PERSONS DWELLING IN THE BORDERLAND:
RESPONSIBILITY AND CRIMINAL LAW
IN THE LATE-NINETEENTH-CENTURY BRITISH EMPIRE

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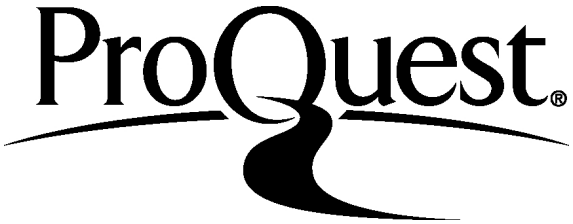

ABSTRACT

This dissertation explores the problem of assessing criminal responsibility and guilt in Britain, Canada, Australia, and India in the late nineteenth century. Criminal cases where the accused's mental state seemed to cut against his moral blameworthiness caused authorities to question the integrity of English jurisprudence. Doctors, lawyers, and administrators around the British empire worked to apply British rules and principles to communities with their own legal systems, cosmologies, and understandings of guilt. At the same time, experts and officials wrestled with medical, social and anthropological theories that suggested that criminality might be inborn and compulsive. The dissertation argues for the importance of responsibility, and criminal law more broadly, as a site for the elaboration of British concepts of personhood and just governance. As imperial power soared, confidence in the coherence of responsibility sank.

Case narratives are at the heart of this dissertation. Chapter One describes criminal responsibility as a medical, legal and administrative problem, and explores how British authorities relied on executive pardoning to manage the criminally insane. Chapter Two follows an Indian civil servant who shot a man in Madras in a fit of mania and then spent the rest of his life fruitlessly demanding a trial. Chapter Three examines non-delusional 'moral' insanity, the rise of criminal anthropology and the role of British imperial courts in challenging traditional understandings of insanity. Chapter Four centres on a serial murderer whose case terrified Melbourne in 1892, and his lawyer's campaign to change the legal definition of insanity. Chapter Five considers the 'cultural defence' and the way that culture and insanity bled into each other when imperial officials considered the guilt of indigenous defendants. Chapter Six focuses on the trial of three men who ritually executed an old woman during the 1885 North-West Rebellion in colonial Canada. Together, these cases from around the empire inspired debates about guilt and innocence, legal universalism, metaphysics and the mind. And yet, the practice of British imperial law was as much about paperwork and punishment as it was about jurisprudential theorizing. The abstractions of responsibility became concrete in the courtrooms, asylums, and prisons of the empire.

Table of Contents

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Years ago, a friend joked that dissertation acknowledgments often descend rapidly into clichés and unscholarly excesses of sentiment. “You make my life so shiny!” we howled, as we tooled along the Atlantic coast. But now, in my last days as a graduate student, it’s hard to resist the urge to fill these pages with superlatives. These years have been some of the best, happiest, and shiniest of my life. My past self might have rolled her eyes or fidgeted uncomfortably at the prospect of thanking, publicly, the colleagues and friends who have made the last five years so great. But right now, all I feel is gratitude.

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INTRODUCTION

I suppose that one of the things of which we are most proud in this country is the administration of the law. That is what the British nation is famous for throughout the world, and it is what has made as much as anything else for the British Empire's magnificent influence throughout the world.

-Edward Marjoribanks, M.P. (1932)[1]

George H. Savage was a clinical psychiatrist who spent most of his professional career at Bethlem Hospital, more commonly known as 'Bedlam', in London. In 1884, he published a manual recording his experiences and counselling young physicians. On the first page of the first chapter of his manual, Savage rejected the idea that insanity could be defined objectively:

> No standard of sanity as fixed by nature can under any circumstances be considered definitely to exist. 'Sanity' and 'insanity,' as recognised by the doctor, and, in fact, by the general public, must be but terms of convenience. No person is perfectly sane in all his mental faculties, any more than he is perfectly healthy in body.[2]

Later in the book, on page 462, Savage considered the intersection of insanity and criminal responsibility. "Just as we have seen," he wrote, "that there is no clear distinction between sanity and insanity, so we must admit that there is no possibility of drawing by definition any clear distinction between liability for acts done, and irresponsibility."[3] Savage was not the only London psychiatrist who doubted that either insanity or responsibility was a stable category. Savage acknowledged his debt to psychiatrist Henry Maudsley, who had written, in an 1874 book on criminal responsibility and mental disease, "There is a borderland between crime and

[1] HC Deb 11 February 1932 vol 261 cc1136-62. Marjoribanks was an amateur legal historian, and had just finished the first of an anticipated three-volume work on the legal career of Sir Edward Carson when he committed suicide in April of 1932 in the wake of a failed love affair.
[2] George H. Savage, *Insanity and Allied Neuroses: Practical and Clinical* (London: Cassell & Company, Ltd., 1884), 1.
[3] Ibid., 462.

insanity, near one boundary of which we meet with something of madness but more of sin, and near the other boundary of which something of sin but more of madness."[4]

Eight years later, in Melbourne, Australia, Alfred Deakin – barrister and future Prime Minister of Australia – was preparing notes for a trial. He planned to argue in court that his client, Frederick Bailey Deeming, Australia's most notorious serial killer, was not guilty because he was insane. "Specialists know from experience," wrote Deakin, "that there are persons dwelling in the borderland of crime & insanity…that in fact sometimes they merit punishment & at others may require treatment."[5] Deakin's notes are dotted with references to Maudsley, scrawled next to the scraps of text that he would stitch together before the jury. In the top margin, Deakin wrote, "Savage, p. 462", and somewhere in the middle of the page, the direct quotation, "Just as we have seen that there is no clear distinction between sanity & insanity…"[6]

This dissertation is about people 'dwelling the borderlands' of late Victorian imperial jurisprudence, a metaphor borrowed from Deakin who borrowed it from Savage who borrowed it from Maudsley. It is about people who explored and inhabited the spaces between sanity and insanity, responsibility and irresponsibility, and, in the Victorian worldview, between civilization and barbarism.[7] It brings together criminal cases involving serious violence, primarily homicide, from colonial Canada, Australia, India and England. In each case, authorities questioned the defendant's legal and moral responsibility for his actions, although there was no doubt that he had done the violent deed. Cases like these, 'responsibility cases', were increasingly troubling to British legal, medical and government authorities in the second half of the nineteenth century.

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[4] Henry Maudsley, *Responsibility in Mental Disease* (London: H.S. King, 1874), 34.
[5] " Draft of his address to the jury in the trial of Frederick Bailey Deeming," Papers of Alfred Deakin, National Archives of Australia, Canberra (NAA), Folder 4, MS 1540/6/184.
[6] Ibid.
[7] For an example of how some Britons divided the world into civilized and barbarous factions, see A.J. Balfour's speech in the House of Commons, in which he describes the difficulties of any "attempt to manage this particular kind of borderland between civilisation and barbarism from Downing Street." HC Deb 09 November 1893 vol 18 cc 543-627.

Many killers appear in this dissertation, but it is not primarily a history of crime; rather, it's a history of ideas about criminality. Responsibility cases reveal the uncertainty that ate at the heart of the ideology and practice of British imperial rule, even as it seemed to beat the strongest.

"[A]n unwarrantable act without a vicious will," wrote William Blackstone in 1769, in his *Commentaries on the Laws of England*, "is no crime at all."[8] The Latin maxim '*actus non facit reum, nisi mens sit rea*', usually translated as, "An act does not make [the doer of it] guilty, unless the mind be guilty; that is, unless the intention be criminal," expresses the same foundational principle of English common law: without a 'vicious' will – a guilty mind, a criminal intention, *mens rea* – a person's act cannot be considered a crime.[9] Nineteenth-century British criminal law distinguished between accidents and intentional harm. It also allowed defendants to plead insanity, provocation and diminished responsibility in cases where they alleged that they lacked the competence to understand and control their actions, even though they might have acted to some degree intentionally.[10] American jurist Oliver Wendell Holmes famously captured the reason for the *mens rea* requirement: "even a dog distinguishes between being stumbled over and being kicked."[11]

As Holmes' example suggests, the principle that a person can only be held criminally responsible, and punishable, for his intentional acts has powerful appeal. But the simplicity of the Anglo-American concept of criminal responsibility is deceptive. Determining whether a particular defendant committed a violent act intentionally could be surprisingly difficult; determining whether he committed that act while sane could be even harder. In his 1863 book, *A*

[8] William Blackstone, *Commentaries on the Laws of England*, Book 4, Ch. 2.
[9] Henry Campbell Black, *A Dictionary of Law: Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* ... (The Lawbook Exchange, Ltd., 1891), 31. On the importance of *mens rea* in the common law from the medieval period, and even before it had acquired a legal definition separate from that of a criminal act or *actus reus*, see: Elizabeth Papp Kamali, "Felonia Felonice Facta: Felony and Intentionality in Medieval England," *Criminal Law and Philosophy*, 2013, 1–25.
[10] In strict liability offences, the *mens rea* of the defendant is not essential for a conviction.
[11] Oliver Wendell Holmes, *The Common Law* (The Lawbook Exchange, Ltd., 1881), 3.

General View of the Criminal Law of England, James Fitzjames Stephen, the most celebrated legal thinker of his generation, reflected on the barriers between a person's mind and the outside world. A determination about the mental state of another was only an inference:

> The inference is made with so little consciousness, that the fact that it is an inference may deserve notice. All that any one person can, under any circumstances, positively know of any other is, that his body is of a certain shape, colour, &c. and that on particular occasions it moves in a certain way. […] Every form of intellectual exertion, every impulse of passion, has to be translated into muscular or nervous motion of some sort before it can be signified to any one, perhaps even to the person who feels it. [12]

In a criminal case, jurors, doctors and lawyers only had access to a person's body, which they could watch and test for clues as to his thoughts and feelings, but these were always only clues. Knowing the mind was an act of empathy and imagination that rested on a presumption that the defendant's inner life resembled one's own. When a defendant committed a violent act seemingly without motive, or in apparent response to an insane delusion, this presumption of intelligibility broke down. Similarly, when a defendant's culture struck his judges as strange and inscrutable, they confronted the uncomfortable possibility that their inferences about the defendant's mind, based as they were on their own cultural experiences, might be wrong.

Responsibility was a mental condition. In the nineteenth century, physicians who specialized in the study of madness and the care of the insane, who called themselves mad doctors and alienists in the nineteenth century but who can be fairly described as early psychiatrists, held themselves out as experts in matters of the mind.[13] When a defendant's lawyers argued that he was insane and irresponsible for his actions, they recruited psychiatrists to

[12] James Fitzjames Stephen, *A General View of the Criminal Law of England* (London: MacMillan and Company, 1863), 75-76.

[13] I don't distinguish in the dissertation between mad doctors, alienists and psychiatrists, and use the terms interchangeably. 'Mad doctor' and 'alienist' were most common in the nineteenth century, but many doctors just described themselves as asylum superintendents or as physicians specializing in the study and care of the insane. I have used the terms 'psychiatry' and 'psychiatrist' somewhat loosely, for the sake of clarity.

testify to the defendant's mental incapacity. Prosecutors called their own medical experts to prove that the defendant should be held criminally responsible. However, responsibility and insanity were not identical. Criminal responsibility had no real coherence outside the realm of the law. Stephen explained, "The question 'What are the mental elements of responsibility?' is, and must be, a legal question. It cannot be anything else, for the meaning of responsibility is liability to punishment."[14]

However, the fact that responsibility was a legal concept did not keep either physicians or lawyers from exploring its relationship to medical understandings of the mind. Lawyers relied on medical knowledge to inform their opinions and arguments about the responsibility of their clients. Doctors routinely commented on the legal responsibility of their patients. Even Stephen, who protested the efforts of psychiatrists like Maudsley to claim preeminence in assessing responsibility, was happy with the "division of labour" in which physicians used their expertise in mental disorder to describe the defendant's mental state before the court. Ultimately, criminal law and psychiatry were both invested in constructing an image of the broken psyche that could be contrasted with the whole, and healthy. This shared interest, and the shared space of the criminal courtroom, made it nearly impossible to consider responsibility without medicine, or insanity without law.

The dissertation focuses on responsibility cases of two types: insanity cases, and what can loosely be described as 'culture cases.' In insanity cases, medical experts and lawyers argued that a defendant should not be found guilty or punished for his criminal act because he was mentally ill. The insanity defence was an ancient, if perennially controversial, element of common law jurisprudence. *Bracton*, in the thirteenth-century, affirmed, "A crime is not committed unless the intention to injure exists…as may be said of a child or a madman, since the absence of intention

[14] James Fitzjames Stephen, *A History of the Criminal Law of England*, vol. 2 (London, 1883), 183.

protects the one and the unkindness of fate excuses the other."[15] The insanity defence was distinct from a denial of the defendant's *mens rea*, because the insane could still be said, generally, to have acted with some degree of deliberate intention. The insanity defence was a plea for the defendant's legal irresponsibility on the basis that his mental disease was an 'unkindness of fate' that so distorted a sufferer's understanding of the world and the morality of his actions that to punish him would be unjust.

By contrast, culture has never been a distinct defence under English criminal law. And yet, cultural considerations seeped, sometimes undetected, into Victorian criminal cases, especially in the empire. In these cases, jurists, government officials and various stripes of expert argued that a defendant's cultural background – whether defined as his race, religion, place of origin, or a hodgepodge of these – should determine how his responsibility was assessed under British law. Sometimes, culture appeared in these cases as a mitigating, or even exculpatory, factor. A defendant could make what scholars have called a 'cultural defence' by arguing that his behaviour, while criminal under the common law, was not blameworthy by the standards of his own community.[16] Other times, colonial authorities used cultural evidence to inculpate a defendant, by arguing that his nature made him more dangerous or malicious.

Insanity cases and culture cases were, despite their apparent differences, fundamentally similar. By the late nineteenth century, the legal definition of insanity was under constant assault by physicians, lawyers and members of the public. Mad doctors pushed the borders of their

[15] Henry de Bracton and Samuel Edmund Thorne, *On the Laws and Customs of England*, vol. 2 (Cambridge, MA: Belknap Press, 1976), 384. For more on medieval *mens rea*, see: Kamali, "Felonia Felonice Facta."
[16] On the cultural defence, see: Alison Dundes Renteln, *The Cultural Defense* (New York: Oxford University Press, 2004); Erik Claes and Jogchum Vrielink, "Cultural Defence and Societal Dynamics," in *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*, ed. Marie-Claire Foblets and Alison Dundes Renteln (Portland, OR: Hart Publishing, 2009), 301–19; Marie-Claire Foblets and Alison Dundes Renteln, eds., *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Portland, OR: Hart Publishing, 2009); R. Goel, "Can I Call Kimura Crazy-Ethical Tensions in the Cultural Defense," *Seattle J. Soc. Just.* 3 (2004): 443.

profession, developing more and subtler definitions of insanity. It became increasingly difficult for lawyers, and even for medical experts, to distinguish between sanity and insanity. Ethnologists and other social scientists suggested that the tendency toward deviant behaviour, including insanity and habitual criminality, was inherited and inborn. They also promulgated evolutionary theories that argued that the so-called 'primitive' peoples of the world were subject to physical and, most importantly, mental weaknesses that made them more prone to crime, and less able to comply with the requirements of English law. Differences between the madman, the moral monster and the benighted colonial subject began to melt away. By the late nineteenth century, primitivism, insanity and criminality had congealed into the amorphous concept of the irresponsible subject, which it was the problem of British criminal jurisprudence, both at home and in the empire, to define, detect, and manage.

The term 'borderland' has acquired a distinct meaning in the historiography of North America. To many historians of the United States, Mexico and Canada, it describes sites of inter-imperial competition, and supplements or supplants Frederick Jackson Turner's famous 1893 account of the role of the 'frontier' in American history.[17] In their recent essay on borderlands history, Pekka Hämäläinen and Samuel Truett argue that borderlands are places where the "master American narratives" of the past "come unraveled."[18] Borderlands are, they continue, "ambiguous and often-unstable realms where boundaries are also crossroads, peripheries are also central places, homelands are also passing-through places, and the end points of empire are also forks in the road….[Borderlands] are places where stories take unpredictable turns and rarely end

[17] Frederick Jackson Turner, *The Frontier in American History* (Frederick Jackson Turner, 2014); Frederick Jackson Turner and John Mack Faragher, *Rereading Frederick Jackson Turner: The Significance of the Frontier in American History, and Other Essays* (New York, N.Y.: H. Holt, 1994); Jeremy Adelman and Stephen Aron, "From Borderlands to Borders: Empires, Nation-States, and the Peoples in Between in North American History," *American Historical Review*, 1999, 814–41.
[18] Pekka Hämäläinen and Samuel Truett, "On Borderlands," *Journal of American History* 98, no. 2 (September 1, 2011): 338.

as expected."[19] The history of the British empire can also be told through attention to borderlands. The borderlands described in this dissertation are both conceptual and territorial. The borderland between insanity and sanity, between identity and difference, is where British officials searched for the meaning of criminal responsibility. These unusual and unusually violent cases, which might be considered part of the legal periphery, became 'central places' for the working out of British and British imperial jurisprudence. The colonies were borderlands not because they were 'peripheral' to metropolitan legal and medical affairs, but because the political and social challenges of colonial administration threatened, to paraphrase Hämäläinen and Truet, to 'unravel' the 'master narrative' of British imperial rule. Just as British imperial power loomed the largest, and as government administrators sought to consolidate their power over the daily affairs of their colonies, responsibility threatened to reveal that the entire edifice was built on a foundation of sand.

The difficult task of evaluating the criminal responsibility of defendants was complicated by the distance and difference of the colonies. Maudsley and Savage were part of a community of psychiatrists who wrote and wondered about the brain, the mind and the will while also tending to patients, testifying in criminal trials, and running insane asylums. Although the centre of Victorian psychiatry was in London, its scope was global. Deakin was part of another, equally important, community, this one of British-trained lawyers who fanned out across Britain's enormous imperial territories. When Deakin turned the pages of Savage's book, he was over ten thousand miles away from London. But in the late nineteenth century, and especially in the late-nineteenth century, these connections among legal and medical professionals were commonplace, even at the greatest distances.

Where Britons went the common law followed, and so did lawyers. "The British people

[19] Ibid.

have an instinctive love of 'law and order,'" one Australian author reflected. "Where seventy or eighty persons are settled in a British community, the policeman is sure to appear, and there will never be difficulty in obtaining the services of a local tradesman or local orator as a justice of the peace."[20] For law-loving Britons, British criminal law was a symbol of good government, as well as a practical instrument for the management of colonial populations. Murder trials and the judicial executions that followed many convictions were opportunities for colonial authorities to showcase the integrity and power of British justice.[21] It was vital, therefore, that judicial executions appear both humane and deserved. Justice required that the defendant be proven to have committed the crime, that his trial was fair, and that he was judged in the appropriate court and under the correct law. Often, establishing that the defendant's mind was guilty – that he was sane and the crime was committed intentionally – was the most controversial aspect of the trial. Wherever lawyers went, they carried with them uncertainty about the implications for criminal law jurisprudence of the borderland between crime and insanity.

In his 1932 speech before the House of Commons, Edward Marjoribanks hailed the law as the source of Britain's "magnificent" global power, and as "one of the things of which we are most proud in this country."[22] The British empire, like Marjoribanks, was not long for this world in 1932. However, he accurately captured the pride and enthusiasm with which many Britons regarded the spread of English law around the world. Law justified and organized the British empire; it was the ideological and moral core of the imperial project. After spending fifteen years as a successful advocate on the Midland circuit, James Fitzjames Stephen travelled to India in

[20] John Leonard Forde, *The Story of the Bar of Victoria: From Its Foundation to the Amalgamation of the Two Branches of the Legal Profession, 1839-1891: Historical, Personal, Humorous* (Melbourne: Whitcombe & Tombs Ltd., 1913), 10.
[21] For more on the dense symbolism of judicial execution in the British colonies, see: Stacey Hynd, "Killing the Condemned: The Practice and Process of Capital Punishment in British Africa, 1900–1950s," *The Journal of African History* 49, no. 03 (2008): 403–18.
[22] HC Deb 11 February 1932 vol 261 cc1136-62.

1869 to serve as Law Member of the Governor General's Council, a high-level legal advisory position. He wrote to his wife, Mary, about his plans to codify and reform colonial Indian law and to make himself the "Indian Blackstone."[23]

> I myself feel greater delight in all this work than I can tell you. […] All the people are wide awake, fiercely hard at work – full of zeal & vigour, & there is the strange subtle feeling of pride in one's name & nation, that runs through every part of every day. It is something to be proud of when one takes one of the first places in the very boldest & most successful enterprise ever tried by mortal man.[24]

Stephen was delighted by the gunfire that woke him every day at 5:30 a.m. while he lived at Fort William in Calcutta. He was on the front lines of empire, leading the charge against backwardness with his legal sword raised. It was, he thought, a noble enterprise. He missed his wife and children, but believed "that to have made a great sacrifice for such objects, will be a lesson to all our children, which nothing else could be."[25] At home or abroad, many of the men who made, interpreted and contested British law shared Stephen's belief that the common law was of world-historical importance. Any threat to the integrity of the common law was a threat to the ideological foundations of British government, in England as in the rest of the world – an attack on what was best and most powerful in the idea of British civilization.

When Britons doubted the justice of the common law, they also doubted the practicability of imperial governance. Armies could conquer territories, but the law was the instrument for the consolidation of British rule. If those who had committed crimes could not be held responsible, and punished, under British law, then the law was useless. As Stephen put it, "if criminal law does not determine who are to be punished under given circumstances, it determines nothing."[26] These doubts never paralysed the British empire, which loped along – expanding, reaching,

[23] James Fitzjames Stephen to Mary Stephen, 18 February 1870, Cambridge University Library (CUL), Department of Manuscripts and University Archives, Stephen Family: Letters and Papers, MS Add.7349/7b.
[24] James Fitzjames Stephen to Mary Stephen, 18 February 1870, CULMS Add.7349/7b.
[25] James Fitzjames Stephen to Mary Stephen, 18 February 1870, CULMS Add.7349/7b.
[26] Stephen, *A History of the Criminal Law of England*, 1883, 2:183.

disciplining – through the nineteenth century, faltering only in the twentieth. However, the pervasive, existential anxiety of the later nineteenth century did affect the kind of justice dealt out in imperial courts, and the way that the lawyers, doctors, and ethnologists of the empire understood and undertook their mission.

I often describe the lawyers, doctors and administrators who figure prominently in this dissertation as beset by anxiety – they were full of doubt, trepidation, concern, worry and, sometimes, fear. But what were they afraid of? Some worried, with good reason, that their colleagues, swayed by developments in psychiatry, criminal anthropology and ethnology, would waffle in their adherence to traditional understandings of criminal jurisprudence. They feared that a broader definition of legal insanity would encourage violence by reducing the law's deterrent force and by, in at least some cases, allowing violent, predatory men to regain their freedom. Others were concerned that the shadow of irresponsibility could fall across entire populations if they were deemed too 'savage' to be justly punished under English law. In this view, mentally ill Europeans and also, possibly, a large majority of the empire's sane but 'primitive' subjects might be unpunishable – and so, ungovernable – under British criminal jurisprudence. A third, and smaller, group considered the possibility that all people might be incapable of the kind of autonomous and conscious choice that British law presumed was the basis of responsibility. A person could conceive of determinism as the disease of a few, the weakness of a lesser class of humanity, or a universal condition. It is difficult to know, exactly, what each person imagined might result from challenges, or changes, to criminal responsibility standards. However, it is clear that an undertow of angst pulled at British officials and legal and medical professionals in the late nineteenth century as they contemplated the nature, and future, of their law.

Homicide cases are often the best sources for exploring criminal responsibility. The bloodier and crueler the killing, the more legal, medical and journalistic interest it attracted, and the more paperwork it generated. Insanity cases, in particular, unearth debates about the borders of responsibility, and also elucidate the institutional infrastructure within which those debates took place. Responsibility cases – exceptional cases on the legal borders – are a means of learning about the jurisprudential heartland. Scholars have used the insanity defence, in particular, to explore broader jurisprudential questions. Historians interested in the conflict between free will and determinism in late-Victorian thought see the insanity defence as the place where this philosophical dilemma was "most succinctly concentrate[d]."[27] Roger Smith, who has written extensively about the insanity defence, has argued that the law was "the most influential institutional setting for debate about the will."[28] Legal scholars, too, have held that criminal insanity is about much more than the disorder of a particular defendant's mind. These cases were often forums for clashes among accounts of what Alan Norrie calls the "broader moral and legal order within which insanity occurred and was to be understood."[29] Arlie Loughnan writes that mental incapacity's connection to questions of subjectivity and individual responsibility suggests that "the place of mental incapacity [is] at the heart of criminal law."[30]

The decision to give pride of place to English, Australian, Canadian and Indian cases in this dissertation was shaped by the archives, which reflect the legal sophistication and importance of these jurisdictions in the late nineteenth century. The majority of Privy Council appeals in the late nineteenth century were Indian, and the India Office in London kept

[27] John R. Reed, *Victorian Will* (Athens: Ohio University Press, 1989), 134.
[28] Roger Smith, *Free Will and the Human Sciences in Britain, 1870-1910* (London: Pickering & Chatto, 2013), 44.
[29] Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (London: Weidenfeld and Nicolson, 1993), 177.
[30] Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford: Oxford University Press, 2012), 6.

meticulous records.[31] The Australian and Canadian judicial archives are also comprehensive, stuffed with correspondence, depositions, notes of evidence and other documents. Canada, Australia and India had highly developed court systems, which referred cases to the Privy Council regularly for review. The governments of these regions were consolidating their legal authority over indigenous people. The Australian colonies were moving toward federation and tightening their control over their Aboriginal populations. Colonial Canada was extending its territorial claims in the North-West Territory and working to pacify its restive indigenous communities. British rule in India was interventionist and ambitious, but unrest outside regional capitals was a constant concern. These were colonies whose imperial self-confidence was cresting, just as their faith in the justice of British criminal jurisprudence began to recede.

The English cases provide a counterpoint to the colonial ones. Debates over responsibility in British courts were similar to those occurring across the British world. There is no archival or historical reason to enforce a strict divide between Britain and its colonies in considering common law and responsibility. Colonial authorities routinely consulted British medical and legal texts and precedent; the Privy Council, the India Office and the Colonial Office connected Britain and to the colonies legally and administratively; and defendants, like Frederick Deeming, often travelled around the British world, committing crimes and serving time in the metropole and abroad.

Psychiatrists like Savage and Maudsley, and lawyers like Deakin and Stephen knew that insanity and responsibility were not fixed categories. Members of the government, imperial and British, knew this too. It was no secret that determining a defendant's responsibility for his actions was a task that could not always be accomplished definitively in court. Even if a jury

[31] For more on the caseload of the Judicial Committee, see: HL Deb 01 July 1870 vol 202 cc1283-99.

convicted a defendant, it was routine for jurors, judges, lawyers, physicians, chaplains and others to appeal to executive authority to adjust the convicted man's punishment to match his 'true' guilt. A conviction for murder carried a mandatory sentence of death in Britain and the empire throughout the nineteenth century. However, many more murderers were convicted than were hanged. In the colonies, governors had to determine whether a person who had been convicted of murder deserved to die for it. In Britain, this task fell to the Home Office, which wielded the prerogative of mercy on the Queen's behalf. In 1875, the Earl of Kimberley declared, before the House of Lords, that the prerogative "involve[d] the exercise of one of the most delicate functions of the machinery of Colonial Government."[32] And yet, it was difficult to say how colonial governors ought to decide who deserved death and who did not. "In matters of this kind," Kimberley continued, "we ought not to be too logical. Constitutional Government in this country has not grown up by means of a rigorous application of the principles of logic, but rather by a happy application of good sense on the part of men who proved themselves equal to deal with emergencies."[33]

In Britain as in the colonies, a death sentence was one of the quotidian emergencies of government. The gap between a defendant's conviction and his date of execution was measured in weeks, or at best a month or two. As soon as the judge donned his black cap and pronounced the sentence, those with an interest in keeping the prisoner alive went to work drafting letters and collecting signatures for petitions. In cases where insanity had been raised at trial, additional medical opinions were solicited, often in the hope of proving that the defendant was insane at the time of his trial or after, rather than when the crime had been committed. A colonial governor might find his desk buried in correspondence, compelled to respond to multiple letters a day for

[32] HL Deb 16 April 1875 vol 223 cc1065-77.
[33] HL Deb 16 April 1875 vol 223 cc1065-77.

weeks. In such instances, as Kimberley said, there was little call for strict adherence to rules. Those empowered to dispense the Queen's mercy were encouraged to follow their intuitions about the prisoner's blameworthiness, as well as the threat he might pose to the community and how the public would receive news of a commutation or pardon. When capital convictions reached executive review, the borders between legal responsibility and medical insanity, and between these concepts and the more amorphous and troublesome one of moral desert, broke down. Law, medicine, religion and science were subsumed under a Victorian understanding of 'good sense', which government officials relied on to determine, with very little oversight or guidance, who deserved to die.

By the late nineteenth century, courts across the empire were working to apply British criminal law, especially for capital offences. However, there was no unified criminal law system in the British empire. In 1900, the First Lord of the Treasury, A.J. Balfour, declared, "the circumstances of the various parts of the Empire are so different that a universal criminal law applicable to all is almost illusory."[34] Imperial legislation, colonial statutes, Privy Council decisions, common law principles and precedent, and the jurisprudence of particular colonies together formed a complex and variegated body of law, which policymakers, administrators, and lawyers had the difficult task of interpreting and applying. As the empire grew and its laws and jurisdictions proliferated, jurists' concerns about the coherence and moral mission of imperial law increased. The 1880s and 1890s were tumultuous – a period of reconstitution and upheaval for the empire. In these decades, Britain turned its attention to Africa, acquiring vast and troublesome new colonies that, some scholars argue, it was deeply ambivalent about governing

[34] HC Deb 29 June 1900 vol 85 c85.

formally.[35] It was also a period during which the settler colonies of Canada, Australia, New Zealand and South Africa increasingly demanded their administrative and legal autonomy, and came increasingly to resent, as an insult to the integrity of their colonial legal systems, the existence of an imperial appeal to the Privy Council.[36]

However, the absence of a unified, uniform criminal law system in the empire does not mean that criminal law across the colonies had no common features. Although statutes varied from colony to colony, as did the precise divisions among legal jurisdictions, British lawyers remained committed to the core of common law jurisprudence. The lawyers of the empire were trained either at British universities or at universities founded by Britons, with strong cultural and professional attachments to British legal theory and practice. This was particularly true when it came to criminal law. Whether in Victoria or Madras, lawyers and doctors debated responsibility in murder cases in the same terms. They had read many of the same medical and legal manuals, they cited the same cases, and they worried about the same things: public safety, free will, mercy, and the link between mental disease and criminal irresponsibility.

Killers produced dense thickets of bureaucracy as their cases wound through the judicial system. Police captured suspects and investigated crimes; coroners collected victims' bodies and held inquests; prisons housed defendants, where physicians interviewed them and wardens supervised their care; judges heard, lawyers argued and jurors judged defendants' cases in court; government authorities considered pleas for mercy and, sometimes, signed orders for a criminal's execution, which had to be witnessed and recorded. Each stage of the process, from criminal investigation to execution, involved paperwork. Moreover, Victorian murder trials were

[35] R. E Robinson, J. Gallagher, and A. Denny, *Africa and the Victorians: The Official Mind of Imperialism*, vol. 131 (Macmillan, 1961).
[36] D. B Swinfen, *Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833-1986* (Manchester, U.K.; Wolfeboro, N.H., U.S.A.: Manchester University Press, 1987); Coen Gallatin Pierson, *Canada and the Privy Council* (London: Stevens, 1960).

public events. Journalists reported on every stage, from murder to judicial execution. Reporters and thrill-seekers crowded into courtrooms, gathered outside prison walls, and pressed for interviews and access to crime scenes. Although murder was often an intimate affair, bringing an accused murderer to trial was not. The reports, correspondence, forms, certificates, memorials and newspaper articles are not just sediment out of which the 'real' story of these killings can be sifted. Responsibility is a philosophical and moral concept. But Victorian common law was not a purely academic enterprise. Rather, it was a massive institutional and administrative system, built on a substratum of moral precepts and intuitions. The idea that responsibility was a precondition for criminal liability was one of those bedrock moral assumptions. However, the relationship between the structures of criminal law as a series of institutions and practices and the theory that underpinned it was always being renovated. Murder cases were both administrative hassles and moral quandaries. Embracing the paperwork, and seeking to understand the professionals who produced it and why, shows how criminal responsibility was built into the daily practice of British law and governance.

The details of defendants' crimes and what came after take centre stage in this project, including accounts of their trials and their ultimate fate. Criminal defendants were the reason lawyers walked the boards of courtrooms declaiming about responsibility. Defendants were not only a discursive field; they were real people. Frederick Deeming was a killer, not an abstraction. In the criminal courtroom, theories about the mind, morality, jurisprudence and culture guided legal practice. There, psychiatrists, lawyers and administrators stared into the eyes of the person whose fate they were charged to decide. George Savage's warning to young doctors that the thing they hoped to study – insanity – did not have a fixed, metaphysical existence was not idle theorizing. Responsibility was a life or death question, as well as an intractable medical and legal

problem. Keeping the focus on the paperwork and the personal and professional lives of the people involved in these cases anchors responsibility to its time and place.

Doctors and lawyers trained in the common law tradition tend to write, and to think, through cases. So do I. Case studies are at the core of this dissertation, and are the lens through which I approach the jurisprudential and practical problem of criminal responsibility. This history borrows some of the analytical and narrative conventions of the psychiatrists and jurists who populate it. Doctors, lawyers and administrators involved in homicide cases were the interpreters of criminal responsibility, and the ones who determined whether defendants would live or die for their alleged crimes. Interpreting the interpreters of responsibility is the best way to understand what criminal responsibility meant in the nineteenth-century British empire. The case history was a staple of medical journals, in the nineteenth century as in the present. Common law lawyers, similarly, look to case law for authority, and reason from cases in order to make arguments about the content and future development of the law. The case studies in the dissertation often rely on the same documents – the medical files and the depositions, for example – that psychiatrists used to write their articles in medical journals, and lawyers used to craft their arguments.

Victorian debates about criminal responsibility were inseparable from biography. As soon as a body was discovered, legal and medical authorities worked to collect the most private details of a suspect's life and to assemble them into a narrative that would make sense of the violence, and would clarify the alleged perpetrator's responsibility for it. This storytelling continued throughout the medico-legal process: in police reports, medical examinations and coroner's inquests; at trial, at the commutation stage, in law reports and medical journals; in asylum casebooks and in autopsy reports. When Victorian officials were called on to describe the

nature and the importance of criminal responsibility in controversial cases, they did so primarily by describing a patient or a prisoner's life – his childhood, his family, his habits, his delusions, and his dangerousness. By writing the history of criminal responsibility through cases, it becomes easier to grasp how Victorian Britons wrote and thought about criminal responsibility in cases.

Concentrating on criminal cases illuminates some people and some themes while obscuring others. Medical and legal records are often so detailed that the daily lives of defendants and the officials who studied and managed them come clearly into view. This is especially true of asylum records, since patients could spend decades in these institutions, occasionally forging surprisingly intimate relationships with their doctors. Lawyers, psychiatrists and government officials produced reams of correspondence and published writing, sometimes enough to give historians a strong sense of who they were and what they thought. Their familiarity with their patients and clients and even the affection, disgust and fascination they felt for them are infectious.

The victims of violent crime, however, are harder to know through the archive. In murder cases, the victim could not testify at trial. Even when a victim survived an assault and testified in court, her testimony was overshadowed in the press and in legal paperwork by descriptions of the defendant and the opinions of forensic experts. Legal and medical attention in responsibility cases was squarely on the mind of the defendant, not the body of the victim. Officials and legal and medical professionals didn't think or know much about individual victims, and their decisions didn't affect the victims' fates. Consequently, the experiences of those who suffered violence are largely absent from their archives. However, criminal responsibility was an urgent and important legal question precisely because so many of these defendants were killers, even if

they were not murderers. The prospect of leaving victims un-avenged and of making the public vulnerable to violence drove the debate about culpability, even though killers often eclipsed them in court.

There are remarkably few women in this dissertation. The colonial officials, doctors and lawyers who were most intimately involved in responsibility cases were all male. Moreover, and less predictably, female defendants were very rarely invoked in debates about the borders of criminal responsibility. When it came to criminal insanity, women seemed to most Victorians to present less of a threat to public safety than men did. Rather than homicidal mania or moral insanity, women who killed were diagnosed with uniquely female afflictions. Puerperal mania, for example, was a condition applied to women who became mentally disturbed during pregnancy, childbirth, and in the first few months *post partum*. James Cowles Prichard, ethnologist and psychiatrist, wrote in 1837 that puerperal madness, was "by no means infrequent."[37] French physician Étienne Esquirol agreed, attributing one twelfth of the cases of female insanity treated at the Salpêtrière hospital in Paris to pregnancy and lactation.[38] There was a firm connection in nineteenth-century psychiatry between puerperal insanity and female violence, especially infanticide. Alfred Swaine Taylor, the author of a highly popular *Manual of Medical Jurisprudence*, wrote that in women afflicted with puerperal mania "murder [of their] offspring [was] the most marked symptom."[39]

Men like Deeming, who killed serially and with no apparent motive, struck commentators as far too dangerous to excuse from conviction and punishment. Female killers, especially when they killed their own young children, were usually regarded with pity and contempt rather than

[37] James Cowles Prichard, *A Treatise on Insanity and Other Disorders Affecting the Mind* (Philadelphia, 1837), 222.
[38] Étienne Esquirol, *Mental Maladies*, trans. E.K. Hunt (Philadelphia: Lea and Blanchard, 1845), 126.
[39] Alfred Swaine Taylor, *A Manual of Medical Jurisprudence*, 8th American Edition (Philadelphia: Henry C. Lea's Son, 1880), 857.

fear.[40] Capital case archives in Canada, Australia, India and England include fewer records of female killers, and most of those cases did not spark high-profile responsibility debates (although the case of Martha Needle, described in Chapter Four, provides one important counter-example). One possible explanation for this phenomenon, beyond the likelihood that women were less liable to kill outside their own families, is that the default subject of English law was, as feminist scholars have argued, conceived of as male.[41] Responsibility was, in the late nineteenth century, the natural state of an adult man, from which only insanity or, perhaps, certain types of cultural and racial backwardness could unseat him. Female defendants were in a class apart; arguments against their criminal responsibility did not seem, to the lawyers and doctors who worked on homicide cases, to strike at the heart of responsibility as a jurisprudential concept.

Cultural historians and micro-historians have shown the rich analytic opportunities that thick description and thoughtful life writing can provide.[42] A.W.B. Simpson, an advocate of a

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[40] On female insanity, see: Elaine Showalter, *The Female Malady: Women, Madness, and English Culture, 1830-1980* (Penguin Books, 1987); Hilary Marland, "Disappointment and Desolation: Women, Doctors and Interpretations of Puerperal Insanity in the Nineteenth Century," *History of Psychiatry* 14, no. 3 (2003): 303–20; Carroll Smith-Rosenberg, "The Hysterical Woman: Sex Roles and Role Conflict in 19th-Century America," *Social Research*, 1972, 652–78; Carroll Smith-Rosenberg and Charles Rosenberg, "The Female Animal: Medical and Biological Views of Woman and Her Role in Nineteenth-Century America," *The Journal of American History*, 1973, 332–56; Alison Bashford, *Purity and Pollution: Gender, Embodiment, and Victorian Medicine* (Macmillan, 2000). Recent work on the history of infanticide has contributed to our understanding of child killing as a crime laden with social and cultural significance. See, for example: Anne-Marie Kilday, *A History of Infanticide in Britain, C. 1600 to the Present* (Palgrave Macmillan, 2013); Mark Jackson, *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550-2000* (Ashgate Publishing, 2002); Jennifer Thorn, *Writing British Infanticide: Child-Murder, Gender, and Print, 1722-1859* (University of Delaware Press, 2003); Josephine McDonagh, *Child Murder and British Culture, 1720-1900* (Cambridge University Press, 2003). When infanticide is discussed outside the Western context, it is generally framed as a contentious social practice rather than as the isolated act of a desperate or deranged individual. See, for example: Rashmi Dube Bhagar and Renu Dube, *Female Infanticide in India: A Feminist Cultural History* (SUNY Press, 2012); D. E. Mungello, *Drowning Girls in China: Female Infanticide in China since 1650* (Rowman & Littlefield Publishers, 2008).

[41] See, for example: Robyn Martin, "Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury, A," *Anglo-Am. L. Rev.* 23 (1994): 334; Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (NYU Press, 2007).

[42] See, for example: Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973); Natalie Zemon Davis, *Fiction in the Archives: Pardon Tales and Their Tellers in Sixteenth-Century France* (Stanford, Calif.: Stanford University Press, 1987); Carlo Ginzburg, *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller* (Baltimore: The Johns Hopkins University Press, 1980); V. A. C. Gatrell, *The Hanging Tree: Execution and the English People 1770-1868* (Oxford University Press, 1996); Robert Darnton, *The Great*

fine-grained, archive-heavy approach to the history of case law, warned, "Greater understanding of cases does not generate general theories; instead it brings out the complexity of affairs and the extreme difficulty of producing generalizations which have any empirical validity."[43] This dissertation is more about the complexity of attempts to assess responsibility under the common law than it is about grand theories. A case-based approach makes the administrative difficulty of dealing with the criminally insane, or just the criminal, plain. There is no clear pattern in the results of appeals for mercy or in the success of insanity and other irresponsibility defences, or at least none that is visible on an imperial scale or in the cases I have encountered in the archives.

However, there are other general trends that a case-level perspective reveals. Although insanity cases were comparatively rare, they were important. Huge medical, legal and government resources were devoted to evaluating prisoners, putting together trials, considering appeals and petitions for clemency, and either conducting executions or caring for prisoners for decades in state asylums. This was as true in England as it was in Australia, Canada or India. Also, even though the results of responsibility cases were unpredictable, the terms of the debates in these cases were surprisingly consistent. Responsibility cases were understood by Britons to raise similar questions, regardless of differences in the facts. Authorities in the colonies might have felt the threat that responsibility posed to the veneer of British legal supremacy more acutely than their counterparts did in London, but they might also have been less concerned about the decline of European ethnic stock. Generally, though, a thorough exploration of responsibility cases suggests remarkable consistency across imperial courtrooms.

Cat Massacre: And Other Episodes in French Cultural History (Basic Books, 2009); Lawrence Stone, "Prosopography," *Daedalus*, 1971, 46–79.

[43] A. W. B Simpson, *Leading Cases in the Common Law* (Oxford: Clarendon Press, 1995), 12.

Recent works on the history of the British empire can be roughly divided based on their authors' commitment to providing an overarching explanation for how the empire functioned. One school seeks to describe the empire as a whole using a single, dominant analytic: John Darwin's interdependent "British world-system"; Christopher Bayly's "pro-consular despotism"; James Belich's emphasis on the colonization and re-colonization of the 'Anglosphere'; P.J. Cain and A.G. Hopkins' "gentlemanly capitalism"; and John Gallagher and Ronald Robinson's "official mind," "informal empire", and emphasis on metropolitan response to crisis on the periphery.[44] Another important stream of scholarship considers the empire as a series of networks that connected people across space and time, with an emphasis on geography and prosopographical accounts of the lives of individuals and communities in motion.[45] This dissertation owes the most to this second branch of imperial historiography. I am not particularly invested in trying to explain why Britain had an empire, or in promoting a heuristic for understanding how it managed to cling together for so long. However, the historians of empire on a grand scale are on to something. Although most recent works take issue with the idea that the empire was ever tightly controlled from London, and reject monolithic accounts of 'Britons' or 'the empire', almost all imperial historians argue that there were real threads that bound the empire, unwieldy as it was,

[44] John Darwin, *The Empire Project: The Rise and Fall of the British World-System, 1830-1970* (Cambridge, UK; New York: Cambridge University Press, 2009); C.A. Bayly, *The Birth of the Modern World, 1780-1914: Global Connections and Comparisons* (Malden, MA: Blackwell, 2004); C.A. Bayly, *Imperial Meridian: The British Empire and the World, 1780-1830* (London and New York: Longman, 1989); James Belich, *Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783-1939* (Oxford: Oxford University Press, 2009); P. J Cain and A. G Hopkins, *British Imperialism, 1688-2000* (Harlow, England; New York: Longman, 2002); Robinson, Gallagher, and Denny, *Africa and the Victorians*.

[45] See, for example: Zoë Laidlaw, *Colonial Connections, 1815-45: Patronage, the Information Revolution and Colonial Government* (Manchester, UK: Manchester University Press, 2005); David Lambert and Alan Lester, eds., *Colonial Lives Across the British Empire: Imperial Careering in the Long Nineteenth Century* (Cambridge; New York: Cambridge University Press, 2006); Miles Ogborn, *Global Lives: Britain and the World, 1550-1800* (Cambridge: Cambridge University Press, 2008); Linda Colley, *The Ordeal of Elizabeth Marsh: A Woman in World History* (New York: Pantheon Books, 2007); Linda Colley, *Captives: Britain, Empire and the World, 1600-1850* (New York: Anchor Books, 2004); Clare Anderson, *Subaltern Lives: Biographies of Colonialism in the Indian Ocean World, 1790-1920* (Cambridge: Cambridge University Press, 2012); Emma Rothschild, *The Inner Life of Empires: An Eighteenth-Century History* (Princeton: Princeton University Press, 2011).

together. Their work is essential in trying to explain the extraordinary consonances among the colonies in how criminal law was practiced and conceived.

In recent years, cultural historians have also taken a greater interest in the history of the empire. Their scholarship has focused on the discourses, epistemologies and cultures of empire, with attention to the mutual constitution of coloniser and colonised.[46] Questions of knowledge, power, and the construction of categories and identities have added new dimensions to histories of empire, while breaking down traditional boundaries between imperial and colonial historiography. Cultural historians have contributed significantly to the prominence of race, gender and sexuality in recent studies of empire. However, neither the grand histories of empire, nor the prosopographical, nor the cultural pay much attention to the common law. [47] This should surprise us. The common law should be an indispensable aspect of any comprehensive history of the British empire, given its importance in guiding imperial governance and policy, the reach and activity of networks of legal professionals, and the role of criminal law in framing the identity and experiences of the colonised.

Historians of the settler colonies, Canada, Australia, New Zealand and South Africa, and of colonial South Asia have led the development of a legal historiography of the British imperial

[46] See, for example: Kathleen Wilson, *A New Imperial History: Culture, Identity, and Modernity in Britain and the Empire, 1660-1840* (Cambridge, UK; New York: Cambridge University Press, 2004); Antoinette M Burton, *Burdens of History: British Feminists, Indian Women, and Imperial Culture, 1865-1915* (Chapel Hill: University of North Carolina Press, 1994); Frederick Cooper and Ann Laura Stoler, *Tensions of Empire Colonial Cultures in a Bourgeois World.* (Berkeley: University of California Press, 1997); Jane Burbank and Frederick Cooper, *Empires in World History: Power and the Politics of Difference* (Princeton, N.J.: Princeton University Press, 2010); Catherine Hall, *Civilising Subjects: Colony and Metropole in the English Imagination, 1830-1867* (Chicago: University of Chicago Press, 2002); Catherine Hall and Sonya O Rose, *At Home with the Empire: Metropolitan Culture and the Imperial World* (Cambridge, UK; New York: Cambridge University Press, 2006); Philippa Levine, *The British Empire: Sunrise to Sunset* (Routledge, 2013).

[47] For examples of historians who have approached British imperial law from a trans-national perspective, see: Douglas Hay and Paul Craven, eds. *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (Chapel Hill: University of North Carolina Press, 2004) for an excellent edited collection on labour law in the British empire, and Paul Halliday, *Habeas Corpus: From England to Empire* (Cambridge: Bellknap Press of Harvard University Press, 2010) for an example of a transnational, imperial legal history of the concept of habeas corpus.

world. In the settler colonies, studies of legal conflict over land and territorial sovereignty have been especially important. [48] The legal history of colonial India has also been exceptionally vibrant.[49] These literatures, however, tend to focus primarily on colonial developments, and on

[48] For some examples of recent works in the legal history of the settler colonies, see: Shaunnagh Dorsett and John McLaren, *Legal Histories of the British Empire: Laws, Engagements and Legacies* (London: Routledge, 2014); John McLaren, *Dewigged, Bothered, and Bewildered British Colonial Judges on Trial, 1800-1900* (Toronto, ON: Published for the Osgoode Society for Canadian Legal History by University of Toronto Press, 2011); Carolyn Strange, "Masculinities, Intimate Femicide and the Death Penalty in Australia, 1890–1920," *British Journal of Criminology* 43, no. 2 (2003): 310–39; Carolyn Strange, *Qualities of Mercy: Justice, Punishment, and Discretion* (Vancouver, BC: University of British Columbia Press, 1996); Carolyn Strange and Tina Loo, *Making Good Law and Moral Regulation in Canada, 1867-1939* (Toronto, ON: University of Toronto Press, 1997); Mark Finnane, "'Payback', Customary Law and Criminal Law in Colonised Australia," *International Journal of the Sociology of Law* 29 (n.d.): 293–310; P. G. McHugh, "The Common-Law Status of Colonies and Aboriginal 'Rights': How Lawyers and Historians Treat the Past'(1998)," *Sask. L. Rev.* 61 (n.d.): 393; Paul G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004); Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge, MA: Harvard University Press, 2010); Bruce Kercher, *An Unruly Child: A History of Law In Australia* (St. Leonards, NSW: Allen & Unwin, 1995); Sidney L. Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (University of Toronto Press, 1998); Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge: Cambridge University Press, 1994); Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada* (Osgoode Society, 1991); Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999); Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada, 1900-1975* (Osgoode Society for Canadian Legal History, 2008); Philip Girard, *Lawyers and Legal Culture in British North America: Beamish Murdoch of Halifax* (University of Toronto Press, 2011); Philip Girard, *Canada's Legal Inheritances: The Maritime Provinces, 1850-1939* (University of Manitoba, Faculty of Law, 1992); Rachael Weaver, *The Criminal of the Century* (Melbourne: Arcadia, 2004); Peter Spiller, Jeremy Finn, and Richard Boast, *A New Zealand Legal History* (Brookers, 2001); Shaunnagh Dorsett, *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave Macmillan, 2010); Richard Boast and Richard S. Hill, *Raupatu: The Confiscation of Maori Land* (Victoria University Press, 2010); Richard Boast, *Buying the Land, Selling the Land: Governments and Maori Land in the North Island 1865-1921* (Victoria University Press, 2008); Mark Finnane, *Colonisation and Incarceration: The Criminal Justice System and Aboriginal Australians* (Sir Robert Menzies Centre for Australian Studies, 1997).

[49] For just a few examples, see: Ritu Birla, *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India* (Durham, NC: Duke University Press, 2008); Mitra Sharafi, *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772-1947* (Cambridge: Cambridge University Press, 2014); Bhavani Raman, *Document Raj: Writing and Scribes in Early Colonial South India* (Chicago: University of Chicago Press, 2012); Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press, 2009); Elizabeth Kolsky, *Colonial Justice in British India* (Cambridge: Cambridge University Press, 2010); Bernard Cohn, *Colonialism and Its Forms of Knowledge: The British in India* (Princeton, NJ: Princeton University Press, 1996); Kunal M. Parker, "'A Corporation of Superior Prostitutes' Anglo-Indian Legal Conceptions of Temple Dancing Girls, 1800–1914," *Modern Asian Studies* 32, no. 03 (1998): 559–633; Julia Stephens, "The Phantom Wahhabi: Liberalism and the Muslim Fanatic in Mid-Victorian India," *Modern Asian Studies* 47, no. 01 (2013): 22–52; Rohit De, "The Two Husbands of Vera Tiscenko: Apostasy, Conversion, and Divorce in Late Colonial India," *Law and History Review* 28, no. 4 (2010): 1011–41; Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India* (University of California Press, 1998).

either the colonies of settlement or on South Asia, or occasionally, the broader Indian Ocean world.[50] Few historians bring both South Asia and the settler colonies into the same frame.[51]

Ronald Hyam has argued that the British empire was never as controlled, closely governed or united as it sometimes appeared to be; its borders shifted constantly, and its component territories were bound together at best in what he calls a "loose-strung Commonwealth."[52] But, he notes, this imperial looseness depended on Britain's maintenance of its prestige – "an impression of unquestionable omniscience" underpinned by "bluff and racial arrogance."[53] Hyam, like other historians of empire, pays it little mind in his work, but the common law was a critical vehicle for the actual and the symbolic enacting of British power in the empire. Criminal law, especially, rested on the performance of British omniscience; discovering, investigating and trying crime all required British officials to claim to know their subjects' habits and habits of mind. This opened the courtroom door to ethnology and its racial arrogance, but also to concerns that Britain's subjects might be fundamentally unsuited to British law.

The history of the common law is a powerful vehicle for exploring how the ideology of empire interacted with the structures of imperial governance. Moreover, a case-based approach to imperial legal history aligns with both the projects of historians who argue that the empire was

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[50] See: Thomas R. Metcalf, *Imperial Connections: India in the Indian Ocean Arena, 1860-1920* (University of California Press, 2008); Fahad Ahmad Bishara, "Paper Routes: Inscribing Islamic Law across the Nineteenth-Century Western Indian Ocean," *Law and History Review* 32, no. 04 (2014): 797–820; Renisa Mawani and Iza Hussin, "The Travels of Law: Indian Ocean Itineraries," *Law and History Review* 32, no. 04 (2014): 733–47; Julia Stephens, "An Uncertain Inheritance: The Imperial Travels of Legal Migrants, from British India to Ottoman Iraq," *Law and History Review* 32, no. 04 (2014): 749–72. On British colonial law in the Straits Settlements, see: Nurfadzilah Yahaya, "Legal Pluralism and the English East India Company in the Straits of Malacca during the Early Nineteenth Century," *Law and History Review*, n.d., 1–20.

[51] For a rare example of a history that considers Britain, India and Australia together, see: Deana Heath, *Purifying Empire: Obscenity and the Politics of Moral Regulation in Britain, India and Australia* (Cambridge University Press, 2010).

[52] Ronald Hyam, *Understanding the British Empire* (Cambridge: Cambridge University Press, 2010), 19. See also: Darwin, *The Empire Project*.

[53] Hyam, *Understanding the British Empire*, 19.

a loose, but connected, assemblage of territories, and also those who see the empire as a series of overlapping webs of influence. British common law can be imagined as an emergent property, coalescing out of innumerable individual cases and shifting constantly in response to new ones. Simpson describes the common law in much the same way as, for instance, Darwin and Hyam do. Simpson writes that historians would do well to surrender to their common sense, and admit "that the common law is more like a muddle than a system."[54] And yet, the common law maintains a striking degree of coherence over time and space. "The explanation," he offers, "for the degree of consensus which exists at any one time will be very complex, and no *general* explanation will be possible."[55] The relative unity and coherence of the British empire, like that of the common law, is nearly impossible to explain, for each of its parts is distinct, contingent, and often only tenuously under the control of central authorities. Writing the history of the common law in the British world cannot impose order on the apparent chaos of the empire. But it can help us to understand the empire better, both as an ideological system and as a structure for governance.

The historiography of nineteenth-century American law is foundational to my approach to British questions and sources, and to my analysis of imperial law.[56] American legal historians have, for decades, been committed to understanding the law in action and in context, and to

[54] A.W.B. Simpson, *Legal Theory and Legal History: Essays on the Common Law* (London: The Hambledon Press, 1987), 381.
[55] Ibid., 378.
[56] See, for example: Thomas Andrew Green, *Freedom and Criminal Responsibility in American Legal Thought* (Cambridge: Cambridge University Press, 2014); Susanna L. Blumenthal, "The Mind of a Moral Agent: Scottish Common Sense and the Problem of Responsibility in Nineteenth-Century American Law," *Law and History Review* 26, no. 1 (2008): 99–159; Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (Cambridge: Cambridge University Press, 1998); Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (Cambridge: Cambridge University Press, 2010); Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America: Sexuality and Citizenship in Twentieth-Century America* (Princeton: Princeton University Press, 2009).

pushing beyond the dry recitation of doctrine and precedent.[57] The literature on nineteenth-century British law, conversely, while often sophisticated, tends to focus less on textured accounts of cases in favour of an intellectual history approach that values treatises, doctrine and even fiction over the reconstruction of individual lives.[58] Scholarship on the history of criminal law in eighteenth-century Britain, much of it inspired by or in conversation with E.P. Thompson, is robust.[59] However, historians of British law have paid less attention to the nineteenth century.[60] The most notable work on the period in the American vein is A.W.B. Simpson's compelling study of murder among shipwrecked sailors.[61] However, there are few British legal histories with Simpson's narrative flair and careful attention to the cultural context of the criminal law as it was experienced in the nineteenth century.

Most of the scholarship on criminal responsibility in Britain has not been written by historians. Rather, legal scholars, many without a disciplinary background in history, dominate

[57] See, for example: Hendrik Hartog, *Man and Wife in America: A History* (Cambridge, Mass.: Harvard University Press, 2000); Hendrik Hartog, *Someday All This Will Be Yours* (Cambridge: Harvard University Press, 2010); Rebecca J. Scott, "Paper Thin: Freedom and Re-Enslavement in the Diaspora of the Haitian Revolution," *Law and History Review* 29, no. 4 (2011): 1061–87; Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (Cambridge: Cambridge University Press, 2003).

[58] Martin J Wiener, *Reconstructing the Criminal: Culture, Law, and Policy in England, 1830-1914* (Cambridge [England]; New York: Cambridge University Press, 1990); Loughnan, *Manifest Madness*.

[59] For eighteenth-century criminal law history, see: Douglas Hay et al., *Albion's Fatal Tree : Crime and Society in Eighteenth-Century England* (London: Verso, 2011); E. P Thompson and Great Britain, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975); John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford; New York: Oxford University Press, 2003); J. M Beattie, *Crime and the Courts in England, 1660-1800* (Princeton, N.J.: Princeton University Press, 1986); Thomas Andrew Green, *Verdict According to Conscience : Perspectives on the English Criminal Trial Jury, 1200-1800* (Chicago: University of Chicago Press, 1985). For an example of an outstanding work on nineteenth-century criminal law, see: A. W. B Simpson, *Cannibalism and the Common Law : The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which It Gave Rise* (Chicago: University of Chicago Press, 1984).

[60] Although see the following multi-volume surveys: R. H Helmholz and John H Baker, *The Oxford History of the Laws of England*, 13 vols. (Oxford; New York: Oxford University Press, 2003); Leon Radzinowicz and Roger Grahame Hood, *A History of English Criminal Law and Its Administration from 1750, Vol. 5, The Emergence of Penal Policy* (London: Stevens, 1986).

[61] A.W.B. Simpson, *Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which It Gave Rise* (Chicago: University of Chicago Press, 1984).

the field.[62] Often, legal scholars discuss the development of legal doctrine over time, sometimes over centuries, as part of their elucidations of contemporary legal questions. These works are valuable for legal historians, but they can sometimes be excessively abstract or teleological.[63] I share the interest of many legal scholars in the development of legal concepts, and their belief that legal doctrine and debates about the nature and purpose of law are worthy of careful consideration. However, an archive-driven historiographical approach grounds jurisprudence, and shows how it affected the lives of real people and the institutions that governed them.

The history of criminal law in the British empire and in the colonies, rather than in Britain itself, is uneven. Histories of crime in the colonies tend to focus on the violence and racism of colonial legal regimes, sometimes at the expense of elucidating the institutional and jurisprudential context in which the law operated.[64] Despite the universalistic pretensions of nineteenth-century British liberalism, British common law was never neutral or free of culture. [65] However, the fact that British law was chauvinistic should not be a conclusion but a starting point.

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[62] See, for example, Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (London: Weidenfeld and Nicolson, 1993); Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford: Oxford University Press, 2012); R.A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart, 2007); Victor Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2005), Jeremy Horder, *Excusing Crime* (Oxford: Oxford University Press, 2004); Lindsay Farmer, *Criminal Law, Tradition, and Legal Order: Crime and the Genius of Scots Law: 1747 to the Present* (Cambridge: Cambridge University Press, 1997); Nicola Lacey, *Criminal Justice* (Oxford: Oxford University Press, 1994); Nicola Lacey, *Women, Crime and Character: From Moll Flanders to Tess of the d'Urbervilles* (Oxford: Oxford University Press, 2008); and Mackay, *Mental Condition Defences in the Criminal Law* (Oxford: Clarendon Press, 1995).

[63] For one critique of legal theorists' approaches to the history of law, or to law in the past, see the author's preface in A.W. Brian Simpson, *Leading Cases in the Common Law* (Oxford: Clarendon Press, 1995). However, some legal scholars have made significant interventions in historical debates. See, for example, chapters by Nicola Lacey, Lindsay Farmer and Mariana Valverde in Markus Dirk Dubber and Lindsay Farmer, *Modern Histories of Crime and Punishment* (Stanford, CA: Stanford University Press, 2007).

[64] See, for example, Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (New York: Oxford University Press, 1998). However, historians of legal culture more general and of the civil law in the colonies have been much more sensitive to matters of legal and institutional context. See, for example: Raman, *Document Raj*; Birla, *Stages of Capital*.

[65] Martin Wiener, *An Empire on Trial: Race, Murder, and Justice under British Rule, 1870-1935* (Cambridge: Cambridge University Press, 2009); Elizabeth Kolsky, *Colonial Justice in British India* (Cambridge: Cambridge University Press, 2010).

In *Law's Dream of Common Knowledge*, legal sociologist Mariana Valverde writes that we should remember that law, like other complex institutions, "has a strong constitutive ability whose effects cannot always be predicted even if we know what the generalized relations of power are in a particular context."[66] The generalized relations of power in British imperial law are clear, and I sympathise with scholars who expose the myth of liberal legal neutrality. And yet, acknowledging the abuses of imperial criminal law does not explain how it worked, practically, ideologically or epistemologically.

The liberalism of empire was conceptually riven; imperial legal power could not be applied coherently or smoothly because it so often pursued contradictory projects. Partha Chatterjee, political scientist and eminent postcolonial theorist and critic, famously described the "rule of colonial difference".[67] He argued that 'colonial liberalism' is a contradiction in terms because colonialism presumes the inferiority (difference) of the colonised, while liberalism claims to view all men as equal and the law (in the British case, the common law) as universally applicable and moral. According to Chatterjee, and others who have adopted his view, the practices and ideology of Western imperialism constantly reflect this tension between difference and identity – it is always present, and never resolved. This dissertation seeks to describe the contradictions and switchbacks of imperial legal reasoning, rather than to seek a resolution of these tensions. There was no a seamless, logically coherent doctrine of criminal responsibility in Britain or the empire. It is the debates themselves, about morality, universalism and justice, that are interesting and that drew the empire together. Legal historians working on particular British

[66] Mariana Valverde, *Law's Dream of Common Knowledge* (Princeton: Princeton University Press, 2003), 10.
[67] Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993).

colonies are increasingly coming together themselves, and are laying the conceptual groundwork for imperial legal history as a field.[68] This dissertation participates in that project.

Histories of medicine and related disciplines, like anthropology, are integral to exploring how the British imagined the colonized, and explained their bodies, brains and behaviours in imperial courtrooms.[69] Physicians were almost invariably called upon to comment on a defendant's mental state, which, as described above, very often shaded into assessments of the defendant's criminal responsibility. Scientists and social scientists expounded theories of the evolution of humankind, and considered the impact of evolution on the minds and behaviour of modern peoples. The academic and professional histories of various branches of the medical and scientific professions are essential to understanding legal debates about responsibility.[70]

The richest body of literature on psychiatry, anthropology and forensic medicine focuses on Britain and the United States, rather than the colonies. However, there is a small but vibrant literature on the history of colonial psychiatry. Most of these works focus on a single colony, or

[68] Dorsett and McLaren, *Legal Histories of the British Empire*.
[69] See, for example: George W. Stocking, *Victorian Anthropology* (New York; London: Free Press ; Collier Macmillan, 1987); George W. Stocking, *Colonial Situations: Essays on the Contextualization of Ethnographic Knowledge* (Madison: University of Wisconsin Press, 1991); Andrew Scull, Charlotte MacKenzie, and Nicholas Hervey, *Masters of Bedlam: The Transformation of the Mad-Doctoring Trade* (Princeton: Princeton University Press, 1996); Peter J. Bowler, *Evolution: The History of an Idea*, 3rd ed. (Berkeley: University of California Press, 2003); Ian Hesketh, *Of Apes and Ancestors: Evolution, Christianity and the Oxford Debate* (Toronto: University of Toronto Press, 2009); Nancy Stepan, *The Idea of Race in Science: Great Britain, 1800-1960* (Hamden, CT: Archon Books, 1982); Peter J. Bowler, *The Eclipse of Darwinism* (Baltimore: The Johns Hopkins University Press, 1983); Smith, *Free Will and the Human Sciences in Britain, 1870-1910*; Alison Winter, *Mesmerized: Powers of Mind in Victorian Britain* (Chicago: University of Chicago Press, 1998); Roy Porter, *Madness: A Brief History* (Oxford; New York: Oxford University Press, 2002).
[70] See, for example: Joel Peter Eigen, "Lesion of the Will: Medical Resolve and Criminal Responsibility in Victorian Insanity Trials," *Law & Society Review* 33, no. 2 (1999): 425–60; Joel Peter Eigen, *Witnessing Insanity: Madness and Mad-Doctors in the English Court* (New Haven: Yale University Press, 1995); Smith, *Free Will and the Human Sciences in Britain, 1870-1910*; Roger Smith, *Trial by Medicine: Insanity and Responsibility in Victorian Trials* (Edinburgh: Edinburgh University Press, 1981); Porter, *Madness*; Roy Porter, *Mind-Forg'd Manacles: A History of Madness in England from the Restoration to the Regency* (London: Penguin Books, 1990); Daniel N. Robinson, *Wild Beasts & Idle Humours: The Insanity Defense from Antiquity to the Present* (Harvard: Harvard University Press, 1998); Mary Gibson, *Born to Crime: Cesare Lombroso and the Origins of Biological Criminology* (Westport, CT: Praeger, 2002); Nicole Rafter, *The Criminal Brain: Understanding Biological Theories of Crime* (New York: New York University Press, 2008).

even a particular colonial asylum, over a relatively limited scope of time.[71] Indian insane asylums, and the expertise in matters of the mind that medical men usually honed there, existed from the early nineteenth century. African colonial asylums, on the other hand, did not appear until the early twentieth century. Purported experts in 'native' psychology often served as expert witnesses in murder trials, and an understanding of their professional identities, priorities and paradigms is important to my own work. I use this colonial literature, in conjunction with histories of British psychiatry and forensic medicine, to consider how the mind sciences affected the articulation of responsibility in the empire.

The six chapters of the dissertation are twinned into three sets united by a common theme, each including an initial chapter with a focus on developments in England, and followed by a chapter with a more colonial bent. The first two chapters describe the institutional and procedural challenges raised by insanity cases, and explore some of the major medical and legal developments that made responsibility so controversial in criminal cases. The next two chapters focus on moral responsibility, and the looming concern among officials, jurists and mad doctors that, at least for some defendants, criminality and insanity might be synonymous. The last set of chapters considers how Victorian ideas about culture and race affected how responsibility was understood in imperial cases involving indigenous defendants. Together, the chapters show that criminal responsibility was a bellwether for Victorian anxieties about the integrity of the

[71] See, for example: Waltraud Ernst, *Mad Tales from the Raj: Colonial Psychiatry in South Asia, 1800-58* (London: Anthem, 2010); Richard C Keller, *Colonial Madness: Psychiatry in French North Africa* (Chicago: University of Chicago Press, 2007); Warwick Anderson, Deborah Jenson, and Richard C Keller, *Unconscious Dominions : Psychoanalysis, Colonial Trauma, and Global Sovereignties* (Durham, NC: Duke University Press, 2011); Jock McCulloch, *Colonial Psychiatry and "the African Mind"* (Cambridge: Cambridge University Press, 1995); Sloan Mahone and Megan Vaughan, *Psychiatry and Empire* (Basingstoke; New York: Palgrave Macmillan, 2007); Megan Vaughan, *Curing Their Ills: Colonial Power and African Illness* (Stanford, Calif.: Stanford University Press, 1991); Jonathan Sadowsky, *Imperial Bedlam: Institutions of Madness in Colonial Southwest Nigeria* (Berkeley: University of California Press, 1999); James H Mills, *Madness, Cannabis and Colonialism: The "Native Only" Lunatic Asylums of British India, 1857-1900* (New York: St. Martin's Press, 2000).

common law, and raised the possibility that the British could never govern their empire under British law.

In Chapter 1, "In the Shadow of the Gallows: Crime and Insanity in Victorian Britain", I describe the legal and administrative system that was engaged when an accused murderer's responsibility for his crime was called into question. Medical and legal authorities applied very different tests in their efforts to diagnose insanity in criminal defendants. By the late nineteenth century, the legal standard for insanity, set in 1843 in the *M'Naghten* case, had come under heavy fire both within and without the legal profession. Criminal responsibility was a life or death question in murder cases, where a conviction carried a mandatory capital sentence. Uncertainty about the meaning of insanity led to administrative confusion about how to handle murder suspects, and ensured that debates over the meaning of responsibility continued long after the courtroom emptied.

Chapter 2, "A Killer in Search of a Trial: T.J. Maltby's Quest for Justice", revolves around the case of an Indian civil servant, T.J. Maltby, who shot a village magistrate in Madras in 1879. Maltby's case shows that criminal insanity was an imperial, and not just a domestic, administrative hassle. Maltby was one of many allegedly insane British subjects who committed crimes around the empire. His case reveals how interconnected the British legal world was, despite its diversity. Maltby's case also shows that the definition of criminal responsibility was routinely contested on conceptual and procedural grounds, including by defendants themselves.

In Chapter 3, "Determinism and Depravity: Moral Insanity Considered", I explore the controversial psychiatric diagnosis of moral insanity. Moral insanity was a kind of insanity that affected only the moral sentiments. To many, moral insanity seemed like a synonym for evil, and they argued that expanding the legal definition of insanity to include it would eviscerate the legal

system. Moral insanity provoked a crisis in a world where savagery lurked just beneath the surface of civilization, and where determinism threatened to undermine nineteenth-century Britons' intense belief in the power of free will.

Chapter 4, "Murder and Metaphysics in Colonial Victoria", is framed by the case of Frederick Bailey Deeming, the serial murderer who Alfred Deakin argued was insane in Melbourne in 1892. Deeming's crimes were so brutal and, apparently, motiveless that they led some to diagnose him with moral insanity. The chapter describes the campaign of another of Deeming's lawyers, Marshall Lyle, to change the legal definition of insanity in the empire.

In Chapter 5, "A Savage Heart: Culpability and Culture in the Victorian World", I consider how Victorian ideas about civilization and barbarism affected colonial officials' efforts to assess the criminal responsibility of indigenous defendants. The notion that non-European peoples might be incapable of meeting British *mens rea* standards further complicated British efforts to assess their responsibility in court.

Chapter 6, "Cannibalism and Clemency in the Canadian North-West", is set in western Canada during the 1885 Métis rebellion against the colonial government. The leader of the rebellion, Louis Riel, was tried and hanged for treason, despite his lawyers' protestations that he was insane. At the same time, a group of Cree men who had committed a ritual killing were convicted of murder and then respited on the ground that their folk beliefs reduced their responsibility for their crime. This chapter further explores how culture could act as a mitigating factor in criminal cases, in the same way that insanity could.

In a speech in 1921, Scottish lawyer R.B. Haldane, after a lengthy stint as Lord Chancellor and a member of the Judicial Committee, told a gathering of his peers, "The human mind is much the

same all the world over. The differences are much less than the identities, and that has been our experience in the judicial committee."[72] For Haldane, human minds around the world were "much the same" – they were not, critically, fully the same. This dissertation drives a wedge into the crack that Haldane tries to plaster over in his account of the minds of Britain's subjects. There had always been a gap between the common law concept of responsibility and how lawyers applied it to individuals in court, but the space had for so long been filled with intuition and assumptions about the fundamental intelligibility of other minds that it had gone unnoticed. By the late nineteenth century, the gap had become a gulf. It was no longer clear that it was possible, from an epistemological standpoint, for juries to assess the responsibility of those whose cultures were alien. It was also unclear whether anyone, British or otherwise, could freely choose his actions, or justly be held responsible for them. Late-Victorian, imperial Britons peered into an abyss where their old certainties had given way, and wondered how they would cross it.

[72] R. B. Haldane, "The Work for the Empire of the Judicial Committee of the Privy Council," *Cambridge Law Journal* 14 (1921), 154.

CHAPTER ONE
IN THE SHADOW OF THE GALLOWS: CRIME AND INSANITY IN VICTORIAN BRITAIN

On 2 March 1898, James Shaw wrote to Queen Victoria. He hoped that, in the sixtieth year of her reign, her Jubilee, she would exercise her prerogative to commute his capital sentence to a lifetime of penal servitude. He had been held at Northampton prison in the months before his trial at the county Assizes in November of 1897. In prison, complained, "three Warders hammered me till I was unconscious one of them hilt [sic] me by the throat with both arms till I lost my senses because they imposed upon me they took bed books and everything away from me."[1] At his trial, he had been too frightened to reveal the bruises that covered him from head to foot. His imprisonment, he explained, was a sad chapter in a sad life. "I saw My Mother die I was the youngest of the seven I left school when I passed the fourth standard It was a young woman teached [sic] me all the education that I got," Shaw wrote in a careful hand.[2] After his mother died, Shaw suffered an attack of "the Brain fever." He then spent seven years in the Scots Guards, enduring long nights of "Rain Lightining [sic] and Thunder", only to return to find his father, a sister and a brother dead.[3] What Shaw failed to mention in his letter was the reason for his conviction. In 1897, he had cut off his thirteen-year-old nephew's head with a razor.

Murder was a capital offence in Britain and its empire throughout the nineteenth century. Once a jury foreman declared a verdict of willful murder, the judge donned his black cap and pronounced the inevitable sentence: death. No other sentence could legally be given once a defendant's guilt had been decided. The history of criminal responsibility cannot be told without judicial execution. The gallows drew the eyes and the ears of the press and the public to

[1] Shaw's Petition to the Queen, 2 March 1898, Case of James Shaw (1897), Records of the Home Office (HO), The National Archives, Kew, HO 144/22922.
[2] Shaw's Petition to the Queen, 2 March 1898, Case of James Shaw (1897), HO 144/22922.
[3] Shaw's Petition to the Queen, 2 March 1898, Case of James Shaw (1897), HO 144/22922..

homicide cases. Under scrutiny, British authorities at home and abroad worked to justify capital sentences, and to ensure that executions were performed with the discretion and humaneness that befitted a civilized, liberal society.[4] A government official – the Home Secretary in Britain, and in the colonies, the Governors General – reviewed each death sentence, and had the power to exercise the prerogative of mercy on behalf of the Crown. The prerogative entitled government authorities to commute death sentences to terms of imprisonment, or even to grant full pardons. In the first half of the twentieth century, approximately half of those convicted of murder in Britain had their sentences commuted.[5] Nineteenth-century rates of commutation varied in Britain and the empire across time and place, but sometimes reached as high as 70%.[6] James Shaw hoped for mercy.

The death sentence affected criminal responsibility in at least two ways. First, the executive review of capital sentences introduced "an expressly political element", as Stacey Hynd has argued, into murder cases.[7] Murder cases were not only the business of lawyers and judges, but also of government officials. This meant that a defendant's guilt and responsibility for his actions were often, in effect, assessed twice: once in court and, if he was convicted, again when the sentence was reviewed. Both jurors and judges knew that, thanks to the prerogative, a guilty verdict meant a death sentence, but did not necessarily mean death. Men who adamantly opposed a defendant's execution could find him guilty in court without guaranteeing his death, and could comfort themselves with the knowledge that they would have a chance to lobby for a political reprieve.

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[4] Hynd, "Killing the Condemned," 403.
[5] Rob Turrell, "«It's a Mystery»: The Royal Prerogative of Mercy in England, Canada and South Africa," *Crime, Histoire & Sociétés/Crime, History & Societies*, 2000, 85.
[6] Turrell writes that 70% of murderers were reprieved in Canada in the 1870s. Ibid., 94.
[7] Hynd, "Killing the Condemned," 405.

Second, the mandatory capital sentence for murder, because it was so inflexible, encouraged defences that called into question a defendant's responsibility for his actions. Psychiatrists and lawyers who abhorred the death penalty argued vehemently for the expansion of the parameters of the insanity defence, since it often represented a defendant's only hope of escaping the gallows. In cases where a defendant had confessed, or where there was ample evidence that he had committed the crime, a responsibility-based defence was the only path forward – other avenues and arguments for mitigation were foreclosed by the mandatory sentence.[8] In cases where an insanity defence or a post-conviction plea for respite succeeded, psychiatric institutions and their keepers were called on to house the accused or convicted murderer, sometimes for decades. Psychiatrists stepped in when prison wardens could not. The high walls of their asylums allowed the insanity defence to succeed in cases where releasing a dangerous lunatic would have been politically and socially unacceptable.

James Shaw was ultimately spared the noose. However, he lived not because the Queen took pity on a miserable former soldier, but because the Home Secretary needed to cover up mistakes in his trial. The prerogative allowed judicial and government authorities to manage cases that troubled legal definitions of responsibility, but also cases that, often for political reasons, were simply troublesome. Shaw's case engaged both aspects of the prerogative. In his case, mercy was a political expedient and a response to uncertainty about the nature of responsibility and the courts' ability to recognize it.

This chapter describes the institutional, medical, and legal context in which a defendant's responsibility for his crimes was decided in Victorian Britain. The geographical focus is on England. However, responsibility was a conceptual and practical problem throughout the British

[8] This is true in cases where the defendant was charged with murder. Manslaughter convictions did not carry a mandatory death sentence.

world. Doctors, lawyers and government authorities in Britain and beyond worked to carve out discretion in the judgment and punishment of homicide defendants even though the mandatory death sentence seemed to preclude it. A defendant's insanity could save him, and offered a powerful justification for either an acquittal or a commutation. The definition of legal insanity adopted in the 1843 *M'Naghten* case, described below, was notoriously narrow and rigid, at least in theory. In practice, however, the men who administered British justice routinely criticized, ignored and loosely interpreted *M'Naghten* at the trial stage, and often jettisoned it when they debated the exercise of the prerogative. Both *M'Naghten* and the mandatory capital sentence survived the nineteenth century, but neither standard was applied regularly or unsparingly in criminal cases.

James Shaw's case was a procedural and jurisprudential quagmire. Medical experts could not agree on the subject of his sanity or his responsibility for his nephew's killing. Government authorities could not decide what to do with him after his conviction. Medical experts, lawyers, jurors, judges, government officials, and asylum doctors were involved in murder cases where a defendant's sanity was in doubt. In the late nineteenth century, there was intense confusion and disagreement over which standard for sanity, and for responsibility, should apply in murder cases. Shaw's case reveals the importance of government oversight of capital convictions, and the way that debates about responsibility continued in official correspondence long after the warders had escorted the defendant from the courtroom.

From Shaw, the chapter turns to the case of the Reverend Henry Dodwell, an attempted murderer who was a thorn in the side of the English medical and legal establishment. Dodwell shot a pistol at the Master of the Rolls in 1878, and spent the rest of his life protesting his ill-treatment and demanding to be released from Broadmoor criminal lunatic asylum. Dodwell's

case reinforces the idea that determining responsibility under the common law was not an isolated decision but a process that could last years, or even a lifetime. Many of England's best-known criminal psychiatrists assessed his sanity or managed his care at Broadmoor. By following Dodwell behind the walls of the asylum, the professional and institutional lives of late-Victorian 'mad doctors' come into view. One more case, that of William Norris, who killed his children, shows how patients could flow in and out of criminal lunatic asylums without ever standing trial. Assessing a man's responsibility for his actions was a process that took place in a variety of institutional settings, and that required those involved to ask and answer the most abstract questions about the nature of the mind, morality and human freedom.[9] They did this not as academic philosophers or as theologians, but as professionals with jobs to do and with their own understandings of their roles in the British justice system.

James Shaw was tried for the murder of Albert Smith on 18 November 1897.[10] Alice Sarah Smith, Shaw's niece and Albert's younger sister, testified. She said that Shaw had given Albert some sweets while the trio went for a walk one afternoon in July. They stopped in an oat field. While her brother ate, some distance away, Alice and her uncle were "together 'ever so long.' She did not cry out, although her uncle hurt her."[11] Alice left the field alone; she could not see Albert. Shaw was arrested two days later when his nephew failed to reappear. The superintendent

[9] Stacey Hynd describes judicial execution in similar terms, as a process rather than an event. See: Hynd, "Killing the Condemned," 417.
[10] R v Shaw, Judge's Notes of Evidence, 18 November 1897, HO 144/22922.
[11] "The Murder of a Boy Near Sulgrave, Revolting Details," *The Northampton Herald*, Saturday, 20 November 1897, HO 144/22922.

of police went to the oat field. There he found a bloody razor, some string, a button, a sweet, and, eventually, Albert's body. His head rested in the grass nearby.[12]

Shaw was defended by Robert Hammond-Chambers, an Eton and Oxford-educated barrister at the peak of his career, who would be appointed Queen's Counsel weeks after the trial.[13] Hammond-Chambers argued in court that Shaw was insane. The killing was so ferocious and so motiveless, Hammond-Chambers told the jury, that it could not have been the act of a sane man.[14] Shaw had a family history of insanity. His father, John, had attempted suicide three times: by trying to drown himself, by cutting his own throat, and, his daughter deposed, "by trying to hang himself to [sic] the bedstead with a pocket handkerchief."[15] The defence also argued that Shaw had suffered fits as a child; that an attack of 'brain fever' as a teenager had left him unconscious for three weeks; that he had a history of violent and erratic behaviour; and that, while in prison, "he also attempted to mutilate himself by cutting off his private parts with a piece of broken glass."[16] Dr. Joseph Bayley, a longtime physician at St. Andrew's Hospital for Mental Diseases in Northampton, testified that Shaw suffered from homicidal mania. "A person suffering from that disease," he said, "might be apparently sane at the time he committed a crime under an impulse he was unable to control."[17] Under questioning, Bayley affirmed that Shaw would have been unable to control his homicidal impulses even "if a policeman were standing

[12] "The Murder of a Boy Near Sulgrave, Revolting Details," *The Northampton Herald*, Saturday, 20 November 1897, HO 144/22922.
[13] Joseph Foster, *Men-at-the-Bar: A Biographical Hand-List of the Members of the Various Inns of Court: Including Her Majesty's Judges, Etc* (Reeves and Turner, 1885), 81.; Henry Robert Addison et al., *Who's Who* (A. & C. Black, 1899), 475.
[14] "The Murder of a Boy Near Sulgrave, Revolting Details," *The Northampton Herald*, Saturday, 20 November 1897, HO 144/22922.
[15] Coroner's Depositions and Northampton Constabulary Memorandum, 21 July 1897, HO 144/22922.
[16] G. Jason Phillips to Sir M. White Ridley, 13 November 1897, CASE OF JAMES SHAW (1897), HO 144/22922. NB. The date on this letter seems to be wrong. The trial took place on 18 November 1897.
[17] "The Murder of a Boy Near Sulgrave, Revolting Details," *The Northampton Herald*, Saturday, 20 November 1897, HO 144/22922.

by."[18] The jury deliberated for nearly five hours late into the night, while a crowd waited outside the courthouse for news. At ten o'clock they returned, and declared Shaw guilty of murder.[19]

Hammond-Chambers had hoped that the jury in Shaw's case would look beyond narrow understandings of criminal insanity to find Shaw irresponsible even though he was, as Bayley warned that homicidal maniacs could be, 'apparently sane.' Shaw's appearance of sanity was a problem for Hammond-Chambers. Shaw's absence of obvious cognitive disturbance seemed to remove him from the remit of the law's definition of insanity. This definition was established in the most famous insanity case in the history of the common law, *M'Naghten* (1843).

Daniel McNaughten shot Tory Prime Minister Sir Robert Peel's secretary, Edward Drummond, one afternoon in January of 1843, as Drummond left Whitehall.[20] A porter watched McNaughten take the gun from his breast pocket, cock it, and aim it at Drummond. A police officer saw McNaughten too. He jumped on McNaughten and struck him, trying desperately to get the pistol, but it discharged and Drummond fell. A surgeon was able to extract the ball from Drummond's back later that day, but he died the next morning.[21] The chief inspector of police, John Tierney, visited McNaughten in his jail cell on the evening of the killing. The two men talked for a long time, swapping stories about McNaughten's native Glasgow. McNaughten told Tierney that members of the Tory party were following him from place to place and persecuting them, and that he had intended to shoot Peel, not Drummond. When one of the prosecutors at McNaughten's trial asked why Tierney had spent so long chatting with his prisoner, Tierney

[18] "The Murder of a Boy Near Sulgrave, Revolting Details," *The Northampton Herald*, Saturday, 20 November 1897, HO 144/22922.
[19] "The Murder of a Boy Near Sulgrave, Revolting Details," *The Northampton Herald*, Saturday, 20 November 1897, HO 144/22922.
[20] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 28 April 2015), February 1843, trial of DANIEL M'NAUGHTEN (t18430227-874).
[21] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 28 April 2015), February 1843, trial of DANIEL M'NAUGHTEN (t18430227-874).

replied that he had felt "the anxiety of human nature to know, under such revolting circumstances, who and what the man was."[22]

Witnesses at the trial described McNaughten as penurious, hardworking, shy, solitary and sickly. Until months before the shooting, he had worked as a turner, a woodworker, in Glasgow, remarkable only for his reticence and frequent headaches. One neighbour from Glasgow told the court that McNaughten was in the habit of filling his pockets with crumbs for the birds. McNaughten's father, also called Daniel McNaughten, described his fruitless efforts to convince his son that there was no conspiracy against him. McNaughten told his father that spies followed him everywhere, sometimes shaking bundles of sticks or straws at him, which he took as a sign that they would soon reduce him to beggary. When his father asked why he had never seen these spies for himself, McNaughten replied, "Oh, no…if they saw you with me they would not follow me at all, it is only when I am alone they follow me."[23]

The main medical witness for the defence was Edward Monroe, a prominent mad doctor who had also trained as a lawyer. Monroe interviewed McNaughten in the weeks after his arrest. He said that McNaughten saw himself as "tossed like a cork on the sea, that wherever he went, whether in town or country, or by the sea shore, he was perpetually watched, and followed."[24] Monroe told the court that he had not "the remotest doubt of [McNaughten's] insanity."[25] Monroe explained that it was an established principle of psychological medicine that it was possible for a person to experience partial insanity or monomania, in which a delusion could

[22] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 28 April 2015), February 1843, trial of DANIEL M'NAUGHTEN (t18430227-874).
[23] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 28 April 2015), February 1843, trial of DANIEL M'NAUGHTEN (t18430227-874).
[24] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 28 April 2015), February 1843, trial of DANIEL M'NAUGHTEN (t18430227-874).
[25] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 28 April 2015), February 1843, trial of DANIEL M'NAUGHTEN (t18430227-874).

overpower a man's reason and self-control on one particular question without affecting his faculties in any other way, on any other subject.[26] Monroe also believed that monomania could affect a man's perception of morality. In McNaughten's case, said Monroe, "his mind was so absorbed in the contemplation of this fancied persecution, that he did not distinguish between right and wrong."[27] Two Scottish mad doctors who had also interviewed McNaughten, William Hutchinson and Alexander Morrison, agreed that McNaughten's crime was the direct result of his delusion of persecution. Hutchinson believed that the prisoner had been "perfectly incapable of exercising control in any matter connected with the delusion."[28] Forbes Winslow, another mad doctor who appeared in many murder trials in the mid-nineteenth century, had not actually spoken with McNaughten, but, on the basis of the courtroom evidence, declared that he had "not the least doubt of the existence of the prisoner's insanity."[29]

The jury held that McNaughten was not guilty on the ground of insanity. He was delivered to Bethlem lunatic asylum on 13 March 1843, at the age of twenty-nine.[30] However, McNaughten's acquittal was not the end of his case's career in the law. On the same day that McNaughten arrived at Bethlem, the House of Lords discussed what was to be done about criminal insanity. The members of the upper House shared an anxiety that the concept of responsibility had become so muddled that urgent action was needed. Some worried that McNaughten's case and others like it were introducing dangerous psychiatric understandings of insanity into public consciousness. "The public mind," declared Lord Campbell, a reform-

[26] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 28 April 2015), February 1843, trial of DANIEL M'NAUGHTEN (t18430227-874).
[27] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 28 April 2015), February 1843, trial of DANIEL M'NAUGHTEN (t18430227-874).
[28] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 28 April 2015), February 1843, trial of DANIEL M'NAUGHTEN (t18430227-874).
[29] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 28 April 2015), February 1843, trial of DANIEL M'NAUGHTEN (t18430227-874).
[30] Schedule A form, Daniel MacNaughten Case File, Berkshire Records Office (BRO).

minded lawyer and politician who would later be made Lord Chancellor, "was in considerable alarm on this subject. The public had been inundated by medical books calculated very much to mislead juries in the case of future trials of a similar kind."[31] According to Campbell, medical books peddled the pernicious notion that many murderers suffered from a "homicidal propensity" that made them unaccountable for their criminal acts.[32]

Lord Brougham, a judge, formerly Lord Chancellor and the architect of the modern Judicial Committee of the Privy Council, also felt that criminal responsibility required official clarification in the wake of cases like McNaughten's. He explained,

> With respect to the point of a person being an accountable being, that was an accountable being to the law of the land, a great confusion had pervaded the minds of some persons […] who considered accountability in its moral sense, as mixing itself up with the only kind of accountable-ness with which they, as human legislators, had to do, and of which they could take cognizance. […] He could conceive a person whom the Deity might not deem accountable, but who might be perfectly accountable to human laws.[33]

Brougham was concerned that jurists, doctors and the public had lost sight of the distinction between criminal responsibility and moral responsibility. The legal system, according to Brougham, did not exist to pass judgment on a man's soul, but merely to punish those who, with some basic degree of understanding and freedom to choose, had broken the law. Brougham hoped to define responsibility in its most lawyerly, most technical sense – as a tool for meting out punishment and deterring future crime, and nothing more.[34]

In an effort to resolve these uncertainties as to the degree of mental illness that would excuse a defendant from responsibility for his crime, the House of Lords, including Brougham

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[31] HL Deb 13 March 1843 vol 67 cc714-44. Lord Campbell also believed that criminal lunatics enjoyed too many privileges at Bedlam. In the same session at the House of Lords, he reportedly said, "He believed, that these cases [criminal insanity cases] had multiplied of late from a desire to obtain the comfort, the notoriety, and the indulgences which were supposed to be enjoyed by individuals acquitted on such grounds. A man acquitted on the score of insanity ought to be removed from the public eye, and heard of as little as possible afterwards."

[32] HL Deb 13 March 1843 vol 67 cc714-44.

[33] HL Deb 13 March 1843 vol 67 cc714-44

[34] HL Deb 13 March 1843 vol 67 cc714-44

and Campbell, formally responded to a number of questions put to them about responsibility and insanity. Their answers to these questions quickly became known as the *M'Naghten* rules.[35] Daniel McNaughten never spelled his name 'M'Naghten'. 'M'Naghten', ostentatiously Scottish and fiendishly counterintuitive, has become by far the most common rendering of his name and of his case, especially by scholars of criminal insanity. However, Daniel McNaughten – although his name was sometimes given as 'McNaughton' or 'McNaughtan' in his medical and legal records – was not a legal abstraction but a shy, retiring and unfortunate man. McNaughten the man faded quickly from the public eye, while *M'Naghten* became the best-known insanity case in the Anglo-American world.

