My analysis of trial novels therefore could apply to such novels as well,[6] in that fictional works that feature abuses of human rights or of civil liberties initiate a debate as to the right or wrong way an institution—in this case a government—perceives threats to its existence or integrity and thus handles issues of both security and justice. Although such novels fail to engage with an institutional *narrative*, they too offer both political and fictional versions of a same event and thus address matters relevant to nationalism and to the place of the individual within the nation.

Like *Anil's Ghost*, however, such novels tend to be set abroad. Of perhaps greater interest to Canadian studies, specifically, would be a study of novels or short stories (or of parts of novels or short stories) which, rather than render a historical legal event like a trial, are nonetheless inspired by a court case or judgment. An example of this might be those passages in Margaret Atwood's *The Robber Bride* (1993), in which the character of Charis sues "Uncle Vern" years after he abused her sexually (318-20). These passages

[6] In addition to Ondaatje's *Anil's Ghost*, such Canadian human rights novels might include Alan Cumyn's *Man of Bone* (1998) and *Burridge Unbound* (2000), Ann Ireland's *Exile* (2002), and David Homel's *The Speaking Cure* (2003).

seem to have been inspired directly by the 1992 Supreme Court of Canada case of K.M. v. H.M., in which the Court determined that a victim of incest could sue her aggressor for breach of fiduciary duty and that, surprisingly, the statute of limitations failed to apply to such cases. In addition to making for fascinating research into legal and literary archives, such research would bring to light the ways in which the Canadian literary community understands, approves of, or criticizes the decisions of the legal establishment.

Work, therefore, remains to be done in the interdisciplinary field of Canadian literature and law. The present study has initiated such work in the hope that if James Boyd White is correct in stating that dialogue, debate, and community-building are ideally what law must stand for, and where its authority ought to reside, then literature has an essential role to play as another face of justice.

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