Lord Chief Justice Tindal's summary of the Lords' responses to the questions McNaughten inspired, delivered in June of 1843, became the core of the common law approach to insanity:

> To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[36]

The *M'Naghten* rules dominated the jurisprudential landscape in insanity cases in both Britain and the British empire. They placed the emphasis of legal insanity squarely on cognition. A defendant could only succeed under the rules if his insanity prevented him from understanding his action, or that his action was wrong. Joel Eigen has described the rules as a "defensive move" on the part of members of the judiciary who worried that the medical definition of insanity was becoming so wide that it would swallow responsibility whole.[37] Monroe and many of the other doctors who testified at McNaughten's trial emphasized his inability to control his actions, or to

[35] M'Naghten's case [1843] United Kingdom House of Lords (UKHL) J16 (19 June 1843).
[36] M'Naghten's case [1843] United Kingdom House of Lords (UKHL) J16 (19 June 1843).
[37] Eigen, *Witnessing Insanity*, 77.

resist his impulse to kill his persecutors. The *M'Naghten* rules, however, gave no quarter to psychiatric definitions of insanity that included purely volitional or moral (non-cognitive) impairment. *M'Naghten* came under immediate attack by those who felt that it was retrograde and cruelly restrictive. The unfairness of *M'Naghten* was a theme repeated by doctors and lawyers throughout the century.

When James Shaw killed his nephew, his defence counsel knew that making out a successful insanity plea would be difficult. His barrister, Hammond-Chambers, adopted an everything-but-the-kitchen-sink approach to proving Shaw's insanity. Shaw was not obviously deluded. He spoke coherently, was literate, and seemed to have no extravagantly false beliefs about the world or his crime. He was not, at least on the surface, a good candidate for satisfying the *M'Naghten* criteria. And so, Hammond-Chambers was faced with the difficult task of proving that Shaw's competence was an illusion that concealed a disordered brain. To do so, he argued that Shaw displayed many of the classic indicators of insanity: a family history of mental disorder; epileptic fits; violent behaviour; and a lack of impulse control. Shaw's father's suicide attempts suggested that Shaw was born of weak and dissolute stock, and that he was biologically prone to insanity and violence. Shaw's seizures and brain fever revealed a malfunctioning brain. Epilepsy had long been associated with madness, and according to some physicians the condition could manifest itself in fits of non-delusional insanity.[38] Last, Bayley's argument that Shaw could not control his violent impulses, even if he was certain to be caught or if he, himself, were the victim, dovetailed with concepts of non-delusional insanity that were popular, if controversial, in the latter half of the century. Despite Hammond-Chambers' competent defence, however, the jury seemed, at least at first, unconvinced.

[38] Maudsley, *Responsibility in Mental Disease*, 178.

But Shaw's fate had not yet been sealed. A few days after the trial, Justice Alfred Wills, who had presided in Shaw's case, wrote in a panic to Sir Matthew White Ridley, the Home Secretary.[39] Wills was a popular and affable figure on the English legal scene. He was best known for his love of the Alps, to which he escaped as often as possible on holiday.[40] Wills was an old acquaintance of the eminent lawyer James Fitzjames Stephen. When the two young men served together on the Midland Circuit in the 1850s, Wills could not fathom how Stephen could spend his evenings reading Hobbes; Wills had always disliked metaphysics.[41] Wills' lack of interest in questions of theory was evident in his handling of Shaw's case. The judge was more concerned about managing dangerous men, sane or insane, and avoiding political scandal than he was about abstruse concepts of responsibility.

As a young man, Stephen contemplated abandoning his legal practice in order to write a "book of high importance & permanent value", possibly "on the fundamental problems of religion & morals."[42] He had published his *General View of the Criminal Law of England* in 1863, and was considering a second, more theoretical work.[43] John Stuart Mill, whom Stephen consulted on the subject, hedged, "There is no one living of whom I would venture to affirm beforehand that he might be expected to write such a treatise on the fundamental problems of religion & morals that it would be good for him to give up a profession he likes & change his plans of life…."[44] In the mid-1860s, Stephen corresponded with Mill, read Hobbes, and wondered how he would make his mark on the world. However, he drew a sharp line between "religion & morals" and law. When it came to the common law, he relied on his expertise as a

[39] Wills to Ridley, 19 November 1897, HO 144/22922.
[40] *The Ludgate* (H. Marshall & Son, 1894), 45.
[41] Leslie Stephen, *The Life of Sir James Fitzjames Stephen, Bart., K.C.S.I., a Judge of the High Court of Justice* (Smith, Elder & Company, 1895), 141.
[42] James Fitzjames Stephen to J.S. Mill, 9 April 1864, CUL MSS Add. 7349/11.
[43] Sir James Fitzjames Stephen, *A General View of the Criminal Law of England* (London, 1863).
[44] J.S. Mill to James Fitzjames Stephen 12 April 1864, CUL MSS Add. 7349/11.

practitioner, and not his philosophical aspirations.[45] On his return to England from India in 1872, Stephen was made a High Court judge. He became an ardent advocate of legal reform in England, although his greatest legislative successes – including the Indian Evidence Act and the draft bill of the 1892 Criminal Code of Canada – were colonial, rather than metropolitan.[46] In the end, Stephen's 'book of high importance & permanent value' would be about law, not religion.

In 1883, Stephen published his three-volume *History of the Criminal Law of England* in which he set out to provide a comprehensive account of the principles and history of English criminal law.[47] Stephen's views on *mens rea* and responsibility expressed in his *History* reflected the pragmatism and rationalism of a seasoned lawyer.[48] He criticized the doctrine of *mens rea* for being deceptively simple. It gave the appearance of unity while concealing a multiplicity of specific meanings. All that *mens rea* indicated, according to Stephen, was that all or nearly all crimes contained both an outward element (*actus reus*), and also a mental element. But the content of the mental element varied widely in the context of different crimes. Murder, for instance, required that the defendant possess 'malice aforethought', while the law of theft required that the defendant intend to deprive the owner of his property permanently or fraudulently. The thoughts, feelings and knowledge that a defendant needed to have to fulfill the *mens rea* condition of criminal responsibility were different for each particular species of

[45] Stephen's biographer, K.J.M. Smith, writes, "Stephen's instinct was very much to keep his intellectual centre of gravity close to the ground." K. J. M. Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge University Press, 2002), 44.
[46] "Stephen, Sir James Fitzjames, first baronet (1829–1894)," K. J. M. Smith in *Oxford Dictionary of National Biography*, ed. H. C. G. Matthew and Brian Harrison (Oxford: OUP, 2004); online ed., ed. Lawrence Goldman, January 2012, http: //www.oxforddnb.com/view/article/26375 (accessed January 27, 2015).
[47] James Fitzjames Stephen, *A History of the Criminal Law of England*, vol. 1, 3 vols. (London: Macmillan and Co., 1883).
[48] James Fitzjames Stephen's *modern* biographer describes him as a 'Victorian rationalist.' See: Smith, *James Fitzjames Stephen*.

crime.[49] Any theorizing about definition of *mens rea* meant very little, according to Stephen, unless it took account of how the concept fractured in particular doctrines and cases.

Stephen understood by criminal responsibility "nothing more than actual liability to legal punishment. It is common to discuss this subject as if the law itself depended upon the result of discussions as to the freedom of the will, the origin of moral distinctions, and the nature of conscience."[50] But while Stephen agreed that such philosophical discussions could not be avoided, he argued that it ought to be acknowledged that the law did not, directly, depend on them to function. For Stephen, the law relied on society's unassailable right to punish those who harmed it, and the legislature was the instrument that established the limits of legal authority.[51]

Stephen shared his more pedestrian, Alps-loving colleague's skepticism as to the value of philosophy to the life of the law. He was especially critical of the medical and philosophical handwringing about insanity and responsibility that followed *M'Naghten*. He thought it was, for the most part, self-indulgent and unrealistic. Juries decided criminal cases based on the particular circumstances of the case – medical and legal theorizing was unlikely to sway the man on the street, confronted with the intimate drama of a killing and the unique mind of a killer.[52] *M'Naghten* provided adequate guidance on a complex issue in which jurors were likely to vote with their guts regardless of what a psychiatrist said on the witness stand.

Stephen was interested in psychological medicine, but he felt it had little to contribute to legal practice or doctrine. In his 1883 three-volume *History of the Criminal Law of England*, his *magnum opus*, he tackled the problematic relationship between madness and criminal

[49] Stephen, *A History of the Criminal Law of England*, 1883, 1:94–95.
[50] Ibid., 1: 96.
[51] For more on Stephen's belief in the authority of the state to exercise force regardless of philosophical considerations, see: Richard A. Posner, "The Romance of Force: James Fitzjames Stephen on Criminal Law," *Ohio State Journal of Criminal Law* 10, no. 1 (2012): 263–75.
[52] Stephen, *A History of the Criminal Law of England*, 1883, 1:186.

responsibility.[53] He began by acknowledging the complexity of the subject, which could not be discussed "without saying something on subjects forming the debateable land between ethics, physiology, and mental philosophy."[54] However, Stephen was quick to clarify that his interest in philosophical justifications of punishment was limited. "On what ground, it is asked, and under what limitations, has Society a right to punish individuals? These questions appear to me to be almost entirely unmeaning, and quite unimportant."[55] Ultimately, he argued, societies were perfectly comfortable in asserting the right of the many to discipline individuals and to "hurt them in various ways for various acts and omissions."[56] Stephen argued that the questions of whom and how harshly to punish were best left to legislators.

Stephen was offended by the abuse hurled at lawyers by medical professionals who accused them of ignoring scientific discoveries.[57] Stephen kept abreast of developments in forensic jurisprudence and the mind sciences. Doctors read his books, and he was often invoked as a foil for psychiatrists in their criticism of legal approaches to insanity. In fact, Tuke gave a copy of an 1891 book to Stephen, "with the sincere esteem of The Author."[58] Stephen was particularly irked by Maudsley's criticism of *M'Naghten* and of the lawyers who supported the doctrine. "His writings are full of passion and vehemence about everything and everybody," wrote Stephen of Maudsley, "but notwithstanding this weakness they are very able."[59] Stephen reproached Maudsley, and the medical profession, for misunderstanding what lawyers meant by 'insanity' and 'responsibility'. Neither term was ever meant to be a medical diagnosis; they were

[53] Stephen, *A History of the Criminal Law of England*, 1883.
[54] Ibid., 1: x.
[55] Ibid., 1: 5.
[56] Ibid.
[57] Ibid., 1: 124–125.
[58] Handwritten dedication in the British Library's copy of Daniel Hack Tuke, *Prichard and Symonds in Especial Relation to Mental Science: With Chapters on Moral Insanity* (J. & A. Churchill, 1891).
[59] Stephen, *A History of the Criminal Law of England*, 1883, 1:132.

legal terms of art. Lawyers were interested in determining who was punishable under the law as it stood – not as it ought to be, but as it was. Medical men wrongly believed that jurists were free to judge defendants according to their own consciences. The reality was that jurists were bound by a matrix of precedent, policy and principle that could not be abandoned or expected to comport with rapidly evolving medical knowledge.

In their review of Stephen's 1883 *History of the Criminal Law of England*, the editors of the *Journal of Mental Science*, psychiatrists D. Hack Tuke and George Savage praised Stephen for accurately describing "the different atmospheres, in fact, which the two professions [medicine and law] necessarily breathe."[60] However, the reviewers rejected Stephen's suggestion that doctors must truckle to the legal definition of responsibility set out in *M'Naghten*. A doctor called to testify as to the mental state of a defendant "may well endeavour to discover whether the man before him is really a responsible being in what he believes to be the true sense of the term."[61] Medical men could sway judges and save insane defendants' lives by applying their own tests of insanity in court, while still acknowledging the differences between the medical and legal definitions of responsibility. Medical men were not ignorant of the law and its strictures. Rather, they refused to concede that responsibility was an exclusively legal concept, and would not throw the insane to the wolves just because they could not meet the unfairly low standards of *M'Naghten*.

Given the controversy over *M'Naghten*, it was not unreasonable for Hammond-Chambers to hope that he might be able to save Shaw, despite his lack of delusions. Wills thought so too, and expected Hammond-Chambers' defence to work. On the day he wrote to Ridley, Wills

[60] Review of *A History of Criminal Law* by James Fitzjames Stephen, *The Journal of Mental Science*, 29 (July 1883), 259.
[61] Review of *A History of Criminal Law* by James Fitzjames Stephen, *The Journal of Mental Science*, 29 (July 1883), 259.

discovered, to his horror, that it actually had. That evening, Wills received a letter from the foreman of the jury in Shaw's case claiming that the jury had not, in fact, been able to reach an agreement. Wills described the scene in the courtroom at Shaw's sentencing. The clerk of assize asked the jury for their verdict, to which the foreman answered, "in a particularly emphatic manner and in a loud clear voice 'Guilty'."[62] Wills was "a little surprised", as he had expected a verdict of 'guilty but insane.' There was a long, "dead pause" – Wills was not the only one who had anticipated an insanity verdict. After confirming that the jury had nothing to add, Wills dismissed them.

However, the next day Wills was "startled and distressed" to discover a letter from the foreman, George Miller. Miller wrote that the jury had expected to be asked two questions: first, whether Shaw was guilty; and second, whether Shaw was responsible for his actions. Miller, as foreman, had declared their belief that Shaw was guilty for the killing, but had been flummoxed when Wills failed to ask about Shaw's responsibility. The jurors agreed that Shaw had killed Albert, but were split on the issue of his responsibility. That, Miller argued, "no jury *could* possibly determine…[S]uch a point must be one for medical skill alone."[63] Wills protested that he was not at fault for the jury's misunderstanding. Still, the mistake was a serious one, which had compromised the integrity of the trial. Wills assured Ridley that it could be corrected if Shaw could be found to be presently insane and removed to the criminal lunatic asylum, Broadmoor. That way, "the extremely undesirable discussion that is sure to follow in the newspapers and elsewhere" if the truth came out could be "nip[ped]…in the bud."[64]

The jurors in Shaw's case expected Wills to ask two questions, one about Shaw's guilt, and the other about his responsibility. On its face, this might seem absurd. If a man were not

[62] Wills to Ridley, 19 November 1897, HO 144/22922.
[63] George Miller to Wills, 19 November 1897, HO 144/22922.
[64] Wills to Ridley, 19 November 1897, HO 144/22922.

responsible for his crimes, then he could not rightly be considered guilty and punishable under the common law. Even if he could be proved to have committed the *actus reus*, the guilty act, without *mens rea*, a guilty mind, he could not be found guilty of a crime with a strong mental element like murder. When considered in this light, the Shaw jurors' belief that they could find Shaw guilty of murder but at the same time not responsible for murder was an outright contradiction. However, the history of the insanity defence in the nineteenth century shows that the Shaw jurors' confusion was justified. By 1897, it was not at all clear that guilt and irresponsibility were incompatible under English law.

Although the insanity defence had an ancient history under the common law, it was first formalized in legislation in 1800. The Criminal Lunatics Act 1800 was passed in the aftermath of the trial of James Hadfield, who shot at King George III while the King sat in his box at the Drury Lane Theatre.[65] The jury found Hadfield not guilty by reason of insanity. The 1800 Act was passed as legislators scrambled to prevent Hadfield from being released following his acquittal.[66] The Act stipulated that in cases of high treason, murder or felony, persons acquitted on the ground of insanity or found to be too insane to stand trial were to be detained until, as the famous phrase went, "His Majesty's pleasure shall be known."[67] The 1800 Act troubled the connection between insanity and irresponsibility. Although defendants could still be found not guilty by reason of insanity, just as they had been described under the common law, the effect of the 1800 Act was to impose a custodial sentence on men who were, technically at least, innocent. For some, especially those whose crimes were not capital, the consequences of becoming

[65] An Act for the safe custody of insane persons charged with offences (The Criminal Lunatics Act) (1800), 39 & 40 Geo. III, c. 94.
[66] For more on the Hadfield case, see: Richard Moran, "The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)," *Law and Society Review*, 1985, 487–519.
[67] An Act for the safe custody of insane persons charged with offences (The Criminal Lunatics Act) (1800), Preamble, 39 & 40 Geo. III, c. 94.

'pleasure men' were worse than a guilty verdict.[68] One nineteenth-century lawyer commented, "the confinement was so protracted that counsel are said to have frequently withdrawn a plea of insanity because punishment was less severe than a committal to an asylum."[69] Historian Nigel Walker writes, "[The Act] was an acquittal in name only, for it tacitly admitted that the doctrine of *mens rea* could not safely be applied to the insane. A criminal lunatic might be as morally innocent as a man who had done harm by accident or in self-defence, but the danger of *treating* him as innocent was too great."[70]

From 1800 to 1883, the statutory special verdict of acquittal by reason of insanity chipped away at the notion that irresponsibility obviated guilt. Although they were declared not guilty at trial, criminal lunatics – the phrase itself a contradiction in terms – were confined and punished for their crimes, at times more severely than those found guilty in court. The primary and crucial difference between responsibility and irresponsibility was that irresponsible killers could not be hanged. Still, under Victorian law irresponsibility did not connote innocence. In 1883, the Trial of Criminal Lunatics Act further confused the question of whether insanity and irresponsibility undermined guilt.[71] The 1883 Act changed the wording of the special verdict from 'not guilty by reason of insanity' to 'guilty, but insane.' Section 1 of the Act explained,

> The special verdict…is open to the objection that it declares a man to be at once *guilty* of an offence and not responsible for it. But the intention of the Legislature was to risk this anomaly in the hope that the formal conviction contained in the new verdict might have a deterrent effect on the partially insane; and, moreover, the whole law as to criminal lunatics proceeds on the assumption that a man may be a criminal and a lunatic at the same time.[72]

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[68] Mark Stevens, *Broadmoor Revealed: Victorian Crime and the Lunatic Asylum* (Barnsley, South Yorkshire: Pen & Sword Social History, 2013), 8.
[69] Sir Alexander Wood Renton, *The Law of and Practice in Lunacy: With the Lunacy Acts 1890-91 (consolidated and Annotated) ...* (Wm. Green, 1897), 795.
[70] Nigel Walker, *Crime and Insanity in England: The Historical Perspective* (Edinburgh: Edinburgh University Press, 1968), 81.
[71] The Trial of Criminal Lunatics Act (1883), 46 & 47 Vict, c. 38.
[72] The Trial of Criminal Lunatics Act (1883), s.1, 46 & 47 Vict, c. 38.

As had been the case in 1800, the 1883 Act came about in response to an attempted regicide. In 1882, Roderick McLean shot at Queen Victoria. He was found not guilty by reason of insanity and sent to Broadmoor. The Queen had weathered a series of attempts on her life, and McLean's acquittal, despite his confinement, galled her. She pressured Parliament to change the wording of the special verdict to reflect the seriousness of crimes committed by the insane, and the opprobrium that she, despite their madness, felt they richly deserved.[73]

By the time of Shaw's trial, then, it was no longer unthinkable for a man to be declared both guilty and irresponsible. Indeed, Wills had expected the foreman to announce that Shaw had been found 'guilty but insane', and was surprised when the foreman declared, simply, that Shaw was guilty. The foreman had waited for a chance to add 'but insane' to the jury's verdict, but the question had never come. But for the foreman's letter to Wills explaining the error, Shaw might have been hanged over a procedural mistake. The debacle over the wording of the verdict in Shaw's trial shows how distant the legal trappings of the insanity defence had become from the jurisprudential and philosophical concepts at the core of the doctrine of responsibility. Medical and legal theories about guilt and responsibility were important, but they operated within an institutional and procedural matrix that dictated their consequences. The Shaw jurymen misunderstood courtroom procedure, but they did not really misunderstand the law.

In order to avoid the shame of a scandal and the hassle of a retrial, Wills and Ridley needed to find a way to justify sparing Shaw's life. While Ridley, as Home Secretary, had the authority to commute Shaw's sentence by virtue of the prerogative, he needed a plausible justification for doing so. Shaw's crime was ugly. He cut an unsympathetic figure. The easiest solution, given the circumstances, was for Ridley to find Shaw insane and to hide him away in

[73] Eigen, *Witnessing Insanity*, 80–1. See also: Stephen White, *What Queen Victoria Saw: Roderick Maclean and the Trial of Lunatics Act, 1883* (Barry Rose Law, 2000).

Broadmoor. However, in order for Shaw to be moved to Broadmoor, Ridley needed medical certificates signed by two physicians certifying that Shaw was insane.

Two weeks after the trial, Shaw wrote to the Queen for the first time. He proclaimed his innocence and lamented his fate: "I wouldn't like to leave this life so soon I have had a lot of illness in my time my age is Twenty Five."[74] He told a different story to Dr. David Nicolson and Dr. Richard Brayn, who came from Broadmoor to interview him at Ridley's urgent request. Over the course of three hours, the doctors persuaded Shaw that his only chance of respite lay in a confession. A confession and remorse could justify the commutation of his sentence; refusal to admit his guilt would lead to the gallows. Shaw confessed. He told Nicolson and Brayn that he had been drinking on the day of the murder. He slipped the razor that the children's father used to cut the corns on his feet into his pocket and lured Alice and Albert into the oat field.[75] Then he led Albert, alone, deep into the grass. There, he sexually assaulted Albert and killed him before returning to Alice and attempting to rape her. Nicolson and Brayn were horrified. They reported to the Home Office that Shaw's crime had been one of "lust-murder developed out of an excessive indulgence in drink." Throughout their interview with him, Shaw had "maintained the utmost self-control and expressed no sorrow or regret in the matter" of the killing. He did not suffer from "an insane condition such as would imply the irresponsibility in [sic] the individual."[76]

Rather than admit publicly to any procedural irregularities and face the prospect of a fresh trial, Wills counseled the Home Office to commute Shaw's sentence to penal servitude for life. Doubt about Shaw's sanity would supply the perfect rationale, and would keep the jury

[74] Shaw's Petition to the Queen, 24 November 1897, HO 144/22922.
[75] Testimony of Francis Smith, R v Shaw, Judge's Notes of Evidence, 18 November 1897, HO 144/22922.
[76] Brayn and Nicolson Report on Shaw, 26 November 1897, HO 144/22922.

foreman quiet.[77] "I do not suppose," argued Wills, "that any one will care whether he is at Broadmoor or Dartmoor [prison], though those of the jury who may share the foreman's views…would of course raise their voices if he were to be hung."[78] Despite Nicolson and Brayn's insistence that Shaw was sane, and had been when he killed his nephew, Ridley decided to declare Shaw insane. Ridley and his office avoided embarrassment and Shaw's life was spared.

Wills clearly found the Shaw case interesting, and asked to be kept up to date on the prisoner's condition. "I find it increasingly necessary," wrote Wills, "to trust a good deal to my own impressions on these constantly recurring questions of lunacy, as to which some of the 'mad doctors' are scarcely sane themselves."[79] Wills' inclination to trust his gut when it came to insanity was apparent in his instructions to the jury. He told Ridley that he had "rather encouraged them not to be too nice about the rule as laid down that he must have been incapable of knowing right from wrong, if they thought the whole circumstances looked like the act of a man under the influence of homicidal mania."[80]

Wills' use of the term 'homicidal mania' suggests that he was, unsurprisingly for Wills, out of touch with the latest psychiatric developments of the day. Wills could probably blame the defence witness, Joseph Bayley, for mentioning the diagnosis during the trial. Bayley had asserted repeatedly that Shaw suffered from "homicidal mania", probably related to his epileptic fits.[81] At the time of the trial, Bayley had been the resident physician at St. Andrew's Hospital for thirty-three years, and before that the head of the Shropshire County Asylum.[82] He was in his

[77] Wills to Ridley, 29 November 1897, HO 144/22922.
[78] Wills to Ridley, 29 November 1897, HO 144/22922.
[79] Wills to the Home Office, 3 December 1897, HO 144/22922.
[80] Wills to Ridley, 18 November 1897, HO 144/22922.
[81] Dr. Bayley's testimony, Judge's Notes of Evidence, HO 144/22922.
[82] Dr. Bayley's testimony, Judge's Notes of Evidence, HO 144/22922.

sixties, and he would continue on at St. Andrew's until his death in 1913.[83] St. Andrew's, a private lunatic asylum, housed between three and four hundred and fifty patients divided, based on their relative means, into two classes.[84] Bayley spent more time worrying about his patients' access to amusements and trips to the sea (and outbreaks of diarrhea, especially in the asylum's earlier years) than he did about homicidal maniacs. By the time he appeared in Shaw's trial, monomania and partial insanity had became almost as unpopular among psychiatrists as the *M'Naghten* rules.

The term 'monomania' was coined and popularized by French physician Étienne Esquirol. Esquirol believed that there was a type of partial insanity that was characterized by "a partial lesion of the intelligence, affections or will."[85] Sufferers "seize[d] upon a false principle, which they pursue[d] without deviating from logical reasonings."[86] Esquirol's account of the disorder was clinical, but harrowing. A monomaniac might feel compelled to kill, even if his conscience rebelled. He might be rational, but his emotions and moral sense might be so impaired that he could offer "very reasonable explanations" for his strange and disturbing behaviour. On all subjects but the one at the centre of their delusions, patients could "think, reason and act, like other men."[87] Esquirol, like many French alienists, relied heavily on the concept of the lesion. A 'lesion' implied a physical injury or a wound – an abscess, a bruise, a tumour, a break. But where in the body might one look for a "lesion of the will"? Nineteenth-century mad doctors considered the question, and offered a variety of answers – the brain, the nerves, the skull. Esquirol's suggestion of the existence of a lesion *somewhere* in the body of the

[83] Arthur Foss and Kerith Lloyd Kinsey Trick, *St. Andrew's Hospital, Northampton: The First 150 Years (1838-1988)* (Granta Editions, 1989), 145.
[84] Ibid., 184.
[85] Esquirol, *Mental Maladies*, 320. [Originally published in French in 1838]
[86] Ibid. [Originally published in French in 1838]
[87] Ibid. [Originally published in French in 1838]

monomaniac reinforced his argument that insanity was a physical disorder, as urgent and as real as a broken leg.

In 1840, Charles Chrétien Henri Marc, physician to Louis Philippe I of France, published *De la folie, considérée dans ses rapports avec les questions médico-judiciaires*.[88] During McNaughten's trial, Monroe was asked if he had ever read the works of 'Monsieur Marcs [sic]' on non-delusional, 'moral' insanity. Monroe recalled that Marc had described "an insanity which irresistibly compels a person to commit particular crimes."[89] Marc was a defender of monomania as a legitimate, although maligned, diagnosis. He argued that medical men had undercut the integrity of monomania as a disease by rampantly over-diagnosing it. He felt that Étienne-Jean Georget, who had coined the term 'monomania' in 1817, had been too fervent in his evangelism, and had spurred criminal lawyers and judges to deny the existence of monomania.[90] Georget had described a type of monomania that manifested itself in a penchant for ferocity, a motiveless need to destroy living things, including human beings. Sufferers committed crimes with "all the refinements of the most execrable cruelty" and "became drunk on the blood of their fellow citizens."[91] Georget's homicidal monomania was immediately controversial. Joel Eigen describes how the diagnosis "propelled its victims into murder and its proponents into turbulent border wars" with both jurists and doctors.[92] Marc's book was a passionate defence, however, of the reality and tragedy of monomania. It was replete with accounts of cases in which helplessly

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[88] Charles Chrétien Henri Marc, *De La Folie, Considérée Dans Ses Rapports Avec Les Questions Médico-Judiciaries* (Paris: J.-B. Baillière, 1840).

[89] *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 28 April 2015), February 1843, trial of DANIEL M'NAUGHTEN (t18430227-874).

[90] Marc, *De La Folie, Considérée Dans Ses Rapports Avec Les Questions Médico-Judiciaries*, 229. For more on the early history of homicidal monomania, see: Eigen, *Witnessing Insanity*.

[91] Etienne Jean Georget, *De la folie, considérations sur cette maladie ...* (Chez Crevot, 1820), 110. Translation mine. In the original, Georget writes that monomania could consist in "un penchant à la férocité, dans un desir, un besoin sans motifs de détruire des êtres vivans [sic] et meme des humains." Men like Caligula, Nero and Louis XI "qui faisaient commettre des crime inouis, avec tous les raffinemens [sic] de la plus exécrable cruauté, qui s'enivraient du sang de leurs con-citoyens" should be considered monomaniacs of that type, according to Georget.

[92] Eigen, *Witnessing Insanity*, 74.

sick people killed those they loved under the influence of frightening and overwhelming delusions. While German courts, according to Marc, had long taken pity on monomania sufferers, the French had executed them.[93] It was, he thought, a national disgrace. He hoped that his work would rescue monomania from disrepute, and monomaniacs from the scaffold.

Some physicians, however, rejected the idea that insanity was divisible into neat categories, and attributable to precise defects in bodily systems. William Orange, who worked for many years as the superintendent of Broadmoor, had little patience for the niceties of nosology. For him, insanity was not a unitary phenomenon, parcelled out in larger or smaller proportions in particular cases. Orange was especially critical of the court's reliance on 'partial insanity' in the *M'Naghten* case. "[I]t is difficult to understand," complained Orange, "what is meant by a person being deprived of *all* self-control, while the *other* faculties are sound."[94] He celebrated the waning of medical interest in monomania, which he dismissed as a voguish diagnosis inspired by French aristocratic science.[95]

Orange singled out Marc for special criticism, especially for creating a detailed taxonomy of monomania, including 'monomanie démoniaque' (demonic monomania); 'aidoiomania' (erotic monomania); 'monomanie homicide' (homicidal monomania); 'kleptmanie' (kleptomania) and 'pyromanie' (pyromania).[96] Orange was disdainful of the *M'Naghten* decision. The 'partial insanity' with which McNaughten was diagnosed, and which saved his life, was borrowed from Marc and his supporters. Monomania had experienced a brief resurgence after the publication of *De la folie* – just in time for its diagnostic categories to be deployed in *M'Naghten.* Under those circumstances, Orange wrote, "It might well be conceded that rules so

[93] Marc, *De La Folie, Considérée Dans Ses Rapports Avec Les Questions Médico-Judiciaries*, 225.
[94] William Orange, "Criminal Responsibility in Relation to Insanity", in Daniel Hack Tuke, ed., *A Dictionary of Psychological Medicine* (London: J & A Churchill, 1892), 308.
[95] William Orange, "Criminal Responsibility in Relation to Insanity", in Ibid.
[96] Marc, *De La Folie, Considérée Dans Ses Rapports Avec Les Questions Médico-Judiciaries*, 259.

given to the world were scarcely likely to be of a character to be binding upon all posterity."[97] The result of this unhappy conjunction, however, had persisted in British law for nearly fifty years. *M'Naghten* was built on shaky medical foundations, and yet stubbornly resisted collapse. Orange called for an individualized approach to insanity and responsibility, in which doctors evaluated each defendant's particular constellation of impairments and abilities and jurists determined whether or not the defendant was 'punishable'. "There may be both criminality and insanity co-existing, and combined in an infinite variety of proportions," concluded Orange, "and every case should be approached with the object of making the best diagnosis possible."[98]

Orange was not alone in his disdain for monomania. The authors of the entry in D. Hack Tuke's *Dictionary of Psychological Medicine* (1892) on 'homicidal monomania', Paul Garnier and Henri Colin, were similarly unimpressed with the diagnosis. Garnier and Colin were Parisian doctors who were eager to distance themselves from mid-century French psychiatry. "The doctrine of monomania," they wrote, "has had its day."[99] And yet, the term 'monomania' belonged to the category of terms "which are more or less sacred by reason of long use…although it is recognised that they no longer correspond to the actual state of science."[100] Henry Maudsley, for his part, thought that monomania had been grossly over-diagnosed, and that jurists in cases like *M'Naghten* had given it "a more rigid definition than [was] conformable with nature."[101]

The dispute among psychiatrists over the existence of partial insanities like homicidal monomania shows just how difficult it was for judges, lawyers and jurors to apply medical

[97] William Orange, "Criminal Responsibility in Relation to Insanity", in Tuke, *A Dictionary of Psychological Medicine*, 318.
[98] William Orange, "Criminal Responsibility in Relation to Insanity", in Ibid., 320.
[99] Paul Garnier and Henri Colin, "Homicidal Monomania", in Ibid., 593.
[100] Paul Garnier and Henri Colin, "Homicidal Monomania", in Ibid.
[101] Maudsley, *Responsibility in Mental Disease*, 71.

understandings of insanity in the courtroom. Psychiatric knowledge changed quickly and radically over the course of the nineteenth century. Daniel McNaughten's monomania diagnosis, supported by Monroe and many of the other medical witnesses in the trial, was no longer fashionable among psychiatrists working fifty years later. And yet, *M'Naghten* had preserved it in amber as the archetypical diagnosis for insane criminals, even though few late-Victorian psychiatrists, Bayley excepted, believed that it had much medical integrity. Worse, the definition of legal insanity preserved in the *M'Naghten* rules was a caricature of monomania, far more limited and inflexible than the monomania that Monroe described in court in the spring of 1843. Given this medical uncertainty about the scientific validity of *M'Naghten*, Wills can be forgiven for encouraging the jury "not to be too nice about the rule as laid down [in *M'Naghten*]" in deciding whether or not Shaw was insane.[102]

In cases like Shaw's, it is difficult to draw a line between theory and practice, metaphysics and procedure. On a practical level, Shaw's jurors, probably in part due to a failure of clarity on Wills' part, misunderstood the form in which they had to express their verdict. But on a theoretical level, their division of the verdict into two questions – was Shaw guilty, and was he responsible – made sense. Pragmatically, Ridley and Wills needed to find a solution to the dilemma the jury error place them in. Ridley used the prerogative to avoid scandal, but also to reflect the jury's true finding, which was that they could not say for sure that Shaw was sane. Wills did not see his self-interest, or his lack of medical expertise, as fatal to his ability to assess Shaw's sanity. Wills was so overwhelmed by the flurry of opinions and theories advanced by mad doctors that he eschewed their expertise in favour of his own instincts and common sense. Even when it came to *M'Naghten*, the settled if controversial law, he encouraged his jurors to

[102] Wills to Ridley, 18 November 1897, HO 144/22922.

apply their own tests of insanity, and to form their own opinions.[103] *M'Naghten* can be understood as both a conceptual model of insanity, and as an element of legal procedure – in principle, its test had to be applied and satisfied in order for a defendant to escape the death penalty. Shaw's case shows that there was tremendous variation in how those involved in the judicial process thought about responsibility, sanity and the justice of the system.

Daniel McNaughten began his life in insane asylums in 1843. Before 1863, most criminal lunatics, including McNaughten, were housed in a special wing at Bethlem Hospital. Bethlem, known widely as 'Bedlam', was one of London's oldest hospitals. Founded in the thirteenth century, the institution had endured wars, fires, neglect, ignominy and three shifts in location by the time its criminal lunatic ward was closed. Bethlem slouched into the nineteenth century notorious for its violence and misery. D. Hack Tuke, reflecting on the state of Bethlem before 1815, rued "the absurdly antiquated medical treatment and the actual inhumanity practised there."[104] Asylum reformers Philippe Pinel and Tuke's own great-grandfather, William Tuke, had advocated non-restraint and non-violence in the treatment of the insane in the early nineteenth century. D. Hack Tuke was sure that "before that good men and true must have had misgivings, and even shuddered in their secret souls at the cruelties practiced upon the insane."[105] But it took until the 1820s and the heyday of British social reformism for the British legislature to take action to improve conditions at the hospital. If it had not, Tuke was sure that "the stones [of Bethlem and York] themselves would have called out."[106]

[103] For more on the importance of lay testimony in insanity trials in the first half of the nineteenth century, see: Eigen, *Witnessing Insanity*, 82.
[104] Daniel Hack Tuke, "Historical Sketch of the Insane" in Tuke, *A Dictionary of Psychological Medicine*, 25.
[105] Daniel Hack Tuke, "Historical Sketch of the Insane" in Ibid.
[106] Daniel Hack Tuke, "Historical Sketch of the Insane" in Ibid.

However, Bethlem's steady improvement from the turn of the century had not touched its criminal ward. John Charles Bucknill, a prominent alienist, wrote in an 1854 book on criminal insanity,

> [It is] a place which has been justly referred to, as a *receptacle* of insane criminals. It is not a modern prison, for there is no corrective discipline; it is not an hospital, for suitable treatment is impossible; it is not an asylum for the relief and protection of the unfortunate, for it is one of the most gloomy abodes to be found in the metropolis. It is simply a *receptacle*; into which the waifs of criminal law are swept, out of sight and out of mind.[107] [emphasis original]

The criminal ward at Bethlem was overcrowded, understaffed, and embarrassing. For years, Parliament debated what to do with its troublesome residents. Criminal lunatics were considered too dangerous to be released, and too disruptive to be housed in ordinary asylums. Finally, the Criminal Lunatics Asylum Act (1860) provided for a new criminal institution: Broadmoor. An army of convict labourers built the hospital, a sinister redbrick pile, amid the tall pines of the Crown Estate of Windsor Forest.[108] When the new asylum opened, the criminal lunatics of Bethlem, including Daniel McNaughten, were bustled out of London to their new home in the Berkshire woods.

Like many people who were removed to a lunatic asylum under a criminal warrant, Daniel McNaugthen would never be released.[109] His doctors at Bethlem described their patient as timorous and secretive about his delusions. Even after eleven years on the ward, his attendants could only glean that he believed that he was being persecuted by someone or something, real or imagined. McNaughten's trial was sensational, but his life was quiet, and sad. "If a Stranger walks through the Gallery," wrote one physician, "he at once hides in the Water Closet or in a

[107] John Charles Bucknill, *Unsoundness of Mind in Relation to Criminal Acts* (London: Samuel Highley, 32, Fleet Street, 1854), 119.
[108] Stevens, *Broadmoor Revealed: Victorian Crime and the Lunatic Asylum*, 6.
[109] Smith, *Trial by Medicine*, 23.

Bed room [sic] and at other times he chooses some darkish corner where he reads or knits."[110] After twenty years at Bethlem, McNaughten was transferred to Broadmoor. Near the end of March 1864, two days after his arrival in Berkshire, McNaughten's doctor reflected on his new patient. McNaughten was "a native of Glasgow, an intelligent man."[111] When questioned about his case, McNaughten deferred to the opinion of the court on both his sanity and the morality of his crime. McNaughten, according to his doctor, "states that he must have done something very bad or they would not have sent him to Bethlem […] When asked whether he now thinks that he must have been out of his mind – he replies 'Such was the Verdict – the opinion of the Jury after hearing the Evidence.'"[112] McNaughten's health faded quickly at Broadmoor. He suffered from heart and kidney disease, rheumatism and anemia. He spent his last months bedridden, pale and puffy. He "gradually sank and died" in the middle of the night in the spring of 1865, at the age of fifty-two.[113]

After Shaw's sentence was commuted, he was moved from prison directly to Broadmoor. Like many 'pleasure men', Shaw lived at the asylum for decades. His Home Office medical file is filled with stamps, one for every year that he spent there. Each stamp described his bodily condition as "poor" and his mental condition, "demented." In 1936, one of his doctors wrote that Shaw's health had been so unfailingly poor for so many years that it was not worth evaluating him – and, anyway, he "would probably not appreciate being moved to any other Mental Hospital." In 1942, a doctor noted no change: "He is now about 71 and it seems that he will have to remain at Broadmoor for the rest of his days."[114] Shaw died of heart failure at

[110] Copy of Bethlem case notes, 21 March 1854, Daniel MacNaughten Case File, BRO D/H14/D2/2/1/75/46.
[111] Copy of Broadmoor case notes, 28 March 1864, Daniel MacNaughten Case File, BRO D/H14/D2/2/1/75/46.
[112] Copy of Broadmoor case notes, 28 March 1864, Daniel MacNaughten Case File, BRO D/H14/D2/2/1/75/46.
[113] Copy of Broadmoor case notes, 3 May 1865, Daniel MacNaughten Case File, BRO D/H14/D2/2/1/75/46.
[114] Medical summary, Case of James Shaw (1897), HO 144/22922.

Broadmoor on 14 February 1947 at the age of seventy-five, having spent nearly fifty years at the asylum.[115]

James Shaw's case offers insight into some of the legal difficulties of assessing a defendant's responsibility for his actions. The special verdict was confusing, especially after 1883. The *M'Naghten* rules were controversial and disliked by both psychiatrists and even judges, although often on different grounds. Psychiatrists felt that *M'Naghten* was excessively narrow and out-of-step with medical knowledge, which was rapidly evolving toward a model of insanity that did not require cognitive disturbances, or at least obvious delusions, for its diagnosis. The mandatory capital sentence for murder meant that government officials had to oversee and approve every murder conviction. The prerogative empowered the Secretary of State to dispense mercy at his discretion, which usually entailed a reconsideration of the defendant's legal responsibility, and moral culpability, for his crime. Assessing a person's responsibility for his crime was a complex process that was performed again and again, by medical experts, judges, jurors and politicians. Responsibility had philosophical dimensions, but was also a routine element of judicial procedure. Even men like Wills, who were not inclined toward abstract theorizing, had to grapple with responsibility in order to do their jobs. Responsibility was both an impossible question – who could claim to know how a man's brain worked, or whether he was really free to choose his behaviour? – and one that needed to be answered in order for the wheels of English justice to turn.

What Shaw's case leaves largely obscure is the community of psychiatric professionals who evaluated defendants before and after trial, and whose institutions received them after their convictions. In his essay on the concept of the 'dangerous individual' in nineteenth-century

[115] Notice of Death, 17 February 1947, Case of James Shaw (1897), HO 144/22922.

forensic psychiatry, Foucault argues that psychiatrists sought "very stubbornly to take their place in the legal machinery" by pathologizing criminality.[116] He describes early nineteenth-century diagnoses like monomania and its sub-diagnosis, homicidal mania, as "great fiction[s]" cooked up by psychiatrists hungry for professional prestige and judicial authority.[117] They were abetted in this scheme by jurists who were overcome by the logic of penal reform, in which confinement and discipline steadily replaced the spectacular violence of earlier regimes of punishment.[118] Foucault's account of nineteenth-century psychiatry as a seamless, cynical "knowledge-system" has coloured histories of psychiatry and, especially, of criminal insanity.[119]

Nineteenth-century European law, science and medicine became increasingly preoccupied with the elaboration of laws governing not only the universe, but also human minds and bodies. Psychiatry emerged as a distinct medical specialty, and its practitioners were eager to assert their professional parity with physicians who studied better understood, and more obviously physical, parts of the body. Psychiatrists with expertise in criminal insanity tended to oppose *M'Naghten* because, they felt, it stemmed from a conservative judicial plot to divorce responsibility and the legal definition of insanity from medical knowledge about the mind and the consequences of brain disease. However, Foucault was wrong to presume that psychiatrists all agreed about the proper borders of their discipline, or that they all wanted to muscle their way into courtrooms in pursuit of professional acclaim. Both jurists and psychiatrists knew that they worked in the shadow of the gallows. The failure to prove a defendant's insanity, and his irresponsibility, in court meant a death sentence. It was a burden that weighed heavily on

[116] Michel Foucault, "About the Concept of the 'Dangerous Individual' in 19th-Century Legal Psychiatry," trans. Alain Baudot and Jane Couchman, *International Journal of Law and Psychiatry* 1, no. 1 (1978): 6.
[117] Ibid.
[118] Ibid., 9.
[119] Ibid., 13. For works on insanity in a Foucauldian vein, see: Smith, *Trial by Medicine*; Eigen, *Witnessing Insanity*; Sadowsky, *Imperial Bedlam*; Vaughan, *Curing Their Ills*.

Victorian psychiatrists. Perhaps heavier still was their duty to care for the criminal lunatics who were too dangerous to be released, and too mad to hang.

The Medico-Psychological Association was the primary professional society for Victorian psychiatrists. The Association began as the Association of Medical Officers of Asylums and Hospitals for the Insane, founded in 1841. Membership in the Association was at first restricted to medical officers who worked in asylums.[120] For the first several years of its existence, the Association's meetings were sparsely attended. Sometimes, only three or four members gathered, always at an asylum, to discuss conditions at their institutions and advances in the knowledge and treatment of mental disease.[121] Other years, poor travel conditions meant that no meeting was held at all. But by the early 1850s, membership rates and interest had improved. In 1853, the Association published the first issue of the *Asylum Journal*. The title of the journal reflected the steady expansion of the Association's sense of its mission and the professional identities of its members. Within two years, it had been rebranded as the *Asylum Journal of Mental Science*. In 1858, the journal became the *Journal of Mental Science*.[122] The Association also shifted its focus away from asylum management and toward the study of mental illness as a distinct medical field. It became the Medico-Psychological Association in 1865.[123]

The members of the Medico-Psychological Association often cut their professional teeth by working in public or private lunatic asylums. The physicians who oversaw these institutions were keenly aware of how challenging it was to describe and diagnose a prisoner, in a jail cell, in

[120] Thomas Bewley, *Madness to Mental Illness: A History of the Royal College of Psychiatrists* (Trowbridge, Wiltshire: Cromwell Press Ltd., 2008), 2.
[121] Ibid., 15.
[122] Ibid., 17.
[123] The Association would acquire the royal charter in 1926, becoming the Royal Medico-Psychological Association. In 1971, it was granted a new charter that established it as the Royal College of Psychiatrists. For more on the history of the Association, see: Bewley, *Madness to Mental Illness: A History of the Royal College of Psychiatrists*.

the days and hours before a criminal trial, and to defend that diagnosis on the witness stand. Asylum superintendents spent their days visiting patients, supervising orderlies, ordering autopsies, corresponding with government officials and distraught relatives, and travelling the country to evaluate purportedly insane criminals as they awaited their trials for capital offences. Criminal insanity was, for them, more than just a philosophical or scientific conundrum. It was their livelihood. For superintendents like David Nicolson, who interviewed James Shaw in 1897, and William Orange, whose encounter with his patient, Henry Dodwell, would effectively end his career, insanity was a site where principle and pragmatism often collided, and where the professional fate of mad doctors might demand deference to legal definitions of insanity.

The case of the Reverend Henry John Dodwell provides a glimpse life inside the gates of Broadmoor, and shows how asylum-based psychiatrists fit into legal debates about responsibility and insanity. Dodwell was arrested in the winter of 1878 for firing a pistol at Sir George Jessell, the Master of the Rolls, as he stepped out of his Hansom cab at the courthouse.[124] Jessell recognized Dodwell immediately. Dodwell had been, until recently, the master of an elite school in Devonshire. He was dismissed in 1876 on allegations of misconduct, but refused to leave the master's residence. When the school's trustees tried to force him to vacate the house, Dodwell went to court. Jessell was the judge in the case, and remembered that Dodwell had quarreled with his solicitor and had insisted on defending himself. It had not gone well. "Like most persons who plead their own cause," recalled Jessell, "he had not quite understood the legal points, but he made a very long harangue to me with reference to his grievances."[125]

[124] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.0, 15 December 2014), March 1878, trial of HENRY JOHN DODWELL (52) (t18780311-365).
[125] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.0, 15 December 2014), March 1878, trial of HENRY JOHN DODWELL (52) (t18780311-365).

A year later, Dodwell was back. He had managed to secure a position as a chaplain at an industrial school in Brighton, but had been fired again. In an overwrought petition to the Queen, Dodwell claimed that the board of Guardians of Brighton had turned against him after he pointed out some irregularities in the school's accounts. Dodwell decried his school's plans to admit illegitimate children, and was aghast that two employees whom the school matron had "caught in a bed room almost in the very act" had not been dismissed.[126] "Your suppliant," Dodwell complained, "was then accused by the Guardians of Brighton of being 'defiant', 'insulting', 'contumacious', 'insubordinate'."[127] He was even more deeply wounded when a lawyer at the Brighton Bench of Magistrates was allowed to call him "'a perfect nuisance' without rebuke in open Court" when he sought legal relief from the Guardians' persecution.[128] Foiled in Brighton, Dodwell returned to the Court of Chancery in London, again representing himself and, again, trying Jessell's patience. "He recounted to us his diverse grievances, and the efforts he had made to obtain redress and the way in which the world in general had conspired against him," Jessell testified. [129] The judge let him ramble, as he "felt it was useless" to try to stop him.[130] The next time Jessell saw Dodwell, he was in the Rolls Yard in Chancery Lane, holding a gun.

Dodwell, true to form, represented himself at his trial for attempted murder. He strutted and blustered, and proclaimed himself a victim of vicious lies and judicial incompetence. "I have come to the most unwelcome conclusion," wrote Dodwell in a letter that was read aloud at trial, "that I can gain a hearing, not a grand thing for any man in any country, only by breaking the

[126] Dodwell's petition to the Queen, 17 August 1877, HO 45/9418/58101.
[127] Dodwell's petition to the Queen, 17 August 1877, HO 45/9418/58101.
[128] Dodwell's petition to the Queen, 17 August 1877, HO 45/9418/58101.
[129] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.0, 15 December 2014), March 1878, trial of HENRY JOHN DODWELL (52) (t18780311-365).
[130] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.0, 15 December 2014), March 1878, trial of HENRY JOHN DODWELL (52) (t18780311-365).

law."[131] In a long statement to the jury, Dodwell argued that he had merely shot at Jessell in order to have his day in court, and that he hoped the judge would convey his apologies to the Queen. The court decided – without calling medical experts to testify – that Dodwell was insane.[132] Dodwell had eschewed defence counsel and was adamant that he was perfectly sane, but he struck his judges as manifestly unhinged. The jury found Dodwell not guilty of attempted murder – his goal was to draw attention to his case and not to kill, and there was some dispute over whether the pistol was even loaded. On the charge of common assault, Dodwell was found not guilty by reason of insanity. He was ordered to be detained indefinitely as a criminal lunatic.[133]

Dodwell shot at Jessell on 22 February 1878. The next day, he was formally admitted to Broadmoor asylum.[134] At the time, Dodwell was fifty-two years old and the father of four children. He was well educated, and apparently rational. On his Broadmoor intake form, under "Chief Delusions or Indications of Insanity", one of his physicians wrote, "None." [emphasis original][135] One of Dodwell's old Oxford chums, a chaplain at the Colney Hatch lunatic asylum in Middlesex, asked the Broadmoor authorities if he might visit and bring his unfortunate friend "some little luxury."[136] "No doubt, he has been very wrongheaded in his line of conduct," wrote the chaplain, "but still, assuming that his complaint was substantial, there was nothing illogical in the persistency with which he sought legal redress" [emphasis original].[137]

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[131] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.0, 15 December 2014), March 1878, trial of HENRY JOHN DODWELL (52) (t18780311-365).
[132] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.0, 15 December 2014), March 1878, trial of HENRY JOHN DODWELL (52) (t18780311-365).
[133] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.0, 15 December 2014), March 1878, trial of HENRY JOHN DODWELL (t18780311-366).
[134] Schedule A form, Rev. Henry John Dodwell Case File, BRO D/H14/D2/2/1/936A.
[135] Schedule A form, Rev. Henry John Dodwell Case File, BRO D/H14/D2/2/1/936A.
[136] Henry Hawkins to Dr. Orange, 4 April 1878, Rev. Henry John Dodwell Case File, BRO D/H14/D2/2/1/936A.
[137] Henry Hawkins to Dr. Orange, 4 April 1878, Rev. Henry John Dodwell Case File, BRO D/H14/D2/2/1/936A.

Although he was pompous and ill-tempered, Dodwell had many friends. They urged medical men to interview Dodwell, with an eye to proving his sanity and securing his release. Lyttelton Stewart Forbes Winslow was a well-known, if slightly eccentric, psychiatrist.[138] Winslow held degrees from Oxford and Cambridge, and lectured on insanity at Charing Cross Hospital Medical School. The doctor met with Dodwell at Broadmoor. In his medical report, submitted to the Home Secretary, Winslow described Dodwell as an upstanding, if tragic, figure, and declared him to be "most rational in every respect."[139] Winslow's opinion was controversial. In the 1880 edition of his authoritative *Manual of Medical Jurisprudence*, Alfred Swaine Taylor, a founder of British forensic medicine, doubted Winslow's impartiality and implied that he had been less than public-minded in his defence of Dodwell. Taylor also argued that the court had been right to find Dodwell insane without expert medical evidence. If experts had been called to court, Taylor wrote, "There would have been the usual conflict of opinion. Some physicians would have pronounced him sane, and others insane and irresponsible. This would only have confused the jury."[140]

Winslow, however, was unshakeable. He took to the pages of the *British Medical Journal* to defend both himself and his patient. "Every Englishman has a perfect right to bring forward his grievance in any way, and as often as he sees proper," Winslow declared. "[I]f all the unfortunate individuals who continue to pin their faith on hopeless causes were to be considered as lunatics our asylums would not be large enough to contain them. Many industrious lawyers, who make [a] harvest out of these persons, would have to beg for their bread."[141] Dodwell,

[138] For more on Winslow's involvement in the Jack the Ripper controversy, and his outlandish theories about the identity of the murderer, see: L. Forbes Winslow, *Recollections of Forty Years* (London: John Ouseley, Ltd., 1910).
[139] Forbes Winslow's report on Dodwell's condition, Spring 1878, Rev. Henry John Dodwell Case File, BRO D/H14/D2/2/1/936A
[140] Taylor, *A Manual of Medical Jurisprudence*, 808.
[141] Forbes Winslow, "The Case of the Rev. Mr. Dodwell", Correspondence, *British Medical Journal* (1878), 2, 271.

according to Winslow, was an English patriot – a "gentleman and a scholar" – who refused to surrender his right to a fair trial despite judicial persecution and hypocrisy.[142] J.M. Winn, a physician and member of the Medico-Psychological Association, also evaluated Dodwell and found him sane.[143] Winn praised Dodwell for his learning and intelligence, and argued that his crime was an act of desperation, motivated by "extreme poverty."[144] Winn reported that Dodwell told him "that if he must go to the workhouse, he preferred that it should be through the criminal dock."[145] Both Winn and Winslow published their reports on Dodwell in the *Journal of Psychological Medicine*, of which Winslow was the editor.[146]

Other doctors also evaluated Dodwell's sanity. Orange, the Superintendent of Broadmoor, and Dr. R.M. Gover, who had recently been the Medical Inspector of Prisons for the Home Office, wrote their own report on Dodwell. They acknowledged that it was important for medical men to distinguish insanity from idiosyncrasy, and accepted that mistaken beliefs were not necessarily delusions. However, their position on Dodwell was unambiguous. Where Winslow had seen perseverance and devotion to truth and justice, Orange and Gover diagnosed pathological obsession. What Winslow celebrated as Dodwell's calm rationality, Orange and Gover decried as sick self-regard. Dodwell, they wrote,

> Is lost in a sense of his own importance […]; he does not regret having wasted six years in endeavouring to prove that he was in the right, notwithstanding that he and his family were brought to the verge of beggary in the attempt; there was nothing wrong, in his opinion, with committing a breach of the Peace by firing at the Master of the Rolls; and he is determined to continue the struggle, at all costs […]. His first duty, in short, is to himself. Such is the state of mind at which he

[142] Forbes Winslow, "The Case of the Rev. Mr. Dodwell", Correspondence, *British Medical Journal* (1878), 2, 271.
[143] Winn's Report on Dodwell's Condition, 22 March 1878, Rev. Henry John Dodwell Case File, BRO D/H14/D2/2/1/936A,.
[144] Winn's Report on Dodwell's Condition, "The Case of the Rev. Mr. Dodwell", *The Journal of Psychological Medicine and Mental Pathology*, 4 (1878), 324.
[145] Winn's Report on Dodwell's Condition, "The Case of the Rev. Mr. Dodwell", *The Journal of Psychological Medicine and Mental Pathology*, 4 (1878), 324.
[146] "The Case of the Rev. Mr. Dodwell", *The Journal of Psychological Medicine and Mental Pathology*, 4 (1878): 321-325.

> has arrived, and so completely is he subjugated by the despotic sway of a single idea and a selfish aim, that he is incapable of being influenced by any magnanimous motive.[147]

Orange and Gover warned the Secretary of State that Dodwell was a "dangerous lunatic", who must not be allowed to leave their custody.[148]

Orange had spent many years living among criminal lunatics. He was a recognized authority on the subject, and was confident that Dodwell, despite his airs and his vehement protests, belonged at the asylum. Orange was the second Superintendent of Broadmoor. He was upright, resolute, the scion of an old Huguenot family.[149] David Nicolson, his colleague who would later evaluate James Shaw at the Home Secretary's request, wrote that Orange's natural reserve "together with a searching but not unkindly look from his clear eye, rather gave strangers the impression that they were 'psychologized.'"[150] Orange came to Berkshire as Deputy Superintendent in 1862, just before the first patients were transferred there from Bethlem. His supervisor, Dr. Meyer, was the institution's first Superintendent. In the spring of 1863, Broadmoor's first patients – ninety-five women transferred from other lunatic asylums – arrived in Berkshire. The first male patients were brought to Broadmoor from Bethlem and its overflow unit, Fisherton House, in February of 1864. By the end of the year, there were 309 patient-prisoners at Broadmoor.[151]

Life at Broadmoor was dangerous, especially in the early years. Patients filled its halls before its high perimeter walls could be completed, and patients routinely hopped the low fences and hedges to freedom. While most were eventually recaptured after days or weeks on the lam, a

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[147] Orange and Gover's report, 10 July 1878, Rev. Henry John Dodwell Case File, BRO D/H14/D2/2/1/936A.
[148] Orange and Gover's report, 10 July 1878, Rev. Henry John Dodwell Case File, BRO D/H14/D2/2/1/936A.
[149] Nicolson, William Orange's obituary, HO 144/158/A41007, p. 1, 5.
[150] Nicolson, William Orange's obituary, HO 144/158/A41007, p. 7.
[151] Ralph Partridge, *Broadmoor: A History of Criminal Lunacy and Its Problems* (London: Chatto & Windus, 1953), 69.

few disappeared permanently into the countryside.[152] Broadmoor was also violent. More than half of its inmates were killers or attempted killers who had been confined indefinitely, at 'Her Majesty's Pleasure.'[153] One Sunday in 1866, while Meyer kneeled to receive communion in the Broadmoor chapel, a patient struck him in the head with a stone slung in a handkerchief. Meyer never fully recovered.[154]

Orange replaced Meyer as Superintendent in 1870, and devoted his career to transforming the care and management of the criminally insane into an orderly system. Orange reached out to doctors around Britain and France in his efforts to develop standards of patient care and, especially, of professional conduct in relation to questions of insanity and law.[155] In 1876, Nicolson joined Orange as Deputy Superintendent. The two had what Nicolson described in Orange's obituary as a "close and unbroken friendship."[156] Nicolson especially admired Orange's knack for understanding his patients, no matter how shocking their crimes or disordered their thinking. Orange, Nicolson wrote, had a special capacity for "penetrating the intimate workings of the mind of accused persons, and his wide experience… made him invaluable in the administration of justice at this angle, where evidence has to be weighed in combination with personal examination, and where the issues of life and death may be said to be involved."[157]

Orange might have been skilled and experienced in his dealings with the criminally insane, but Broadmoor – as the unfortunate Meyer had discovered – was a dangerous place. On 6 June 1882, four years after his admission to the asylum, Dodwell exacted his revenge. While

[152] Ibid., 69–71.
[153] Ibid., 72.
[154] Nicolson, William Orange's obituary, HO 144/158/A41007, p. 1-2.
[155] Nicolson, William Orange's obituary, HO 144/158/A41007, p. 2.
[156] Nicolson, William Orange's obituary, HO 144/158/A41007, Kew, p. 2.
[157] Nicolson, William Orange's obituary, HO 144/158/A41007, Kew, p. 3.

Orange looked over a stack of letters, Dodwell crept up beside him and swung a heavy stone, wrapped in a handkerchief, into the doctor's skull. Dodwell had read reports of Orange's recent testimony in a case that resembled his own, and he hoped that the attack would trigger a coroner's inquest where he might, yet again, air his grievances.[158] Like Meyer, Orange never recovered. Orange's friend, H. Charlton Bastian, wrote to the Home Office that the attack had "produced such effects as to make it in the highest degree improbable that [Orange] will ever be able to practice his profession again in any mode whatsoever."[159] The assault shook his confidence and rattled his nerves. Even after a year's sick leave, Orange struggled when he returned to work. In addition to running the asylum, he travelled across the country to interview and diagnose men and women accused of capital cases whose sanity was in doubt. In his last year at Broadmoor alone, Orange advised in thirty-three capital cases.[160] Despite the efforts of the Home Office to persuade him to stay on, Orange retired in 1886, at the age of fifty-two. Nicolson assumed his position as Superintendent.[161]

Dodwell loathed Broadmoor. To him, the psychiatrists who ran the institution were jailers, antagonists and brutes. In one of many letters to his solicitor, Dodwell wrote, "Dr. Orange is crafty, polished, oily, able to lie with consummate grace and neatness without moving a muscle but still has the unsteady eye and the feigned hollow voice of the untrustworthy."[162] Dr. Nicolson, meanwhile, was simply "an uncouth Scotch man [sic]."[163] Twenty years later, at the time of his interview of the child-killer, Shaw, David Nicolson would be an old hand at managing a criminal insane asylum. But in 1878, he was relatively new to Broadmoor.

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[158] Nicolson, William Orange's obituary, HO 144/158/A41007, p. 4.
[159] H. Charlton Bastian to the Undersecretary of State, Home Office, 20 April 1886, HO 144/158/A41007.
[160] E. Leigh Pemberton to Sir Warwick Morshead, 24 March 1886, Broadmoor Letterbooks, BRO D/H14/A1/2/5/5 (1884-1897), p. 110,.
[161] Nicolson, William Orange's obituary, HO 144/158/A41007, Kew, p. 4.
[162] Dodwell to James Bray, Esq., 18 June 1878, Rev. Henry John Dodwell Case File, BRO D/H14/D2/2/1/936A.
[163] Dodwell to James Bray, Esq., 20 May 1878, Rev. Henry John Dodwell Case File BRO D/H14/D2/2/1/936A.

Nicolson was born on Christmas day in Auchlethen, Aberdeenshire.[164] He had a thick Scottish accent and a disarming forthrightness that even Dodwell could not entirely resist. Nicolson received his medical degree from the University of Aberdeen in 1866, when he was only twenty-two. He then spent several years working as an assistant surgeon in prisons before joining Orange at Broadmoor in 1876. Nicolson did his best to liven up the asylum. He formed an asylum choral society, and even performed in the staff-patient joint production of *HMS Pinafore*.[165] While Dodwell saw Orange as his equal and his nemesis, he grudgingly appreciated Nicolson's rougher charms. "He is blunter in his nature and has had to deal with Convicts (I believe)," wrote Dodwell, who was pleased that Nicolson occasionally apologized when accused of insulting his sensitive patient.[166]

Nicolson did not escape Broadmoor unscathed. In the fall of 1884, a patient injured him so severely that he was forced to take a three-month medical leave.[167] Nicolson was attacked again in November 1889, requiring a six-week leave of absence.[168] Nicolson persisted as Superintendent until 1896, when he was appointed Lord Chancellor's Visitor in Lunacy. At the time, he was widely hailed as an expert on criminal insanity. His obituary in *The Lancet*, after his death in 1932 at the age of eighty-seven, described him as "the first authority in the country on the way to deal with the insane subject when breaking the law."[169] The editors were especially sad to lose him, as he had long been their advisor on matters of criminal insanity. Nicolson argued consistently for agreement and cooperation between doctors and lawyers. He warned his

[164] Nicolson's obituary, *The Lancet* 220 (1932), p. 100.
[165] Stevens, *Broadmoor Revealed: Victorian Crime and the Lunatic Asylum*, 16.
[166] Dodwell to J. Bray, Esq., 18 June 1878, Rev. Henry John Dodwell Case File, BRO D/H14/D2/2/1/936A,.
[167] Home Office to Broadmoor Board of Supervision, 22 November 1884, Broadmoor Letterbooks, BRO D/H14/A1/2/5/5 (1884-1897), p. 39,.
[168] Home Office to Broadmoor Board of Supervision, 5 November 1889, Broadmoor Letterbooks, BRO D/H14/A1/2/5/5 (1884-1897), p. 266,.
[169] Nicolson's obituary, *The Lancet* 220 (1932), p. 100.

colleagues to beware of feigned insanity, and always to keep public safety in mind. "His views were firm and unprejudiced," they wrote, "his warnings against mawkishness were due to no lack of humanity, but to a keen sense of the responsibility of the law towards the citizen."[170]

Dodwell and his supporters complained that Orange's report, in which he had described his patient as 'selfish' and 'lost in a sense of his own importance', was not independent, and demanded a third set of medical opinions. Maudsley and G.F. Blandford, both active members of the Medico-Psychological Association, were called to Broadmoor.[171] In their report, they declared that Dodwell was undoubtedly insane, and that he was "labouring under a common form of insanity which is characterized by delusions of persecution and suspicion."[172] Dodwell was convinced that Orange, Gover and everyone else at Broadmoor and at the Home Office were conspiring to keep him in custody, and offered overblown accounts of trivial slights as his only proof.[173] Although Dodwell clearly told Maudsley and Blandford why he shot Jessell, he could not explain how the shooting was supposed to help his cause, and could not understand that it had backfired. "Having regard then to the fixed delusions under which he has laboured for some time and still labours, to the strong and engrossing hold which they have upon his mind, […] and to his incapacity to see either the folly or the wrong of what he has done," Maudsley and Blandford strongly recommended that Dodwell remain at Broadmoor.[174]

Maudsley was a leading light of the London psychiatric firmament. He wrote often and at length about the philosophical and medical dimensions of insanity, and was among the most

[170] Nicolson's obituary, *The Lancet* 220 (1932), p. 101.
[171] Mr. Assheton Cross, HC Deb 25 February 1879 vol 243 cc1748-9.
[172] Maudsley and Blandford's report, 17 September 1878, Rev. Henry John Dodwell Case File, BRO D/H14/D2/2/1/936A.
[173] Maudsley and Blandford's report, 17 September 1878, Rev. Henry John Dodwell Case File, BRO D/H14/D2/2/1/936A.
[174] Maudsley and Blandford's report, 17 September 1878, Rev. Henry John Dodwell Case File, BRO D/H14/D2/2/1/936A.

passionate critics of *M'Naghten*. He was the joint editor of the *Journal of Mental Science* from 1863 to 1878, lectured on insanity at St. Mary's Hospital from 1868 to 1881, and was a professor of medical jurisprudence at University College London from 1869 to 1879.[175] He wrote eleven books about insanity and medical jurisprudence. Maudsley was rich and well-connected. He maintained a successful private practice. His wife, Caroline, was the youngest daughter of John Conolly, the famous alienist and leader of the movement to abandon restraint and other violence in the treatment of the insane.[176] They married the year that Conolly died.

It is no surprise that Maudsley diagnosed Dodwell as insane. As a lifelong critic of *M'Naghten*, he tended to take a broad view of insanity in which subtle eccentricities and perversions could be evidence of profound mental disease. Maudsley was especially interested in the cases of those whose insanity was difficult to detect except by experts with years of experience in the field. These were the patients whose lives were threatened by the antiquated *M'Naghten* rules, to which Maudsley was unrelentingly hostile. "It is of great importance," wrote Maudsley, "then to recognise a borderland between sanity and insanity, and of greater importance still, not resting content with a mere theoretical recognition of it, to study carefully the doubtful cases with which it is peopled."[177] For Maudsley, the problem of distinguishing between sanity and insanity was technological, not metaphysical. He was certain that, someday, "the insensible movements of molecules [would] be as open to observation as [were] the molar

[175] "Maudsley, Henry (1835–1918)," T. H. Turner in *Oxford Dictionary of National Biography*, eee ed. H. C. G. Matthew and Brian Harrison (Oxford: OUP, 2004); online ed., ed. Lawrence Goldman, September 2010, http://www.oxforddnb.com/view/article/37747 (accessed December 18, 2014).
[176] "Conolly, John (1794–1866)," Andrew Scull in *Oxford Dictionary of National Biography*, eee ed. H. C. G. Matthew and Brian Harrison (Oxford: OUP, 2004); online ed., ed. Lawrence Goldman, May 2006, http://www.oxforddnb.com/view/article/6094 (accessed December 18, 2014).
[177] Maudsley, *Responsibility in Mental Disease*, 40.

movements of the heavens", and the physiological causes of insanity would be revealed.[178] Madness was as much a bodily disease as smallpox; it was just harder to diagnose.

Maudsley's criticism of *M'Naghten* circulated throughout the British imperial world. Robert Nelson was the staff surgeon of the HMS *Juno*, which sailed near Shanghai in 1876 and 1877. Edwin Stamp, a young seaman, argued violently with a messmate before collapsing in a fit of convulsions. He spent hours lashed into his own hammock, gripped by two delusions: "one that he was drowning, the other that he was riding a steeple-chase, but these shortly ceased and he sank into a deep sleep, only broken occasionally by some incoherent talking chiefly on 'horsey' subjects."[179] Stamp spent fifty-one days on the sick list. In his comments on the case, Nelson contemplated the grim fate that would have awaited Stamp if he had killed someone. In such an event, Nelson "should have had no data whereupon to assess irresponsibility, and the court and outraged country would no doubt have hanged the man as a warning not to give way to evil passions which the medical jurist can only interpret as 'don't be afflicted with epilepsy!'"[180] He continued, "Dr. Maudsley writes strongly on the iniquity of the present law of insanity by which many an irresponsible person is judicially hanged."[181] Nelson, afloat off the coast of Singapore, included a footnote citing the most recent edition of *Responsibility in Mental Disease*.

After Dodwell attacked Orange in 1882, he was removed from his relatively comfortable room in Block 2, where well-behaved patients were allowed to see visitors, to a cell in Block 1,

[178] Ibid., 44.
[179] Journal of Robert Nelson, Staff Surgeon, HMS *Juno*, China, 1[s] October 1876 – 31st December 1877, Records of the Admiralty, (ADM), The National Archives, Kew, ADM 101/197..
[180] Journal of Robert Nelson, Staff Surgeon, HMS "Juno", China, 1st October 1876 – 31st December 1877, ADM 101/197.
[181] Journal of Robert Nelson, Staff Surgeon, HMS "Juno", China, 1st October 1876 – 31st December 1877, ADM 101/197.

one of Broadmoor's 'back blocks' reserved for dangerous patients.[182] Dodwell continued his letter-writing campaign undaunted. According to Mark Stevens, the chief curator of the Broadmoor archives, Dodwell sent out eighty-four letters in 1883, one hundred and twenty in 1884, and sixty-two in the first five months of 1885.[183] Dodwell's paranoia about the conspiracy against him continued unabated over the years. Slowly, his friends and family fell away. He grew old and sick, and on 15 June 1900 he died of heart failure in the Broadmoor infirmary.[184]

Dodwell's case shows how little consensus there was among psychiatrists on the relationship between sanity and irresponsibility, or on the nature of mental illness. The judge and jury in his case considered him unquestionably mad – so mad, in fact, that they did not need the guidance of any medical experts in order to find him not guilty by reason of insanity. Winslow and Winn, however, thought that Dodwell was perfectly sane, and that he really had been wronged by a legal system that would not hear his grievances. Orange and Gover thought that he was insane and dangerous, and so did Maudsley and Blandford. In the end, Dodwell's vicious attack on Orange confirmed suspicions that he was volatile, conniving and hopelessly deluded. His removal to Block 1 signaled the death of any hope of Dodwell's release, although it seems he never realized it.

Shaw wound up at Broadmoor despite a murder conviction, and Dodwell, despite the fact that no medical witnesses testified at his trial. Others, like William Albert Norris, came to Broadmoor without ever standing trial. Norris was admitted on 20 June 1884. His intake form paints a grim, spare picture of what brought him to Berkshire. Dr. Orange, then Superintendent

[182] Mark Stevens, "Henry Dodwell" (2009) http: //www.berkshirerecordoffice.org.uk/albums/broadmoor/henry-dodwell/.
[183] Mark Stevens, "Henry Dodwell" (2009) http: //www.berkshirerecordoffice.org.uk/albums/broadmoor/henry-dodwell/.
[184] Mark Stevens, "Henry Dodwell" (2009) http: //www.berkshirerecordoffice.org.uk/albums/broadmoor/henry-dodwell/.

of Broadmoor, filled it out. Orange described Norris as a married labourer of thirty, with an "imperfect" degree of education.[185] Under 'Number of children born alive', Orange wrote "5"; under 'Number now living', "None."[186] Norris, in Orange's dispassionate summary, "killed his two [living] children, a girl aged 3 years and a boy aged 15 months, by stunning them with a rolling pin, and afterwards cutting their throats with a table knife."[187] After killing the children, Norris walked into Southwark Police Station and said, "I have just murdered my two children."[188] The police sergeant who found the children, Beatrice and George, testified at the coroner's inquest that their bodies were lying side by side on a bed, their heads hanging partly over the side, throats cut, wearing only "a night dress which was much discoloured by blood."[189]

Norris was confined at Clerkenwell to await his trial. Prison authorities soon came to suspect that their prisoner might be insane. Dr. Robert Mundy Gover, who had evaluated Dodwell's sanity in 1878, and Orange interviewed Norris in prison. Gover had made his career as a prison surgeon and from 1878 until the eve of his death in 1897, served as Medical Inspector of Prisons for the Home Office. Gover was gentle, unassuming and well known for his affability – not much of a theorist, but a dedicated civil servant.[190] He, the government's highest-ranking prison doctor, and Orange, as the Superintendent of Broadmoor, represented each of the institutions that might claim authority over Norris: the prison, and the asylum.

In his report on Norris, Gover explained that he and Orange had met with a surgeon, Mr. Gillins, who had been called to evaluate Norris' sanity after he suffered an attack of acute mania in 1882. The spell had passed in a few days, but Gillins and Norris' wife, Edith, both believed

[185] William Norris, Broadmoor intake form, Case of William Albert Norris, HO 144/529/A36056, Case of William Albert Norris.
[186] William Norris, Broadmoor intake form, Case of William Albert Norris, HO 144/529/A36056.
[187] William Norris, Broadmoor intake form, 20 June 1884, Case of William Albert Norris, HO 144/529/A36056 .
[188] Thomas Biggs' deposition, Coroner's Inquest, 20 May 1884, Case of William Albert Norris, Records of the Central Criminal Court (CRIM), The National Archives, Kew, CRIM 1/21/2.
[189] Thomas Biggs' deposition, Coroner's Inquest, 20 May 1884, Case of William Albert Norris, CRIM 1/21/2
[190] Obituary of Robert Mundy Gover, *The Lancet*, 1 (12 June 1897), 1644.

that something was seriously wrong with Norris.[191] Norris, according to his wife, was "never himself after his attack of mania", "shedding tears about trifles" and stealing.[192] It seemed to Gover that Norris' "volition was impaired and that he fell a victim to temptation."[193] Gover also thought that Norris' memory was weak, and that this was a sign of other, more sinister, intellectual impairments. Gover declared that Norris had been insane when he killed his children, and that he was "quite unable to defend himself against any charge whatsoever"; he was a proper candidate for removal to Broadmoor.[194] A few days after Gover filed his report, two prison medical officers signed a certificate authorizing Norris' transfer to Broadmoor on the grounds that he was too insane to stand trial.[195] Norris was transferred that day from prison to the asylum.

Norris was aggrieved that he had been denied what he saw as his right to a trial. In an 1886 letter addressed simply to "Wite all London", Norris wrote, in an orderly hand but with the inconsistent spelling of a labouring man, "hasking you kindley to Let me have a trile […] I tell you truley that I ham Inencince [innocent]."[196] Norris claimed that he had left his children alone in the house, and that he found them, dead, on his return. He had at first been resigned to hang, despite his innocence, because he did not care to live without his family. But he found life at Broadmoor intolerable. To be "keep under Lock and kee" without a trial was worse than death, and he prayed that the government would agree that his case warranted "a great deal of Studdy."[197]

[191] Gover's Report, 16 June 1884, Case of William Albert Norris, HO 144/529/A36056 .
[192] Gover's Report, 16 June 1884, Case of William Albert Norris, HO 144/529/A36056 . Norris was convicted of burglary in the fall of 1883: Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.2, 06 May 2015), September 1883, trial of WILLIAM ALBERT NORRIS (27) (t18830910-867).
[193] Gover's Report, 16 June 1884, Case of William Albert Norris, HO 144/529/A36056 .
[194] Gover's Report, 16 June 1884, Case of William Albert Norris, HO 144/529/A36056 .
[195] Medical certificate, 20 June 1884, Case of William Albert Norris, HO 144/529/A36056 . The physicians were Llewellyn Arthur Morgan and Philip Francis Gilbert, who were employed as prison surgeons.
[196] William Norris to the Home Department, 19 March 1886, Case of William Albert Norris, HO 144/529/A36056 .
[197] William Norris to the Home Department, 19 March 1886, Case of William Albert Norris, HO 144/529/A36056 .

Later that year, in another letter to the Home Office, Norris again demanded to be tried for his crime. He wrote,

> I have Been in this Asylem Over two years and I havent had a trile and I don't think heney judge or magraste [magistrate] knows Weather A Man his heanisente [innocent] or Gealtey [guilty] if thy Dont try the man I have never had a trile and I Should Like to know Weather heney one Can Say Weather I ham Esenent or Gealtey so I Can truly Say that I ham Esenent[198]

Norris felt that he was being denied his fundamental right to defend himself in court, and to vindicate his innocence. Like Dodwell, Norris was convinced that the fault lay, in part, with a justice system in which the superintendents of public asylums, like William Orange, profited from their guardianship of the insane. "Theare hare," complained Norris, "a Clarse of Men that his giting a living By keeping us here and they Wont [let us have] a trile Because they Well have to Bring us in Sane to take hour trile and that his Enouf hear as Bade as taking a Drop of Bloode From thear harts."[199] Norris worried that he would never be tried because, in order for a trial to happen, he would first have to be certified as sane enough to plead; Orange and other medical men would never allow a criminal lunatic to slip through their clutches, back into the world of the sane.

Unlike Dodwell, Norris eventually escaped the asylum. In November of 1899, Norris was about to mark sixteen years since his original commitment to Broadmoor. He wrote, as he had periodically through the years, to Ridley, who still served as Home Secretary.[200] Norris pleaded for a trial as his right as an Englishman: "I read in the Daily Papers that our Prieminister said that they was fighting for Equal Mens Rights and I aske you for a Engelishmum Right Eather a triale

[198] William Norris to the Home Department, Received 12 October 1886, Case of William Albert Norris, HO 144/529/A36056 .
[199] William Norris to the Home Department, Received 12 October 1886, Case of William Albert Norris, HO 144/529/A36056 .
[200] Ridley was the Secretary of State during the 1897 Shaw trial.

[or] my Liberty."[201] In the end, Norris got his wish. Dr. Brayn pronounced him sane in 1901, and provided him with a conditional discharge that allowed him to work at the Salvation Army Land Colony in Essex.[202] The Colony was a charitable scheme in which paupers, vagrants and other marginal men lived in dormitories and learned agricultural skills by working the land.[203] Norris had tended to the Broadmoor garden for some years, and Brayn thought he was ready to leave the asylum.[204] Norris did well at the Colony, although there was some concern about his drinking.[205] Two years later, he found a new position and was placed in the custody of his niece.[206]

Norris disappeared from the Home Office records after his 1903 discharge. His Broadmoor medical file suggests that he may have returned to the asylum some years later.[207] Norris spent nearly two decades confined at Broadmoor without ever pleading his case before a judge. He was at the mercy of a justice system in which administrators, including those who staffed the Home Office and Broadmoor itself, enjoyed virtually unfettered discretion in how they managed his care. Norris' complaints that his rights as an Englishman entitled him to a criminal trial went unheeded. He believed that his doctors were government stooges, intent on keeping him locked away for their own professional advancement. And yet, Norris eventually left Broadmoor a free man, even if he did eventually return. Norris' case reveals the often-overlooked population of untried criminal lunatics, the unpredictability of their fates within the justice system, and the importance of extra-legal authorities in assessing prisoners' sanity.

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[201] Norris to Ridley, 23 November 1899, Case of William Albert Norris, HO 144/529/A36056 .
[202] Norris Broadmoor medical form, 7 May 1901, Case of William Albert Norris, HO 144/529/A36056 .
[203] Henry Rider Haggard, *The Poor and the Land: Being a Report on the Salvation Army Colonies in the United States and at Hadleigh, England, with Scheme of National Land Settlement and an Introduction* (Longmans, Green, and Company, 1905), 128.
[204] Richard Brayn, 18 January 1901, Case of William Albert Norris, HO 144/529/A36056 .
[205] David Lamb to the Home Secretary, 30 April 1903, Case of William Albert Norris, HO 144/529/A36056 .
[206] Norris' conditional discharge papers, 8 June 1903, Case of William Albert Norris, HO 144/529/A36056 .
[207] William Albert Norris Case File, BRO D/H14/D2/2/1/1215 (1884-1910). The complete file will not be available to researchers until 2017.

Medico-psychological specialists' patients were central to how they understood their mission as physicians and the relationship of their profession to the justice system. Men and women passed through the courts, from arrest to indictment to trial, in a matter of weeks or months; their time in criminal lunatic asylums, however, was measured in years and decades. Men who had terrified their communities, compelled the press, and perplexed judges and jurors seemed to shrink in the monotony and pettiness of daily life at Broadmoor. Patients spent their days reading and complaining, while superintendents tended to their casebooks and correspondence.

Physicians at Broadmoor lived and worked cheek by jowl with the most notorious and dangerous men in Britain. This intimacy with patients bred both empathy and pragmatism among the doctors of Broadmoor. They delved into the particularities of their patients' delusions, catalogued what they read, ate, and said, and worried about their health. They were inclined to believe that their charges were insane, and tended to have a broad understanding of what might constitute insanity. However, they also knew that the residents of Broadmoor could be dangerous, and took a pessimistic view of their ability ever to leave their care. Superintendents like Nicolson and Orange were public officials. Their first responsibility was to the public, especially public safety, and not to their patients. Still, and unlike many of the lawyers who wrote about and who were involved in the trials of criminal lunatics, the physicians of Bethlem and Broadmoor saw their patients as sick individuals rather than as sources, or subjects, of legal doctrine.

William Orange and David Nicolson were clinicians and practitioners. They represented the core constituency of the Medico-Psychological Association at its founding: superintendents of asylums. Although the Association as a whole had made a concerted move toward academic

medicine, science and professional prestige, men like Orange and Nicolson had less time for writing and theorizing than their peers who spent their days delivering university lectures and curating scientific journals. Both of them did write scholarly essays, as Orange had for Tuke's 1892 *Dictionary of Psychological Medicine*, but they were too busy dodging rocks, recapturing escapees and filling out forms to produce major medical texts.

However, a number of medico-psychological specialists approached the debate over moral insanity from a philosophical, academic or research perspective. Maudsley best represents this more academic strand of psychiatry. Maudsley devoted much of his writing to questions that were more philosophical than medical. One work in this vein was his *Body and Will: Being An Essay Concerning Will in Its Metaphysical, Psychological, & Pathological Aspects* (1883).[208] However, even though *Body and Will* was overstuffed with dense meditations on dualism, causation and God, Maudsley admitted that these concepts had little bearing on his daily activities as a physician. Despite his penchant for grandiosity, Maudsley imagined himself primarily as a doctor who gleaned his insights from his work with individual patients.

> I have been engaged all my life in dealing with the mind in its concrete human embodiments, and that in order to find out why individuals feel, think, and do as they do, how they may be actuated to feel, think, and do differently, and in what way best to deal with them so as to do one's duty to oneself and to them, I have had no choice but to leave the barren heights of speculation for the plains on which men live and move and have their being.[209]

In considering the history of criminal responsibility, Maudsley's meditation on the 'mind in its concrete human embodiments' is helpful. Shaw's and Dodwell's cases both show how the question of responsibility functioned as a philosophical, doctrinal and procedural matter in the English legal system. The doctors, lawyers, politicians and jurors who assessed a defendant's

[208] Henry Maudsley, *Body and Will: Being An Essay Concerning Will in Its Metaphysical, Psychological, & Pathological Aspects* (London, 1883).
[209] Ibid., preface.

responsibility could not do so purely in the abstract. Their task was not just to decide whether or not, for example, homicidal mania existed, but also to determine whether the person standing before them was a homicidal maniac. They had to assess a patient or a prisoner's sanity knowing that their decision could tip the scales toward life or death, a lifetime of confinement or freedom. Each person who considered a defendant's responsibility in a criminal case did so in a particular professional capacity, with particular responsibilities and inclinations.

For many doctors and lawyers, capital punishment was central to the debate over criminal insanity. McNaughten's insanity saved his life. The jurors' uncertainty about his sanity resulted in the respite of Shaw's death sentence. James Fitzjames Stephen and Henry Maudsley, each the most famous representative of his profession in the late nineteenth century, both acknowledged the role of the mandatory death sentence in spurring arguments about insanity and responsibility. For them, the real debate was often less about competing definitions of responsibility, and more about the scaffold. Defendants found not guilty by reason of insanity rarely left the asylum, and no one pretended that daily life was much different in Broadmoor or in Newgate. But a murder conviction meant death, barring the intercession of the Crown, and a finding of insanity did not. "Abolish capital punishment," Maudsley declared, "and the dispute between lawyers and doctors ceases to be of practical importance."[210]

Stephen did little to contradict him on this point. As far as he was concerned, insanity and responsibility were only so controversial because British society had become increasingly uncomfortable with capital punishment. Stephen supported the systematic execution of habitual criminals, even non-violent ones. "If society could make up its mind to the destruction of really bad offenders," he wrote, breezily, "they might, in a very few years, be made as rare as wolves, and that probably at the expense of a smaller sacrifice of life than is caused by many a single

[210] Maudsley, *Responsibility in Mental Disease*, 129.

shipwreck or colliery explosion."[211] Although Maudsley and Stephen had opposing views of the justice and usefulness of executing criminals, they agreed that anxiety about the death sentence made responsibility especially fraught. If execution were reserved for only the very worst offenders, then it became critically important for the legal system to differentiate between the mad and the bad, the evil and the ill.

D. Hack Tuke's 1892 *Dictionary of Psychological Medicine* was intended as a comprehensive guide to the medicine and laws of lunacy. [212] Dozens of medical men from England, Scotland, Canada, France, Germany, the United States, Denmark, and Italy contributed articles. From the outset, Tuke made it clear that insanity and the question of legal responsibility were inseparable. The problem of responsibility was foremost, even in a work that was not explicitly devoted to forensic medicine or crime. In his prefatory essay, Tuke argued that madness was ancient, and so was the belief that at least some of the mad were less responsible for their actions than the sane. "[T]here never was a period in the history of the human race when insanity did not exist," wrote Tuke. "[T]he madman was a recognised character, a felt anomaly, among his fellows. Although so frequently regarded as possessed, or as simply criminal, cruel, and bloodthirsty, a certain number were seen to be what is vulgarly understood as 'mad', and more or less irresponsible."[213]

The mad had, for centuries, been 'recognized characters' in the British legal imagination. However, they only became figures in the nightmares of British lawyers in the nineteenth century. As British law became less bloody, and fewer men were convicted of capital crimes and even fewer were executed, jurists and politicians were increasingly called on to justify judicial killing on moral, and legal, grounds. The Act of 1800 meant that the criminally insane could be

[211] Stephen, *A History of the Criminal Law of England*, 1883, 1:479.
[212] Tuke, *A Dictionary of Psychological Medicine*.
[213] Daniel Hack Tuke, "Historical Sketch of the Insane" in Ibid., 1.

safely, and legally, confined in state-run asylums for the rest of their natural lives. Hanging them was no longer the only way to protect the public from their depredations. The gallows symbolized the ultimate moral condemnation, which required judges and government officials to argue that the men and women they hanged truly deserved their fate. Developments in the new field of psychiatry that enshrined a broader definition of insanity threatened old judicial certainties about responsibility and its assessment. Psychiatrists became partners in the legal system's efforts to determine prisoners' responsibility, and served as the custodians of the criminal mad. Responsibility was an unstable concept in nineteenth-century British law and medicine. A robust administrative system was built around the identification and management of criminal lunatics. The problem was that no one could agree on who they were.

The next chapter explores how people labeled criminal lunatics flowed from the colonies to courts and asylums in Britain. Administrators and professionals working in the empire shared their metropolitan counterparts' uncertainties about the definition of legal insanity and their concerns about maintaining the reputation and integrity of the common law. The mandatory capital sentence for murder motivated them, as it did lawyers and doctors in England, to raise doubts about a defendant's responsibility and, often, his sanity as a means of moderating his punishment. However, as T.J. Maltby's case will show, a defendant's mind was no easier to read in Madras than it was in Berkshire.

CHAPTER TWO
A KILLER IN SEARCH OF A TRIAL: T.J. MALTBY'S QUEST FOR JUSTICE

On Christmas Eve night in 1879, the eight or eleven men who were hired to bear Thomas James Maltby, of the Madras Civil Service, the many kilometres from Vizianagrum to Chicacole in the Madras Presidency of colonial India placed the heavy palanquin on the ground.[1] The party had left Vizianagrum in the late evening, and after three or four hours the men were tired and footsore. They stopped beneath a large tree in the village of Sattivada. Maltby called for new bearers who would be willing to press on for Chicacole that night.[2] Maltby waited, reclining against the tree trunk. Latchmi Nayudu, the village *munsif* or local judge, and two other villagers sat with Maltby, while the bearers warmed themselves around a small fire. [3] Suddenly, the silence was pierced by three gunshots and the *munsif* fell, dead. Another man, wounded in the cheek, fled into the village. Maltby, who had pulled a Colt .38 revolver from beneath his clothes and shot without rising from the ground, ran and hid. The next morning, he was apprehended by the authorities and brought back to Vizianagrum.[4]

When Maltby killed the *munsif*, he undermined the authority of the colonial government and of its law. Rather than try him, the Madras government shipped him back to England as a

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[1] This account of the events of 24 and 25 December 1879 is reconstructed from evidence compiled by head magistrate O.B. Irvine in the weeks following the killing. While many of the major facts are described consistently across the testimony of many witnesses, the details often vary slightly (e.g. whether Maltby hired eight, nine, eleven or twelve bearers in Vizianagram). For example, Koyana Pedigadu, a washerman from Sattivada, testified that Maltby had arrived at the village with only eight bearers, rather than the usual twelve. See, *Testimony of Koyana Pedigado, washerman,* India Office Records and Private Papers (IOR), The British Library, London, IOR/L/PJ/6/13, File 688, p. 14-15. Maltby's interpretation of many of the events described by the witnesses is vastly different, as will be explored below. The official witness statements are drawn from IOR/L/PJ/6/13, File 688.

[2] Testimony of Bandi Paidi Gadu, bearer, IOR/L/PJ/6/13, File 688, p. 9.

[3] 'Nayudu' refers to both a Telugu caste and a common title, often applied to village headmen or soldiers. It is related to the Sanskrit '*nayaka'* and other derivations, including the common 'naik', 'nayak' or 'naique'. See: Sir Henry Yule, *Hobson-Jobson: A glossary of colloquial Anglo-Indian words and phrases, and of kindred terms, etymological, historical, geographical and discursive.* New ed. edited by William Crooke, B.A. (London: J. Murray, 1903) p. 614. *Munsif* or 'moonsiff' was the title of a "native civil judge of the lowest rank". See: Yule, *Hobson-Jobson,* p. 581.

[4] Testimony of Atti Appaya, cultivator and bandy hirer (Maltby's surviving victim). IOR/L/PJ/6/13, File 688, p. 13.

criminal lunatic who was too insane to stand trial. In response, Maltby, a lawyer and an experienced bureaucrat, embarked on a zealous letter-writing campaign protesting his treatment and demanding a trial. Almost six months after Maltby shot and killed Latchmi Nayudu, Sir Louis Mallet forwarded a thick sheaf of printed papers to the Home Office in London. Mallet, the permanent Under Secretary of the India Office, had recently received the documents from the Government of Madras. In his cover letter, Mallet promised that the Superintendent of Broadmoor, William Orange, would be given due warning of Thomas Maltby's imminent, ignominious, return to the country of his birth.[5] The day before the papers arrived at the Home Office, Maltby left Madras aboard the *S.S. Stelvio*.[6] Although his days as a traveler were not yet over, he would never return to India.

Thomas Maltby was a killer and a fugitive. But he was also a civil servant, lawyer, and linguist. The empire's vast bureaucracy – the endless drafts, petitions, memorials, reports and warrants –formed the terrain upon which Maltby fought for his rights, his identity and his sanity. Maltby's file was transferred from the India Office to the Home Office, which occupied opposite ends of Whitehall, while a ship bore Maltby himself across the ocean, from India to England. Responsibility for Maltby, and legal authority to confine him as a 'criminal lunatic' would also shift, from the Government of India to the Queen.[7] The journey from India to England was measured in thousands of miles; from the India Office to the Home Office, in feet. The British empire operated on both scales. Imperial authorities – administrators, politicians, lawyers, and

[5] Louis Mallet to the Under Secretary of State, Home Office. May 15th, 1880. IOR/L/PJ/6/13, File 688.
[6] Maltby's Petition to the Queen, IOR/L/PJ/6/130, File 1409. There is some disagreement in the records over whether Maltby left India on April 22nd or May 14th, 1880. In his *Petition*, Maltby gives the date as May 14th, and his initial date of admission to Broadmoor Asylum, June 10th, 1880, seems to support a May 14th departure from Madras. However, the report of Maltby's case at the Court of Queen's Bench gives the date as April 22nd (see: *In re Maltby* [1881] 7 Queen's Bench (QB) 18, p. 20).
[7] *The Law Reports, Under the Superintendence and Control of the Incorporated Council of Law Reporting for England and Wales. Supreme Court of Judicature. Cases Determined in the Queens Bench Division and on Appeal Therefrom in the Court of Appeal, Decisions on Crown Cases Reserved and Decisions of the Railway and Canal Commission, Vol. 7, 1881. In re Maltby* [1881] 7 QB 18, p. 20.

even doctors – could be remarkably attentive to small matters and small men. And yet, they never forgot the vastness of the territory to which the decisions they made and the policies they adopted would be applied.

In his *Global Lives*, Miles Ogborn argues for writing histories of empire through the lens of biography. Histories of people who travelled across the expanses of empire underscore, according to Ogborn, "the role of human action in the making of the world."[8] Other historians have also placed biography, increasingly in the form of prosopographical accounts with a geographical bent, at the centre of their approaches to the history of the British empire.[9] The stories of men like Maltby reveal the practical, human dimensions of an imperial legal system that is too often rendered as a series of vague principles and abstruse statutes. Maltby's case shows the role of human action in the making of the British legal world, and the dense interconnections among the professionals and institutions involved in its management. His case is especially effective in demonstrating how tightly English legal authorities were bound to those in the colonies, in particular in cases involving insanity and serious crime. Responsibility was a matter of common law jurisprudence, but also of British and imperial policy.

Maltby's case created a jurisdictional snarl. The authorities who asserted power over him, or had responsibility for him thrust upon them, were multiple and entangled. As a lunatic, he fell under the jurisdiction of medical men and the Commissioners in Lunacy, officials responsible for administering and supervising Britain's complex network of asylums. As a criminal, Maltby was subject to the courts, to judges, to police and to the Home Department. As an Indian civil servant, the India Office and the Madras government controlled his pension and his movements in India. From each set of authorities, Maltby – an exceptionally persistent, prolific, and truculent

[8] Ogborn, *Global Lives*, 11.
[9] Laidlaw, *Colonial Connections, 1815-45*; Colley, *The Ordeal of Elizabeth Marsh*; Rothschild, *The Inner Life of Empires*; Lambert and Lester, *Colonial Lives*.

epistler – demanded different things. He wanted his doctors to declare him sane, the India Office to pay him, the Home Office to release him, politicians to advocate for him, and the Madras government to beg his forgiveness. Above all, Maltby wanted a trial in India. He wanted to be judged and punished (or released) for his crime, not managed or treated or ignored. Unfortunately for Maltby, upon his return to England those around him primarily received him as an administrative hassle. Fortunately for historians of the British empire, Maltby's case generated so much bureaucratic chatter that it is possible to use it to reconstruct ten years of official paperwork. Maltby's case shows how very many government agencies had stakes in the management of imperial crime and criminals, and how complicated it could be to assess criminal responsibility in an imperial context.

In *Albion's Fatal Tree*, E.P. Thompson, Douglas Hay and their co-authors famously condemned eighteenth-century British criminal law as an instrument of class oppression, wielded mercilessly and cynically by the propertied against the poor.[10] If British criminal justice is a tree, its upper branches bowed by the weight of the dangling corpses of the executed, Thomas Maltby's case exposes the roots. Many men and women in Britain and the empire were drawn into the criminal justice system, but not all of their cases were heard in court, and even fewer resulted in a judicial execution. At every stage in the judicial process, there were branches that led away from the gallows and toward freedom, the asylum, or jail. Historian Peter King has imagined the eighteenth and early nineteenth-century British criminal justice system as a series of rooms along a corridor. Each room is a stage in the criminal process, from accusation to execution, and each contains people who open doors and reveal tunnels through which the

[10] Hay et al., *Albion's Fatal Tree*.

accused might escape to freedom. Only some make it to the end of the corridor, and walk through the last, fatal door.[11]

Whichever metaphor one chooses to describe British criminal justice in the nineteenth century, a tree or a corridor, the central point is the same. By focusing only on the criminal cases that went to trial, or only those that ended in execution, we lose sight of those that didn't, and so come away with an incomplete view of the justice system. Concerns about a prisoner's responsibility for his actions could affect his fate at any stage in the judicial process, not only in court. Doubts about a defendant's responsibility could result in his acquittal, as in McNaughten's case, or in the commutation of his sentence, as in Shaw's. Maltby's case shows that prisoners could also find themselves declared irresponsible, or at least incapable of standing trial for their crimes, before they even set foot in a courtroom.

Maltby, unlike James Shaw and Henry Dodwell, was never tried for his crime. And yet, doctors and government officials consistently classified him, from 1879 until his death in 1921, as a 'criminal lunatic.' The previous chapter described some of the strangeness of labelling a person simultaneously insane, and therefore irresponsible for his actions, and criminal, and presumably capable of being held responsible. And yet, as noted earlier, Section 1 of the 1883 Criminal Lunatics Act explained, "The whole law as to criminal lunatics proceeds on the assumption that a man may be a criminal and a lunatic at the same time."[12] William Orange, in his first address as president of the Medico-Psychological Association in 1883, acknowledged both the tension inherent in the phrase 'criminal lunatic', and its ubiquity. "What is," he mused, "a criminal lunatic?"[13] "The name appears, at first sight," said Orange, "to imply a contradiction

[11] Peter King, *Crime, Justice, and Discretion in England, 1740-1820* (Oxford University Press, 2003), 1–2.
[12] The Trial of Criminal Lunatics Act (1883), s.1, 46 & 47 Vict, c. 38.
[13] William Orange, "Presidential Address, Annual Meeting of the Medico-Psychological Association, 27 July 1883," *The Journal of Mental Science* 29, no. 127 (October 1883): 330.

of terms, inasmuch as a person who is a lunatic may be said to be incapable of committing what, in the strictest sense of the word, can be called a crime."[14] And yet, he noted that the phrase had been in use in Britain for the previous eighty years, since the creation of the special verdict in 1800, and gave no sign of flagging. Despite its apparent contradictions, and the fact that the category of the criminal lunatic could not "claim for itself mathematical precision", Orange hailed it as useful and "really descriptive of the class of persons to whom it is applied."[15]

There were many paths to status as a criminal lunatic. A defendant who was convicted of a crime and who subsequently went mad in prison could be transferred to Broadmoor. Government authorities might commute the capital sentence of a defendant whom they thought was mentally ill but who had not qualified for acquittal on *M'Naghten* grounds, and send him to the asylum. A person could also, like Maltby, be apprehended as a criminal suspect and brought directly to a hospital. In such cases, authorities treated their prisoner as though he had been tried and found not guilty by reason of insanity (or, after 1883, 'guilty but insane'), even though the trial had never actually taken place.

Orange supported the use of 'criminal lunatic' in part because, as he told his colleagues, "every criminal lunatic, of whatever class, has not only been charged before a court of law…but is actually in custody."[16] It is important to distinguish between a criminal charge and a trial. Maltby had, at least according to the British government, been charged with Latchmi Nayudu's murder, although he had never stood trial, and had never been convicted of a crime. However, the criminal charge ensured that Maltby could legally be considered a criminal lunatic for the rest of his life, even without a trial. The charge and two medical certificates attesting to his insanity were all that was needed to give the Home Office the authority to confine him

[14] Ibid.
[15] Ibid., 330–1.
[16] Ibid., 331.

indefinitely, at the Queen's pleasure. British jurists and government officials used the Prerogative to adjust a convict's punishment when his responsibility for his crimes was controversial, or to avoid scandal by covering up judicial impropriety. The British imperial criminal justice system relied on administrators and executives as much as it did on lawyers, judges, jurors and medical experts. Administrators were freer to operate in the grey areas of legislation. Maltby's case reveals another avenue used by government authorities, including jurists, to manage criminal lunatics: denying their fitness to plead.

Nigel Walker, in his study of crime and insanity in England, estimates that in the period from 1884 to 1893, approximately 11% of those indicted for murder in English courts were acquitted on the ground of insanity. 11.4% of killers, meanwhile, were found unfit to plead and transferred to asylums as criminal lunatics without trial.[17] Although the prisoner's trial was technically only postponed in such cases, to be held, in theory, once he came to his senses, in reality defendants labelled unfit were almost never tried for their crimes.[18] Usually, they were kept in an asylum until their deaths, or else quietly released once their doctors, and the government, agreed that they had returned to sanity. Maltby, then, was far from alone in his failure to secure a trial after a pre-trial insanity diagnosis. Although consigning prisoners to Broadmoor without trial was occasionally controversial, it was expedient.[19] Maltby was shocked and appalled by the notion that Englishmen could lose their liberty, sometimes forever, without a trial. But administrative solutions to the problem of criminal insanity – and a violent civil servant stirring up trouble in a restive district of Madras was a big problem – were ubiquitous, both in England and in the empire.

[17] Walker, *Crime and Insanity in England*, 86. Walker writes that there was an annual average of 68.4 persons tried for murder during the period from 1884 to 1893.
[18] Smith, *Trial by Medicine*, 21.
[19] Ibid.

Maltby's case also points to the importance of culture in the formulation of imperial criminal defences, a theme that will feature prominently in subsequent chapters. Generally, culture featured most prominently in imperial criminal cases where the defendant was non-European, and where he and his supporters argued that the standards of English justice were inapplicable to him because of his cultural, racial or religious difference.[20] However, European defendants, like Maltby, also used cultural arguments to explain and justify their crimes against non-Europeans. Elizabeth Kolsky and others have written about the 'diseased-spleen defence', in which British murderers blamed their Indian victims' deaths on their supposedly fragile Indian spleens, rather than on the blows they had suffered.[21] One British coroner working in India remarked, in 1837, on the "very slight degree of violence" which could precipitate death by splenic rupture, a "not unfrequent occurrence in this country, where death by misadventure, has followed a trifling blow… inflicted on the abdomen."[22] The 'diseased-spleen defence' implied that European murderers had never intended to kill their victims, and that they could not be held responsible for the vicissitudes of defective Indian biology. Maltby's defence, in which he claimed that he had shot the *munsif* to save his own life, also relied on a British construction of Indians as profoundly different from the Europeans who ruled them. Maltby argued that his would-be attackers' behaviour constituted a clear threat to his life, albeit one that was expressed in the cultural language of Madras, which most Britons could not speak.

[20] See, for example, *R v Machekequonabe* (1897) 28 O.R. 309.; Judge's Notes of Evidence, 5 July 1860, *R v Peter (An Aboriginal),* Public Record Office Victoria (PROV), Melbourne, VPRS 264/P0000/2.; *Advocate-General of Bengal v Ranee Surnomoyee (Fort William, Bengal)* [1864] UKPC 14 (22 July 1864).
[21] Kolsky, *Colonial Justice in British India*, 138; Jordanna Bailkin, "The Boot and the Spleen: When Was Murder Possible in British India?," *Comparative Studies in Society and History* 48, no. 02 (2006): 462–93.
[22] J.F. Heddle, "A Selection of Cases of Violent Death Which Have Formed Subjects of Investigation Before the Coroner of Bombay," in *Transactions of the Medical and Physical Society of Bombay*, vol. 1 (Bombay: The American Mission Press, 1838), 309. It is interesting to note, however, that two of the four people people whom Heddle describes as having died because of ruptured spleens were Portuguese, at least according to Heddle, rather than Indian. It seems that Heddle attributed delicate spleens to post-monsoon fevers and general lack of healthy conditions in certain parts of Bombay.

Maltby claimed that Indian culture was alien and unintelligible except to those, like himself, who had spent their careers studying the colony and its people. He argued that, as a dedicated employee of the colonial government, he had privileged access to the Indian culture of Madras. He contended that his perception of the threats against him posed by his bearers and the villagers of Sattivada should trump the expectations of a fictional, normative, British observer. Maltby demanded to be treated as an Englishman with an Englishman's rights to the procedural protections of the common law, but argued that English expectations and evaluations of the threat he faced and the reasonableness of his response were inapplicable in Madras. Maltby's claims amounted to a sort of 'cultural defence' by projection – an argument that different, culturally-specific legal standards should apply in his case, by virtue of the cultural differences of the community in which the crime occurred, and his own, superior understanding of the minds of the Indians around him.

Thomas Maltby was born on 16 December 1844 in Aldersgate in the City of London. His father, also Thomas James Maltby, was a solicitor who would later become the British Vice-Consul in Belgium.[23] Maltby passed his Civil Service final examinations in 1865. He came in 34th of the 45 candidates who successfully completed the examinations, and was awarded no special prizes.[24] He went to Madras, and was stationed in and around the Ganjam district north of the city of Madras, in present-day Andhra Pradesh.

[23] Baptisms solemnized in the parish of St. Anne and Agnes, Aldersgate, in the City of London in the year 1844, p. 49.
[24] Civil Service of India, *The Times* (London, England), Thursday, Aug 08, 1867; pg. 10; Issue 25884.

In 1874, five years before he killed Latchmi Nayudu in Sattivada, Maltby published his first book, *A Practical Handbook of the Uriya or O'di'ya Language*.[25] In his preface, Maltby argued that European officials needed to acquire at least a conversational knowledge of the native language of those whom they governed. How could magistrates, he wrote, hope to take down statements made in the vernacular without even a "slight acquaintance" with the language?[26] He suggested that the Government commission a series of handbooks with simple, practical exercises, such as his own, "if they wish[ed] their officers to possess any real influence with the people, and the material welfare of the country to be developed."[27] Maltby considered proficiency in the vernacular essential to effective government, and was himself fluent in at least Telugu and Uriya. Years later, in the wake of the killing, Maltby made much of his ability to speak to his bearers in Telugu, boasting that he understood them "perfectly".[28] Interestingly, Maltby distinguished carefully in his *Handbook* between "the native style of conversation" and the European one.[29] Maltby believed that language was both a matter of dialect and of normative convention, and that both interacted to produce influence and provide insight into the worlds and minds of others.

Maltby's understanding of himself as an official with special access to native consciousness appears repeatedly in witness testimony, including his own, about the death of Latchmi Nayudu. Three days before Christmas, Maltby arrived in Vizianagrum from his usual station at Parvatipur. He stayed with Major Butler, of the 17th Madras Native Infantry Division, and his wife. In his statement, Butler described Maltby's behaviour as highly eccentric – having

[25] Thomas James Maltby, *A Practical Handbook of the Uriya or O'di'ya Language* (Calcutta: Wyman & Co., Publishers, Hare Street, Calcutta, 1874).
[26] Maltby, *A Practical Handbook*, x.
[27] Maltby, *A Practical Handbook*, p. xii.
[28] Maltby, Statement written at the Madras Asylum, 1880, IOR/L/PJ/6/13, File 688, p. 34.
[29] Maltby, *A Practical Handbook*, p. vii.

an inappropriate conversation with the local Rajah at the racket court, being unable to send a simple telegram, staying awake all night pacing and muttering to himself while handling a revolver on the veranda.[30] Prominent in Butler's testimony, as in that of many others, was the Rampa Rebellion. In 1879, members of some tribal groups in the mountains of Vizagapatam district rebelled against British rule, in protest against new restrictions on toddy tapping and the corruption of local administrators. Maltby was preoccupied with the rebellion, particularly with the activities of a notorious rebel named Chendrayya. The restive tribes were from Telugu and Uriya speaking areas, and Butler testified that Maltby "harangued his bearers in Telugu about Chendrayya."[31] Maltby also asked the bearers to spread news to their relations who might know Chendrayya that "Mr. Maltby has come to this district" and that he would soon bring order.[32]

Maltby was convinced that his language skills would help him to catch the rebel Chendrayya and pacify the district. This would bring him the recognition he felt he richly deserved, and had been cruelly denied, in the Civil Service. During a visit with William Elseworthy, agent to Messrs. Arbuthnot, a major imperial bank, Maltby complained that the Duke of Buckingham, then Governor of Madras, had treated him terribly, moving him around the Presidency five times in the previous year.[33] Elseworthy described Maltby as being "in a great rage with [the Duke]."[34] After surprising Elseworthy by consuming an entire half-pound of jam and declaiming for a half-hour on the ill-treatment of American Indians, Maltby declared that he would soon settle the Rampa Rebellion by "speaking to the people in their own tongue."[35]

[30] Testimony of Major Butler, IOR/L/PJ/6/13, File 688, pp. 2-3.
[31] Testimony of Major Butler, IOR/L/PJ/6/13, File 688, p. 3.
[32] Testimony of Major Butler, IOR/L/PJ/6/13, File 688, p. 3.
[33] Maltby claimed to have been moved from Kis, to Ganjam, to finally to Vizagapatam, and also through Rajahmundry and Cocanada in Godávari in the previous year. Maltby, Statement written at the Madras Asylum, 1880, IOR/L/PJ/6/13, File 688, p. 34.
[34] Testimony of William Elseworthy, IOR/L/PJ/6/13, File 688, p. 6.
[35] Testimony of William Elseworthy, IOR/L/PJ/6/13, File 688, p. 6.

Maltby was critical of Buckingham's treatment of civil servants, as well as the Governor's approach to the Rampa conflict.

On 23 December 1879, the day before he left for Chicacole, Maltby met with Alister Macnab, whom he had come to see about booking his passage on a steamer to Calcutta to bring his grievances to the attention of the Indian government. Maltby accused Buckingham of "ruining the service" through the "intolerable" treatment of Civilians.[36] In the same breath, Maltby told Macnab "the [Rampa] business was being mismanaged by the Duke. He said his [Maltby's] whole service had been among the hillmen, and that he understood them thoroughly."[37] Maltby saw Buckingham's handling of the Rampa Rebellion as further proof of the Governor's incompetence, and failure sufficiently to value civil servants whose knowledge of local language and culture could restore order in the Presidency. Maltby's linguistic acumen was not merely a skill or a career ornament; it was central to his identity as a competent official.

Maltby imagined himself as a man unusually in tune with the people of Vizagapatam, with a special role to play in subduing the rebellion. His linguistic expertise and his belief that he had access to privileged cultural understanding led, in part, to the tragedy at Sattivada. Many of the witnesses of the crime remarked on the suddenness of Maltby's violence. One of Maltby's bearers, Bandi Paidi Gadu, testified, "there were no high words, quarrel or anything of the sort before the shooting."[38] Another bearer averred, "There was no quarreling [sic] or any of the sort at Sattivada."[39] Maltby wrote that he first became suspicious when he discovered that one of the bearers was called Chendrá, and that his name was pronounced in "a low peculiar tone."[40] He was further unsettled by his bearers' silence, as they failed to make their "*usual Ojo! Ojo! noise,*

[36] Testimony of Alister Macnab, IOR/L/PJ/6/13, File 688, p. 7.
[37] Testimony of Alister Macnab, IOR/L/PJ/6/13, File 688, p. 7.
[38] Testimony of Bandi Paidi Gadu, IOR/L/PJ/6/13, File 688, p. 10.
[39] Testimony of Madela Pentada, IOR/L/PJ/6/13, File 688, p. 10.
[40] Maltby, Statement written at the Madras Asylum, 1880, IOR/L/PJ/6/13, File 688, p. 34.

which is invariably the custom in the north [italics original]."[41] Worse yet, Maltby claimed that he heard one of the bearers say "*(Kottandi! Kottandi!)* strike! strike!"[42] Piecing together other snatches of overheard conversations in Telugu, Maltby wrote, "*I came to the conclusion that Chendrá* [whom Maltby was now convinced was, in fact, Chendrayya] *and his gang intended to murder me*."[43]

Maltby's killing of the *munsif*, in this context, was not murder, but self-defence. The absence of an open quarrel served as proof that Maltby was savvy enough to lull his would-be attackers into complacency before striking. He further justified his actions by claiming that he was formulating a plan for the suppression of the disturbances, based on his extensive experience in Madras' northern districts. He wrote that he was "in a position to realize the state of affairs in the north", where the rebels had wreaked havoc and remained "unpunished" by police.[44] Maltby's statement was peppered with Telugu words, with his translations written next to them. He attributed his apprehension of the plot to murder him to his careful observation and knowledge of local customs (the bearers failing to shout), his administrative work in areas affected by the disturbances and, especially, to his ability to understand the alleged plotters' words.

Maltby presented himself as an Englishman so attuned to Indian ways that his perception of the threat to his life should be judged as if he himself were Indian. For Maltby, the question of culture – his own, and of the Indians around him – was not merely academic; it was the key to determining how he should be judged under imperial law. Maltby asserted his entitlement to English justice, particularly, procedural rights and the right to a trial, while also demanding that

[41] Maltby, Statement written at the Madras Asylum, 1880, IOR/L/PJ/6/13, File 688, p. 34.
[42] Maltby, Statement written at the Madras Asylum, 1880, IOR/L/PJ/6/13, File 688, p. 34.
[43] Maltby, Statement written at the Madras Asylum, 1880, IOR/L/PJ/6/13, File 688, p. 34.
[44] Maltby, Statement written at the Madras Asylum, 1880, IOR/L/PJ/6/13, File 688, p. 35.

the behaviour of the bearers be interpreted legally in light of Indian norms, rather than British expectations. In a letter written during his confinement in Madras, Maltby relied on both English and Indian conventional wisdom to press his case that he had acted reasonably in response to an obvious threat. "The notoriously disturbed state of the country round Vizianagram," he argued, "and my position as a Magistrate coupled with the openly treacherous behaviour of the bearers engaged, could point to but one obvious conclusion, that is, a conspiracy, and we have the authority of Shakespeare that 'treason and murder ever kept together'. Legally speaking, moreover, I was not the assailer, but the assaulted in more ways than one."[45] According to Maltby, his cultural hybridity revealed great imperial vistas to him that were invisible to his superiors in the government. Maltby's understanding of Indian culture allowed him to see the bearers' apparently innocuous behaviour as "openly treacherous"; Shakespeare allowed him to see their treachery and conspiracy as a prelude to murder.

It was well established in Anglo-American law in the nineteenth century that it was possible successfully to plead self-defence even if the defendant turned out to have been mistaken about the nature or imminence of the threat he faced. The important consideration was what the defendant genuinely believed and, importantly, whether that genuine belief in the threat posed by the victim was reasonable.[46] "Where a man acts…under a mistake of fact…in what he supposes, on reasonable grounds, to be the defence of his person…against serious instant danger," explained James Fitzjames Stephen, "his position is, generally speaking, the same as it would have been if the facts which he supposed to exist had really existed."[47] Maltby argued vehemently that he had killed Latchmi Nayudu in self-defence based on a reasonable assessment

[45] Maltby to R. Davidson, 19 April 1880, HO 144/60/93521.
[46] Seymour D. Thompson, "Homicide in Self-Defence", *Am. L. Rev.* 560 (1880), 560.
[47] James Fitzjames Stephen, *A History of the Criminal Law of England*, vol. 3 (Cambridge: Cambridge University Press, 2014), 12–3.

of the threat to his life posed by the Indians among whom he lived. Maltby, as a lawyer, knew that he did not have to prove that Chandrayya's men really had tried to kill him in Sattivada, although Maltby asserted that they had. Rather, he needed to convince the officials considering his case that his perception of the threat posed by the villagers and by his bearers was reasonable – that any sensible person in his position would have detected the plot, and drawn his pistol.

Maltby knew, however, that most Englishmen – even most members of the Indian Civil Service – would not have felt that they were in 'serious, instant danger', in Stephen's phrase, that night. To the casual, English observer, the villagers appeared to have done nothing suspicious, and certainly nothing justifying Maltby's violence. In fact, Maltby's behaviour struck those who considered his case as so outrageous and unprovoked that it was not only unreasonable, but insane. Maltby hadn't just made a mistake; he had succumbed to his paranoid delusions. Maltby's only hope, which he pursued relentlessly, was to convince his erstwhile colleagues and his doctors that his behaviour had, in fact, been reasonable by Indian standards, and that it was Indian standards that should prevail in evaluating the legality of his actions. Unfortunately for Maltby, however, the legal authorities involved in his case were unwilling to contemplate the possibility that his behaviour had been reasonable by any standard, whether Indian or English. To them, Maltby was obviously mad, and all of his attempts to justify the killing were evidence of the persistence and power of his delusions.

Two years after his arrest, Maltby published his second book, *The Ganjam District Manual*.[48] He had been working on it for years but had struggled in the months before the killing, telling his supervisor, the District Magistrate of Ganjam, "he could not get through it because he

[48] Thomas James Maltby, *The Ganjam District Manual*, Edited by G.D. Leman (Madras: Printed by W.H. Moore, At the Lawrence Asylum Press, 1882).

could not settle down."[49] The completed *Manual* had no preface, and made no reference to Maltby's troubles. Rather, it was a comprehensive guide to the district, including descriptions of the landscape, climate, diseases, property-holding system, ports, history, important figures, and recent events. Maltby did not mention the Rampa Rebellion. Years later, Maltby would use the book as evidence of his sanity and fitness to stand trial for murder.[50] However, *The Ganjam District Manual* must have meant more to Maltby than just proof of his sanity. Like his first book, Maltby likely saw his *Manual* as evidence of his knowledge of Indian culture, and an indictment of the colonial administrators who doubted his interpretation of the events of December 1879.

Indirectly through the *Manual* and forthrightly in his correspondence, Maltby insisted that English paradigms for identifying threatening behaviour were inapplicable in Madras. His expertise alerted him to the imminent attempt on his life, he thought, where a hapless Englishman would have missed the culturally specific signs and been killed. Maltby was arguing, in effect, that most English authorities could not read Indian minds, because the cultural chasm between them was too wide. Only a man of great erudition, experience and sensitivity, like Thomas Maltby, could reach across it. Maltby saw himself as the ideal civil servant – as comfortable in remote Madras as in England, willing to use his considerable talents to bend India to British authority, and able to read Indian minds in the way that British jurists had so long aspired to do. He felt he had been betrayed by an imperial justice system that was hopelessly out of touch with the actual experience of empire. In a letter excoriating the government of Madras, Maltby fumed, "I… hereby solemnly protest against all their acts not only as a Magistrate but as an Englishman interested in the good Government of India, and I do hereby denounce them as

[49] Testimony W.D. Horsley, Esq., District Magistrate of Ganjam, IOR/L/PJ/6/13, File 688, p. 26.
[50] Maltby to Garstin, Madras Council, 21 May 1889, IOR/L/PJ/6/260, File 1427.

bad in law, arbitrary, repressive and oppressive, and opposed to all equity, justice and sound policy."[51]

When Maltby was arrested, he had recently been appointed Acting Senior Assistant Magistrate of Vizagapatam, and was also an Assistant Collector. He had been in Madras for approximately fourteen years, since shortly after he passed his final Civil Service examinations in 1865.[52] From the moment he was captured in Sattivada, allegedly after a night spent hiding in the bushes and begging a local "fortune teller" (also described as a "mad woman") to shelter him, Maltby became concerned about his legal position.[53] Maltby seems to have experienced great shock, and probably remorse, when first confronted with his crime. However, he quickly began, consciously or unconsciously, to reshape the night's events into a narrative that not only painted his actions as heroic, but also, and more importantly, legally justifiable. Maltby drew on his legal experience and his familiarity with legal language to establish his credibility as a witness, and to contest the procedures that led to his incarceration in Madras, and eventual deportation to England.

Early in the morning on December 25th, a group of villagers brought Maltby back to the foot of the fateful tree. There, the corpse of the *munsif* still lay, surrounded by the dead man's crying widow and four children. One older man, Buttana Tattigadu, testified that the crowd took Maltby to the body, and that he "fell upon the corpse and cried when he saw it."[54] Tattigadu added that when Maltby draped himself over his victim's body, he "could not hear the words [Maltby] uttered. They were in Telugu."[55] Another man heard Maltby ask Latchmi Nayudu's

[51] Maltby to R. Davidson, 19 April 1880, HO 144/60/93521.
[52] Maltby's Petition to the Queen, IOR/L/PJ/6/130, File 1409.
[53] Testimony of Kunuku Appayya, farmer, IOR/L/PJ/6/13, File 688, p. 16; and Summary of Witness Statements, IOR/L/PJ/6/13, File 688, pp. 24-25.
[54] Testimony of Buttana Tattigadu, bariki, IOR/L/PJ/6/13, File 688, p. 16.
[55] Testimony of Buttana Tattigadu, bariki, IOR/L/PJ/6/13, File 688, p. 16.

wife, Atti Latchamma, to follow him to Vizianagrum, so that he could give her food.[56] Aumanchi Suryanarayana chastised Maltby for his hypocrisy – how could one judge slay another for no reason? He reported asking Maltby, "You are a type of justice; is it proper to kill the Nayudu"? To which Maltby replied, "I did not know I killed him."[57]

Maltby had not yet, in the immediate aftermath of the killing, settled upon the elaborate story of conspiracy and betrayal that he would tell in his official statement. In the years that followed, Maltby would repeatedly claim that he'd had no choice but to shoot the *munsif*, whom he accused of treachery, and would express no sorrow over the man's death. However, the impression given by the testimony of those who witnessed the crime and its aftermath is that Maltby was bewildered, chagrined and ashamed. Maltby grieved, perhaps for Latchmi Nayudu, and perhaps for himself. In that moment, he might have realized his terrible mistake. Or he might have believed that there really was a plot against him, but regretted that he had been forced to kill in response. Regardless of why Maltby killed the *munsif*, his identity as a man of justice and as an 'insider' with special access to Madras' Telugu-speaking people – poignant in his cries, in Telugu, over the body of his victim – was quickly crumbling.

On the afternoon of December 25th, at around 3 p.m., J. Sunder Siva Row Pantulu, the Police Inspector of Vizianagrum, and the Sub-Magistrate, Chendica Raghnayakulu Nayudu, arrived in Sattivada. They found Maltby lingering nine or ten yards from the corpse, surrounded by a throng of some three hundred people.[58] It had been over twelve hours since Maltby had killed the *munsif*, and by now his visions of a surprise attack by Chendrayya and his gang had

[56] Testimony of Koyana Pedigadu, washerman, IOR/L/PJ/6/13, File 688, p. 15. Although it is important to note that there was disagreement about whether or not Maltby had promised to protect or care for Latchmi Nayudu's wife and children. His wife, Atti Latchamma, testified that Maltby had declared that he would protect the family, while another witness, Sirivoori Narayanaraju, denied that Maltby had made such a promise. See: Testimony of Atti Latchamma, IOR/L/PJ/6/13, File 688, p.19; and Testimony of Sirivoori Narayanaraju, IOR/L/PJ/6/13, File 688, p. 18.

[57] Testimony of Aumanchi Suryanarayana, IOR/L/PJ/6/13, File 688, p. 1

[58] Testimony of J. Sunder Siva Row Pantulu, Police Inspector, IOR/L/PJ/6/13, File 688, p. 19.

taken shape. He told the Inspector that "he had done a dreadful deed, but he was right in doing so, as the deceased was a member of Chendrayya's party."[59] He told the Sub-Magistrate that "he fought face to face with Chendrayya" and only began shooting when someone came up behind him to choke him.[60] Pantulu's account of the ride back to Vizianagrum suggests that Maltby was frightened, excited, and impulsive. He galloped his pony too fast, flitted in conversation from one subject to another, spoke at length of his fears of reprisal by Chendrayya's henchmen, and insisted that the Inspector hold him around the waist to comfort him.[61]

On arriving in Vizianagrum, Maltby was confined in a guesthouse to await the arrival of O.B. Irvine, Acting Head Magistrate of the district and Maltby's direct superior. Irvine arrived on December 26th. Given reports of Maltby's mental state, Irvine decided to "hold [his] Court", as he would later describe it in a letter to the Indian Government, there rather than transporting Maltby to a courtroom.[62] By this time, Maltby had realized the difficulty of his position. He had killed a fellow man of the law in what appeared, at least, to have been an unprovoked act of violence. There were dozens of witnesses. He was under arrest and in disgrace. In response, Maltby called on his legal knowledge and his position as a legal expert to protect himself. It might seem obvious that an accused murderer should argue that he killed in self-defence or to further a noble cause. Maltby did this, of course. However, the legal arguments that proved most effective, and which Maltby turned to often in the wake of the crime, were procedural and technical; they were arguments about jurisdiction, rules of evidence, and the interpretation of statutes. In short, they were peculiarly lawyerly. Maltby's ability to negotiate the colonial legal system did not, ultimately, change his fate. However, Maltby's constant legal objections

[59] Testimony of J. Sunder Siva Row Pantulu, Police Inspector, IOR/L/PJ/6/13, File 688, p. 20.
[60] Testimony of Chendica Raghnayakulu Nayudu, IOR/L/PJ/6/13, File 688, p. 21.
[61] Testimony of J. Sunder Siva Row Pantulu, Police Inspector, IOR/L/PJ/6/13, File 688, p. 20.
[62] O.B. Irvine to the Chief Secretary to Government, 27th December 1879, IOR/L/PJ/6/193, File 108.

provoked a response among the government officials and lawyers who dealt with him. Legal language bolstered the credibility of even a man who had been labelled a criminal lunatic.

When Irvine first examined Maltby after the crime, Irvine reported that Maltby "got very excited and said he would not allow the witnesses for the prosecution to be examined as in reality he was the prosecutor and had several charges to bring against the witnesses."[63] Irvine left the guesthouse convinced of Maltby's insanity, and decided to suspend proceedings and begin a formal inquiry into Maltby's mental state, under s. 423 of the Code of Indian Criminal Procedure (1872).[64] From the time Maltby met with Irvine, a lively official conversation – through letters, telegrams, and reports – began about Maltby, and only rarely with him.

Under s. 423 of the Code, once Irvine suspected that Maltby was insane, Maltby ceased to be the subject of the law's judgment and became the object of its scrutiny, to be managed and disposed of but not held responsible. Within a week of his meeting with Irvine, Maltby had been assigned a bungalow at the local Waltair Asylum, with a full police guard stationed around the house. His horses and dogs were on the auction block, and the government was preparing to send him to the Presidency asylum in Madras, where he could be held before his deportation to England.[65] In his report on Maltby's first week at Waltair, Dr. Smith, Civil Surgeon, certified that Maltby was a "lunatic and a proper person to be taken charge of and detained."[66] Smith continued, "As regards the crime of which he has been guilty, he is quite irrational and so far

[63] O.B. Irvine to the Chief Secretary to Government, 27th December 1879, IOR/L/PJ/6/193, File 108.
[64] *Indian Code of Criminal Procedure being Act X of 1872* (London: Wm. H. Allen & Co., 13, Waterloo Place, S.W., 1872). Section 423, "*procedure in case of accused being lunatic.* – When any person accused on an offence before a Magistrate competent to try the case appears to such Magistrate to be of unsound mind and incapable of making a defence, such Magistrate shall institute an inquiry to ascertain the fact of such unsoundness of mind, and shall cause the accused person to be examined by the Civil Surgeon of the District, or some other medical officer, and thereupon shall examine such Civil Surgeon or other medical officer as a witness, and shall reduce the examination into writing. If such Magistrate is of opinion that the accused is of unsound mind, he shall stay further proceedings in the case."
[65] O.B. Irvine to the Chief Secretary to Government, 3rd January 1880, IOR/L/PJ/6/193, File 108.
[66] Surgeon-Major J. Smith, Civil Surgeon, Vizagapatam, to the District Magistrate, Vizagapatam, 3rd January 1880, IOR/L/PJ/6/193, File 108.

from appreciating the gravity of the act either treats the subject with indifference or expresses his satisfaction with what he has done."[67]

Maltby was an exceptionally prolific correspondent, but he was otherwise quite ordinary. Indian Civil Servants routinely broke under the pressure of their posts, at times slipping into violent paranoia. Many Victorian psychiatrists believed that sunstroke, which French alienists called *coup de soleil*, could result in a dangerous form of madness that produced erratic behaviour and an extreme susceptibility to the effects of alcohol.[68] In 1866, Scottish physician Francis Skae described both sunstroke and head injury as causes of "traumatic insanity." While sunstroke was rare in England, it was a great danger for Britons abroad. Those who suffered from traumatic insanity were, according to Skae, manic, irritable, suspicious, and dangerous to others. Their characteristic delusions were "*pride*, *self-esteem*, and *suspicion*." The condition was chronic and rarely cured; this form of insanity tended to "pass into *dementia*, and to terminate fatally by brain disease."[69] Although no one officially diagnosed Maltby with sunstroke-induced madness, his carers might well have interpreted his pomposity, suspiciousness and violence as proof that he was afflicted. "A European is, from the heat, in greater danger of ailment of brain than he would be in this country," declared a British judge when he considered Maltby's predicament in 1881.[70] While Maltby maintained that his years in India and his careful study of Indian culture had made him an especially competent civil servant, his judges and his doctors assumed that his long service in the Indian heat had, perversely, made him mentally and legally incompetent.

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[67] Surgeon-Major J. Smith, Civil Surgeon, Vizagapatam, to the District Magistrate, Vizagapatam, 3rd January 1880, IOR/L/PJ/6/193, File 108.
[68] Norman Chevers, *A Manual of Medical Jurisprudence for Bengal and the North-Western Provinces* (Calcutta: Carbery, 1856), 556.
[69] Francis Skae, "On Insanity Caused by Injuries to the Head and by Sunstroke," *The Edinburgh Medical Journal* XI, no. Part II (June 1866): 694.
[70] *In re Maltby* [1881] 7 QB 18, p. 24.

It is tempting to dismiss Victorian evocations of 'brain fever' as excrescences of their fear of, and fascination with, the tropics.[71] However, some scholars have suggested that there might have been something to the idea that nineteenth-century Britons could come mentally undone in the colonies. In his work on nineteenth-century colonial expeditions in Central Africa, Johannes Fabian argues that European explorers experienced states of 'ecstasis' – a sense of being 'out of their minds.'[72] These men guzzled laudanum, a tincture of opium and alcohol, and dosed themselves with quinine and arsenic in desperate attempts to ward of the insomnia, fevers and dysentery that plagued them in the tropics.[73] They were hot, tired, lonely, sick, frightened and obsessed with hiding these weaknesses from the Africans around them.[74] Even if explorers in Africa were not clinically mad, Fabian claims, they were habitually so impaired by misery or drugs that they were not in full possession of their senses.[75] E.M. Collingham describes the physical experience of Britons in India in similar terms, although with less emphasis on the effect of the imperial preoccupation with bodily health, hygiene and good behaviour on officials' minds.[76] Maltby's fourteen years in India, where he ate jam and hobnobbed with petty nobles, were almost certainly much more comfortable than the weeks and months that Fabian's explorers spent trekking through the African jungle. However, he was still a long way from home. The decorum, composure, vigour and control that colonial officials were expected to maintain at all times came at a psychic cost. Sometimes colonial Britons lost their minds and, when they did, it was often the colonised who paid the price.

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[71] See: David Arnold, *The Tropics And the Traveling Gaze: India, Landscape, and Science, 1800-1856* (University of Washington Press, 2011).
[72] Johannes Fabian, *Out of Our Minds: Reason and Madness in the Exploration of Central Africa* (University of California Press, 2000), 3.
[73] Ibid., 66–7.
[74] Ibid., 78.
[75] Ibid., 4.
[76] E. M Collingham, *Imperial Bodies: The Physical Experience of the Raj, C. 1800-1947* (Cambridge, UK: Polity Press ; Blackwell Publishers, 2001).

When Britons in the colonial service became paranoid, undisciplined and violent, their superiors ordered them back to Europe. By the late nineteenth century, there was a well-trod path from India to the asylums of Britain along which troublesome colonial officials trudged home. The Criminal Lunatic Acts of 1849 and 1851 gave colonial Indian authorities the right to detain defendants indefinitely after they had been acquitted on the ground of insanity, in the same way that the 1800 Criminal Lunatics Act had created England's 'pleasure men.' The 1851 Act also improved cooperation among India's various regional authorities, and made it easier for them to transfer criminal lunatics among Indian asylums and, most importantly, to ship them to institutions in England. [77] By the time of Maltby's crime, Indian asylums, perpetually overcrowded and underfunded, had long served as what Waltraud Ernst describes as "a depot for Europeans *en route* to repatriation" in Britain.[78]

Maltby was also not alone in his belief that the Indians among whom he lived were conspiring against him, and that the East India Company was an incompetent and malicious employer. The case of East India Company Captain John Campbell is eerily similar to Maltby's. In October of 1850, Campbell was tried for murder in Madras. He was found not guilty by reason of insanity, and eventually shipped to Bethlem. According to his doctors at Bethlem, Campbell had lived in a house in Madras that was far from that of any other European. In his isolation, Campbell became increasingly paranoid. He had threatened to make public some information tarnishing the Company's reputation, and he was sure that the colonial authorities were out to get him. Campbell became convinced, wrote his doctors, "that the natives were paid by the Government to irritate him, so that he might be induced to commit a murder for which he

[77] Waltraud Ernst, *Mad Tales from the Raj: The European Insane in British India, 1800-1858* (London; New York: Routldedge, 1990), 36.
[78] Ibid., 59.

would either be hung or confined for life."[79] One day, some Indian men approached his house. Even though they were across a river, Campbell took aim at them with a rifle and killed a man.[80] At Bethlem, Campbell's delusions deepened. He thought that his attendants had been bribed to annoy him and to provoke a violent outburst; that other patients deliberately swore at him; and that there was a plot to induce his wife to participate in sodomy.[81]

Like McNaughten and so many others, John Campbell was transferred from the criminal ward at Bethlem to Broadmoor in 1864. By then he was over sixty, and had been at Bethlem for eleven years.[82] Campbell's brother, sister and wife visited him regularly, to see how their "poor brother was progressing."[83] His brother sent him issues of *Nature* magazine and other books, and Campbell and his family seem to have had a cordial relationship with Dr. Orange and the other Broadmoor staff.[84] Campbell died at Broadmoor in 1875, of pneumonia.[85]

The case of another resident of Broadmoor, James Hall, also bears many similarities to Maltby's. Maltby certainly thought so, and used Hall's case as proof that Europeans ought to be tried when they committed crimes against natives in India.[86] James Hall was the Superintendent of Survey in Native States, stationed in Gujurat ('Guzerat'). He was charged with murder and tried at the High Court at Bombay in 1874, and found not guilty by reason of insanity.[87] On the day of the crime, Hall had been travelling the countryside with Indian guards. He was, according to the evidence considered at his trial, "exceedingly agitated, declining to ride and walking along

[79] Casebook entry, John Campbell, Criminal Case Books (CBC), Bethlem Royal Hospital Archives, Bethlem Museum of the Mind, Beckenham, Kent, CBC/3, Bethlem Hospital: Criminal Lunatics, p. 77.
[80] Casebook entry, John Campbell, CBC/3, Bethlem Hospital: Criminal Lunatics, p. 77.
[81] Casebook entry, John Campbell, CBC/3, Bethlem Hospital: Criminal Lunatics, p. 77.
[82] John Campbell intake form, John Campbell Case File, Berkshire Records Office (BRO), D/H14/D2/2/1/59, (1864-1875).
[83] C.D. Campbell to Orange, 19 March 1873, John Campbell Case File (1864-1875), BRO D/H14/D2/2/1/59.
[84] C.D. Campbell to Orange, 1 January 1874, John Campbell Case File (1864-1875), BRO D/H14/D2/2/1/59.
[85] Coroner's certificate, 18 April 1875, John Campbell Case File (1864-1875), BRO D/H14/D2/2/1/59.
[86] Maltby to Lord Hamilton, Secretary of State for India, 22 August 1895, IOR/L/PJ/6/403, File 1436.
[87] Warrant for Hall's removal to England, 24 September 1874, James Hall Case File, BRO D/H14/D2/2/1/828.

with his gun in his hand."[88] Hall had called for some brandy, but refused to drink it, claiming it had been poisoned. His attendants tried to convince Hall to slow his march, and to pitch his tent under a tree. Suddenly, Hall raised his rifle and fired at his escort, killing two men outright and fatally wounding a third.[89]

The Attorney-General of Bombay described Hall as suffering from "very strong and continued delusions that his life was sought by the people of the country in which his duties were carried on."[90] The delusions had gripped him intermittently for years, and his supervisor, Colonel Barton, testified that Hall thought "that the men of the country were driving wild cattle upon him to take his life", and had insisted on always carrying arms.[91] Barton, on the advice of a doctor, had insisted that Hall go on furlough in England to cure his monomania. Hall went but had returned to India three months later, still wild and unpredictable. Barton tried to send Hall away again, but Hall snapped before he could be removed from the region.[92]

Hall, just like Maltby would, claimed that his guards had been acting suspiciously, and that he had shot them in self-defence. In a letter to Barton, Hall wrote that after a sleepless night spent observing the suspicious behaviour of his attendants and,"believing that I should soon be seized, and if I walked on any further that reduced strength would not permit me to walk farther; rather than perish ignominiously, I thought it best to force conclusions and opened fire on my *sowars* [Indian cavalry soldiers]."[93]

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[88] Summary of Hall's trial, 27 June 1874, James Hall Case File, BRO D/H14/D2/2/1/828.
[89] Summary of Hall's trial, 27 June 1874, James Hall Case File, BRO D/H14/D2/2/1/828.
[90] Summary of Hall's trial, 27 June 1874, James Hall Case File, BRO D/H14/D2/2/1/828.
[91] Summary of Hall's trial, 27 June 1874, James Hall Case File, BRO D/H14/D2/2/1/828.
[92] Summary of Hall's trial, 27 June 1874, James Hall Case File, BRO D/H14/D2/2/1/828.
[93] Hall to Barton, 2 April 1874, James Hall Case File, BRO D/H14/D2/2/1/828. For the definition of sowar, see: See: Sir Henry Yule, *Hobson-Jobson: A glossary of colloquial Anglo-Indian words and phrases, and of kindred terms, etymological, historical, geographical and discursive.* New ed. edited by William Crooke, B.A. (London: J. Murray, 1903), 857. A sowar was, according to Yule, 'A native cavalry soldier; a mounted orderly.'

After the killings, Hall hid in a bungalow with a hunting knife in one hand, a rifle within reach, and a belt of cartridges at his waist. He held the knife to his chest and threatened to kill himself if anyone approached the bungalow. He told his colleague, Captain William LaTouche, "what his fears were, viz., that he was to be seized by the natives, and taken to the temple at Dakore to be sacrificed, trampled to death by an elephant, painted red, packed in an ice-machine, and sent home."[94] It took three hours for LaTouche and Hall's wife to talk themselves onto the verandah, and hours more to seize Hall's rifle and the knife.[95] LaTouche testified that Hall had always been very popular with his Indian subordinates, and that he was kind to them.[96] Hall told LaTouche, however, that shooting his guards was "the finest shooting he had made."[97]

At his trial, Hall's defence lawyer was John Duncan Inverarity, a Harrow and Cambridge educated barrister who had recently become an advocate of the Bombay High Court.[98] Inverarity was the son of an East India Company lawyer, and enjoyed a high professional profile in the Presidency.[99] Inverarity had a special interest in the jurisprudence of insanity, and would later act as legal adviser to Isidore Bernadotte Lyon in his authoritative *Textbook of Medical Jurisprudence for India* (1889).[100] Inverarity argued that Hall had been miserably deluded for years. Like John Campbell, Inverarity argued that Hall was undone in part by his isolation in the colony. "He was isolated in the districts," said Inverarity, "with not another European near him,

[94] Testimony of Captain LaTouche, Summary of Hall's trial, 27 June 1874, James Hall Case File, BRO D/H14/D2/2/1/828.
[95] Summary of Hall's trial, 27 June 1874, James Hall Case File, BRO D/H14/D2/2/1/828.
[96] Testimony of Captain LaTouche, Summary of Hall's trial, 27 June 1874, James Hall Case File, BRO D/H14/D2/2/1/828.
[97] Testimony of Captain LaTouche, Summary of Hall's trial, 27 June 1874, James Hall Case File, BRO D/H14/D2/2/1/828.
[98] Harrow School, *The Harrow School Register, 1801-1893* (Longmans, Green, 1894), 309.
[99] Cheltenham College, *Cheltenham College Register, 1841-1889* (Bell, 1890), 153.
[100] Isidore Bernadotte Lyon, *A Textbook of Medical Jurisprudence for India* (Calcutta: Thacker, Spink & Co., 1889).

and every native who approached he imagined was about to kill him."[101] Inverarity told the jury that Hall's case was "exactly similar" to an 1831 case tried at the Norfolk Assizes, *R v Offord*.[102] Offord, hopelessly paranoid, shot and killed a man whom he thought was the ringleader of a conspiracy to harass and kill him. Medical experts argued at trial that Offord suffered from monomania, which had made him unaware of the nature of his crime. The jury acquitted Offord on the ground of insanity.[103] Inverarity was persuasive. Without retiring, the jury found Hall not guilty by reason of insanity. Hall and Maltby would be contemporaries at Broadmoor for over a decade. Hall died there in 1895, after twenty years in the asylum.[104]

Maltby arrived in Madras by steamship on 7 January 1880, and was placed under the care of Dr. A.H. Leapingwell, the Superintendent of the Madras Asylum. On 31 January, Maltby wrote an extensive statement describing in detail his version of the events of 24 and 25 December.[105] Leapingwell forwarded the document to the Indian Government, explaining that the first half of the statement was in Maltby's handwriting but that Leapingwell himself had copied the second half because Maltby refused to part with the original.[106] Although his colleagues and doctors agreed that he was insane, and that his delusions about Chendrayya and his part in killing the *munsif* were ample evidence, Maltby diligently prepared the legal documents he believed would be of use in his criminal trial. Although the government had suspended criminal proceedings in his case, Maltby steadfastly refused to accept that he was now a criminal lunatic rather than an accused murderer.

[101] Inverarity's closing speech, Summary of Hall's trial, 27 June 1874, James Hall Case File, BRO D/H14/D2/2/1/828.
[102] Inverarity's closing speech, Summary of Hall's trial, 27 June 1874, James Hall Case File, BRO D/H14/D2/2/1/828.; *R v Offord* (1831), 5 Carr. & P., p. 168.
[103] *R v Offord* (1831), 5 Carr. & P., p. 168.
[104] Coroner's certificate, 25 February 1895, James Hall Case File, BRO D/H14/D2/2/1/828.
[105] Maltby, Statement written at the Madras Asylum, 1880, IOR/L/PJ/6/13, File 688, p. 34.
[106] Leapingwell to the Government, 13 March 1880, IOR/L/PJ/6/13, File 688, p. 34

A few weeks after Maltby produced his formal statement, the Official Visitors of the Madras Lunatic Asylum published a report on his condition. The Visitors, who included three surgeons, a sanitary commissioner and a Presidency magistrate, found Maltby to be quite quiet and rational until they touched on the subject of Chendrayya. When they mentioned the rebel leader, Maltby became agitated and grandiose, describing how his superior knowledge of the Rampa Rebellion had allowed him to foil the plot against him.[107] They declared him "of unsound mind and unable to make a defence of his actions before a judicial tribunal."[108] Maltby was stuck. If he had abandoned his story of self-defence, then he would have had no hope of an acquittal. But precisely *because* Maltby would not abandon his self-defence narrative, the men who evaluated him assumed that he was too insane to understand what really happened in Sattivada.

There seemed to be no way out for Maltby. Still, he was aggrieved by yet another declaration of his insanity. Most of all, Maltby abhorred the liminal, uncertain position to which he had been condemned – neither guilty nor innocent, neither a prisoner nor a patient. Maltby had lost his freedom and all external confirmation of his status as a sane and responsible man. The Visitors forwarded a copy of a satirical essay, titled "How to Make a Government Lunatic", that Maltby had written and sent to the *Madras Mail*.[109] In the essay, Maltby provided instructions for how to drive a sane man mad. He exhorted his imagined Government,

> Irritate [the man] by treating him neither as a fool, or a criminal, or a knave, or a lunatic. If you can, allow him to imagine himself to be an amalgamated compound of all four. Continue above treatment for 10 days. […] Heap up the agony, add to the suspense, and by general uncertainty harass not only his life, but the very soul out of him as well.[110]

[107] Report of the Official Visitors of the Madras Lunatic Asylum, February 1880, IOR/L/PJ/6/13, File 688, p. 31.
[108] Report of the Official Visitors of the Madras Lunatic Asylum, 23rd February 1880, IOR/L/PJ/6/13, File 688, p.32.
[109] T.J. Maltby, "How to Make a Government Lunatic", February 1880, IOR/L/PJ/6/13, File 688, p. 32.
[110] T.J. Maltby, "How to Make a Government Lunatic", February 1880, IOR/L/PJ/6/13, File 688, p. 32.

Maltby's desperate desire for a trial reflected not only his hope for acquittal and release, but also his wish to be returned to his previous social position. Maltby employed legal language and referred to his legal training in his writings in part to reclaim his membership in the community of men who could discern their own best interests and, perhaps more importantly, advocate for them in the courtroom.

In May of 1880, after nearly five months in Madras, Maltby made his voyage to London on board the *Stelvio*. A surgeon, Dr. Stanbrough, was appointed to accompany Maltby on the trip, and foiled his patient's attempt to escape when the ship docked in Malta. Maltby had apparently planned to meet his wife and two children in Switzerland.[111] Maltby was admitted to Broadmoor, on the edge of the Berkshire moors, on 10 June 1880. His doctors, Orange and Nicolson, wrote a detailed report on his condition a few days later. They reiterated that Maltby was quiet and reasonable except on the subjects of Chendrayya and the Madras government's betrayals; whenever those topics came up, Maltby showed himself to be "still insane".[112] They elaborated,

> He protests most strongly against being treated as insane, and declares emphatically that if he had been allowed a hearing he would have been able to prove to the satisfaction of the Court that he acted under no delusion, and that, instead of being the accused, he himself should have been the accuser. He asserts that the Government has kept him from the Court because they were afraid of the disclosures that he would make. […] He also asserts that his great insight into the Native mind was a source of prejudice and jealousy to the authorities, preventing them from listening to the valuable suggestions he had made to them.[113]

Maltby's return to England did not, in the opinion of his doctors, involve a return to sanity.

However, Maltby did use his proximity to his social network of middle-class colleagues and friends in London to build a case against his confinement without trial. Upon hearing about

[111] Minute report of the Judicial Department, 13 July 1880, IOR/L/PJ/6/18, File 996.
[112] Report of Dr. Orange and Dr. Nicolson on Maltby's condition, 13 July 1880, IOR/L/PJ/6/18, File 996.
[113] Report of Dr. Orange and Dr. Nicolson on Maltby's condition, 13 July 1880, IOR/L/PJ/6/18, File 996.

the killing, Maltby's father, Maltby Sr., began corresponding with officials in the India Office to find out whether his son would be considered a state prisoner on his arrival, whether he would be permitted to see advisers and friends, and what, precisely, he should tell Maltby's wife, Maud.[114] After consulting with the Home Office, the India Office informed Maltby's father that his son's communications with friends would be subject to unspecified "usual rules" and limited as advised by the authorities at Broadmoor.[115] As quickly became the norm where Maltby was concerned, the exact terms of his confinement were left undefined.

Maud travelled to London to meet the *Stelvio*, and she and her father-in-law worked together to help her husband. A couple of weeks after his arrival at Broadmoor, Maltby was transferred to the private, and more comfortable, Moorcroft House Asylum in Hillingdon upon the request of his friends and family.[116] Maltby began to prepare a formal legal challenge to his detention. His luck improved in November, when the Commissioners in Lunacy visited him at Moorcroft. Although they maintained that he was not yet sane, they concluded, "Mr. Maltby was not now sufficiently insane to render him unable to plead to an indictment, if it were thought proper to remove him to India to be tried for murder."[117]

Although Maltby and Maud were hopeful that this new medical report would lead to his trial and release, the seasons passed and Maltby remained confined at Moorcroft. Maud wrote repeatedly to the Home Office and India Office, demanding Maltby's release and financial support for herself and her children.[118] On 8 September, Maltby was formally discharged from the Civil Service, on the pension he would have received had he been invalided after his twelve

[114] Maltby Sr. to Louis Mallet, 2 May 1880, Thomas Maltby Home Office File, Records of the Home Office (HO), The National Archives, Kew HO 144/60/93521.
[115] Home Office directions on how to respond to Thomas Maltby Sr.'s letter to Louis Mallet of 2 May 1880, Thomas Maltby Home Office File, HO 144/60/93521.; India Office to T.J. Maltby Sr, 20 May 1880, IOR/L/PJ/6/13, Files 711-712.
[116] Minute, Public and Judicial Department, 2 September 1880, IOR/L/PJ/6/23, File 1356.
[117] Report of the Commissioners in Lunacy, 6 November 1880, IOR/L/PJ/6/26, File 1605.
[118] Minute, Public and Judicial Department, 2 September 1880, IOR/L/PJ/6/23, File 1356.

years' service. The total, before deductions, came to £310 per year.[119] The money helped the family, although much of the pension initially went to pay for the expense of bringing Maltby home to England and of his maintenance at Moorcroft. The Maltbys were wrong, though, to believe that this signalled any softening in the government's position. A minute circulated within the Public and Judicial Department of the India Office in response to a letter from Maud put it bluntly: "It seems unlikely that any idea will at present be entertained of releasing a dangerous criminal lunatic as Mr. Maltby whose violence extended to murder less than a year ago."[120] The government officials dealing with his case clearly thought that sending Maltby back to Madras for trial would only result in his return to England either as a convicted murderer or, once again, as a criminal lunatic. Maltby could not hope to benefit from the trial. Irvine, in the cover letter he attached to the stack of depositions he sent to London, described the killing as "the tragedy that has so sadly terminated [Maltby's] useful career."[121]

Beyond a general sense that it would be cruel to allow Maltby to stand his trial in India, it is clear that the officials handling Maltby's case were unsure of how they might legally do so, even if they wanted to. Maltby was repatriated under the authority of 14 & 15 Victoria, Cap. 81, An Act to Authorize the Removal from India of Insane Persons charged with Offences, and to give better Effect to Inquisitions of Lunacy taken in India (1851).[122] The Act allowed the repatriation to England of insane persons charged with offences in India, and their indefinite

[119] Minute, Public and Judicial Department, 10 August 1880, IOR/L/PJ/6/18, File 996.
[120] Minute, Public and Judicial Department, 2 September 1880, IOR/L/PJ/6/23, File 1356.
[121] Irvine to the Chief Secretary to Government, 29 January 1880, IOR/L/PJ/6/13, File 688, p.1.
[122] Section 1 of the Act reads: "That if any Person shall have been or shall hereafter be indicted for or charged with any Crime or Offence in any Court in *India*, [italics original] and shall have been or shall hereafter be acquitted of or not be tried for such Crime or Offence on the Ground of his being found to be of unsound Mind, and shall by reason of the Premises be lawfully in custody in *India*, it shall be lawful for the Person or Persons administering the Government of the Presidency in which such Person shall be so in Custody to order such Person to be removed from *India* to any Part of the United Kingdom, there to abide the Order of Her Majesty concerning his or her safe Custody, and to give such Directions for enabling such Order to be carried into effect as may be deemed fit and proper." *The Statutes of the United Kingdom of Great Britain and Ireland, 14 & 15 Victoria* (London: Her Majesty's Printers, 1851), p. 463.

detention in British insane asylums at the discretion of the government. William Macpherson was Secretary of the Judicial Department of the India Office from 1879 to 1882. He was an expert on Indian law and had once been the legal adviser to the India Office, and he handled much of the correspondence concerning Maltby's case.[123] Macpherson believed that the Act under which Maltby had been repatriated, An Act to Authorize the Removal from India of Insane Persons, included no mechanism for its own reversal. He observed, in one minute, that the Act gave the Queen and her Home Secretary the authority to bring criminal lunatics to England, but not to send them back to the colonies.[124] He raised the possibility that Maltby might be arrested in England and then deported to Madras, but dismissed it. He wrote, "there will be some appearance of harshness in now arresting him and sending him back to India, where it is clear that prior to his removal from India he repeatedly demanded to be tried. Probably when the Madras Government sent him to England, they never intended that he should be returned to them for trial."[125]

Frustrated with the failure of the government to either free him or try him, despite the Commissioners' report suggesting that he was fit for trial, Maltby hired solicitors Cobbold and Wooley and petitioned for a writ of *habeas corpus* against the Home Secretary and the superintendent of Moorcroft House. The Court of Queen's Bench heard the case, reported as *In re Maltby*, on 25 March 1881.[126] Maltby's barristers, Mayne and Castle, argued that the 1851 Act, which stated that anyone indicted for or charged with a crime in an Indian court could be deported to England and held in custody at Her Majesty's pleasure, applied only to those who

[123] Gordon Goodwin, 'Macpherson, William (1812–1893)', rev. Catherine Pease-Watkin, *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [http: //www.oxforddnb.com/view/article/17734, accessed 30 March 2013]
[124] Minute, Public and Judicial Department, 18 November 1880, IOR/L/PJ/6/26, File 1612.
[125] Minute, Public and Judicial Department, 18 November 1880, IOR/L/PJ/6/26, File 1612.
[126] *In re Maltby* [1881] 7 QB 18

had been formally charged with a crime. They held that, since a British subject could only be tried for murder before a jury in India, Maltby could only properly be charged before a jury. Maltby's interview with Irvine, the Head Magistrate, in the guesthouse was, by this reasoning, insufficient to constitute either a "court" or a "charge", and so Maltby's deportation under the Act was illegal.[127] Counsel for the Home Secretary argued that Irvine had successfully brought the "court" to Maltby out of kindness on that day in December, and that Maltby had effectively been "charged" with the *munsif*'s murder.

Beyond these technical arguments over the proper meaning of "court" and "charge", two overriding concerns, often repeated by officials reflecting on Maltby's troubles, resurfaced: that Maltby was insane, that he had killed the *munsif* without justification, and that it would be cruel to send him to stand a trial from which he could not benefit. The government's barristers remarked, '"Even if there be some irregularity in the procedure there is inherent power in this Court to refuse a writ of habeas corpus when the applicant is dangerous to the public by reason of lunacy. If the rule is made absolute he must be sent back for trial to India when he will be acquitted on the ground of insanity and again sent here to be detained."[128]

Maltby lost. Despite his social resources and his legal knowledge, Maltby's campaign was compromised by both the diagnosis of his insanity and by the fact that the Court saw India as alien enough to excuse, or even to require, slight deviations from English criminal procedure. Maltby himself had attempted to trade upon the strangeness of India in his claims of self-defence, although the Court succeeded where he had failed. Maltby had committed a terrible crime in a distant place, where ambiguities and irregularities of both protocol and law were more acceptable, and maybe inevitable. He had been returned safely to England and was receiving a

[127] *In re Maltby* [1881] 7 QB 18, p. 22.
[128] *In re Maltby* [1881] 7 QB 18, p. 22.

pension and care in a private institution in bucolic and temperate Hillingdon. It would have been inconvenient and, according to some, inhumane to send him to Madras to meet his fate. Justice Denman in his speech in Maltby's case declared,

> It is important to remember that the statute is […] in a sense a remedial statute, dealing with India where a European is, from the heat, in greater danger of ailment of brain than he would be in this country, and the object is the wise and humane one of removing Europeans from the hot climate to their native air; and I do not think we are bound to hold that the words are to be limited to the exact meaning which they would bear if we were dealing with a matter wholly arising in the United Kingdom, the circumstances being so different.[129]

The case was notable enough to be reported and written up, albeit succinctly, in the London *Times*.[130] Maltby was bitterly disappointed by the result. In a Petition to the Queen he wrote some months later, he accused the two Exchequer judges sitting in the case, Justice Denman and Baron Pollock, of falsely alleging that he was a danger to the public.[131] Maltby considered an appeal to the House of Lords on this point, but his wife informed the Home Department in early May that Maltby had decided to postpone the appeal "at the desire of his Counsel."[132]

Imperial authorities were eager to remove Maltby from Madras as quickly and as quietly as possible. Partly, this served to preserve the Indian colonial government's prestige by hiding the weakness and violence of its officers. However, the imperative to conceal cases of criminal insanity by avoiding the courtroom, and a high-profile and inevitably controversial trial, was not only colonial. British authorities, whether at home or abroad, struggled to manage criminal lunatics, as the debacle over James Shaw's fate makes clear. In the nineteenth century, understandings of insanity and of responsibility were shifting radically. The criminal lunatic asylum seemed to jurists and government officials to represent, simultaneously, a threat to

[129] *In re Maltby* [1881] 7 QB 18, p. 24.
[130] Queen's Bench Division, *The Times* (London, England), Thursday, March 24, 1881; p. 4; Issue 30150.
[131] Maltby's Petition to the Queen, 1884, IOR/L/PJ/6/130, File 1409.
[132] Secretary of State for the Home Department to the India Office, 18 May 1881, IOR/L/PJ/6/40, File 722.

traditional penal institutions and the principles that underpinned judicial punishment, and a boon to officials who needed somewhere to send the dangerous mad.

On 23 May 1881, Maltby took "advantage of an opportunity that offered itself", as he put it, and made his escape from Moorcroft.[133] It was unusual for a criminal lunatic like Maltby to be confined at a private asylum. Moorcroft catered principally to paying clients, who were voluntarily brought by their friends and relatives to the asylum for medical treatment, rather than under warrant, as Maltby had been. The staff at Moorcroft was clearly unaccustomed to dealing with men like Thomas Maltby. It was Maltby's custom to meet his wife at a nearby train station, in order to accompany her back to the asylum for her regular visit. That day, as usual, an attendant had escorted Maltby to the station. Maud Maltby told the attendant that she had hurt her foot and could not walk, and asked him to call a carriage to take them home. When the attendant returned, having left Maltby and Maud alone at the train station, "he reported that he had missed them & although numerous enquiries were made", as of the next day the asylum Superintendent wrote, "nothing further [had] been heard of the lunatic."[134]

Reactions to Maltby's escape were mixed. "Nothing can be done, I suppose," remarked one Home Office official, "He has probably gone abroad & his family must take the consequences of any fresh development of his insanity."[135] William Harcourt, the Home Secretary, was less blasé; he called Maltby a "dangerous lunatic" and demanded an enquiry into "the persons to blame."[136] Despite Harcourt's concerns, recapturing Maltby presented major difficulties. The first of these was the ambiguity of Maltby's legal status. Maltby was considered

[133] Maltby's Petition to the Queen, 1884, IOR/L/PJ/6/130, File 1409.
[134] Henry Stilwell to the Home Office, 24 May 1881, HO 144/60/93521.
[135] Notes in response to Henry Stilwell's letter of 18 May 1881, HO 144/60/93521.
[136] Notes in response to Henry Stilwell's letter of 18 May 1881, HO 144/60/93521.

a criminal lunatic by the authorities, and was held under warrant, but he had never been tried or convicted in a court. The fact that he was a criminal lunatic who had been housed at a private asylum, rather than at Broadmoor, had the unexpected consequence of shielding him from the authority of either of the two major statutes on escaped lunatics.

When the Home Office wrote to the Commissioners in Lunacy to request their advice about the statutory powers under which Maltby might be recaptured, they responded that there was no applicable precedent for a case like Maltby's. [137] One statute, An Act to Consolidate and Amend the Laws for the Provision and Regulation of Lunatic Asylums for Counties and Boroughs, and for the Maintenance and Care of Pauper Lunatics in England (1853), stipulated that escaped lunatics could be retaken within fourteen days, but the Commissioners did not think it applied to criminal lunatics.[138] The Act in question dealt with lunatics who were found not to be under proper "care and control" in their local communities and who might be victims of cruelty and neglect; it offered no guidance for how to handle articulate, resourceful killers who absconded overseas with the connivance of their friends.[139] A second statute, the Criminal Lunatic Asylum Act 1860, stated that any person who escaped from "any Asylum for Criminal Lunatics" could be "retaken at any Time."[140] But, although Maltby was a criminal lunatic, Moorcroft was not an "Asylum for Criminal Lunatics." Once again Maltby was in legal limbo.

Maltby's position was unusual, but his recapture remained legally possible. Maltby and Maud had fled to his father's home in Brussels. As members of the Home Office reflected in

[137] Commissioners in Lunacy to the Home Office, 7 June 1881, HO 144/60/93521.
[138] The statute was 16 & 17 Victoriae, Cap. 97, *An Act to Consolidate and Amend the Laws for the Provision and Regulation of Lunatic Asylums for Counties and Boroughs, and for the Maintenance and Care of Pauper Lunatics in England* (1853), s. 88.
[139] See, for example, s. 68, 16 & 17 Victoriae, Cap. 97, *An Act to Consolidate and Amend the Laws for the Provision and Regulation of Lunatic Asylums for Counties and Boroughs, and for the Maintenance and Care of Pauper Lunatics in England* (1853).
[140] s. 11, 23 & 24 Victoriae, Cap. 75, *An Act to make better Provision for the Custody and Care of Criminal Lunatics* (1860).

their notes on the Commissioners' letter, it was likely that the Belgians could be persuaded to "give him up" if they were shown the depositions from the Madras inquiry and the Secretary of State's warrant.[141] Maltby's legal situation alone was not enough to dissuade the Home Office from pursuing him. Still, having no clear law giving the British government authority to assert its jurisdiction over Maltby was inconvenient. Godfrey Lushington, at the Home Office, ordered that the Maltby papers be forwarded to a Committee recently appointed to inquire into the law on criminal lunatics, so that they could remedy the "defect."[142]

In addition to the legal ambiguities of Maltby's case, his escape raised political difficulties. C.E.H. Vincent, the director of criminal investigations at Scotland Yard, summarized the problem. Maltby was known to have fled directly to Brussels to stay with his father, the Vice-Consul.[143] Initiating formal extradition proceedings and involving the Belgian police would embarrass the government and risk a diplomatic incident. Beyond asking Thomas Maltby Sr. to surrender his son to the Moorcroft authorities, Vincent recommended that the Home Office take no action to retrieve their prisoner.[144] Losing his man might have been difficult for Vincent, who was so fond of detective work that he endowed an annual prize to reward skilled work in the field.[145] Other members of the British administration, however, were relieved to have Maltby safely out of their hands. Lushington guessed that the Indian Government and the Secretary of State, under whose warrant Maltby had originally been confined, would prefer not to apply for his extradition, even if Belgium were to oblige.[146] By July of 1881, the British government had abandoned hope of pursuing Maltby across international borders. Stilwell, the Superintendent of

[141] Notes on the letter from the Commissioners in Lunacy to the Home Office on 7 June 1881, HO 144/60/93521.
[142] Notes on the letter from the Commissioners in Lunacy to the Home Office on 7 June 1881, HO 144/60/93521.
[143] Maltby addressed his letters from Brussels, and used Belgian letterhead. He never tried to hide his location.
[144] C.E.H. Vincent to the Home Office, 9 June 1881, HO 144/60/93521.
[145] Reginald Lucas, "Vincent, Sir (Charles Edward) Howard (1849–1908)," rev. Clive Emsley, in *Oxford Dictionary of National Biography*, ed. H. C. G. Matthew and Brian Harrison (Oxford: OUP, 2004); online ed., ed. Lawrence Goldman, September 2010, http: //www.oxforddnb.com/view/article/36660 (accessed February 17, 2014).
[146] Notes on the letter from the Commissioners in Lunacy to the Home Office on 7 June 1881, HO 144/60/93521.

Moorcroft, wrote that summer, barely containing his jubilation, to ask if he could officially strike Maltby's name from his list of patients. The Home Office agreed.[147]

Maltby was a fugitive, and would travel in Europe and the American Southwest for the next three years. Maud and their children joined him in Brussels, at his father's house. Rather than celebrate his freedom, however, Maltby continued his campaign for exoneration. He finished his Petition to the Queen on 21 October 1881, and noted his address as 63, Avenue Louise, Brussels. The Petition was printed professionally in a neat booklet on glossy paper, with each of twenty-one important points duly enumerated.[148] Like almost all of Maltby's writings, the Petition was coherent, detailed and respectful of the formalities of official correspondence. Maltby,'Your Petitioner', provided a full account of the legal and bureaucratic miss-steps and abuses, as he saw them, which had led him to his desperate situation. He lamented, especially, the failures of legal process, and the fact that he was never "charged" before the Madras High Court. He ended with demands for compensation for all that he has lost: his property, his "personal status", his pay, and, most of all, "for the wrongful, cruel and unjust loss of liberty which your Petitioner endured in India and in England between the 27th December 1879, and the 23rd May 1881."[149] The Petition would become Maltby's talisman. He would send copies, often multiple copies, to almost everyone with whom he had official contact from 1881 on.

Maltby's Petition to the Queen is discomfiting to read now, and so it must have been in the 1880s. For a man deemed incapable of making his defence in court, Maltby was distressingly lucid, precise and persuasive. Maltby's story of his departure from India and his experiences in England was accurate, when checked against official correspondence, and his grasp of the

[147] Stilwell to the Home Office, 5 July 1881, HO 144/60/93521; Notes on Stilwell's letter of 5 July 1881, 7 July 1881, HO 144/60/93521.
[148] Maltby's Petition to the Queen, 1884, IOR/L/PJ/6/130, File 1409.
[149] Maltby's Petition to the Queen, 1884, IOR/L/PJ/6/130, File 1409.

machinations of the government bodies involved in his case – the Madras High Court, the Madras Government, the Home Office, the India Office – was impressive. No doubt the bureaucrats and lawyers with whom Maltby corresponded thought so, too.

Shortly after absconding from Moorcroft, Maltby wrote to Louis Mallet at the Home Office to request the arrears of his pension, which had not been drawn by Maud Maltby since May. Maltby was so prompt in requesting the proper paperwork that he was the first to inform the India Office of his escape from Moorcroft. A Judicial Department minute from that August hints at the sense of alarm that Maltby's deluge of official correspondence could produce: "Mr. Maltby, writing from Brussels, [underlining original] asks to be supplied with the necessary papers in order to draw his pension. […] [T]his Office has received no information of Mr. Maltby's departure from the Asylum in England in which he was detained by order of the Home Office."[150]

This was the first of many official letters that Maltby would send to the India Office from Brussels. In one letter, Maltby described his puzzlement at Mallet's refusal to communicate officially while he was a "fugitive from justice (?)."[151] The bracketed question mark was in Maltby's original letter, which he wrote in an elegant hand from the English Club, Brussels, using its monogrammed stationery. Maltby sent Mallet a copy of his Petition to the Queen, hoping that this "memorial" would prove that he was no fugitive, but the victim of a great injustice. In reply, Mallet, on the instructions of the Judicial Committee of the India Office, wrote to Maltby unofficially to inform him that his Petition could not be considered until he turned himself in.[152] Mallet was a man known for his discipline and enthusiasm for protocol.[153]

[150] Minute, Judicial Department, August 1881, IOR/L/PJ/6/46, File 1111.
[151] Maltby to Louis Mallet, August 1882, IOR/L/PJ/6/79, File 1357.
[152] Minute, Judicial Department, 12 August 1882, IOR/L/PJ/6/79, File 1357.

He must have been nonplussed by this extended, semi-private correspondence with a criminal lunatic with the audacity to demand, in the most proper bureaucratic register, that his pension be paid to him while on the lam in Belgium. Maltby went unpaid.

The next three years in Maltby's life are mysterious. At some time in 1882, he left Brussels for Colorado and New Mexico in the United States. It seems that Maltby, or his family, had property in America. A few of the witnesses questioned in Madras in 1880 mentioned Maltby's American estate, and his great interest in Canada and the United States.[154] Dr. Leapingwell, the Superintendent of the Madras Asylum, reported that Maltby believed that he had only survived Chendrayya's attack thanks to "dodges he had learned in America."[155] Maud gave birth to one of the couple's children, a girl, in Topeka, Kansas in 1878.[156] In 1882, Maltby and Maud had another child.[157] Meanwhile, Maltby kept writing from America. In 1883, Maltby sent a petition to the High Court of Madras from somewhere in Chicago, although his permanent address was in Idaho Springs. True to form, he carefully described his case and numerous statutes he thought relevant. He again rejected the claim that he had ever been legally "charged", and begged to "reassert that old maxim of English law *falsus in uno, falsus in omnibus*, which openly proclaims that fraud is in itself sufficient to vitiate all judicial or *quasi*-judicial proceedings founded thereon."[158] Maltby's petition was sufficiently credible to prompt the High Court to initiate proceedings on the matter. However, the Court merely found that it could not entertain Maltby's objections unless a Pleader presented them in person, through the

[153] Donovan Williams, 'Mallet, Sir Louis (1823–1890)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Jan 2008 [http: //www.oxforddnb.com/view/article/17889, accessed 30 March 2013]
[154] Letter by Newton Jennings, 13 January 1880, IOR/L/PJ/6/13, File 688, p. 27; Testimony of J.W.S. Butler, IOR/L/PJ/6/13, File 688, p. 3.
[155] Maltby's case history, Dr. Leapingwell, 11 March 1880, IOR/L/PJ/6/13, File 688, p. 38.
[156] Births, The Times (London, England), Wednesday, Mar 27, 1878; pg. 1; Issue 29213.
[157] Report of Maltby's Condition, Dr. Brayne, Broadmoor, 13 November 1897, IOR/L/PJ/6/463, File 2338.
[158] Maltby's Petition to the Madras High Court, 16 October 1883, IOR/L/PJ/6/193, File 108.

superintendent of a jail where he was confined.[159] It is unclear exactly where Maltby went and what he did in America. His travels took him to Belgium, Colorado, Illinois and New Mexico, and probably further afield. In an 1897 letter, Maltby remembered appearing in North American courts "on more than one occasion in connection with law-suits in that country."[160] The contrast between his freedom and access to the courts in America and his experiences in England was not lost on Maltby.

Despite the fact that he had been essentially written off by the British authorities, and despite his freedom to travel the world, sue his neighbours, and add to his family, Maltby could not resist the temptation to return to England. Neither time nor liberty could blunt his determination to stand trial. On 25 October 1884, two Scottish officers apprehended Maltby while he was sitting in the waiting room of the India Office in London.[161] Maltby was shocked and indignant, protesting the humiliation of the public arrest and the roughness with which he was bundled into a cab and taken back to Moorcroft.[162] It is difficult to believe that Maltby would return to the India Office waiting room after three years of liberty and litigation abroad. It seems that he took the Madras High Court's 1883 proceedings, in response to his petition, as an invitation to return and to plead his case – his most ardent wish – rather than a refusal to deal officially with a fugitive. He wrote, in a letter to the Under Secretary of State at the India Office,

> [H]aving received the permission of the Madras High Court to appear in person and argue my case before them in their Proceedings dated the 3rd December 1883, I returned to England from North America, and, whilst attending to my private affairs at the India Office, I was suddenly seized […] and brought down to this private prison, called by some a Lunatic Asylum.[163]

[159] Proceedings of the High Court of Judicature at Madras, 3rd December 1883, No. 3780, IOR/L/PJ/6/193, File 108.
[160] Maltby to Sir Philip Hutchins, 10 December 1897, IOR/L/PJ/6/467, File 2528.
[161] Minute, Judicial Department, 11 December 1884, IOR/L/PJ/6/142, File 2485.
[162] Maltby to the India Office, 11 December 1884, IOR/L/PJ/6/142, File 2485.
[163] Maltby to the India Office, 11 December 1884, IOR/L/PJ/6/142, File 2485.

The police report on Maltby's recapture paints a fuller picture. Maltby arrived in London on the 15 October. He and Maud had had a falling out in America, and she had returned to London, to the Waterloo Hotel, in late September. Apparently, Maltby's appearance at the hotel had caused "great astonishment and consternation to his wife" and a "violent scene" ensued.[164] The two stayed at the hotel together, but Maud was always careful to keep the door to their adjoining rooms locked.[165] It is unclear who first alerted the authorities to Maltby's return. Perhaps it was Maud, so overwhelmed by her husband's erratic behaviour that she had fled to England, where Maltby was sure to be arrested if he followed. According to Godfrey Lushington, Maud "now wishe[d] him to be in an asylum" and, it was believed by the staff of the Home Office, would never again conspire to help her husband escape.[166] In any event, Maltby was easy to find at the hotel, and made no effort to conceal his identity.

Inspector Newman Turpin of the Metropolitan Police went to the Waterloo Hotel on 24 October and interviewed guests about Maltby. Turpin consulted with the police Superintendent, and proceeded to the India Office the next morning to ask what they thought should be done with Maltby. As it happened, he was already there, having come to apply for his pension in person. While Maltby waited at the India Office, Turpin walked through the building to the offices of the Home Office, since they had primary jurisdiction over Maltby's case. Eventually, Turpin and another inspector, Roots, were instructed to arrest Maltby. Maltby, for his part, "struggled violently" and "refused to walk quietly", and so was dragged from Whitehall by the inspectors and two uniformed policemen, as officials and messengers poured into the corridor to take in the

[164] Metropolitan Police Report on Recapture of Maltby, 27 October 1884, HO 144/60/93521.
[165] Metropolitan Police Report on Recapture of Maltby, 27 October 1884, HO 144/60/93521.
[166] Note of Godfrey Lushington on telegram from Lord Buckingham to the Home Office, 25 October 1884, HO 144/60/93521.

spectacle.[167] The police took Maltby to Scotland Yard. While Maltby waited to be transferred to Moorcroft, he wrote four letters, two to politicians, one to his wife, and one to a sergeant of the City Police.[168] As Maltby was being hauled, struggling and screaming, to the carriage that would bear him to Moorcroft, he turned to Turpin and asked, "Do you think I have let [Home Secretary] Harcourt have enough of it?", to which Turpin replied, "I certainly think you have and us too."[169] Maltby burst out laughing and decided to "leave off", walking calmly the rest of the way to the cab.[170] Maltby had returned to England, and would never leave or live outside an asylum again.

During Maltby's absence from London, the law governing his case had changed. In 1884, the Colonial Prisoners Removal Act came into effect.[171] During the second reading of the Bill in the House of Lords, in March of 1884, the Earl of Derby argued that the new Act would make it easier to transfer criminals, including criminal lunatics, from the colonies back to England. The justifications for this practice echoed those expressed by the court of Queen's Bench in Maltby's *habeas* suit. Derby explained, "If you are to deal with an English sailor imprisoned on the West Coast of Africa as you would at Portland, you would probably kill him—if his confinement has to be relaxed and mitigated, to avoid the danger from climate, it ceases in a great measure to be penal, and introduces irregularity in the discipline of the prison, if Natives are also confined there."[172] Section 9 of the Act dealt specifically with the case of escaped criminals, including criminal lunatics, who had been deported to England from the colonies. The first part of the section stipulated that if a prisoner escaped, "by breach of prison or otherwise, out of custody, he may be retaken in the same manner as a person convicted of a crime against the law of the

[167] Metropolitan Police Report on Recapture of Maltby, 27 October 1884, HO 144/60/93521.
[168] Metropolitan Police Report on Recapture of Maltby, 27 October 1884, HO 144/60/93521.
[169] Metropolitan Police Report on Recapture of Maltby, 27 October 1884, HO 144/60/93521.
[170] Metropolitan Police Report on Recapture of Maltby, 27 October 1884, HO 144/60/93521.
[171] 47 & 48 Victoriae, Cap. 31, *An Act to make further provision respecting the removal of Prisoners and Criminal Lunatics from Her Majesty's possessions out of the United Kingdom* (1884).
[172] *Hansard, HL Deb 20 May 1884 vol 288 cc815-6.*

place to which he escapes may be retaken upon an escape."[173] The second sub-section made both the escapee and anyone who helped him subject to criminal punishment.[174]

Another Act, also passed in 1884, enhanced the authority of officials and doctors to retrieve escaped criminal lunatics, and to punish their accomplices. S.11 of the Criminal Lunatics Act resolved the uncertainties of the Criminal Lunatics Asylums Act, 1860, which had caused so much confusion after Maltby's escape. The 1884 Act specified that ss. 11 and 12 of the 1860 Act applied to "every asylum or place in which criminal lunatics are confined so far as regards those lunatics, and to the criminal lunatics in such asylum or place, in all respects as if such asylum or place were an asylum for criminal lunatics", including provisions for punishment.[175] S.11 of the 1860 Act, described above, stipulated that a person who had escaped from a criminal lunatic asylum was subject to recapture. The 1884 Act enlarged s.11 to apply to criminal lunatics generally, regardless of the type of institution where they had been confined. S.12 of the 1860 Act laid out the punishments for anyone who helped a criminal lunatic to escape "through wilful Neglect or Connivance."[176] These were severe. Anyone responsible for assisting an escaped criminal lunatic was guilty of a felony, and liable to up to two years' imprisonment with or without hard labour, or four years' penal servitude, while officers or servants whose carelessness led to escapes could be fined up to £20.[177]

Maltby did not take his recapture well. Dr. Stilwell, of Moorcroft House, wrote to the India Office about Maltby's disruptive behaviour since his return from America. He complained, "[Maltby] was represented as being quiet and harmless and not requiring constant attention.

[173] s.9(1), 47 & 48 Victoriae, Cap. 31, *Colonial Prisoners Removal Act* (1884).
[174] s.9(2), 47 & 48 Victoriae, Cap. 31, *Colonial Prisoners Removal Act* (1884).
[175] s. 11(1), 47 & 48 Victoria, Ch. 64, *Criminal Lunatics Act,* 1884.
[176] s. 12, 23 & 24 Victoriae, Cap. 75, *An Act to make better Provision for the Custody and Care of Criminal Lunatics* (1860).
[177] s. 12, 23 & 24 Victoriae, Cap. 75, *An Act to make better Provision for the Custody and Care of Criminal Lunatics* (1860).

After his return here however on October 25th last, it was found that he was so excitable and bent upon escaping, that it became necessary to place an attendant with him constantly."[178] Stilwell also wrote to the Home Office, informing them that a private facility like Moorcroft was not equipped to provide the "care and safe custody of a person so insane and dangerously impulsive" as Maltby.[179] Stilwell, desperate to be rid of his troublesome patient, even wrote directly to Harcourt, the Home Secretary, informing him that Maltby had made violent attempts to escape since his recapture, and had threatened the lives of his attendants and anyone else complicit in what he called his "illegal detention."[180] And so Maltby found himself back at Broadmoor in March of 1885. The public criminal asylum was better equipped to handle and to contain difficult patients like Maltby.

Orange's and Nicolson's letters and reports on Maltby's condition suggest a precipitous decline upon his readmission to Broadmoor. In one note to the India Office, Nicolson described Maltby as suffering from bouts of mania marked by incoherent rambling interrupted by intermittent periods of lucidity "found to end in a profusion of letter-writing to various people in correction with what he regards as his grievances."[181] Despite Maltby's growing desperation, or because of it, he kept writing to his contacts in all the branches of government with any interest in his case.

First, Maltby attempted to revive his 1883 petition to the Madras High Court, the official response to which had lured him back to London in 1884. He sent another petition to the High Court, explaining that he had again been imprisoned unjustly and still had never been formally charged with murdering the *munsif*. He claimed to be prepared to prove that he had acted in self-

[178] Dr. Stilwell to the India Office, 27 February 1885, IOR/L/PJ/6/148, File 385.
[179] Dr. Stilwell to the Home Office, 19 February 1885, HO 144/60/93521.
[180] Dr. Stilwell to W.V. Harcourt, 25 February 1885, HO 144/60/93521.
[181] Dr. Nicolson to the India Office, 13 September 1886, IOR/L/PJ/6/183, File 1375.

defence, if only the Court would rule against the validity of Irvine's proceedings.[182] Maltby, a careful observer of procedure, ensured that Nicolson, who succeeded Orange as Superintendent in 1886, signed the letter, just as the High Court's 1883 proceedings in Maltby's case had stipulated.[183] He had also hired lawyers, Messrs. Grant, in Madras, to whom he forwarded his letter. Despite the fact that Maltby's doctors at Broadmoor considered him virtually incapable of coherent conversation, the High Court took him seriously enough to hear his objections yet again. In November, the Court decided that Irvine's inquiry in Vizianagrum had been conducted according to law, that Maltby's deportation to England was therefore also lawful, and that "the High Court has no jurisdiction over persons confined in jails or asylums in England, and therefore cannot interfere in the matter of the present petition."[184] They forwarded copies of Maltby's petition to the Government of Madras, which sent more copies to the India Office and to the Secretary of State for India in London, which forwarded copies to the Home Office.[185]

Maltby also attempted to contact politicians, to see if they might intervene on his behalf. For example, about six months after his return to Broadmoor, Maltby wrote to Randolph Churchill, MP, begging for help in reviving his Petition to the Queen, which Maltby imagined had "been lying at the India Office unnoticed since October 1881."[186] Maltby claimed to have "many other friends" who were eager to "see the matter ended."[187] Poignantly, he asked Churchill to acknowledge receipt of a letter Maltby had sent him while a fugitive in Chicago, which he was sure Churchill would remember.[188] It is possible that Churchill had received Maltby's letter from Chicago, but he never read this one. Asylum staff instead sent Maltby's

[182] Petition from Maltby to the Madras High Court, 18 May 1886, IOR/L/PJ/6/193, File 108.
[183] Proceedings of the High Court of Judicature at Madras, 3rd December 1883, No. 3780, IOR/L/PJ/6/193, File 108.
[184] Proceedings of the High Court of Judicature at Madras, 11 November 1886, No. 3059, IOR/L/PJ/6/193, File 108.
[185] Minute, Public Department, 17 January 1887, IOR/L/PJ/6/193, File 108.
[186] Maltby to Randolph Churchill, 28th September 1885, HO 144/60/93521.
[187] Maltby to Randolph Churchill, 28th September 1885, HO 144/60/93521.
[188] Maltby to Randolph Churchill, 28th September 1885, HO 144/60/93521.

letter directly to the Home Office, with a cover letter from Orange describing how Maltby had suffered three attacks of mania since his return in March.[189] Maltby's condition was summarized in notes made by members of the Home Office about his letter: "body indifferent, mind unsound."[190] They decided not to forward the letter to Churchill.[191]

After his second petition to the Madras High Court failed to prove that he had never been "charged", Maltby's presence in the archives begins to fade. Fewer and fewer avenues for reopening his case remained. The Madras High Court was unwilling to question Irvine's investigation, and so was the Court of Queen's Bench. Maltby's only hope of finally getting his day in court rested in proving to his doctors that he was sane, or at least sane enough to be tried. Across his whole body of official letters, Maltby devoted far more energy to arguing points of criminal procedure than to arguing that he was sane. Most of his official letters mentioned nothing about his sanity, but were strongly focused on alleged mistakes in criminal procedure and reconstructions of the events of the night of the killing. On Christmas Eve in 1879, just before Maltby set out for Chicacole, Mrs. Butler remembered Maltby handing her a pistol and saying, "This is a thing I dare not trust myself with in one of my insane moments."[192] She also reported that he asked her anxiously over dinner whether she thought him insane.[193]

As the ten-year anniversary of his crime approached, his doctors gave up on the prospect of any improvement. In an 1887 report, Nicolson put it bluntly, "[Maltby] is quite unfit by reason of his insanity to stand his trial or to be sent to India with that view; and I am of opinion that his mind will never be sufficiently restored to make him fit to do so."[194] The India Office concurred.

[189] Dr. Orange to the Home Office, 28th September 1885, HO 144/60/93521.
[190] Notes on Maltby's letter to Randolph Churchill, 28th September 1885, HO 144/60/93521.
[191] Notes on Maltby's letter to Randolph Churchill, 28th September 1885, HO 144/60/93521.
[192] Testimony of Mrs. H. Butler, IOR/L/PJ/6/13, File 688, p. 3.
[193] Testimony of Mrs. H. Butler, IOR/L/PJ/6/13, File 688, p. 3.
[194] Report on Maltby's Condition, Dr. Nicolson, 3 February 1887, IOR/L/PJ/6/195, File 276.

In a letter to the Home Office, also in 1887, Permanent-Undersecretary of the India Office John Gorst wrote, "Mr. Maltby's condition is such as renders him wholly unfit to be sent to India or to stand his trial."[195]

Maltby was acutely aware that his travails had lasted nearly a decade. His friends and enemies were disappearing – Irvine and his father, the consul, were dead by the late 1880s. In the margin of one letter that Maltby sent, words uncharacteristically ill-formed, in which he announced his father's recent death, Nicolson scribbled, "Mr. Maltby's mental condition is at present much decayed and unsettled."[196] Even though his situation was bleak, Maltby did not give up entirely. In March of 1889, the Duke of Buckingham, former Governor of Madras and the mastermind of the official conspiracy to discredit Maltby (according to Maltby), also died.[197] Maltby wrote to a member of the Madras government Council, J.H. Garstin, hoping that he might be able to persuade the new Governor of Madras, Robert Bourke, Lord Connemara, to help with his case, now that Buckingham was out of the picture.[198] Maltby wrote of his suffering and the injustice of waiting ten long years without trial. He hoped that "now that the Duke of Buckingham is dead, there may be no objections to my appearing for my trial, and it seems hard to refuse to a British subject that which is readily granted as a right to every Hindoo."[199] Nothing came of the letter.

As the years passed, Maltby made overtures to new government officials in both Madras and London. However, the longer he stayed at Broadmoor, the less likely he was to receive answers. One of his last archived letters was addressed to Sir Philip Hutchins, who had once

[195] John Gorst to the Home Office, 21 January 1887, HO 144/60/93521.
[196] Maltby to the Accountant General, 25 June 1889, IOR/L/PJ/6/205, File 1110.
[197] E. J. Feuchtwanger, 'Grenville, Richard Plantagenet Campbell Temple-Nugent-Brydges-Chandos-, third duke of Buckingham and Chandos (1823–1889)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, May 2009 [http: //www.oxforddnb.com/view/article/11498, accessed 31 March 2013]
[198] Maltby to Garstin, 21 May 1889, IOR/L/PJ/6/260, File 1427.
[199] Maltby to Garstin, 21 May 1889, IOR/L/PJ/6/260, File 1427.

been a judge on the Madras High Court and was, by 1897, a member of the Imperial Legislative Council of India. In the letter, Maltby denied that he was at Broadmoor for medical reasons, but only on the order of the Secretary of State.[200] He listed the evidence of his competence and innocence: that he was never charged, that he acted in self-defence, that he appeared in court in America, and that there was not universal agreement among doctors as to his incapacity to stand trial.[201] He demanded a personal interview. Instead of writing back to Maltby, Hutchins wrote to Maltby's doctors. Dr. Richard Brayn, who became Superintendent after Nicolson retired, warned Hutchins, "If you reply to his letter, it will only encourage him to write again, and annoy you with a further correspondence which can serve no useful purpose."[202] Maltby, however, continued to write to Hutchins, and Brayn continued to encourage Hutchins to give no reply. In February of 1898, Maltby made one last, impassioned plea, girding his despair in the law's Latin maxims,

> There is an old legal maxim which says 'falsus in uno falsus in omnibus', and I feel sure that as a just man, you must regret in any way being a party to a miscarriage of justice, which has consigned me to prison for more than fourteen years without a trial [underlining original] of any sort or kind. I am myself almost helpless in the matter, and unless the authorities at the India Office insist upon my release on the grounds of 'nolle prosequi' I am likely to remain here the rest of my life.[203]

It seems that Maltby's correspondents finally stopped writing back. After 1898, Maltby vanished from the records of the Judicial Department of the India Office. He remained at Broadmoor until his death, at the age of 76, in 1921.[204] By the time he died, Maltby had spent thirty-nine years in

[200] Maltby to Philip Hutchins, 10 December 1897, IOR/L/PJ/6/467, File 2528.
[201] Maltby to Philip Hutchins, 10 December 1897, IOR/L/PJ/6/467, File 2528.
[202] Brayn to Philip Hutchins, 22 December 1897, IOR/L/PJ/6/467, File 2528.
[203] Maltby to Philip Hutchins, 23 February 1898, IOR/L/PJ/6/473, File 403.
[204] Deaths Registered in July, August and September, 1921, Easthampsted, Berkshire, p. 46.

custody, and forty-two as a criminal lunatic in the eyes of the British and British imperial governments. [205]

One of the most remarkable features of Maltby's life is the richness of its archive. The heavy bound volumes of Public and Judicial files among the India Office Records are replete with letters by and about Maltby.[206] Maltby has his own dedicated file in the archives of the Home Office, at the British National Archives.[207] In addition to printed records of the evidence collected in Madras in the wake of his trial, Maltby's appeal to the Court of Queen's Bench made it into the English law reports.[208] Compared to other similar cases in which a European killed someone in India and then was returned to London for confinement, the quantity of writing in Maltby's case is extraordinary.[209] John Thomas Margoschis, to provide one more example, was headmaster of the Society for the Propagation of the Gospel's school at Vepery, Madras. In the grip of "delusions concerning Natives", in the words of the Superintendent of the Madras Asylum, he killed his servant, Pauliam.[210] Margoschis was acquitted of culpable homicide on the ground of insanity at the Madras High Court, and was soon removed to England under the same statute used to authorize Maltby's forced return.[211] Margoschis' file, which contains only about a dozen letters and telegrams, pales in comparison to Maltby's, despite the many similarities in their cases.[212] Cases from across the empire that were spectacularly gruesome or in which the

[205] It is unclear why the correspondence about Maltby ends in 1898, since Maltby lived until 1921. It is possible that his mental condition deteriorated significantly around this time, although that is speculation.
[206] There are over one hundred letters in the India Office Records at the British Library in London dealing with Maltby.
[207] See HO 144/60/93521
[208] *In re Maltby* [1881] 7 QB 18.
[209] For more on the British policy of deporting the European insane from India, see: Ernst, *Mad Tales from the Raj*, 1990, 123.
[210] Medical Certificate signed by Dr. Leapingwell, Superintendent of the Madras Asylum, 3 May 1881, IOR/L/PJ/6/43, File 994: 13 Jun 1881.
[211] Letter to the Secretary of State for India from Hudleston and Davidson, 13 June 1881, IOR/L/PJ/6/43, File 994; The statute in question was *14 & 15 Vic., Cap. 81*, of which more below.
[212] Maltby also recognized the similarities between his own case and those of other Europeans who had been removed to English asylums after committing crimes in India. He lists Margoschis, as well as two others named Hall

political stakes were very high produced more writing, and particularly more press.[213] However, for a middling member of the imperial administration who killed a low-ranking Indian official, Maltby's presence in the official record is unusual.

Maltby's ability to communicate with the government officials, lawyers and administrators handling his case in their own register, respecting the formalities of bureaucratic prose and written self-presentation, was a primary reason for their interest in his predicament. Many of the European insane in India were educated and relatively well-heeled, as both Maltby and Margoschis were.[214] However, Maltby had the particular advantage of fluency in the two 'languages' that were most pertinent to his circumstances: that of the Indian Civil Service, and that of the law. Even after many years of incarceration at Broadmoor, he followed conventions of formality and politeness in his official correspondence and publications. Although he never succeeded in his goal of returning to India to stand his trial, letters about him by the officials he petitioned suggest that his case troubled them.

Despite his many failures, Maltby's ability to tap into the empire's bureaucratic networks was impressive. The British empire, and particularly its legal and administrative branches, relied heavily on record-keeping and dense correspondence networks. Maltby's case placed him in ambiguous jurisdictional territory – he killed the *munsif* in Madras, was under the custody of the Home Office, and drew his financial support from the India Office – which provided a wide catchment of potential official correspondents. However, the fact that Maltby's flurries of writing, apparently produced in and among moments of mania, were received as formal petitions,

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and Kelly, as examples of analogous cases in which Europeans were formally tried before their removal – the most damning of differences between their fate and his own, for Maltby. Maltby to Lord Hamilton, Secretary of State for India, 22 August 1895, IOR/L/PJ/6/403, File 1436.

[213] For instance, the roughly contemporary cases of the insane murderer Frederick Deeming and the Canadian rebel Louis Riel generated court cases, stage plays, and innumerable editorials.

[214] For more on insane Europeans in India, see: Waltraud Ernst, *Mad Tales from the Raj : The European Insane in British India, 1800-1858* (London; New York: Routledge, 1990).

legal instructions and commentaries, and official memoranda should not be overlooked. Despite his status as a criminal lunatic, Maltby continued to speak in the voice of a civil servant and lawyer; he was too intelligible to his interlocutors to be summarily dismissed by them.

Maltby's correspondents also wrote to him and about him because they felt that his case raised important legal and administrative issues that could not be ignored. The two 1884 statutes that would have governed his 1880 transportation to England and his 1881 escape if they had been in force, the Criminal Lunatics Asylums Act and the Colonial Prisoners Removal Act, might well have been conceived with Maltby in mind. Maltby's appeal to the Court of Queen's Bench was unsuccessful, but the decision was reported and written up in the newspaper. He lost, but his case made its mark on imperial jurisprudence. Men and women like Maltby circulated around the British world, in search of their fortunes and their freedom. When they committed crimes, they were sucked into a criminal justice system that regularly crossed continents. Just as lawyers in Indian courts cited English precedent, men who had killed their victims in London and in Madras could find themselves stalking Broadmoor's halls side-by-side, eking out lives on the same wards, petitioning the same authorities for their release.

It is as difficult to pin down T.J. Maltby now as it was in the nineteenth century. Most of his many correspondents in the British and Indian governments knew him primarily through his letters. His colleagues in Madras, his doctors and fellow patients in England, and his family sat across from him at meals, talked with him about imperial policy, and played racket sports against him. Without that intimate acquaintance, it is impossible to say for sure whether Maltby was sane or insane on the night he shot Latchmi Nayudu or after. In his letters Maltby was intelligent, self-important, tenacious and, at times, staggeringly unrealistic about his chances of succeeding in his campaign for a trial. It is easy to understand why many of his correspondents took him

quite seriously, especially at first. Maltby's letters, especially read alongside notes by his doctors about his condition, also emit whiffs of paranoia, grandiosity and mania. But it can sometimes be difficult to imagine that Maltby presented such a clear case of insanity that he was unfit even to plead his case, given the notoriously narrow *M'Naghten* test. The expense and hassle of sending him back to India certainly deterred legal and administrative authorities from considering Maltby's request for a trial, as did their reluctance to draw unnecessary attention to the bad behaviour of an imperial civil servant. It's also possible, though, that Maltby struck those who met him in person as unambiguously mad, and that they were right to spare him the ordeal of a trial and a second repatriation to England.

My own sense is that Maltby was paranoid, but that his anxiety and fear of reprisal was not entirely irrational. Just because Maltby was paranoid, to paraphrase Joseph Heller, doesn't mean no one was after him.[215] Like many Indian civil servants in the provinces, he was often isolated from other Britons. Maltby lived in an Indian world where he, as a representative of British imperial power, was unwelcome. He relied on his Indian servants' services in every aspect of his personal and professional life, and this intimacy made him vulnerable. For all his bluster and bravado, Maltby was no fool – he knew that British control over the Madras countryside was incomplete, which the Rampa Rebellion made abundantly clear. That dark night in Sattivada, Maltby was surrounded by men he had once liked and trusted, but whom he had come to see as enemies. Despite the real insecurity of British authority in the region, however, it seems to me that Maltby did lose his mind somewhere on the road to Chicacole. He had become obsessed with the Rebellion and with the threat of attack by Chendrayya's henchmen, and he killed the innocent *munsif* in a moment of overwhelming panic. Maltby's claim that he feared for his life strikes me as genuine, but his allegations against the villagers of Sattivada and against his

[215] Joseph Heller, *Catch-22: 50th Anniversary Edition* (New York: Simon and Schuster, 2010).

own long-suffering bearers are likely spurious. I believe that Maltby's mental condition deteriorated under the strain of his confinement and the stress of his years as a fugitive, and worsened upon his return to England. But Maltby was a passionate advocate for his sanity and his account of the events in Sattivada, and he would reject outright my conclusion that a reasonable man would not have reached for his revolver.

Criminal responsibility and the management of the criminally insane were pan-imperial problems. The mandatory death penalty infused responsibility with an acute urgency in homicide cases. In the colonies, officials faced the additional challenge of applying English criminal law in regions where indigenous peoples resisted their authority, and where even white Britons questioned the fairness of applying the common law without modification. A guilty verdict and a judicial execution were powerful expressions of the power and justice of British law, and by extension, British rule. Avoiding scandal and embarrassment was essential. And yet, no universally satisfactory definition of insanity could be found, and physicians, lawyers and officials – and sometimes the accused themselves – criticised *M'Naghten* and its application in common law courts with unrelenting fervour. Assessing a defendant's responsibility could be further complicated if he or his representatives argued that the cultural assumptions implicit in English law should not hold in the colonies. Non-*M'Naghten* insanity and cultural considerations were never formal defences to murder under English law. In practice, however, all stripes of insanity could shake the faith of a judge, juror or government official in the justice of a defendant's punishment, and pleas for adapting British law standards to reflect colonial norms and conditions were common, and sometimes persuasive.

Homicide cases were risky for colonial authorities. If a defendant's mental state was confounding, it was often easier to ship him halfway across the world than to confront his

ambiguous criminal responsibility in court. Was Maltby *M'Naghten* mad, was he slightly unhinged but still legally competent, or was he, as he argued, just an especially skilled interpreter of Indian behaviour? The officials who managed his case and his care seem genuinely to have believed that he was insane, but their assertions that he would surely satisfy the *M'Naghten* conditions strain credulity. Whisking Maltby back to England without trial was the politically expedient solution to the dilemma his responsibility raised.

None of his correspondents, even Stilwell, the exasperated superintendent of Moorcroft, argued that Maltby should die for killing the *munsif* (no one asked Latchmi Nayudu's widow what she thought her husband's killer deserved). Maltby might have been dangerous, but he did not strike fear into the hearts of most who met him. He was more of a pain than a terror. Colonial administrators did not seem to believe that sparing Maltby's life would encourage others to commit violent acts, or that it would be immoral to let him live. However, other killers were different. Sometimes, a criminal defendant's violence was so disturbing that those who handled his case could not countenance the prospect of his escaping the gallows. The irony was, however, that defendants who perpetrated bizarre and motiveless violence often struck their judges and doctors as insane, and so, unfit for criminal punishment. The next chapter introduces the problem of moral insanity and its challenges to the jurisprudence of responsibility, the course of psychiatry, and the integrity of English criminal law.

CHAPTER THREE
DETERMINISM AND DEPRAVITY: MORAL INSANITY CONSIDERED

William Bigg was especially drawn to horses.[1] The rich farmlands of Ontario, for which he had traded the smokestacks and slag heaps of Swansea, contained a temptation that Bigg could not resist.[2] Again and again, he crept into pastures at night to cut horses' throats, and snuck into their stalls to hurt them in daylight. When police finally caught Bigg he confessed to torturing and killing the horses, and also to twisting the necks of farm birds and hiding their broken bodies in wood piles.[3] He was twelve years old.[4] After a year in jail, he was returned to his family. His father and stepmother watched him during the day and locked him into a separate room at night; he had once attempted to strangle his brother, and had been discovered pressing a pile of clothes against his baby sister's face. When he was captured with money stolen from his father's desk, Bigg was sentenced to seven years' imprisonment in the local penitentiary. He spent time in the criminal asylum connected to the prison, but was duly discharged at the end of his sentence.

One night, Bigg's father cut himself while paring apples. Bigg, according to the doctors who would later record his grim history, "was observed to become restless, nervous, pale, and to have undergone a peculiar change of demeanour."[5] Bigg took advantage of the hubbub to escape from his parents' house to a neighbour's yard, where he cut another horse's throat. Bigg fled to the woods, where he raped a young girl who came upon his hiding place. He was arrested, tried

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[1] The patient is referred to as W.B. by D. Hack Tuke, whose account of the case I describe below, and by C.K. Clarke as 'William B.' and 'W.B.' in his article, C.K. Clarke, "The Case of William B.-Moral Imbecility," *The American Journal of Insanity* 43, no. 1 (1886): 83–103. He is also identified as William Bigg in: Felix Schirmann, "Badness, Madness and the Brain–the Late 19th-Century Controversy on Immoral Persons and Their Malfunctioning Brains," *History of the Human Sciences* 26, no. 2 (2013): 33–50.

[2] Review of *Reports on the Sanitary History and Industrial Diseases of Swansea, and the Surrounding Mineral Districts* by Thomas Williams (1854), *The Medical Times and Gazette*, vol. 9 (John Churchill: London, 1854), p. 525.

[3] Tuke, *Prichard and Symonds in Especial Relation to Mental Science*, 102.

[4] Clarke, "The Case of William B.-Moral Imbecility," 86.

[5] Tuke, *Prichard and Symonds in Especial Relation to Mental Science*, 103–4.

and sentenced to death for the assault, but was pardoned and released after ten years.[6] On his way home from prison, Bigg captured yet another horse, cutting off parts of its tongue and slashing its belly and neck.[7] He was arrested for mutilating the horse and transferred to the Kingston Asylum in late September 1879. Bigg's doctors described him as intelligent, well-dressed, and pleasant, but also volatile, manipulative and cruel. Bigg tortured and killed any animal that wandered into the ward; an attendant's favourite terrier, "literally crushed" in a bucket, a cat "split up from the throat to the tail", and a dove with a twisted neck were "the results of his bloodthirsty and unstudied impulse."[8] Bigg's fellow patients fared little better. Bigg was in the habit of leading severely disabled patients into the dark recesses of the asylum in order to mutilate them.[9]

During an escape from the asylum five years later, Bigg slipped away from a picnic for the patients and was recaptured while trying to rape another girl, Martha Cooper. At his trial for assault, neither the prosecution nor the defence mentioned insanity, even though Bigg had just escaped from an asylum. The only, ambiguous, mention of Bigg's history was the judge's declaration at sentencing that he "must be lenient under the circumstances."[10] No one could subsequently explain why the possibility that an escaped mental patient might not be criminally responsible for his actions was never mooted. The jury found Bigg guilty, and he received a six-month prison sentence. As soon as the six months ended, he was transferred to another asylum,

[6] None of the archival documents or published accounts of Bigg's case can explain why Bigg was pardoned in 1878. His doctors and prison officials could not discover the reason, and court and administrative records from that case seem to have been lost. On the confusion about Bigg's pardon, see: John Creighton to W.G. Metcalf, 23 October 1884, Archives of Ontario, North York, ON (AO) RG 10-291, B280641.
[7] Tuke, *Prichard and Symonds in Especial Relation to Mental Science*, 104.
[8] William Bigg Casebook Notes, Kingston Asylum, AO RG 10-292, p. 226.
[9] William Bigg Casebook Notes, Kingston Asylum, AO RG 10-292, p. 226.
[10] Clarke, "The Case of William B.-Moral Imbecility," 102.

this time in Hamilton, Ontario.[11] Four days after Bigg was picked up at the Kingston Asylum by the police to await his trial, Dr. D. Hack Tuke, hailed by his hosts as "the celebrated English alienist," visited the asylum.[12] When Tuke returned to England, he brought the story of William Bigg with him.

Tuke described Bigg's case at the 1885 annual meeting of the Medico-Psychological Association in Cork. At the time, Bigg was confined at the Hamilton Asylum in Ontario. Tuke described Bigg's case at length to an audience of asylum superintendents and other mental health specialists listened. Even for men accustomed to working with the criminally insane, Bigg's behaviour – compulsive animal torture, serial rape, youthful murder attempts – was shocking.[13] Tuke hoped that Bigg's combination of perversion and rationality would convince the assembled of the existence of a disturbing and controversial mental illness: moral insanity.

Moral insanity was generally defined as madness that afflicted the self-control, inclinations, or feelings of the sufferer while leaving his cognitive functions intact. For nineteenth-century physicians, the term 'moral' had many meanings; doctors rarely used it as a simple synonym for 'ethical.' Rather, all facets of the mind apart from the purely intellectual could be described as moral.[14] The word 'moral' in nineteenth-century medicine was, as some scholars have argued, "multivocal" and moral insanity was "*ab ignitio*…a heterogeneous clinical concept."[15] The morally insane patient was, Ernst has argued, "distinguished by the *absence* or what is otherwise considered to be the core phenomenon of mental illness: mental

[11] Ibid., 95.
[12] Medical Superintendent's Journal, 25 August 1884, AO F 4417-3-0-1, p. 304.
[13] Nicole Rafter has described Bigg's case as a paradigmatic example of moral insanity. See: Nicole Rafter, "The Unrepentant Horse-Slasher: Moral Insanity and the Origins of Criminological Thoughts," *Criminology* 42, no. 4 (2004): 979–1008.
[14] H. Sass and S. Herpertz, "Personality Disorders: Clinical Section," in *A History of Clinical Psychology: The Origin and History of Psychiatric Disorders*, ed. German E. Berrios and Roy Porter (London: Athlone, 1995), 635.
[15] Ibid.

derangement."[16] The ambiguity and capaciousness of moral insanity made it controversial. The notion that a person's will and desires could be diseased while his cognition remained unscathed struck many as absurd. Moreover, moral insanity was never able to shake its *prima facie* association with evil. Even though doctors did not believe that moral insanity was, by definition, a disease of the conscience or the soul, many of the patients who seemed to be most clearly morally insane were those who committed horrific crimes without any apparent motive. Senseless cruelty and violence struck some physicians as best explicable through a diagnosis of moral insanity. But the fact that violence was a primary symptom of a disordered will, or disordered emotions, brought mad doctors into direct conflict with the lawyers and judges who also made violence, and the punishment of the violent, their business.

Moral insanity presented a direct challenge to traditional, legal understandings of criminal responsibility. To many, the diagnosis seemed to erase any distinction between criminality and insanity. It suggested that those who were most dangerous and most depraved were, in fact, the least responsible for their actions. Most types of insanity raised significant questions about where to draw the line between responsibility and irresponsibility. But moral insanity was the most controversial of the nineteenth-century psychiatric diagnoses. It forced lawyers and doctors to consider what they knew, and could ever know, about the human condition, and to explicate their understandings of how a just society should operate.

Moral insanity was closely tied to the evolutionary and determinist theories that dominated late-nineteenth-century Victorian science and social science. Moral insanity seemed to some psychiatrists to be the result of atavism among Europeans, who had lost their grip on civilization and slipped into the primitive savagery that lurked within all people.

[16] Waltraud Ernst, "Personality Disorders: Social Section," in *A History of Clinical Psychology: The Origin and History of Psychiatric Disorders*, ed. German E. Berrios and Roy Porter (London: Athlone, 1995), 646.

Degenerationists prophesied that civilized societies would regress toward primitivism, and the morally insane struck some physicians as harbingers of a broader social trend. Moral insanity also intersected with scientific and religious arguments about the existence, or non-existence, of free will. Some British Christians worried that evolutionism, materialism and atheism would destroy morality. If William Bigg were sick and not sinful, then who could ever be considered evil? And if evil was an incoherent concept in a determined universe, what about good? This chapter describes each of these major dimensions of moral insanity – its degenerationism and its determinism – and how each facet threatened criminal responsibility.

Tuke told William Bigg's story to his colleagues in order to convince them to admit, publicly, that moral insanity existed. He hoped that Bigg's case of moral insanity was so severe that no self-respecting psychiatrist could deny it. By 1885, moral insanity had existed as a distinct diagnostic category for over fifty years. However, many members of the psychiatric community were reluctant to accept it as a legitimate diagnosis. Tuke believed that the only reason for psychiatrists to deny the existence of moral insanity was fear of a loss of professional prestige. In the absence of delusions, hallucinations or obvious intellectual deficits, the definition of insanity seemed to have no fixed borders. While some physicians, like Tuke, might have welcomed the expansion of psychiatrists' sphere of expertise to include more, and more subtle, cases, others saw this expansion as a dilution of the field, and a threat to its integrity and respectability. Tuke blamed the law for deterring his colleagues from venturing boldly into the frontiers of their rapidly evolving discipline.

Tuke published his 1885 account of Bigg's case, along with more notes on the next six years of Bigg's hospitalization, in an 1891 book.[17] In his preface, Tuke reflected on how anyone could deny that a man like Bigg – compulsive horse-slaughterer, torturer of dogs and cats, serial rapist – was insane. "We are still, it seems to me," argued Tuke, "…under the curse of the law."[18] Tuke and other mind specialists accused the legal establishment of interfering in the development of medico-psychological knowledge. Mad doctors like Tuke saw moral insanity as a coherent development in the science of insanity, which had been moving steadily away from definitions of insanity that required sufferers to exhibit profound cognitive impairment or outlandish behaviour.[19] By the middle of the nineteenth century, medical opinion in Britain had coalesced around the idea that insanity could be so subtle as to be almost undetectable, except by trained experts. However, some psychiatrists refused to expand the definition of insanity to include madness without any cognitive symptoms.

"Those physicians who have had large experience of the insane," wrote D. Hack Tuke, "are essentially agreed as to the existence of a group of cases of a very peculiar and painful character."[20] And yet, Tuke complained, many members of the medical community refused to acknowledge or to name the psychological disorder with which they were daily confronted in their asylums, hospitals and prisons. He accused them of ignoring clear and overwhelming medical evidence of the existence of moral insanity because they were afraid of controversy. Tuke dared his colleagues to doubt the existence of moral insanity by forcing them to contemplate the horrors of Bigg's history, and Bigg's horses.

[17] Tuke, *Prichard and Symonds in Especial Relation to Mental Science*.
[18] Ibid., 110.
[19] Eigen, "Lesion of the Will: Medical Resolve and Criminal Responsibility in Victorian Insanity Trials," 428.
[20] Tuke, *Prichard and Symonds in Especial Relation to Mental Science*, iv.

William Bigg looked ordinary enough. One of his doctors at the Hamilton Asylum, where he arrived in the spring of 1886, described him as "a tall not unpleasant looking man and certainly not the man to be suspected of the crimes recorded in his past history."[21] The Medical Superintendent of the Kingston Asylum, Charles Kirk Clarke, warned Bigg's new keepers that appearances could be deceiving. "After knowing Wm Biggs for some years," wrote Clarke, "I cannot caution you too much in regard to him. He is the most plausible and deceitful fellow I have ever known, and it is almost impossible to imagine him the character that he really is."[22]

In 1886, Bigg was forty-eight years old. He was lean and pale, weak-chinned, hollow-cheeked and jug-eared. In a photograph taken while Bigg was in prison, he stared dreamily at the camera, the corners of his thin lips haunted by a smile.[23] Clarke thought that the prison photograph didn't go Bigg justice. At the asylum, "he was somewhat of a dandy, and would never be taken for a patient by a stranger."[24] In his clinical records, Clarke described his patient as "ridiculously credulous", vain, cowardly and childish. "His mind was of small caliber," wrote Clarke.[25] Once, when Bigg was asked to participate in one of the asylum's regular minstrel performances, he "exhibited boyish glee at the prospect…but when the performance came off, he sat in the 'charmed circle' like a lump of stone – immovable – and even when he was the 'centre piece' of a joke no smile was provoked – he was quite incapable of understanding the slightest fun."[26]

[21] William Bigg Casebook Notes, Hamilton Asylum, AO RG 10-284, MS 641/5.
[22] C.K. Clarke to J.M. Wallace, 12 May 1886, AO RG 10-285: B111416.
[23] Photograph of William Bigg, William Bigg Casebook Notes, Kingston Asylum, AO RG 10-292.
[24] Clarke, "The Case of William B.-Moral Imbecility," 95.
[25] William Bigg Casebook Notes, Kingston Asylum, AO RG 10-292, p. 480-1.
[26] William Bigg Casebook Notes, Kingston Asylum, AO RG 10-292, p. 480-1.

However, Bigg's doctors believed that despite his dull demeanour, he was a "remarkable man."[27] One physician described Bigg as suffering from "probably the most extraordinary case of mania for bloodletting known to the Specialist of insanity."[28] Clarke wrote that Bigg belonged to "a totally different class" from the other patients.[29] Those who cared for Bigg consistently described his "cruel thirst" for violence as compulsive and uncontrollable, especially whenever he saw blood. Clarke wrote that his patient was "inveterately addicted to the most pernicious vices," with an "insatiable appetite for torture."[30] Blood, for Bigg, was a "strange stimulant" that caused him to act "almost as if under the influence of an intoxicant."[31] As cruel as Bigg could be, his doctors consistently described his behaviour as a symptom of disease. In their view, Bigg was insane, with little or no control over his actions. His doctors described his outrageous violence in physiological terms: it was an addiction, an impulse, a thirst, an appetite, an intoxicant which Bigg's frail body and weak mind lacked the strength to resist.

Dr. William Metcalf was the Medical Superintendent of the Kingston Asylum until August of 1885, when Clarke replaced him. Metcalf struggled, often unsuccessfully, to protect the weaker patients from Bigg. One evening, for example, Metcalf rushed to the bedside of a severely epileptic patient. Bigg had stabbed the man in the gut with a pocketknife, pierced him with a fork, and bitten him. When Metcalf asked Bigg why he had done it, he replied, "Well there are times when I am impelled to do such things and I have not the power to resist."[32] Bigg's fits of violence were gruesome but sporadic, often interspersed with years of amiable docility. Although Bigg spent many nights muzzled and confined in his room, the asylum staff always,

[27] C.K. Clarke to J.M. Wallace, 4 May 1886, AO RG 10-285: B111416.
[28] William Bigg Casebook Notes, Kingston Asylum, AO RG 10-292, p. 200.
[29] Clarke, "The Case of William B.-Moral Imbecility," 98.
[30] William Bigg Casebook Notes, Kingston Asylum, AO RG 10-292, p. 225.
[31] Clarke, "The Case of William B.-Moral Imbecility," 97.
[32] Medical Superintendent's Journal, Kingston Asylum, 4 July 1881, AO F 4417-3-0-1, p. 77.

eventually, allowed him to return to the normal rhythms of asylum life. He went to see fireworks in town, he danced at balls, he helped out around the wards. "This Institution," Metcalf angrily reminded a lawyer who criticized his handling of Bigg, "is an ordinary hospital for the insane. [emphasis original]"[33] Metcalf pitied Bigg, whom he saw as a weak, childish man beset by powerful, perverse urges.

After the stabbing, Metcalf wrote in his journal that he "censured [Bigg] for keeping a knife secreted when he knew his failing and that he could not resist. I urged him in future to tell the keeper when the impulse to shed blood was strong and to ask to be put into his room until he felt that he had control over himself."[34] Metcalf, ever the optimist, seemed satisfied when Bigg "promised to do so and appeared not only sorry for what he had done but anxious to do better in future."[35] "[Bigg] was liked by every one in the institution," Clarke would later confess, "as he was always pleasant, industrious and apparently anxious to 'do better.'"[36] Although the hospital staff knew about their patient's crimes, they inevitably came to trust him and to believe, almost despite themselves, that Bigg loved and appreciated them. Clarke was troubled by Bigg's uncanny ability to feign normality, his skill in "'sizing' his companions" – including Clarke himself – so that they were lulled into a dangerous complacency.[37]

Like many of his colleagues, Metcalf would pay dearly for his devotion to the moral management of the insane. His natural inclination to trust and like the patients with whom he lived and worked, sometimes for decades, made him vulnerable. One morning, as he and his staff walked the ward, Patrick Moloney, a paranoid patient whom no one had suspected of having

[33] Metcalf to Low, 10 March 1885, AO RG 10-291, B280641.
[34] Medical Superintendent's Journal, Kingston Asylum, 4 July 1881, AO F 4417-3-0-1, p. 78.
[35] Medical Superintendent's Journal, Kingston Asylum, 4 July 1881, AO F 4417-3-0-1, p. 78.
[36] Clarke, "The Case of William B.-Moral Imbecility," 96.
[37] Ibid.

homicidal tendencies, leapt out from a verandah doorway and stabbed Metcalf in the abdomen.[38] Three days later, Metcalf died. Clarke, who had been his assistant as well as his brother-in-law, took over the running of the asylum and recorded his friend's death in the Medical Superintendent's journal.[39] Perhaps out of loyalty to Metcalf, or perhaps out of fear for himself, Bigg could not abide Maloney. After both men were transferred to the Hamilton Asylum in 1886, Bigg threatened to kill Maloney if they were forced to remain in the same ward.[40]

Not all physicians agreed with Tuke. Their objections to moral insanity were, as Tuke alleged, generally motivated by professional anxieties. However, their refusal to accept that moral insanity was real was not, for most, purely self-interested. If psychiatrists were to lose their status as expert legal authorities on madness, they reasoned, then more insane defendants would be mistaken as sane by inexperienced judges and jurors, and unjustly hanged. By the first decades of the nineteenth century, the wards of Bethlem Hospital were crowded with those found to be insane in criminal trials. In 1863, Broadmoor Asylum opened its doors and gobbled up hundreds of men whose diseased minds had saved them from execution for their crimes. Mad doctors gave evidence in criminal trials, and supervised the confinement and treatment of men too dangerous and disturbed for prison. Medical experts on criminal insanity had become valuable partners in the Home Office's efforts to manage the insane, and in the legal system's attempts to assess their culpability in court.

Joel Eigen has estimated that medical witnesses appeared in only one in ten criminal insanity trials in the mid-eighteenth century, while by the 1840s they testified in 50% of insanity trials concerning offences to property, and 90% of insanity trials concerning assault and other

[38] Medical Superintendent's Journal, Kingston Asylum, 15 August 1885, AO F 4417-3-0-1, p. 364.
[39] Medical Superintendent's Journal, Kingston Asylum, 19 August 1885, AO F 4417-3-0-1, p. 366. Clarke would later also be the victim of a serious, although not fatal, attack at the asylum in 1888. See: Medical Superintendent's Journal, Kingston Asylum, 19 August 1885, AO, p. 458.
[40] William Bigg Casebook Notes, Hamilton Asylum, AO RG 10-284, MS 641/5.

violent offences.[41] There is, as yet, no statistical data on the proportion of criminal trials in which moral insanity was explicitly alleged. Anecdotally, however, it is clear that non-delusional forms of insanity, including moral insanity, were mooted often in late nineteenth-century trials of defendants who committed acts that seemed motiveless, exceptionally cruel, or excessively violent. Purportedly morally insane defendants were likely to be those who were least sympathetic to juries, and most disturbing and terrifying to the public. An acquittal in such a case could provoke scandal and outrage. If psychiatrists advocated too stridently for moral insanity and against the criminal responsibility of those who suffered from it, they risked their professional reputations and their ability to sway juries toward acquittals in non-moral insanity cases.

Over the course of the nineteenth century, criminal insanity had become an increasingly respectable field of medical expertise. It had also attracted criticism and public scrutiny. Tuke and his supporters believed that moral insanity was an undeniable, scientific fact, and that those who denied its existence privileged public policy and professional prestige over medicine. To others, however, moral insanity was a perversion of the mind sciences, and a sign of the arrogance of self-aggrandizing and short-sighted mad doctors.

Clarke, for his part, believed that Bigg was a "moral imbecile", and that his case represented "an absolute type."[42] Clarke distinguished, although not at all clearly, between 'moral imbecility' and 'moral insanity'. He argued that Bigg's imbecility freed him "from the trammellings of that hazy definition known as 'moral insanity.'"[43] Clarke cited Tuke's article about Bigg, moral insanity and criminal responsibility in the *Journal of Mental Science* approvingly. It seems likely that Clarke, who was quick to distinguish between his own hospital

[41] Eigen, "Lesion of the Will: Medical Resolve and Criminal Responsibility in Victorian Insanity Trials," 430.
[42] Clarke, "The Case of William B.-Moral Imbecility," 102.
[43] Ibid.

and criminal asylums, simply preferred to leave the squabbling about criminal responsibility to others. To him, Bigg's compulsive barbarity, manipulativeness and deceptive mildness epitomized mental, and moral, debility. Bigg was mentally ill, and would be in an asylum, where he belonged, for the rest of his life; Clarke left his colleagues to worry about how the law should deal with other men like him.

After Tuke told the story of Bigg and his horses at the Association meeting, the floor was opened for discussion. Dr. David Nicolson, then the Superintendent of Broadmoor, praised physician and ethnologist James Cowles Prichard for his precocious insights into the problem of moral insanity. The question of moral insanity, Nicolson told the assembled,

> is one in regard to which we are only now seeing the practical results arising from what were in [Prichard's] time more or less matters of theory. And it is more to the credit of one who lived in those, what we may call darker days of superstitious notions about things, to have evolved this and brought it into the clear daylight of science, so that in our day it should be capable of bearing good fruit.[44]

Nicolson was careful, however, to remind his audience that moral insanity was more than just an intriguing medical theory. Rather, it was a dangerous diagnosis that threatened the professional credibility of its supporters, the integrity of the legal system, and the safety of the community. The legal dimensions of moral insanity were never far from physicians' minds. Although Nicolson affirmed his belief in the disorder, he cautioned, "if we were to allow the term to be too influential in our minds, we would be thwarting justice, and cutting our own throats as men who were endeavouring to carry out scientific ideas: so that instead of carrying weight in the courts of law we would be laughed at."[45]

[44] Tuke, *Prichard and Symonds in Especial Relation to Mental Science*, 57.
[45] Ibid., 58.

To its supporters, moral insanity provided a reasonable explanation for otherwise inexplicable violence and wickedness. Bigg lacked the delusions that were the telltale signs of legal insanity, but his propensities were simply too bizarre to be the fruits of a sane mind. Beyond explaining the otherwise inexplicable, moral insanity had the additional appeal of fitting neatly into Victorian scientific ideas about evolution and the biological causation of behaviour. Men like Bigg, went the argument of many psychiatrists, were born, not made. Bigg's doctors made much of his father's "extremely nervous constitution", which manifested itself in a "hysterical" concern for the wellbeing of Bigg and his four brothers.[46] Bigg's brother, Frederic, also seemed to have inherited their father's mental instability. A history of the Bigg family assembled by the doctors at the Kingston Asylum described Frederic as a "'dark sinister' creature", a "monster" who "used to gratify the demon in his soul" by holding his wife down and thrusting kitchen knives into the floor around her head and neck while threatening to kill her.[47] Clarke predicted, in a letter to J. Wallace at the Hamilton Asylum, that Frederic would "probably startle the world by committing some horrible crime."[48] This emphasis on heredity and biological determinism was widespread in Victorian accounts of both crime and insanity. Men like Bigg, compulsively, senselessly violent and obviously insane, represented the culmination of both criminal anthropology and hereditarian approaches to psychiatry: the pathological criminal.

To its detractors, however, moral insanity was not a natural extension of Victorian psychiatric medicine – it was a violation of both medical and ethical standards. To moral insanity sceptics, the diagnosis was a tool used by psychiatrists and lawyers to medicalize and excuse evil. Moral insanity represented an attempt to use scientific ideas about relative cultural and

[46] C.K. Clarke and J. Webster, "The Case of Wm. B.-Moral Imbecility," *Bulletin of the Ontario Hospitals for the Insane* 7, no. 4 (July 1914): 208–9.
[47] Bigg's Family History, AO RG 10-285: B111416.
[48] C.K. Clarke to J.M. Wallace, 12 May 1886, AO RG 10-285: B111416.

racial development to undermine the moral authority of the common law, both at home and abroad. The diagnosis was also complicit, in the minds of its critics, in a more general assault on free will and, therefore, on the concept of responsibility in both ethics and law.

James Cowles Prichard credited himself with coining the phrase 'moral insanity' in an essay in the *Cyclopaedia of Practical Medicine* (1833), and repeated the claim regularly in his scholarly writings.[49] However, there was always some dispute as to the novelty of the notion that a person could be insane without suffering from delusions or hallucinations. One phrenologist commented, in a footnote added to one of Prichard's papers, that "to phrenologists, moral insanity ha[d] long been familiar."[50] Still, it is fair to say that Prichard was instrumental in popularizing the diagnosis, and that he became the most eminent representative of the pro-moral insanity faction among psychiatrists.

In his 1842 *On the Different Forms of Insanity in Relation to Jurisprudence*, Prichard described moral insanity as a controversial but increasingly accepted diagnosis. "I mean to denote by it," he wrote, "a disorder which affects only the feelings and affections, or what are termed the moral powers of the mind, in contradistinction to the powers of the understanding or intellect."[51] Prichard distinguished moral insanity from monomania, the older and better-known category of mental disorder in which a person was considered 'sane' except with respect to a single, overpowering delusion or false belief.[52] Prichard was keen to differentiate his concept of moral insanity from that of French physicians like Jean-Étienne Esquirol, Étienne-Jean Georget

[49] James Cowles Prichard, "Insanity", in John Forbes, *The Cyclopaedia of Practical Medicine: Comprising Treatises on the Nature and Treatment of Disease, Materia Medica and Therapeutics, Medical Jurisprudence, Etc. Etc. Eme-Isc*, vol. 2 (Sherwood, Gilbert, and Piper, 1833), 12.
[50] *The Phrenological Journal, and Magazine of Moral Science, for the Year 1844*, 1844, 169.
[51] James Cowles Prichard, *On the Different Forms of Insanity in Relation to Jurisprudence* (London: Hippolyte Ballière, 1842), 19.
[52] Ibid., 30–31.

and Charles Marc.[53] Prichard argued that many people, including "the Russian Emperor Paul" and "Frederick the Second of Prussia", who were "wrong-headed and perverse through life, and singularly capricious and depraved, would afford in reality, if the matter could be ascertained, examples of moral insanity, native or congenital."[54]

At times, Prichard distinguished carefully between moral insanity, in which a sufferer's intellect was undisturbed but his moral nature was diseased, and what he called 'instinctive insanity', in which a sufferer's ability to exercise self-control was diminished or destroyed.[55] However, especially in his earlier works, Prichard did not always separate diseases that affected the moral senses and those that attacked the will. He wrote, for instance, that there was an illness that caused "a sudden and often irresistible impulse…to commit acts which under a sane condition of mind would be accounted atrocious crimes" had been widely recognized by French physicians, but wrongly described as homicidal monomania.[56] It could not be a monomania because monomania implied the existence of a delusion. Rather, the correct diagnosis was moral insanity. For Prichard as for others, moral insanity was defined negatively: it was any form of insanity that did not include hallucinations, delusions or other cognitive defects.[57]

The slippage between moral insanity as, essentially, perversion, and moral insanity as a lack of self-control is important. Moral insanity was a capacious diagnosis, which made it difficult for nineteenth-century physicians to debate coherently – each physician and lawyer had

[53] Ibid., 36–37.
[54] Ibid., 62.
[55] James Cowles Prichard, "Observations on the Connection of Insanity with Diseases in the Organs of Physical Life," in *The Phrenological Journal, and Magazine of Moral Science, for the Year 1844*, 169.
[56] James Cowles Prichard, "Soundness and Unsoundness of Mind", in John Forbes, *The Cyclopaedia of Practical Medicine: Comprising Treatises on the Nature and Treatment of Disease, Materia Medica and Therapeutics, Medical Jurisprudence, Etc. Etc. Sof-Yaw, Supplement*, vol. 4 (Sherwood, Gilbert, and Piper, 1835), 53.
[57] Prichard, *On the Different Forms of Insanity in Relation to Jurisprudence*, 19.

his own esoteric understanding of its borders.[58] Moral insanity's slipperiness can also make it difficult to describe historically, since its clinical features were always in flux. All were agreed that moral insanity was fundamentally different from insanity that involved cognitive or intellectual disturbance. Beyond that divide, though, little was clear. Still, physicians and lawyers spilled much ink in the effort to describe the differences, if there were any, among moral insanity, instinctive insanity, homicidal monomania and Philippe Pinel's *manie sans délire*. As one physician explained after his own attempt to pick apart these diagnoses: "The above disquisition may appear a trifling with words; not so when it is considered that the words involve doctrines on which formidable consequences hang, both moral and judicial."[59]

Like other writers on moral insanity, Prichard was aware of the legal implications of a diagnosis of moral insanity. His 1842 book, *On the Different Forms of Insanity in Relation to Jurisprudence*, included a lengthy guide for distinguishing sane murder from insane killing, for use by jurors and judges in criminal cases. Madmen, wrote Prichard, killed without motive, even slaughtering beloved wives and children without warning. Insane homicides killed indiscriminately, often committing suicide or waiting patiently for their arrest in the aftermath.[60] Prichard argued that legal authorities had wrongly emphasized cognitive impairment over moral corruption, and had cruelly convicted and executed men and women who were deceptively lucid but hopelessly mad.

Two moral insanity cases from the early life of the diagnosis in British and British imperial criminal law illustrate how the meaning of moral insanity shifted from case to case. The first time a lawyer used moral insanity as a defence in a British court was in 1844, in the

[58] Physician Thomas Mayo, for example, argued that Prichard's 'instinctive mania' was actually just a sub-species of moral insanity. See: Thomas Mayo, *Medical Testimony and Evidence in Cases of Lunacy: With an Essay on the Conditions of Mental Soundness* (Parker, 1854), 64.
[59] Ibid., 80.
[60] Prichard, *On the Different Forms of Insanity in Relation to Jurisprudence*, 126–9.

Australian colony of New South Wales.[61] The case was that of John Knatchbull, a thief, fraudster, convict and sea captain, who had murdered a shopkeeper with a tomahawk. On the day of the attack, a neighbour saw Knatchbull lingering near the door of Ellen Jamieson's house in Sydney. Knatchbull eventually entered the house, and the neighbour, suspicious, crept closer to listen. He heard "no sound except a noise like that of some one breaking a cocoanut [sic] with a hammer."[62] The neighbour called for help, and a group of men broke down the door to find Jamieson lying in a pool of blood, her head split open. When police arrested Knatchbull, he had Jamieson's pocketbook and bags full of coins and banknotes hidden in his blood-spattered clothes.[63] Jamieson survived for twelve days before succumbing to her injuries.

Robert Lowe defended Knatchbull. Lowe, a British lawyer with albinism, had come to Sydney to make his fortune in 1842 after his doctors said that he would go blind within seven years.[64] He was a great orator, and was famously erudite, impatient and uncompromising.[65] Although he had only recently arrived in New South Wales, Lowe approached Knatchbull's case with trademark boldness. At trial, he spent no time in contesting the prosecution's version of events. Instead, Lowe argued that the prisoner was "one of those persons for whom laws had not been made, and who, although for the peace and welfare of society he ought to be placed under

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[61] 'Knatchbull, John (1792–1844)', Australian Dictionary of Biography, National Centre of Biography, Australian National University, http: //adb.anu.edu.au/biography/knatchbull-john-2313/text3001, published first in hardcopy 1967, accessed online 21 April 2015. For another authority for the claim that Knatchbull's case included the first moral insanity plea in a British court, see: Jan Wilson, "'An Irresistible Impulse of Mind': Crime and the Legal Defense of Moral Insanity in Nineteenth Century Australia," *Australian Journal of Law & Society* 11 (1995): 145.

[62] "SUPREME COURT.—CRIMINAL SIDE." *The Sydney Morning Herald* (NSW: 1842-1954) 25 Jan 1844: 2. Web. 22 Apr 2015 <http: //nla.gov.au/nla.news-article12411912>.

[63] "SUPREME COURT.—CRIMINAL SIDE." *The Sydney Morning Herald* (NSW: 1842-1954) 25 Jan 1844: 2. Web. 22 Apr 2015 <http: //nla.gov.au/nla.news-article12411912>.

[64] R. L. Knight, 'Lowe, Robert (1811–1892)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http: //adb.anu.edu.au/biography/lowe-robert-2376/text3125, published first in hardcopy 1967, accessed online 22 April 2015.

[65] R. L. Knight, 'Lowe, Robert (1811–1892)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http: //adb.anu.edu.au/biography/lowe-robert-2376/text3125, published first in hardcopy 1967, accessed online 22 April 2015.

the most severe restraint, ought not to be held responsible for his actions."[66] Lowe told the jury that the brain could be divided into distinct faculties, and that any one of these might be diseased without have any negative effect on the others. He emphasized the potential for insanity to infect the will. The person suffering from a diseased will "might, with a full knowledge of what he was doing, feel compelled – irresistibly compelled, to crimes which if a perfectly free agent he would be the last to commit."[67] Knatchbull had, said Lowe, "a childish nature, for no man in possession of his faculties would have perpetrated such an offence as this."[68] Lowe reminded the jury that *M'Naghten* stipulated that a man could be acquitted on the basis of insanity – even if he admitted to having committed the criminal acts in question. He argued that no sane man would have murdered Ellen Jamieson so brutally, and with no chance of escaping detection. Stranger still, Knatchbull was the scion of a wealthy English family. He had grown up in Kent with every material advantage, and had slowly fallen "step by step into the lowest depths of disgrace…urged on by some resistless demon [to] insanity."[69] In a final absurdity, Knatchbull had murdered Jamieson on the night before his own wedding.

Lowe called no expert witnesses to support his claim that his client was insane, protesting to the judge that he had not been given sufficient time to prepare the case. The judge, Sir William Burton, was openly skeptical of Lowe's arguments. He said that he had never before heard of a lawyer claiming that a disease of the will, and the will alone, was enough to release a defendant from responsibility for his crime. Burton told the jury that the law protected lunatics, but did not

[66] "SUPREME COURT.—CRIMINAL SIDE." The Sydney Morning Herald (NSW: 1842-1954) 25 Jan 1844: 2. Web. 22 Apr 2015 <http: //nla.gov.au/nla.news-article12411912>.
[67] "SUPREME COURT.—CRIMINAL SIDE." The Sydney Morning Herald (NSW: 1842-1954) 25 Jan 1844: 2. Web. 22 Apr 2015 <http: //nla.gov.au/nla.news-article12411912>.
[68] "SUPREME COURT.—CRIMINAL SIDE." The Sydney Morning Herald (NSW: 1842-1954) 25 Jan 1844: 2. Web. 22 Apr 2015 <http: //nla.gov.au/nla.news-article12411912>.
[69] "SUPREME COURT.—CRIMINAL SIDE." The Sydney Morning Herald (NSW: 1842-1954) 25 Jan 1844: 2. Web. 22 Apr 2015 <http: //nla.gov.au/nla.news-article12411912>.

"extend itself to those whose will was so depraved as to lead them to the commission of crimes for which no other excuse than their depraved will could be found."[70] The judge raised the concern that moral insanity of the type described by Lowe would give free rein to those who submitted to their most savage urges. If such a defence were to succeed, "man would only have to be bad enough to listen to every evil suggestion thus prompted to commit offences of the most grave nature with perfect impunity."[71] "Whatever place the argument which had been advanced in defence of the prisoner might have in the theories of philosophers," declared Burton, "it had no place in the law of England, nor…had it a place either in common sense or morality."[72] He was sorry to have heard such an argument made for the first time in his court. Although one magazine would later describe this statement of Burton's as "a perfect piece of absurdity – full of twaddle", it was persuasive.[73] The jury returned a verdict of guilty without even leaving the jury box.[74]

The exchanges in court between Burton and Lowe show that, from the beginning of its career in British courtrooms, moral insanity seemed to many lawyers to be threatening to the entire edifice of the common law. Burton spoke for many in his profession when he argued that the law could not recognize moral insanity as exculpatory without offering legal immunity to those who committed the most depraved crimes. Knatchbull, as he waited in his prison cell, excoriated Burton for going "beyond his duty as a judge, ripping open old wounds…a thing too

[70] "SUPREME COURT.—CRIMINAL SIDE." The Sydney Morning Herald (NSW: 1842-1954) 25 Jan 1844: 2. Web. 22 Apr 2015 <http: //nla.gov.au/nla.news-article12411912>.
[71] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.2, 20 April 2015), December 1847, trial of WILLIAM NEWTON ALLNUTT (t18471213-290).
[72] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.2, 20 April 2015), December 1847, trial of WILLIAM NEWTON ALLNUTT (t18471213-290).
[73] "The Punishment of Death", *The Zoist*, No. 7 (October 1844): 315.
[74] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.2, 20 April 2015), December 1847, trial of WILLIAM NEWTON ALLNUTT (t18471213-290).

prevalent in this Colony, and a piece of inhumanity on the part of a judge."[75] As Knatchbull discovered, however, it was not uncommon for judges to enter the fray when moral insanity was involved – the stakes were simply too high for them to bite their tongues. In part due to Lowe's framing of his purported insanity as moral, rather than cognitive, Knatchbull came quickly to represent evil personified. To some commentators, he was a "monster in human form" – one of a shadowy race of moral monsters that would descend upon an innocent public if the law could no longer punish them for their misdeeds.[76]

Lowe's willingness to argue for Knatchbull's innocence on the basis of non-delusional insanity, on the other hand, contradicts any assumption that all lawyers were, by virtue of their professional loyalties, hostile to moral insanity or to the biological determinism that it implied. Lowe was the first of many British lawyers to contend that a legal system that limited its definition of insanity to delusion, despite changes in medical knowledge, was unjust. Eleven years after Prichard coined the phrase 'moral insanity', the diagnosis had filtered into courtrooms across the British world. Although Knatchbull and many others would hang despite their lawyers' best attempts to plead their insanity, moral insanity would become part of criminal lawyers' toolbox of arguments with which they set about trying to dismantle responsibility as it had previously existed in common law jurisprudence.

Knatchbull spent the weeks after his conviction writing letters to family and friends. He also wrote a memoir, which his lawyers leaked to the press to drum up sympathy for their client. In the memoir, Knatchbull claimed that he had rushed to Ellen Jamieson's rescue after he saw a man whom he knew to be a "bad character" enter her house. It was his terrible misfortune that

[75] John Knatchbull, "Life of John Knatchbull", in Colin Roderick, *John Knatchbull: From Quarterdeck to Gallows* (Sydney: Angus & Robertson, Ltd., 1963), 125.
[76] "A MEMOIR OF J. KNATCHBULL." *The Cornwall Chronicle* (Launceston, Tas.: 1835-1880) 17 Feb 1844: 4. Web. 23 Apr 2015 <http: //nla.gov.au/nla.news-article66016698>.

witnesses wrongly accused him of committing the crime.[77] Knatchbull remained convinced almost to the last that his sentence would be commuted, especially given that the Governor of New South Wales, Sir George Gipps, was a friend of his family.[78] However, the Executive Council refused to grant him clemency. Three days before his execution, Knatchbull confessed to the "horrid deed" for which he was "justly to suffer death."[79] He was hanged on 13 February 1844, before a crowd of over five thousand who assembled outside Sydney's new Darlinghurst jail.[80] As was standard practice at major Australian prisons, a cast of Knatchbull's head was taken for phrenological research.[81] Lowe and his wife, Georgiana, adopted Ellen Jamieson's orphaned children, Bobby and Polly. The family returned to England in 1850 due to Georgiana's poor health and homesickness. Lowe had a long and illustrious political career in Britain, including a stint as Home Secretary and his elevation to the House of Lords as Viscount Sherbrooke in 1880.[82] Although his eyesight remained poor, he never went blind.

The controversy over Knatchbull's case, and over moral insanity more generally, far outlived him. In 1844, the first edition of the magazine *The Zoist: A Quarterly Journal of Cerebral Physiology and Mesmerism* published its first issue. In October of 1844, it featured an article, "The Punishment of Death", commenting on Knatchbull's case and decrying the execution of the insane.[83] *The Zoist* reprinted the entire account of the trial from the *Sydney Morning Herald*. Robert Lowe, who in 1845 was editing the Sydney *Atlas*, republished the

[77] John Knatchbull, "Life of John Knatchbull", in Roderick, *John Knatchbull: From Quarterdeck to Gallows*, 119.
[78] Knatchbull had complicated and very public life. For much more about him and the case, see: Ibid., 4.
[79] Knatchbull's confession, 10 February 1844, in Ibid., plate xv.
[80] "EXECUTION OF KNATCHBULL." *Morning Chronicle* (Sydney, NSW: 1843-1846) 14 Feb 1844: 2. Web. 23 Apr 2015 <http: //nla.gov.au/nla.news-article31742161>.
[81] Roderick, *John Knatchbull: From Quarterdeck to Gallows*, 241.
[82] R. L. Knight, 'Lowe, Robert (1811–1892)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http: //adb.anu.edu.au/biography/lowe-robert-2376/text3125, published first in hardcopy 1967, accessed online 22 April 2015.
[83] "The Punishment of Death", *The Zoist*, No. 7 (October 1844): 295-316. For more on *The Zoist*, see: Winter, *Mesmerized: Powers of Mind in Victorian Britain*, 154–5.

article, to much public dismay in Australia.[84] The *Zoist* article praised Lowe, mocked Burton, and accused the government of ignoring the clear signs of Knatchbull's disease, which were evident in his propensity for theft. "Is it right," the author asked, "to take revenge upon a being who…has acted in accordance with the promptings of his organism, over the formation of which organism he exercised no control[?]"[85] The author clearly laid out the link between moral insanity and determinism. Knatchbull's crime, he affirmed, had been inevitable.[86] British judges were wrong to "act upon the assumption that a man can be a moral or immoral character just as he pleases. This doctrine is an offshoot of the religion of the day. The laws are founded on these views, and the clergy declare that the views are correct. Fatal error."[87] The editor also promised its readers a lithograph drawing of the cast of Knatchbull's head, as soon as it was available.[88]

Moral insanity was also making incursions into murder cases in England. William Newton Allnutt was a slight boy of twelve when he poisoned his grandfather, Samuel Nelme, with arsenic.[89] Nelme was fond of sprinkling powdered sugar, which he spooned from the family's sugar-basin with his one remaining arm onto the fruit that he ate for dessert most evenings. A week before Nelme's death, William had asked his mother, Maria Louisa, "what arsenic was like; [she] said it was like flour."[90] Nelme kept arsenic to kill rats. When the coroners autopsied his corpse, they found lethal doses of arsenic in his stomach, liver, intestines and brain. William was charged with Nelme's murder and tried at the Old Bailey in London in

[84] "The Sydney Morning Herald. TUESDAY, MARCH 11, 1845."The Sydney Morning Herald (NSW: 1842-1954) 11 Mar 1845: 2. Web. 23 Apr 2015 <http: //nla.gov.au/nla.news-article12877947>.
[85] "The Punishment of Death", *The Zoist*, No. 7 (October 1844): 312.
[86] "The Punishment of Death", *The Zoist*, No. 7 (October 1844): 313.
[87] "The Punishment of Death", *The Zoist*, No. 7 (October 1844): 312.
[88] "The Punishment of Death", *The Zoist*, No. 7 (October 1844): 310.
[89] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.2, 20 April 2015), December 1847, trial of WILLIAM NEWTON ALLNUTT (t18471213-290).
[90] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.2, 20 April 2015), December 1847, trial of WILLIAM NEWTON ALLNUTT (t18471213-290).

December of 1847. At trial, Maria Louisa said that she had had "a good deal of trouble" with her young son.[91] She had struggled with her health, both physical and mental, around the time of his birth. Her husband had died two years before the trial, at the age of thirty-seven, from drink and epilepsy. As an infant, William had fallen and knocked himself unconscious on the blade of a plough. The year before the killing, William had slipped on some ice and returned home "as pale as possible, and very queer and bewildered—he looked vacant."[92] From then on, William had become increasingly willful, and often weirdly silent. Maria Louisa believed that her son was listening to whispered voices that urged him to misbehave. "I have remonstrated with him for doing something wrong," she told the court, "he has told me that somebody told him to do it; that somebody seemed to say to him, 'Do it, do it, you will not he found out;' that they talked to him in his head."[93] In a letter that William wrote to his mother from Newgate, possibly under the influence of the prison chaplain, he admitted that he had poisoned his grandfather in revenge. The two had quarreled, and Nelme had cuffed William and threatened to do it again. "I know I have sinned against God," William wrote, "and I deserve to be cast into hell."[94] Still, he begged for mercy, and for the chance to make up for the evil he had done.

William's defence lawyer was William Ballantine. In the 1840s, Ballantine was the most famous and best-loved barrister at the Old Bailey.[95] He hoped to convince the jury that his client suffered from moral insanity, and that his disordered moral sense brought him within the remit of the *M'Naghten* defence. Ballantine's biggest problem was that William was obviously rational.

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[91] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.2, 20 April 2015), December 1847, trial of WILLIAM NEWTON ALLNUTT (t18471213-290).
[92] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.2, 20 April 2015), December 1847, trial of WILLIAM NEWTON ALLNUTT (t18471213-290).
[93] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.2, 20 April 2015), December 1847, trial of WILLIAM NEWTON ALLNUTT (t18471213-290).
[94] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.2, 20 April 2015), December 1847, trial of WILLIAM NEWTON ALLNUTT (t18471213-290).
[95] Allyson Nancy May, *The Bar and the Old Bailey, 1750-1850* (Chapel Hill: University of North Carolina Press, 2003), 225.

His letter to his mother, while probably coached by the chaplain, was sophisticated, especially for a child. All of William's keepers at Newgate averred that the boy seemed completely sane. So, Ballantine did everything he could to suggest that William was, despite all appearances, mentally diseased. The voice that egged William on was a delusion. William's two serious head injuries suggested some kind of hidden brain trauma. Insanity was in William's blood: his father had been an alcoholic and an epileptic; his mother had suffered from puerperal insanity. William had been prone to sleepwalking, scrofula, and chronic ringworm, all of which Ballantine argued might have contributed to, or been signs of, his insanity.[96]

Ballantine referred in court to the work of psychiatrist Forbes B. Winslow on moral insanity. Winslow argued that moral insanity did, in fact, exist, and that when experts agreed that a defendant suffered from it, he should not be considered responsible for his actions. A morally insane person "had no power over the train of thought; his will is diseased; he has no motive for the crime; he struggles for a considerable time against the diseased impulse, till at last it overpowers him."[97] But the coroners agreed that it had taken at least a week of steady poisoning for the arsenic in Nelme's system to reach fatal levels. Moreover, William had a motive – he was angry with his grandfather and scared of receiving another beating. The Newgate prison surgeon pronounced Forbes "not of very great authority" anyway.[98]

Ballantine examined a number of medical witnesses, including physicians who had treated William's father and William for his many physical complaints. A local doctor who had

[96] For more on lesions of the will and sleepwalking in general, and on the Allnutt case in particular, see: Joel Peter Eigen, *Unconscious Crime : Mental Absence and Criminal Responsibility in Victorian London* (Baltimore: Johns Hopkins University Press, 2003).
[97] Forbes Winslow, *The Plea of Insanity in Criminal Cases* (London: H. Renshaw, 1843), 37.
[98] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.2, 20 April 2015), December 1847, trial of WILLIAM NEWTON ALLNUTT (t18471213-290).

treated William's scrofula told the court that the boy's "conscience [wa]s diseased."[99] But only one witness was an expert in lunacy. This was Dr. John Connolly, the director of the Hanwell Lunatic Asylum and a pioneer of the movement toward non-restraint and moral management of the insane. Connolly testified that, given all the evidence of William's family and medical history, he was "imperfectly organized; and […] I should say he is of unsound mind—I believe…that his brain is either diseased, or in that excitable state in which disease is most probable to ensue, that it is not a healthy brain."[100] Connolly was unwilling to diagnose William with moral insanity outright. However, he speculated, "the future character of his insanity would be more in the derangement of his conduct than in the confusion of his intellect."[101]

In the end, the jury found William Allnutt guilty of willful murder. He was sentenced to death, although both the jury and the judge recommended that the government show mercy on account of his age. William's sentence was commuted to transportation for life. He made the long journey to Western Australia in 1851, but died only two years later, at the age of eighteen, of consumption.[102] Ballantine and the witnesses he called in William Allnutt's case made a strong argument that something was wrong with William's brain, but they could not convince the jury that his moral sense was so destroyed that he had not understood that poisoning his grandfather was wrong. No one paid much attention to the voices William heard, perhaps because they were not overwhelming enough to cloud his understanding of his actions or their morality. Although the defence failed, William Allnutt's case provides an early example of how

[99] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.2, 20 April 2015), December 1847, trial of WILLIAM NEWTON ALLNUTT (t18471213-290).
[100] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.2, 20 April 2015), December 1847, trial of WILLIAM NEWTON ALLNUTT (t18471213-290).
[101] Old Bailey Proceedings Online (www.oldbaileyonline.org, version 7.2, 20 April 2015), December 1847, trial of WILLIAM NEWTON ALLNUTT (t18471213-290).
[102] Australian Joint Copying Project. Microfilm Roll 92, Class and Piece Number HO 11/17, Page Number 151 (78), (http: //www.convictrecords.com.au/, 20 April 2015).

lawyers and doctors tried to bring moral insanity into the courtroom as a barrier to responsibility. There was no agreement among the witnesses as to whether moral insanity was primarily a disorder of the will – as Winslow described it – or whether it was a disease of the soul, that caused a cognitively intact sufferer to desire, and to do, evil. Ballantine, in his memoirs of his long career at the bar, took no explicit position on moral insanity. However, he doubted the legal authority of the *M'Naghten* rules, and was critical of a legal system that would hang madmen who showed some symptoms of insanity – like a persistent delusion – just because they might seem in some other ways to be sane. "The gout that has taken possession of man's toe," Ballantine wrote, "suddenly leaps to his heart. […] The law must yield to the dispensations of Providence, however much prejudice and passion may seek to sway its administration."[103]

Considered together, the cases of John Knatchbull and William Allnutt provide a sense of the incredibly high stakes of moral insanity in nineteenth-century British criminal law. Moral insanity could be used as a synonym for excusable evil, anathema to those who believed that the criminal law was all that stood between civilization and barbarism in the British world. These cases attracted the attention of renowned physicians, the international press, and the government. These trials were not only about the fate of a dissolute sea captain or a troubled child, but also about the conceptual integrity of criminal responsibility as a whole.

In Knatchbull's case, both sides of the moral insanity debate mobilized the notion of civilization to bolster their positions. Those in favour of a moral insanity defence argued that it was barbaric and uncivilized to execute the mad. Those against claimed that allowing a moral insanity defence would destroy civilization by allowing the brutal and the barbarous to run wild. In the late nineteenth century, Britons fretted endlessly about the implications of evolution for British social

[103] William Ballantine, *Some Experiences of a Barrister's Life* (New York: Henry Holt and Company, 1882), 210.

and cultural survival. The widespread concern among Britons that what had once evolved could some day devolve, and that evolution had bequeathed modern Britons a savage legacy, explains why the debate about moral insanity was about much more than just murder or mental illness.

Although Prichard was an ethnologist as well as a psychiatrist, explicit references to race and degeneration are largely absent from his medical writing. The same is true of his ethnological scholarship, which rarely ventured into the medical. However, commentators on Prichard's work drew connections between moral insanity and ideas about racial decline, especially in the later decades of the century. Historian Martin Wiener has argued that the Victorian anxiety about savagery was not just projected onto colonized peoples, but also on the British lower classes and even "the deeper layers of the psyche within even the 'respectable' classes."[104] Moral insanity, violent and unpredictable, was the perfect vehicle for this generalised angst about the fragility of civilization. Thomas Mayo, a physician, wrote in 1854 that Prichard's theory of moral insanity was liable to "occasion the sudden outbreaks [sic] of the brutal character – a character under rapid development at present in the lower orders of the country, to find refuge under this plea."[105] The fear that Britons, especially members of the working classes, were susceptible to savagery was widespread in Victorian England.[106] Moral insanity, it seemed to some, might offer these more 'primitive' Britons immunity from legal punishment.

Moral insanity and evolutionism were inseparable in the minds of many psychiatrists and lawyers. Ethnologist Edward B. Tylor enjoyed a wide audience among Victorian psychiatrists.[107] In his *Primitive Culture*, Tylor described the "hideous misery and depravity" of the urban lower classes in Europe. He wrote,

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[104] Wiener, *Reconstructing the Criminal*, 26.
[105] Mayo, *Medical Testimony and Evidence in Cases of Lunacy*, 58.
[106] Stocking, *Victorian Anthropology*, 229.
[107] Review of Tylor's *Anthropology: An Introduction to the Study of Man and Civilisation*, *Journal of Mental Science*, Vol. 27, January (1882), 593.

> If we have to strike a balance between the Papuans of New Caledonia and the communities of European beggars and thieves, we may sadly acknowledge that we have in our midst something worse than savagery. But it is not savagery; it is broken-down civilization. […] To my mind the popular phrases about 'city savages' and 'street Arabs' seem like comparing a ruined house to a builder's yard.[108]

Tylor, himself, was not particularly worried that European civilization would ever fully degenerate.[109] However, his assimilation of poor Europeans and peoples he considered savage, like the New Caledonians, reflected a powerful trend among social theorists and others, including psychiatrists.

In considering what it meant to be savage, Tylor argued that savage moral standards were looser and weaker than those of civilized peoples. If a Londoner ever attempted to live according to savage norms, he "would be a criminal only allowed to follow his savage models during his short intervals out of gaol."[110] In Tylor's view, savage peoples were, from a moral and intellectual perspective, similar to children. They lived their lives on the edge of violence, requiring only minor distress or temptation to tip over into brutality.[111] Tylor was not a lawyer, and never had to take the stand as a witness in a murder trial. He never explored the implications of his ethnology for criminal responsibility. But lawyers and psychiatrists read him, and at least some, like Mayo, took his account of the 'broke-down civilization' of the European poor to heart. If a significant population of proletarian Britons was, essentially, quasi-savage, then these men and women were both more prone to sudden violence and less likely to be fully responsible for their actions under common law principles, strictly applied. Mayo and others saw moral

[108] Edward Burnett Tylor, *Primitive Culture: Researches Into the Development of Mythology, Philosophy, Religion, Art, and Custom* (J. Murray, 1871), 38.
[109] Ibid., 48.
[110] Ibid., 27.
[111] Ibid., 28.

insanity as offering a ready-made defence for European degenerates, and took it upon themselves to slam the doors of criminal responsibility shut before 'city savages' elbowed their way through.

Henry Maudsley, the famous psychiatrist, argued that moral insanity and primitivism were sides of the same coin. For him, moral insanity was the result of the degeneration of a civilized brain into a state of atavistic savagery. By the late-nineteenth century, Maudsley's writings on insanity turned increasingly to the ethnological. Like other physicians of his generation, he was taken with Herbert Spencer's application of Darwinian evolution to the mind, and with his promotion of ethnopsychology. Maudsley argued that moral insanity was the result of a 'civilized' brain suffering moral degeneration so that it returned to its barbaric, primordial state. Pathological violence and cruelty were signs of sickness among Europeans. Non-European peoples, whom Maudsley arranged on a ladder from utter debasement to near-civilization, were less susceptible to moral insanity because they had less far to fall. In one of his later works, *The Pathology of Mind* (1895), Maudsley illustrated his theory of the relationship between ethnicity and moral insanity. "The Australian savage," wrote Maudsley, "…clearly cannot go mad because of a breach of the moral law, nor ever present an example of true moral insanity; before he can undergo moral degeneration he must first be humanized and then civilized."[112]

For Maudsley, then, moral insanity was a symptom of a breakdown in European civilization. He accepted that moral insanity was perplexing from a legal perspective. It could fairly be said, he admitted, that moral insanity "confound[ed] all distinction between vice or crime and madness."[113] He argued that medical experts could, with enough time and information, separate true moral insanity from wickedness, but accepted that this was very difficult to accomplish in the context of a criminal trial. It was impossible, according to Maudsley, for a

[112] Henry Maudsley, *The Pathology of Mind: A Study of Its Distempers, Deformities, and Disorders* (London: Macmillan and Co., 1895), 29.
[113] Maudsley, *Responsibility in Mental Disease*, 173.

sane person to fully understand the workings of an insane mind. "If a sane person could succeed in doing this," he mused, "it could be only on one condition – namely, that he should become as insane as the person whose mind he was studying."[114] Maudsley's proposed solution was for the law to take a broad and flexible view of insanity, and to err on the side of caution in abandoning capital punishment for insane defendants. If the law could not accommodate the complexity and mystery of responsibility, "and in its regard to the welfare of society cares not greatly to trouble itself about the individual, that is no reason," Maudsley declared, "why we should shut our eyes to facts."[115] Moral insanity was a difficult diagnosis for doctors to make, and perhaps an impossible one for the common law to accommodate. However, Maudsley felt that psychiatrists were duty-bound to proclaim the fact of the disease's existence, regardless of its practical implications. Maudsley argued that moral insanity was not a philosophical problem, but a banal, if distressing, physical condition. "As there are persons who cannot distinguish certain colours, having what is called colour-blindness, and others who, having no ear for music, cannot distinguish one tune from another," he wrote, "so there are some few who are congenitally deprived of moral sense."

D. Hack Tuke, who brought William Bigg to the attention of the British psychiatric community, also posited a relationship between insanity and primitivism. He echoed Maudsley's theory that moral insanity, and violent criminality more generally, were the result of Europeans' reversion to a lower stage in the human evolutionary hierarchy. A morally insane person lacked the mental control and sophistication that he should have inherited from his civilized forbears. Either that, or he had lost his claim to a civilized mind through vice or misfortune. He became, because of his disease, like the primitive peoples of the far reaches of the empire. Like them, he

[114] Ibid., 219.
[115] Ibid., 182.

was an artifact of evolution – almost an animal – who could not reasonably be expected to abide by the norms and laws of civilized society. "Such a man as this," wrote Tuke,

> Is a reversion to an old savage type, and is born by accident in the wrong century. He would have… been in harmony with his environment, in a barbaric age, or at the present day in certain parts of Africa, but he cannot be tolerated now as a member of civilized society. But what is to be done with the man who, from no fault of his own, is born in the nineteenth instead of a long-past century? Are we to punish him for his involuntary anachronism?[116]

Tuke's account of moral insanity as the return, in a member of a civilized society, to savagery differs slightly from Tylor's view. For Tylor, Europeans could never genuinely recapture the primitivism of their evolutionary past. In Tylor's estimation, "the inmates of a Whitechapel casual warn and of a Hottentot kraal agree[d] in their want of the knowledge and virtue of higher culture", but were mentally and morally different, if both debased.[117] Tylor was more concerned about the urban proletariat, and the debauchery and violence that he believed thrived in London slums. Tuke, however, had a more literal understanding of European savagery. Tuke's morally insane subject was a throwback to an earlier stage in human biological and cultural evolution, which he imagined still existed in remote parts of the empire. He accepted that such a person's destructive behaviour could not be tolerated in a civilized society, but emphasized that the morally insane had not chosen to be born out of step with European civilization. Importantly, Tuke implied that a morally insane person was not evil – he was just out of sync with his environment. Tuke's rhetorical question as to what ought to be done with a man afflicted with this type of 'involuntary anachronism' went to the crux of the problem. If the morally insane were not responsible for their actions, but they posed a threat to civilized society that it could not tolerate, then how could the government possibly respond?

[116] Tuke, *Prichard and Symonds in Especial Relation to Mental Science*, 110.
[117] Tylor, *Primitive Culture*, 38.

James Fitzjames Stephen, ever the pragmatist, offered one solution to the problem of moral insanity, and to Victorian notions about the diversity of moral and cognitive standards attributed to various racial and cultural groups. Stephen was generally sympathetic to moral insanity as a diagnosis, and could see no reason to doubt the clinical experience of Prichard and Maudsley. Like them, he took seriously the notion that people of different races might have different moral senses and mental abilities. The problem, for Stephen, arose when medical men tried to argue that the law should take these differences in moral sensibility into account in determining responsibility and, critically, punishment.

> The moral sense of an English gentleman, the moral sense of an Irish peasant, the moral sense of a Hindoo, the moral sense of any two individual men, differ profoundly. The criminal law is essentially distinct from all these differences. It says to all alike, 'Think and feel as you please about morals, but if you do certain things you shall be hanged.'[118]

Stephen could not see why a person who was 'bad' because of mental disease or biological or cultural imperative should be treated any differently than a person who was bad because of his character, education, or birth.[119] However, not all lawyers and physicians shared Stephen's unshakeable faith in the authority of the common law to punish those whose moral senses seemed to differ from the implied legal norm. Stephen, who had made his name as the architect of the Indian Evidence Act and as a supporter of codification and standardization, famously embraced a degree of despotic legal authority that made some of his British colleagues squirm.[120] And yet, when it came to the implications of moral insanity for self-control and the will, Stephen was significantly more cautious in how he framed the law's authority to punish mentally ill defendants.

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[118] Stephen, *A History of the Criminal Law of England*, 1883, 1:184.
[119] Ibid., 1: 185.
[120] For more, see: Posner, "The Romance of Force: James Fitzjames Stephen on Criminal Law."

Before examining Stephen's take on the problem of free will in more depth, it is important to consider the connections between criminal insanity and free will as a philosophical position. Thomas A. Green has explored how legal academics thought about the problem of free will and determinism in twentieth-century America. He argues that no matter how attractive scientific and philosophical determinism was to intellectuals, legal scholars accepted that legal policy and practice needed to accommodate the "conventional morality" of the general public, in which responsibility was premised on a presumption that free will existed.[121] Most of the time, academics could wring their hands about causation and determinism without having to intervene directly in the daily practice of criminal law.[122] However, the free will problem was difficult to avoid in the context of the insanity defence. "How the *absence* of responsibility because of insanity was defined," writes Green, "unavoidably implicated the personal qualities indicating the *presence* of responsibility; complete theories of the former required confronting the latter, and circumscribing those qualities that indicated responsibility directly begged the free will question."[123]

In late Victorian Britain, natural and social scientists were increasingly drawn to determinist accounts of the universe, including determinist understandings of the mind and of human behaviour. Other scholars leapt to the defence of free will, and upheld more traditional understandings of human nature, and the possibility of responsibility. Moral insanity epitomized the clash between determinist and free will based understandings of human nature, especially

[121] Green, *Freedom and Criminal Responsibility in American Legal Thought*, 10.
[122] Some scholars have argued that the free will problem is, in fact, not really worth worrying about. See Peter Westen, "Getting the Fly out of the Bottle: The False Problem of Free Will and Determinism," *Buffalo Criminal Law Review* 8, no. 2 (January 2005): 599–652.
[123] Green, *Freedom and Criminal Responsibility in American Legal Thought*, 15.

from the perspective of its most vehement detractors.[124] The *Zoist* article on Knatchbull illustrates the point:

> The irrational opinions generally embraced regarding the freedom of the will, are advanced and supported by the religious teachers of the people. They tell their pupils that they are free agents, and that by '*faith*' and '*the grace of God*' they can lead a virtuous life. […] Philosophy clearly proves that the character of every being is a compound product – the result of a peculiar cerebral organism and of the innumerable circumstances which have acted, and are still acting upon it. […] This is a law, and it is not in the power of man to resist.[125]

Often, moral insanity pitted not only free will against determinism, but also agnosticism against Christianity. Some scholars have even described the late nineteenth century as a time of "war" between determinist scientists and free will loving lawyers and religious leaders, with psychiatric diagnoses like moral insanity, monomania and dipsomania (alcoholism) as flashpoints.[126] The Victorian conflict over free will did run hot. However, it was often difficult to divide middle-class Britons into distinct camps. Professional and academic communities never split seamlessly along religious or philosophical lines.[127] Still, moral insanity did have a tendency to provoke rancorous, ideological debate between supporters and sceptics.

A famous 1886 debate between T.H. Huxley, a natural scientist and 'Darwin's Bulldog', and W.S. Lilly, a barrister, former member of the Indian Civil Service, and Catholic, captures the stakes of the free will controversy, and its connection to criminal law. In an essay in the *Fortnightly Review*, Lilly excoriated British scientists and social scientists who subscribed to what he called the French "medico-atheistic" school: "the school which inculcates sensism of the

[124] Rafter, *The Criminal Brain: Understanding Biological Theories of Crime*, 38.
[125] "The Punishment of Death", *The Zoist*, No. 7 (October 1844): 312-3.
[126] Mariana Valverde, *Diseases of the Will: Alcohol and the Dilemmas of Freedom* (Cambridge: Cambridge University Press, 1998), 45.
[127] Matthew Stanley, *Huxley's Church and Maxwell's Demon: From Theistic Science to Naturalistic Science* (Chicago: University of Chicago Press, 2015). Although for more on how insanity trials involved a clash between determinist science and voluntarist law, see: Smith, *Trial by Medicine*.

grossest kind, which reeks of the brothel, the latrine, and the torture trough."[128] Lilly argued that materialism, determinism and atheism, which he used interchangeably, had led Britain into a great "moral crisis" in which traditional religious and moral values were being replaced by faith in a soulless natural law.[129] Lilly's essay was stuffed with Latin maxims. He was a lawyer and a Catholic. Lilly was convinced that determinism would make criminal law nothing but "*leges sine moribus vana*" (useless law without morals); that without morality, law would become just the brutish "*ultima ratio* of force"; and "*fiat justicia pereat mundus*," that men must enforce justice even in a fallen world.[130] Despite his histrionics, Lilly hit on the central problem of responsibility in the age of scientific determinism: "But how visit with moral disapprobation those who were incapable of doing anything but what they did? Poor victims of temperament, of heredity, of environment, they are to be pitied, not blamed."[131] If determinism were true, Lilly feared that it would reduce the law to a cruel system for the protection of the majority's persons and property – a system that punished the innocent and sick (and dangerous) without moral justification.

T.H. Huxley responded with his own essay, "Science and Morals."[132] He argued that natural science had no invented determinism. Christianity had long wrestled with predetermination and the implications of faith in an omniscient and omnipotent god. Science and even a belief in the inevitability of the law of causation were no obstacles to belief in the divine, or in transcendent human experiences. However, warned Huxley, if Lilly and others like him believed that free will was necessary for morality, they were in deep trouble. "If the belief in the uncausedness of volition is essential to morality," wrote Huxley, "the student of physical science

[128] W.S. Lilly, "Materialism and Morality," *The Fortnightly Review*, 40 (1 November 1886), 580.
[129] W.S. Lilly, "Materialism and Morality," *The Fortnightly Review*, 40 (1 November 1886), 584.
[130] W.S. Lilly, "Materialism and Morality," *The Fortnightly Review*, 40 (1 November 1886), 586.
[131] W.S. Lilly, "Materialism and Morality," *The Fortnightly Review*, 40 (1 November 1886), 586.
[132] T.H. Huxley, "Science and Morals" (1886), in Thomas H. Huxley, *Evolution and Ethics* (New York: D. Appleton and Company, 1899).

has no more to say against that absurdity than the logical philosopher or theologian."[133]

Huxley's response to Lilly might have satisfied many readers that, at the very least, Darwin's theory of evolution and the turn to agnosticism among scientists presented no fresh threats to morality. However, Huxley either missed or dismissed Lilly's worries about how the law should, or could, proceed in a world where deterministic accounts of human nature held sway. As a barrister with experience in the administration of law in the empire, Lilly's essay was not just religious bluster. The traditional interdependence of free will and responsibility persisted in common law jurisprudence. The 'conventional morality' of law, to borrow Green's phrase, was premised on a choice-based justification of punishment. If determinist social scientists and psychiatrists flooded British and British imperial courtrooms with claims that defendants had no choice but to commit their crimes, then responsibility and the conventional morality that underwrote it were doomed. Lilly's overheated evocation of dastardly French 'medico-atheism' concealed an argument made over and over again by lawyers and even by law-minded psychiatrists. This intellectual climate informed how lawyers, doctors and members of the public thought about moral insanity, and about its implications for the survival of the common law.

Stephen was suspicious of doctors who attempted to medicalize crime and its management. "Lawyers were, and are, right," he wrote, "in admitting with great suspicion and reluctance excuses put forward for what on the face of them are horrible crimes, especially as some medical theories seem to go to the length of maintaining that all crime is of the nature of disease."[134] Maudsley had addressed this criticism in *Responsibility in Mental Disease*, published over a decade earlier. Even if all crime were believed to be the result of madness, the response to criminal madness was not pity and care but confinement, usually for life, in an asylum. Maudsley

[133] Ibid., 144.
[134] Stephen, *A History of the Criminal Law of England*, 1883, 1:126.

asked, rhetorically, "But do we in reality punish insanity, however little we may wish to do so?"[135]

Stephen had read Maudsley's book, but was unconvinced.[136] He was untroubled by the prospect of executing an insane criminal, provided that the criminal understood, more or less, what he had done. *M'Naghten*, he argued, effectively separated the hopelessly deluded from the merely unbalanced, and so was a sound legal standard. Stephen, himself, would have narrowed the legal definition of insanity even further. He believed that Daniel McNaughten had an irrational fear of Tory persecution but, he added, "My own opinion, however, is that, if a special Divine order were given to a man to commit murder, I should certainly hang him for it unless I got a special Divine order not to hang him."[137] Generally, Stephen took a hard line against criminals. The proper attitude toward criminals was not, he argued, "long-suffering charity but open enmity; for the object of the criminal law is to overcome evil with evil."[138]

Despite Stephen's pragmatism on the subject of criminal responsibility, he did not consider responsibility unimportant or uninteresting. In fact, he was preoccupied with the idea that insanity could overwhelm a sufferer's free will, and convinced that those who suffered from that species of insanity should be considered irresponsible for their actions. In his account of choice and compulsion in his *History*, Stephen wrote that he would do his best to avoid the "interminable controversies" that usually swirled around the free will question.[139] Nevertheless, he waded in. Stephen argued that there was a strong connection between the strength of a man's will and the level of his intellect. He believed that it was "almost impossible for the intellect to

[135] Maudsley, *Responsibility in Mental Disease*, 26.
[136] Stephen, *A History of the Criminal Law of England*, 1883, 2:124–7.
[137] Stephen, *A History of the Criminal Law of England*, 1883, 1: 160.
[138] Stephen, *A History of the Criminal Law of England*, 1883, 2: 179.
[139] Ibid., 2: 99.

be seriously disarranged or weakened without a corresponding effect on the will."[140] Stephen felt confident that most of a madman's actions could be considered voluntary, and therefore criminally punishable. Although Stephen accepted that mental disease might produce a criminal impulse or temptation in a sufferer, he maintained that it was the madman's duty to struggle against his baser urges.[141] But in the small class of cases where madness destroyed a person's power of self-control, Stephen believed that the sufferer should be excused from responsibility for his actions.[142]

Stephen's emphasis on self-control as the key criterion for determining criminal insanity brought him beyond the traditional boundaries of *M'Naghten*. He knew this, and worked to insert his understanding of responsibility into the existing legal framework. He argued, for example, that a person with no self-control could not understand that his criminal act was wrong, because a lack of self-control implied an inability to appreciate general rules of conduct and to apply them to a particular case.[143] Although Stephen supported including self-control in any future codification of the common law, he felt that including his esoteric definition of self-control under *M'Naghten* was perhaps sufficient, and prudent. After all, he observed, "many people, and in particular many medical men, cannot be got to see the distinction between an impulse which you cannot help feeling and an impulse which you cannot resist."[144] A person who could not control his actions because of a mental disease was not, in Stephen's view, morally blameworthy. If he were punished anyway, the law would be "put out of harmony with morals" and punishment would not "as it always should, connote, as far as may be possible, moral infamy."[145] In such

[140] Ibid., 2: 104.
[141] Ibid., 2: 169.
[142] Ibid., 2: 170.
[143] Ibid., 2: 171.
[144] Ibid.
[145] Ibid., 2: 172.

cases, the mad should be confined to protect the public; hanging them would undermine the moral authority of the law, and fear of hanging would have no effect if a man's behaviour was truly uncontrollable.

Though Stephen was unmoved by the pleas of Tuke and others for clemency in cases of moral insanity involving moral perversion, he was disturbed by the prospect of the criminal law punishing those whose moral insanity manifested in a loss of self-control. In this sense, he can be understood as Maudsley's opposite. Maudsley believed that the morally insane should be treated more leniently under the criminal law, regardless of whether their illness caused depravity or weakness of will. Maudsley was serene in the face of determinism. He was untroubled by the stubborn insistence of theorists, and especially lawyers, on the existence of free will in any kind of absolute form. He argued that no person's will was free from outside influence, whether biological, emotional or otherwise. "The dogma of free will," he argued, "has been a cherished dogma of the study, but it has not imbued the regulations made for the conduct of life;… an ideal of the imagination inspired by the heart, it has no place in the work of the practical understanding."[146] Maudsley was open to the idea that a man might suffer from a mental disease that compelled him to commit crimes, and that the disease should be considered an exculpatory or mitigating factor in assessing his criminal responsibility. But Maudsley did not consider weakness of will to be more distressing or more worthy of clemency than other types of mental illness.

One final murder case shows that moral insanity had only become more ubiquitous in the psychiatric community, and more controversial in criminal cases, as the nineteenth century

[146] Maudsley, *Body and Will: Being An Essay Concerning Will in Its Metaphysical, Psychological, & Pathological Aspects*, 8.

progressed. Moral insanity, and the insanity defence in general, continued to generate reams of official correspondence and outbursts of public outrage. The case of George Victor Townley, a middle-class dreamer who killed his paramour in 1863, shows how questions of criminal responsibility drew psychiatrists, lawyers and government officials into debates about human nature and the integrity of the legal system.[147] Townley's advocates argued that he was morally insane. They pulled every administrative string that they could to save his life, and in the process exposed the uncertainty that legal and medical authorities still faced when they confronted cases of non-delusional insanity.

George Victor Townley was admitted to Bethlem Hospital's criminal lunatic ward on 11 January 1864.[148] Townley was highly educated, fastidious, and reserved. He was tall and muscular, with a "pleasing expression of countenance."[149] He did not look or sound like a murderer, or a madman. His doctors at Bethlem glued and taped newspaper clippings about his trial into the asylum's criminal casebook. "This case," they noted, "is one that has been exciting much attention lately, there being great diversity of opinion regarding his mental condition."[150]

Before he was sent to Bedlam, Townley was tried at the Derby Assizes for the murder of Bessie Goodwin, in December of 1863. Three lawyers represented Townley in court. One of them was James Fitzjames Stephen. Stephen, in letters to his wife, wrote that he had never had "such an interesting case – or one so dramatic."[151] "The people here are all in a state of mind

[147] Townley's trial made such a splash that a book was published in 1864 with a full account of the case, including reproductions of photographs and trial documents: *The Trial and Respite of George Victor Townley, for Wilful Murder. With Original Documents and Correspondence ... ;Dr. Winslow's Analysis of the Convict's Mind, Portraits, Autographs, and Plan.* (Derby: W. Bemrose & Sons, 1864).
[148] George Victor Townley casebook entries, Bethlem Hospital: Criminal Patients (CBC), Bethlem Royal Hospital Archives, Bethlem Museum of the Mind, Beckenham, Kent CBC/5..
[149] George Victor Townley casebook entries, CBC/5.
[150] George Victor Townley casebook entries, CBC/5.
[151] James Fitzjames Stephen to Mary Stephen, Derby, 9 December 1863, Extracts from letters written by James Fitzjames Stephen to Mary R. Stephen, Copied by Lady Stephen, Cambridge University Library (CUL), Department of Manuscripts and University Archives, Stephen Family: Letters and Papers MS add. 7349/7a.

about it," he observed, "& expect a terrible crush to hear the trial."[152] Municipal authorities in Derby erected barriers around the courthouse and waited for the crowds. The *Derby Mercury*, a local paper, published a detailed account of the trial.[153] Although the trial was scheduled to begin at ten o'clock, eager spectators - mostly women – poured into the courthouse gallery early that morning. The scene was orderly. The decision to admit only those lucky enough to secure tickets had kept the crowd, according to the *Derby Mercury* reporter, "much smaller than upon the occasions of recent trials for murder."[154] A large number of seats had been reserved for journalists from local and metropolitan newspapers. Townley, dressed all in black, stared intently at the judge as he entered the courtroom. The reporter observed that he looked "a little paler and older" than he had at his committal hearing, and that he had trimmed back his large beard.[155] Townley was quiet. He hardly spoke to his lawyers, and rose from his seat only once, to hear the court's final judgement on the last day of the trial.

Townley, the son of a respectable family of Manchester merchants, had fallen in love with Bessie Goodwin, a military captain's grand-daughter, four or five years earlier. Soon, they were engaged to be married. But in the summer of 1863, Bessie wrote to Townley to call off the marriage. Townley had no occupation or means of his own beyond some work as his father's assistant; he knew he was not much of a match. Townley's mother, at his trial, told the jury that her son was gentle and artistic, but "displayed a very poor capacity for business pursuits."[156] Still, Townley begged Bessie for a final meeting. "We shall both be happier and better in mind,

[152] James Fitzjames Stephen to Mary Stephen, Derby, 9 December 1863, CUL MS add. 7349/7a.
[153] THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.
[154] THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.
[155] THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.
[156] Testimony of Mary Townley, Notes of Evidence, Trial of Victor Townley, Records of the Ministry of Health (MH), The National Archives, Kew, MH 51/60..

as well as body, after this last interview," he assured her.[157] "I do not wish to see you," replied Bessie, "if it can possibly be avoided, […] and say 'Good-bye' without seeing each other."[158] There were rumours that Bessie was in love with a clergyman.[159] On 21 August 1863, Townley rushed to Bessie's family home at Wigwell Hall in Wirksworth, near Derby. He knocked and was let in. He and Bessie talked in the library, and then in the garden. Shortly after Townley started down the lane toward the train station, a passer-by heard a woman moan. He found Bessie leaning against the garden wall, covered in blood. He tried to help her to the house, but after a few faltering steps she collapsed. She had been stabbed four or five times behind her ears, and one deep strike had severed her carotid artery. Townley returned, and helped to carry Bessie's body into the house. She died in his arms. Townley admitted openly to the killing. When asked why, he said, "The woman that deceives me dies."[160] Captain Goodwin, Bessie's grandfather and a frail man of eighty, brought Townley, wet with Bessie's blood, into the library. The pair drank brandy and tea until the police and the doctor arrived.[161]

The facts of the case were uncontested by either Townley or his defence counsel. Rather, their argument was that Townley had been insane and the time of the murder.[162] Kenneth Macaulay, one of Townley's barristers and Thomas Babington Macaulay's cousin, told the jury

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[157] Townley to Bessie, transcript of letter read at trial, THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.
[158] Bessie to Townley, transcript of letter read at trial, THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.
[159] THE REV. F. R. BRYANS AND THE LATE MISS GOODWIN, *The Dundee Courier & Argus* (Dundee, Scotland), Monday, January 04, 1864; Issue 3246. *19th Century British Library Newspapers: Part II.*
[160] THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.
[161] THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.
[162] One might wonder why Townley's counsel did not attempt a provocation defence. First, the result could only have been a finding of manslaughter, and not a 'not guilty' verdict. Second, it seems unlikely that Townley's killing of Bessie would have struck jurors as impulsive and sudden, given that he brought the knife and arranged the meeting after having been spurned. For more on provocation, see: A. J. Ashworth, "The Doctrine of Provocation," *The Cambridge Law Journal* 35, no. 02 (November 1976): 292–320.

that Townley's family tree was rotten with insanity.[163] The family was afflicted with insanity "to an extent almost beyond what was ever heard of," with nearly a dozen close relatives dying by suicide or in lunatic asylums.[164] Macaulay argued that Bessie's cruel rejection of the gentle, fragile Townley roused the madness to which his heritage made him so susceptible. Macaulay was confident that the evidence at trial would prove, in satisfaction of the *M'Naghten* rules, that "the prisoner's intellect was so disturbed that he was not fit to judge the nature or the quality of his act, or to resist its consequences."[165]

The defence called Forbes B. Winslow, whose work had been quoted by Ballantine in William Allnutt's trial, to testify as to Townley's sanity. Winslow met with Townley twice while he awaited his trial in jail, for a total of just over two hours. He told the court that his second interview with Townley had been the night before the trial, and that he was convinced that Townley was deranged. Winslow had tried to convince Townley of the seriousness of his crime. However, Townley refused to accept that his act was at all wrong, "alleging that he considered Miss Goodwin as his own property – that she had been illegally wrested from him by acts of violence. […] [A]nd he had as perfect a right to deal with her life as he had to deal with any other description of property, such as the money in his pocket, the furniture in his house, or the pictures on his wall." [166] Winslow described how Townley "very insanely argued" that the killing was righteous, and how Townley acquired a "wild maniacal aspect" when telling

[163] *Law Times, the Journal and Record of the Law and Lawyers* (Office of The Law times, 1865). Also see K.J.M. Smith's account of Stephen's animosity toward Macaulay for his poor performance in the Townley case: James Fitzjames Stephen, *Selected Writings of James Fitzjames Stephen: A General View of the Criminal Law*, ed. K. J. M. Smith (Oxford: Oxford University Press, 2014), 15.
[164] Macaulay's speech to the jury, THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.
[165] Macaulay's speech to the jury, THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.
[166] Forbes Winslow's testimony, THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.

Winslow about a conspiracy against him.[167] Moreover, what sane murderer would not only turn himself in, but cradle his victim's head as she died? Who but a madman would have calmly sat down to tea with Captain Goodwin that night? Winslow diagnosed his patient with "general moral derangement."[168] In fact, Winslow declared that he found Townley's "moral sense more vitiated than in any man [he] ever saw."[169]

But the judge, Mr. Baron Martin, was sceptical. He asked Macaulay to produce proof that Townley suffered from a delusion. "I have watched very carefully for proof of any delusion under which he has laboured," said Martin, "Can you tell me where to find it?"[170] Although the *M'Naghten* rules mentioned 'disease of the mind', there was no specific requirement that the defendant experience a distinct delusion. Still, Townley's lack of an obvious delusion hurt his case. Mr. Boden, for the prosecution, argued that Townley was a scorned lover, depressed and angry. The defence never proved, or even asserted, that Townley did not know that his crime was punishable by death. To excuse such an act would be foolish. Boden claimed never to have heard of "any such thing as a general moral derangement being a defence in a court of justice for the crime of wilful murder"; "in all probability Dr. Winslow would find some derangement in the minds of many persons who imagine[d] that they [were] perfectly sane."[171]

The judge gave a long summary speech in which he attacked the defence's case. Hearing that the defence intended to argue that Townley was insane, Martin "endeavoured to learn was

[167] Forbes Winslow's testimony, THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.
[168] Forbes Winslow's testimony, THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.
[169] Forbes Winslow's testimony, THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.
[170] Judge Baron Martin, THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.
[171] Boden's summary, THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.

the law was on the subject" of insanity.[172] Martin told the jury that he had read about a man who believed that he was made of glass.[173] The man was in constant fear "that persons were aiming at striking heavy blows at him"; if he had killed someone to avoid shattering, then he would have been legally irresponsible.[174] However, anything short of this species of specific, spectacular delusion was not enough to shield a man from responsibility. Martin was new to the law of insanity, and to the science. His views on the subject would have struck the medical witnesses as hopelessly superficial. However, the jury was convinced. They took only six minutes to return a guilty verdict. Martin delivered Townley's death sentence, with which he entirely agreed, in dramatic tones. According to the *Derby Mercury* reporter, the judge was compelled to stop in the middle of his speech "owing to an outburst of pent-up feeling", and staggered to the final phrase, in which he prayed that the Lord would have mercy on Townley's soul, "amidst sobs from the bench and every part of the Court."[175]

James Fitzjames Stephen had mixed feelings about the case. In letters to his wife, he argued that Townley's intellect was "very defective", but that Forbes Winslow's evidence of his insanity was "legally speaking, no defence at all."[176] In the days before the trial, Stephen delayed responding to letters from Townley because, he wrote, "I never had a more unpleasant job. I cannot make up my mind what I am to say, as it seems desperately hard to say just what I think."[177] Stephen suspected that the stress of the killing and the trial had damaged Townley's psyche, but was not at all convinced that Townley was legally irresponsible for his actions.

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[172] Martin's summary, THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.
[173] Martin's summary, THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.
[174] Martin's summary, THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.
[175] Martin's sentencing, THE TRIAL OF GEORGE VICTOR TOWNLEY, FOR WILFUL MURDER. *The Derby Mercury* (Derby, England), Wednesday, December 16, 1863; Issue 6873.
[176] James Fitzjames Stephen to Mary, Nottingham, 3 December 1863, CUL. MS. Add. 7349/7a.
[177] James Fitzjames Stephen to Mary, Derby, 3 December 1863, CUL. MS. Add. 7349/7a.

Stephen was a skilled and ambitious lawyer; he did everything he could to secure Townley's acquittal. But once the trial was over, he was free to express his true feelings about his client's responsibility, and the confused state of the insanity defence.

After Townley's conviction, Stephen criticized every aspect of the case except for the final result. The entire defence had been, in his opinion, "the most deplorable failure."[178] Stephen's co-counsel, Kenneth Macaulay, was "quite overpowered, & spoke wretchedly missing every point, & not saying a single impressive sentence."[179] Forbes Winslow, he complained, "let us down dreadfully" and was unpersuasive on the stand.[180] The judge, preoccupied with the case of the man who thought he was made of glass, had, Stephen argued, adopted a foolishly extreme definition of legal insanity. Martin seemed, fumed Stephen, "determined to take the narrowest view of the law, a view so narrow that if it were true, madness would really make no difference at all."[181] Stephen believed that Martin erred in his understanding of legal insanity. However, Stephen was not willing to embrace a definition of legal insanity and irresponsibility that could accommodate moral insanity. The trial had been an embarrassment, but Stephen was pleased with Townley's conviction. He had done his duty as defence counsel, but ultimately he concluded, "in any real sense of the word, the man [Townley] was no more mad than I"; it was "no doubt right & just" for Townley to hang.[182]

A writer for the *Liverpool Mercury* summed up the public hostility to the interference of mad doctors in murder trials. Their theories were "sophistical and most perilous."[183] They would, if accepted by judges and juries, "ensure absolute impunity to the worst crimes of the worst

[178] James Fitzjames Stephen to Mary Stephen, Nottingham, 13 December 1863, CUL. MS. Add. 7349/7a.
[179] James Fitzjames Stephen to Mary Stephen, Nottingham, 13 December 1863, CUL. MS. Add. 7349/7a.
[180] James Fitzjames Stephen to Mary Stephen, Derby, 11 December 1863, CUL. MS. Add. 7349/7a.
[181] James Fitzjames Stephen to Mary Stephen, Derby, 9 December 1863, CUL. MS. Add. 7349/7a.
[182] James Fitzjames Stephen to Mary Stephen, Nottingham, 13 December 1863, CUL. MS. Add. 7349/7a.
[183] THE MAD DOCTORS AGAIN, *Liverpool Mercury* (Liverpool, England), Tuesday, December 15, 1863; Issue 4945.

criminals" and "be utterly destructive of human life."[184] The author was especially appalled by Winslow's testimony in the Townley case. If the kind of moral derangement Winslow described were exculpatory, "the administration of justice in cases of murder would become an absolute farce. Anybody might then murder anybody with entire impunity if he was only cunning enough to profess contempt for all moral restraints."[185] To make an absence of remorse proof of irresponsibility was a "revolting paradox", in which the most ruthless, callous and vicious were the least culpable.[186] If all "men who commit monstrous crimes are mad," wrote another journalist for *The Western Times*, "the occupation of judges and juries would be gone and penal laws a dead letter."[187]

And yet, and although the writer for the *Liverpool Mercury* proclaimed Townley's guilt, Townley would be spared.[188] Just days after the trial, Baron Martin wrote to the Home Secretary to recommend that a commission be constituted to inquire into Townley's state of mind. Martin still supported the jury's guilty verdict, but worried that Townley might be presently insane, and not fit to be executed.[189] Townley's friends filed a petition begging for his life to which the Mayor of Derby was the first signatory. James Fitzjames Stephen refused to sign it.[190] In Manchester, a second petition circulated near the end of December which had garnered 10,000

[184] THE MAD DOCT0RS AGAIN, *Liverpool Mercury etc* (Liverpool, England), Tuesday, December 15, 1863; Issue 4945.
[185] THE MAD DOCT0RS AGAIN, *Liverpool Mercury etc* (Liverpool, England), Tuesday, December 15, 1863; Issue 4945.
[186] THE MAD DOCT0RS AGAIN, *Liverpool Mercury etc* (Liverpool, England), Tuesday, December 15, 1863; Issue 4945.
[187] Murder Most Foul, *The Western Times* (Exeter, England), Friday, December 18, 1863; pg. 5; Issue 1902. *British Newspapers, Part III: 1780-1950.*
[188] MADNESS AND MURDER, *Nottinghamshire Guardian* (London, England), Friday, December 18, 1863; pg. 5; Issue 935.; The Press and the Trial of Townley, *The Derbyshire Times and Chesterfield Herald* (Chesterfield, England), Saturday, December 19, 1863; pg. 3; Issue 483. *British Newspapers, Part III: 1780-1950.*
[189] Intercession for George Victor Townley, *Daily Post* (Liverpool, England), Friday, December 18, 1863; pg. 5; Issue 2656. *British Newspapers, Part IV: 1780-1950.*; The Wigwell Hall Murder, *Newcastle Guardian, and Tyne Mercury* (Newcastle-upon-Tyne, England), Saturday, December 19, 1863; pg. 2; Issue 930. *British Newspapers, Part III: 1780-1950.*
[190] James Fitzjames Stephen to Mary Stephen, Nottingham, 13 December 1863, CUL MS Add. 7349/7a.

signatures. Townley's father, Charles James Townley, sent a witnessed declaration to the Home Office in which he claimed that there were eleven "known and well authenticated cases of actual insanity" on his wife's side, but that this evidence had not been presented at his son's trial for "obvious family reasons."[191] However, Christmas came and went, and Townley's sentence had yet to be commuted. The local hangman, Calcraft, had been informed that his services would be needed at ten o'clock on New Year's Eve.[192]

But on Boxing Day, two local doctors – Henry Goode and Thomas Harwood – interviewed Townley in the condemned cell. Goode boasted only an M.B., a junior medical qualification, and Harwood, although he had worked as a surgeon and doctor in Derby for over forty years, had only trained as an apothecary. [193] Along with two local magistrates, Goode and Harwood interviewed Townley twice in two days. Over and over, Townley asserted that he was perfectly sane, and that he did not believe that he had done anything wrong in killing Bessie. "Bessie Goodwin was my property," Townley told the doctors, "and I had a right to do what I did because she was false to me."[194] Townley had acquiesced in his defence counsel's efforts to argue that he had been insane at the time of the crime, but reluctantly. He hoped to spare his parents the ignominy of watching their son hang, although he himself was untroubled by the prospect of his own death. "I suppose you are examining me to see if I am of sound mind," he told his interviewers. "I believe myself to be of perfectly sound mind. I am perfectly satisfied,

[191] Declaration of Charles James Townley, *George Victor* Townley, 17 December 1863, MH 51/60.
[192] The Execution of Townley, *The Derbyshire Times and Chesterfield Herald* (Chesterfield, England), Saturday, December 26, 1863; pg. 3; Issue 484. *British Newspapers, Part III: 1780-1950.*
[193] Harwood to Waddington, 21 January 1864, *George Victor Townley* MH 51/60,.; Certificate of Insanity for G.V. Townley, 29 December 1863, MH 51/60. Harwood was also not a member of the Royal College of Surgeons, although Goode was.
[194] Examination of George Victor Townley before the Commissioners in Lunacy, Derby Gaol, 26 December 1863, *George Victor Townley* MH 51/60.

and perfectly clear, and," he continued, "perfectly easy on the point of what I did."[195] The doctors forwarded the transcripts of their interviews to London for review by the Commissioners in Lunacy. Beginning in 1828, the public Commission in Lunacy, supported by a staff of medical experts known as Commissioners in Lunacy, had overseen the licensing and operation of British madhouses.[196] A letter from the Commission arrived in Derby on 29 December, two days before Townley's execution date, postponing the hanging on the ground that Townley was insane.[197]

Townley was transferred to Bethlem in mid-January. But he would not stay long. There were rumblings in the press to the effect that Townley, with his powerful friends and ample means, had bought his life through the instrument of a "secret tribunal" (the Lunacy Commission). "I hear all the people in Derby are furious about Townley," wrote Stephen, "& I am inclined to think they are not wrong."[198] Before the suspension of Townley's capital sentence, Stephen had praised his family for their grace and bravery. Once Townley had been spared, Stephen felt "a horrible disgust for the whole family…as if the girl's blood lay between me and them."[199]

"The proper execution of justice has received a great blow," cried magistrate Mr. J.G. Crompton at the Derbyshire County Sessions, "for it really does give full grounds on the part of the public for thinking that justice is unequally administered, and that the rich man does not stand in the same position as the poor man with regard to the punishment inflicted for his

[195] Examination of George Victor Townley before the Commissioners in Lunacy, Derby Gaol, 27 December 1863, *George Victor Townley*.MH 51/60,
[196] Bewley, *Madness to Mental Illness: A History of the Royal College of Psychiatrists*, 7.
[197] RESPITE OF GEORGE VICTOR TOWNLEY, *The Newcastle Courant etc* (Newcastle-upon-Tyne, England), Friday, January 1, 1864; Issue 9862.
[198] James Fitzjames Stephen to Mary Stephen, Nottingham, 1 January 1864, CUL MS add. 7349/7a.
[199] James Fitzjames Stephen to Mary Stephen, Nottingham, 3 January 1864, CUL MS add. 7349/7a, CUL.

offences."[200] The Derbyshire magistrates drafted a memo to Sir George Grey, the Home Secretary, expressing their displeasure.[201] Townley's post-trial respite, they contended, signalled that there was "one law for the rich and another for the poor" – "if Townley and his friends had been poor, he would have been executed."[202] One reporter was less outraged than puzzled; his headline read, "'Killing no murder!' Or the Strange Efforts to Save Townley."[203] The controversy reached such a pitch that the Home Office released copies of official correspondence regarding the case, including responses to the various memoranda forwarded to the Secretary of State.[204] There was a general feeling that Townley's respite – which was not a pardon, and so could be reversed on a finding that he was, after all, sane – would be temporary. The case had been a comedy of errors and embarrassments, and some argued that only Townley's death could restore the dignity of the court and of the government.[205]

In late January, a new Lunacy Commission was sent to Bethlem to evaluate Townley. This time, four high-profile mad doctors conducted the investigation: N. Helps, the superintendent of Bethlem; John Meyer, the superintendent of Broadmoor; John Charles Bucknill, asylum reformer, former superintendent of the Devon Asylum, and founder of the *Journal of Mental Science*; and W. Charles Hood, a Visitor of Chancery Lunatics.[206] The Commissioners met with Townley and reviewed all of the documents related to his case,

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[200] THE DERBYSHIRE VISITING JUSTICES AND THE RESPITE OF TOWNLEY, *The Derby Mercury* (Derby, England), Wednesday, January 6, 1864; Issue 6876.
[201] THE MURDERER OF MISS GOODWIN, *The Hull Packet and East Riding Times* (Hull, England), Friday, January 15, 1864; Issue 4121.
[202] Derby county magistrates to Sir George Grey, 5 January 1864, *George Victor Townley* MH 51/60.
[203] "KILLING NO MURDER!" OR THE STRANGE EFFORTS TO SAVE TOWNLEY . *The Huddersfield Chronicle and West Yorkshire Advertiser* (West Yorkshire, England), Saturday, January 09, 1864; pg. 8; Issue 721. *19th Century British Library Newspapers: Part II.*
[204] THE CASE OF TOWNLEY, *Liverpool Mercury etc* (Liverpool, England), Saturday, January 16, 1864; Issue 4973.; THE TOWNLEY CASE—THE OFFICIAL CORRESPONDENCE, *Manchester Times* (Manchester, England), Saturday, January 16, 1864; Issue 319.
[205] THE RESPITE OF THE MURDERER TOWNLEY, *The Derby Mercury* (Derby, England), Wednesday, January 20, 1864; Issue 6878.
[206] Medical Report on Townley's Sanity, 28 January 1864, MH 51/60.

including accounts of his family's history of insanity. They unanimously found Townley to be sane, and ordered his removal from Bethlem to Pentonville prison.[207] The Home Office felt it would be distasteful to press for Townley's execution, and satisfied itself with a commutation of his capital sentence to a lifetime of penal servitude.[208]

Like his stay at Bethlem, though, Townley's time at Pentonville would be short. In February of 1865, Townley threw himself over the balustrade of the central prison atrium on his way back to his cell from chapel.[209] Although Townley usually sat silently in chapel, his head resting on his hand, this final Sunday he had belted out the last verses of a hymn – "Where is death's sting? Where, grave, thy victory?" – in a bass so booming that the men in his pew all noticed.[210] As the prisoners filed out, Townley clambered over the balcony railing and fell, head first, onto the concrete twenty-four feet below.[211] The prison surgeon scraped him off the floor, but Townley died a few hours later in the infirmary.

The anonymous author of an article in *Mental Science* on Townley's fate crowed that Townley's suicide "was, perhaps, the last small act of justice which he could do to outraged society; […] it may not untruly be said that nothing in his life became him so well as the leaving of it."[212] Townley's case had "mercilessly dragged" the whole medical profession, including its medico-psychological specialists, into "foul disgrace", and the author hoped that Townley's death would finally silence his "injudicious" and parasitical friends.[213] The physicians and

[207] George Victor Townley casebook entries, CBC/5, Bethlem Hospital: Criminal Patients (1862 to 1864), BRH.
[208] Waddington to Evans & Mundy, 1 February 1864, *George Victor Townley*.MH 51/60.
[209] "The Suicide of George Victor Townley", *The Journal of Mental Science*, 11 (1866), 67.
[210] "The Suicide of George Victor Townley", *The Journal of Mental Science*, 11 (1866), 68.
[211] "The Suicide of George Victor Townley", *The Journal of Mental Science*, 11 (1866), 66.
[212] "The Suicide of George Victor Townley", *The Journal of Mental Science*, 11 (1866), 66.
[213] "The Suicide of George Victor Townley", *The Journal of Mental Science*, 11 (1866), 66.

humanitarians who argued for Townley's insanity had, in the opinion of the author, indulged in "a disgusting aping of science" with the cynical aim of perverting the course of justice.[214]

The author held moral insanity in special contempt. He accused physicians who believed in the condition of peddling "ill-grounded and unphilosophical theories" which were irreconcilable with a "conception of the relations and responsibilities of the individual as a citizen."[215] The author's primary concern was to shore up the credibility of the medical profession. Cases like Townley's, he raged, sent the message that medico-psychological specialists were "incapable of rising from a narrow view of the individual as a subject of medical science to the larger view of him as an element in the social system, - of the man as a citizen, and of the relations of his crime to society."[216]

The same issue of *Mental Science* included another, anonymous, article on Townley and the problem of moral insanity. The author declared,

> Insanity, as hitherto used by articulately speaking men, is inconsistent with responsibility; but, in the gabble of medical science, irresponsibility is proved by the mere fact of extraordinary immorality. If this is to be so, it will certainly simplify the criminal code. It only requires a new chart and scale of wickedness. Henceforth, the greater the knave, the less his guilt.[217]

The author poured scorn on physicians who believed that extraordinary wickedness was proof of an unsound and irresponsible mind. They were, he contended, quacks. After Townley's death, an autopsy was conducted on his brain. The prison surgeon found nothing amiss – no lesions, no wasting, no damage beyond that caused by Townley's final fall. The author excoriated medical men who, despite this evidence, refused to admit that Townley had been sane all along. The author had no patience for their claim that there was no necessary correlation between insanity

[214] "The Suicide of George Victor Townley", *The Journal of Mental Science*, 11 (1866), 77.
[215] "The Suicide of George Victor Townley", *The Journal of Mental Science*, 11 (1866), 79.
[216] "The Suicide of George Victor Townley", *The Journal of Mental Science*, 11 (1866), 82.
[217] "Moral Insanity", *The Journal of Mental Science*, 11 (1866), 133.

and organic disease of the brain.[218] He echoed the feelings of many, both within and without the medical community, who felt that moral insanity was no more than a "mischievous juggle of words" which served only to harm the reputation of the medical profession, and the integrity of the law.[219] The editors of the *Lancet*, however, maintained throughout the Townley affair that he was insane. Mental illness "in all its horrid deformity and terrible manifestations" too frequently outraged public sympathy and sensibility. However, men like Townley suffered from a cruel disease that physicians were duty-bound to acknowledge, to treat, and to pity.[220]

Unlike Townley, William Bigg met a comfortable end. He died in his bed at the Hamilton Asylum in 1915, at the age of seventy-seven.[221] Up until his death, his doctors remarked on his "habit of abusing other patients who are stupid."[222] In 1914, the *Bulletin of the Ontario Hospitals for the Insane* published an updated version of Clarke's 1886 article about Bigg, titled, "Notes of a Clinical Case: The Case of Wm. B. – Moral Imbecility."[223] Dr. J. Webster, then the Superintendent of the Hamilton Hospital for the Insane, contributed notes on Bigg's medical history after 1886. Every year or two, roughly predictably, Bigg would break down and lapse into violence. Every time Bigg acted out, he always denied his guilt before finally confessing. Like Clarke, Webster believed that his patient could not control himself. After misbehaving, wrote Webster, Bigg "usually showed deep contrition, rightly maintaining that he was not responsible, saying, 'It's a kind of mania, I can't help it.'"[224] Although Bigg denied that he was insane, he told his doctors in 1895 that he did not wish to be free because he feared that he would

[218] "Moral Insanity", *The Journal of Mental Science*, 11 (1866), 135.
[219] "Moral Insanity", *The Journal of Mental Science*, 11 (1866), 136.
[220] "George Victor Townley", *The Lancet*, 1 (1865), 212.
[221] Extracts from Clinical Casebook of the Hospital for the Insane, Hamilton, AO RG 10-285: B111416.
[222] Extracts from Clinical Casebook of the Hospital for the Insane, Hamilton, AO RG 10-285: B111416.
[223] Clarke and Webster, "The Case of Wm. B.-Moral Imbecility."
[224] Ibid., 228.

"again get into trouble" if left to his own devices.[225] In 1897, Bigg declared that he was "trying to lead a better life" but still did not "think he could be trusted with his liberty."[226] As Bigg grew older and feebler, he became a chronic masturbator; he also enjoyed pulling the wings off flies and scalding other patients with hot water in the bathrooms. However, Webster noted in his last published word on the case, his elderly patient appeared to have more insight into his condition than ever before.[227] Bigg was clearly dangerous but he was also, at least according to his doctors, a victim of his own uncontrollable impulses. In the quiet years between assaults and eviscerations, Webster, Clarke and the other asylum staff glimpsed the man Bigg might have been if moral imbecility had not ruined him. When he wasn't gutting cats or torturing his fellow patients, Bigg was, wrote Webster, "a willing, intelligent worker, cheerful and pleasant in conversation, and nothing in his appearance suggested that he was other than a simple, kindly, inoffensive man."[228]

Moral insanity was a medical, legal, philosophical, social and institutional conundrum. Its definition was so broad that it could describe almost any shade of aberrant or destructive behaviour. Disturbed and disturbing creatures like William Bigg epitomized the condition, while men like Townley and Knatchbull – who committed acts of sudden violence, but who were less theatrically perverse – were more difficult to classify. And yet, moral insanity was never raised in Bigg's 1884 trial, while Townley's and Knatchbull's legal cases hung on the validity of the diagnosis and its implications for the *M'Naghten* rules. The ambiguity and flexibility of moral insanity made it dangerous. In a legal system where the insanity defence was heavily contested, and where a successful plea of irresponsibility meant a reprieve from judicial execution, moral

[225] Ibid., 229.
[226] Ibid., 230.
[227] Ibid., 231.
[228] Ibid., 227.

insanity had the potential to change not only a particular defendant's fate but also the fates of uncountable men and women in similar cases.

But the influence of moral insanity went beyond insanity cases. According to its critics, moral insanity trampled the boundary between evil and insanity. The disease seemed to welcome society's most brutish into hospitals while allowing less heinous criminals to rot in jail or to hang. Distressingly, moral insanity comported with a scientific philosophy that denied the existence of free will, in which human beings were helpless links in an infinite and unbreakable chain of causation. If all human behaviour was predetermined by the laws of science, good and evil seemed to lose their meaning, and legal punishment, its moral justification. Robert Lowe described Knatchbull during his trial as "one of those persons for whom laws had not been made."[229] Moral insanity raised the possibility that there were, in fact, no persons for whom the common law had been made – no one properly held responsible for his actions, and no one to punish.

Not every physician or lawyer who believed in the existence of moral insanity thought that accepting it meant rejecting free will and responsibility. Most were more concerned about securing a favourable verdict for their client or patient watching them anxiously from the dock than they were about metaphysics. However, those who opposed moral insanity often did so in sweeping, chiliastic terms. For them, the defendant in a murder case was not a man but a symbol of the end of responsibility, both legal and moral. The next chapter, about Frederick Bailey Deeming, shows that controversies about moral insanity were not confined to Britain, but spread around the British world, like knives secreted in the pockets of common law jurisprudence.

[229] "SUPREME COURT.—CRIMINAL SIDE." *The Sydney Morning Herald* (NSW: 1842 -1954) 25 Jan 1844: 2. Web. 22 Apr 2015 <http: //nla.gov.au/nla.news-article12411912>.

CHAPTER FOUR
MURDER AND METAPHYSICS IN COLONIAL VICTORIA

Alfred Deakin wrote multiple drafts of the speech he would give in court in May of 1892, but his argument never changed. He urged the jury to be fair and fearless in deciding the case, and to defy the "mobs of morbid & frenzied sensation seekers" who sought to corrupt Australian criminal justice with the "violent methods of lynch law."[1] He argued that the evidence against the defendant was circumstantial: no one had actually seen the killing, the witnesses' statements were occasionally contradictory, and the body of the victim, with her nose smashed and her eyes rotted away, was difficult to identify.[2] Most of all, though, Deakin sought to persuade the jury that Frederick Bailey Deeming – bigamist, thief, fraudster, rumoured epileptic, and killer of two of his wives and four of his children – was insane.[3]

Deakin's task was not easy. Frederick Deeming was not obviously delusional. He wrote, spoke and dressed well. He did not fit the ideal of the raving lunatic rending his clothes and babbling at phantoms, nor was he the 'wild beast' of legal myth.[4] Instead, Deakin used the horror of Deeming's crimes to show the corruption of his mind. He described Deeming as weaker and more treacherous than Shakespeare's Iago or Edmund. Deeming was "a monster so appalling" that he naturally inspired the question, "Is he human?"[5] Deakin moved from Deeming's extreme brutality to more abstract questions about the relationship between free will and criminal responsibility, the complicated judicial history of the insanity defence, public safety considerations, and the jury's role in such cases. On one scrap of paper, in notes he later crossed

[1] Alfred Deakin, draft of address to the jury in the Deeming trial, Special Collections, National Library of Australia, Canberra (NLA), MS 1540/6/19-28.
[2] Alfred Deakin, draft of address to the jury in the Deeming trial, NLA MS 1540/6/19-28.
[3] Alfred Deakin, draft of address to the jury in the Deeming trial, NLA MS 1540/6/19-28.
[4] Alfred Deakin, draft of address to the jury in the Deeming trial, NLA MS 1540/6/19-28.
[5] Alfred Deakin, draft of address to the jury in the Deeming trial, NLA MS 1540/6/19-28.

out with a rippling line, Deakin described Deeming as one of many "persons dwelling in the borderland of crime & insanity."[6] Deakin reminded the jury that it was impossible to pinpoint the precise moment when day ended and night began, and argued that the mind was the same way. There was no clear boundary between sanity and insanity, between responsibility and irresponsibility. Men like Deeming lived in the twilight, and no amount of judicial squinting could clearly distinguish them from the shadows.

Charles Rosenberg argues that for educated Americans in the late nineteenth century, "the problem of evaluating criminal responsibility was almost synonymous with the by now familiar yet threatening term, moral insanity."[7] Moral insanity was also synonymous with criminal responsibility in the late-Victorian British empire. Deeming's case, like the cases of Victor Townley, William Allnutt and John Knatchbull, was not only about the borders of an unusual and controversial psychiatric diagnosis; it was also about the fate of responsibility in an increasingly determined world. D. Hack Tuke argued that moral insanity was an undeniable medical fact, which no psychiatrist could deny in good faith. But Tuke was not a lawyer, and his interest in legal questions was always subordinate to his commitment to psychiatric medicine. This chapter considers the efforts of one Melbourne lawyer, Marshall Lyle, to change the meaning of legal insanity in the empire. Lyle not only accepted the idea that moral insanity shook the foundations of common law criminal responsibility; he hoped the diagnosis would allow reformers to rebuild British criminal law from the ground up.

In the last decade of the nineteenth century, Lyle dedicated himself single-mindedly, although not exclusively, to dismantling the *M'Naghten* rules using high-profile homicides as test cases. He took on criminal cases for free or for a pittance because he was determined to

[6] Alfred Deakin, notes for address to the jury in the Deeming trial, NLA MS 1540/6/184.
[7] Charles E. Rosenberg, *The Trial of the Assassin Guiteau: Psychiatry and the Law in the Gilded Age* (University of Chicago Press, 1968), 254.

prove that the common law's approach to insanity was shamefully conservative and, in capital cases, genuinely murderous. Lyle left few archival traces of his life outside his legal practice. However, the criminal case files of late-century Victoria are dotted with his letters, memos and petitions. This chapter follows Lyle's legal work through a selection of these cases, which included Frederick Deeming's. Lyle defended 'moral monsters' in the face of a jurisprudence that simultaneously denied, ignored and feared them. He failed. However, his ardent defence of high-profile murderers on the grounds that they were criminally insane made headlines, and shaped the Victorian debate about responsibility.

It was not by chance that when moral insanity was first raised as a defence to murder, it was in a common law court in Australia. By the late nineteenth century, both New South Wales and Victoria, Australia's flagship colonies, had emphatically proclaimed their transformations from convict-ridden backwaters to glittering centres of British imperial innovation and ambition. One emblem of the Australian colonies' success was their self-confident common law system. Droves of British-trained lawyers undertook the long journey south in search of professional advancement and adventure. Their sons attended Australian universities that worked to match their British equivalents in rigour and sophistication. Australia was on the imperial frontier, and also on the frontier of British imperial law. Australian lawyers, eager to display their jurisprudential sophistication and enthusiastic participants in imperial professional networks, launched themselves into the moral insanity debate with boldness and vigour. One Australian legal historian has argued that Australian judges and lawyers were "English to the core," and that their commitment to English law – and especially to English criminal law – only increased as the

Australian colonies crept closer to legislative independence.[8] The British imperial world was united, despite its stunning diversity, by common law jurisprudence and by the legions of professionals who worked assiduously in its service. Colonial Victoria overcame the 'tyranny of distance' in matters of criminal jurisprudence; the common law bound even the empire's most remote outposts together.[9]

Almost fifty years after Knatchbull split his victim's skull with an axe, Frederick Deeming buried his second wife's body beneath the floor of their home in Melbourne. Deeming's trial, like Knatchbull's, brought the question of moral insanity and the meaning of criminal responsibility before the officials, press and public of Australia. Deeming was the archetype of the morally insane criminal – as bizarre, articulate and dangerous a murderer as D. Hack Tuke could have imagined. Deeming was perhaps even more disturbing than William Bigg, the horse mutilator. Bigg, after all, never actually killed anyone. Deeming, meanwhile, was a serial killer of women and children. His case provided a perfect opportunity for those, like Lyle, who rejected *M'Naghten* as unscientific and excessively narrow to challenge the doctrine's validity.

English psychiatrists and jurists were both intrigued and unsettled by moral insanity, and so were their Australian counterparts. Traditional understandings of criminal responsibility were under attack in Melbourne just as they were in London. A successful Australian assault on *M'Naghten* had the potential to change criminal law throughout the British world, especially if a case made its way to the Judicial Committee of the Privy Council in London. The Judicial Committee was one of the primary arteries connecting London and its colonies. Although its

[8] Kercher, *An Unruly Child*, 93–94.
[9] On the idea of the tyranny of distance in Australian history, see: Geoffrey Blainey, *The Tyranny of Distance: How Distance Shaped Australia's History* (History Book Club, 1968). Bruce Kercher has argued that Australian legal innovation and independence from England was mostly expressed in its statutes. As far as the common law was concerned, the degree of fidelity to British jurisprudence was remarkable. See: Kercher, *An Unruly Child*.

decisions did not bind either England or the rest of the empire, the Committee's recommendations had tremendous moral and political weight that could, over time, change the complexion of the common law wherever it was found. The Committee had a long history of refusing to hear appeals in criminal cases. However, cleavages among lawyers over moral insanity were so deep, and the partisans of reform of *M'Naghten* so vociferous, that they inundated a reluctant Judicial Committee with petitions for permission to appeal in the hope that change would come to the empire.

Lyle's career belies the idea that arch, conservative lawyers and progressive, power-hungry physicians were trapped in a Foucauldian feud over the meaning of madness.[10] Doctors and lawyers did not align neatly on either side of the moral insanity debate. Lyle worked tirelessly to bring the jurisprudence of insanity into harmony with criminal anthropological principles. Meanwhile, some psychiatrists were strong supporters of *M'Naghten*, and were embarrassed by their colleagues' intrusion into criminal courtrooms. Even if many lawyers and doctors did, in fact, find themselves at odds over moral insanity on predictable grounds, there is more to the Deeming case than jockeying for professional influence.

Alfred Deakin told the jury that insanity cases turned them into a "jury of metaphysicians."[11] This transformation did not affect jurors alone, but also applied to medical experts, judges, administrators and lawyers. Deakin embraced the philosophical in his speech partly for dramatic effect, but also because insanity cases threatened the justification of punishment that undergirded English criminal jurisprudence.[12] Deakin was expressing a

[10] Weaver, *The Criminal of the Century*, 66–7.
[11] Alfred Deakin, draft of address to the jury in the Deeming trial, NLA MS 1540/6/19-28.
[12] Legal scholars who have recently explored the way that criminal responsibility, including insanity, touches foundational concepts in criminal law include, for example, Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford: Oxford University Press, 2012); Antony Duff, *Answering for Crime: Responsibility and Liability in Criminal Law* (Oxford: Hart, 2007); Victor Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2005); and Jeremy Horder, *Excusing Crime* (Oxford: Oxford University Press, 2004).

fundamental truth, though one often elided, about the slipperiness of *mens rea* and of responsibility as concepts underlying the whole of the common law. Moral insanity was not just a theoretical problem for jurors idly to mull as they sweated in the jury box of Melbourne's Supreme Court. Once they had listened to the parade of medical experts and witnesses, the lawyers' speeches and the judge's instructions, they had to discuss and decide the case. There was no room for ambiguity in their verdict: either Deeming was guilty or he was not; he would hang or he would spend his life in an asylum. In criminal cases, some of the most intractable, mind-boggling concerns of philosophy had to be answered after hours, or even minutes, of deliberation. Vast bodies of medical and legal knowledge had to be compressed so that the jury could consume and digest them, and so that they could produce the definitive verdicts that the legal system needed to survive. Criminal insanity cases show this process in action.

The trial of Frederick Bailey Deeming in Melbourne in 1892 was among the greatest legal sensations in the history of Australia. Deeming's story has inspired true crime writers since the moment it first appeared in the Australian press.[13] Kirsten McKenzie, in her work on scandal and respectability in nineteenth-century Sydney and Cape Town, writes that scandals offer scholars a way to understand status in the colonial world.[14] McKenzie refers to claims to bourgeois respectability and class status, but scandals also elucidate other types of status. Scandals violate norms and expectations, and cross boundaries in ways that both disturb and

[13] See, for example: Anonymous, *Biography of Frederick Bayley Deeming: A Romance of Crime* (Printed for the proprietors and publishers, William E.G. Shackle and J.G. Sutton, by the Port Melbourne Tribune Printing and Publishing Compy., Limited, [1892]); Anonymous, *The Complete History of the Windsor Tragedy* (Melbourne, Mason, Firth & Mcutcheon, 1892); Anonymous, *The Criminal of the Century: A Complete History of the Career of Frederick Baily Deeming, alias Albert Williams, alias Baron Swanston ...: The Perpetrator of the Windsor and Rainhill Murders* (Sydney, Australian Mining Standard Office, 1892); Anonymous, *The History of a Series of Great Crimes on Two Continents* (Adelaide, Frearson & Brother, 1892), 1st, 2nd and 3rd Editions; Anonymous, *The Life of Deeming: The Murderer of Women and Children* (Melbourne, Williams, 1892); Anonymous, *The Windsor and Rainhill Murders* (Melbourne, Walker May & Co., 1892). For contemporary academic works on Deeming, see: John Steven O'Sullivan, *A Most Unique Ruffian: The Trial of F.B. Deeming, Melbourne 1892* (Melbourne: Cheshire, 1968); Rachael Weaver, *The Criminal of the Century* (Melbourne: Arcadia, 2006).

[14] Kirsten McKenzie, *Scandal in the Colonies: Sydney & Cape Town, 1820-1850* (Melbourne: Melbourne University Publishing, 2004), 8.

thrill. They push participants and observers to define, defend or, sometimes, to assail the limits of conventional categories and practices. In Deeming's case, his status as a sane, responsible subject of the common law was in question, and his case was so enthralling and upsetting, in part, because it revealed the fungibility of sanity and responsibility as legal and moral categories.

The cases that follow all involve Australians of European ancestry. Aboriginal Australians and migrants from outside Europe – from British India, the Middle East, and East Asia – are missing. Many Britons saw moral insanity as a particularly European affliction. Moral insanity had, in the late nineteenth century, a racial, degenerationist tinge. As discussed in Chapter Three, moral insanity was broadly understood as a disease of civilization, in which people from civilized stock regressed toward an atavistic, savage state, often due to generations of mental weakness and vice. Some even believed that insanity of all types was far more common among Europeans. "Criminality, like insanity," wrote one British physician, "waits upon civilisation. Among primitive races insanity is rare; criminality, in the true sense, is also rare."[15] In a profoundly racist colony like Victoria, Aboriginal Australians were not generally thought to have as far to fall on the ladder from civilization to primitivism, and so their madness could not, by definition, take a form that involved degeneration. Non-European men and women did have the misfortune of enduring British justice in Australia's common law courts, and their responsibility for their actions was often controversial. However, the moral insanity debate was almost exclusively about the nature of the European psyche, and the unsettling possibility that British law could not fairly or accurately assess the responsibility of even the archetypal, British subject.

In the 1880s, Melbourne was a colonial boomtown. "Marvellous Melbourne ruled Victoria," writes James Belich, "a colony as populous and rich in 1890 as the American state of

[15] Havelock Ellis, *The Criminal*, 3rd ed. (London: Walter Scott Publishing Company, 1903), 370.

California."[16] Deeming's travels and his pursuit by police in two Australian states and in England reveal the interconnectedness of imperial jurisdictions, and the ease with which people and information flowed among them. As Deeming travelled around the globe by coach, rail and steamer, information followed him on wire services and in telegrams. Deeming was perpetually in motion. He criss-crossed the empire in his pursuit of money and women, and in his efforts to dupe colonial authorities. Colonial cities, with their mobile and swiftly expanding populations, offered newcomers rich opportunities for deception and personal reinvention.[17]Although Deeming's exploits were sensational, his mobility was not. Despite how quotidian imperial travel was, however, Deeming's case struck observers as extreme. He provided both a comforting example of the expediency of imperial justice, including policing, and distressing proof of how difficult it was for authorities to keep track of their subjects if they did not wish to be found.

Frederick Deeming was born in Birkenhead, England on 30 July 1854.[18] From that day until his arrest by police in March of 1892, it is difficult to say with certainty what happened to him, where he went, or under which name he travelled. Police, newspaper reporters, popular writers and lawyers struggled mightily to construct coherent accounts of Deeming's travels, identities and crimes, but there are ambiguities and inconsistencies in every narrative. Deeming's police file contains one valiant attempt to produce a comprehensive timeline of Deeming's activities, cobbled together from newspaper stories, inquest testimony and reports of the

[16] James Belich, *Replenishing the Earth : The Settler Revolution and the Rise of the Anglo-World, 1783-1939* (Oxford; New York: Oxford University Press, 2009). Belich goes on to describe the catastrophic bust that hit Victoria in 1891.
[17] Kirsten McKenzie, *Scandal in the Colonies: Sydney & Cape Town, 1820-1850* (Melbourne: Melbourne University Publishing, 2004), 4. NB. Fittingly, Deeming was believed to have been involved in land fraud in South Africa, and perhaps to have committed murders there.
[18] 'Deeming Insures His Life in Queensland'. (1892, April 9). *The Queenslander* (Brisbane, Qld.: 1866-1939), p. 709. Retrieved January 31, 2014, from http: //nla.gov.au/nla.news-article19822844.

Melbourne detectives who worked the case.[19] That document provides a sketch of what police knew about Deeming in 1892.

Deeming worked as a plumber and gasfitter in Birkenhead, England until 1881, when he travelled to Australia for the first time. Deeming plied his trade in Sydney for a few years, often changing employers. Sometime in the early 1880s, he was joined in Sydney by his English wife, Marie James, and first child. He and Marie soon had two more children. In 1886, he went into business independently, but his premises were destroyed in a fire. He was suspected of insurance fraud, and fled to South Africa to avoid arrest for fraudulent insolvency, leaving his family to follow. In 1888 or 1889, Deeming's wife and children returned to Birkenhead, and the couple had a fourth child. Deeming's activities during these years are particularly difficult to trace.[20] There were rumours that he masterminded a mining property fraud in the Transvaal, then escaped to Montevideo where he was arrested and returned to England, and that he escaped again and married a Scottish girl in Hull in 1890 while passing himself off as a retired Australian sheep farmer.

In 1891, Deeming's affairs come into greater focus. In July, under the name of Albert O. Williams, Deeming rented a villa in Rainhill, Lancashire. A month later, he murdered all four of his children and his wife, and buried them in a pit beneath the hearthstones of their home. That September, he married Emily Mather, a local woman, and left with her for Melbourne aboard the *Kaiser Wilhelm II* on November 2nd. On arriving in Victoria in mid-December, Deeming rented a house on Andrew Street in the Melbourne suburb of Windsor under the name of Drewin. On 17

[19] 'Precis of Career of Frederick Bailey Deeming alias A.O. Williams the Windsor Murderer', Inward Registered Correspondence, Public Record Office Victoria (PROV), Melbourne, VPRS 937/P0000/511.
[20] For example, another police report holds that Deeming was held at Hull Gaol on a charge of False Pretences for nine months in 1890-1891, and that he only fled to South America after his release. See: Report of Sergeants Considine and Cawsey, 'Re Antedecents of Convict Albert Williams under sentence of Death for MURDER', 5 May 1892, PROV VPRS 1100/P0000/1: Albert Williams, Capital Sentences Files.

December, he bought cement from a local shop. Police would later discover Emily Mather's body interred under the hearth of the little house. Detectives believed that she had been killed on Christmas Eve.[21] In January of 1892, Deeming travelled from Sydney to Adelaide under the name Baron Swanston. On board, he met a young woman named Kate Rounsevell and seduced her with jewellery and promises of marriage. He left in February for the Southern Cross Goldfields in Western Australia, where he hoped to make his fortune. Kate was to join him once he had set up their marital home. On 4 March, however, a rank smell led Deeming's Windsor landlord, and local police, to his grisly secret. [22]

Sergeant O'Loughlin and Constables Webster and Kinniburgh of the Melbourne police described the horror of slowly chipping the cement away from Emily Mather's corpse so that it could be transported to the city morgue. Each man vividly recalled the stench, which sickened them and clung to their skin and clothing so persistently that they had to have their uniforms destroyed.[23] Mather's skull was cracked and her throat had been cut. She had been buried naked but for a thin chemise, and placed in the ground on her side with her knees tucked into her chest.[24]

Within thirty-six hours of the discovery of Emily Mather's body, Melbourne police had produced a twelve-page report on Deeming.[25] Sergeants Considine and Cawsey, two of

[21] Report of W.N. Considine, Melbourne Police, Criminal Investigations Department, Inward Registered Correspondence, PROV VPRS 937/P0000/511.
[22] Other police reports date the discovery of Emily Mather's body as March 3rd, 1892.
[23] Report of Sergeant O'Loughlin, 6 May 1892, Inward Registered Correspondence, PROV VPRS 937/P0000/511; Report of Constable Webster, 6 May 1892, Inward Registered Correspondence, PROV VPRS 937/P0000/511; Report of Constable Kinniburgh, 12 May 1892, Inward Registered Correspondence, PROV VPRS 937/P0000/511.
[24] Police report submitted by Sergeants Considine and Cawsey, 5 March 1892, Inward Registered Correspondence, PROV VPRS 937/P0000/511.
[25] Police report submitted by Sergeants Considine and Cawsey, 5 March 1892, Inward Registered Correspondence, PROV VPRS 937/P0000/511.

Melbourne's fifteen detectives, worked the case.[26] William Considine was a seasoned veteran, already in his twenty-first year on the force. On his retirement the next year, the *Argus* newspaper would report that his name had been "associated in a professional way with nearly every sensational Victorian crime and criminal" of the previous decade and a half.[27] Deeming would be among his greatest cases, and would help to bring his total number of successful career death sentences to ten.[28] Cawsey was the junior partner. He would remain with the police for nearly twenty years after the Deeming case, eventually rising to the rank of Inspector. As an old man, he would vividly recall the day when the chief of the Criminal Investigation Branch, Kennedy, called him into his office and said, "A woman's body has been found under a hearthstone in an empty house in Andrew Street, Windsor. Get on with it. I don't want to see you again until you bring in the man."[29]

Considine and Cawsey worked late into the night assembling evidence culled from extensive witness interviews.[30] They felt certain that the man who'd rented the Andrew Street house as Drewin was identical with the man named Albert Williams, who had travelled to Melbourne on the *Kaiser Wilhelm II* from England that November. They made much of 'Drewin''s purchase of cement from a local shop on 17 December, which they believed was bought "to conceal a premeditated crime."[31]

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[26] Man Who Tracked Deeming. (1933, July 7). *The Bombala Times* (NSW: 1912-1938), p. 2. Retrieved January 31, 2014, from http: //nla.gov.au/nla.news-article134562085.
[27] 'Resignation of Sergeant Detective Considine.' (1893, February 1). *The Argus* (Melbourne, Vic: 1848-1957), p. 7. Retrieved January 30, 2014, from http: //nla.gov.au/nla.news-article8509716.
[28] 'Resignation of Sergeant Detective Considine.' (1893, February 1). *The Argus* (Melbourne, Vic.: 1848-1957), p. 7. Retrieved January 30, 2014, from http: //nla.gov.au/nla.news-article8509716.
[29] 'The Man Who Tracked Deeming.' (1933, July 7). *The Bombala Time*s (NSW: 1912-1938), p. 2. Retrieved January 31, 2014, from http: //nla.gov.au/nla.news-article134562085.
[30] Sergeant Henry Cawsey's arrest book, *Papers Relating to F.B. Deeming, 1885-1967*, Special Collections, State Library Victoria (SLV), Melbourne Box 4246/2 MS 14755,
[31] Police report submitted by Sergeants Considine and Cawsey, 5 March 1892, Inward Registered Correspondence, PROV VPRS 937/P0000/511.

Frederick Deeming was a striver, a fabulist and a dandy. The contrast between his constant attempts at refinement and the senseless violence of his crimes contributed an element of bathos to a tragic and terrifying case, to the delight of the public and the press. Australian police were helped in their investigation by Deeming's penchant for ostentatious jewellery and his distinctive, bushy, ginger moustache. Samuel Bradley, a fellow passenger on the *Kaiser Wilhelm II*, remembered Deeming wearing "large quantities of jewellery quite exceeding good taste", including a large sapphire seal ring, diamond cufflinks and studs, and a watch with a heavy gold chain.[32] On the ship, Deeming claimed to have been a military engineer for nineteen years, having served and been wounded multiple times in various Egyptian campaigns, and to have been awarded the Victoria Cross. Bradley's disdain for Deeming and his pretensions permeated his testimony, as when he wrote that Deeming, "though intelligent… is uneducated and tries to ape his superiors in conversation by the insertion of extraordinary aspirates where not required."[33] Many witnesses also described Deeming's beloved pet canary, which he housed in an ornate brass birdcage with red stained-glass panels.[34]

By mid-March of 1892, Deeming, known as Williams, had been conclusively traced back to Rainhill. Melbourne police began writing reports to the New Scotland Yard in London beginning on 5 March 1892. Sergeant Cawsey provided detailed descriptions of both Emily Mather and Deeming, known to police principally as Albert Williams, including accounts of Deeming's boasts about his career and a catalogue of Deeming's gaudy jewellery. Emily Mather was "26 to 28 years of age, about 5 feet high, slim build, dark clear complexion, large dark eyes,

[32] Samuel Bradley to the Sydney Police Department, 8 March 1892, Inward Registered Correspondence, PROV VPRS 937/P0000/511.
[33] Samuel Bradley to the Sydney Police Department, 8 March 1892, Inward Registered Correspondence, PROV VPRS 937/P0000/511.
[34] See, for example, Police report submitted by Sergeants Considine and Cawsey, 5 March 1892, Inward Registered Correspondence, PROV VPRS 937/P0000/511; and Samuel Bradley to the Sydney Police Department, 8 March 1892, Inward Registered Correspondence, PROV VPRS 937/P0000/511.

brown hair of very luxuriant growth, long thin nose, slightly roman, high cheek bones, upper front teeth all false, rather large ears especially the lobs [sic]."[35] Lancashire police confirmed the identities of both Emily Mather and the man known to them as Albert Williams.

Emily Mather's mother, Dove, told police that Williams appeared in Rainhill in June of 1891. He had claimed to be an Inspector of Stores in the Indian Army or the Bengal Cavalry, wounded many times in various wars, and the wealthy son of a veteran of the Crimean War. Dove Mather reported that her daughter had written her letters from each port on her journey to Australia, but that her last letter from the couple had been sent by her new son-in-law, dated 28 December 1891.[36] Williams had written to tell his mother-in-law that the newlyweds were bound for Hong Kong in the New Year.[37] Dove gave police a photograph of Emily, and described her daughter as standing five foot one or two, with a fresh complexion, dark brown hair and eyes, and a small scar on her left cheek.[38]

Great pains were taken to keep the public away from Deeming. Once he was in police custody in Perth he had to be smuggled back into Melbourne, past the determined mobs of newspapermen and their devoted readers who were desperate for a glimpse of the prisoner. Despite Sergeant Cawsey's complaints of seasickness, it was decided that the party should travel by steamer to discourage Deeming's escape – he was apparently "resolute and determined" to

[35] Victoria Police, Criminal Investigation Branch, to New Scotland Yard, 7 March 1892, Inward Registered Correspondence, PROV VPRS 937/P0000/511.
[36] Emily Mather had been dead for three or four days.
[37] Copy of letter from the Superintendent of the Lancashire Constabulary on 12 March 1892 to the Assistant Commissioner of Police, Criminal Investigation Department, New Scotland Yard, and forwarded from Scotland Yard to the Chief Commissioner of Police in Melbourne on 18 March 1892, Inward Registered Correspondence, PROV VPRS 937/P0000/511.
[38] Copy of letter from the Superintendent of the Lancashire Constabulary on 12 March 1892 to the Assistant Commissioner of Police, Criminal Investigation Department, New Scotland Yard, and forwarded from Scotland Yard to the Chief Commissioner of Police in Melbourne on 18 March 1892, Inward Registered Correspondence, PROV VPRS 937/P0000/511. Dove Mather that the photograph be returned, but it remains today in the Chief Commissioner's papers at the Public Record Office Victoria.

abscond – and to prevent angry, eager crowds from hindering their passage.[39] On 1 April 1892, uniformed policemen were stationed at Port Melbourne to deceive onlookers, while the ship carrying Deeming landed quietly at St. Kilda, where plainclothes officers and a discrete waggonette waited to convey the prisoner to Melbourne Gaol.[40]

On 22 April 1892, Deeming appeared in court for the first time. He was arraigned at the Supreme Court of Melbourne before Justice Henry Hodges, who would try Deeming the next week. Hodges had come to Australia from Liverpool as a boy. His father, a former ship's captain, worked as a teacher in the Bendigo goldfields from 1854.[41] Hodges waffled between entering the Anglican ministry and law. He was rusticated from the University of Melbourne for helping a fellow student cheat on an examination, but he eventually returned and completed his legal education. Hodges later became a successful advocate. In 1889 he joined the Supreme Court of Victoria, where he was known for his violent temper, humourlessness, precision and tendency toward moderation in criminal sentencing.[42] Hodges was a devout Anglican, and was chancellor of the diocese of Melbourne from 1889 to 1909.[43] A barrister who knew him said, "His frame of mind was severely logical, his law pre-eminently sound […]. He regarded his office in the nature of a sacred trust."[44]

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[39] Telegrams from Perth for the Chief Commissioner of Police, Victoria, 21 and 23 March 1892, Inward Registered Correspondence, PROV VPRS 937/P0000/511.
[40] 'The Trial.' (1892, April 25). *Launceston Examiner* (Tas.: 1842-1899), p. 3. Retrieved January 23, 2014, from http: //nla.gov.au/nla.news-article39463025.
[41] J. McI. Young, 'Hodges, Sir Henry Edward (1844–1919)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http: //adb.anu.edu.au/biography/hodges-sir-henry-edward-1092/text11549, published first in hardcopy 1983, accessed online 31 May 2015.
[42] J. McI. Young, 'Hodges, Sir Henry Edward (1844–1919)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http: //adb.anu.edu.au/biography/hodges-sir-henry-edward-1092/text11549, published first in hardcopy 1983, accessed online 31 May 2015.
[43] J. McI. Young, 'Hodges, Sir Henry Edward (1844–1919)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http: //adb.anu.edu.au/biography/hodges-sir-henry-edward-1092/text11549, published first in hardcopy 1983, accessed online 31 May 2015.
[44] "DEATH OF SIR HENRY HODGES." *The Argus* (Melbourne, Vic.: 1848-1957) 9 Aug 1919: 18. Web. 31 May 2015 <http: //nla.gov.au/nla.news-article4707327>.

Deeming's defence team consisted of his solicitor, Marshall Lyle, and barristers Alfred Deakin and William Forlonge.[45] The Crown Prosecutor in the case was Robert Walsh, an Irish lawyer who had left Dublin for Victoria, where he made his fortune practicing mining law during the Australian gold rush.[46] Until 1859, all the barristers working in colonial Victoria had first passed the bar in Britain or Ireland.[47] Irish-trained lawyers, like Walsh and Lyle, continued to dominate the legal landscape of late-nineteenth-century Australia. They had come seeking the social and economic advancement that could elude Celtic professionals in Britain and Ireland, which one Irish émigré described as "over-stocked" with lawyers.[48]

Deeming pled not guilty. The defence called for a postponement of the trial to allow more time for the gathering of psychological evidence from England and elsewhere to support an insanity defence, but Hodges denied the request. One newspaper reported that Hodges added, "it was highly desirable in cases of murder that prisoners should be tried at the earliest date possible, and that if convicted they should be executed at the earliest date (At this remark, the prisoner palpably winced, and looked very perturbed)."[49]

Alfred Deakin, the lead barrister in Deeming's defence, is by far the most celebrated of the lawyers involved in the Deeming case. Deakin was born in Australia to British immigrants. He grew up in suburban Melbourne, and took a law degree at the university. Deakin was, at first, an unenthusiastic lawyer, who spent more time writing poetry and essays than legal briefs. Eventually, he drifted into journalism, where he excelled, and which sparked his interest in

[45] Forlonge's name was often spelled 'Furlonge' in the press and by Deeming. Papers of Alfred Deakin, National Archives of Australia, Canberra (NAA) See: Folder 2: MS 1540/6/16-92, MS 1540/6/18.
[46] Forde, *The Story of the Bar of Victoria*, 225.
[47] Ibid., 235.
[48] Ibid., 30. The lawyer in question was E.J. Brewster.
[49] 'The Windsor Tragedy.' (1892, April 23). *The Inquirer & Commercial News* (Perth, WA: 1855-1901), p. 5. Retrieved January 23, 2014, from http: //nla.gov.au/nla.news-article69704249.

politics.[50] By the time of Deeming's trial, Deakin had been prominent in Victorian politics for over a decade. He was a liberal, and a fervent advocate of Australian Federation within a strong imperial framework. In 1891, Victoria suffered an economic bust so devastating that historians have described it as "Armageddon."[51] Deakin lost both his and his father's savings in late 1890, and Deakin was forced to resume his law practice. He was steadily recouping his losses in 1892. Although he took no fee for his work in the Deeming case, the high-profile trial contributed to his notoriety. Deakin would later rise to the position of Attorney General, and finally to Prime Minister in 1903.[52] William Percival Forlonge, the junior defence barrister in Deeming's case, also received his legal training at the University of Melbourne.[53] He left little mark on the Victorian legal scene, and information about his life and career is scarce.

In an eerie, and possibly fanciful, coincidence, an Australian newspaper reported that Deeming and Lyle had lived across from one another in December of 1891, on Andrew Street. A brusque stranger had frightened Lyle's elderly housekeeper by asking, rudely, to come in so that he could check out the view of his own rented villa, number 57. He had been refused, and Lyle had moved his household shortly thereafter. The housekeeper later identified Deeming as the stranger. One reporter was sure "that his request was made with a view to ascertaining whether the deadly work he contemplated at 57 Andrew street could be witnessed from any of the neighboring houses."[54]

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[50] R. Norris, 'Deakin, Alfred (1856–1919)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http: //adb.anu.edu.au/biography/deakin-alfred-5927/text10099, published first in hardcopy 1981, accessed online 1 June 2015.
[51] Belich, *Replenishing the Earth*, 2009.
[52] R. Norris, 'Deakin, Alfred (1856–1919)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http: //adb.anu.edu.au/biography/deakin-alfred-5927/text10099, accessed 23 January 2014.
[53] University of Melbourne, *The Melbourne University Calendar* (The University of Melbourne, 1879), 228; Forde, *The Story of the Bar of Victoria*, 20.
[54] MR. MARSHALL LYLE RETAINED. (1892, April 2). *The Bendigo Independent* (Vic.: 1891-1901), p. 3. Retrieved June 3, 2015, from http: //nla.gov.au/nla.news-article174510771.

Lyle was a frequent presence in high-profile Victorian criminal cases in the 1890s. His participation in the Deeming case greatly boosted his public profile and led some to include him among Melbourne's leading solicitors.[55] Unlike Deakin, for whom legal work was a means to a financial end, Lyle had a particular interest in capital punishment and in the problem of legal insanity. Lyle was described in the press shortly after the Deeming trial as a "clever Irishman and enterprising solicitor."[56] Judging from his many letters and petitions, Lyle was a theatrical and passionate man, loath to truckle to authority, quick to involve the press to help his causes, and ambitious. He considered himself a humanitarian and a friend of cutting-edge science, including criminal anthropology and studies of mental illness. In Deeming, he saw an opportunity to inveigh against systematic injustices in both jurisprudence and legal practice.

The Deeming case instantly became a focal point for debates about legal insanity in the press and by the legal and medical communities. "There is no doubt," declared one columnist for the *South Australian Register*, "that the whole subject of insanity and its relation to crime and punishment is in a state of uncertainty and suspense."[57] Cesare Lombroso's work on criminal anthropology, and particularly his belief in the physiological nature of criminality, was reviving interest in phrenology and the heritability of criminal tendencies.

Lyle kept abreast of "the recent strides of medico-legal science and criminal anthropology", and felt that elite science should supersede what he saw as out-dated legal tradition and popular understandings of insanity and criminality.[58] He corresponded with Cesare Lombroso in the 1890s. Some years after Deeming's trial, Lyle requested and compiled a series

[55] 'A Lecture by Marshall Lyle.' (1892, June 18).*Freeman's Journal* (Sydney, NSW: 1850-1932), p. 18. Retrieved January 24, 2014, from http: //nla.gov.au/nla.news-article111324411.
[56] 'Marshall Lyle and the Murderer's Memoir.' (1892, August 20). *Freeman's Journal* (Sydney, NSW: 1850-1932), p. 19. Retrieved January 24, 2014, from http: //nla.gov.au/nla.news-article111324868.
[57] 'The Defence of Insanity.' (1892, April 2). *South Australian Registe*r (Adelaide, SA: 1839-1900), p. 6. Retrieved January 27, 2014, from http: //nla.gov.au/nla.news-article48227757.
[58] Lyle to the Executive Council, 14 August 1891, William Colston Capital Case File, PROV, VPRS/264/P0000/18.

of criminal files, including the photographs and demographic information of a variety of criminals in different categories, to be sent to Lombroso in Italy.[59] One file included photographs of Deeming wearing a polka-dotted tie and a scrubby beard, his hair swept behind protruding ears. He pressed his thin lips together in a slight sneer, staring at the camera from beneath a furrowed, heavy brow.[60]

Lyle also wrote to Havelock Ellis, the English physician best known for his studies of human sexuality.[61] Ellis was the son of an English sea captain. He made a number of journeys to Australia in his youth, and later spent four years in New South Wales where he worked as a teacher and tutor. In 1879, Ellis returned to England to pursue a career in medicine.[62] Ellis became interested in eugenics, formally supporting campaigns for voluntary euthanasia, abortion and other species of sexual reform.[63] In 1890, Ellis published *The Criminal*, a work of criminal anthropology. The book had gone through five editions by 1914. The third edition, published in 1903, included the same photograph of Deeming, wearing the same spotted bowtie, which Lyle had sent to Lombroso.[64] In *The Criminal*, Ellis thanked Lyle for sending him seventeen photographs of criminals from New South Wales along with the portrait of Deeming, which Lyle

[59] General Correspondence, 16 April 1898, Correspondence, Photos and History Sheets of Certain Male Criminals (1862-1902), PROV VPRS 8369. The types of criminal's whose files Lyle's asked for fit into the following of Lombroso's categories: "sexual criminals", "bushranger type", "burglar type", "sneak thief type", "the criminal larrikin type, including dangerous assaulters and violent criminals", and "homicidal criminals".
[60] Deeming's History Sheet, Correspondence, Photos and History Sheets of Certain Male Criminals (1862-1902), PROV VPRS 8369.
[61] J. Weeks, 'Ellis, (Henry) Havelock (1859–1939)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Sept 2013 [http: //www.oxforddnb.com/view/article/33009, accessed 1 June 2015]. Ellis' most famous work was his multi-volume *Studies in the Psychology of Sex* (1897-1910). See: Havelock Ellis, *Studies in the Psychology of Sex: Sexual Inversion* (Watford: University Press, 1897).
[62] K. J. Cable, 'Ellis, Henry Havelock (1859–1939)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http: //adb.anu.edu.au/biography/ellis-henry-havelock-3479/text5327, published first in hardcopy 1972, accessed online 1 June 2015.
[63] J. Weeks, 'Ellis, (Henry) Havelock (1859–1939)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Sept 2013 [http: //www.oxforddnb.com/view/article/33009, accessed 1 June 2015].
[64] Ellis, *The Criminal*, 365.

considered the "most characteristic of that noted criminal."[65] On the page, Deeming's image floats between the two halves of Ellis' declaration that "the only real responsibility is *social* responsibility [emphasis original]."[66]

Deeming was often described as either an 'instinctive criminal' or as insane. While the difference under the common law could be one of life and death – death for the criminal, life in an asylum for the madman – Ellis argued that differentiating between the two categories was absurd. He praised Lombroso for breaking down the wall between madness and criminality. Madmen and criminals, Ellis wrote, were "both recognised as belonging to the same great and terrible family of abnormal, degenerate, anti-social persons."[67] Philosophical attempts to assert a metaphysical basis for responsibility and free will had, in Ellis' view, failed. People were welcome to act as though free will existed, and entitled to punish those who committed harmful acts, but ought, according to Ellis, to realize that true metaphysical responsibility was impossible. The insane and abnormal were "*socially*, necessarily responsible," but only in the sense that "every individual who commits dissonant acts in the society he belongs to, necessarily provokes a reaction."[68]

Ellis effectively advocated a 'conventional morality', as discussed in the previous chapter, in which society treated criminals *as if* they had been free to choose their criminal behaviour – as if they had 'metaphysical' free will and responsibility – despite growing scientific evidence to the contrary. Ellis even suggested abandoning the term 'responsibility' altogether, and replacing it with 'social reaction.' By dispensing with responsibility and its emphasis on desert, society could better embrace the kind of social engineering that reformers like Ellis

[65] Ibid., 381.
[66] Ibid., 365.
[67] Ibid., 367.
[68] Ibid., 366.

believed was the best approach to crime. Society should 'react' to criminality prophylactically – in preventive treatment of those with criminal tendencies, for example – and also punitively, with a focus on rehabilitation.[69] It is no wonder, then, that Lyle chose Ellis as a correspondent. Both he and Ellis believed that British common law clung to a definition of responsibility that was scientifically unsound and socially destructive. Lyle had to argue that Deeming was insane if he was to have any chance of saving his life. However, Lyle's true aim was not to enlarge the definition of criminal insanity to encompass non-delusional insanity, but to chip away at metaphysical notions of responsibility so that a hereditarian, social-scientific model could take its place.

The cases that came before Deeming's and which formed its bedrock in Victorian law elucidate the stakes of Deeming's case for Lyle and other imperial lawyers who worried about criminal responsibility. The most important immediate precedent for the Deeming case was that of William Colston. At 5 a.m. on a March morning in 1891, William Colston, a carpenter and former sergeant in the British Army, passed out on the road to Mr. Davis' orchard in the village of Narbethong, some 90 kilometres northeast of Melbourne. He awoke, still drunk, and made his way to the Davis' house. He knew Mr. and Mrs. Davis well, and was unsurprised when Mary Davis, never a paragon of modesty, answered the door in her nightdress. He was only slightly perplexed when she suddenly pulled him down onto her bed and shouted for her husband, as "Davis and I had always laughed at it, - considering her eccentric."[70]

As Colston went on to explain in his confession, the situation escalated rapidly. Rather than laughing it off, Colston alleged that Mr. Davis had demanded £5 in exchange for his silence about the assault on his wife. Colston resentfully agreed to the blackmail, thinking that he could

[69] Ibid.
[70] Confession of William Colston, 31 March 1891, William Colston Capital Case File, PROV VPRS/264/P0000/18.

persuade Davis to change his mind while the men walked through the orchard to retrieve some of Colston's things. They argued, and Colston suddenly decided that "although he [Davis] had always laughed and seemed to understand it before – he must have been in the plot, I collard [sic] the axe off his shoulder and hit him twice, and drew my brisk knife and cut his throat for he seemed to me then only as vermin."[71] Colston then returned to the house, struck Mary Davis with the axe, and ransacked the place to make it seem as though there had been a robbery.

Colston was soon caught, interrogated, and transferred to Melbourne Gaol, to be tried at the Supreme Court. Given Colston's confession, his only chance of avoiding a capital sentence was to convince the jury that he had been insane at the time of the crime. Lyle was Colston's solicitor, and took the lead in crafting his insanity defence. In late April, Lyle averred that Colston was insane, and the Victorian colonial government appointed six men – two, including resident physician of Melbourne Gaol, Dr. Andrew Shields, for the Crown and four for the defence – to examine Colston.[72] The doctors failed to agree, and the trial was postponed for over three months to allow more and more consultants to meet with Colston.

In the months before the trial, these doctors and a stream of other medical men visited Colston to gauge his sanity using interviews and tests. Exhibit 'I' in Colston's trial was a write-up of one such exercise. The test involved four doctors who had watched as Colston took dictation in a test of his memory and "mental vigour", as they scrutinized him for the signs of paralysis that were strongly associated with mental disease.[73] "Colston passed the ordeal in a

[71] Confession of William Colston, 31 March 1891, William Colston Capital Case File PROV VPRS/264/P0000/18,.
[72] 'The Narbethong Murders.' (1891, April 22). *Bendigo Advertiser* (Vic.: 1855-1918), p. 2. Retrieved January 24, 2014, from http: //nla.gov.au/nla.news-article88960834.
[73] Exhibit I, Writing from dictation by William Colston, 10 July 1891, William Colston Capital Case File PROV VPRS/264/P0000/18,. According to Dr. Francis Ryan, who testified for the defence in Colston's trial, general paralysis of the insane resulted in a "perversion of the moral faculties", "a blunting of the general nervous system", and "a loss of control mentally and physically", all symptoms of which the sufferer might easily be unaware. See: Testimony of Francis Ryan, Judge's notes of evidence, R v Colston, William Colston Capital Case File, PROV VPRS/264/P0000/18.

most satisfactory manner," wrote Shields, "too satisfactory I fear rather for himself and his prospects, or for the theory of insanity."[74] Dr. Edward Rosenblum, the senior medical officer of the Yarra Bend Asylum, found the writing test persuasive proof of Colston's mental faculties. Conversations with Colston about his escape, the crime, and Mrs. Davis convinced Rosenblum that there was no reason to believe that Colston "did not understand the nature of his actions & knew that he was doing wrong."[75]

Rosenblum employed the formulation of insanity set out in the *M'Naghten* rules. Colston may have been mentally ill by some medical definition, but many of his doctors clearly felt that he had little chance of meeting the criteria for legal insanity. Although some doctors, including Rosenblum, noted that Colston spoke slightly irregularly and struggled to explain how a previously peaceable man could murder two people at the barest provocation, they did not find him insane. Dr. Youl, a regular visitor to the Gaol, summed up the central difficulty: "There are dozens of men now about Melbourne with a number of the peculiarities Colston has."[76] Medical men who worked with accused criminals often not only understood insanity jurisprudence, but also supported its rigidity. Although left unstated, Dr. Youl's implication was clear. If Colston were found insane and irresponsible, the foundation of criminal responsibility would be at risk. If Colston were insane, how many murderers could be said to be sane?

Colston was of such general interest to the Australian medical community that one of his interviewers, Dr. James Jamieson, presented the case to the Medical Society of Victoria.

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[73] Judge's notes of evidence, R v Colston, William Colston Capital Case File, PROV VPRS/264/P0000/18.
[73] 'The Narbethong Murders.' (1891, June 4) *The Maitland Mercury & Hunter River General Advertiser* (NSW: 1843-1893), p. 6. Retrieved January 24, 2014, from http: //nla.gov.au/nla.news-article18991690.
[74] Exhibit I, Writing from dictation by William Colston, 10 July 1891, William Colston Capital Case File, PROV VPRS/264/P0000/18.
[75] Statement of Edward Rosenblum on the matter of Colston's sanity, William Colston Criminal Trial Brief, PROV VPRS 30/P0000/841.
[76] Statement of Dr. Youl on the matter of Colston's sanity, William Colston Criminal Trial Brief, PROV VPRS 30/P0000/841.

Jamieson later wrote up the case, and the discussion that followed, in the September 1891 edition of the *Australian Medical Journal*.[77] In his article, Jamieson reflected on the difficulty of analysing a defendant's sanity in a courtroom. Most of the medical men who evaluated Colston agreed about the existence of his symptoms: his impassive countenance, facial twitching, stilted speech, uneven pupils, and drooping right lip.[78] But they differed in their interpretations of them. Physicians might reasonably attribute his symptoms to incipient general paralysis of the insane, or perhaps Bell's palsy, or to too many drunken nights spent outdoors, or nothing at all.[79] Andrew Shields, the prison doctor, attended Jamieson's presentation and told his assembled colleagues that Colston was perfectly sane. Colston's stoicism, in Shield's view, "in another person would have been put down as *philosophical* [emphasis original]," rather than pathological.[80]

The jurors in Colston's case had been asked to wade into a morass of complex and contradictory medical testimony; to decide whether Colston was physically ill, mentally unsound, or just a drunk; and then to determine his responsibility according to common law principles. Jamieson did not think they were up to the challenge. The average juror, wrote Jamieson, "suddenly called from his shop or office," was unqualified to weigh in on such an "intricate question in nerve pathology."[81] Moreover, British adversarial courtroom procedure encouraged lawyers to seek unequivocal statements from their witnesses, and to discredit the

[77] James Jamieson, "The Medical Aspects of the Colston Case," *Australian Medical Journal* (15 September 1891), 433-444. The Medical Society of Victoria and the Victorian Branch of the British Medical Association were, in September of 1891, still separate medical societies. However, they had almost the same membership, and there were proposals to simply amalgamate them. Medical Society of Victoria, Ordinary Monthly Meeting, Wednesday 7 January 1891, *Australian Medical Journal* 13 (15 September 1891), 7-9.
[78] James Jamieson, "The Medical Aspects of the Colston Case," *Australian Medical Journal* 13 (15 September 1891), 436.
[79] James Jamieson, "The Medical Aspects of the Colston Case," *Australian Medical Journal* 13 (15 September 1891), 439.
[80] James Jamieson, "The Medical Aspects of the Colston Case," *Australian Medical Journal* 13 (15 September 1891), 442.
[81] James Jamieson, "The Medical Aspects of the Colston Case," *Australian Medical Journal* 13 (15 September 1891), 434.

opinions of opposing experts. "To investigate the question before the Court," lamented Jamieson, "as one of scientific interest or importance, is the last thing thought of."[82] Jamieson, for his part, did not think that there was sufficient evidence to prove that Colston was insane.

At the November meeting of the Victorian Branch of the British Medical Association, another of Colston's doctors, John William Yorke Fishbourne, responded to Jamieson's paper of a few months earlier. He hoped to present Colston's case from the perspective of the doctors who had defended him in court.[83] Andrew Shields was then the president of the Branch, and Fishbourne was its secretary. Fishbourne told his colleagues that he did not stand to gain from finding Colston insane. Rather, he explained, "to declare a man insane meant a storm of derision from the public and press, as well as a decided opposition from all Government officials," in addition to the "inconvenience and unpleasantness of attendance to give evidence in the court."[84] On meeting Colston, Fishbourne immediately noticed his "general pathognomic aspect" – his twitches and slurs – and concluded that the prisoner was insane.[85] A second interview, attended by other physicians including Henry Maudsley's nephew, Dr. Henry Carr Maudsley, only confirmed Fishbourne's diagnosis.[86] Fishbourne thought that Colston was in the early stages of the disease where symptoms were subtler, but that he was clearly experiencing "moral

[82] James Jamieson, "The Medical Aspects of the Colston Case," *Australian Medical Journal* 13 (15 September 1891), 434.
[83] John William Yorke Fishbourne, "Notes on the Colston Case," *Australian Medical Journal* 13 (15 December 1891), 586-604.
[84] John William Yorke Fishbourne, "Notes on the Colston Case," *Australian Medical Journal* 13 (15 December 1891), 587.
[85] John William Yorke Fishbourne, "Notes on the Colston Case," *Australian Medical Journal* 13 (15 December 1891), 587.
[86] John William Yorke Fishbourne, "Notes on the Colston Case," *Australian Medical Journal* 13 (15 December 1891), 589. Henry C. Maudsley was Henry's Maudsley's brother's son, who practiced in Melbourne: K. F. Russell, 'Maudsley, Sir Henry Carr (1859–1944)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http: //adb.anu.edu.au/biography/maudsley-sir-henry-carr-7528/text13133, published first in hardcopy 1986, accessed online 3 June 2015.

perversion" indicated by his "absence of remorse for the horrible crimes which, in a man of Colston's intelligence, character, and history" could indicate madness.[87]

Dr. John Springthorpe, who was present during the meeting, praised Fishbourne for speaking out in favour of Colston's insanity. Springthorpe argued that Colston had obviously committed his crimes in a "state of great epileptiform furor, or uncontrollable impulse in a weakened brain."[88] Colston's crime included what Springthorpe described as many of the classic indicators of madness. The defendant, "this man whom everyone liked, and everyone trusted," suddenly came to believe that his victims were plotting against him. A sexual spark ignited a sudden rage, resulting in a brutal double murder that was "out of all proportion in both detail and totality to the requirements of the case."[89] Springthorpe considered Colston a victim of an unjust legal system that stubbornly adhered to a cruel and out-dated definition of legal insanity.[90] All he and other physicians could do, "if ever we have the misfortune to again attempt to serve a demented criminal," was to challenge *M'Naghten* both in theory and in practice.[91] For even if the *M'Naghten* test were unshakeable, Springthorpe urged his colleagues to remind lawyers of its uncertainties: "What is the standard of right and wrong by which the law judges, and what amount of knowledge constitutes legal knowledge?"[92] Springthorpe railed against a criminal legal system that protected old doctrine at the expense of new science. "'Let the individual perish

[87] John William Yorke Fishbourne, "Notes on the Colston Case," *Australian Medical Journal* 13 (15 December 1891), 590.
[88] John William Yorke Fishbourne, "Notes on the Colston Case," *Australian Medical Journal* 13 (15 December 1891), 596.
[89] John William Yorke Fishbourne, "Notes on the Colston Case," *Australian Medical Journal* 13 (15 December 1891), 596.
[90] John William Yorke Fishbourne, "Notes on the Colston Case," *Australian Medical Journal* 13 (15 December 1891), 599.
[91] John William Yorke Fishbourne, "Notes on the Colston Case," *Australian Medical Journal* 13 (15 December 1891), 599.
[92] John William Yorke Fishbourne, "Notes on the Colston Case," *Australian Medical Journal* 13 (15 December 1891), 599.

provided the law remains supreme.' And as has happened before," Springthorpe said, ruefully, "the individual perished."[93]

For his part, Colston was unrepentant and surprisingly calm in the contemplation of his fate. He wrote Shields a letter to thank him for his kindness, in which he ruminated on why a steady former soldier and upright workman might suddenly resort to extreme violence. Colston's theory was that he had taken too readily to military discipline. "I must have been bottling up my temper for the last eighteen years or so," he surmised.[94] The threat of blackmail was too much to bear, and he snapped. He took, as Shields would later describe it, a philosophical view of his predicament:

> I can't say I am sorry for them, but the act has rendered me liable to face eternity sooner than might have been, and that I can put up with. Since Cain killed Abel and was allowed to live, marry, and rear a family, I suppose murders will occur in spite of the punishment in store; and the fact of being caught in the toils myself, I look on as a streak of bad luck which I must make the best of.[95]

Colston ended his letter by enquiring about the case of a friend, and making various suggestions about how to speed a procedural challenge through the courts. Colston's apparent nonchalance and good humour struck some of his doctors and many in the press as an indication that Colston was either a lunatic or a "supreme egotist." In other words, Colston was either profoundly insane or so cold-hearted that he was unperturbed by either murder or the prospect of his own demise.[96] That the decision in Colston's case was so often framed in this way before the trial and until his death explains why he was of such interest to so many medical men, and so important to the law of insanity. It was fairly clear to many, and almost certainly to Lyle, that Colston could not meet

[93] John William Yorke Fishbourne, "Notes on the Colston Case," *Australian Medical Journal* 13 (15 December 1891), 600.
[94] Colston to Andrew Shields, 13 May 1891, William Colston Criminal Trial Brief, PROV VPRS 30/P0000/841.
[95] Colston to Andrew Shields, 13 May 1891, William Colston Criminal Trial Brief, PROV VPRS 30/P0000/841.
[96] 'The Narbethong Murders.' (1891, June 4) *The Maitland Mercury & Hunter River General Advertiser* (NSW: 1843-1893), p. 6. Retrieved January 24, 2014, from http: //nla.gov.au/nla.news-article18991690.

the *M'Naghten* test as traditionally understood. Lyle's hope was that a verdict of insanity in Colston's case would smash the test, or at least pry open its terms so that articulate, intelligent killers like Colston could walk through.

Colston's trial finally began on 15 July 1891. His lead barrister was Dr. William L. Mullen. Mullen, a physician and a barrister, trained at the University of Melbourne. In his legal practice, he specialized in cases that raised medical questions. As a doctor, he was an expert in lunacy. Mullen would serve as the medical superintendent of three Australian asylums before, just over a year after losing his first wife and three weeks after marrying his second, he would commit suicide by prussic acid poisoning.[97] At Colston's trial, Mullen called many medical witnesses who claimed that Colston had both been insane at the time of the murder, and was still insane and incapable of standing trial. However, the jury was unconvinced that Colston suffered from general paralysis of the insane, and found him sane at the time of trial, sane when he committed the crime, and guilty of wilful murder.[98] Lyle was disappointed and angry. There was a rule at Melbourne Gaol that prisoners could only be interviewed by medical men in the presence of the gaol medical officer, which Lyle felt had undercut his defence.[99]

Lyle's principle objection, however, was that the judge in Colston's case – Justice Hickman Molesworth – had wrongly instructed the jury to apply the *M'Naghten* definition of insanity. Colston's defence counsel argued that this was the incorrect definition of "insane" under the terms of the Victorian Crimes Act of 1890.[100] The Crimes Act stipulated that defendants who were acquitted on the ground of insanity could be confined at the Governor's

[97] A LUNATIC ASYLUM TEAGEDY. (1912, August 21). *The Advertiser* (Adelaide, SA: 1889-1931), p. 8. Retrieved June 5, 2015, from http: //nla.gov.au/nla.news-article5326093.
[98] Judge's notes of evidence, R v Colston, William Colston Capital Case File, PROV VPRS/264/P0000/18.
[99] 'The Narbethong Murders.' (1891, June 4) *The Maitland Mercury & Hunter River General Advertiser* (NSW: 1843-1893), p. 6. Retrieved January 24, 2014, from http: //nla.gov.au/nla.news-article18991690.
[100] Statement of Hickman Molesworth on the *Crimes Act* challenge, 21 July 1891, William Colston Capital Case File, PROV VPRS/264/P0000/18.

pleasure.[101] The 1890 Act referred to, and borrowed the language of, the British Criminal Lunatics Act (1800), which had created England's 'pleasure men' in the wake of the Hadfield trial.[102] The 1800 Act did not include a definition of insanity, and neither did the Australian 1890 Act. Lyle's legal strategy is not completely transparent on this point. However, it seems likely that he meant to imply, by referring to the Victorian Crimes Act, that Molesworth was wrong to read a *M'Naghten* insanity standard into the statute because it was based on an English law that predated *M'Naghten* by forty-three years.

If this was Lyle's plan, it was a long shot. The 1800 Act left the definition of insanity ambiguous, but this was exactly the ambiguity that the House of Lords had sought to eliminate with *M'Naghten*. By the end of the nineteenth century, Britain, and the empire, had embraced the *M'Naghten* guidelines, if at times ambivalently. Molesworth's instructions to the jury on the legal definition of insanity were consistent with Victorian law and English precedent. Lyle's true argument was that the prevailing definition of legal insanity in the British common law system was unjust, and should be reformed. His objection to Molesworth's reading of the 1890 Act was not really about the niceties of statutory interpretation – it was a direct challenge to the settled law of the British world.

Lyle saw the Colston case as an opportunity to attack the *M'Naghten* test in the highest court of the British empire, the Judicial Committee of the Privy Council. The Judicial Committee, also known as the Board, was the imperial court of last resort. It was constituted in its modern form in 1833, in An Act for the Better Administration of Justice in His Majesty's

[101] An Act to consolidate the Law relating to Crimes and Criminal Offenders (Crimes Act) 1890, Act 54 Vict. No. 1079, s. 458.
[102] An Act for the safe custody of insane persons charged with offences (The Criminal Lunatics Act) (1800), 39 & 40 Geo. III, c. 94.

Privy Council, later known generally as the Judicial Committee Act.[103] The Committee's members included all the judges of the English House of Lords, eminent judges from high courts and courts of appeal from Great Britain, India and other colonies, and politically powerful laymen such as the Lord Chancellor, the Vice Chancellor, and all previous holders of these offices.[104] Petitions for appeal were sent directly from the colonies to the sovereign, who then referred them to the Board for consideration. The Board read the documents forwarded from the colonial court or from the petitioner's lawyers, considered the evidence, and issued a recommendation to the King or Queen as to how the case should be decided. These recommendations were given in open court.[105] The Lord Chancellor was the President of the Council, and was responsible for deciding which judges should sit in each case. At least four members of the Committee had to hear a case in order for their recommendation to be valid.[106]

The Judicial Committee was a peculiar entity. Although routinely referred to as a court, its inclusion of lay members, its special relationship to the monarchy, and its immense jurisdiction all set the Board apart from the highest courts in the colonies, or in Britain. Henry Reeve, then the Registrar of the Privy Council, gave evidence during a royal Select Committee investigation into appellate jurisdiction in Britain and the empire in 1872. He described the Judicial Committee's jurisdiction as "founded…essentially on the prerogative; it has existed since a very early period, and it is not strictly limited to the functions of a court of justice; it

[103] *An Act for the Better Administration of Justice in His Majesty's Privy Council* (1833), 3 & 4 Gulielmi IV Cap. XLI.
[104] *An Act for the Better Administration of Justice in His Majesty's Privy Council* (1833), 3 & 4 Gulielmi IV Cap. XLI, s. 1.
[105] *An Act for the Better Administration of Justice in His Majesty's Privy Council* (1833), 3 & 4 Gulielmi IV Cap. XLI, s. 3.
[106] *An Act for the Better Administration of Justice in His Majesty's Privy Council* (1833), 3 & 4 Gulielmi IV Cap. XLI, s. 5.

partakes of an administrative and executive character which it is extremely difficult to define."[107] Barristers Frank Safford and George Wheeler, in their authoritative guide to Privy Council practice published in 1901, wrote of the Judicial Committee, "Its authority is probably unique. Its jurisdiction is undoubtedly more extensive, whether measured by area, population, variety of nations, creeds, languages, laws or customs, than that hitherto enjoyed by any Court known to civilization."[108]

There was no guarantee that the Judicial Committee would agree to hear a case. Defendants in criminal cases had to apply for special leave to appeal; these cases were heard "as an act of grace" and as an exercise of royal prerogative, not as a matter of right.[109] Therefore, Lyle's first hurdle would be to persuade the Judicial Committee to grant him leave to appeal on Colston's behalf. To do this, he had to convince the Committee that Colston's case raised important matters of law that demanded review at the highest imperial level.[110] And so, as soon as the Melbourne Supreme Court decided the case, Lyle began to gather documents and to sift through legal authorities in order to make his appeal.

However, on 10 August 1891, Lyle discovered that the Victorian Executive Council, a government body presided over by the colony's Governor, the Earl of Hopetoun, was preparing to discuss the Colston case. Hopetoun, a Scottish nobleman, had travelled to Melbourne to assume his governorship in 1889, at the age of twenty-nine. He was slight, gracious, and not especially clever. His youth and his love of horseback riding endeared him to the public, despite

[107] Minutes of Evidence, *Report from the Select Committee of the House of Lords on Appellate Jurisdiction*, 1872, in *Reports from Committees: Seven Volumes*. Session 6 February – 10 August 1872, vol. VII (Great Britain, House of Commons, 1872), 18.
[108] Frank Safford and George Wheeler, *The practice of the Privy Council in judicial matters: in appeals from courts of civil, criminal and admiralty jurisdiction in the colonies, possessions, and foreign jurisdictions of the Crown, and in appeals from ecclesiastical and prize courts ...: with forms of procedure and precedents of bills of costs* (London: Sweet & Maxwell, 1901), xiii.
[109] Safford and Wheeler, *The practice of the Privy Council*, 732.
[110] Safford and Wheeler, *The practice of the Privy Council*, 732.

his poor health and aristocratic airs.[111] One magazine article described the difficulty of successfully governing "a vigorous young democracy, in which there is an acute jealousy of the slightest sign of Downing Street domination, and where loyalty to the mother country goes hand in hand with the freest possible criticism of the very highest persons and functions."[112] And yet, Hopetoun had prevailed. His easy manner delighted Australians. Once, Hopetoun's portrait was accidentally published in a newspaper because he bore a resemblance to the accused in a sensational crime. At least, as one writer noted, "the rascal" for whom Hopetoun had been mistaken "was a clean-shaven, good-looking fellow."[113] When asked if he recognized the picture, Hopetoun reportedly exclaimed, "Know it? Why, that's the coat I was married in!"[114] Hopetoun, like Deakin, was a supporter of Australian Federation, and would eventually be appointed the first Governor General of the Commonwealth of Australia in 1900.[115]

Hopetoun may have been more of a charmer than a thinker, but he relished the routine tasks of government.[116] Among the most important of his responsibilities was his leadership of the Executive Council. The Council, with Hopetoun at its head, had the authority to commute criminal sentences to less severe terms through its prerogative of mercy. The Council reviewed capital convictions, which was particularly important when the cases were controversial or raised questions about the defendant's sanity. Lyle, caught off guard by the Council's decision to move

[111] Chris Cunneen, 'Hopetoun, seventh Earl of (1860–1908)', Australian Dictionary of Biography, National Centre of Biography, Australian National University, http: //adb.anu.edu.au/biography/hopetoun-seventh-earl-of-6730/text11621, published first in hardcopy 1983, accessed online 2 June 2015.
[112] *The Sketch: A Journal of Art and Actuality* (Ingram brothers, 1895), 117.
[113] Ibid.
[114] Ibid.
[115] Chris Cunneen, 'Hopetoun, seventh Earl of (1860–1908)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http: //adb.anu.edu.au/biography/hopetoun-seventh-earl-of-6730/text11621, published first in hardcopy 1983, accessed online 2 June 2015.
[116] Chris Cunneen, 'Hopetoun, seventh Earl of (1860–1908)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http: //adb.anu.edu.au/biography/hopetoun-seventh-earl-of-6730/text11621, published first in hardcopy 1983, accessed online 2 June 2015.

ahead in its consideration of Colston's situation, wrote in great haste to explain why the Executive Council should withhold judgment:

> [T]his case is one not alone of supreme importance to the individual concerned, but to the administration of justice. The rule creates a precedent as to all cases of insanity of a non-delusional character. It is the first time any such question has been ruled upon since McNaughten's case. It must affect the power of the medical profession to restrain the large and daily increasing number of non-delusional insane, whom medical science and asylum experience determine as the most dangerous to the community, but whom the so-called test in Colston's case decide are perfectly sane.[117]

On the same day, Lyle also wrote to the Crown Law Department, to inform Attorney General William Shiels of his petition to the Privy Council. Unfortunately for Lyle, neither the Council nor the Attorney General took his plans to appeal seriously. In a memorandum to Lord Hopetoun a week later, Shiels wrote that he believed that Lyle's petition for leave to appeal had "no reasonable prospect" of being accepted by the Privy Council. The rules in McNaughten's case had been declared fifty years before by the highest court in Britain and had been "universally acted upon in English Jurisprudence" ever since; Colston would hang.[118]

The Executive Council informed Lyle that it would decide Colston's fate, regardless of the pending petition for permission to appeal. Lyle responded with outrage and desperation. He argued that it was his right, and his client's, as subjects of the British empire to appeal directly to the Queen through her Privy Council. He accused the court and the Council of denying Colston the benefit of the doubt, of overthrowing the learning and authority of medical science, and of sinking to the "lowest level of Lynch law."[119] He threatened to notify the royal authorities that Hopetoun was acting contrary to English law by failing to accommodate the appeal, and begged

[117] Lyle to the Executive Council, 10 August 1891, William Colston Capital Case File, PROV VPRS/264/P0000/18.
[118] William Shiels to Lord Hopetoun, 18 August 1891, William Colston Capital Case File, PROV VPRS/264/P0000/18.
[119] Lyle to the Executive Council, 14 August 1891, William Colston Capital Case File, PROV VPRS/264/P0000/18.

the Council to consider the constitutional import and "lamentable consequences" of their decision.[120] The Council was not swayed by Lyle's pleading. They met, considered Colston's case, and declined to commute his capital sentence. He was hanged on 24 August 1891, at ten o'clock in the morning, at Melbourne Gaol. The newspapers reported that Colston went quietly, and that he praised the justice and mercy of the Victorian legal system until the end.[121]

Shiels and the Executive Council had every reason to be sceptical about Lyle's chances of securing permission to appeal to the Judicial Committee of the Privy Council. Throughout its history, the Committee had shown itself repeatedly to be unwilling to hear appeals in criminal cases. The Committee expressed its usual position in an 1863 case, *Falkland Islands Company v The Queen,* where it held,

> The inconvenience of entertaining such Appeals in cases of a strictly criminal nature is so great, the obstruction which it would offer to the administration of justice in the Colonies is so obvious, that it is very rarely that applications to this Board similar to the present have been attended by success.[122]

This statement continued to express the Committee's attitude toward criminal appeals throughout the nineteenth century, and it was well known among colonial authorities. [123]

Still, Lyle's cause was not hopeless. Since the 1860s, some criminal matters had indeed been heard by the Privy Council, including many from the Australian colonies. Lyle hoped to base his Privy Council appeal on the cases of *Bertrand*, *Supple*, and *Levinger*. In 1867, the Judicial Committee of the Privy Council agreed to hear an appeal in the case of Henry Louis Bertrand, a defendant from New South Wales whose counsel alleged that there had been serious

[120] Lyle to the Executive Council, 14 August 1891, William Colston Capital Case File, PROV VPRS/264/P0000/18.
[121] 'On the Gallows.' (1891, August 24). *Barrier Miner* (Broken Hill, NSW: 1888-1954), p. 3. Retrieved January 25, 2014, from http: //nla.gov.au/nla.news-article44082701.
[122] *Falkland Islands Company v The Queen* [1864] UKPC 10; NB. The Committee delivered its opinion on the petition to appeal on 24 June 1863.
[123] For example, it was explicitly approved by the JCPC in *Dillet v Graham* [1886] UKPC 18

irregularities in the proceedings at his trial.[124] For the first time, the Privy Council chose to exercise its power to hear a criminal appeal. In *Bertrand*, the Privy Council reiterated its general reluctance to hear criminal appeals, as these were likely to lead to "mischief and inconvenience."[125] However, the Committee reminded petitioners that criminal appeals were not impossible, and laid down a series of conditions under which permission might be granted. A case would be heard if it raised "questions of great and general importance" which were likely to occur often in future cases; if "the due and orderly administration of the law" were to be "interrupted, or diverted into a new course, which might create a precedent for the future"; and if there were "no other means of preventing these consequences."[126]

Lyle believed that Colston's case satisfied the *Bertrand* conditions. However, the idea that a strict application of the dominant legal rule (*M'Naghten*) risked "diverting [the law] into a new course" was always going to be difficult to prove. The argument relied on Lyle's ability to distinguish delusional from non-delusional insanity, and to show that using *M'Naghten* to find a non-delusional lunatic sane was a departure from justice and standard practice. Shiels, certainly, did not believe that Colston's case represented a diversion from the principles of the established law. Rather, it was Lyle who hoped to change the law of insanity that had prevailed since 1843. Shiels quoted directly from *Bertrand* in his letter to the Executive Council, concluding that Colston's case failed this test and encouraging them to proceed with his execution despite Lyle's petition.[127]

Lyle had rested much of his argument in favour of Colston's petition on two Australian criminal cases in which leave to appeal to the Privy Council had been granted. In 1870, Gerald

[124] *Attorney General New South Wales v Henry Louis Bertrand* LR 1 PC 520 (1867)
[125] *Attorney General New South Wales v Henry Louis Bertrand* LR 1 PC 520 (1867)
[126] *Attorney General New South Wales v Henry Louis Bertrand* LR 1 PC 520 (1867)
[127] William Shiels to Lord Hopetoun, 18 August 1891, William Colston Capital Case File, PROV VPRS/264/P0000/18.

Henry Supple chased two men through the streets of Melbourne wildly brandishing a gun. Supple was an Irishman who at times claimed to be a barrister, and who had worked for some years in the newspaper business. Witnesses described him as generally amiable and temperate, but prone to fits of temper over imagined slights.[128] One friend testified that Supple was very short-sighted, and that he had seemed to be "breaking down" in the weeks before the incident.[129] As Supple ran through town that day, a man named John Walshe waylaid him. Supple shot and killed Walshe during the struggle. He had apparently meant to kill a colleague of his at the Melbourne *Age*, G. P. Smith, whom he'd managed to shoot in the arm. Doctors in Supple's case argued that he suffered from the delusion that his friends were slandering him. The result was a highly unusual verdict. The jury found Supple guilty of murder but added, "We are unanimous in believing that the pistol was discharged accidentally."[130] Supple's lawyers petitioned the Privy Council for leave to appeal, on the question of how the law should regard the accidental killing of a victim by a defendant who intended to murder someone else. Leave was granted. However, Supple's supporters in Victoria managed to secure a commutation of his sentence from the Executive Council, from death to hard labour, and the Privy Council appeal was ultimately dropped. Supple spent seven years in prison in Melbourne, and was finally released upon the death of his intended victim, Smith. Supple moved to New Zealand, and lived there until he died at the age of seventy-five.[131]

The case of Hugo Levinger also offered Lyle some hope in his campaign to bring Colston's case to the Privy Council. Levinger was a Bavarian accused of killing an unnamed

[128] Judge's Notes of Evidence in the trial of Gerald Supple, Gerald H. Supple, Capital Case File, PROV VPRS 264/P0000/6. NB. Supple apparently raged against any publication that used the phrase 'Celtic Race', for example.
[129] Testimony of Myles Garrett Byrne, Judge's Notes of Evidence in the trial of Gerald Supple, Gerald H. Supple, Capital Case File, PROV VPRS 264/P0000/6.
[130] Jury's finding, Judge's Notes of Evidence in the trial of Gerald Supple, Gerald H. Supple, Capital Case File, PROV VPRS 264/P0000/6.
[131] 'Death of Mr. G.H. Supple.' (1898, October 8). *Freeman's Journal* (Sydney, NSW: 1850-1932), p. 20. Retrieved January 25, 2014, from http: //nla.gov.au/nla.news-article115383767.

South Sea Islander aboard the *Young Australian* as it sailed near Polynesia. The trial was dramatic. The *Young Australian*'s crew were accused of slave trading, and tales of starvation, shark attacks, and murder swirled around the case.[132] Levinger himself was reported to have said, when the emaciated corpse of a native man had been thrown overboard, "here will be a loss of £5.10."[133] By the time of Levinger's trial in Melbourne, where he had escaped to after his ship landed in Sydney, the rest of the *Young Australian*'s crew had already been convicted of murder in New South Wales.[134]

However, the key legal controversy in the case was procedural. The ship's owner was Irish, it sailed under the British flag, and it had departed from Sydney, so Levinger came under British jurisdiction. Because he was a foreign national, however, a mixed jury, composed of six aliens and six British subjects, heard his case.[135] Levinger tried to assert his common law right to peremptorily challenge one of the proposed alien jurors, as he and his counsel had successfully done in the case of some of the British jurors.[136] The Supreme Court of Victoria in Melbourne, to which Levinger had escaped from Sydney, held that he did not have this right with respect to the foreign jurors in a mixed jury.[137] Levinger was convicted of manslaughter and sentenced to seven years' hard labour. In the wake of the trial, Levinger's lawyers, assisted by his brother, successfully appealed to the Privy Council. The Privy Council held that Levinger should not

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[132] Testimony of Henry Heath, Extract from Judge's Notes of Evidence in the *Levinger* trial, Hugo Levinger: Accused of Murder, 1870, PROV VPRS 1095/P0000/14.; 'The Alleged Murder on the High Seas.' (1869, June 25). *The Mercury* (Hobart, Tas.: 1860-1954), p. 4. Retrieved January 27, 2014, from http: //nla.gov.au/nla.news-article8859771.

[133] Testimony of Henry Heath, Extract from Judge's Notes of Evidence in the *Levinger* trial, Hugo Levinger: Accused of Murder, 1870, PROV VPRS 1095/P0000/14..

[134] Memorandum for His Excellency the Governor from Justice Williams, In re the Levinger Petition, 1869, Hugo Levinger: Accused of Murder, 1870, PROV VPRS 1095/P0000/14..

[135] For more on the mixed jury, see: Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge* (Chicago: University of Chicago Press, 1994).

[136] There had been no dispute during the trial as respected Levinger's right to challenge a juror for cause; only the right to peremptory challenges was in doubt.

[137] 'Alleged Murder on the High Seas. Trial of Hugo Levinger.' (1869, June 22). *The Mercury* (Hobart, Tas.: 1860-1954), p. 3. Retrieved January 26, 2014, from http: //nla.gov.au/nla.news-article8859710.

have been deprived of his right to challenge potential jurors in his case, regardless of whether they were foreign or part of a mixed jury.[138]

Levinger raised a fairly narrow, technical legal question about common law rights and mixed juries. *Supple* might have incited much broader discussion about the relationship between criminal acts and intention, but the appeal was withdrawn, no Privy Council judgment was published, and interest in the case petered out quickly. Neither appeal centered legally on the defendant's insanity, and neither was an overt attack on a prevailing legal standard. *Colston*, despite Lyle's efforts, represented the reaffirmation of both the Privy Council's conservative approach to hearing criminal appeals, and the traditional legal understanding of criminal insanity. Despite these setbacks, Lyle did not give up. Lyle saw Frederick Deeming as a non-delusional, insane killer, as Colston had been, and as a second opportunity to revolutionize *M'Naghten*, or destroy it.

Deeming's crimes were especially horrible because he killed his own wives and children. And yet, child-killing did not always result in a night in the condemned cell and a morning in the noose. As in England, there were many ways for a killer to avoid judicial execution in Australia. A defendant could be considered unfit to plead, as Maltby was. He might have his sentence commuted, as did Norris, who slew his children and eventually left Broadmoor in his niece's care. A defendant could be found not guilty by reason of insanity. While it might seem obvious that Deeming did not fit the *M'Naghten* definition of insanity, and did not deserve a reprieve, the cases of other parents who killed their children serve as useful counterexamples. Deeming would hang, but the nature of his crime alone did not guarantee his conviction, and Lyle knew this from first-hand experience.

[138] *Hugo Levinger v The Queen* [1870] UKPC 46

One woman who attacked her own children, Ellen Scarcebrook, had a family history of insanity, and had recently been accused of being mad herself. In a note written in a hasty scrawl to her husband Alfred, she declared, "I shall live not longer, and my children will go with me, I am sorry for you dear Alfred, for all the trouble I have brought on you, but I am not able to bring my family up, I cannot stand the worry, and I will never go to a mad house the same as my mother my Father is responsible for a lot."[139] That evening, while Alfred was away from home, she poisoned their five-year-old son, Edwin, and their month-old baby with strychnine.[140] The baby died that day and Edwin, the next morning despite desperate attempts to save him.[141]

Andrew Shields interviewed Ellen Scarcebrook during her time at Melbourne Gaol. She told Shields that she had struggled to nurse her new baby, and that she had felt "queerness in her head" since her confinement. She had tried to kill her children so that they would not be left alone if she were taken away to an asylum. Shields believed that she had been suffering from "mania of lactation", a species of puerperal insanity, at the time of the crime.[142] Marshall Lyle acted as Scarcebrook's solicitor, doing battle with Shields once again. Lyle tried, without avail, to circumvent the Gaol policy that had so vexed him in the Colston case, in which medical interviews had to be conducted in the presence of the Gaol medical officer.[143] Despite this setback, however, Lyle and the rest of Scarcebrook's defence triumphed. The jury found Ellen Scarcebrook not guilty on the ground that she was insane at the time of the offence, and she was

[139] Exhibit 'C', Note by Ellen Scarcebrook to Alfred Scarcebrook, Ellen Scarcebrook Criminal Trial Brief (1891), PROV VPRS 30/P0000/860.
[140] Deposition of Alfred Scarcebrook, Coroner's Inquest, Ellen Scarcebrook Criminal Trial Brief (1891), PROV VPRS 30/P0000/860.
[141] Deposition of Peter McPherson Reid, Coroner's Inquest, Ellen Scarcebrook Criminal Trial Brief (1891), PROV VPRS 30/P0000/860.
[142] Report of Andrew Shields, 14 November 1891, Ellen Scarcebrook Criminal Trial Brief (1891), PROV VPRS 30/P0000/860.
[143] Lyle to the Crown Solicitor, 11 November 1891, Ellen Scarcebrook Criminal Trial Brief (1891), PROV VPRS 30/P0000/860.

detained at Melbourne Gaol under medical supervision at the Governor's pleasure. She was released six weeks later, after Shields declared her sane and recovered.[144]

Sometimes, if a defendant seemed to be clearly insane at the time of arrest, he might be dealt with under s. 6 of the Victorian *Lunacy Act* of 1890.[145] Section 6 stated that if at least two justices with jurisdiction in the place where the prisoner had been detained believed that he was insane, they were required by law to have the prisoner's mental state evaluated by two medical practitioners. If the medical practitioners certified that the prisoner was insane, he could be confined in an asylum until judged sane enough to stand trial.[146] The *Lunacy Act* played an important role in the case of Arthur Pattison. On the night of 27 February 1893, Alice Pattison woke up her mother, Arthur Pattison's wife, Kate. Alice shared the back bedroom of the farmhouse with her brother, Arthur, and her sisters, Florence and Margaret. Alice asked, "What's up with Dada? He is in the room with the axe."[147] Kate at first thought that her daughter was ill and inventing stories, but she soon discovered the grim truth. Her husband had slain two of their children with an axe and fatally wounded a third, and had then tried to hack himself to death.[148]

There had been no warning. The couple had been happily married for sixteen years, and had had nine children.[149] Kate described her husband as quiet and loving, a good father and farmer, although prone to illness and headaches. Shortly before the murder, Arthur had learned that the payment schedule on their property was about to be changed, and the family might soon

[144] 'Liberation of Mrs. Scarcebrook.' (1891, December 31). *The Advertiser* (Adelaide, SA: 1889-1931), p. 5. Retrieved January 29, 2014, from http: //nla.gov.au/nla.news-article24810190.
[145] *Lunacy Act 1890,* 54 Victoria No. 1113
[146] s.6, *Lunacy Act 1890,* 54 Victoria No. 1113
[147] Deposition of Kate Pattison, Coroner's Inquest in the case of Arthur Pattison, Case 240, Arthur Pattison Criminal Trial Brief (1893), PROV VPRS 30/P0000/928.
[148] TERRIBLE DOMESTIC TRAGEDY. (1893, March 1). *Barrier Miner* (Broken Hill, NSW: 1888-1954), p. 2. Retrieved June 10, 2015, from http: //nla.gov.au/nla.news-article44108702
[149] Eight were living at the time of the murder.

be homeless.[150] They were already destitute.[151] As early as the Coroner's Inquest, held in Shepparton near the Pattisons' home, there was general agreement among the lay and medical witnesses that Pattison must have been insane at the time of the crime. One doctor, Jeremiah McKenna, described Pattison as a man "of small intelligence of weak mind and…almost an imbecile."[152] McKenna used the language of *M'Naghten*, averring that such a man under intense financial strain could very well kill his children "without his knowing he was doing wrong."[153] Besides, said McKenna, "none but a lunatic would attempt self murder with an axe."[154] The jury at the Coroner's Inquest found Pattison guilty of killing the children, and he was transferred to Melbourne Gaol to await trial.

McKenna's assessment of Pattison was soon echoed by Andrew Shields, who described the new inmate as "childish", "silly" and possessed of "no cunning."[155] He felt that Pattison's case was a "very clear one of weak intellect rendering him irresponsible for his conduct."[156] Given Pattison's inability to pay for his own defence and the broad agreement that he was insane and had been during the murder, it was decided that he should be dealt with under s. 6 of the *Lunacy Act*. The expense and time of gathering witnesses and jurors for trial would be wasted, as Pattison would certainly be found unfit to plead.[157] The difficulty in Pattison's case was that his

[150] Deposition of Kate Pattison, Coroner's Inquest in the case of Arthur Pattison, Case 240, Arthur Pattison Criminal Trial Brief (1893), PROV VPRS 30/P0000/928.
[151] Memo from Sub-Inspector R.A. Smyth to E.N. Moore, Clerk of Courts, Shepparton, 1 April 1893, Case 240, Arthur Pattison Criminal Trial Brief (1893), PROV VPRS 30/P0000/928.
[152] Deposition of Jeremiah McKenna, Coroner's Inquest in the case of Arthur Pattison, Case 240, Arthur Pattison Criminal Trial Brief (1893), PROV VPRS 30/P0000/928.
[153] Deposition of Jeremiah McKenna, Coroner's Inquest in the case of Arthur Pattison, Case 240, Arthur Pattison Criminal Trial Brief (1893), PROV VPRS 30/P0000/928.
[154] Deposition of Jeremiah McKenna, Coroner's Inquest in the case of Arthur Pattison, Case 240, Arthur Pattison Criminal Trial Brief (1893), PROV VPRS 30/P0000/928.
[155] Memo from Andrew Shields to the Crown Solicitor, 6 April 1893, Case 240, Arthur Pattison Criminal Trial Brief (1893), PROV VPRS 30/P0000/928.
[156] Memo from Andrew Shields to the Crown Solicitor, 6 April 1893, Case 240, Arthur Pattison Criminal Trial Brief (1893), PROV VPRS 30/P0000/928.
[157] C.A. Smyth to the Attorney General, 7 April 1893, Case 240, Arthur Pattison Criminal Trial Brief (1893), PROV VPRS 30/P0000/928.

insanity was not permanent. By July, Shields believed that Pattison had come to his senses and so, under the terms of s. 6, could now be tried for murder.[158] The question was, should he be? Shields and the other authorities involved in Pattison's case still believed that he had been insane at the time of the killings. They were sure that a criminal jury would agree. Officials felt that it would surely be harsh (and expensive) to subject Pattison to a trial which could only result in returning him to Shield's custody, where he already was, at the Governor's pleasure, to which he was already, effectively, subject under s. 6. Still, three children were dead, and some felt that Pattison should be called to account for his actions at a trial.[159] McKenna and Shields worried that a trial would cause a relapse of Pattison's homicidal mania.[160] However, a convincing precedent in the colony for releasing a homicidal lunatic without trial could not be found.[161] Pattison was tried on 13 September 1893, found not guilty by reason of insanity, and confined in an asylum at the Governor's pleasure.[162]

Deeming's crimes superficially resembled those of Arthur Pattison and Ellen Scarcebrook. He, too, murdered his children, and he, too, struck many who met him as insane. Doctors and lawyers who met Pattison and Scarcebrook emphasized how much they had loved their children, and how the choice to kill was a desperate one. The killings were caused by a perversion of their parental affections, the breaking of weak minds. Pattison and Scarcebrook were found not guilty on the ground that their insanity had destroyed their ability to understand

[158] s.6, *Lunacy Act 1890,* 54 Victoria No. 1113
[159] C.A. Smyth to the Solicitor General, 3 July 1893, Case 240, Arthur Pattison Criminal Trial Brief (1893), PROV VPRS 30/P0000/928.
[160] McKenna to the Crown Solicitor; Memo from Shields to the Crown Solicitor, 12 July 1893, Case 240, Arthur Pattison Criminal Trial Brief (1893)13 July 1893, PROV, VPRS 30/P0000/928.
[161] Shields claimed to have identified two such cases, and four in which a recovered lunatic had been tried. Apparently, though, the two cases were not considered persuasive given the gravity of Pattison's crime. Memo from Shields to the Crown Solicitor, 14 August 1893, Case 240, Arthur Pattison Criminal Trial Brief (1893), PROV VPRS 30/P0000/928.
[162] 'The Shepparton Tragedy.' (1893, September 13). *The Sydney Morning Herald* (NSW: 1842-1954), p. 7. Retrieved January 30, 2014, from http: //nla.gov.au/nla.news-article13928805. NB Note that in the Maltby case, in which the circumstances were very similar, Maltby was never tried. In his case, the public vindication of the law was seen as less compelling than the expense and, potentially, scandal of returning him to Madras for trial.

that their murders were wrong. Neither was ever described as suffering from delusions, or as unaware that they were killing their children. This disturbed moral sense seems as though it should have placed Pattison and Scarcebrook in the domain of moral insanity. In short, their cases might easily be seen as raising the same problems in the definition of criminal responsibility as Deeming's and Colston's did. And yet, they did not. Scarcebrook was diagnosed with lactation mania, and she was pitied, not feared.[163] Pattison was seen as a homicidal maniac and an imbecile, whose despair was proved by his pathetic attempt to die by his own axe. Colston's rage made him dangerous, and guilty. Deeming's insanity, in contrast, was not the result of an excess of fatherly sentiment, or any sentiment at all.

Deeming was consistently described as callous, manipulative, and vain. Even Lyle, who was most anxious to have Deeming declared insane, never mentioned cases like Scarcebrook's as useful precedents. Questions about the metaphysics of responsibility, the existence of free will, the nature of evil, and the morality of punishment arose in cases like Deeming's because he was seen as a threat. A legal system that could not punish him was one that few jurists or administrators could stomach or support. It is worthwhile, however, to keep cases like *Scarcebrook* and *Pattison* in mind when lawyers spoke and wrote so passionately of the inflexibility and narrowness of *M'Naghten* in the nineteenth century, or the rules' inability to accommodate the non-delusional lunatic.

Deeming was tried over four days at the end of April and the beginning of May 1892. Much of the testimony concerned his sanity. Medical men took the stand, some telling colourful tales of Deeming's Dickensian childhood, insane parents, and history of confinement to lunatic asylums, and others flatly denying that anything Deeming said could be taken seriously. Andrew

[163] For more about lactation mania and its relationship to gender, see: Nancy Theriot, "Diagnosing Unnatural Motherhood: Nineteenth-Century Physicians and 'Puerperal Insanity,'" *American Studies* 30, no. 2 (October 1, 1989): 69–88.

Shields was a skeptic. "It is my opinion," he said, "that the prisoner is not insane. I cannot believe anything he says on his own testimony."[164] Although Shields did not believe it, he reported to the courtroom what Deeming had told him about his life. Deeming claimed that he had no memories from before the age of eleven or twelve. He said that he had suffered from seizures throughout his life, that he had contracted syphilis while in Africa, and that every year on his birthday he blacked out and could not remember the day. Deeming thought that this might be because his mother had given birth to him while unconscious. His mother, now dead, haunted him, whispering evil things to him at night. Deeming claimed to have been hospitalized for his insanity, and that once, as a young man, he had pushed a lady off a pier for calling him 'Mad Fred.'[165]

Dr. Thomas Dick, witness for the prosecution, also testified that he believed Deeming to be sane. Dick had been the superintendent of a lunatic asylum for six years, and had made mental illness his medical specialty. He told the court that he believed that Deeming was feigning insanity, and that his descriptions of his hallucinations and delusions were contradictory. Dick thought Deeming lacked the responsibility of an "ordinary average man" and was an "instinctive criminal", but possessed sufficient moral sense to know right from wrong.[166] Although Dick labeled Deeming sane, his testimony suggests that what he really meant was that Deeming was sane enough to punish.

Dr. John Springthorpe, who had defended Colston in 1891 and who had, evidently, elected to do his part to challenge *M'Naghten* and to suffer "the misfortune to again attempt to

[164] Testimony of Andrew Shields, Judge's Notes of Evidence, *R v Deeming*, p. 25, PROV VPRS 264/P0000/21.
[165] Testimony of Andrew Shields, Judge's Notes of Evidence, *R v Deeming*, p. 25, PROV VPRS 264/P0000/21.
[166] Testimony of Thomas Dick, Judge's Notes of Evidence, *R v Deeming*, p. 25, PROV VPRS 264/P0000/21.

serve a demented criminal," testified on Deeming's behalf.[167] He had, by then, risen to the head of the Victorian Branch of the British Medical Association. He repeated Deeming's personal history of want and violence before the court. The malevolent ghost of his mother again figured prominently, goading Deeming to kill and telling him that he was "born to hang."[168] Springthorpe read Deeming's own account of the killing of his first wife, Marie James. Deeming claimed that Emily Mather had secretly hired a man to kill Marie, so that they could be married. Deeming also claimed that Emily Mather was still alive, having broken his heart and absconded. He did not know whose corpse had been found beneath the stones at Andrew Street.[169] Springthorpe believed that many of Deeming's statements were "distortions, exaggerations, delusions, hallucinations", but that his lies, in addition to some scars on his skull, supported diagnoses of syphilis and epilepsy.[170]

John William Yorke Fishbourne, who had defended Colston, also spoke in favour of Deeming's insanity. Fishbourne had studied insanity and treated insane patients for over twenty years. And yet, even he seemed unsettled by Deeming. Fishbourne testified that Deeming should not be held responsible, but his endorsement of the defence's position was decidedly tepid. Fishbourne was "inclined to think" Deeming's delusions were real; he was "inclined to believe" that Deeming was sincere; he had "reason to think" Deeming's family history was true; it "might be possible" for an epileptic not to have known that murder was wrong. The jury was unconvinced by the defence's prevarications. They found Deeming guilty, and he was sentenced to death. In addition, the jury considered two questions submitted to them by Justice Hodges: "(1) Is the prisoner now insane? Ans. No; (2) If it had been proved that his father and mother had

[167] John William Yorke Fishbourne, "Notes on the Colston Case," *Australian Medical Journal* 13 (15 December 1891), 599.
[168] Testimony of John Springthorpe, Judge's Notes of Evidence, *R v Deeming*, p. 25, PROV VPRS 264/P0000/21.
[169] Testimony of John Springthorpe, Judge's Notes of Evidence, *R v Deeming*, p. 25, PROV VPRS 264/P0000/21.
[170] Testimony of John Springthorpe, Judge's Notes of Evidence, *R v Deeming*, p. 25, PROV VPRS 264/P0000/21.

been in a Lunatic Asylum and that he had been twice in a Lunatic Asylum, would you have been of opinion (a) That he is now insane? Ans. No; (b) That he was insane at the time the act charged against him was done? Ans. No."[171]

As soon as Deeming was convicted, Lyle began a campaign to stay his execution so that he could submit Deeming's case to the Privy Council. As in Colston's case, Lyle believed that far more was at stake than the life of a single murderer. Rather, he believed that Deeming's case was a test of the integrity and modernity of the Australian, and by extension, British, legal system. While he argued for Deeming's insanity and the weakness of the case against him on specific grounds – Deeming had a family history of insanity, he had suffered seizures, he had once had a head injury, there were no witnesses to the murders, the press had prejudiced the jury – he embraced Deeming as a test case for the law of insanity as a whole. A long letter from Lyle to the Executive Council after Deeming's conviction shows how Lyle used his client to probe deeper legal and moral issues. He wrote, in part,

> You have doubtless read in the public press that the prisoner…is some unique moral monster of such a condition that it is hoped that none other such monstrous creations are to be found in the human family. […] The Prisoner represents a class which is rapidly increasing with the so called civilisation of our times. He is the typical criminal of the century and amidst the darkness of blind prejudice and heated animal passion he stands knocking at the door of English conscience and thought. The English speaking world may endeavour not to hear the sounds but the sounds must yet be heard. […] England, Australia, and America must face in an honest way the problem of grappling with the criminal[.] […] The duty of an English judge compels him to tread the beaten track of precedent and it has fallen to the lot of the Counsel ever and anon in history to present to the tribunal the living Truth.[172]

Lyle believed that a reckoning was taking place among modern legal systems the world over. He wrote that continental Europe had learned a hard lesson after the autopsy of serial killer

[171] Judge's Notes of Evidence, *R v Deeming*, p. 25, PROV VPRS 264/P0000/21.
[172] Lyle to the Executive Council, 7 May 1892, p. 2, PROV VPRS 264/P0000/21.

Franz Schneider in Vienna that year, which supposedly showed that the man suffered from "brain dropsy."[173] The Schneider case had riveted the Western world. In 1891, Schneider, a muscular man with "high cheek bones, hollow cheeks, and a sandy beard and moustache" with an expression of "repulsive ferocity," and his wife, Rosalie, "a miserable-looking, under-sized woman not more than 4ft. 4in. in height" who might once have been beautiful, had lured a series of unemployed servant girls to secluded spots in the Vienna suburbs.[174] There, according to Schneider's testimony, Rosalie gripped each girl's hands while her husband strangled their victim.[175] The couple stole the girls' clothes and money.[176] Over a thousand ticket-holders crammed themselves into the hall of the Vienna Courts of Justice to watch the couple's trial, held in late January of 1892.[177] Rosalie and Franz' defence had been that each was the unwitting pawn of the other. Onlookers followed the drama through opera glasses, and smuggled wine and bread into the courtroom so as not to lose their seats during the lunch recess. In the end, the jury found them both guilty and sentenced them to death.[178] Rosalie's sentence was commuted to life imprisonment. Franz Schneider was hanged that spring with the help of the hangman and three assistants who dangled from his legs and arms as he slowly suffocated.[179]

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[173] 'The Murderer Schneider.' (1892, March 21). *The Advertiser* (Adelaide, SA: 1889-1931), p. 5. Retrieved January 30, 2014, from http: //nla.gov.au/nla.news-article24816485. For an example of how the Schneider murder was written up in the English and Australia press, see: 'Execution of Schneider, the Notorious Vienna Murderer.' (1892, April 27) *The Inquirer & Commercial News* (Perth, WA: 1855-1901), p. 6. Lyle to the Executive Council, 7 May 1892, p. 14, PROV, VPRS 264/P0000/21.
Retrieved January 30, 2014, from http: //nla.gov.au/nla.news-article69707145. Lyle discusses Schneider's case in:
[174] "An Austrian Murder Trial," *The Times*, 26 January 1892. The British newspapers often referred to Schneider as Frank, rather than Franz.
[175] "An Austrian Murder Trial," *The Times*, 27 January 1892.
[176] "An Austrian Murder Trial," *The Times*, 28 January 1892.
[177] "An Austrian Murder Trial," *The Times*, 26 January 1892.
[178] THE SCHNEIDER MURDER TRIAL. (1892, March 19). *South Australian Chronicle* (Adelaide, SA: 1889-1895), p. 19. Retrieved June 6, 2015, from http: //nla.gov.au/nla.news-article91550248; "An Austrian Murder Trial," *The Times*, 26 January 1892.
[179] THE SCHNEIDER EXECUTION. (1892, April 25). *The Advertiser* (Adelaide, SA: 1889-1931), p. 7. Retrieved June 6, 2015, from http: //nla.gov.au/nla.news-article25326492.

Deakin's trial notes show that he also considered Schneider's case as a cautionary tale.[180] After Schneider's death, an autopsy of his brain was reported to show incontrovertible evidence of brain disease.[181] One Australian newspaper columnist believed that Schneider's autopsy proved that "the law had hanged one who, in all likelihood, was totally irresponsible for doing what is not a crime unless the agent is responsible. That is, the law had probably committed another murder."[182] Deeming was probably also a victim of cruel biological forces, the columnist argued.[183]

America had been shamed in the same way in the famous Guiteau case, in which Lyle reminded the Executive Council that a *post mortem* had showed that the prisoner was a victim of "brain disorder."[184] In 1881, Charles Julius Guiteau shot President James Garfield, who suffered and wasted for over two months before succumbing to his injuries. Rosenberg writes that the Guiteau affair became, in its time, "something of a milestone in the popularization of hereditarian explanations of insanity and criminality."[185] The publishers of an 1882 collection of documents, interviews and commentary about the case raved, "This trial developes [sic] the insanity question as it has never before been opened."[186] Guiteau's lawyers argued that he was morally insane, and not responsible for his actions. They lost, Guiteau was hanged, and the results of a brain autopsy showed no physical evidence of insanity.[187] However, despite the

[180] Alfred Deakin, draft of address to the jury in the Deeming trial, NLA MS 1540/6/185-188.
[181] A MURDERER'S BRAIN. (1892, March 22). *Geelong Advertiser* (Vic.: 1859-1924), p. 3. Retrieved June 6, 2015, from http: //nla.gov.au/nla.news-article149926667.
[182] STRAY NOTES. (1892, May 23). *Barrier Miner* (Broken Hill, NSW: 1888-1954), p. 2. Retrieved June 6, 2015, from http: //nla.gov.au/nla.news-article44090727.
[183] STRAY NOTES. (1892, May 23). *Barrier Miner* (Broken Hill, NSW: 1888-1954), p. 2. Retrieved June 6, 2015, from http: //nla.gov.au/nla.news-article44090727.
[184] Lyle to the Executive Council, 7 May 1892, p. 14, PROV VPRS 264/P0000/21. For more on the Guiteau case, see: Charles Rosenberg, *The Trial of the Assassin Guiteau: Psychiatry and the Law in the Gilded Age* (Chicago: University of Chicago Press, 1968).
[185] Rosenberg, *The Trial of the Assassin Guiteau*, 244.
[186] Henry Gillespie Hayes and Annie J. Dunn Guiteau Dunmire, *A Complete History of the Trial of Guiteau, Assassin of President Garfield* (Philadelphia: Hubbard Bros., 1882), vi.
[187] "The Guiteau Autopsy," *Boston Medical and Surgical Journal* 107 (June-December 1882), 67.

vociferous disagreements among the medical experts who testified during Guiteau's trial, most physicians believed, by the 1890s, that he had been obviously and chronically insane.[188] Many came to see his hanging as a mistake, an embarrassment, and even a travesty. Lyle and Deakin urged the Melbourne Supreme Court to avoid a similar shame, and to spare Deeming.

The Deeming case, in Lyle's view, was Australia's chance to show that it could rise above the mob, accept scientific reality, and change its approach to criminal responsibility. The case was an opportunity for the colonies to demonstrate that they were more modern, humane and just than either Europe or America, and to lead the common law rather than simply to follow it. The ardent solicitor, ever portentous, concluded, "Your conduct under the lesson will be judged by those who follow you, and by your God. The vindication will assuredly follow."[189]

For all Lyle's *Sturm und Drang* and promises of Australian glory, few were moved to consider acquitting Deeming. Lyle's claims that Deeming represented the new normal, the 'typical criminal of the century', were meant to prompt his interlocutors to change their ways. But instead, the truth that Lyle claimed to preach left legal and government authorities paralysed with horror. Lyle himself described his client, in the same letter, as suffering from "complete absence of the moral sense."[190] Indeed, Deeming's interactions with police, lawyers and medical men served only to reinforce the idea that he was eerily unfeeling. Constable Evan Williams apprehended Deeming in Southern Cross, Western Australia. One morning after the arrest, Deeming casually remarked that a murderer must have a terribly troubled conscience. Williams replied, "Yes. It would be a cold-blooded man to commit a murder like that," to which Deeming responded, "But a man who has lived a good life up to the murder need not fear. He can only die

[188] Rosenberg, *The Trial of the Assassin Guiteau*, 243.
[189] Lyle to the Executive Council, 7 May 1892, p. 14, PROV VPRS 264/P0000/21.
[190] Lyle to the Executive Council, 7 May 1892, p. 7, PROV VPRS 264/P0000/21.

once."[191] If the average criminal of the world to come were to be like Deeming, it is hardly surprising that judges were reluctant to adopt a view of insanity that would result in his acquittal.

At trial, Deeming had been sentenced to die on 23 May 1892. On 19 May 1892, the Privy Council convened at Whitehall before a large audience to hear Deeming's petition for special leave to appeal and to delay his capital sentence. Two London lawyers of Irish extraction, Gerald Geoghegan and Henry Hamilton Lawless, appeared on Deeming's behalf.[192] Geoghegan and Lawless complained of how little time they had had to prepare their case. The evidence consisted only of reports drawn from the public press and two short telegrams that had passed between Deeming's solicitors in London and Lyle in Australia.[193] Deeming's funds were running low, and Lyle had scrambled to acquire a free copy of Justice Hodges' Notes of Evidence to cable to London as late as the day before the Privy Council hearing.[194]

Geoghegan said that Deeming's petition did not raise a question of law. Rather, he asked that his client's execution be postponed on the ground that there were affidavits from Deeming's brother and sister-in-law on the subject of his family history of insanity, which were still on their way to Australia and had not been considered by the jury.[195] The *Riel* case, which features in Chapter Six, was cited as precedent for granting a temporary respite in such cases. [196] The petition as framed by Geoghegan was far less ambitious than Lyle's sweeping indictment of *M'Naghten*. Whether this was because Geoghegan and Lawless dismissed Lyle's approach as

[191] Testimony of Evan Williams, Judge's Notes of Evidence, *R v Deeming*, p. 25, PROV VPRS 264/P0000/21.
[192] 'Deeming's Petition to the Privy Council: The Application Refused.' *The Manchester Guardian (1828-1900);* May 20, 1892; ProQuest Historical Newspapers: *The Guardian* (1821-2003) and *The Observer* (1791-2003) pg. 8; "CAREER OF MARSHALL HALT." *Observer* (Adelaide, SA: 1905-1931) 2 Nov 1929: 15. Web. 30 Jul 2015 <http: //nla.gov.au/nla.news-article165613478>.
[193] 'Deeming's Petition to the Privy Council: The Application Refused.'*The Manchester Guardian (1828-1900);* May 20, 1892; ProQuest Historical Newspapers: *The Guardian* (1821-2003) and *The Observer* (1791-2003) pg. 8.
[194] Lyle to the Attorney General, 18 May 1892, PROV, VPRS 264/P0000/21.
[195] The truth of this testimony was widely disputed, once reportedly described by a medical attendant of the Deeming family in England as a "tissue of lies." See: 'The Windsor Murder.' (1892, May 17). *The Daily News* (Perth, WA: 1882-1950), p. 3. Retrieved January 30, 2014, from http: //nla.gov.au/nla.news-article76459039.
[196] 'Deeming's Petition to the Privy Council: The Application Refused.'*The Manchester Guardian (1828-1900);* May 20, 1892;ProQuest Historical Newspapers: *The Guardian* (1821-2003) and *The Observer* (1791-2003) pg. 8.

quixotic or because there had been a breakdown in communication among the solicitors, Deeming's petition was flimsy. As might be expected, the Judicial Committee affirmed their general reluctance to accept appeals in criminal cases, and chastised Geoghegan for failing to argue that there had been any irregularity in the proceedings of Deeming's trial. In their eyes, the appeal was no more than a complaint that the jury had been persuaded of Deeming's sanity and his guilt.

It was well-established in Privy Council jurisprudence that the Committee would accept the factual determinations of lower courts.[197] Although the Judicial Committee did have the power to order cases to be retried and to instruct courts to consider new evidence or to disregard faulty evidence, this was virtually unheard of in criminal cases.[198] As Geoghegan could not convince them that there was a point of law at issue, it was "impossible therefore to suppose that any such application as the present one could be successful."[199] Commenting on the Privy Council decision, one Australian newspaper praised the Council for declining to interfere. The reporter held, with some pride, that Deeming's trial in Australia had been conducted "with as much care and regularity as those in the United Kingdom." Deeming was one of a class of "moral monstrosities" – criminal lunatics, but lunatic "in one sense of the word" only.[200] Whatever that sense of 'lunatic' was, it made Deeming loathsome, but responsible and punishable under imperial law.

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[197] Frank Safford and George Wheeler, *The Practice of the Privy Council in Judicial Matters: In Appeals from Courts of Civil, Criminal and Admiralty Jurisdiction in the Colonies, Possessions, and Foreign Jurisdictions of the Crown, and in Appeals from Ecclesiastical and Prize Courts...* (London, 1901), 732.
[198] *An Act for the Better Administration of Justice in His Majesty's Privy Council* (1833), 3 & 4 Gulielmi IV Cap. XLI, s. 8.
[199] 'Judgment of the Lords of the Judicial Committee of the Privy Council on the Petition for Special Leave to Appeal of Frederick Deeming, from the Colony of Victoria'; delivered May 19th 1892, [printed], PROV, VPRS 264/P0000/21.
[200] 'The Privy Council and the Deeming Appeal.' (1892, June 28) *Wagga Wagga Advertiser* (NSW: 1875-1910), p. 4. Retrieved January 30, 2014, from http: //nla.gov.au/nla.news-article101861547.

Deeming and his counsel must have known that their chances of securing a reprieve were slim. On 17 May, Lyle wrote to the Governor to inform him that Deeming wished to donate his brain to science after his death, so that it could be dissected and studied.[201] Earlier that week, the Victorian branch of the British Medical Association had written to the Attorney General to express its official interest in acquiring Deeming's brain.[202] Two days before the execution, the Attorney General declared that the British Medical Association would be disappointed, and would not receive the brain. The official justification for withholding it was that Deeming should be treated the same as any other executed criminal.[203] In reality, it is more likely that the government was eager to put the Deeming matter to rest after half a year of relentless controversy and media attention. Perhaps the Governor and the Attorney General also hoped to avoid Lyle's 'lesson' about the risks of mistaking the insane for the evil. Havelock Ellis, for one, was appalled at the Victorian government's refusal to permit scientific study of Deeming's brain. "The action of a government in such a sense," he wrote, "can only be regarded as due to a fear that its mistakes will be exposed, and since such action conduces to mistakes in the future, it is most reprehensible."[204]

Deeming wrote his final will and testament a few days before the execution. He bequeathed most of his property, including his writings, to Marshall Lyle. He also left Lyle "a drawing to enable him to secure money buried in Lamu, East Africa."[205] He thanked the governor of the Gaol, J. Shegog, for his kindness, and left valuable items, a flask, rings, gold

[201] Lyle to the Governor, 17 May 1892, PROV, VPRS 264/P0000/21.
[202] Augustus Kenny of the Victorian branch of the British Medical to the Secretary of the Crown Law Office, 12 May 1892, PROV VPRS 264/P0000/21.
[203] 'The Windsor Murderer.' (1892, May 23). Bendigo Advertiser (Vic.: 1855-1918), p. 3. Retrieved January 30, 2014, from http: //nla.gov.au/nla.news-article89018793.
[204] Ellis, *The Criminal*, 405.
[205] The Last Will and Testament of Frederick Bailey Deeming, PROV VPRS 7591/P2 Wills, unit 205, 51/087.

cufflinks, a plot of land, to him and to a number of warders.[206] Reverend H.F. Scott, who had attended Deeming in jail, received a Bible, Deeming's brother in London, a watch, and nothing for Kate Rounsefell but a copy of an earlier will (in which she had been left a percentage of his estate) "as a token of the lies she told in court."[207]

Deeming was hanged at Melbourne Gaol, precisely on schedule, at 10 a.m. on 23 May 1892. The *Argus* published a long piece on the execution, lingering over details of Deeming's restless last night and his terrible morning. He made no grand statement before he died. Some observers heard him cry 'no' while others claimed he had said 'Lord receive my spirit', but most noticed only unintelligible gurgling.[208] The reverend, Scott, gave a long interview. Scott told the paper that Deeming was "the most complex human problem [he] ever attempted to solve."[209]

Deeming was dead, but the problem of determining criminal responsibility in murder cases persisted. Just over a year later, in September of 1894, many of the same men –lawyers, doctors, colonial administrators – found themselves embroiled in a case that was slightly less sensational, but just as bloody. Marshall Lyle did not give up on his campaign to change *M'Naghten* through the Australian courts. The case of Martha Needle, a bold and profligate killer, presented new opportunities for Lyle to argue for sweeping criminal law reform.

Martha Needle was born in 1864. She was raised by her mother, Mary, and her stepfather Daniel Foran, a labourer, in Port Adelaide. Her mother was a drunk who Martha claimed had

[206] Deeming had written Shegog a letter two days before the execution thanking him for his exceptional kindness. See: Deeming to J. Shegog, 21 May 1892, SLV MS 12158.
[207] The Last Will and Testament of Frederick Bailey Deeming, PROV, VPRS 7591/P2 Wills, unit 205, 51/087.
[208] 'The Windsor and Rainhill Murders.' (1892, May 24).*The Argus* (Melbourne, Vic.: 1848-1957), p. 5. Retrieved January 30, 2014, from http: //nla.gov.au/nla.news-article8422925.
[209] 'The Windsor and Rainhill Murders.' (1892, May 24).*The Argus* (Melbourne, Vic.: 1848-1957), p. 5. Retrieved January 30, 2014, from http: //nla.gov.au/nla.news-article8422925.

tried to slit her throat as a girl.[210] Detectives could never prove the attempted murder, but did discover that Foran had been convicted of indecently assaulting Martha when she was a child.[211] Martha married Charles Needle when she was only seventeen. The couple settled in the Melbourne suburb of Richmond and had three daughters, Mabel, Elsie, and May. Within six years, all three children and Charles were dead, struck by a mysterious illness that caused severe vomiting. Martha took up with a new man, Otto Juncken. He and his brother, Louis, moved into her home in Richmond. Soon Louis was dead, a third brother, Herman, was ill, and Martha Needle had been arrested for murder.[212] She had dosed all of her victims with 'Rough-on-Rats', a commercially available rat poison.[213]

Needle's case was heard by Justice Hodges. She was under the supervision of Andrew Shields at Melbourne Gaol. And, unsurprisingly, the Governor, Attorney General, and Crown Solicitor were bombarded with letters, memos and petitions from Marshall Lyle, her solicitor. In a letter to the Governor, Lyle described Needle as belonging to the notorious "woman poisoner class", a group consisting of thousands women known to be insane but put to death anyway by cruel governments.[214] These arguments recalled those that Lyle had made about Deeming and his instinctive criminality. However, by the time of Needle's case, Lyle had broadened his programme of legal reform to include the abolition of all capital punishment. In 1894, he had become a special correspondent of the Howard Association for the Prevention of Crime, a British

[210] Memo of A. Shields, 12 September 1894, Martha Needle Capital Case File, 1894/6254, PROV VPRS 264/P0001/02,.
[211] Report of Detective Constable Priest, South Australian Police, 17 September 1894, PROV, VPRS 264/P0001/02, Martha Needle Capital Case File, 1894/6254.
[212] Report of Sergeant A.E. Whitney and Constable R. Fryer of the Melbourne Police, 28 September 1894, Martha Needle Capital Case File, 1894/6254, PROV VPRS 264/P0001/02.
[213] Testimony of George Miller, Pharmacist's Assistant, Judge's Notes of Evidence, *R v Needle*, 24 September 1894, Martha Needle Capital Case File, 1894/6254, PROV VPRS 264/P0001/02.
[214] Lyle to the Governor, 5 October 1894, Martha Needle Capital Case File, 1894/6254, PROV VPRS 264/P0001/02.

penal reform society dedicated to the modernisation of criminal law and penal practices, and particularly committed to abolishing the death penalty.[215]

This mission of the Howard Association, founded in 1866, was "the promotion of the best methods of the Treatment and Prevention of Crime and Pauperism."[216] Lord Brougham, the legal reformer who had led the overhaul of the Judicial Committee decades earlier, headed its first list of patrons, although he died only two years later.[217] The members of the Howard Association were broadly sympathetic to criminal anthropology, and to the idea that criminality was at least partially hereditary and biological. They campaigned for more lenient, reformatory sentencing on the ground that criminals were dangerous, surely, but also sick, and deserving of compassion.

Lyle had come, it seems from the archive, to his general rejection of capital punishment from a deep discomfort with the insanity defence. Like him, the Howard Association also routinely connected penal reform, capital punishment and insanity. By the end of the century, the laws surrounding criminal insanity were in such disarray and disrepute that the Association used them to sow more general doubt about the legitimacy of capital punishment. "If public opinion is not yet quite prepared to demand the Abolition of Capital punishment," the author of the 1896 Annual Report commented, "there can be no reasonable doubt that the Law of Murder, as relating to Homicidal Insanity, ought to be altered; for its present state is the occasion of scandals."[218]

Capital punishment and the insanity defence had long been intimately connected.[219] Late-nineteenth-century criminal anthropology – and its suggestion that many, or even all, criminals

[215] *The Howard Association, Annual Report,* October 1894, 20.
[216] William Tallack, *Howard Letters and Memories* (London: Methuen & Company, 1905), 144.
[217] Ibid., 145.
[218] *The Howard Association, Annual Report,* October 1896, 17.
[219] Radzinowicz and Hood, *A History of English Criminal Law and Its Administration from 1750, Vol. 5, The Emergence of Penal Policy*, 681.

suffered from physical and moral weaknesses that predisposed them to criminal behaviour – cemented the bond. Capital punishment seemed increasingly cruel as criminals came to appear, to many, more unlucky than evil. One former secretary of the Association, William Tallack, described his thoughts as he walked along a hallway, thickly padded to prevent inmates from dashing their heads against the stone walls, in a ward for weak-minded prisoners at a London prison:

> Those prisoners had committed serious crimes, but, as the writer noticed the various obvious signs of physical and mental mal-development in them, the question forced itself upon him: 'Supposing I had been born under such defective bodily conditions as these men, and had experienced their subsequent privations and temptations, should not I also have probably committed some act which had brought me, as a felon, instead of a visitor, to this place?'[220]

Lyle took up the Howard Association's position that all criminality, or at least most of it, was caused by a pernicious combination of hereditary weakness and an environment conducive to vice and violence. Lyle had learned from his failure in the Deeming and Colston cases. He knew that convincing the authorities that Needle was insane would not necessarily save her. He even accepted that "there are greater reasons for punishing some of the insane, than the sane", although never for putting either the sane or the insane to death.[221] Lyle was also careful to point out the social benefits of a more 'scientific' approach to criminal insanity, shying away from the purely principled arguments he had made in *Deeming*.[222] In his many letters about Needle, he repeatedly mentioned the importance of scientific jurisdiction over the criminal insane in efforts to improve public safety. "We believe," he wrote to Arthur Akehurst at the Crown Law Department, "that there can be no successful warfare against crime and criminals, until the

[220] Tallack, *Howard Letters and Memories*, 258–9.
[221] Lyle to the Governor, 5 October 1894, Martha Needle Capital Case File, 1894/6254, PROV VPRS 264/P0001/02.
[222] Thomas A. Green describes a similar shift in twentieth-century American legal thinking about criminal responsibility in "Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice", *Michigan Law Review* 93 (1995): 1915-2053.

principle be recognised that the scientific examination of the dangerous members of society is the duty of the State, assisted by intelligent officers."[223]

Martha Needle was found guilty of the murder of Louis Juncken, and sentenced to death.[224] The sentence was carried out, despite protests from Lyle and other supporters, on 23 October 1894. Otto Juncken, Louis Juncken's brother, believed her innocent to the last, and was a frequent visitor during her time in the Gaol. Needle went calmly, standing proudly on the trap door outside the condemned's cell. One reporter described her as "an inscrutable psychological problem" and a "callous, hardened criminal and a woman of the very worst type."[225]

Lyle tried to use *Colston*, *Deeming*, and *Needle* as instruments to advance what he considered to be a humane, scientific, modern approach to the criminal law. In 1895, he reported to the Howard Association on Australia's continued affection for the death penalty. "The striking fact is," he wrote, "that murders have increased, notwithstanding that the scaffold has been so busy and the death-sentence has been so rigorously carried out, and its supposed 'deterrent' horrors have been minutely chronicled and published throughout the length and breadth of the land."[226] Lyle was a special correspondent of the Association until 1898, after which it seems that his interests finally drifted away from criminal policy.[227]

Deeming's case and others like it forced imperial lawyers and administrators to consider and articulate fundamental questions about the nature and jurisdiction of criminal justice in the empire. These cases demonstrate the depth of judicial anxiety about moral insanity, and help to

[223] Lyle to the Crown Law Department, 9 October 1894, Martha Needle Capital Case File, 1894/6254, PROV VPRS 264/P0001/02.
[224] Judge's Notes of Evidence, *R v Needle*, 24 September 1894, Martha Needle Capital Case File, 1894/6254, PROV VPRS 264/P0001/02.
[225] 'Execution of Martha Needle.' (1894, October 23). *Clarence and Richmond Examiner* (Grafton, NSW: 1889-1915), p. 5. Retrieved January 31, 2014, from http: //nla.gov.au/nla.news-article61264915.
[226] *The Howard Association, Annual Report,* October 1895, 18.
[227] *The Howard Association, Annual Report,* October 1899.

explain the extraordinary persistence of the *M'Naghten* rules in common law jurisprudence. Australian legal authorities were engaged in a complex negotiation between their loyalty to common law jurisprudential principles, and their practical need for expedient trials and public order.

These cases also reinforce the importance of the government executive in the administration of justice in the most serious cases. Thomas Green writes that, today, we have allowed our self-consciously 'progressive' approach to criminal sentencing to "disguise from ourselves how little we have confronted the implications of our doubts [about criminal responsibility] at the trial phase."[228] A similar dynamic was at work in the criminal law of the British empire, with the judicial and executive branches of colonial governments working in tandem to manage their growing doubts about the ability of British courts to determine responsibility in the empire. Even though the commutation of sentences did not generate binding legal precedent, the fact that judges, juries, and lawyers knew that the possibility of an executive pardon existed affected how they argued cases, heard them, and decided them.

Legal authority in the British empire was continuously being tested, as lawyers as ambitious and stubborn as Lyle attacked the principles of criminal responsibility, the bounds of jurisdiction, and the authority of colonial law within the imperial framework. They did not often win outright, but in compelling authorities to justify themselves in response to legal challenges in capital cases, they forced to the surface the logic of criminal justice that had lurked, unseen, in the shadows.

The focus of the dissertation now shifts from medical madness to cultural incompetence. The

[228] Thomas A. Green, "Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice", *Michigan Law Review* 93 (1995), 1917.

next two chapters build on the evocations of primitivism and atavism that accompanied debates about the existence of moral insanity. In the late nineteenth century, colonial officials imagined that there were legions of 'primitive' peoples living under British rule. If moral insanity was a reversion among afflicted whites to a more 'savage' state, then how should colonial officials respond to colonized peoples whom, many believed, were perpetually in that same state of savagery? Victorian lawyers and administrators might have told themselves that spectacularly morally insane men like Deeming or Bigg were of a rare and terrible breed. But the many connections between insanity and primitivism, and between both of these concepts and legal irresponsibility, in nineteenth-century British thought could not be denied.

CHAPTER FIVE
A SAVAGE HEART: CULTURE AND CULPABILITY IN THE VICTORIAN WORLD

Jimmy Governor and his friend, Jacky Underwood, broke down the front and back doors of the Mawbey house in Breelong, in the interior of the Australian colony of New South Wales, one late July night in 1900.[1] They came upon Sarah Mawbey, her daughters Grace and Hilda, her sons Percival, Jack and Bertie, her niece Elsie Clarke and Helen Kerz, a teacher who boarded with the family. Sarah's husband and older sons were staying at the family's old homestead, while the women had moved to the new. The intruders slashed Sarah, Elsie and Percy with tomahawks and clubbed them with nulla-nullas while Hilda, Grace and Helen escaped through the window.[2] Bertie managed to alert John Thomas Mawbey, Sarah's husband and the children's father, of the attack and he came running, boots unlaced and screaming for help. He found Grace and the teacher, Helen, lying near a creek. He scooped up Grace, bloodied and moaning, and carried her to the house. John found Hilda's body sometime later in the creek. Grace, Hilda, Percival and Helen died that night. Sarah Mawbey survived only long enough to name her attackers.[3]

Jimmy Governor was a man of mixed Aboriginal and European descent (he was often called a 'half-caste' in the Australian press) who had married a white woman, Ethel Page, in 1898. Page was sixteen years old and five months pregnant when she and Jimmy married.[4] Governor had grown up in an Aboriginal community, at the fringes of Australian settler society. Like many Aboriginal men, he worked odd jobs for rural white farmers in order to support his

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[1] FEARFUL OUTRAGE BY BLACKS." *The Argus* (Melbourne, Vic.: 1848-1957) 23 Jul 1900: 5. Web. 30 Mar 2015 <http: //nla.gov.au/nla.news-article9548973>.
[2] A nulla-nulla or waddy is an Aboriginal club or cudgel used in hunting and combat.
[3] "THE BREELONG MURDERS." *Nepean Times* (Penrith, NSW: 1882-1962) 28 Jul 1900: 3. Web. 30 Mar 2015 <http: //nla.gov.au/nla.news-article101351176>.
[4] Katherine Ellinghaus, *Taking Assimilation to Heart: Marriages of White Women and Indigenous Men in the United States and Australia, 1887-1937* (Lincoln: University of Nebraska Press, 2006), 153.

family.[5] At the time of the murders, he and his brother, Joe, and his friend Jacky, had been hired to fix the Mawbeys' fence. Jimmy had recently clashed with John Mawbey over his pay and rations.[6] After the killings, police caught Jacky Underwood, but Jimmy and Joe went on the lam. For months, the brothers eluded the scores of policemen and trackers despatched to capture them.[7] They robbed and killed as they went, until Jimmy was arrested and Joe, shot dead in October.[8]

At his trial, Governor gave a statement describing the torment he had suffered as a man with European and Aboriginal ancestry married to a white woman.[9] On the evening of the Breelong murders, Jimmy explained that he had gone to the farmhouse to confront Sarah Mawbey. "Did you tell my missus that any white woman who married a blackfellow ought to be shot? […] Did you ask her what sort of nature did I have – black or white?", Jimmy asked. Sarah Mawbey and Helen Kerz laughed at him "with a sneering laugh," and Kerz said, "Pooh, you black rubbish, you want shooting for marrying a white woman."[10] At that, Governor told the court that he started hitting the women, that he could not stop, and that he could not remember what had followed.

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[5] Ibid., 156.

[6] "BREELONG MURDERERS." *The Brisbane Courier* (Brisbane, Qld.: 1864-1933) 28 Jul 1900: 9. Web. 30 Mar 2015 <http: //nla.gov.au/nla.news-article19071636>.

[7] "THE BREELONG MURDERS." *National Advocate* (Bathurst, NSW: 1889-1954) 26 Jul 1900: 2. Web. 30 Mar 2015 <http: //nla.gov.au/nla.news-article156776319>.

[8] There were rumours that Joe Governor's brain had been sent to a scientist at the University of Sydney so that he could study the differences between European and Aboriginal criminal brains. ""JOE GOVERNOR'S BRAIN."." *Evening News* (Sydney, NSW: 1869-1931) 17 Dec 1900: 7. Web. 30 Mar 2015 <http: //nla.gov.au/nla.news-article114004807>.

[9] Marriages between white women and Aboriginal men in Australia were deeply taboo. Katherine Ellinghaus argues that these marriages were even more stigmatized than other marriages between Europeans and non-Europeans – they were "at the bottom of the scale…the extreme by which other interracial marriages were measured." Ellinghaus, *Taking Assimilation to Heart*, 149.

[10] "The Breelong Murders." *Warwick Examiner and Times* (Qld.: 1867-1919) 28 Nov 1900: 3. Web. 30 Mar 2015 <http: //nla.gov.au/nla.news-article82161942>.

Governor's defence counsel was Francis Stewart Boyce, an ambitious young barrister who would make his name in the case before going on to become a leading divorce lawyer, Supreme Court judge and politician.[11] Boyce argued at trial that Governor had been terribly provoked by Sarah Mawbey and Helen Kerz, and so that he should only be considered guilty of manslaughter, not murder. Boyce's defence of Jimmy Governor rested on an interpretation of Governor's liminal racial identity. "Here was a man of no high feeling or high sentiment," Boyce told the jury, "a rover under the roof of Heaven, a man who by his environment and nature had not learned to control himself as other men had. Could we, who had neglected, despised, and taunted the aboriginals, expect them to exercise the ordinary human control[?]"[12] Boyce emphasized Governor's aboriginality to suggest that his powers of self-control were limited by his upbringing and heritage. He was a member of an ignoble people whom white Australians had, ungenerously, failed to uplift.[13]

But Governor was not only Aboriginal; he was also, to some degree, white, and had married a white woman. This made Governor "a man of sensitive nature – a better man than most blacks… and the taunts hurled at his wife were doubly felt by him."[14] Governor's rage at the insults against his wife betrayed his European sense of manly honour and chivalry. When Helen Kerz called him "black rubbish", Governor could forbear no longer – "the savage heart,

[11] Martha Rutledge, 'Boyce, Francis Stewart (1872–1940)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http: //adb.anu.edu.au/biography/boyce-francis-stewart-5320/text8985, published first in hardcopy 1979, accessed online 25 July 2015.
[12] "THE BREELONG TRAGEDY." *The Sydney Morning Herald* (NSW: 1842-1954) 24 Nov 1900: 11. Web. 30 Mar 2015 <http: //nla.gov.au/nla.news-article14377033>.
[13] This interpretation of Jimmy Governor's crime had a long life. Frank Clune, in his 1959 account of the case, wrote that Jimmy Governor "will go down in Australian history as a dark man who had a white man's pride." Clune also argued that white prejudice and a failure to uplift Aboriginals contributed to Governor's anguish, and to his crime. Frank Clune, *Jimmy Governor: The True Story* (Melbourne: Horwitz Publications, Inc., 1959), 13.
[14] "THE BREELONG TRAGEDY." *The Sydney Morning Herald* (NSW: 1842-1954) 24 Nov 1900: 11. Web. 30 Mar 2015 <http: //nla.gov.au/nla.news-article14377033>.

tainted with the thirst of blood, burst through reason."[15] In Boyce's estimation, Governor had been a sitting duck: a husband with the noble sentiments of a white man, and the impulsivity and proclivity to violence of an Aborigine.[16] The jury were unmoved. They deliberated for only ten minutes before returning a verdict of guilty on the charge of murder.[17]

On 1 January 1901, the Australian colonies achieved independence as the federated Commonwealth of Australia. [18] Governor, meanwhile, waited for death in a jail cell in Sydney. His case had cast a pall over the birth of the new nation. One journalist complained that Governor's hanging might dampen the festivities by reminding white Australians that their civilization rested on the violent subjugation of 'savage' aboriginal peoples.[19] "Truly," he wrote,

> [It is] an unfortunate period for the vindication, to the extreme degree of the laws of white civilisation! It is not intended for one moment to forget the enormity of this semi-savage's crimes; but those at all acquainted with the aboriginal races will recognise that they have not the same appreciation of barbaric acts as the superior and disciplined white races. The Breelong murders were inexplicable to civilised intelligence. If a white man were the author of such atrocities, and without more motive, then he would be put down as a homicidal maniac.[20]

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[15] "THE BREELONG TRAGEDY." *The Sydney Morning Herald* (NSW: 1842-1954) 24 Nov 1900: 11. Web. 30 Mar 2015 <http: //nla.gov.au/nla.news-article14377033>.

[16] Jimmy Governor's motives are a matter of scholarly debate. Some argue, for example, that the killings were in response to a labour dispute between Governor and the Mawbeys, who paid him poorly for his work. Labour exploitation of Aborigines by their white employers was widespread. See: Ellinghaus, *Taking Assimilation to Heart*, 159.

[17] "THE BREELONG TRAGEDY." *The Sydney Morning Herald* (NSW: 1842-1954) 24 Nov 1900: 11. Web. 30 Mar 2015 <http: //nla.gov.au/nla.news-article14377033>.

[18] Jimmy Governor's case is among the most famous in the history of Australia. Recent works on Jimmy Governor's life and trial include: Clune, *Jimmy Governor*; Brian Davies, *The Life of Jimmy Governor* (Ure Smith, 1979); Maurice John Garland, *Jimmy Governor: Blood on the Tracks* (Melbourne: Brolga Publishing, 2009); Laurie Moore and Stephan Williams, *The True Story of Jimmy Governor* (Allen & Unwin, 2001). Jimmy Governor's case also inspired a fictionalized account that was nominated for the Booker Prize. See: Thomas Keneally, *The Chant of Jimmie Blacksmith* (Angus and Robertson, 1972). A film of the same name was released in 1978.

[19] In this chapter, I often use the Victorian categories of 'savage', 'primitive' and 'civilized.' This is because my goal is to describe how imperial Britons thought about their subjects, and their place in criminal law jurisprudence and practice. These terms are distasteful but representative of that worldview – but please imagine that they are all bracketed with scare quotes throughout. I've occasionally omitted the quotation marks, but only to avoid clutter.

[20] "Jimmy Governor." *Narromine News and Trangie Advocate* (NSW: 1898-1955) 14 Dec 1900: 3. Web. 30 Mar 2015 <http: //nla.gov.au/nla.news-article120164417>.

Queen Victoria died on 22 January 1901. Three days later, Jimmy Governor walked, pressing a cigarette between his lips, to the drop.[21]

Indigenous defendants, including men of mixed heritage like Jimmy Governor, troubled colonial officials charged with applying the 'laws of white civilization' to people whom Victorian racial thinking explicitly excluded from that civilization. At Governor's trial, Boyce argued that his client's "savage heart, tainted with the thirst of blood, burst through reason," and made it impossible for him to control himself in the face of Sarah Mawbey and Helen Kerz's abuse. [22] Boyce might easily have substituted the word 'mind' for 'heart'. In effect, he was arguing that his client was cognitively impaired because of his aboriginal heritage, and that it would be unjust for his judges to expect him to think, feel and behave as a civilized man would. For Boyce, Governor's aboriginality was a mental disability, and one that the common law ought to regard as analogous to insanity. In an 1865 article, Robert Dunn, a British ethnologist, articulated the imagined connection between race and cognitive ability much more crudely when he argued for the similarity "between the narrow, low, and receding forehead in the skull of the poor idiot or degraded Bushman."[23] "So striking and so great, indeed," Dunn continued, "is the intellectual inferiority of the Bushman, the Australian, and the Negro to that of the Indo-European, that their claims even to our common humanity have been denied to them."[24]

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[21] "Jimmy Governor Executed." *The Richmond River Herald and Northern Districts Advertiser* (NSW: 1886-1942) 25 Jan 1901: 2. Web. 30 Mar 2015 <http: //nla.gov.au/nla.news-article127880633>.
[22] "THE BREELONG TRAGEDY." *The Sydney Morning Herald* (NSW: 1842-1954) 24 Nov 1900: 11. Web. 30 Mar 2015 <http: //nla.gov.au/nla.news-article14377033>.
[23] Robert Dunn, "Some Observations on the Psychological Differences Which Exist Among the Typical Races of Man," *Transactions of the Ethnological Society of London* 3 (1865): 12.
[24] Ibid., 19. Dunn, however, was a monogenist and believed that humanity had a single biological origin. On the conflict between monogenism and polygenism in Victorian anthropological thought, see: Stocking, *Victorian Anthropology*.On Dunn, see: Graham Richards, 'Dunn, Robert (1799–1877)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [http: //www.oxforddnb.com.ezp-prod1.hul.harvard.edu/view/article/8280, accessed 16 Oct 2015]

Although Boyce's defence of Governor failed, a defendant's culture could, in fact, operate in common law criminal courts in a way that was analogous to criminal insanity. Defendants' lawyers argued that their clients ought not be held responsible for their actions because their culture constituted a kind of mental, and moral, handicap. Sometimes, these arguments, which involved the proffering of cultural evidence against a defendant's mental or moral guilt, succeeded. Even though there was no formal 'cultural defence' under British criminal law, culture-based defences were common. Victorian Britons regularly used a person's culture, her religion, race or ethnicity, as a proxy for her autonomy, rationality, and competence. This cultural dimension of responsibility runs just under the surface of every criminal case. As described in Chapter Two, T.J. Maltby argued that he was responding reasonably to Indian cultural cues that revealed that his bearers were plotting his death when he killed the unfortunate *munsif*. Maltby's plea was a species of cultural argument, in which he tried to shed the British standard of reasonableness that applied by default in English common law jurisprudence. When a defendant was actually a member of an indigenous community, rather than a white man who had declared himself culturally proficient in the way that Maltby did, cultural evidence had much more valence. British authorities heard many cases like Governor's in the second half of the nineteenth century, and many defendants, unlike Governor, managed to avoid judicial execution. These defendants, or their advocates, convinced white judges, jurors and politicians that indigenous people, with their 'savage' hearts and minds, were not the kind of subjects presumed in common law jurisprudence.

Previous chapters considered the challenge posed to jurisprudential understandings of criminal responsibility by nineteenth-century shifts in the scientific approach to insanity. Moral insanity, in particular, seemed to suggest that those who committed violent and disturbing crimes

were, almost by definition, the victims of mental pathologies that obviated their responsibility for their actions. The rise of criminal anthropology in the last decades of the century bolstered the credibility of moral insanity by positing that criminality in general was the product of biological predispositions. Chapter Three and Chapter Four alluded to the fact that many advocates for the existence of moral insanity believed that the condition was atavistic – that is, that it arose when a sufferer's brain reverted to an earlier evolutionary stage. This chapter takes up that strand of Victorian thinking about cognitive ability and its connection to race, or culture, and the effects of Victorian racism on the jurisprudence of criminal responsibility.

Late-Victorian colonial officials attempted to square their competing beliefs in the mental weakness and impulsivity of indigenous peoples, and their mission to civilize and discipline them under British criminal law. Jurists and others imagined that indigenous culture could prey on an indigenous person's mind. There was a clear, and for many colonial officials, distressing, link between indigeneity and diminished criminal responsibility. This chapter considers how the jurisprudential understanding of mental capacity responded to a diverse imperial population. All but one of the cases analysed took place in the Australian colonies, none of the defendants was white. Of the Australian cases, one involved an Indian defendant, one a Chinese defendant, and the others, defendants of Aboriginal or of mixed Aboriginal and European descent. The other case, concerning a property question that hinged on the criminality of suicide in India, was appealed from Bengal to the Privy Council.

The nature and degree of a defendant's supposed mental impairment depended on his particular culture, and on where white Britons – obsessed as they were with hierarchies of civilization and theories of racial degeneration – placed his people on the scale between abject savagery and (white) civilization. Social, economic and political conditions were different in

Bengal and Victoria, or New South Wales. As an Aboriginal labourer, Jimmy Governor had little in common with the widow of an Indian aristocrat. However, despite these differences of culture, class, and crime, the question of the amenability of indigenous people to common law justice remained constant in British judicial discourse.

Occasionally, indigenous defendants succeeded in convincing British authorities that they had committed their crimes while insane.[25] However, most defendants, whether in Britain or in the empire, could not meet the strict definition of insanity set by *M'Naghten*. Despite their inability to pass the *M'Naghten* test, British authorities could be reluctant to apply common law punishments to indigenous defendants. Often, government officials' solution was to mitigate a harsh sentence after it had been passed, rather than to encourage judges or jurors to deviate from the strict application of English law. Prisoners whom authorities believed suffered from a race-based mental deficit could have their sentences respited, just as insane prisoners could find themselves quietly diverted away from the gallows and toward the asylum. Lawyers who raised cultural evidence at trial in knew that their client might secure a commutation even if he were convicted. Their impassioned courtroom speeches were intended to sway politicians and the general public as much as the jury. A formal cultural defence was not necessary in order for cultural considerations to play a critical role in the British colonial justice.

Many Victorian scientists and social theorists denigrated supposedly 'savage' people for their weak wills, ignorance and uncontrollable passion. Indigenous people seemed, if forced to live under the authority of a British legal system, to have little chance of avoiding crime. They were, in the opinion of some white Victorians, the victims of biological legacy that they could not deny and of a legal order to which they were hopelessly incapable of adapting. In *The Pathology of Mind*, Maudsley vividly encapsulated the belief among some Victorians that the

[25] *Queen Empress v Lakshman Dagdu* (1886), Bombay Law Reports, 512-519.

non-European peoples of the empire were doomed to fall afoul of 'civilized' prohibitions against violence:

> Being the fit product of his time and place, and his immoral doings the right things for him to do then and there, he [the 'savage'] is necessarily unfitted to feel, think, and act in the vastly more complex conditions of civilized existence, where his natural ways and doings necessarily cause him to be treated as noxious vermin. A precocious savage who had the ill fortune to develop a moral sense among savages would probably have no greater chance of survival than a tiger which developed a sudden horror of bloodshed; and a low savage in a civilized society must needs fare almost as badly as a carnivorous animal would fare in a land of herbivorous animals which it was forbidden to eat.[26]

Judges and government officials, missionaries and lawyers, worried that indigenous defendants lacked the capacity to understand the moral wrongness of their actions, and to control their violent impulses. Even if they understood, many Britons wondered if it could really be just to expect the same degree of self-control, thoughtfulness and forbearance from 'savages' as the law demanded from civilized men. Others parried that the only way to bring civilization and justice to Britain's colonial subjects was to enforce British law without exception, even if applying the law in such cases involved, perversely, abandoning traditional understandings of *mens rea* and guilt.[27]

Criminal responsibility was, especially when it intersected with questions about the amenability of colonial populations to judgement under British law, a problem of imperial governance. The great majority of people living under British rule in the late nineteenth century were not white, not Protestant, and not convinced of the unassailable superiority of the common law. Throughout the empire, indigenous populations resisted their subjection to English legal discipline. Colonial officials around the British world were generally willing to negotiate with

[26] Maudsley, *The Pathology of Mind: A Study of Its Distempers, Deformities, and Disorders*, 29.
[27] On exceptions under English law, and on common law as a tool of civilization, see: Damen Ward, "A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia," *History Compass* 1, no. 1 (January 1, 2003): 1–24.

subject peoples as to the legal regulation of civil matters like marriage and land ownership. Crime, however, was different. When it came to violence, either interpersonal or juridical, British authorities were keen to assert the supremacy of British law, and colonial authority. This was especially true in the context of killings.

Katherine Luongo, writing about witchcraft in colonial Kenya, notes that lesser crimes might be overlooked, but "a dead body was evidence of the sort of *public* disorder and challenge to state authority that could not be ignored."[28] And yet, colonial authorities were often loath to respond judicially to disorder, even killings, in a way that appeared to compromise the integrity of common law jurisprudence. A dead body was a challenge to state authority, but also an opportunity for a colonial government to meet that challenge with a performance of forbearance, administrative competence, and justice. By the end of the nineteenth century, the primary project of British rule had mutated from conquest to pacification. The norms of judicial punishment had, in Foucauldian terms, shifted from spectacle to discipline.[29] British criminal law had to be supreme, but it also had to appear to be measured and just.

The diary of John Buckley Castieau, the governor of Melbourne Gaol in the late nineteenth century, offers some insight into the importance of propriety in British judicial punishment. In August of 1875, two Japanese commissioners visited the jail while they were in Melbourne to present at the Melbourne Intercolonial Exhibition.[30] Castieau and his staff were "anxious to share

[28] Katherine Luongo, *Witchcraft and Colonial Rule in Kenya, 1900–1955* (Cambridge University Press, 2011), 104.
[29] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1977), 8.
[30] Peter H. Hoffenberg, "'Nothing Very New or Very Showy to Exhibit'?: Australia at the Great Exhibition and After," in *Britain, the Empire, and the World at the Great Exhibition of 1851*, ed. Jeffrey A. Auerbach and Peter H. Hoffenberg (Aldershot, Hampshire: Ashgate Publishing, Ltd., 2008), 115.

in the honor & glory of helping to escort the distinguished foreigners."[31] Castieau proudly showed the visitors the labour yard, where male prisoners broke stones and ate their rations at long tables. He took them to see "the women at work making corn sacks & doing all kinds of needle work & then immediately after the 'place of execution'. The bolt was drawn for their information & the drop allowed to fall. They looked rather astonished."[32] Next, Castieau brought the Japanese commissioners, who were by then "interested though perhaps a little frightened", to meet An Gaa, a Chinese man who had been sentenced to death for the murder of another Chinese labourer. An Gaa was in shackles in a tiny cell with a thick iron door. Castieau thought that he "looked more like a sulky dog than anything else He took no notice of his visitors & when allowed retired back to the corner of his cell & slunk down on his seat."[33] An enquiry had been made into the sanity the miserable An Gaa, but he had been found sane and would soon be hanged. Castieau was delighted when his guests, at the conclusion of their macabre tour, asked for his name and recorded it, "to be used no doubt when reference is made to their Gaol visit in the Diary which they keep to astonish the Old Folks at Home when they get back after their extensive travels."[34]

An Gaa had come to Victoria from China to pan for gold.[35] He was arrested in June of 1875 and charged with murder after authorities discovered the body of another labourer, Pooey Waugh, in a hut the men shared. At trial, much of the testimony concerned the correct interpretation of what one witness described as the Chinese concept of 'Young Sheen', which

[31] Diary of J.B. Castieau, 1875, 19 August 1875, Papers of J.B. Castieau, Special Collections, National Library of Australia, Canberra (NLA), MS Acc. 13.094.
[32] Diary of J.B. Castieau, 1875, 19 August 1875, Papers of J.B. Castieau, NLA MS Acc. 13.094.
[33] Diary of J.B. Castieau, 1875, 19 August 1875, Papers of J.B. Castieau, NLA MS Acc. 13.094.
[34] Diary of J.B. Castieau, 1875, 19 August 1875, Papers of J.B. Castieau, NLA MS Acc. 13.094.
[35] CASTLEMAINE COURT OF ASSIZE. (1875, July 20). *Mount Alexander Mail* (Vic.: 1854-1917), p. 2. Retrieved October 17, 2015, from http: //nla.gov.au/nla.news-article197549886

supposedly related to revenge and notions of retribution for slights committed in past lives.[36] The judge was Sir Redmond Barry, an Irishman who had come to Australia to make his fortune as a lawyer. He became the first chancellor of the University of Melbourne in 1853, and was in the 1870s a leading figure in Melbourne. As a judge, he was conservative and had a reputation for harshness, although he also had a long history of representing Aboriginal defendants for free in criminal trials.[37] Barry chastened the defence in An Gaa's case for attempting to introduce evidence "of a metaphysical kind." After all, he reminded the court, "Traditions could not be received as evidence."[38]

However, G.C. Leech, for the defence, insisted that Chinese tradition was essential to the case, and to the jury's understanding of the testimony of Chinese witnesses who implicated An Gaa in the crime.[39] Leech told the jury that conducting An Gaa's defence, which he had been appointed to do by the court because the prisoner was a pauper, was "one of the most awful duties ever imposed on him – in defending a stranger in a strange land – a most unusual responsibility."[40] He argued, "Fatalism was a prominent part of the belief of all Asiatics," and their testimony – informed as it was by a belief that An Gaa's fate had already been sealed – was

[36] CASTLEMAINE COURT OF ASSIZE. (1875, July 21). *Mount Alexander Mail* (Vic.: 1854-1917), p. 2. Retrieved October 17, 2015, from http: //nla.gov.au/nla.news-article197551735

[37] Peter Ryan, 'Barry, Sir Redmond (1813–1880)', Australian Dictionary of Biography, National Centre of Biography, Australian National University, http: //adb.anu.edu.au/biography/barry-sir-redmond-2946/text4271, published first in hardcopy 1969, accessed online 17 October 2015. Barry was the judge in Ned Kelly's famous 1880 trial.

[38] CASTLEMAINE COURT OF ASSIZE. (1875, July 21). *Mount Alexander Mail* (Vic.: 1854-1917), p. 2. Retrieved October 17, 2015, from http: //nla.gov.au/nla.news-article197551735

[39] Later in life, Leech became interested in theological matters, including a mystical sect that espoused 'universalism.' See: UNIVERSALISM. (1870, August 15). *Bendigo Advertiser* (Vic.: 1855-1918), p. 2. Retrieved October 18, 2015, from http: //nla.gov.au/nla.news-article87913433; See also: Forde, *The Story of the Bar of Victoria*, 240.

[40] CASTLEMAINE COURT OF ASSIZE. (1875, July 21). *Mount Alexander Mail* (Vic.: 1854-1917), p. 2. Retrieved October 17, 2015, from http: //nla.gov.au/nla.news-article197551735

"unreliable, and should be taken with considerable caution."[41] Leech told the jury in his two-hour closing speech,

> The Chinese were a people who had laws so different from our own as to render it almost impossible to understand them. There was the old inveterate habit of adapting circumstances to the cases brought before the courts. The theories of circumstantial evidence were not formed for these alien races, but for men of our own race, manly straight forward witnesses; but in the present case, considering the whole train of witnesses, Asiatics, interpreters and others, how could they be trusted when they had a different form of theology binding on their conscience.[42]

Leech hoped to convince the jury that the rules of English law should not be applied to Chinese people whose moral sense and understanding of the universe, he held, made them untrustworthy witnesses. British common law, in Leech's view, reflected the national character and culture of Britons; it could not be used without modification to govern other peoples.

Despite Leech's efforts, the jury found An Gaa guilty of murder. Barry announced the death sentence. In the aftermath of the trial, Leech made one last plea for his client's life. He wrote to the Executive Council asking that An Gaa's sanity be assessed. He had come to the conclusion, he wrote, that An Gaa was "so intellectually weak that the weakness amounts to imbecility" and that he ought not, therefore, be hanged.[43] Two doctors interviewed the prisoner, but reported that they found no firm evidence of insanity. When the Japanese commissioners saw An Gaa huddled in his cell a month later, his fate had already been sealed.[44]

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[41] CASTLEMAINE COURT OF ASSIZE. (1875, July 21). *Mount Alexander Mail* (Vic.: 1854-1917), p. 2. Retrieved October 17, 2015, from http: //nla.gov.au/nla.news-article197551735

[42] CASTLEMAINE COURT OF ASSIZE. (1875, July 21). *Mount Alexander Mail* (Vic.: 1854-1917), p. 2. Retrieved October 17, 2015, from http: //nla.gov.au/nla.news-article197551735; No title. (1875, July 21). *Mount Alexander Mail* (Vic.: 1854-1917), p. 2. Retrieved October 17, 2015, from http: //nla.gov.au/nla.news-article197551731.

[43] THE CONDEMNED MAN, AN GAA. (1875, August 3). *Bendigo Advertiser* (Vic.: 1855-1918), p. 3. Retrieved October 17, 2015, from http: //nla.gov.au/nla.news-article88261440

[44] MELBOURNE. (1875, August 24). *Mount Alexander Mail* (Vic.: 1854-1917), p. 3. Retrieved October 18, 2015, from http: //nla.gov.au/nla.news-article197550882.

Castieau's concern for procedural correctness in the execution of judicial violence continued in his entries on An Gaa's execution, conducted less than two weeks after his exhibition to the Japanese travellers. He wrote,

> This evening I went to see that everything was ready for the execution & found the hangman ready for his 'job'. A strap had been made to fasten the arms of the condemned man…the Sheriff however read somewhere about a pinioning jacket & expressed a contempt for the old fashioned rope, so to please him the strap has been made to use, instead[.] Gately the executioner […] seemed delighted at the prospect of the morrow & took my instructions in the most docile & dog like manner possible. I shall be very glad when the unfortunate China-man is dead & as usual before an execution feel nervous for fear any bungling may occur.[45]

Castieau feared that a mistake would compromise the orderliness of the execution. It was essential that the prisoner's death appear to be quick and painless. Once, after a man slowly choked to death in a botched execution, Castieau publicly defended his staff but confessed in his diary, "I said nothing about the time I laid awake last night & how for hours the ugly rope & its dreadful load kept dangling before my eyes whenever I chanced to dose [sic]."[46] At ten o'clock on 30 September 1875, Castieau and the sheriff fetched An Gaa from the condemned cell. A Chinese interpreter spoke at length to the prisoner, who only mumbled indistinctly in response. When the rope was placed around his neck An Gaa seemed to swoon, but the bolt was drawn and his neck was snapped before he could collapse on the trap door. After the execution, Castieau filed the necessary paperwork: the warrant for An Gaa's execution, certificates attesting to the prisoner's death, and a coroner's inquest report confirming "that 'An Gaa' had been hanged in accordance with the provisions of the Private Execution Act."[47] A plaster cast of An Gaa's head

[45] Diary of J.B. Castieau, 1875, 29 August 1875, Papers of J.B. Castieau, NLA MS Acc. 13.094.
[46] Diary of J.B. Castieau, 1875, 5 October 1875, Papers of J.B. Castieau, NLA MS Acc. 13.094.
[47] Diary of J.B. Castieau, 1875, 30 August 1875, Papers of J.B. Castieau, NLA MS Acc. 13.094.

was taken, and then two doctors removed his brain "to make scientific experiments with it after it had been thoroughly hardened in spirit."[48]

Defining culture in the nineteenth century sense is difficult. There were no firm divides among concepts of race, culture and civilization in the Victorian era, or at least none that was meaningful or consistent in British legal policy or discourse. British officials slipped easily among religious classifications ('Christian', 'infidel'), civilizational divisions ('primitive', 'civilized') and racial categories ('European', 'African') as they thought and wrote about the differences between themselves and the people they ruled. The ideas of English social theorists like Herbert Spencer, E.B. Tylor and John Lubbock – especially their interest in the evolution of human societies from savagery to civilization – filtered into British courtrooms.[49] However, colonial officials, including jurists, almost never quoted directly from these early anthropological texts. The distinctions among various social scientific schools of thought were, largely, lost in their transformation into the everyday common sense of colonial administration. Mark Francis, writing about nineteenth-century Canada, argues that for colonial officials,

> The conceptual apparatus of 'civilization' was a reservoir filled with the thoughts of scholars and missionaries who claimed to possess significant knowledge about indigenous peoples. Borrowings by officials from the reservoir were usually simplistic. If one had been able to ask them why they used the word 'civilization' in a certain way, they would have replied that they had no need of theories, or that they felt no need to define or explain a notion whose meaning seemed so obvious.[50]

[48] Diary of J.B. Castieau, 1875, 30 August 1875, Papers of J.B. Castieau, NLA MS Acc. 13.094.
[49] See: Herbert Spencer, *Social Statics; Or, The Conditions Essential to Human Happiness* (New York: D. Appleton and Company, 1873); Tylor, *Primitive Culture*; John Lubbock, *The Origin of Civilisation and the Primitive Condition of Man Mental and Socil Condition of Savages by John Lubbock* (Longmans, Green, 1870).
[50] Mark Francis, "The 'Civilizing' of Indigenous People in Nineteenth-Century Canada," *Journal of World History* 9, no. 1 (1998): 73.

Boyce did not need to provide a scientific account of the history of mankind in order to argue that Jimmy Governor was, because of his indigenous heritage, prone to violence and deficient in self-control. By the turn of the twentieth century, the psychological and physical difference of Aborigines was a given for white Australians. Boyce's task, in court, was to convince the jury that Governor's difference went some way to excusing his violence – a much harder sell to settlers who could imagine their own farmhouses splattered with the blood of their wives and children.

The cases in which cultural evidence and arguments about the 'savage hearts' of the non-white peoples of the empire featured are the best window into the connection between culture and criminal responsibility. However, it is important first to consider some of the prominent thinkers whose theories filled the 'reservoir' of ideas about civilization, to borrow Francis' metaphor, from which the lawyers, doctors and officials involved in these cases drew. In the second half of the nineteenth century, British psychiatrists and social theorists were becoming increasingly preoccupied with the connections between theories of racial decline and understandings of criminality. This interest in how savagery might affect both crime and criminal responsibility was bolstered by the proliferation of degenerationist writings by continental European authorities. The two most influential continental degenerationist thinkers of the late-nineteenth century were Bénédict Auguste Morel, a French psychiatrist and amateur anthropologist, and Cesare Lombroso, who eagerly collected photographs of morally insane criminals like Frederick Deeming.

In an 1894 article published in the *Journal of the Anthropological Institute of Great Britain and Ireland,* Sir Thomas Smith Clouston reflected on the state of criminal anthropology

in Britain.[51] Clouston, an aristocratic Scottish psychiatrist and asylum superintendent, wrote extensively on mental disease. He was a successful lecturer at Edinburgh University and a co-editor, with Henry Maudsley, of the *Journal of Mental Science*.[52] Clouston is not remembered as one of the great medical thinkers of the nineteenth century, but his work provided, according to one of his biographers, "a bold and populist synthesis of the leading currents of Victorian thought."[53] And Clouston, like so many educated Victorians, was convinced of the importance of criminal anthropology. Cesare Lombroso and Bénédicte Auguste Morel, the continental pioneers of criminal anthropology, had inspired English luminaries like Havelock Ellis and Maudsley and intrepid Scottish doctors like David Nicolson to take up the scientific study of criminality, but, argued Clouston, there was more work to be done. "I think the time is very near," he wrote, "when some knowledge of it will be required of all medical men, and especially of all lawyers and the higher officials of our prisons."[54] Clouston argued that, when the doctors, lawyers and prison officials of Britain finally embraced criminal anthropology as their European counterparts had done, they needed to consider the developmental sources of criminality. In particular, Clouston explained, Britons would need to reckon with "the not fully evolved man who might do his work well enough in a primitive society, but who cannot accommodate himself to the conditions of a highly organised and largely artificial modern society."[55]

Degenerationism was first associated with Bénédict Auguste Morel, whose *Traité des dégénérescences physiques, intellectuelles et morales de l'espèce humaine et des causes qui*

[51] T.S. Clouston, "The Developmental Aspects of Criminal Anthropology," *The Journal of the Anthropological Institute of Great Britain and Ireland* 23 (1894): 215–25.
[52] Allan Beveridge, 'Clouston, Sir Thomas Smith (1840–1915)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Oct 2009 [http: //www.oxforddnb.com.ezp-prod1.hul.harvard.edu/view/article/38634, accessed 16 Oct 2015]
[53] Allan Beveridge, 'Clouston, Sir Thomas Smith (1840–1915)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Oct 2009 [http: //www.oxforddnb.com.ezp-prod1.hul.harvard.edu/view/article/38634, accessed 16 Oct 2015]
[54] Clouston, "The Developmental Aspects of Criminal Anthropology," 217.
[55] Ibid., 225.

produisent ces variétés maladives (1857) was popular among Britons who worried about crime.[56] As Clouston put it, "the term 'degeneracy' is in the mouths of all writers on the subject since Morel's great work was written."[57] Morel was a respected psychiatrist who was the superintendent of the Saint-Yon lunatic asylum in northern France when he first published the *Traité*. He was also a corresponding member of a number of medical societies, including the Royal Academy of Medicine in Turin, where Lombroso lived and worked. Morel began the *Traité* by lamenting the frightening recent growth in the number of epileptics, 'idiots', and criminals in both Europe and the United States.[58] As a young man, Morel had become convinced that the physical and moral histories of man could not be studied in isolation, and that anthropology and psychiatry were natural bedfellows.[59] He was particularly taken with Prichard's *Natural History of Man* (1843), in which Prichard argued for the single origin of man (monogenism) while meticulously cataloguing the physical and moral differences of various "tribes of the human family."[60] However, Morel was much more pessimistic about the trajectory of human development than Prichard had been.

In his *Traité*, Morel took a capacious view of the causes and effects of degeneration, arguing that insanity, criminality and primitive state of non-European peoples were all indicative of a pernicious, and creeping, human tendency toward degeneration to a savage, primordial state. All manner of sin, stupidity and debility was evidence of degeneration, which could manifest itself in almost limitless ways. While criminality and insanity were not identical for Morel, he

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[56] Rafter, *The Criminal Brain: Understanding Biological Theories of Crime*, 99; Bénédict Auguste Morel, *Traité Des Dégénérescences Physiques, Intellectuelles et Morales de L'espèce Humaine et Des Causes Qui Produisent Ces Variétés Maladives* (Paris: J.B. Baillière, 1857).
[57] Clouston, "The Developmental Aspects of Criminal Anthropology," 221.
[58] Morel, *Traité Des Dégénérescences Physiques, Intellectuelles et Morales de L'espèce Humaine et Des Causes Qui Produisent Ces Variétés Maladives*, viii.
[59] Ibid., xiv.
[60] James Cowles Prichard, *The Natural History of Man* (London: H. Bailliere, 1843).

maintained that immorality, misery, and alcoholism were frequent causes of intellectual disturbance.[61] In Morel's framework, degeneration was so variegated that it could be detected everywhere, and no one – not even vigorous, middle-class Frenchmen – was safe. It was this dark vision of human evolution in free fall that dominated late-nineteenth-century social science.[62] Maudsley, unsurprisingly, was a fan of Morel's. In *The Pathology of Mind,* Maudsley praised Morel for his lucid account of "the brute brain within the man's."[63] "All the moral and intellectual acquisitions of culture," warned Maudsley, could be lost in a trice through the inbreeding of the degenerate "until the lowest human and fundamental animal elements only are left."[64]

Lombroso is widely acknowledged as the founder of criminal anthropology. He based his explanation for white crime on a belief in the innate violence and impulsivity of non-European peoples. In 1876, Lombroso was appointed to a professorship in legal medicine at the University of Turin. That year, he published his most famous work, *Criminal Man.*[65] In *Criminal Man*, Lombroso argued that criminality was the result of atavism. Criminals were throwbacks to a savage past, subject to the violent and perverse impulses of pre-civilized man. Their criminality was inborn and biological, and could be read in their sloped brows, jug ears and large jaws.[66] Lombroso argued that the criminal European shared many physical and mental traits with "primitive man" – proof that crime was as hereditary and as inevitable as evolution.[67] Nicole Rafter argues that one of Lombroso's earlier, still un-translated works, *L'uomo bianco e l'uomo*

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[61] Morel, *Traité Des Dégénérescences Physiques, Intellectuelles et Morales de L'espèce Humaine et Des Causes Qui Produisent Ces Variétés Maladives*, 377.
[62] Valverde, *Diseases of the Will: Alcohol and the Dilemmas of Freedom*, 51.
[63] Maudsley, *The Pathology of Mind: A Study of Its Distempers, Deformities, and Disorders*, 116.
[64] Ibid., 115.
[65] Rafter, *The Criminal Brain: Understanding Biological Theories of Crime*, 65.
[66] Cesare Lombroso, *Criminal Man*, ed. Mary Gibson and Nicole Hahn Rafter (Durham, NC: Duke University Press, 2006), 195.
[67] Ibid., 222.

di colore (The White man and the Man of Color) (1871), shows the centrality of race and primitivism in his account of criminality.[68] In *L'uomo bianco*, Rafter describes how Lombroso compared the skulls of aboriginal peoples to those of apes, and argued that indigenous Americans and other non-Europeans were morally and physically similar to white criminals.[69] Lombroso was not alone, and not first, to describe criminality as an aspect of savagery, and to posit that non-European peoples more savage, and less civilized, than Europeans were. However, his fame and his dedication to a biological, determinist theory of criminality made it more difficult for British jurists to ignore the implications of degenerationism and stadial theory for criminal law jurisprudence.

The late-Victorian obsession with civilizational and racial taxonomy was in part, as degenerationism's popularity suggested, a reflection of British, metropolitan concerns about their own future.[70] Victorians saw their own society as technologically advanced, commercially sophisticated and territorially ambitious. The empire ballooned in the last decades of the century, as Britain pushed aggressively into Africa. Scientific advances, especially the rise of Darwinism, dovetailed with an increasingly secular vision of the universe, dominated by the rational, self-disciplined individual. As Britain hurtled toward liberal modernity it was inevitable, in the minds of the educated middle class, that some categories of people – women, children, criminals, paupers, labourers, Irishmen, and the colonized masses – would be left behind.[71] Although there were differences between an Irish farmer, an English thief and an Indian lawyer, all, argues George Stocking in his history of British anthropology, were believed to lack the intelligence, foresight and self-restraint of the truly civilized. They were, to various degrees, trapped in the

[68] Ibid., 72.
[69] Ibid., 73.
[70] Francis, "The 'Civilizing' of Indigenous People in Nineteenth-Century Canada," 55.
[71] Stocking, *Victorian Anthropology*, 229–230.

primitive stages of mental and moral development that the idealized Englishman had long ago escaped. People in these classes were "governed more by impulse, deficient in foresight, they were in varying degrees unable to subordinate instinctual need to human rational control."[72]

Britain's rapid modernization struck some Victorians as dangerous. Not only were some categories of white Britons incapable of meeting the expectations of an increasingly sophisticated and dynamic society, but some commentators also worried that the pace of change could cause mental and social breakdown. Clouston, for example, wrote, "The continual process of too sudden adaptation to new environments and new conditions that is going on in our modern life constitutes…one of the great causational factors of criminality as I believe it does [sic] of certain forms of insanity."[73] Moreover, many social theorists wondered whether middle-class British men had really left their savage origins behind. Herbert Spencer, for one, argued that humanity was still tethered to its primordial moorings. In his *Social Statics*, Spencer argued that African 'Bushmen', American Indians and Aboriginal Australians were openly savage in their love of torture and their lust for the hunt.[74] Contemporary Europeans, with their humane societies, charities and vegetarianism, had largely transcended their bloodthirsty origins.[75] But civilization was fragile. Those who adopted 'primitive' customs in 'primitive' places suffered the "barbarizing of colonists" – American "Lynch law" proved that Europeans could easily succumb to savagery.[76] Even in England, the "change" was not complete. Britons' "savage selfishness" was evident in their shameless gambling, their reckless commercial speculating, and their

[72] Ibid., 229.
[73] Clouston, "The Developmental Aspects of Criminal Anthropology," 221.
[74] Spencer, *Social Statics; Or, The Conditions Essential to Human Happiness*, 449.
[75] Ibid., 450.
[76] Ibid.

jostling the doors of theatres. In myriad small ways, civilized men showed that they were "little else than barbarians in broadcloth."[77]

British degenerationists saw threats to their civilization everywhere, including in London's own prisons and poorhouses, taverns and tenements. Insanity, criminality and racism came together in late-nineteenth century psychiatry, criminal anthropology, and social science. Psychiatry and anthropology were naturally intertwined, and a significant number of professionals dabbled in both fields. When psychiatrists and anthropologists turned their attention to crime, both groups looked to savagery and primitivism for answers. Historians of Britain have written about the development of the social sciences and their connection to the racialisation of white criminals.[78] By focusing on the implications of degenerationism at home, however, British historians overlook the empire, and its central position in framing the dichotomy between civilization and savagery. For Britons, the 'savage' was not an abstraction. 'Savages' were real people, many millions of whom lived under British rule and British law in the colonies, and whose skulls often adorned the desks of well-to-do physicians and professors. When men like James Cowles Prichard or Henry Maudsley wrote about savagery and the degeneration of man, they were not thinking purely metaphorically – they did it while staring into the empty sockets of the future they feared awaited their children and grandchildren.

When Victorian racial theorists described the conquest of primitive peoples by civilized ones as inevitable, they complicated the moral justification for the British imperial project. In this view, Britons were pawns of nature, red in tooth and claw, simply playing their assigned part

[77] Ibid., 221–2.
[78] Wiener, *Reconstructing the Criminal*; Stocking, *Victorian Anthropology*; Stepan, *The Idea of Race in Science: Great Britain, 1800-1960*.

in the evolutionary process.[79] In his 1926 *Crime and Custom in Savage Society*, legal anthropologist Bronislaw Malinowski wrote, "The study of the rapidly diminishing savage races is one of those duties of civilization – now actively engaged in the destruction of primitive life – which so far has been lamentably neglected."[80] Which was too bad, continued Malinowski, because anthropology could "help the white man to govern, exploit, and 'improve' the native with less pernicious results to the latter."[81] Malinowski was writing at a much more optimistic time, after the stormiest clouds of degenerationism had parted. However, he put his finger on the nexus between anthropology and strategies for governance and civilizational uplift that defined late-Victorian imperial law. British ethnology abetted the project of imperial governance. However, a belief in the difference of colonized peoples could also call into question the integrity Britain's most important tool for the day-to-day governance of its empire: the law.

However enthusiastically it was sometimes pursued, the project of incorporating indigenous peoples into the British criminal law system proceeded in fits and starts. It wasn't until the 1830s, for example, that the Australian colonies aggressively asserted their criminal jurisdiction over the Aboriginal population.[82] In other colonies, the process took much longer. In 2001, John Comaroff coined the term 'lawfare' to describe the efforts of the colonial state to "conquer and control indigenous peoples by the coercive use of legal means."[83] In the same essay, however, he cautioned against taking British declarations of legal supremacy at face value. In fact,

[79] Tennyson's poem has long been associated with Victorian evolutionism and, especially, with the idea of natural selection. The poem was first published nine years before Darwin's *Descent of Man*. Laura Otis, *Literature and Science in the Nineteenth Century : An Anthology* (Oxford University Press, 2002), 239.
[80] Bronislaw Malinowski, *Crime and Custom in Savage Society* (London: Kegan Paul, Trench, Trubner & Co. Ltd., 1926), xi.
[81] Ibid.
[82] Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836*.
[83] John L. Comaroff, "Colonialism, Culture, and the Law: A Foreword," *Law & Soc. Inquiry* 26 (2001): 306.

> colonialism was often an underdetermined, chaotic business, less a matter of the sure hand of oppression – though colonialisms have often been highly oppressive, nakedly violent, unceasingly exploitative – than of the disarticulated, semicoherent, inefficient strivings for modes of rule that might work in unfamiliar, intermittently hostile places a long way from home.[84]

British imperial law in the nineteenth century bears out this tension between unhinged self-confidence and crippling doubt; between aspirations of control over aboriginal populations, and concern that aggressive 'lawfare' might undermine the humanitarianism that justified the empire by exposing the violence and cruelty of the common law. Even long after authorities declared the pre-eminence of imperial authority over crime, there were doubts about whether or not indigenous peoples were appropriate subjects of British law. Often, it was the fear that Britain's colonial subjects were too primitive to be judged fairly under civilized British law that kept imperial officials up at night. When indigenous people committed acts of violence and found themselves in a common law courtroom, they were often met with what Comaroff calls 'inefficient strivings' and confusion, rather than the smooth application of established legal principles.

Colonial legal authorities were often overtly and systematically racist in their treatment of non-Europeans under imperial common law. Historians of colonial law have shown, for example, how British officials manipulated the law to shield themselves from responsibility for crimes committed against indigenous victims, or to punish the colonised severely for assaults against whites.[85] However, ideas about race, civilization and culture were also deployed in imperial criminal trials in other, less obvious, ways.

Common law jurisprudence rests on a set of assumptions about who the subject of law is, and what her attributes are. When, for example, judges are asked to assess the reasonableness of

[84] Ibid., 311.
[85] See: Kolsky, *Colonial Justice in British India*; Martin J Wiener, *An Empire on Trial: Race, Murder, and Justice under British Rule, 1870-1935* (Cambridge; New York: Cambridge University Press, 2009).

a person's behaviour, or whether she should have foreseen the consequences of her actions, they often do so by imagining what an abstracted archetypical person would have considered reasonable, or what that person would have foreseen. Legal scholars have given this fictional legal everyman many names: the 'reasonable man', the 'average man,' the 'default legal person.'[86] Some have argued, convincingly, that common law jurisprudence invokes different concepts of the legal subject for different purposes – that there are actually legions of reasonable, average, and default legal persons who stand in for our assumptions about what people know, feel, and want, or ought to.

Susanna Blumenthal argues, for instance, that defendants must meet the minimum cognitive standards of the default legal person before they can even be measured against the reasonable man. If a man is so plagued by delusions that he qualifies as legally insane, then punishing him for behaving unreasonably is legally incoherent.[87] Oliver Wendell Holmes, in *The Common Law* (1881), saw the 'average man' of the law, in contrast to Blumenthal's concept of the default legal person, not as representing a minimum threshold for legal responsibility or a reflection of the sociologically 'average' person, but as an aspirational figure. The standards embodied in the 'average man', argued Holmes, "do not merely require that every man should get as near as he can to the best conduct possible for him. They require him at his own peril to come up to a certain height."[88] Regardless, though, of whether the assumed subject of nineteenth-century common law was average or ideal, and even whether there was one fictional legal subject or many, he was, or they were, inescapably Anglo-American. And when Victorian Britons tried to apply criminal law principles to indigenous peoples, they were confronted with

[86] Susanna L. Blumenthal, "The Default Legal Person," *UCLA L. Rev.* 54 (2006): 1135. See also: Pierre Schlag, "Problem of the Subject," *Tex. L. Rev.* 69 (1990): 1627.
[87] Blumenthal, "The Default Legal Person."
[88] Holmes, *The Common Law*, 50.

the distressing possibility that their legal archetypes were so far removed from the cultures and life experiences of the colonised that applying them strictly would be unfair.

In the courts of the British empire, lawyers and judges debated whether or not the basic assumptions of British common law about its abstracted, imagined subject were applicable to people who manifestly did not correspond to the British 'average.' Victorian race theory argued strongly that primitive peoples were profoundly different from their civilized rulers. Degenerationists, convinced that even civilized Britain was slipping into primordial savagery, sometimes went so far as to wonder if mankind's declining mental and physical vigour would soon mean that no one could be reasonably expected to meet the expectations of the common law. In assessing the responsibility and blameworthiness of non-European defendants in the courtrooms of the empire, legal officials had to decide, on the spot and often with dire practical consequences, whether or not the common law was asking too much of its subject peoples.

The late-nineteenth-century consensus that the peoples of the empire were inferior to their British benefactors complicated the attribution of criminal responsibility in courtrooms around the British world. This is not to suggest that British officials threw up their hands and surrendered their authority to judge and govern non-Europeans under British criminal law. Scholars have argued persuasively that the 'rule of colonial difference' and the colonial liberalism that it underpinned rarely hampered imperial policy.[89] However, the fact that greed and violence often overcame imperial administrators' compunctions about applying British law abroad does not mean that the lieutenants of empire were unaware, or untroubled, by tensions in the ideology of British rule. Sometimes, British judges and governors allowed themselves to question the justice of expecting indigenous people to think and act like Britons, while

[89] Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993).

simultaneously declaring that it was impossible for indigenous people to meet civilized standards. By adopting a more 'savage', or a more culturally relative, standard for accountability, British judges spared some defendants a brutal execution, released some from prison decades early, and saved some huge sums of money.

In his work on criminal defences in contemporary British law, legal philosopher John Gardner writes that the growing cosmopolitanism of British society has undermined old assumptions that people sharing "the same physical space share the same social and cultural space", and that we must now grapple with the "moral consequences of human diversity."[90] Gardner's analysis is astute, but cultural diversity is not a new problem for British criminal law. One of the great projects of imperial rule was to construct a system of legal and political administration that could accommodate the social and cultural differences of Europeans and non-Europeans sharing the same colonial space.[91] While historians of empire have tended to interpret imperial cases where cultural difference was at issue primarily as engaging questions of jurisdiction – of deciding which legal system, in a pluralist context, should apply in a defendant's case – they are also cases about how culture affects capacity for guilt, and amenability to punishment.[92]

Legal scholars and anthropologists have recently begun to explore how cultural difference plays into evaluations of criminal responsibility in contemporary courtrooms in

[90] John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford; New York: Oxford University Press, 2007), 156–7.
[91] The problem of how to incorporate diverse populations into the British empire, and into British notions of political subjecthood, was acute in the eighteenth century. In the nineteenth century, legal subjecthood became an increasingly pressing concern. On subjecthood in the eighteenth century, see: Hannah Weiss Muller, "Bonds of Belonging: Subjecthood and the British Empire," *Journal of British Studies* 53, no. 01 (2014): 29–58.
[92] L. Benton, "Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State," *Comparative Studies in Society and History* 41, no. 3 (1999): 563–88.

America, Britain and continental Western Europe.[93] Most often, the cases discussed in this literature are modern (most post-1950) and involve conflicts over customs and values among Westerners and immigrants to Western countries from Asia and Africa. Alison Dundes Renteln, in *The Cultural Defense*, remarks on the paucity of scholarship explicitly addressing the viability of a formal cultural defence in Anglo-American law.[94] She argues that, despite official squeamishness about embracing a formal cultural defence, judges have routinely considered cultural evidence as potentially mitigating or even exculpatory, especially in homicide cases.[95] Renteln is especially critical of the way that cultural defence arguments have been squeezed into the insanity defence, and the implication that a defendant's cultural beliefs produce a kind of mental illness.[96] "The 'objective reasonable person,'" Renteln writes, "is merely a person from the dominant culture. Naturally, if a member of an ethnic group is judged against the standards of the dominant culture, his or her traditions are likely to be considered unreasonable."[97]

As noted above, it is no accident that cultural defences are, even today, often linked to insanity. Moral insanity was generally understood, in the nineteenth century, as a reversion by the sufferer to a more primitive, more barbaric stage of human evolution. Both 'culture', in the racialized, pejorative sense, and insanity damaged a person's ability to meet the mental and moral standards that underpinned criminal responsibility. Primitivism was the normal state of

[93] See, for example: Claes and Vrielink, "Cultural Defence and Societal Dynamics"; Foblets and Renteln, *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*; Renteln, *The Cultural Defense*; Pascale Fournier, "Ghettoisation of Difference in Canada: Rape by Culture and the Danger of a Cultural Defence in Criminal Law Trials, The," *Man. LJ* 29 (2002): 81; Will Kymlicka, Claes Lernestedt, and Matt Matravers, eds., *Criminal Law and Cultural Diversity* (Oxford: Oxford University Press, 2014). For an example of a contemporary cultural defence case, see the story of Fumiko Kimura: Goel, "Can I Call Kimura Crazy - Ethical Tensions in the Cultural Defense"; L. Volpp, "(Mis)Identifying Culture: Asian Women and the Cultural Defense," *Harv. Women's LJ* 17 (1994): 57. Leslie Pound, "Mother's Tragic Crime Exposes A Culture Gap," *Dallas Morning News*, June 10, 1985, http: //articles.chicagotribune.com/1985-06-10/features/8502060678_1_first-degree-murder-suicide-fumiko-kimura.

[94] Renteln, *The Cultural Defense*.

[95] Ibid., 23.

[96] Ibid., 29.

[97] Ibid., 15.

uncivilized peoples and insanity, especially moral insanity, described an individual sufferer's deviation from the psychological and social norm. These differences conceal a fundamental similarity: in both cases, the sufferer experienced a mental impairment that stemmed from her inability to participate fully in civilized life. Renteln and others point out that common law standards are never culturally neutral. Victorian Britons knew this, too. They were proud of the distinct Englishness of the common law, and were aware that they had set their indigenous subjects the Sisyphean task of assimilating into a British social order to which they could never, by dint of their indigeneity, belong.[98] The result of colonial officials' belief in the mismatch between English legal principles and the mental and moral capacity of indigenous defendants was the introduction of cultural evidence in criminal cases.

The kind of civilizational and racial thinking that made its way into colonial courtrooms is exemplified in the work of a Norman Chevers, a member of the Indian Civil Service who was an expert on medical jurisprudence. Chevers wrote his popular textbook, *A Manual of Medical Jurisprudence for Bengal and the North-West Provinces*, for lawyers and medical examiners working in the Anglo-Indian criminal legal system. In the *Manual*, he tried to distil a vague sense of the alleged biological and, especially, psychological differences of Indians into a set of practical procedures that would make it easier to apply English justice in India.

Chevers' *Manual* was published in 1856 by order of the Government of India. In his preface, Chevers wrote that his manual was a supplement to English physician Alfred Swaine Taylor's popular *Manual of Medical Jurisprudence*, which was "the standard authority on the

[98] See Homi K. Bhabha, *The Location of Culture* (Routledge, 2012).

subject."[99] Chevers claimed that a separate, Indian medical jurisprudence was necessary because crimes occur "under circumstances entirely dissimilar to those which call for the like investigations in Europe", singling out questions regarding "Unsoundness of Mind, Identity, Suicide, Torture, &c" as particularly vexing.[100]

Chevers' *Manual* began with a picture of an instrument supposedly "used in the murder of a child in a temple at Jessore."[101] Chevers believed that the 'national character' of the Indian people was the main determinant of their criminality. In his introduction, he observed, "It would probably be impossible to point to any races of men whose great crimes more distinctly emanate from and illustrate their national character, than is the case with those various classes of natives who inhabit the British possessions of India."[102] Only by developing a scientific understanding of the "'Pathology' of crime in India" – distinct from that in England – could colonial authorities secure order in the colony.[103]

Chevers concentrated on what he considered to be distinctively 'Indian' questions: torture (including: "Torture of Witches", "the Bull's Hide Torture", "Torture by Stinging Nettles" and, ominously, "Torture *which leaves no marks*" [italics original]); burial alive; mutilation; bites of venomous serpents; strangulation, including *thuggee*; infanticide; suicide; and insanity.[104] Many of these chapters included remarks and notices weighing in on the historical and cultural importance of the offence. Chevers was preoccupied with making 'the Indian' intelligible to European authorities. "It is only by thoroughly knowing the people," he wrote, "and by fixing the

[99] Chevers, *A Manual of Medical Jurisprudence for Bengal and the North-Western Provinces*, preface. Taylor, *A Manual of Medical Jurisprudence*.Taylor's *Medical Jurisprudence* was extremely commercially successful in both England and America. It went through 12 English editions between 1844 and 1891, and 12 American editions between 1845 and 1897.
[100] Chevers, *A Manual of Medical Jurisprudence for Bengal and the North-Western Provinces*, 1.
[101] Ibid.
[102] Ibid., 5.
[103] Ibid., 12–13.
[104] Chevers, *A Manual of Medical Jurisprudence for Bengal and the North-Western Provinces*.

mind sedulously upon the records of their crimes, that an European can learn how strange a combination of sensuality, wild and ineradicable superstition, absolute untruthfulness, and ruthless disregard for the value of human life, lie below the placid, civil, timid, forbearing exterior of the native of India."[105]

On the subject of insanity, Chevers believed that Indians could suffer from mental disorders as Europeans could. However, he wrote that it was difficult for British medical experts to distinguish "the ravings of Monomania" from Indians' "ridiculous and unnatural" religious feeling.[106] For Chevers as for other Victorians, the presumed natural state of non-European peoples resembled madness, or at least a state of diminished rationality. Megan Vaughan has argued that colonial psychiatrists in Africa sought to describe a pathologized, although 'normal' African mind rather than to diagnose or treat illness among the mentally 'abnormal'.[107] British experts tended, whether writing ethnographic treatises in their London studies or evaluating prisoners in Indian jails, to consider non-European peoples as collectives, with a collective interior life, rather than as discrete individuals. In Africa, Vaughan writes, "there was a strong strand of thinking which held that Africans were, by definition, hardly capable of being individuals at all."[108]

Chevers' *Manual* remained the premier Indian medical jurisprudence text until the 1890s, when other British medical experts who had made their careers in India entered the fray.[109] His work shows how medical and social scientific understandings of non-Europeans, and especially those who lived in the world's 'torrid zone', could be mobilized in the context of imperial

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[105] Ibid., 8.
[106] Ibid., 568.
[107] Vaughan, *Curing Their Ills*, 11. See also: McCulloch, *Colonial Psychiatry and "the African Mind"*; Georges Canguilhem, *The Normal and the Pathological* (New York: Zone Books, 1989).
[108] Vaughan, *Curing Their Ills*, 203.
[109] See: Lyon, *A Textbook of Medical Jurisprudence for India*; James Dunning Baker Gribble and Patrick Hehir, *Outlines of Medical Jurisprudence for Indian Criminal Courts*, 2nd ed. (Madras: Higginbotham and Co., 1891).

criminal law. Each theorist or expert, whether medical or legal, had a slightly different understanding of the innate mental and moral differences between civilized and uncivilized peoples. Peoples tainted with savagery were liable to be described as passionate, impulsive, eccentric, hedonistic, perverted, cruel, credulous and dull. Members of supposedly primitive cultures were imagined as cogs in the wheels of their environment, history and religion, with only a superficial and deceptive independence.

Chevers' ideas about the innate inferiority and pathological exoticism of Indians were echoed around the empire. An Australian case involving an Indian defendant, Fatta Chand, shows how colonial officials drew from the reservoir of Victorian racial thinking. The jurists and commentators in Chand's case never mentioned Chevers' text or any other ethnological or jurisprudential treatise explicitly. They didn't need to. Whenever non-Europeans entered a British courtroom, whether as defendants or witnesses, they waded into a mire of popular ethnographic and social scientific knowledge that, although it could sometimes diminish their culpability for their criminal acts, also diminished their claims to equal subjecthood and personhood under the law.

Fatta Chand was an Indian man who took a steamer from Calcutta to Melbourne in the late nineteenth century. In November 1890, less than a year after his arrival in Victoria, Chand was arrested, tried, and convicted of murder. He was hanged in April 1891 behind the thick, stone walls of Melbourne Gaol. Chand was a British subject; this was as true when he lived in his village in Punjab as it was when he walked the streets of Melbourne. However, his religion and his culture made him exotic in Victoria, and coloured every interaction he had with the colonial legal system. Lawyers and journalists interpreted Chand's behaviour by reference to an

abstracted, racialised 'Hindoo' archetype. Chand's identity as a Hindu was enough for the court to infer his criminality and his guilt.

Fatta Chand disembarked from the steamship *Nerbudda* on 25 January 1890. The Victorian economic boom of the 1870s and 1880s had brought new waves of Indians, Afghans and Syrians to Melbourne. [110] Like many new immigrants to Australia from Asia and the Middle East, Chand found work as a hawker selling small goods – aprons, scarves, jewellery – door to door. Hawkers peddled their wares in tony suburbs, crowded city streets, and on Aboriginal reservations. They flowed through Melbourne society, seeping through the barriers that divided the rich from the poor, and the respectable from the down-at-heel. Hawkers needed a government license to ply their trade, and in order to get a license, they had to demonstrate basic English proficiency in Hawker's License Courts.[111] Many who could not obtain a hawker's license worked illegally, living on the margins of a marginal trade.

A young Indian man named Juggoo Mull had accompanied Fatta Chand on his journey across the sea.[112] Mull was slight, sporting a beard and a moustache.[113] He received a hawker's license and lived with some twenty other hawkers in a house owned by Azamoo Khan, an Afghan wholesaler and overseer.[114] On the morning of 27 November 1890, Robert Allan, a butcher in the town of Healesville, had been wandering through a local paddock and stockyard when he saw a pile of brush at the bottom of an embankment. He made his way down and shifted the branches, which lay across a patch of freshly disturbed earth. He dug away the dirt and

[110] Belich, *Replenishing the Earth*, 359.
[111] Nadia Rhook, "Listen to Nodes of Empire: Speech and Whiteness in Victorian Hawker's License Courts," *Journal of Colonialism and Colonial History* 15, no. 2 (2014), http: //muse.jhu.edu/journals/journal_of_colonialism_and_colonial_history/v015/15.2.rhook.html.
[112] "THE ALLEGED MURDER BY A HINDOO." *The Argus* (Melbourne, Vic.: 1848-1957) 2 Mar 1891: 10. Web. 8 Oct 2014 <http: //nla.gov.au/nla.news-article8479610>.
[113] Testimony of Azamoo Khan, Judge's Notes of Evidence (Hood), 23 March 1891, *R v Fatta Chand*, Public Record Office Victoria (PROV), Melbourne VPRS/1100/P0000/1.
[114] "THE ALLEGED MURDER BY A HINDOO." *The Argus* (Melbourne, Vic.: 1848-1957) 27 Feb 1891: 9. Web. 8 Oct 2014 <http: //nla.gov.au/nla.news-article8479098>.

uncovered a man's torso, with its arms missing. He dug deeper, and uncovered a face.[115] It was Juggoo Mull.

The police arrested Chand in connection with the killing. [116] Chand and Mull had hawked together, selling goods and doing odd jobs at the Aboriginal Station at Corranderk and on the road between the Station and Azamoo Khan's house in Melbourne. Sergeants Considine and Cawsey, the same pair of detectives who would soon lead the manhunt for Frederick Deeming, led the investigation. Many witnesses described seeing Mull and Chand together a few days before Mull disappeared. Considine and Cawsey could not discover much about Chand, but believed that he had fallen into debt and had killed his more successful friend in order to rob him.[117] Chand vehemently denied the charges.

Chand would be tried twice for murder. Both trials were complicated by his anonymity and his ethnicity. Chand, who had been hawking without a license, had avoided well-travelled roads, urban centres and strangers. After his conviction, Chand told Andrew Shields, who examined him at Melbourne Gaol, that he could not provide an alibi because he had worked hard to avoid police attention.[118] It was standard practice for police investigators to report on the personal histories (the "antecedents") of those they arrested. Considine and Cawsey filed a report on Chand that served more to highlight how little the authorities knew about him than to shed light on his character or his biography. "From the time of his arrival to his apprehension," they wrote, "He seems to have lived a quiet and uneventful life."[119] All that the detectives were able

[115] Testimony of Robert Allan, Judge's Notes of Evidence (Hood), 23 March 1891, *R v Fatta Chand*, PROV VPRS/1100/P0000/1.
[116] Very occasionally the records list 'Fatta' as 'Patta', but almost all of the documents identify the defendant as Fatta Chand.
[117] Report of Considine and Cawsey on the murder of Juggoo Mull, Judge's Notes of Evidence (Hood), 23 March 1891, *R v Fatta Chand*, PROV VPRS/1100/P0000/1.
[118] Memo from Andrew Shields on the subject of Fatta Chand, 30 March 1891, PROV VPRS/1100/P0000/1.
[119] Report of Considine and Cawsey on the antecedents of Fatta Chand, 25 March 1891, PROV VPRS/1100/P0000/1.

to ascertain about Chand was the name of the ship that carried him to Melbourne, that he had worked as a hawker under Azamoo Khan's direction, and that he had been less successful in business than his friend, Juggoo Mull. "Owing to the short time he has resided in the colony, his nationality and the nomadic life he has been leading," wrote the detectives, "nothing except that given can be ascertained."[120]

Chand's carefully cultivated anonymity ultimately doomed him. European experts for the defence and the prosecution were predisposed by their chauvinism to erase the individual histories and personalities of the unlucky non-Europeans who found their way into common law courtrooms. The British model of the autonomous legal subject, the jurisprudential reference point for presumptions about personhood, thought, feeling and behaviour, was different for Chand, as an Indian migrant, than it was for others. The Victorian authorities knew little about Chand beyond his ethnicity, but they believed they knew enough. Chand was new to the colony, spoke little English, and had spent most of his time in Melbourne hiding from the police. He was a blank canvas onto which authorities could project images of how 'Indians' behaved – how 'they' killed, what 'they' wore, what 'they' believed – without the inconvenience of first having to erase the details of the prisoner's life.

Chand was tried at the Melbourne Supreme Court. His first trial was held in late February. Gilbert Smith, a journalist and self-professed 'Oriental interpreter', took the stand for the defence. Smith claimed to have known Mull and Chand for some time. He told the court that Chand could not speak English well, "although he might be able to say 'You buy' and things of that sort."[121] The court heard that Chand was the last man to see Mull alive, and Chand had no

[120] Report of Considine and Cawsey on the antecedents of Fatta Chand, 25 March 1891, PROV VPRS/1100/P0000/1.
[121] "THE ALLEGED MURDER BY A HINDOO." *The Argus* (Melbourne, Vic.: 1848-1957) 2 Mar 1891: 10. Web. 8 Oct 2014 <http: //nla.gov.au/nla.news-article8479610>.

alibi for his whereabouts on the day of the killing. In his instructions to the jury, the judge, Molesworth, told them that the evidence again Chand was "purely of a circumstantial character."[122] Eleven of the jurors voted to convict Chand of murder. However, one man insisted that the evidence against Chand was too flimsy to justify a guilty verdict. After ten hours of deliberation and despite Molesworth's cajoling, the jury could not agree, and a new trial was ordered.[123]

Chand was tried again three weeks later, this time before Justice Hood. In his closing address to the jury, Chand's lawyer, Edward Forlonge, who had also appeared in the Deeming trial, argued that the case was one of mistaken identity. Forlonge, just as Leech had in An Gaa's case fifteen years earlier, impugned the reliability of the non-European witnesses who had placed Chand and Mull together in late November. He disputed the evidence given by the inhabitants of Coranderrk on the ground that "the aboriginals might easily be mistaken in recognizing Fatta Chand."[124] And, for good measure, he relied on the hackneyed trope of Indian mendacity and declared, "He did not hesitate to charge the Hindoo witnesses with perjury."[125] The evidence in this new trial was the same, but the judge's instructions to the jury were not. According to one journalist who reported on the case, Hood accepted that the evidence against Chand was circumstantial, but added that "if juries refused to act on circumstantial evidence then half the criminals would be allowed to go free."[126] The jurors, Hood cautioned, must remember, "The

[122] "THE ALLEGED MURDER BY A HINDOO." *The Argus* (Melbourne, Vic.: 1848-1957) 2 Mar 1891: 10. Web. 8 Oct 2014 <http: //nla.gov.au/nla.news-article8479610>.
[123] "THE ALLEGED MURDER BY A HINDOO." *The Argus* (Melbourne, Vic.: 1848-1957) 2 Mar 1891: 10. Web. 8 Oct 2014 <http: //nla.gov.au/nla.news-article8479610>.
[124] "THE MURDER OF AN INDIAN HAWKER." *The Argus* (Melbourne, Vic.: 1848-1957) 25 Mar 1891: 9. Web. 8 Oct 2014 <http: //nla.gov.au/nla.news-article8486295>.
[125] "THE MURDER OF AN INDIAN HAWKER." *The Argus* (Melbourne, Vic.: 1848-1957) 25 Mar 1891: 9. Web. 8 Oct 2014 <http: //nla.gov.au/nla.news-article8486295>.
[126] "THE HINDOO MURDER." *Riverine Herald* (Echuca, Vic.: Moama, NSW: 1869-1954) 25 Mar 1891: 2. Web. 8 Oct 2014 <http: //nla.gov.au/nla.news-article114685945>.

blood of the murdered man cried aloud for vengeance."[127] After deliberating for three hours, the jury returned a verdict of guilty and did not recommend mercy.[128]

There were problems with the trial. Gilbert Smith wrote to the Governor, the Earl of Hopetoun, objecting to how Chand's Indian background had been discussed during the trial. Smith had acted as Chand's interpreter to his solicitor and counsel. He was not committed to removing Chand's nationality from consideration, but in correcting how the prosecution had used it. The Crown prosecutor, Mr. Finlayson, had reportedly told the jury only an Indian could have killed Mull, because dismemberment was the general practice of Hindu murderers.[129] Smith argued that there was no "invariable practice" among Hindu murderers, but, if he were forced to identify one, it would be poisoning.[130] Smith contended that the testimony of Aboriginal and white witnesses placing Chand with Mull on the day of the murder was faulty, as Indians were notoriously difficult to tell apart.[131] He argued that an amulet found at the crime scene was of Muslim origin, and would never have been kept by either Mull or Chand, as Hindus.[132]

Smith described Chand as "a stranger in a strange land", "a poor unfortunate Hindu, destitute and pleading for a fair trial." He also claimed that the defence had been short-changed, while the prosecution enjoyed all the resources of the government and the services of an elite barrister like Finlayson. "Here is an Indian hawker," Smith wrote, "sneaking through a district, […] unable to speak English, fearful of arrest for having no license, locked up in gaol without money, defended by the Crown as a pauper, called upon to prove where he was the week the

[127] "THE HINDOO MURDER." Riverine Herald (Echuca, Vic.: Moama, NSW: 1869-1954) 25 Mar 1891: 2. Web. 8 Oct 2014 <http: //nla.gov.au/nla.news-article114685945>.
[128] "THE MURDER OF AN INDIAN HAWKER." The Argus (Melbourne, Vic.: 1848-1957) 25 Mar 1891: 9. Web. 8 Oct 2014 <http: //nla.gov.au/nla.news-article8486295>.
[129] Gilbert Smith to the Governor, 13 March 1891, PROV VPRS 264/P0001/1.
[130] Gilbert Smith to the Governor, 13 March 1891, PROV VPRS 264/P0001/1.
[131] Gilbert Smith to the Governor, 13 March 1891, PROV VPRS 264/P0001/1.
[132] Gilbert Smith to the Governor, 13 March 1891, PROV VPRS 264/P0001/1.

murder was committed!! Could he have done so?"[133] On 14 April 1891, the Executive Council considered Fatta Chand's case. The Council interviewed Justice Hood, who reiterated his support for the jury's conviction. They looked at some of the exhibits, questioned Hood about the case, and considered Gilbert Smith's letter. After what the meeting's minutes describe as a "prolonged discussion", the Council directed that Chand's death sentence be carried out in two weeks' time.[134]

In the run-up to his execution, the public's fascination with Chand, and especially with his religion, grew. It was customary for prisoners to be attended by a spiritual adviser in their last weeks, but no Hindu religious official could be found in Victoria. [135] Eventually, a man who was described as a "Brahmin" was mustered from a "nearby colony" and brought to Chand's side, but Chand "repelled" him and was attended in his last hours by a Protestant reverend who claimed to have visited Chand's village in India. [136] Chand was inconsolable, however, and began to refuse food. The press speculated, ghoulishly, that Chand was scheming to "[cheat] Jones, the hangman, of his £5 hanging fee" by starving himself to death instead of enduring the dishonour and "eternal misery" that were due to Hindus who ate food prepared by Christians, or who were executed by them.[137] One newspaper reported that Chand "broke down" when the noose was placed around his neck, protesting his innocence in his native tongue to the very last.[138] Another reporter interviewed a 'well-known Hindoo interpreter' who thought little of Chand's

[133] Gilbert Smith to the Governor, 13 March 1891, PROV VPRS 264/P0001/1.
[134] Minutes of the Executive Council, Minute 22, 14 April 1891, PROV VPRS 1080/P0000/28.
[135] "On the Gallows." *Barrier Miner* (Broken Hill, NSW: 1888-1954) 28 Apr 1891: 4. Web. 8 Oct 2014 <http: //nla.gov.au/nla.news-article44066320>.
[136] "On the Gallows." *Barrier Miner* (Broken Hill, NSW: 1888-1954) 28 Apr 1891: 4. Web. 8 Oct 2014 <http: //nla.gov.au/nla.news-article44066320>; Captain Evans to A.P. Akehurst, 1 June 1891, PROV, VPRS 264/P0001/1.
[137] "On the Gallows." *Barrier Miner* (Broken Hill, NSW: 1888-1954) 28 Apr 1891: 4. Web. 8 Oct 2014 <http: //nla.gov.au/nla.news-article44066320>.
[138] Execution of Fatta Chand. (1891, April 29). *Bowral Free Press and Berrima District Intelligencer* (New South Wales: 1884-1901), p. 2. Retrieved January 28, 2014, from http: //nla.gov.au/nla.news-article118285448.

declarations of his innocence because, supposedly, a Hindu believed that his suffering would be both earthly and eternal, and that this would be worse if he confessed his crime.[139] Chand made one dying request. "Tell [my father] I'm dead," Chand reportedly begged, "but do not tell him that I was hanged. Say I died of cholera, and that my body was burned."[140]

Fatta Chand's anonymity, and the blankness that Victorian authorities attributed to him, was only partial. The authorities, including Chand's partisans, could not interview his family, could not prove where he had been on the day Juggoo Mull was killed, and could not have visited Chand's village in Punjab. However, much of their ignorance about Chand was wilful. Chand's English might have been poor, but Gilbert Smith, another court interpreter named Arthur Pritchard, and the Protestant minister who attended to Chand in prison all spoke his language at least moderately well. None of them bothered to share anything personal that they had learned about Chand with the authorities. Although some might have been sympathetic to the unfortunate man, Smith was the only one who tried to intervene with the Executive Council on Chand's behalf, and he largely ignored Chand in favour of arguing in generalities about 'Indians'. Chand was in police custody for months, but still authorities claimed almost total ignorance about him as an individual, while often simultaneously boasting of their familiarity with the culture of Indians, or 'Hindoos', as a people.

Moreover, colonial authorities undervalued the testimony of the people in Melbourne who knew Chand best – the colleagues who shared work, meals and a home with him, his supplier, Khan, the Aboriginal people who recognized him from his visits to Coranderrk – because they were not European. Chand's own lawyers disputed the truth and reliability of their

[139] "On the Gallows." *Barrier Miner* (Broken Hill, NSW: 1888-1954) 28 Apr 1891: 4. Web. 8 Oct 2014 <http://nla.gov.au/nla.news-article44066320>.
[140] "On the Gallows." *Barrier Miner* (Broken Hill, NSW: 1888-1954) 28 Apr 1891: 4. Web. 8 Oct 2014 <http://nla.gov.au/nla.news-article44066320>.

testimony. Chand did have connections in Victoria, but in the minds of the Australian police, jurors and jurists in Chand's case, these connections were not enough to tie an Indian man to Melbourne. Chand's voice rarely pierces through the reams of newspaper articles and letters about him. But he *was* speaking – to the minister, to the prison doctor, Andrew Shields, to Gilbert Smith, to Azamoo Khan, and even to the men who gathered to watch him die.

Jimmy Governor, An Gaa and Fatta Chand were found guilty and executed for their crimes, despite their advocates' claims that they were being unfairly treated under English law. But cultural arguments did not always fail. The case of the Rani Swarnamoyee of the Bengali zamindari of Cossimbazar is worth exploring in detail.[141] Swarnamoyee won her case before the Judicial Committee of the Privy Council. It is one of a handful of criminal appeals heard by the Committee in the nineteenth century, and an example of how Britain's colonial subjects could trade on their indigeneity to argue for their exemption from common law rules.

Somendra Chandra Nandy is the present Rajah of Cossimbazar, about two hundred kilometres north of Calcutta. Sometime in the 1960s, he discovered an immense cache of documents in boxes and trunks in his ancestral home.[142] In 1986, he published a comprehensive, meticulously documented history of his family, including Swarnamoyee. Nandy's *History of the Cossimbazar Raj* offers a glimpse into the rich financial and personal history of Swarnamoyee and her unfortunate husband, Krishnanath. In 1844, the year of his death, Kumar Krishnanath

[141] A zamindar, or zemindar, was an Indian landholder who collected revenue from his estate, of which he paid a percentage to the colonial government. In Bengal, zamindars often held very large tracts of land. A zamindar's estate was a zamindari, or zemindari. See: Sir Henry Yule, *Hobson-Jobson: A Glossary of Colloquial Anglo-Indian Words and Phrases, and of Kindred Terms, Etymological, Historical, Geographical and Discursive*, ed. Arthur Coke Burnell (London, 1903), 980.

[142] Michael E. Scorgie and Somendra Chandra Nandy, "Emerging Evidence of Early Indian Accounting," *Abacus* 28, no. 1 (1992): 88–97.

was the heir of the aristocratic rulers of the Bengal zamindari of Cossimbazar.[143] Krishnanath's father, the Rajah Harinath Roy, had died in the boy's infancy, and he had spent his youth under the watchful eye of the Bengal Court of Wards and under the thumb of his mother and grandmother.[144] Krishnanath spent most of his life beset by scheming officials, false friends and deceitful family members eager to gobble up chunks of the young heir's legacy.[145] He was thin, pale, and sickly, although he was an avid horseman.[146] As a teenager, he married. His bride was eleven years old, beautiful, and illiterate. Her name was Swarnamoyee, 'the golden girl'.[147]

Eventually, Krishnanath managed to assert his independence, and even sued his mother and grandmother for their financial mismanagement of his estate.[148] Still, he always kept physicians in his retinue, afraid that his jealous relatives would poison him.[149] When he reached eighteen, the age of majority under English law, it seemed that Krishnanath's money troubles were abating. He and Swarnamoyee lived in a grand house in the countryside, and Krishnanath acquired a large collection of Arabian horses and English hunting hounds.[150] He loved European food and furnishings, and was especially fond of wine.[151] He patronized the arts, loved education, although he was never a very good student, and was interested in horticulture,

[143] The spelling of Krishnanath's name varies very widely in the modern and historical literature. In the English records, he is often known as 'Christenauth'. This struck me as the more tortured rendering, so I have tried to stay with the more common modern English spelling.
[144] Somendra Chandra Nandy, *History of the Cossimbazar Raj in the Nineteenth Century* (Calcutta: Dev-All Private Ltd., 1986), 210.
[145] Ibid., 212.
[146] Ibid., 200.
[147] Nandy, *History of the Cossimbazar Raj in the Nineteenth Century*. The English transliteration of Swarnamoyee's name varies widely among contemporary and historical sources. In most nineteenth-century records, she was called Surnomoyee. I have chosen Swarnamoyee, as it seems to be the most common modern rendering.
[148] Ibid., 219.
[149] Ibid., 229.
[150] Ibid., 225.
[151] Ibid., 250.

physics, astronomy, mining and shipping.[152] In 1841, Krishnanath was awarded his formal title of Raja Bahadur by the Indian government.[153] In 1842, Swarnamoyee gave birth to a daughter.[154]

However, all was not well in Cossimbazar. There were allegations that Krishnanath had threatened to flog Swanamoyee for failing to produce an heir, and that he had tried to kill his infant daughter by leaving her on the floor of an empty room.[155] In the summer of 1844, Krishnanath, then twenty-two, was drinking heavily. Swarnamoyee was pregnant with the couple's second child. In the wake of a rift with a close friend and advisor, the management of Krishnanath's lands was in disarray and his tax revenue was falling.[156] The Rajah was allegedly in the thrall of a servant, Keshab Sarkar, who had worked his way up from cook's helper to confidante. In September of 1844, a box of Krishnanath's jewels went missing. Keshab accused another servant, Gopal, against whom he bore a grudge. Krishnanath's guards brutally beat Gopal and, when he refused to confess, they tortured him. When the local magistrate heard about Gopal's treatment, he issued orders for Krishnanath's arrest.[157] Krishnanath fled to Calcutta, but knew that he would be pursued. In late October, Gopal died of his injuries. On hearing the news, Krishnanath, anxiety-ridden and despairing, shot himself through the eye with a double-barrelled shotgun.[158]

When Krishnanath died, Swarnamoyee assumed the stewardship of the Cossimbazar Raj. Seventeen years old and pregnant, she immediately hired a tutor to begin her instruction in English, Persian and Sanskrit. She studied the zamindar system, and travelled across her lands in a palanquin, announced by drums and flanked by elephants, swordsmen, and carts full of money

[152] Ibid., 260.
[153] Ibid., 264.
[154] Ibid., 267.
[155] Ibid., 281.
[156] Ibid., 272–3.
[157] Ibid., 279.
[158] Ibid., 283.

and provisions.[159] Under her careful management over the next decades, her late husband's estate doubled. She became a patron of the arts, founded schools for girls, and gave generously to charities. Contemporaries and biographers praised her administrative acumen and extraordinary munificence, and were especially impressed that she observed strict purdah despite her role as a public figure.[160]

However, Krishnanath's estate continued to be plagued by legal difficulties. In June 1845, Swarnamoyee gave birth to a second daughter, Saraswati.[161] With no male heir, Swarnamoyee's role in Cossimbazar was in doubt. Krishnanath had hastily drafted a series of new wills in the days before his suicide, in which he purported to leave almost all of his estate to the nefarious servant Keshab.[162] Swarnamoyee and her supporters drafted a memorial to the Queen in which they argued that Krishnanath had not been in his right mind when he wrote the will.[163] The case went to court in India, and it was held that the will was invalid. Swarnomoyee was given control of the estate, but Krishnanath's relatives were unsatisfied with their share of the revenue. They colluded with various East India Company officials to claim the benefits of the estate. A hornet's nest of lawsuits swarmed Swarnamoyee as she struggled to take charge of Cossimbazar.

In July of 1863, one of the many lawsuits contesting Swarnomoyee's control over Krishnanath's estate made its way to the Judicial Committee of the Privy Council in London.[164] Krishnanath's grandmother had died, and the Indian Government wanted to claim the rest of her annuity. The Advocate General of Bengal, on behalf of the Crown, argued that the East India

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[159] Ibid., 468.
[160] Ibid., 286–7.See also: Usha Chakraborty, *Condition of Bengali Women Around the Second Half of the Nineteenth Century* (Calcutta, 1963), 114.
[161] Nandy, *History of the Cossimbazar Raj in the Nineteenth Century*, 306.
[162] Ibid., 293.
[163] Ibid., 428.
[164] *Advocate-General of Bengal v Ranee Surnomoyee (Fort William, Bengal)* [1864] UKPC 14 (22 July 1864)

Company had been wrong to acquiesce in Swarnomoyee's control of the estate.[165] The appellants in the case, the Indian government, argued that English criminal law had been applicable to both Indians and Europeans in Calcutta when the Rajah had committed suicide in 1844. They claimed that India had been, in the first years of British contact, a "barbarous country", and that the English had carried both their laws and the sovereignty of Britain with them as conquerors.[166] Under the English law of *felo de se*, in which suicide, or self-murder, was a crime, a suicide's personal property was forfeited to the Crown. Therefore, much of Krishnanath's estate was the rightful property of the British Indian government.

The Bengal government rested its case on an interpretation of *Calvin's Case*. The case, decided by the English Court of King's Bench in 1608, was the earliest and most famous articulation of the nature of British subjecthood, and the nature of British legal jurisdiction abroad, in common law jurisprudence.[167] Robert Calvin was a toddler from Edinburgh who inherited property in England shortly after the union of Scotland and England in 1603.[168] The Court held that all those governed by the King of England at the time of their birth were British subjects, including Calvin. Edward Coke's decision in *Calvin's Case* formulated British subjecthood as kind of cosmic, moral relationship fixed in natural law – a formulation that lived on long after young Robert Calvin was dead and buried. William Blackstone, in his *Commentaries,* wrote that subjecthood was a "natural allegiance" that was "intrinsic, and

[165] *Advocate-General of Bengal v Ranee Surnomoyee (Fort William, Bengal)* [1864] UKPC 14 (22 July 1864), 2.
[166] *Advocate-General of Bengal v Ranee Surnomoyee (Fort William, Bengal)* [1864] UKPC 14 (22 July 1864), 3.
[167] *Calvin's Case* 7 Coke Report 14 a, 77 ER (1608)
[168] Polly J. Price, "Natural Law and Birthright Citizenship in Calvin's Case (1608)," *Yale JL & Human.* 9 (1997): 81. NB Price writes that Robert Calvin's surname might have actually been Colville.

primitive."[169] The bond between British subject and sovereign – the exchange of allegiance for protection – was widely applicable, portable, difficult to transfer and immune even to treason.[170]

However, the relationship between political subjecthood and legal subjecthood in the British empire was ambiguous. In *Calvin's Case*, Coke wrote that if a Christian king conquered a Christian territory, then the laws of that territory were presumed to remain in force unless they were explicitly altered by the conqueror. If a Christian king defeated an infidel kingdom, however, "there ipso facto the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue."[171] However, Daniel Hulsebosch has argued that the case has often been misinterpreted to mean that Britons overseas always brought the common law with them.[172] Hulsebosch contends that Coke's judgment was in fact far narrower: status as a British subject only entitled a person to the protections of the common law inside Britain. Those living in British dominions overseas were subject to a hodgepodge of laws depending on their independent legal traditions and the circumstances and degree of their colonization by the Crown. "[T]he king-in-council," Hulsebosch writes, "had jurisdiction over all inhabitants in those other dominions but his common law courts did not."[173]

The appellants in Swarnamoyee's case hoped to convince the Judicial Committee that India was an infidel country that had been conquered by the Crown, and so that the common law applied to all Europeans and non-Europeans in India. Lord Kingsdown, who delivered the Judicial Committee's decision in Swarnamoyee's case, was not persuaded. Kingsdown praised

[169] William Blackstone, *Commentaries on the Laws of England*, Book 1, Ch. 10, p. 358.
[170] *Calvin's Case* 7 Coke Report 14 a, 77 ER (1608), 393.
[171] *Calvin's Case* 7 Coke Report 14 a, 77 ER (1608), 398.
[172] Daniel J. Hulsebosch, "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence," *Law and History Review* 21, no. 03 (2003): 439–82.
[173] Ibid., 457.

Lord Stowell's well-known decision in the *Indian Chief* (1800), in which he considered the jurisdiction of British law over the American consul, Mr. Millar, who had been living at the British factory at Calcutta.[174] British authorities had seized a shipment of Millar's goods, and the validity of the seizure depended on whether or not he had acquired British national character during his residence in Calcutta. Stowell explained that in the western world, alien merchants and native peoples mixed and became incorporated into one another's lives. "But in the East," he continued, "from the oldest times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners, as all their fathers were."[175] Stowell found that Millar had become, to some extent, legally British while under British protection in Calcutta. His decision in *Indian Chief*, however, was remembered primarily for his account of British settlement in India as fundamentally heterogeneous. British law superseded Mughal or other strands of Indian law in British factories and ports, but did not extend to the country as a whole. Britons had not, and probably would not, become integrated into wider Indian society; there was a strong presumption of incompatibility between British and Indian life, and law.

Kingsdown, following Stowell's lead, argued that the first British settlement in India in the sixteenth century was modest and geared only toward trade – it would be centuries before the Crown interfered in its governance. Kingsdown described Mughal India as a "very populous and highly civilized country, under the government of a powerful Mahomedan ruler" – hardly an empty or barbarous wasteland.[176] The judges argued that English law was not applicable to Indian Hindus or Muslims at the time of the first English settlement, and that only express

[174] *The Indian Chief* 3 Robinson's Reports 29 (1800).
[175] *The Indian Chief* 3 Robinson's Reports 29 (1800).
[176] *Advocate-General of Bengal v Ranee Surnomoyee (Fort William, Bengal)* [1864] UKPC 14 (22 July 1864), 3.

alteration of Indian law by the Crown could have brought Indians under its jurisdiction.[177] Moreover, even when English civil and criminal law had been explicitly applied to India, as the judges agreed it generally had in Calcutta by the 1726 Charter, English law could not be interpreted to extend to non-Christians in ways which would have been attended with "intolerable injustice and cruelty."[178] In addition, the Indian Penal Code of 1860 did not classify suicide as a punishable offence, although it did criminalize abetting suicide and suicide attempts.[179] The government's efforts to assert the criminality of suicide in 1844 seemed even more retrograde and insensitive in light of the law that held in 1864.

The judges then proceeded to consider English laws, based on Christian moral precepts, which would have been unfair to enforce against Hindus and Muslims in India. For instance, English laws forbidding bigamy were unsuitable for a people who routinely practiced polygamy. To punish Indians for polygamy would have been "monstrous."[180] The English prohibition against the "heinous offence" of having carnal knowledge of young girls was, in the judges' view, inappropriate in a country where girls were often married at or under the age of ten.[181] Turning to suicide, the judges argued that it was considered a crime primarily against the King, who would lose a subject, and against the Christian commandments. Part of the punishment was that the suicide could not be buried in consecrated ground, but this was obviously no punishment at all for non-Christians. The judges took this as further proof that the European law of *felo de se* was not applicable to Indians. The moral blameworthiness of suicide was, according to the judges, culturally dependent. In non-Christian countries suicide "deriv[ed] its moral character

[177] *Advocate-General of Bengal v Ranee Surnomoyee (Fort William, Bengal)* [1864] UKPC 14 (22 July 1864), 4.
[178] *Advocate-General of Bengal v Ranee Surnomoyee (Fort William, Bengal)* [1864] UKPC 14 (22 July 1864), 5.
[179] *Indian Penal Code* (1860), Ss. 306 and 309.
[180] *Advocate-General of Bengal v Ranee Surnomoyee (Fort William, Bengal)* [1864] UKPC 14 (22 July 1864), 5.
[181] *Advocate-General of Bengal v Ranee Surnomoyee (Fort William, Bengal)* [1864] UKPC 14 (22 July 1864), 5. Although the Age of Consent Act (1891) would raise the age of consent for all girls in India from ten to twelve.

altogether from the circumstances" in which it was committed, and could be considered justifiable, meritorious or immoral.[182] The appellants' appeal against Swarnamoyee was dismissed, and her right to her husband's estate was secured.

The Judicial Committee rejected the description of India, in Swarnamoyee's case, as "barbarous." Kingsdown took pains to emphasize that Mughal India had been "highly civilised", and so it could not be presumed that it had been conquered, and its law expunged, during the reign of Queen Elizabeth. Although the Privy Council's judges did not endorse the Advocate-General of Bengal's interpretation of the colonial history, and legal status, of Bengal, they never suggested that British rule in India was unjust or that British law was not morally superior to Indian law. The case was heard in London in 1864. By then, civilizational and racial thinking was already well established in the British worldview. The Privy Council's moral relativism and flexibility in Swarnamoyee's case was modest. The Committee's decision in *Ranee Surnomoyee* did not suggest that Indian law was as morally correct as British, Christian law – no doubt Kingsdown's contempt for bigamy, sex with children, and suicide endured unshaken. Rather, the Judicial Committee's decision is best understood in the context of the ethnological thought that defined its time. The Committee's judgment implied that Indian Hindus and Muslims suffered from an inferior moral sense, and so would experience the punishments of English law as outrageous and cruel, rather than harsh but just. The Committee's relativism was expressed in their assessment of the capacity of non-Christian Indians to understand the evil of their acts. They did not doubt the superiority English law, or of the Englishmen who were enlightened enough to be judged under it.

[182] *Advocate-General of Bengal v Ranee Surnomoyee (Fort William, Bengal)* [1864] UKPC 14 (22 July 1864), 6.

Aboriginal Australians, Chinese labourers, and Hindu and Muslim hawkers occupied very different places in the Victorian racial cosmology. Victorian stadial theory posited that the world's peoples could be arranged into an elaborate hierarchy of civilizations, with Britain at the top and the most abjectly barbarous peoples at the bottom. There was little agreement about where various cultures should be located along the scale, although settled, militarised and monotheistic peoples tended to score higher than nomadic peoples with less transparent (to Europeans) traditions of belief and governance.[183] Australian Aborigines were almost always classed among the least civilized peoples, while Indian non-Christians usually fared considerably better. Charles Darwin, who is not known for his excesses of ethnographic enthusiasm, wrote in *The Descent of Man* (1871) that he considered Aboriginal Australians to be only a relatively short evolutionary 'break' away from the gorilla.[184] Criminal cases involving Aboriginal Australian defendants tested Britons' faith in the universal applicability and justice of their law. Because indigenous Australians represented, in the British imperial imagination, the least civilized class of humanity, cases in which they appeared often prompted colonial authorities to doubt the ability of the common law to rule the empire.

Aboriginal Australians' relationship to the British imperial government in the Australian colonies was often in question in the nineteenth century. [185] Damen Ward describes a group of commentators and colonial officials who were zealously 'exceptionalist.' That is, they believed that English law was culturally specific, and that it was unfair to expect primitive indigenous peoples to meet the legal standards of the most civilized and sophisticated legal system on

[183] James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland: Auckland University Press, 1986).
[184] Charles Darwin, *The Descent of Man and Selection in Relation to Sex*, 2nd ed. (New York: D. Appleton and Company, 1896), 156.
[185] See, for example: Ann Hunter, "Boundaries of Colonial Criminal Law in Relation to Inter-Aboriginal Conflict (Inter Se Offences) in Western Australia in the 1830s-1840s," *Australian Journal of Legal History* 8 (2004): 215–36.

Earth.[186] In an 1837 essay, "Exceptional Laws in Favour of the Natives of New Zealand", one commentator effectively summarized the position of Britons who favoured exempting indigenous peoples from British law.[187] In a sub-section titled, "It is possible to oppress and destroy under a show of justice," the author argued,

> The establishment of the same rights and the same obligations can only be fair between parties who have the same power in the same field; but where one of the parties is immeasurably inferior to the other, the only consequence of establishing the same rights and the same obligations for both will be to destroy the weaker under a show of justice. Now it is obvious that such would be the case with the New Zealanders, or any other barbarous race, if put in competition with the European.[188]

In a similar vein in the same year, the authors of the 1837 report of the Parliamentary Select Committee on Aboriginal Tribes argued, "To require from the ignorant hordes of savages living in Eastern or Western Australia the observance of our laws would be absurd, and to punish their non-observance of them by severe penalties is palpably unjust."[189] Members of the Select Committee were especially anxious to prevent white settlers from abusing what they understood to be their natural superiority in order to exploit and abuse indigenous peoples.[190] The Report expressed the humanitarian, evangelical, reformist Committee's disgust that imperial violence and cupidity had tainted the freedom and civilization that British rule promised the world's primitive peoples. "Men calling themselves Christians," they wrote, "subjects of a christian [sic]

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[186] Ward, "A Means and Measure of Civilisation," 8.
[187] The essay was originally published anonymously, although Ward identifies the author as Samuel Hawtrey. See: Ibid.
[188] Edward Jerningham Wakefield and John Ward, *The British Colonization of New Zealand: Being an Account of the Principles, Objects, and Plans of the New Zealand Association, Together with Particulars Concerning the Position, Extent, Soil and Climate, Natural Productions, and Native Inhabitants of New Zealand* (John W. Parker, 1837), 400.
[189] Great Britain Parliament House of Commons Select Committee on Aboriginal Tribes, *Report of the Parliamentary Select Committee on Aboriginal Tribes, (British Settlements.)* (Society, 1837), 127.
[190] Ibid., 30.

government, professors of the christian faith, have stooped, for the attainment of selfish ends, to practice upon the confiding ignorance of these simple and untutored children of the desert."[191]

However, the passionate paternalism that animated the humanitarians of the Select Committee waned as the nineteenth century progressed. As Lisa Ford shows in her *Settler Sovereignty*, from the 1830s white settlers in the colonies came increasingly to see total territorial jurisdiction as "a necessary accoutrement of sovereignty" and grew intolerant of indigenous exemptions from common law authority.[192] Sir George Grey, who three terms as the governor of South Australia and of New Zealand in the mid-nineteenth century, criticized the exceptionalists for allowing Australian Aboriginals to wallow in the savagery of their customs, even if they did so for philanthropic reasons. Grey argued that indigenous Australians were, by and large, "as apt and intelligent as any other race of men" but their laws were so debased that "it would appear…impossible that any nation subject to them could ever emerge from a savage state."[193] Grey accepted that forcing Aboriginals to comply with British law might seem unjust, at first. But in the end, he insisted, the only humane way to help Aborigines to "rise into a state of civilization" was to educate them in British culture by treating them as full subjects of the common law.[194]

It has long been the general wisdom that Grey's vision of the legal incorporation of Aborigines into British criminal law was achieved in the 1850s. However, the reality was quite different. Australian legal historians have noted an enduring reluctance of white authorities to

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[191] Ibid., vii.
[192] Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836*, 3.
[193] George Grey, "A Report upon the Best Means of Promoting the Civilization of the Aboriginal Inhabitants of Australia," in *Further Information Respecting the Aborigines*, by The Aborigines' Committee of the Meeting for Sufferings (London: Edward Marsh, 84, Houndsditch, 1842), 25.
[194] Ibid., 26. Grey also believed that colonial authorities should remove impediments to Aboriginals testifying in court, provide defence counsel for free, and educate them about their rights to fair pay for their labour. See: Ibid., 29.

prosecute Aboriginal people for crimes committee *inter se*, even into the last decades of the nineteenth century.[195] Partly, the reluctance of British authorities to prosecute Aboriginal Australians stemmed from logistical difficulties. Few white Australians spoke indigenous languages, and investigating crime in Aboriginal communities could be arduous and a strain on police resources. Furthermore, racist tropes about the unreliability of Aboriginal witnesses in court meant that authorities were less likely to believe that they could gather sufficient evidence to make a conviction.[196] However, Aboriginal defendants did find themselves in British common law courts in Australia. When parties to the cases included whites, or when Aboriginal people were accused of committing crimes in or near major white settlements, the apparatus of the common law justice system creaked into operation. Many Australian cases involving Aborigines suggest that the white hesitation consistently to prosecute Aboriginal crimes was not only born of neglect or laziness, although both factors clearly contributed to it. Rather, these cases also reveal a deep uncertainty about the applicability of common law standards to Aboriginal people, and an unwillingness to declare their capacity to reach the moral and cognitive heights presumed in common law jurisprudence.

In one 1858 case, tried in the colony of Victoria, two Aboriginal men, known to the imperial authorities as Old Man Billy and Young Man Billy, were accused of hitting another Aboriginal man, Johnny, over the head and then drowning him in a river. Old Man Billy and his nephew Young Man Billy were charged with murder, and their case was heard at Ballaarat, near Melbourne, by Justice Williams.[197] The principal witness in the case was an Aboriginal woman named Kitty, who testified that she had seen "the Billys" strike Johnny with a rock. She believed

[195] Finnane, "'Payback', Customary Law and Criminal Law in Colonised Australia," 303.
[196] Ibid., 304.
[197] Judge's Notes of Evidence, 25 October 1858, *R v Old Man Billy and Young Man Billy*, PROV VPRS 264/P0000/1.

that the motive had been ongoing tension between the Billys' tribe and Johnny's. Williams and the jury were persuaded by her account, but made much of the fact that she was "unsworn" and so, in their eyes, unreliable. The jury found both men guilty of murder, but strongly urged the Governor to have mercy in their case. In a letter to the Executive Council, Williams wrote that he supported the recommendation to mercy "on the ground of their ignorance of our customs. And the peculiar nature of their own."[198] Both men's sentences were commuted from death to seven years' hard labour.[199] Although the sentence was not death, it was harsh. Old Man Billy died in April of 1859, after he and Young Man Billy had been at work breaking stones in a prison stockade for months. The cause of death was officially recorded as dropsy. He was forty.[200]

The idea that Aboriginal defendants' customs were so peculiar that they merited different treatment under imperial law appeared in many cases. Sometimes arguments about cultural difference and its presumed impact on criminal responsibility were made through subtle references or in letters among judges and administrators, as in the Billys' case, and sometimes explicitly by lawyers and witnesses. In 1860, an Aboriginal man, known as 'Peter' but who called himself Mun-gett, was accused of raping a seven-year-old white girl as she walked home from a hotel in a small town in the Pentland Hills, about 60 kilometres outside Melbourne.[201] Like Jimmy Governor, it seems possible, based on contemporary newspaper reports, that Mun-

[198] Williams to the Executive Council, 26 October 1858, PROV VPRS 264/P0000/1.
[199] MELBOURNE NEWS. (1858, November 2). *Bendigo Advertiser* (Vic.: 1855-1918), p. 2. Retrieved January 29, 2014, from http: //nla.gov.au/nla.news-article87984606.
[200] INQUEST ON A MURDERER. (1859, June 4). *The Argus* (Melbourne, Vic.: 1848-1957), p. 5. Retrieved January 29, 2014, from http: //nla.gov.au/nla.news-article5682248.
[201] Judge's Notes of Evidence, 5 July 1860, *R v Peter (An Aboriginal),* PROV VPRS 264/P0000/2.

gett was of mixed European and Aboriginal heritage. However, he and everyone around him considered him Aboriginal, both culturally and racially.[202]

His case was heard by Justice Polhman, and the criminal sittings of the Melbourne Supreme Court. Dr. Mackay, one of Mun-gett's barristers, entered a special plea before the trial. Mackay argued that his client belonged to a sovereign Aboriginal tribe, and that Mun-gett "did never become subject to, or submit himself, or otherwise acknowledge allegiance to, our said Lady the Queen."[203] Mun-gett demanded the right to be tried by a tribal court with customary jurisdiction over serious crimes, such as rape and murder. This was reported to be the first case in Victoria in which an Aboriginal person had refused to plead on the ground that he was not a British subject.[204] After some debate, Mackay agreed to reserve the question of Mun-gett's status as a British subject to be heard before the Full Court, in the event that Mun-gett was convicted.[205]

William Thomas testified in Mun-gett's defence. At the time, Thomas was working as the Guardian of Aborigines, an office created in the late 1830s in which colonial governments across the empire engaged 'Guardians' or 'Protectors' to supervise Aboriginal communities and, in theory, to protect them from violence or exploitation.[206] Thomas did little to help Mun-gett's

[202] LAW REPORT. (1860, June 29). *The Argus* (Melbourne, Vic.: 1848-1957), p. 6. Retrieved January 29, 2014, from http: //nla.gov.au/nla.news-article5685209. The *Argus* reported that Mun-gett was a 'half-caste', but that the Supreme Court had decided to consider his case as if he had been a 'pure aboriginal'.
[203] CRIMINAL SESSIONS. (1860, February 16). *The Argus* (Melbourne, Vic.: 1848-1957), p. 3. Retrieved January 29, 2014, from http: //nla.gov.au/nla.news-article5677272.
[204] VICTORIA. (1860, February 21). *South Australian Register* (Adelaide, SA: 1839-1900), p. 3. Retrieved January 29, 2014, from http: //nla.gov.au/nla.news-article49895896. It was common for imperial peoples to claim their rights as British subjects and Englishmen. See: Muller, "Bonds of Belonging." Mun-gett's defence relied on the opposite claim – that he was not, and had never been, a subject of the Queen.
[205] CRIMINAL SESSIONS. (1860, February 17). *The Argus* (Melbourne, Vic.: 1848-1957), p. 7. Retrieved January 29, 2014, from http: //nla.gov.au/nla.news-article5677335.
[206] Kenneth D. Nworah, "The Aborigines' Protection Society, 1889–1909: A Pressure-Group in Colonial Policy," *Canadian Journal of African Studies / Revue Canadienne Des études Africaines* 5, no. 1 (January 1, 1971): 79–92.

cause. He told the jury that for Aborigines, "the more civilized the worse."[207] Although he had known 'Peter' since childhood, Thomas said that 'Peter' had been lately living among settlers. Thomas' implication that Mun-gett's contact with white society had contributed to his criminality was part of a discourse that emphasized the psychological and physical dangers for indigenous peoples of attempting to live among the civilized. Jimmy Governor, in Boyce's view, snapped because his white heritage gave him a European's sense of honour and propriety but without a European's characteristic forbearance and self-control. Governor could not hope to become a truly civilized man, no matter how hard he worked or whom he married. Megan Vaughan argues that, for many Britons, "'The African' in the twentieth century, like the European woman in the nineteenth century, was simply not equipped to cope with 'civilization.'"[208] When Africans were thrust pell-mell into European-style schools, cities and factories, colonial officials believed, they went mad.[209] Similarly, Thomas argued that Mun-gett was a victim of his contact with European society – morally and mentally incapable of adjusting to modernity, and helpless before the impulse to violence that this disequilibrium unleashed.

Under cross-examination, Thomas declared that Aborigines "know right from wrong. He is punishable for Rape. It is a crime. They have laws for almost every offence. He would be punished for Rape by the father. It would be a blow to the head." Only under re-examination by the defence did Thomas add, "The blows are according to discretion. They never put them to death for Rape."[210] Mun-gett was found guilty and sentenced to death. The Supreme Court, sitting in full, convened some months later to consider Mun-gett's special plea. "The Court did

[207] Testimony of William Thomas, Judge's Notes of Evidence, 5 July 1860, *R v Peter (An Aboriginal),* PROV VPRS 264/P0000/2.
[208] Vaughan, *Curing Their Ills*, 107.
[209] Ibid., 109.
[210] Testimony of William Thomas, Judge's Notes of Evidence, 5 July 1860, *R v Peter (An Aboriginal),* PROV VPRS 264/P0000/2.

not call on the Solicitor-General for any reply," the Melbourne *Argus* reported, "but held that the Queen's writ runs throughout this colony, and that British law is binding on all peoples within it; and that the conviction was good."[211] Mun-gett's sentence was later reviewed by the Executive Council and commuted to fifteen years' hard labour.[212]

R v Peter set the precedent in Victoria for the total subjection of Aboriginals to British criminal law. Some months after *Peter*, defence counsel in a manslaughter case involving an Aboriginal couple attempted to distinguish *Peter*, in which the defendant was Aboriginal but the victim was white, from cases where both parties were Aboriginal. In *R v Jemmy*, the Full Court heard the special plea that the imperial courts should allow Aborigines to be tried by their customary courts for crimes *inter se*. Lawyers for the defence compared the Aborigines to American Indians, to the Irish, and even to Normans after the Conquest. In response, the Court affirmed *Peter* and the supremacy of imperial jurisdiction. However, Chief Justice Stawell added, "It is not intended to decide that in no case might there be a concession to a subject race of immunity from the laws of the conquerors living among them."[213]

Some, including Australian Supreme Court judges, have taken *Peter* and *Jemmy* as proof that criminal law applied equally to Europeans and Aborigines in the second half of the nineteenth century.[214] However, both *Peter* and *Jemmy* should be seen as evidence of how fraught the question of how to respond to non-European defendants remained for imperial jurists. In *Peter*, Mun-gett's arguments were taken seriously enough that the Full Court heard them, and

[211] LAW REPORT. (1860, June 29). *The Argus* (Melbourne, Vic.: 1848-1957), p. 6. Retrieved January 29, 2014, from http: //nla.gov.au/nla.news-article5685209.
[212] COLONIAL NEWS. (1860, July 24). *The Maitland Mercury & Hunter River General Advertiser* (NSW: 1843-1893), p. 4. Retrieved January 29, 2014, from http: //nla.gov.au/nla.news-article18677360.
[213] LAW REPORT. (1860, September 7). *The Argus* (Melbourne, Vic.: 1848-1957), p. 6. Retrieved January 29, 2014, from http: //nla.gov.au/nla.news-article5689352.
[214] Martin Kriewaldt, "The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia," *University of Western Australia Law Review* 1, no. 20 (1962 1961): 1–50.

the Executive Council felt bound to commute his sentence. In *Jemmy*, Justice Stawell explicitly circumscribed the Court's decision, leaving open the possibility of legal concessions to conquered peoples in future cases. Although no nineteenth-century cases successfully challenged the principle of imperial legal supremacy, in practice accommodations were regularly considered and often made in the administration of Australian criminal law.

Even while imperial jurists and officials proclaimed the subject status of colonized peoples, and their vulnerability to British common law, they were careful to allow space for flexibility in punishment and in future judgments. Aboriginal peoples' subjection to British authority was never in doubt, but their ability to function as subjects of British common law remained in question. George Grey might have been certain that "the only way to prevent great crimes on the part of the natives, and massacres of these poor creatures as the punishment of such crimes, [was] to check and punish their excesses in their infancy," but not all shared his belief that indigenous peoples would, or could, distinguish the common law's lessons from its violence.[215]

D. Hack Tuke, writing about Prichard, recounted how "one of [Prichard's] fellow-students has stated that in their daily walks 'this subject [the 'varieties of the human race'] was always uppermost. A shade of complexion, a singularity of physiognomy, a peculiarity of form, would always introduce the one absorbing subject. In the crowd and in solitude it was ever present with him.'"[216] The politicians, lawyers and doctors who administered British criminal law in the empire did not, in general, dwell explicitly or at length on the civilizing mission, or on the failure of colonized peoples to succeed at the rigged game of humanitarian uplift. However, the difficulty of judging 'savage' subjects under 'civilized' law was ever present with them.

[215] Grey, "A Report upon the Best Means of Promoting the Civilization of the Aboriginal Inhabitants of Australia," 27–8.
[216] Tuke, *Prichard and Symonds in Especial Relation to Mental Science*, 5.

The next, and final, chapter describes a set of criminal cases from Canada. In the late nineteenth century, in the vast western prairies, colonial officials confronted a supernatural creature that preyed on the indigenous peoples of the plains. This creature, the *wendigo*, embodied the difficulty of imposing British common law in a faraway land, on people who were willing to kill to defend their communities against intruders of all kinds

CHAPTER SIX
CANNIBALISM AND CLEMENCY IN THE CANADIAN NORTH-WEST

"A 'wendigo', 'cannibal' or 'witch'", wrote Charles B. Rouleau, "is a person who has an irresistible appetite for human flesh. The [I]ndian superstition is that if they do not do away or kill that person, their wives and children are in danger of being killed. That a 'wendigo' is always watching a chance to kill some body [sic], in order to satisfy that craving appetite."[1]

Charles B. Rouleau was a Stipendiary Magistrate in the North-West Territories, a vast swathe of land in colonial Canada that stretched from the barren islands of the Arctic Circle to the northern border of the United States, and from present-day Alaska in the west to the eastern shores of Hudson's Bay. On 25 September 1885, Rouleau tried three Cree men for murder in a courtroom in Battleford, a small town on the banks of the North Saskatchewan River in the flat, empty Canadian prairies. The defendants, Charles Ducharme, Dressy Man and Bright Eyes, were unlikely killers. Though he remained tall and still worked as a labourer, Ducharme's grey hair revealed his age, eighty-five.[2] He had been born in Pembina, the site of the oldest European settlement in the Dakotas, at the turn of the century - three years after the settlement acquired its first fur trading post and twenty-three years before surveyors first noticed that the town lay two miles below the forty-ninth parallel.[3] Dressy Man was a married man of sixty-five. He was slight, with dark grey eyes.[4] Bright Eyes was only eighteen.[5]

The men were accused of killing an old woman named Riskewack, known in English as She Wins. At trial, the prisoners did not cross-examine the witnesses or call anyone to speak in

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[1] Charles B. Rouleau to J.S.D. Thompson, 27 November 1885, Library and Archives Canada, Ottawa (LAC), Charles Ducharme Capital Case File, RG 13, vol. 1423, file 207A.
[2] Stony Mountain Penitentiary Admissions Book, 1885, LAC RG 13, T-11095.
[3] Ruth Swan and Edward A. Jerome, "The History of the Pembina Métis Cemetery: Inter-Ethnic Perspectives on a Sacred Site," *Plains Anthropologist* 44, no. 170 (November 1, 1999): 82.
[4] Stony Mountain Penitentiary Admissions Book, 1885, LAC RG 13, T-11095.
[5] Stony Mountain Penitentiary Admissions Book, 1885, LAC RG 13, T-11095.

their defence as, according to Rouleau's transcript of the evidence, "the witnesses for the prosecution stated what was done."[6] The witnesses described how, on the day of her death, She Wins was carried to the site of her execution wrapped in an animal skin. She was too weak and frail to walk. Surrounded by dozens of onlookers, both Cree and European, Ducharme raised a stick and struck her on the side of the head. She fell to the ground. Bright Eyes raised his pistol and shot, the gun so close that the powder scorched her bloodied hair. Dressy Man then approached and buried his axe in her neck.[7]

A jury of six white men convicted Charles Ducharme and Dressy Man of murder and sentenced them to death. Bright Eyes, perhaps treated more leniently because of his youth, was sentenced to twenty years' imprisonment for manslaughter.[8] Three days later, Charles Rouleau forwarded his papers from the case to Ottawa, the colonial capital. He included a note in which he disagreed with the jury's decision to convict Ducharme and Dressy Man of murder. He wrote, "taking into consideration their degree of civilization; the impression under which they were, that they could and were in duty bound to do away with their victim, I think that in law the degree of malice was not sufficient to justify the Jury to bring a verdict of murder."[9] Rouleau argued that Ducharme and Dressy Man felt "duty bound" to execute She Wins because her frail form concealed a dark and dangerous nature: she was a *wendigo*.[10]

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[6]Rouleau's transcript of evidence at the trial of Charles Ducharme, Dressy Man and Bright Eyes, forwarded to the Minister of Justice on 28 September 1885, Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[7] Testimony of Francis Dufresne at the trial of Charles Ducharme, Dressy Man and Bright Eyes, Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[8] Rouleau's transcript of evidence at the trial of Charles Ducharme, Dressy Man and Bright Eyes, forwarded to the Minister of Justice on 28 September 1885, Ducharme Capital Case File, LAC RG 13.
[9] Charles B. Rouleau to the Minister of Justice, 28 September 1885, Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[10] There are several alternative forms and spellings of *wendigo* used among various First Nations peoples. Common variants include *witiko, witigo, windigo*, *wintigo, and wittikow.* Variations on the Cree form, *wihtikow*, spelled *witigo*, are generally used in the Charles Ducharme and Dressy Man capital case file. However, I have adopted the most common English form – *wendigo* – throughout this chapter. For more on the linguistic origins of the term *wendigo*, see Robert A. Brightman, "The Windigo in the Material World," *Ethnohistory* 35, no. 4 (October 1, 1988): 337–79.

Rouleau argued against the guilt of men who clubbed, shot and hacked a helpless old woman to death, even though they admitted it openly in court. He was animated by the same concerns that moved the Judicial Committee of the Privy Council to allow the Rani Swarnomoyee to inherit her dead husband's estate, and that inspired Francis Stewart Boyce's passionate defence of Jimmy Governor. Rouleau, like so many members of the colonial judiciary, did not believe that indigenous defendants should, or even could, be held to the standards of behaviour and cognition implicit in British criminal law. Rather, he thought that the defendants' traditional Cree belief in *wendigos* - in cannibal monsters - was so overwhelming and so terrifying that, under English law, it undermined their responsibility for their crime. According to Rouleau, the Cree men lacked the intention to murder; they thought that they were executing an evil spirit living in a miserable human shell, protecting themselves and their community from being hunted and eaten. The men did not have the guilty minds of murderers, but the woefully, helplessly deluded minds of people who could not know better.

This chapter furthers Chapter Five's analysis of how culture could mitigate or even obviate responsibility in criminal cases heard in British courts in a new imperial setting, the Canadian North-West. The chapter begins with the 1885 *wendigo* case and the legal debates it inspired among colonial officials as they considered defendants' honest belief in phenomena that they, as jurists, swore were not real. Then it moves to the case of Swift Runner, a rumoured *wendigo* and convicted murderer, whose crimes would not soon be forgotten by colonial officials. An account of Louis Riel's trial, and the complex cultural arguments made for and against his guilt, connects the *wendigo* cases more explicitly to the politics of the North-West. The chapter then loops back to Ducharme, Dressy Man and Bright Eyes, and contrasts their case against that of Louison Mongrain, who escaped execution because he was noble and 'civilized'

rather than noble and strange. These cases reinforce the interconnection of insanity and culture in imperial jurisprudence, and the central role that amateur ethnology played in criminal trials involving aboriginal defendants. The case of Ducharme, Dressy Man and Bright Eyes was imbricated in Canadian controversies over the pacification of indigenous communities, the integrity and authority of colonial courts, and the response of English jurisprudence to non-white defendants with purportedly alien minds, customs and cosmologies. I often refer to this 1885 case as 'the *wendigo* case', but only for brevity's sake. There were many cases in colonial Canadian jurisprudence involving *wendigos* and many, many more cases across the British empire in which late Victorian anthropology entered the criminal courtroom and shook colonial officials' faith in the universality of the common law.

The *wendigo* case is one of a constellation of criminal cases decided in the wake of the 1885 Rebellion in the North-West Territories. 1885 was a year of crisis in the Dominion, in which aboriginal forces took arms against the steady encroachment of British imperial authority over Canada's prairie hinterland.[11] The revolt pitted animist and Christian First Nations and Catholic Métis - people of mixed European and First Nations ancestry, sometimes called 'halfbreeds' in the nineteenth century - against the colonial Canadian government, dominated by English-speaking Protestants with strong British connections.[12] White settlers and soldiers pressed deeper and deeper into territory long occupied by Métis and First Nations groups, threatening their autonomy and their livelihood. The Rebellion's leader was Louis Riel, a

[11] Terminology can be complicated when describing aboriginal Canadian communities. In general, both Métis and groups sometimes known as 'Indian' can be accurately described as aboriginal. First Nations is often preferred today when referring to 'Indian' groups in Canada, although First Nations does not, usually, include the Métis, by virtue of their mixed heritage. Here, I have referred to both the Métis and the Cree as indigenous and aboriginal, but have restriction 'First Nations' to the Cree and Ojibwa. For more on terminology, see: Edward J. Hedican, *Applied Anthropology in Canada: Understanding Aboriginal Issues* (University of Toronto Press, 2008), 5–8.

[12] The Métis described in this chapter were, like Louis Riel, French-speaking and Catholic. However, there were other Métis groups in the nineteenth century of Scottish and English heritage, many of whom were Protestant Christians and spoke English. Ibid., 7–8.

charismatic Métis politician and self-proclaimed prophet who became one of the most famous and controversial figures in Canadian history.

During the uprising, the Cree community of which Ducharme, Dressy Man and Bright Eyes were members attacked a white settlement at Frog Lake. The attack became known as the Frog Lake Massacre. Ten days later, the same community of Cree seized the government station at Fort Pitt. Nine whites died at Frog Lake and one at Fort Pitt. Shortly after the sacking of Fort Pitt, She Wins met her death surrounded by a crowd of Cree and their European prisoners, who had been captured at the Fort. A month later, in May, Canadian forces routed Riel's rebels at the Battle of Batoche, and the Cree soon surrendered. That summer and fall, the government tried the rebels, including Cree who had killed at Frog Lake and Fort Pitt. Riel's trial is the most famous, but the case of Ducharme and Dressy Man is the most striking. She Wins was the only Indian person whose killing was prosecuted as part of the Frog Lake murder trials. Her ritual execution as a cannibal creature sits uneasily beside the politically-motivated killings of government employees and policemen.

Although Ducharme, Dressy Man and Bright Eyes were tried alongside rebels, they had not killed She Wins in battle or as an attack on the state. The politics at work in the case were those of grinding, quotidian colonial resistance, not of the climax of an outright war. The Canadian government saw the Rebellion as a great crisis; the rebels' criminal cases were, in the words of the Deputy Minister of Justice, "very exceptional ones."[13] However, the *wendigo* case was, in a sense, mundane. It was a manifestation of a perennial problem of imperial law and governance, which colonial authorities confronted across the empire from the first days of colonial rule to the last. Officials had to decide whether or not to hold defendants who acted on supernatural beliefs that were emblematic, in the eyes of government authorities, of their

[13] Burbidge to Campbell, 10 August 1885, LAC RG 13, vol. 2132, part 15.

profound cultural difference, to the same standards as they would a European, or a British, defendant. The *wendigo* case offers a window into the routine course and concerns of imperial criminal law at a time of rapid change and military turmoil. The geographic, political and social frontiers between central, colonial Canada and the prairies were being breached, and the cultural world in which the *wendigo* thrived was under threat as it had never been before.

The story of Charles Ducharme, Dressy Man and Bright Eyes is part of the history of the Canadian North-West. From the 1850s, the buffalo herds on which the indigenous peoples of Canada had long depended began to dwindle. First Nations groups, including the Ojibwa and the Cree, were forced to compete for scarce natural resources with the Métis and with white settlers who were flooding the Western plains. To survive, many Cree turned to agriculture and, reluctantly, to the patronage of the Indian reservation system, which provided them with rations and protected lands.[14] In 1867, the provinces of Québec, Ontario, Nova Scotia, and New Brunswick were joined together under the *British North America Act* to become the Canadian confederation. The newly unified Canadian government moved quickly to consolidate its power and to pacify the vast lands to the West. Rupert's Land and the North-West Territory, the land between Ontario and the British Columbia border beyond the Rocky Mountains, had long been administered by the Hudson's Bay Company, which operated a network of trading posts in the region. The territories were sold to the Canadian government without the approval of the many indigenous and Métis communities who lived and traded there. The consolidated North-West Territories encompassed districts that would later become the modern provinces of Alberta, Saskatchewan and Manitoba.

[14] John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879–1885," *Canadian Historical Review* 64, no. 4 (December 1, 1983): 526.

In 1869 and 1870, Indian and Métis communities rebelled against the sale of their lands to Canada in a rising known as the Red River Rebellion. The sharp decline in the buffalo population had already compromised traditional hunting and migration practices, and the influx of settlers, railways, courts and police that Canadian government entailed undermined the independence and sustainability of indigenous communities. Canadian Prime Minister Sir John A. MacDonald saw the expansion of white settlement in the North-West essential to the pacification and civilization of First Nations peoples, whom he believed were, "as a whole, quite loyal, though they would have preferred their present wild and semi-barbarous life to the restraints of civilization that will be forced upon them by the Canadian Government and the new settlers."[15] Few First Nations people welcomed these intrusions into the North-West. In response, Louis Riel led an uprising that culminated in, to the dismay of Canadian officials, the trial and execution of a government surveyor by Riel's forces.[16] Overall, the rebellion was a modest affair and was quickly put down. However, the agitation induced the Canadian government to negotiate with the Métis over individual land claims, and to create the new province of Manitoba. A restive indigenous population would do little to attract European migrants and, especially, the commercial investors that Canada dreamed of luring to the prairies.[17]

Over the next several years, North-West Cree leaders, especially Big Bear of the Fort Pitt region in the District of Saskatchewan, negotiated with the Canadian government in efforts to protect their people's administrative autonomy and to preserve their access to what remained of the buffalo herds.[18] It was not easy to keep the peace in the face of food shortages and increasingly retaliatory police tactics. In the spring of 1884, Big Bear's father-in-law, whose

[15] MacDonald to Carnarvon, 14 April 1870, Carnarvon Papers, The British Library, London, Add. MS 60803.
[16] MacDonald to Carnarvon, 14 April 1870, Carnarvon Papers, BL Add MS 60803.
[17] On economic booms in the settler colonies, see: Belich, *Replenishing the Earth*, 2009.
[18] Tobias, "Canada's Subjugation of the Plains Cree, 1879–1885," 521.

name was rendered by officials as Yah-yah-koot-lah-wah-boo, hungry and frustrated after returning from a long unsuccessful hunt, came into a government provision store at Fort Pitt and demanded rations. The shopkeeper refused. The Cree man insisted, and eventually drew a knife. A North-West Mounted Police (NWMfhunP) inspector tried and sentenced Yah-yah-koot-lah-wah-boo to two months' hard labour for assault.[19] Paranoia and resentment defined the relationship between government agents and Cree on the reservations. In a lengthy 1883 report on the Saskatchewan Indians, Assistant Indian Commissioner Hayter Reed wrote of his suspicions that the Fort Pitt Cree were planning something "to test the powers of the authorities once more." The solution to this inchoate threat, Reed thought, was intrusive policing: "It is by meeting the Indians at every step and often by anticipating their intentions that one can be successful and not wait until their plans are formed, for then nothing can stop them."[20]

In 1885, after fifteen years of treaties and an increasingly uneasy relationship between the Plains Cree and the Canadian government, Riel led another more widespread and violent uprising broke out in the North-West. The Saskatchewan Cree had many grievances, but Big Bear and his allies had so far been able to persuade their people that armed insurrection against the Canadians would never succeed. Instead, the Cree passively resisted government authority by refusing to follow orders, holding traditional gatherings, cooperating across communities, and moving their camps without permission. The government responded with violence, heavy policing, false promises and strategic starvation.[21] The Métis, however, declared war. During the war, Big Bear lost control over his community and the Frog Lake Massacre, the capture of Fort Pitt and the killing of She Wins happened in quick succession in the first flush of Riel's

[19] J. McRae, Indian Agent, to the Indian Commissioner, 11 March 1884, LAC RG 10, vol. 3576, file 311.
[20] Report of Hayter Reed, sent to the Indian Commissioner, 28 December 1883, LAC RG 10, vol. 3668, file 10644.
[21] Tobias, "Canada's Subjugation of the Plains Cree, 1879–1885," 536.

campaign. The tide turned quickly, though, and Riel's campaign ended in defeat in May, three months after it began.

In the fall after Riel's defeat, the Frog Lake Cree went to court. Charles-Borromée Rouleau, the judge in the *wendigo* case, was a French Catholic and a lawyer, originally from Lower Canada, the modern province of Québec. He was new to the wilds of the North-West Territories. He had been appointed to his post in 1883, and had moved his household, including his wife and two children, from Ottawa to Battleford in the dead of winter. Life as a Stipendiary Magistrate in the North-West was lonely and hard. Until 1885, there were never more than three stipendiary magistrates employed in the whole Territory; in 1885, a fourth was added to assist with the legal business churned up by the Rebellion.[22] Magistrates rode such enormous circuits, often by sleigh, that it was not unusual for trials to be delayed for half a year while judges made their way to far-flung communities.[23] Rouleau spent the first months of his time in Battleford complaining about the insufficiency of his government moving allowance.[24] Rural Saskatchewan was very different from the European and cosmopolitan cities of Ottawa, Montreal and Québec where Rouleau had begun his career. In a letter to the Minister of Justice, Rouleau described some of the difficulties of his new posting. The language of the great majority of the people in the region was Cree. Most spoke neither English nor French, or if they did, so badly that Rouleau could not "make them understand anything pertaining to the administration of justice."[25] First Nations and Métis people seeking legal advice came to his house every day that court was not in session, and Rouleau had to scour the neighbourhood for willing Cree interpreters.[26] When

[22] W.F. Bowker, "Stipendiary Magistrates and the Supreme Court of the North-West Territories, 1876-1907," *Alberta Law Review* 26 (1988): 270.
[23] Ibid., 267–8.
[24] Letters between Charles Rouleau and the Ministry of Justice, November 1883-February 1884, LAC RG 13-A-2, volume 58, file 1594.
[C]harles Rouleau to Alexander Campbell, 4 December 1884, LAC RG 13-A-2, volume 61, file 1315.
[26] Charles Rouleau to Alexander Campbell, 4 December 1884, LAC RG13-A-2, volume 61, file 1315..

Ducharme, Dressy Man and Bright Eyes were led into his courtroom, Rouleau had been in the North-West for just under two years.

Charles Rouleau's argument that Ducharme and Dressy Man lacked the malice necessary for a murder conviction was initially met with skepticism in Ottawa. John Sparrow David Thompson, an eminent Nova Scotia lawyer, had been appointed to the Ministry of Justice only days before Rouleau's letter arrived.[27] Thompson was a former Attorney-General of Nova Scotia, and would become the architect of the Canadian Criminal Code of 1892. He would also serve as Prime Minister of Canada from 1892 to his abrupt death, of a catastrophic heart attack, over lunch at Windsor Castle following his swearing in ceremony in December of 1894.[28] But in the fall of 1885, Thompson was new to Ottawa and also new, one might imagine, to the Cree bestiary.

Thompson's primary objection to Rouleau's argument for clemency was technical. Rouleau complained to Thompson, "In law the degree of malice was not sufficient to justify the Jury to bring a verdict of murder. And although my charge to the Jury was to that effect, still they thought to render such a verdict."[29] The jurors were settlers who had just endured a frightening assault on their property and their authority in the North-West. They were not inclined to sympathize with the Cree defendants. In a report forwarded to the Governor-General-in-Council, which was responsible for reviewing capital convictions to determine whether defendants should be given clemency, Thompson argued that Rouleau had made a mistake in his

[27] P. B. Waite, "Thompson, Sir John Sparrow David," *Dictionary of Canadian Biography*, vol. 12, (University of Toronto/Université Laval, 2003–), accessed July 15, 2014, http: //www.biographi.ca/en/bio/thompson_john_sparrow_david_12E.html.
[28] P. B. Waite, "Thompson, Sir John Sparrow David," *Dictionary of Canadian Biography*, vol. 12, (University of Toronto/Université Laval, 2003–), accessed July 15, 2014, http: //www.biographi.ca/en/bio/thompson_john_sparrow_david_12E.html.
[29] Charles B. Rouleau to J.S.D. Thompson, 27 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.

interpretation of the law.[30] Rouleau had erred, according to Thompson, by telling the jury that Ducharme and Dressy Man needed to have experienced 'actual malice' in order to be guilty of murder. Malice, generally called 'malice aforethought' and usually used interchangeably with intention in criminal law, refers to the idea that a defendant must have intended to kill or grievously harm his victim in order to be considered guilty of murder. 'Actual malice', on the other hand, moves away from this legal definition toward a more colloquial one, in which malice resumes its connotations of wickedness and ill-will. In 1894, Oliver Wendell Holmes described actual malice as "a malevolent motive for action, without reference to any hope of a remoter benefit to oneself to be accomplished by the intended harm to another."[31]

In this first letter to Thompson, Rouleau wrote that Ducharme and Dressy Man genuinely believed that they were "in duty bound" to kill the old woman, and so lacked the kind of malevolent motive that would constitute actual malice.[32] Rouleau seemed to take it for granted that the whole Cree community believed that She Wins was a cannibal, and that there was no option but to kill her. Thompson took a different view. He rejected the idea that 'actual malice' was required for a murder conviction. "It is perfectly clear from the evidence", Thompson reported, "that the condemned men fully intended to take the life of their victim, and that they took her life without any lawful excuse or justification. This in law amounts to murder. The design to do such an act is malice. A felonious act done wilfully is done, in the eye of the law, maliciously."[33] Thompson also accused Rouleau of confusing the jury and of encouraging an

[30] Thompson's report on the *Ducharme* case, 5 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[31] Oliver Wendell Holmes Jr., "Privilege, Malice, and Intent," *Harvard Law Review* 8, no. 1 (April 25, 1894): 2.
[32] Charles B. Rouleau to the Minister of Justice, 28 September 1885, Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[33] Thompson's report on the *Ducharme* case, 5 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.

inconsistent ruling, since Thompson could find no justification for Bright Eyes' more lenient sentence.

The word 'malice' in everyday speech evokes maliciousness and meanness. For Rouleau, the defendants in the *wendigo* case truly believed that they were saving their community and killing a dangerous creature who begged for death. Rouleau never specified whether he saw their actions as a kind of self-defence, as a mercy killing, or as both, but he did not believe that they should be considered alongside murderers whose motives were less altruistic. In common law parlance, there is no contradiction in the idea that one might do something just and good intentionally, and therefore with malice. Thompson's view, that motive and spite do not matter when considering culpability for murder, was in line with criminal law doctrine. However, Rouleau was in the North-West trying the Cree, living among them, and struggling to understand them. He was not a great champion of First Nations rights. Still, Rouleau felt that he could understand why Ducharme, Dressy Man and Bright Eyes killed She Wins. His empathy for these defendants – and perhaps his belief in the irreconcilability of the British imperial and Cree belief systems – drove him to depart from the mainstream understanding of criminal responsibility in order to work, at trial and after, to save them.

Thompson, who had spent his whole career in eastern and central Canada, had little patience for what he viewed as superstition.[34] The Minister also connected the *wendigo* case to the upheaval of the Rebellion, and to the colonial government's efforts to bring the aboriginal communities of the prairies to heel. In his view, the strangeness of Cree culture – and the resistance to British colonial norms that it represented – called for the harsh and didactic imposition of imperial criminal law, not leniency. "If the Indians in that Territory are to be made

[34] Thompson's report on the *Ducharme* case, 5 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.

amenable to the law at all," he wrote, "it seemed to him [Thompson] that a case of very cruel and deliberate murder of an inoffensive old woman was a crime calling for exemplary punishment."[35] Thompson believed that the Cree had to be assimilated, forcibly if necessary, into colonial society. For many Canadian officials, the civilizing mission acquired a new urgency in the wake of the Rebellion. At a meeting of the North-West Council, the government body of which both Richardson and Rouleau, as stipendiary magistrates, were members, Edgard Dewdney, the Lieutenant-Governor of the North-West Territories, addressed the assembled. "The fond hope which Canada had so long entertained of being able to manage the large number of Indians resident in these Territories, without a resort to arms, has unfortunately during the present year, been dispelled," he said. But, he continued, some aboriginal people, like Louison Mongrain, remained loyal to the government and "this loyalty was apparently in the ratio in which they had advanced in civilization under the teachings of good Missionaries and able officials."[36] She Wins was not a direct casualty of the Rebellion. And yet, her death seemed to offer the Canadian government an opportunity to flex its legal authority over the rebellious Cree, and to continue its efforts to transform its restive aboriginal subjects into loyal, civilized ones.

It is not surprising that Thompson made little of the mentions of cannibalism in the notes of evidence that Rouleau sent him. Rouleau's notes were cursory and included the testimony of only two witnesses: François Dufresne, a Métis described by Rouleau as a "yeoman" from nearby Fort Pitt, and a Cree whose name Rouleau gives as Faskwy Ak or Paskwy Ak.[37] Dufresne told the court that he had seen She Wins hobbling into camp, leaning on a stick, two days before

[35] Thompson's report on the *Ducharme* case, 5 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[36] Minutes of the North-West Council, 5 November 1885, North-West Territories Government, Record Books, Minutes of the Council, NWT., 1877-1886., Saskatchewan Archives Board, Saskatoon (SAB-Saskatoon),Vol. II, 1879-1885,
[37] Rouleau's transcript of evidence at the trial of Charles Ducharme, Dressy Man and Bright Eyes, forwarded to the Minister of Justice on 28 September 1885, Ducharme Capital Case File, LAC RG 13.

her death. On the day of the killing, Dufresne noticed that the woman was crouched in her tent, and that she seemed ill. Some Cree told him that the woman was a cannibal, and that she would be killed. Dufresne had tried to dissuade them, but the next scene he described from the stand was of the woman being carried to the place of execution, and the grisly assaults that followed.[38] Paskwy Ak's testimony was even more succinct, corroborating Dufresne's account of the killing and adding, "I heard the old woman say it would be better for them to take her away from the camp and kill her, because if they did not, that she would destroy the women and children."[39] Although Thompson quoted this last snippet of evidence as acknowledgment of the role of 'superstition' in the case, he did not linger on its meaning or consider it to be legally important.

If Thompson had known more about *wendigos*, Rouleau's mention of a cannibal creature might have given him pause. The *wendigo* was central to the mythologies of many Subarctic Algonquian peoples, including the Cree. Over the centuries, the *wendigo* has come to be known outside indigenous communities as a "celebrated" and "perennial staple" of Subarctic Algonquian ethnology and in the academic literature on culture-specific psychiatric disorders.[40] The *wendigo* was a person who, possessed by a spirit sometimes described as the spirit of winter, had been transformed into a cannibal with a heart and stomach of ice, plagued by an insatiable hunger for human flesh.[41] Many Western scholars of the *wendigo* have noted its association with survival cannibalism. That is, people forced to eat human meat to survive during periods of starvation were believed to be more likely to become *wendigos*, who killed and ate humans

[38] Testimony of François Dufresne, Rouleau's transcript of evidence at the trial of Charles Ducharme, Dressy Man and Bright Eyes, forwarded to the Minister of Justice on 28 September 1885, Ducharme Capital Case File, LAC RG 13.
[39] LAC, Testimony of Paskwy Ak, Rouleau's transcript of evidence at the trial of Charles Ducharme, Dressy Man and Bright Eyes, forwarded to the Minister of Justice on 28 September 1885, Ducharme Capital Case File, LAC RG 13.
[40] Brightman, "The Windigo in the Material World," 337.
[41] Shawn Smallman, "Spirit Beings, Mental Illness, and Murder: Fur Traders and the Windigo in Canada's Boreal Forest, 1774 to 1935," *Ethnohistory* 57, no. 4 (September 21, 2010): 573.

compulsively.[42] Previous cannibalism put one at risk of becoming a *wendigo*, but did not guarantee it. Moreover, it was possible for anyone to become a *wendigo*, even those who had never before eaten people. Recent scholarship on *wendigos* has tended to focus on *wendigo* "psychosis", which refers to a sufferer's belief that she has become, or will become, a *wendigo*. While some scholars have argued that no one has ever really suffered from the psychosis, others have argued that there were real cases in which patients genuinely imagined that they were monsters, and felt an aching desire to eat human flesh.[43]

From the 1920s, *wendigos* were objects of social-scientific fascination. The phenomenon was held up as emblematic of the exoticism and primitivism of First Nations peoples. By the 1970s, social scientists had begun to question the integrity of this approach. Some argued that the *wendigo* was a postcolonial construct, born out of Western racism and fear of indigenous people who only, if ever, resorted to cannibalism in cases of extreme privation and social disorder.[44] Others explained the *wendigo* as a label applied to social outcasts and weak members of indigenous communities in order to justify their execution.[45] Scholars have noticed a concentration of *wendigo* cases in the late nineteenth century, and a rapid tailing off of *wendigos* in the colonial archive in the first half of the twentieth century.[46] Riel's 1885 Rebellion can be seen as the last great paroxysm in the battle between Canada's indigenous peoples and the imperial state for judicial and political control of the North-West. The consolidation of central authority that followed, the waves of settlers, the entrenchment of the reservation system, the

[42] Brightman, "The Windigo in the Material World," 337.
[43] Ibid., 346.
[44] Charles A. Bishop, "Northern Algonkian Cannibalism and the Windigo Psychosis," in *Psychological Anthropology*, ed. Thomas R. Williams (The Hague: Mouton, 1975), 237–48.
[45] Lou Marano, "Windigo Psychosis: The Anatomy of an Emic-Etic Confusion," *Current Anthropology* 23, no. 4 (August 1, 1982): 385–97.
[46] Smallman, "Spirit Beings, Mental Illness, and Murder," 587–588.

elaboration of the Western Canadian judicial system, and the violent pacification of armed revolt, eroded the cosmology in which the *wendigo* hunted.

However, in the last decades of the nineteenth century, *wendigos* were more than faded memories of a mythic past. For both Europeans and First Nations peoples, predatory cannibalism was frighteningly real. In the depths of winter in 1879, a grisly crime was committed near Fort Saskatchewan, in northern Alberta. Swift Runner, a Cree man, was tried late that summer for murdering his wife, Charlotte, at Open Hills Creek near the Athabasca trail. The judge in Swift Runner's trial was Hugh Richardson. Richardson was born in London in 1826, and had immigrated to Canada at the age of six. He was called to the bar at Osgoode Hall in Toronto, in 1847.[47] He was a man on the make, and would try Louis Riel and his allies at Regina in the summer and fall of 1885. The jury was composed of local settlers, including three English-speaking Métis and four white men who were "up on the Cree language [...] and could thus readily follow the proceedings and evidence in both languages."[48] Swift Runner had an interpreter, but no defence counsel.[49] Swift Runner and Charlotte had been married for several years, and had six children - three boys and three girls. The youngest was an infant, a girl.[50] Charlotte's father, Kis-Sie-Ko-Way, had last seen the family on the banks of The Long Lake, near the Athabasca River, and about a day's walk from the nearest Hudson's Bay trading post. They had parted ways shortly after the snow began to fall, with Swift Runner's family, and his brother and mother, forking away from the rest of the group. The Cree struggled to survive in

[47] Thomas Flanagan, "Richardson, Hugh (1826-1913)," *Dictionary of Canadian Biography*, vol. 14, (University of Toronto/Université Laval, 2003–), accessed July 21, 2014, http: //www.biographi.ca/en/bio/richardson_hugh_1826_1913_14E.html.
[48] Hugh Richardson to the Ministry of Justice, 20 August 1879, Swift Runner Capital Case File, LAC RG 13, vol. 1417, file 138A.
[49] Notes of Evidence in Swift Runner's case, 6 August 1879, Swift Runner Capital Case File, LAC RG 13, vol. 1417, file 138A.
[50] Testimony of Kis-Sie-Ko-Way, Notes of Evidence in Swift Runner's case, 6 August 1879, Swift Runner Capital Case File, LAC RG 13, vol. 1417, file 138A.

large camps over the long and barren winters of the northern prairies, and it was their custom to split into small, mobile sub-bands who could seek scarce game over a larger territory.[51] No one would have been surprised when the family disappeared into the woods.

When Kis-Sie-Ko-Way next saw Swift Runner at Egga Lake in the early spring, his son-in-law told him a heartbreaking tale: "I could not expect to see any of the family as the prisoner was the only one left. That his wife was brave she had shot herself that two of his children had died and he had buried their bodies as well as he could, and that the rest of his family had then left him."[52] According to a police witness, Swift Runner claimed that his wife was sick. She had left some of her children in the woods to die, and had later shot herself through the breast out of guilt – or maybe so that Swift Runner would leave her and save their last surviving child, a little boy.[53] Swift Runner said that he tried to carry his young son to safety on his back, but that he lost his strength as he slowly starved in the wilderness. Eventually, he was forced to abandon the boy and make his way to his people at Egg Lake, alone. But Kis-Sie-Ko-Way could not help but notice that Swift Runner "did not look very poor or thin, or as if he had been starving."[54]

In June, Swift Runner and three policemen set out to find the bodies of his wife and children in the forest. The policemen would not let their prisoner go free until they had confirmed that his account of the tragedy was true. There was no sign of Swift Runner's mother and brother. Swift Runner led the men on a circuitous path, claiming all the while that they would never find the bodies, that snow and leaves would surely have covered the graves or that

[51] Smallman, "Spirit Beings, Mental Illness, and Murder," 572.
[52] Testimony of Kis-Sie-Ko-Way, Notes of Evidence in Swift Runner's case, 6 August 1879, Swift Runner Capital Case File, LAC RG 13, vol. 1417, file 138A.
[53] Testimony of George Washington Brazian, Notes of Evidence in Swift Runner's case, 6 August 1879, Swift Runner Capital Case File, LAC RG 13, vol. 1417, file 138A.
[54] Testimony of Kis-Sie-Ko-Way, Notes of Evidence in Swift Runner's case, 6 August 1879, Swift Runner Capital Case File, LAC RG 13, vol. 1417, file 138A.

bears would surely have eaten the corpses.[55] After much cajoling, Swift Runner led them to his son's grave. The fifteen-year-old boy's body was emaciated, but intact. After a long night camped out in the woods, Swift Runner reluctantly brought his escort to the grave of his wife and two youngest children. The police discovered a chilling scene. They found multiple skulls, bones, hair and clothing strewn around a series of nearby campsites. In the campfires, they found parts of entrails.[56]

Swift Runner had killed and eaten his family. "The skulls and bones had all been boiled," said one medical man, "and the long ones appeared so broken [sic] that the marrow could be extracted."[57] Throughout the trial, Swift Runner asked no questions and called no witnesses. Near the end of the proceedings, one of the policemen read out Swift Runner's confession, which he had made three weeks before the trial. He admitted to shooting, strangling, and chopping up his wife and children with an axe. He ate one of his sons before the eldest died of starvation, and threatened to kill and eat his wife if she objected. He eventually did.[58] The family was never more than a day's walk from food and rescue. He claimed that his mother and brother had left them before the killing began. When asked if he wanted to say anything to the jury, he replied, "No. I did it."[59]

In a letter to the Deputy Minister of Justice, Hugh Richardson marveled at Swift Runner's perversity. He described Swift Runner as unusually intelligent - "rather above ordinary

[55] Testimony of George Washington Brazian, Notes of Evidence in Swift Runner's case, 6 August 1879, Swift Runner Capital Case File, LAC RG 13, vol. 1417, file 138A.
[56] Testimony of Inspector Gagnon, Notes of Evidence in Swift Runner's case, 6 August 1879, Swift Runner Capital Case File, LAC RG 13, vol. 1417, file 138A.
[57] Testimony of George Herchmer, Notes of Evidence in Swift Runner's case, 6 August 1879, Swift Runner Capital Case File, LAC RG 13, vol. 1417, file 138A.
[58] LAC, Swift Runner's confession, Notes of Evidence in Swift Runner's case, 6 August 1879, Swift Runner Capital Case File, LAC RG 13, vol. 1417, file 138A.
[59] Notes of Evidence in Swift Runner's case, 6 August 1879, Swift Runner Capital Case File, LAC RG 13, vol. 1417, file 138A.

Indians" - and betraying no sign of insanity.[60] Richardson could not fathom why Swift Runner would eat his family within such easy reach of the Fort. Swift Runner sat quietly in court, and "seemed and expressed himself as prepared for the sentence of death."[61] On 27 October, the Governor General in Council ordered that the sentence of death should be carried out on 20 December.[62] Sixty Indians and Métis trudged through thick snow into the prison yard to watch the hanging. Edward Richard, a sheriff despatched from Battleford to observe the execution, reported to the Minister of Justice that so many had come because rumours were circulating among the population "about deeds of cruelty that were to accompany the execution", and that they had left satisfied with the method's humaneness.[63] The case made a stir among government officials as well. Justice Minister Alexander Campbell wrote to the Prime Minister, Sir John A. Macdonald, to share his view that Swift Runner had killed his family simply to be rid of the responsibility of providing for them.[64] Judicial executions were always likely to draw crowds, but there was another reason why the people of Fort Saskatchewan were so interested in Swift Runner. There were rumours that he was a *wendigo*.

Swift Runner's, in fact, is perhaps the most famous modern *wendigo* case. Contemporary scholars of the *wendigo* phenomenon, including historians, ethnologists and ethnopsychiatrists, have discussed Swift Runner as a *wendigo* archetype.[65] And yet, Swift Runner's legal file contains none of the explicit discussions of *wendigos* that Ducharme's and Dressy Man's does.

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[60] Richardson to the Deputy Minister of Justice, 20 August 1879, Swift Runner Capital Case File, LAC RG 13, vol. 1417, file 138A.
[61] Richardson to the Deputy Minister of Justice, 20 August 1879, Swift Runner Capital Case File, LAC RG 13, vol. 1417, file 138A.
[62] Report of Governor-General in Council, 27 October 1879, Swift Runner Capital Case File, LAC RG 13, vol. 1417, file 138A.
[63] Edward Richard to the Minister of Justice, 4 February 1880, Swift Runner Capital Case File, LAC RG 13, vol. 1417, file 138A.
[64] Alexander Campbell to Sir John A. Macdonald, 24 October 1879, Swift Runner Capital Case File, LAC RG 13, vol. 1417, file 138A.
[65] See Brightman, "The Windigo in the Material World"; Marano, "Windigo Psychosis"; Smallman, "Spirit Beings, Mental Illness, and Murder"; Colin A. Thomson, *Swift Runner* (Calgary: Detselig, 1984).

His sentence was not commuted, and there is no evidence to suggest the authorities even considered it. Also, although She Wins was often described by colonial officials as 'crazy' and 'insane', Richardson explicitly discounted the possibility that Swift Runner's cannibalism was the result of madness. It is likely that the brutality of Swift Runner's crime, his confession, and his lack of legal representation all contributed to a pat decision, and a swift execution. However, such a stunningly violent crime could not pass unnoticed, and would not be easily forgotten. Six years later, as Hugh Richardson judged the Métis and Indian rebels, might well have thought back on the extraordinary trial that he had presided over at Fort Saskatchewan. Charles Rouleau, even though he was new to the North-West, took a basic understanding of *wendigos* - and the terrible things they could do to people - as a given. Thompson, who had never sat in a courtroom in the North-West, lacked the necessary context to know that allegations of cannibalism among the Cree were not just figments of a 'primitive' imagination - the *wendigo* was a nightmare which had recently been made flesh, and there were court records to prove it.

But in his first exchange with Rouleau in 1885, Thompson knew none of this. And so, he focused on the legal and the political as reasons to deny clemency to Ducharme and Dressy Man. The last dimension of Thompson's objections to Rouleau's arguments for commutation of the capital sentences reflects the political and social upheaval in which the case took place. "If the Indians in that Territory are to be made amenable to the law at all," wrote Thompson, "it seemed to [me] that a case of very cruel and deliberate murder of an inoffensive old woman was a crime calling for exemplary punishment."[66]

In *Imperial Justice*, Bonny Ibhawoh argues that prosecutions of what he calls "medicine murders" - ritual murders allegedly connected to indigenous beliefs in witchcraft - were political.

[66] Thompson's report on the *Ducharme* case, 5 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.

On the subject of the spike in colonial East African medicine murder cases in the mid-twentieth century, Ibhawoh writes that killings "which had been accepted as legitimate mechanisms of social defence - for example the killing of suspected witches - now resulted in a capital sentence. [...] Capital punishment for these offences became a political penalty as much as a judicial punishment."[67] The *wendigo* case was a political opportunity for the Canadian government to punish with death a killing that, under Cree law, was most likely just and justified. In Thompson's view, at least at first, the case seemed to provide a powerful, uncontroversial example in which imperial law could assert its jurisdiction over traditional Cree practices that violated its core prohibition against willful, unprovoked killing.

The defendants in the *wendigo* case left no letters or diaries in which they might have explained why they killed She Wins, and how they felt about their prosecutions for her murder. However, the history of their community and the role of the *wendigo* in Cree mythology offer hints. In the second half of the nineteenth century, the Cree had periodically suffered the agony of starvation and endured the humiliation and privation of surviving on government rations. The *wendigo* was a personification of hunger and want, evoking the taboo of cannibalism and the hardships of winter. Killing such a creature is difficult to describe as murder, especially since the *wendigo* used the human as a vessel, transforming it into a monster with an ambiguous relationship to the person whose body it inhabited.[68] Or maybe there were no *wendigos*, even mythic ones. It is possible that the *wendigo* is, as some have claimed, a European fantasy falsely attributed to a people whom they consistently exoticised. It is possible that She Wins was killed for pragmatic reasons - because she was old and a drain on her community's resources - or to

[67] Bonny Ibhawoh, *Imperial Justice: Africans in Empire's Court* (Oxford: Oxford University Press, 2013), 95.
[68] Brightman, "The Windigo in the Material World."

make a point, because ritually killing her in front of the captured whites was an assertion of the autonomy and integrity of Cree custom.

However, whether or not the Cree believed in *wendigos*, at least some Europeans, including traders, missionaries, lawyers and judges like Rouleau, thought that they *did*. Colonial officials were, for the most part, confident that *wendigos* did not really exist. However, the most important legal question in cases in which an aboriginal defendant executed an accused *wendigo* was not whether the creature existed, but whether the defendant's mental state was culpable. If the defendant honestly and reasonably thought he was executing a dangerous monster, he was innocent. If the defendant knowingly killed a human being he was guilty, unless he could prove that he had acted in self-defence. The legal controversy over Ducharme and Dressy Man was about how to determine, and to judge, what they *thought* they were doing when they executed She Wins – She Wins' true nature, and the existence of *wendigos,* were secondary considerations.[69] For those Europeans who believed in the belief in *wendigos*, the Cree defendants from Frog Lake were so deeply in the thrall of superstition that they could not be considered guilty of a crime. The genuineness and intensity of the Cree's belief, and not the reality, is what mattered for assessing the *mens rea* and the culpability of the *wendigo* killers. Rouleau argued that the Cree defendants did not have the *actual* malice necessary for a murder conviction because they had killed in self-defence and out of duty to their community. According to Rouleau, their fear of *wendigos* meant that their motives were pure, even noble. Their minds were not those of murderers.

[69] However, the existence or non-existence of *wendigos* did have bearing on how reasonable the belief in them was. If *wendigos* were real, like lions, for example, and all Canadians had believed that *wendigos* were real, the way they believed in lions, then this would have supported the claim that it was reasonable to kill a *wendigo* to protect oneself. The officials in the *wendigo* case all assumed that *wendigos* did not really exist, which made it much more difficult for Cree defendants to argue that they had acted reasonably in self-defence.

Officials and other whites in the North-West were intermediaries between the Cree and the government authorities in Ottawa. They saw themselves as having privileged access to the minds and cultures of the Cree through their experiences in the remote prairies. They acted as self-appointed interpreters, translating the *wendigo* myth into the language of criminal responsibility. Rouleau and men like him could demonstrate their value, their authority and their commitment to the doctrines of imperial criminal law by educating the Canadian government, including the Ministry of Justice and the Governor-General-in-Council, about the culture and practices of Canada's new subjects in the West. There was less immediate political impetus to punish the *wendigo* killers than there was to punish those who had challenged state authority and killed whites to further the war. The *wendigo* case was a chance for North-West legal authorities to show that they and the law they practiced had integrity, doctrinal sophistication, and compassion. This was especially important in light of the fates of the other Frog Lake killers, and of the rebellion's great leader, Louis Riel.

A bowl of blood connected the *wendigo* case to the trial of Louis Riel. Riel led his forces in a daring bid for independence because the Canadian government had systematically expropriated and discriminated against the Métis, who occupied an interstitial position between their French Catholic coreligionists and their indigenous kin. At his trial, held in July of 1885, both the prosecution and the defence struggled to make sense of Métis identity, and to construct narratives about Riel's culture and identity that served their legal aims. Like Jimmy Governor, Louis Riel was of mixed indigenous and European heritage. Riel's lawyers argued that these two cultural patrimonies were at war within their client, just as they were in the empire. They worked to show, throughout the trial, that Riel's indigeneity and his French Catholicism had made him

unstable and prone to madness, just as Jimmy Governor's lawyers had argued that his European pride and Aboriginal impulsiveness had doomed him.

Early in Riel's trial, the defence called Thomas Mackay, a settler and pro-government military volunteer who had met Riel during the rebellion.[70] Mackay had gone to Riel's headquarters, a shack next to a church, to parley with him. During their meeting, Riel yelled, "You don't know what we are after – it is blood! blood! We want blood! It is a war of extermination! Everybody that is against us is to be driven out of the country."[71] His lawyers seized upon Mackay's mention of blood to suggest that Riel was a habitual blood-eater:

> Q. What was on the table when you went into the council chamber?
> A. Some tin dishes and some spoons, some fried bacon and some bannocks.
> Q. Any blood on the dishes?
> A. No. I did not see any.
> Q. Will you swear that there was not? Will you swear that some of them were not eating cooked blood at the time?
> A. Not that I saw.[72]

Riel's lawyers failed to extract an admission that Mackay had seen Riel eating blood, but the rhetorical effect of the line of questioning might itself have satisfied their goal.[73] On its face, eating blood out of a bowl, as opposed to in a sausage or a pie, might have struck the white members of the jury as odd and distasteful, although not necessarily shocking. Evocations of blood-eating might also, however, have struck a deeper, more sinister chord among jurors, and lawyers, who lived in the North-West and who remembered Swift Runner.

Louis Riel is a towering figure in the history of Canada. He has inspired countless monographs, edited collections of his writings, statues, television programmes, and

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[70] Testimony of Thomas Mackay, *R v Riel* [1886 ed.], 17-18.
[71] Testimony of Thomas Mackay, *R v Riel* [1886 ed.], 19.
[72] Testimony of Thomas Mackay, *The Queen vs. Louis Riel: Accused and Convicted of the Crime of High Treason* (Ottawa, 1886), 25.
[73] Riel claimed in a letter to J.W. Taylor, the U.S. Consul in Winnipeg, that he had, in fact, been eating stewed blood all winter because he was unable to digest anything else. Riel to J.W. Taylor. Regina. 1 August 1885, George F.G. Stanley, ed., *The Collected Writings of Louis Riel* (Edmonton: University of Alberta Press, 1985), 157.

parliamentary resolutions.[74] The story of Riel's uprising and its brutal quashing by Canadian forces haunts every narrative about the consolidation of the Canadian West, including this one. Riel's biography and campaign must appear here only briefly, and only insofar as they elucidate the *wendigo* case and the judicial negotiations about culture and legal subjecthood that it showcased. Riel has been described as a hero, a traitor, a prophet and a politician. He was also a defendant in a criminal trial in a British colonial court. Riel's life, like the lives of Ducharme, Dressy Man and Bright Eyes, also depended on colonial officials' assessment of the relationship between his culture and his criminal responsibility.

Riel was a member of the French-speaking Métis community, an ardent Catholic and passionate advocate for Métis rights. After the Red River Rebellion of 1870, Riel spent time in the United States before returning to Montreal, where he had attended seminary school as a boy.[75] In the mid-1870s, Riel's sanity began to fray. On 20 May 1876, he was admitted to the Beauport lunatic asylum near Montreal, under the name of Louis David Riel. He was transferred there from the asylum at Longue Pointe, Québec, where he had been since 1874. He remained at Beauport for eighteen months.[76] Riel was diagnosed with monomania, megalomania and

[74] For some examples of Riel's continuing prominence in Canadian media, public history and popular culture, see "Visitors may do Double-Take at Exhibit of Famed Canadians," *Kamloops Daily News* [Kamloops, BC], 26 March 2013: B.5.; "Louis Riel has Left a Complicated Legacy," *Peterborough this Week* [Peterborough, ON], 17 April 2013: 1.; Curtis, Christopher. "A New Take on Louis Riel's Role; Metis at Core of Canada, President Says," *Calgary Herald* [Calgary, AB], 28 December 2012: A. 17.; "Manitoba's New Holiday: Louis Riel Day", *CBC News*, 25 September 2007, Retrieved 21 April 2013.

[75] On Louis Riel and his trial, see Jennifer Reid, *Louis Riel and the Creation of Modern Canada: Mythic Discourse and the Postcolonial State* (Albuquerque: University of New Mexico Press, 2008); George R. D. Goulet, *The Trial of Louis Riel: Justice and Mercy Denied, a Critical, Legal and Political Analysis* (Calgary: Tellwell, 2005); Dan Asfar and Tim Chodan, *Louis Riel* (Edmonton: Folklore, 2003); Stanley, *The Collected Writings of Louis Riel*; J. M. Bumsted, *Louis Riel v. Canada: The Making of a Rebel* (Winnipeg: Great Plains, 2001); Maggie Siggins, *Riel: A Life of Revolution* (Toronto: HarperCollins, 1994); Joseph Kinsey Howard, *The Strange Empire of Louis Riel* (Toronto: Swan, 1970). For examples of how Canadian historians have worked to place Riel in international context see especially Reid, *Louis Riel and the Creation of Modern Canada*; Thomas Flanagan, *Louis "David" Riel: Prophet of the New World* (Toronto: University of Toronto Press, 1996).

[76] Riel's certificate of admission to Beauport Asylum, 11 May 1876, LAC C-1228, p. 217-8.

melancholia by a series of doctors over the next decade of his life.[77] His interlocutors were struck by his ecstatic and grandiose religious theories and his vision of himself as a prophet. While confined at Beauport Riel composed many poems and songs, including this one, which he wrote in English:

> My mouth is the small telephone[78]
> Of the great eternal city.
> Witness against inequity
> [?] the Heavenly Queen's own.
>
> I am Kept as a poor insane
> In the Lunatic Asylum.
> But the world's judgment is vain.
> Man without god, is without brain.
> And fit for the Cage of Barnum.[79]

Riel kept up a lively correspondence while at Beauport, writing often to friends and to political and religious grandees. Riel proclaimed himself the prophet of a new Catholic sect that would save the Church, which had become worldly and debased. In one letter to Elzéar-Alexandre Taschereau, the Archbishop of Québec, Riel followed his signature with claims that he was a prophet and infallible pontiff: "Prophête, Pontife infaillible, Prêtre Roi [selon] la charité du Sacré Coeur de Jésus Christ."[80]

After his release from Beauport in 1878, Riel moved to the United States.[81] There, he reportedly spent time in an asylum in Washington before moving to Montana, marrying, and settling into life as a school teacher.[82] In 1884, a delegation of Métis travelled to Montana to ask

[77] See, for example, LAC, Report of Dr. Jukes on Riel's mental state, 6 November 1885, John A. Macdonald Papers, LAC MG 26A, vol. 106,
[78] Riel was very interested in telephones, which were invented in 1876. Telephones appear as a metaphor in many of his writings from this period.
[79] Untitled poem by Louis Riel, Bibliothèque et Archives nationales du Québec, Montréal, (BAnQ), Beauport Asylum Patient File of Louis Riel, P115, S2, SS6, SSS4, D2.
[80] Riel to Taschereau, 18 June 1876, Beauport Asylum Patient File of Louis Riel. BAnQ P115, S2, SS6, SSS4, D2.
[81] For more on Louis Riel's experiences in the United States, see J. M. Bumsted, "Louis Riel and the United States," *American Review of Canadian Studies* 29, no. 1 (1999): 17–41.
[82] Petition on behalf of Louis Riel, 24 October 1885, LAC RG 13, vol. 1421, part 1.

Riel to return to Canada, and to lead them in a war against the Canadian government. In a letter contemplating their plea, Riel wrote, "So cordial and pressing is your invitation that you want me to accompany you with my family. You leave me free to say no, but yet you are waiting for me, so that I have only to get ready."[83] Riel knew that returning to Canada might cost him his life; this was his Gethsemane. In an interview with Dr. Jukes, the staff surgeon of the North-West Mounted Police, shortly before his death, Riel reflected on the meeting and remarked, "I told them that to me it was a question of life or death; that in doing so I must contend with a rope about my neck; but my reply was, if my brothers require it I am ready to lay down my life for my brothers."[84]

What followed was a year of preaching, planning, and fighting. Riel convinced many Métis, Indians, and even some European settlers to join his cause, and they began seizing European property and arms in Saskatchewan in the spring of 1885. During the conflict, Riel's top lieutenants passed a resolution declaring that he was indeed a prophet.[85] After a great early victory at Duck Lake in late March, however, Riel and his troops were overrun. Outnumbered and outgunned by Canadian military forces who flooded the arid prairies, Riel surrendered in mid-May after his troops' disastrous defeat at the Battle of Batoche. A special correspondent for the Toronto *Globe* described Canadians' jubilation at the victory: "No event in the history of our country, since the thirteenth day of Sept., 1759, is more entitled to the historian's pen than the now famous battle of Batoche."[86]

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[83] Louis Riel to the Saskatchewan delegation, 5 June 1884, LAC C-1228, pp. 461-2.
[84] Report of Dr. Jukes on Riel's mental state, 6 November 1885, John A. Macdonald Papers, LAC MG 26A, vol. 106.
[85] Resolution declaring Riel a prophet, undated, LAC C-1228, p. 105. 13 September 1759 was the date of the Battle of the Plains of Abraham, in which British forces led by General James Wolfe defeated French troops led by the Marquis de Montcalm, resulting in the surrender of Québec to the British.
[86] "Batoche: A Comprehensive Survey of the Field," *The Globe* [Toronto], Monday, 13 July 1885, 5. The Battle of the Plains of Abraham, where English forces defeated the French at Québec, occurred on 13 September 1759.

Riel doubted from the beginning that he could have a fair trial in the North-West Territories. In a letter to his defence counsel, written from jail, he pleaded to be tried before the Canadian Supreme Court. He wrote, "I humbly ask not to be treated as a murderer or shackled before the jury has decided; and I have confidence that it will find me not guilty. I am an American citizen. As such, I beg the Canadian government to accord me a 'fair play' trial."[87] However, Riel's protestations came to naught. He was charged with treason and tried in late July at Regina. Many of his allies were charged with the Canadian statutory crime of treason-felony which was not capital. But Riel was charged with the English common law crime of treason, which carried a mandatory sentence of death.[88] The Canadian government had saved its harshest justice, its most fearsome lawyers and the bulk of its money and time for Riel. Executing dozens of political prisoners would be expensive and would make reconciling the indigenous peoples of the North-West to Canadian rule more difficult. The government's reliance on treason-felony was the result of plea-bargaining. In exchange for the convenience and thrift of a guilty plea, Crown prosecutors agreed to charge Riel's collaborators with felony-treason, for which they would serve a sentence of between three and ten years in prison, or even less in the likely event of a mass pardon once passions had cooled.[89]

For Riel, though, a death sentence was almost inevitable. George Burbidge, Deputy Minister of Justice and one of Riel's prosecutors, summarized the government's position succinctly: "Riel has so great an influence over the Half-breeds and Indians that the North-West would never be safe with him at large, and as long as he is in the Penitentiary or an Asylum there

[87] Louis Riel to Lemieux, Fitzpatrick and Dr. Frist, 16 June 1885, LAC C-1228, p. 1042. The original quotation is: "Je demande humblement de ne pas être traité comme un meutrier, et de ne pas être enchainé avant que le jury ait prononcé; et j'ai confiance qu'il me trouvera pas coupable. Je suis citoyen américain. Comme tel, je prie le gouvernement canadien de m'accorder un procès fair play."
[88] Statutes of Canada, *An Act for the Better Security of the Crown and of the Government* (1868), c. 69, s.5.
[89] Burbidge to Campbell, 10 August 1885, LAC RG 13, vol. 2132, part 15.

is a danger of his being set at large. If he escapes the gallows the Indians and Halfbreeds will really think that if he is not a prophet he is at least Divinely succored."[90] The authors of the *Canada Law Journal* gleefully predicted that he would be convicted "of the highest crime known to the law, taken as he has been red handed." But, they generously allowed, "due form and ceremony" should prevail, and the authorities must resist their urge to proceed with "unseemly haste."[91]

Riel was tried before a jury of six in Regina.[92] The judge in his case was stipendiary magistrate Hugh Richardson, who had presided in Swift Runner's trial some years before. Richardson had been recently promoted to Regina from his post in Battleford, where he was replaced by Rouleau.[93] At the time of Riel's trial, he was fifty-nine, lavishly bearded, and a retired Lieutenant-Colonel in the Volunteer Militia. Before the Riel trial, Richardson had presided in three previous capital cases: Swift Runner's case in 1879, and, as one journalist put it, "that of the Stevenson brothers, the Regina Halfbreeds, who were hanged for the murder of an unoffending man."[94]When Riel's defence team pressed Mackay for details about Riel's alleged blood-eating they might have had Richardson in mind. Richardson had surely not forgotten Swift Runner, and the rumours of supernatural cannibalism that circulated among the indigenous communities of the Canadian plains. Journalists had not forgotten the case either, as it was among the handful of capital cases over which Richardson had presided in his career as a prairie magistrate. Regina jurors, too, were likely to have known about *wendigos*. It is possible that Riel's defence team were aware of the power of the *wendigo* myth, and of the belief among

[90] Burbidge to Campbell, 10 August 1885, LAC RG 13, vol. 2132, part 15.
[91] "Treason Felony in the North-West," *The Canada Law Journal*, June 1, 1885, 205–7.
[92] Riel was tried under the provisions of a Canadian statute, *An Act to Amend and Consolidate the Several Acts Relating to the North-West Territories* (1880), 43 Victoria, c. 25.
[93] Charles Rouleau to Alexander Campbell, 4 December 1884, LAC RG 13-A-2, volume 61, file 1315.
[94] "Riel's Trial: The Rebel Ringleader Brought Before a Jury," *The Globe* [Toronto], 21 July 1885, 2.

Europeans that a *wendigo* was, as one lawyer wrote, "a crazy person desirous of eating human flesh."[95] Hayter Reed, who had been promoted to Indian Affairs Commissioner, described She Wins as a "crazy cannibal woman."[96] While Riel was not openly accused in court of cannibalism, his defence team might have been making subtle reference to the European suspicion that indigenous people who ate blood and claimed to be *wendigos* were, in fact, mad.

The team of prosecutors in Riel's case was daunting and openly partisan. Christopher Robinson, an eminent barrister and trusted ally of Sir John A. Macdonald's Conservative government, was senior counsel. He was joined by Britton Bath Osler, a prominent criminal lawyer from Toronto, and a member of the successful Osler family; George Wheelock Burbidge, the Deputy Minister of Justice; David Lynch Scott, the mayor of Regina and an organizer of Regina's home guard during the Rebellion; and Thomas Chase-Casgrain, a Québec lawyer who would be burned in effigy for his involvement in Riel's prosecution.[97] Riel's defence included far fewer of the stars in Canada judicial firmament. He was represented by French Canadian criminal lawyer François-Xavier Lemieux, and three other competent but little-known lawyers from central Canada, Charles Fitzpatrick, J.N. Greenshields, and T.C. Johnstone.[98] Riel had little or no money at the time of the trial. In a note sent from Regina jail to Lemieux and Fitzpatrick, he implored, "My family [is] very poor and abandoned in Saskatchewan," and asked for news of them.[99] It had taken weeks to raise donations from friends and acquaintances, as well as from fellow French-speaking Catholics who were sympathetic to his cause. Many were from Québec,

[95] Sharp to Thompson, 10 November 1885, LAC RG 13, vol. 1423, file 207A.
[96] Hayter Reed to the Superintendent of Indian Affairs, 3 November 1888, Charles Ducharme Capital Case File, LAC, RG 13, vol. 1423, file 207A.
[97] René Castonguay, "Chase-Casgrain, Thomas," *Dictionary of Canadian Biography*, vol. 14, (University of Toronto/Université Laval, 2003–), accessed July 19, 2014, http: //www.biographi.ca/en/bio/chase_casgrain_thomas_14E.html.
[98] *R. vs. Louis Riel [1886 Ed.]*, 8.
[99] Louis Riel to Lemieux and Fitzpatrick, 18 June 1885, LAC C-1228, p. 1034.

where Riel had spent many years and which had a rancorous relationship with the Anglo-Saxon, Conservative Macdonald government.[100]

Throughout the first days of the trial, both teams of lawyers focused on the events of the Rebellion of that spring. The defence frequently cross-examined prosecution witnesses, but never made a serious attempt to contest Riel's role in the conflict. Instead, they hung their case on their contention that Riel was insane, and so could not be held criminally responsible for his actions. Riel's insanity defence was generally understood to be a great gamble. Riel's views were well known in Canada, and most people, whether they thought he was a saviour or a scourge, believed that he was sane. The liberal Toronto *Globe* newspaper had printed excerpts from his diary in serialized form after they were seized during the Battle of Batoche, so that all could judge his mental state for themselves. A reporter warned readers that the diary "will, we repeat, give no aid or comfort to those who build their hopes of the writer's release on the insanity plea. Very much the reverse. If all who are mentally astray only so far as these jottings indicate that Riel is, were shut up in our asylums, we should have to increase capacity of those establishments very considerably."[101]

Riel's lawyers sought to paint Riel's behaviour as erratic and his religious views as the products of a disturbed mind. They made much of Riel's religious ecstasies, his repeated claims that he was a prophet, and his plans to transform the North-West Territories into the seat of a new Rome. They also encouraged speculation that Riel intended to make himself Pope.[102] The defence also argued that Riel's plan for the North-West Territories was the work of a madman. Henry Walters, a prosecution witness, owned a store in Batoche which Riel's forces plundered early in the Rebellion. They took Walters captive, and Riel told him about his intention to divide

[100] Affidavit filed by Fitzpatrick, *R. vs. Louis Riel [1886 Ed.]*, 9–10.
[101] "Riel's Diary", *The Globe* [Toronto], Wednesday, 15 July, 1885, 4.
[102] Testimony of Thomas Jackson, *R. vs. Louis Riel [1886 Ed.]*, 84.

the North-West into seven equal parts. In Walter's account, the plan sounded fairly sensible – the settlers, Métis, native peoples, and Church were each to have a part in Riel's scheme.[103] However, the defence aggressively cross-examined a number of witnesses who mentioned the 'sevenths' plan, suggesting a number of unusual groups who might be given land once the Canadians had been defeated.[104] One witness, a druggist named Thomas Jackson, testified that Riel hoped to give land to Poles and Hungarians, "and soon."[105]

The prosecution, in contrast, focused on establishing that Riel had been the calm, rational commander of a traitorous army. They called witnesses who were held captive by Riel who testified that he "seemed to have control and asked the questions."[106] Witnesses consistently described Riel as intelligent and calculating, and several were only present in the courtroom thanks to their humane treatment when prisoners of the rebels.[107] Riel's plan to divide the territory into sevenths was odd, but many of the ethnic groups that witnesses listed – Métis, Indians, white settlers, Irish Americans, even Poles – made some sense, as either resident communities of the North-West or potential Catholic allies. The most compelling evidence of Riel's insanity, if measured against the prosecution's deliberate efforts to defeat it, was the suggestion that Riel was in the grip of intense religious delusions.

To show that Riel's religious ideas were not evidence of madness, the prosecution resorted to cultural arguments about the role of religion in the lives of the Métis. The prosecution deployed their construction of Métis religiosity in two, conflicting ways. One strategy was to argue that Riel was a calculating manipulator who knowingly took advantage of the Métis by

[103] Testimony of Henry Walters, Ibid., 70.
[104] See, for example, Charles Nolin's assertion that Riel intended to give territory to Prussians, the Irish, Jews, Bavarians and Hungarians, among others. Testimony of Charles Nolin, Ibid., 99.
[105] Testimony of Thomas Jackson, Ibid., 83.
[106] Testimony of John W. Astley, Ibid., 27.
[107] For example, Astley described Riel as intelligent and clever, rather than eccentric. Testimony of John Astley, Ibid., 33.

presenting himself as a prophet. In this line of argument, they set Riel apart from the mass of his followers. They presented him as clever and well-educated – a man whose years abroad had washed away his Métis naiveté, and allowed him to use his people's faith against them to foment rebellion. The prosecution was abetted in this by their witnesses, many of whom expounded on the fervent Catholicism of the Métis, whom they described as superstitious, gullible and easily manipulated. Charles Nolin, for example, said upon questioning, "the Half-breeds are a people who need religion. Religion has a great influence on their mind. […] If the prisoner had not made himself appear as a prophet, he would never have succeeded in bringing the Half-breeds with him."[108] Another witness described the Métis as "very religious", and attributed Riel's influence among them to the fact that "he was so religious and appeared so devout."[109]

The second prosecution strategy was to admit that Riel genuinely believed he was a prophet, but to argue that this did not make him insane. They tried to show that Riel's grandiosity was normal in the context of his people's fervent Catholicism. The cross-examination of defence witness Father Alexis André is particularly revealing. Father André told the court, in response to Lemieux's questions, that Riel was perfectly sensible when discussing literature, science and other matters, but "upon politics and religion he was no longer the same man; it would seem as if there were two men in him, he lost all control of himself on those questions."[110] He said that Riel was "completely a fool, in discussing these questions; it was like showing a red flag to a bull."[111] Casgrain, for the prosecution, pushed Father André to admit that a passion for religious reform did not make Riel mad. Casgrain asked, "A man may be a great

[108] Testimony of Charles Nolin, Ibid., 99–100.
[109] Testimony of Father Alexis André, Ibid., 114.
[110] Testimony of Father Alexis André, Ibid., 112.
[111] Testimony of Father Alexis André, Ibid., 113.

reformer of great religious questions without being a fool?" To which Father André responded, "I do not deny history."[112]

The prosecution did not rest, though, at comparing Riel to an abstracted 'normal' Métis man. They searched the empire and the region for other examples of prophets from groups who deviated from the imagined Anglo-Saxon standard. This strand of argument was most useful to the prosecution in their attacks on the defence's medical witnesses. The first was Dr. François Roy, the superintendent of the lunatic asylum of Beauport. On the stand, Roy diagnosed Riel with megalomania, which manifested itself in grand delusions on particular topics. Many sufferers declared themselves prophets or kings, and exhibited extreme irritability and selfishness.[113] Osler attacked Roy's credibility by accusing him of being too busy to work with or remember individual patients in his large asylum (which housed some 800 patients at a time), of caring only for profit, and also criticized him forgetting to bring Riel's medical file to Regina.[114] Once Roy was thoroughly flustered, Osler turned to the question of prophets. [115] He asked Roy if he had ever heard of Joseph Smith and Brigham Young, and asked him if these founders of Mormonism were insane. Roy waffled. Osler asked if he would call "Brigham Young's ideas of prophetic inspirations inconsistent with knowledge of what is right and wrong."[116] Roy, deflated, said he would need to study the man for a few months before making any such determination. In his cross-examination of Roy, Osler slipped easily from arguing that Riel could be both sane and a religious leader to arguing that Riel was a false prophet and the author of "a skilful [sic]

[112] Testimony of Father Alexis André, Ibid.
[113] Testimony of François Roy, Ibid., 120–121.
[114] Testimony of François Roy, Ibid., 122–125.
[115] Roy began to stumble over his words and asked to switch to French. He also evaded questions as Osler became more aggressive. Testimony of François Roy, Ibid., 124.
[116] Testimony of François Roy, Ibid., 125.

fraud."[117] Roy resisted giving Osler the answer that he wanted, and the lawyer ended the cross-examination in a fit of pique.

The defence then called another medical witness, Dr. Daniel Clark of the Toronto Lunatic Asylum.[118] Clark had been an expert witness in lunacy cases many times over his ten years as a superintendent, and was much more sophisticated in his understanding of legal approaches to insanity than was Dr. Roy. Clark demonstrated early that he appreciated the difference between legal and medical standards for assessing insanity. He said,

> I could convince any lawyer if they will come to Toronto Asylum, in half an hour, that dozens in that institution know right and wrong, both in abstract and in concrete, and yet are undoubtedly insane. The distinction between right and wrong covers part of the truth. […] [I]t is one of these metaphysical subtilities [sic] that practical men in asylums know to be false.[119]

Clark knew that, in order for the insanity defence to succeed, Riel's lawyers needed to prove not only that he was insane, but that his insanity destroyed his ability to understand the nature and quality of his actions or to understand whether they were right or wrong.[120] Clark was able to thread the needle for the prosecution: Riel could be delusional, grandiose, and chiliastic – insane – without being legally excusable, as long as he knew the difference between right and wrong. Clark saw Riel as different enough from his Métis followers that he could comfortably be pronounced both insane and aware of the morality of his actions. Clark testified that Riel "was not an ignorant man. He was not like an Indian who never read a newspaper, and knew nothing of the country around him. He had travelled, he had been in Ottawa, he had been in the United States, and he knew all about the power of Britain and the Dominion."[121]

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[117] Testimony of François Roy, Ibid.
[118] Testimony of Dr. Daniel Clark, Ibid., 128.
[119] Testimony of Dr. Daniel Clark, Ibid.
[120] *Queen v. M'Naghten*, 8 ER 718 [1843]).
[121] Testimony of Dr. Daniel Clark, *R. vs. Louis Riel [1886 Ed.]*, 129–130.

The prosecution's insistence on Riel's legitimate status as a kind of prophet was ironic. Their task was to prove Riel's treason and to secure a capital conviction, and yet their efforts to prove that Riel was responsible for his criminal actions led them to take Riel's self-presentation as a prophet seriously. The insanity defence placed Riel's lawyers in the odd position of having to argue that their client was a raging lunatic – eating blood, spouting heresy, plotting to divide Canada up and give it to a motley assortment of Europeans – in order to save his life. Both the defence and the prosecution struggled to fit Riel into different cultural narratives of insanity to advance their arguments. The defence needed Riel to be 'white' enough that his behaviour could only be insanity, but 'Métis' enough that his religious views could be genuine rather than a means of manipulating his followers. The prosecution needed Riel to be so Métis, or at least so alien, that his strange behaviour could be evidence of a genuine religious vocation. Alternatively, the prosecution could, and did, argue that Riel was too intelligent and too moderate to be anything but a cunning, sophisticated criminal. The constructions of what it meant to be Métis or to be 'educated', 'intelligent', and 'well-travelled' – that is, intelligible to the European Canadians in the courtroom – were not just lawyers' games. The insanity defence failed, and Riel was sentenced to hang on 16 November 1885.

Riel's defence counsel appealed his case to the High Court at Manitoba without success. Lemieux and Fitzpatrick then petitioned the Judicial Committee of the Privy Council for leave to appeal. The request caused a stir in London, where "the greatest lawyers of the realm [had] been summoned to attend the hearing, or rather consideration of the case."[122] The Committee declined to allow the appeal. They reiterated in their judgment that it was the "usual rule…not to grant leave to appeal in criminal cases, except where some clear departure from the requirements of

[122] "The Louis Riel Case", *The Observer*, 11 October 1885, p. 3.

justice is alleged to have taken place."[123] Among other objections, Riel's lawyers challenged Richardson's authority to hear the case; complained that there had never been a coroner's inquest or indictment; and decried the fact that Riel was not permitted to attend his appeal hearing in Manitoba.[124] The Privy Council judges, however, dismissed these objections. Even if the Canadian government had departed from English common law criminal procedure in Riel's case, this was permitted by imperial statutory law in pursuit of "peace, order, and good government." "Forms of procedure unknown to the English common law," the judges noted, had already been widely established and acted on in India and "to throw the least doubt upon the validity of…those words would be of widely mischievous consequence."[125] The Committee also rejected any notion that Riel was not responsible for his acts by reason of "mental infirmity."[126]

With no Privy Council appeal forthcoming, Riel's only hope lay in the prerogative of mercy. There was much disagreement among British authorities in London as to the wisdom of commuting Riel's sentence. Henry Herbert, the fourth Earl of Carnarvon who was then the Lord Lieutenant of Ireland, wrote to the British Prime Minister, Lord Salisbury, to encourage him to push Ottawa toward clemency in Riel's case.[127] "No one who has not followed somewhat closely of late years Canadian politics," wrote Carnarvon, "can tell how delicate & serious such a case is an what very grave consequences it may have if a wrong decision is come to."[128] Some

[123] *Louis Riel v The Queen (Manitoba)* [1885] UKPC 37 (22 October 1885)
[124] "The Louis Riel Case", *The Observer*, 11 October 1885, p. 3.
[125] *Louis Riel v The Queen (Manitoba)* [1885] UKPC 37 (22 October 1885). Lemieux had questioned the validity of the North-West Act 1880. The Dominion Parliament derived its authority to pass the 1880 Act from Imperial Statute 34 & 35, Vic., cap. 28, which stated that the Parliament of Canada could make legal provisions for the administration of peace, order and good government for the territories.
[126] *Louis Riel v The Queen (Manitoba)* [1885] UKPC 37 (22 October 1885). One of the other procedural irregularities involved the requirement that notes of evidence be taken in full. Riel's lawyers argued that shorthand notes of the kind taken at Riel's trial did not constitute notes 'in full.' The Committee rejected this out of hand.
[127] Peter Gordon, 'Herbert, Henry Howard Molyneux, fourth earl of Carnarvon (1831–1890)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Jan 2008 [http: //www.oxforddnb.com.ezp-prod1.hul.harvard.edu/view/article/13035, accessed 24 Oct 2015].
[128] Carnarvon to Salisbury, 22 October 1885, Carnarvon Papers, Domestic Records of the Public Record Office (PRO), The National Archives, Kew, PRO/30/6/130.

British officials warned that Riel's execution could inflame tensions between Québec and English Canada. Carnarvon reiterated the point in a letter to Colonel Frederick Arthur Stanley, the Colonial Secretary, "[Sir John A. MacDonald] may be strong enough to hang Riel – who richly deserves it – but I know that it will be an act that will severely strain the relations of parties & men in Canada, & I feel sure that it must add a fresh element of irritation to an already dangerous heap of combustibles."[129]

However, many in the British government felt that MacDonald could not commute Riel's sentence without losing face, and that it would damage relations with the settler colonies for London to demand Riel's respite. Carnarvon's cousin, Robert Herbert, a long-serving permanent under-secretary of the Colonial Office, put it bluntly, "I do not think it would be possible, without running the risk of seriously embarrassing Sir John Macdonald, to move in any way at present in the Riel matter. […] Sir John appears to have decided that he cannot condone this second act of rebellion."[130] In a letter to Stanley at the Colonial Office, Lord Lansdowne, the Governor General of Canada, justified the Canadian government's decision to proceed with Riel's execution. Lansdowne argued that Riel had knowingly returned from exile in order to wage war on Canada, and that his actions had left settlers frightened to make their homes in the West. Riel's execution was necessary in order to justify hanging the rebels who had killed white settlers at Frog Lake, and to send a message to discontented indigenous communities who might contemplate further violence.[131]

Lansdowne also praised the jury in Riel's case for recognizing that a Métis man's fervent religious 'delusions' should not be sufficient to support a plea of insanity. Lansdowne wrote,

[129] Carnarvon to F.A. Stanley, 25 October 1885, PRO/30/6/130.
[130] R. Herbert to Carnarvon, 23 October 1885, PRO/30/6/130.
[131] "Case of Louis Riel: Reasons for Non-Commutation of his Sentence," Lansdowne to Stanley, 13 November 1885, PRO/30/6/130.

> The admission, either by the courts or by the Executive, that in a country circumstanced in regard to its settlement as at the North-west Territories any person with a morbid or excitable temperament, and with a mind subject to occasional illusions or accesses of religious or political fanaticism might break the law with a confident expectation of escaping the punishment which the law awards, could not fail to have far reaching and disastrous consequences.[132]

In Lansdowne's view, the First Nations people of Canada were naturally prone to a degree of fanaticism that, in a European, would indicate mental illness. If all British subjects in colonial Canada who suffered from religious delusions were to be considered irresponsible for their actions, then entire indigenous communities could find themselves immune to criminal sanction. It was a future that Lansdowne quailed to contemplate.

François Lemieux's final option was to petition for a delay of Riel's execution, so that a medical commission could be assembled to assess his mental state. In their consideration, and ultimate rejection, of the gambit, the Canadian government requested a report from Dr. Jukes, the physician monitoring Riel in Regina. Jukes wrote that, despite his unusual and fervent religious views, Riel was undoubtedly sane. Riel himself utterly repudiated the suggestion that he was insane, and had tried hard to dissuade his counsel from impugning his sanity at trial. "He has assured me over & over again," wrote Jukes, "that though life was sweet, even though the penalty was death, he would never consent to purchase immunity at the sacrifice of his mental integrity."[133] Ten days after the government received Jukes' report, Riel was dead.

These glimpses of Louis Riel's life and, especially, of his trial in Regina show how blurred the boundaries could be between insanity and culture as factors that might compromise a defendant's criminal responsibility in a British colonial court. In Riel's case, both prongs of the

[132] "Case of Louis Riel: Reasons for Non-Commutation of his Sentence," Lansdowne to Stanley, 13 November 1885, PRO/30/6/130.
[133] Report of Dr. Jukes on Riel's mental state, 6 November 1885, John A. Macdonald Papers, LAC MG 26A, vol. 106.

defence of incapacity failed - the jurors held that Riel was sane enough knowingly to commit treason, and European enough to understand the implications and morality of his actions. However, the failure of these arguments about capacity in Riel's case should not be taken as proof that they were unimportant, or easy to dismiss in other cases. The Canadian government needed a guilty verdict against Riel to vindicate its authority, to placate its supporters, and to justify its more lenient treatment of Riel's Métis lieutenants. Still, Riel had many supporters among white Canadians, some of whom firmly believed - and even testified - that he was either insane or in the grip of an overwhelming, primitive religiosity that made responsible decision-making impossible. Even though colonial authorities often found ways to scramble over it. culture could present a major conceptual barrier to the formulation of criminal responsibility in the empire.

The Cree were, in many ways, even more deeply marked by difference in the eyes of the colonial state than the Métis. The ritual execution of She Wins at Frog Lake was much less intelligible to white Canadians than the Métis' rebellion over land, political autonomy and faith. It was Riel's dangerousness that pushed Canadian prosecutors to argue for his humanity, and his moral and cognitive sophistication. Only a worthy opponent, the British believed, could challenge them, and could be held fully responsible for his crimes under the common law. The colonial government needed Riel to be fearsome but intelligible, a person who was intelligent and rational enough that he could be fairly judged and punished under the British law. *Wendigo* killings, on the other hand, engaged a number of competing imperial imperatives, including the desire of colonial officials to emphasize the inferiority and atavism of the indigenous people over whom they claimed sovereignty.

She Wins was not the only person who died at Frog Lake in the spring of 1885. There were eleven victims that April: nine whites at the Frog Lake Massacre, one NWMP officer at Fort Pitt, and She Wins. After the Rebellion had been put down, eleven people were tried for homicides committed at Frog Lake. Of those defendants, eleven were convicted, of whom eight were hanged and three had their sentences commuted to life imprisonment. The three who avoided the scaffold were Ducharme and Dressy Man, and a third Cree man, named Louison Mongrain. Mongrain was sentenced to death for shooting Constable David Lattimer Cowan, the NWMP officer who died at Fort Pitt in April of 1885. Like Ducharme and Dressy Man, he would be shown mercy and eventually pardoned.

The *wendigo* defendants and Mongrain were able to move the colonial state to mercy, but for entirely different reasons. Mongrain protected white families during the Rebellion. He was the model of the 'good Indian', as he was often described by his champions. Ducharme and Dressy Man, on the other hand, represented the unreconstructed Indian, whose superstitions had not yet been dislodged by Protestant Christianity and orderly agriculturalism. However, colonial officials seemed to recognize both Mongrain and Ducharme (Dressy Man's other exploits during the Rebellion tarnished his reputation) as 'good', albeit according to different standards. Mongrain deserved mercy because he was kind to white settlers; Ducharme deserved mercy because he was brave and selfless, albeit only according to the beliefs of his community. Imperial officials did not agree that *wendigos* existed. But they managed to imagine what a world in which *wendigos were* real would be like, and in that world, Ducharme was a hero. When the time came to punish the *wendigo* killers, Canadian authorities struggled to reconcile the defendants' altruistic intentions with the violence that they had done.

Ducharme, Dressy Man and Bright Eyes belonged to the Frog Lake community of Plains Cree led by Big Bear.[134] When Riel and his followers declared war and battled Canadian forces along the Saskatchewan River, Big Bear attempted to negotiate with Canadian authorities and to preserve his community's independence from the Métis campaign. However, when news of the Métis' great victory over the Canadians at the battle of Duck Lake spread to Big Bear's camp on the banks of Frog Lake, he could not contain his men's zeal, and their rage.[135]

On 2 April 1885, Big Bear's men burst into the Catholic church in the tiny white settlement at Frog Lake and declared war. A group of men were rounded up and marched, under guard, toward Big Bear's camp. Pa-Pa-Mah-Cha-Kwayo, or Wandering Spirit, a young Cree warrior, shot sub-Indian Agent Thomas Quinn. Chaos erupted.[136] One witness described seeing bodies lying ground while others ran from their attackers in a panic, only to stumble and fall. One victim turned around to face his death as the Cree bore down on him, appearing "to have lost all hope."[137] Others were shot as they walked before their captors. "The whole time of the massacre," the witness would later recall, "did not last more than the time to smoke a pipe."[138] In all, nine white men died. On 3 April, Francis Dickens, the dissolute and disreputable son of author Charles Dickens and an Inspector in the NWMP, wrote frantically to the authorities in Battleford, listing casualties and begging for rescue.[139] "The Indians are living in the Farm houses & Mission at Onion Lake," Dickens lamented. "They took all the horses and Mr.

[134] Rudy Wiebe, "Mistahimaskwa," *Dictionary of Canadian Biography*, vol. 11, (University of Toronto/Université Laval, 2003–), accessed July 15, 2014, http: //www.biographi.ca/en/bio/mistahimaskwa_11E.html.
[135] Rudy Wiebe, "Mistahimaskwa," *Dictionary of Canadian Biography*, vol. 11, (University of Toronto/Université Laval, 2003–), accessed July 15, 2014, http: //www.biographi.ca/en/bio/mistahimaskwa_11E.html.
[136] Quinn had recently been involved in adjudicating conflicts between whites and Cree on the reservation over provisions and ammunition. See Quinn to the Indian Commissioner, 17 December 1884, LAC RG 10, vol. 3576, file 311.
[137] Testimony of Kopisikeuiw (Thunder), 9 October 1885, Iron Body Capital Case File, LAC RG 13, vol. 1421, file 194A.
[138] Testimony of Osisawehow, 9 October 1885, *Iron Body Capital Case File*, LAC RG 13, vol. 1421, file 194A.
[139] Roderick Charles Macleod, "Dickens, Francis Jeffrey," *Dictionary of Canadian Biography*, vol. 11, (University of Toronto/Université Laval, 2003–), accessed July 22, 2014, http: //www.biographi.ca/en/bio/dickens_francis_jeffrey_11E.html.

Quinney's money ($250). [...] We expect to be attacked at any minute. Please send reinforcements as soon as possible. [emphasis original]"[140]

On 13 April, two hundred and fifty warriors under the command of Wandering Spirit, the leader of the Frog Lake raid, surrounded Fort Pitt, a station for the NWMP, government officials and European traders. Twenty-eight civilians surrendered and were taken captive, and the twenty-five police at the Fort were forced to abandon it. Wandering Spirit and his warriors kept the whites prisoner and pillaged the Fort until, in the aftermath of the battle of Batoche on 12 May, the community scattered and its leaders surrendered.[141]

Ducharme, Dressy Man and Bright Eyes killed She Wins on or around 16 April 1885, shortly after the sacking of Fort Pitt. At the time, their camp included the civilian prisoners captured at the Fort. François Dufresne, the Métis man who testified at the murder trial, was one of those prisoners, along with his wife Sas-Kaw-Wis-Ke-O, or Thick Wood Woman. Dufresne worked as an interpreter in the service of the Hudson's Bay Company in the Fort Pitt region.[142] Frog Lake was a crackling hotbed of politics, insurrection, and righteous anger. Although She Wins' death seemed to have little to do with indigenous grievances against Canadian colonial rule, it was bound up in the Rebellion.

On 6 November 1885, the day after Thompson submitted his report on the *wendigo* case, the Canadian Privy Council ruled that it would allow the law to take its course: Ducharme and Dressy Man would be hanged on 27 November.[143] The date of the hanging was meaningful. In the aftermath of the Rebellion and of the Frog Lake Massacre, a number of warriors from Big

[140] Francis Dickens to the Commanding or Indian Agent, Battleford, 3 April 1885, LAC RG18-C-1, volume 3778.
[141] Rudy Wiebe, "Mistahimaskwa," *Dictionary of Canadian Biography*, vol. 11, (University of Toronto/Université Laval, 2003–), accessed July 15, 2014, http: //www.biographi.ca/en/bio/mistahimaskwa_11E.html.
[142] Crown Prosecutor D.L. Scott to the Officer Commissioner NWMP, 26 January 1887 (copy), LAC RG 18, vol. 1075, R v Dressy Man.
[143] Report of the Privy Council of Canada, John J. Magee, Clerk, 6 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.

Bear's community were tried for murder. Eight members of the Frog Lake community were sentenced at trials in late September and early October: six for crimes committed during the Massacre, and two - Ducharme and Dressy Man - for murdering She Wins. Ikta and Man Without Blood, two men described as Assiniboine, were also tried in Battleford. Man Without Blood was found guilty of the murder of Bernard Tremont, a local Farm Instructor, on 31 March, three days before the Frog Lake incident.[144] Ikta killed James Payne at Stoney Reserve on 30 March.[145] They too were sentenced to hang with the Frog Lake Cree. Rouleau was the judge in every case.

In late July, Wandering Spirit - the defeated warrior who had led the attack on Frog Lake – attempted suicide.[146] He survived, and was tried at Battleford on 22 September for murder.[147] He pled guilty, and Rouleau fixed the date of his execution for 27 November 1885.[148] The list of the guilty and the condemned was long, and Rouleau did not hesitate to recommend their speedy execution. On 5 October, Rouleau wrote to Thompson, forwarding the trial papers in the cases of Manachoos (Bad Arrow), Kittemakeyin (Miserable Man), Papamakesik (Round the Sky), Wawanitch (The Man Without Blood), and Ikta.[149] Big Bear's son, Little Bear, and Iron Body were also tried and convicted before Rouleau for shooting trader George Dill at Frog Lake.[150] Although Little Bear pled not guilty, he called no witnesses and asked no questions of those who

[144] Man Without Blood Capital Case File, LAC RG 13, vol. 1421, file 198A
[145] Ikta Capital Case File, LAC RG 13, vol. 1421, file 195A. There is some disagreement in the documents as to whether 'Ikta' or 'Itka' is the correct spelling of the prisoner's name. I have chosen 'Ikta' because this is the name under which Library and Archives Canada has identified the file.
[146] Caron Papers, LAC MG 27, I D3, vol. 199.
[147] Complaint of A. D. Stewart, 22 September 1885, Wandering Spirit Capital Case File, LAC RG 13, vol. 1421, file 196A.
[148] Formal charge and arraignment of Wandering Spirit, 22 September 1885, Wandering Spirit Capital Case File, LAC RG 13, vol. 1421, file 196A.
[149] Rouleau to Thompson, 5 October 1885, Bad Arrow Capital Case File, LAC RG 13, vol. 1421, file 197A.
[150] Little Bear Capital Case File, LAC RG 13, vol. 1421, file 199A.

spoke against him, telling the court that the Crown witnesses' statements were true.[151] Iron Body called a witness who testified that the prisoner had only killed a dog, but Rouleau, who tried the case alone without a jury, was unconvinced.[152] On 27 November, eight men would die.[153]

In all these cases, Rouleau was confident in the defendants' guilt, and eager for their punishment. Bad Arrow and Miserable Man, Rouleau crowed, were convicted on the basis of evidence "so direct and conclusive that there can be no doubt as to their guilt."[154] The evidence in Round the Sky's case "cannot be stronger", wrote Rouleau, "and the prisoner richly deserves also the sentence pronounced on him."[155] Man Without Blood and Ikta both confessed to murder. The killings had happened in quick succession, in the disorder of the confrontation between the Cree and the settlers at Frog Lake. After Wandering Spirit shot Thomas Quinn, Bad Arrow had shot Charles Gouin as he tried to escape the fray. The first bullet felled Gouin, and the second, fired by Miserable Man as Gouin propped himself up on an elbow to look at his attacker, killed him.[156] The Cree men said that Wandering Spirit and Big Bear's son had urged them to violence.[157] Although they pled 'not guilty', Bad Arrow and Miserable Man called no witnesses and declined to cross-examine anyone who spoke for the prosecution. According to Rouleau's notes, the prisoners stated "that the witnesses told the truth."[158]

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[151] Rouleau's notes of evidence, 9 October 1885, Little Bear Capital Case File, LAC RG 13, vol. 1421, file 199A.
[152] Testimony of Kamanitowas, 9 October 1885, Iron Body Capital Case File, LAC RG 13, vol. 1421, file 194A. Iron Body elected to be tried by the Stipendiary Magistrate alone at his arraignment.
[153] Sheriff Chapleau to the Secretary of State, 17 December 1885, *Bad Arrow Capital Case*, LAC, RG 13, vol. 1421, file 197A.
[154] Rouleau to Thompson, 5 October 1885, Bad Arrow Capital Case File, LAC RG 13, vol. 1421, file 197A.
[155] Rouleau to Thompson, 5 October 1885, Bad Arrow Capital Case File, LAC RG 13, vol. 1421, file 197A.
[156] Testimony of Toussaint or Calling Bull, 3 October 1885, Bad Arrow Capital Case File, LAC RG 13, vol. 1421, file 197A. Toussaint would find himself in Stony Mountain Penitentiary, sentenced to 10 years' imprisonment for receiving stolen goods. He was tried by Rouleau in the fall of 1885, and pardoned in October 1889. Stony Mountain Penitentiary Admissions Book, 1885, LAC RG 13, T-11095.
[157] Testimony of Four Sky Thunder, 3 October 1885, Bad Arrow Capital Case File, LAC RG 13, vol. 1421, file 197A. Four Sky Thunder would also find himself in Stony Mountain Penitentiary, sentenced to 14 years' imprisonment for 'escape'. He was tried by Rouleau in the fall of 1885, and pardoned in July of 1890. Stony Mountain Penitentiary Admissions Book, 1885, LAC RG 13, T-11095.
[158] Rouleau's Notes of Evidence, 3 October 1885, Bad Arrow Capital Case File, LAC RG 13, vol. 1421, file 197A.

Many of the Indian prisoners tried for murder in Rouleau's court either called no witnesses in their defence or pled guilty. A letter from Britton Bath Osler to George Burbidge, the Deputy Minister of Justice, in August 1885 suggests that the prisoners had little hope of a favourable verdict.[159] Osler was in Regina, where he had been prosecuting dozens of members of Louis Riel's defeated rebel forces, along with Riel himself. In the letter, Osler complained of the expense of conducting so many criminal trials. Locating witnesses in remote settlements, taking statements, paying interpreters and transporting lawyers and witnesses to Regina was time consuming and costly. But the message of "firmness and severity on the part of the Government" would not be cheap.[160] "We thought of getting them to plead guilty and discharge[d] on recognisance," wrote Osler, "but after consultation with Col. Herchmer and Lt. Gov. Dewdney have concluded that it is necessary to prosecute vigorously."[161] It would cost less to transport witnesses from Frog Lake and Fort Pitt to Battleford than to Regina. And so, Rouleau's courtroom became an outpost of the Regina court, specialising in trying Cree accused of murder.[162] Another letter from the Ministry of Justice to W. Prescott Sharp, who served as prosecutor in the Cree cases tried at Battleford, instructing him collect evidence in Fort Pitt, reiterated the point: "you will keep in mind that the Department do not desire to incur any unnecessary expense."[163]

The Canadian government spared costs and political capital by limiting its harshest retribution to leaders of the Rebellion, as well as anyone accused of murder or 'outrage.' "There is no desire to arrest or prosecute any of the rank and file in the late rebellion," Sharp was

[159] B.B. Osler to Burbidge, 16 August 1885, LAC RG 13, vol. 2132, part 11.
[160] B.B. Osler to Burbidge, 16 August 1885, LAC RG 13, vol. 2132, part 11.
[161] B.B. Osler to Burbidge, 16 August 1885, LAC RG 13, vol. 2132, part 11.
[162] Osler told Burbidge that it would cost $100 for each witness brought down to Regina for trial. B.B. Osler to Burbidge, 16 August 1885, LAC RG 13, vol. 2132, part 11.
[163] Ministry of Justice to W. Prescott Sharp and A.D. Stewart, 18 August 1885, LAC RG 13, vol. 2132, part 6.

instructed. However, once a trial was set, the Government was determined to get its money's worth. Osler remarked that Col. Herchmer, the Inspector of Indian Agencies for the North-West Territories, had told him that it was "absolutely necessary to convict if possible all the Indians under arrest."[164] Osler's letter to Burbidge also suggested that many of the trials themselves were only for show. At the trial, wrote Osler, one lawyer "made a very eloquent speech in their [the defendants'] favour, but it had no effect as the sentences had been fixed before the court opened."[165] Once the Frog Lake Cree had been arrested, the prestige and resources of the Canadian government were invested in their conviction. A guilty verdict vindicated colonial authority and fed the European hunger for vengeance. Their fate was sealed, and the Cree defendants knew it.

Thompson might have seen the plight of Ducharme and Dressy Man as a simple murder case - perhaps especially so in contrast with the other highly politicized Rebellion trials that were crowding his desk - but it did not look that way to legal authorities in the North-West Territories. Rouleau, who evidently had no compunction about sentencing Cree rebels to death, did not think that the *wendigo* case was unambiguous. Neither did the prosecutor, W. Prescott Sharp. On 10 November, Sharp wrote to Thompson to tell him more about *wendigos*. Having heard that the Governor-General-in-Council had declined to commute the death sentences of Ducharme and Dressy Man, Sharp wanted to make sure that the Ministry of Justice understood precisely why an old woman had been killed so theatrically that April. Sharp would later confess to the deputy Minister of Justice, A. Power, that he did not trust Rouleau to explain the *wendigo* phenomenon to the government in Ottawa. He was unsure of whether or not to intervene in the Executive's

[164] B.B. Osler to Burbidge, 16 August 1885, LAC RG 13, vol. 2132, part 11.
[165] B.B. Osler to Burbidge, 16 August 1885, LAC RG 13, vol. 2132, part 11.

consideration of the case, but "doubts stole into my mind as to whether the Magistrate took sufficiently full notes in the case & whether his report was clear."[166]

In his letter to Thompson, Sharp explained that the Cree believed that the old woman was a *wendigo*, "a crazy person desirous of eating human flesh."[167] *Wendigos* were nearly impossible to kill and possessed powers of resurrection. A *wendigo* endangered and terrified the whole Frog Lake community, and they had agreed that the woman had to die. However, they were afraid to kill her. Sharp was "informed by intelligent half breeds that the presence of such a person would strike terror into the hearts of whole camps of Indians."[168] The Frog Lake Cree had even tried to persuade their white captives to kill the *wendigo* for them, but when they refused, Ducharme, Dressy Man and Bright Eyes had offered to do the dangerous work in order to save the community.[169] If this alone had not piqued Thompson's interest, Sharp's final observation surely did: "Dressy Man clubbed Const. Cowan & knocked his brains out after Louison Mongrain killed him. He also cut his heart out."[170]

Louison Mongrain was tried for the murder of Constable Cowan of the NWMP during the capture of Fort Pitt, on 15 April 1885.[171] Charles Rouleau was the judge in his trial, and W. Prescott Sharp, the prosecutor. Although only Mongrain was tried, Dressy Man was also named in the official complaint as one of Cowan's killers.[172] At the arraignment, the trial was set for 25 September 1885, which was the same day, and the same courtroom, in which Ducharme, Dressy

[166] W. Prescott Sharp to A. Power, 24 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[167] W. Prescott Sharp to A. Power, 24 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[168] W. Prescott Sharp to A. Power, 24 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[169] W. Prescott Sharp to A. Power, 24 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[170] W. Prescott Sharp to A. Power, 24 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A. .
[171] Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[172] Official complaint of A.H. Stewart, Chief of Police in Hamilton, 23 September 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.

Man and Bright Eyes had stood trial.[173] Sharp, possibly because Dressy Man had already been convicted of murdering She Wins earlier that day, entered a plea of *nolle prosequi*, declining to prosecute Dressy Man for Cowan's murder. The trial proceeded against Mongrain alone.[174]

Mongrain was Cree and a member of Cut Arm's band, who lived on Onion Lake reserve. Mongrain and others from his community joined Big Bear's camp after the Frog Lake Massacre. Mongrain joined the group of Cree who seized Fort Pitt on 13 or 14 April.[175] When he returned to the Frog Lake camp, he had brought George G. Mann, a government Farm Instructor whom Mongrain had known at Onion Lake, and Mann's family, with him. He left the family at Frog Lake on the day that Cowan was shot.[176]

Clarence Loasby, an NWMP constable, was the first witness at Mongrain's trial. He told the court that he and Cowan, along with a man named Henry Quinn, came across Big Bear's band on their return from a scouting mission. Loasby said that as the men rode toward the Fort, the Cree began to shoot at them.[177] The policemen described the shooting as unprovoked, but it wasn't. In statements made after the trial, William Bleasdell Cameron, the sole male survivor of the Frog Lake Massacre and a prisoner in Big Bear's camp, told a different story.[178] According to Cameron, Quinn had advised Cowan and Loasby to avoid riding through the Indian camp, as this would be seen as a provocation. Cowan accused Quinn of cowardice and the men, blinded by bravado, rode directly through the group of Cree warriors who were demanding the surrender of

[173] Arraignment of Mongrain and Dressy Man, 23 September 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[174] Rouleau's notes of evidence in trial of Louison Mongrain, 25 September 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[175] Statement of W.B. Cameron, 11 March 1886, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[176] LAC, Statement of W.B. Cameron, 11 March 1886, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[177] Testimony of Clarence Loasby, Rouleau's notes of evidence in trial of Louison Mongrain, 25 September 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[178] Lally Grauer, "Mclean, William James," *Dictionary of Canadian Biography*, vol. 15, (University of Toronto/Université Laval, 2003–), accessed July 16, 2014, http: //www.biographi.ca/en/bio/mclean_william_james_15E.html.

the Fort.[179] Loasby was wounded in the ensuing firefight; Cowan, shot, fell from his horse during the melée.[180] Theirs was the first blood shed at Fort Pitt.

Another policeman, J.A. Martin, testified at trial that William McLean, of the Hudson's Bay Company, had been negotiating with the Cree that day. They had promised not to kill anyone as long as the police surrendered the Fort, but that fragile peace had shattered when the mounted policemen crested the hill toward the Cree camp.[181] Martin said that he saw two Cree feel Cowan's body to see if he was still breathing. Then a man in a white blanket walked up to him and fired two shots at close range.[182] Kasowakayo, a Cree man who had joined Big Bear's camp in May, after Cowan's death, said that he had overheard Mongrain telling a crowd that after he fell, "[Cowan] was lying on his back and Cowan put his hands up saying don't brother and I fired two shots at him."[183] Other Cree witnesses testified that they had also overheard Mongrain's confession, shared around a campfire shortly after the incident.[184] The defence called only one witness, Mesinachassayo, who swore that he had seen Mongrain near Cowan, but that Mongrain fired no shots and had made no confession.[185] The jury found Mongrain guilty of murder and sentenced him to hang with the other convicted rebels, on 27 November.

Unlike the other Cree who shuffled through Charles Rouleau's courtroom in late September, Louison Mongrain had allies among the settler community at Fort Pitt. A month after

[179] Statement of W.B. Cameron, 11 March 1886, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[180] Testimony of Clarence Loasby, LAC, Rouleau's notes of evidence in trial of Louison Mongrain, 25 September 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[181] Testimony of John Alfred Martin, Rouleau's notes of evidence in trial of Louison Mongrain, 25 September 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[182] Testimony of John Alfred Martin, Rouleau's notes of evidence in trial of Louison Mongrain, 25 September 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[183] Testimony of Kasowakayo, Rouleau's notes of evidence in trial of Louison Mongrain, 25 September 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[184] Testimony of Toussaint or Calling Bull, and Kapesiweinokeo, Rouleau's notes of evidence in trial of Louison Mongrain, 25 September 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[185] Testimony of Mesinachassayo, Rouleau's notes of evidence in trial of Louison Mongrain, 25 September 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.

his conviction, Amelia McLean, William McLean's seventeen-year-old daughter, wrote to the government to beg for Mongrain's life. She began, "Mr. White, very kindly, told me that if I wrote down about that good Indian that is to be hanged on the 37th [sic] of Nov. and explain all about him, he will be saved."[186] Amelia McLean described Mongrain as a hero, who had saved the McLean family and that of Farm Instructor Mann during the Frog Lake Massacre. Mongrain brought the families food, convinced his camp not to kill them or conscript them in the war against Canadian forces, and even "gave the Manns the last pot of flour he had."[187] "He always said," wrote the girl, "he was a friend of the Whiteman's."[188] Amelia said that her father was sure an Indian from the Saddle Lake reserve had shot Cowan, not Mongrain, and that the real murderer had later been killed by cowboys at another reserve. Amelia herself was sure that Mongrain, whom she always called 'Louison', had been wearing different pants from the ones described at trial. She was shocked that any First Nations people had spoken against him at his trial, although others - who noted that Mongrain's protection of the whites had hardly ingratiated him with many Cree warriors - were not.[189] Amelia spoke fluent Cree, and offered her services in any way that "might help the best friend we had among the Indians."[190] Amelia's letter found its way to the office of the Secretary of State, who forwarded it to the Ottawa Privy Council for consideration.

Amelia McLean was the eldest of Hudson's Bay trader William James McLean's nine children. She had grown up in the North-West Territories at a series of trading posts and military

[186] Amelia McLean, 25 October 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[187] Amelia McLean, 25 October 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[188] Amelia McLean, 25 October 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[189] Statement of W.B. Cameron, 11 March 1886, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[190] Amelia McLean, 25 October 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.

forts, and she and her family had forged strong bonds among the Cree.[191] She was a gifted linguist who would later work as an Indian-language translator and amateur ethnographer.[192] Her letter about Mongrain provoked a flurry of telegrams among government authorities, who were desperate to track down the McLean family in time to gather more evidence in the Mongrain case before his execution.[193] McLean's family of eleven had left Saskatchewan for Fort Alexander in Manitoba, which was over seventy-five miles across Lake Winnipeg from the penitentiary at Selkirk where Mongrain and the other rebels would serve their sentences.[194] S.L. Bedson, the superintendent of Stony Mountain penitentiary, eventually had to set out himself for Fort Alexander to find Amelia, since he could convince no one else to brave the ice-clogged lake until the spring thaw.[195] Finally, on 31 October, Bedson managed to depose Amelia and her father, and to send their statements to Ottawa.[196] Amelia McLean swore that Mongrain had saved her family's life at the risk of his own. He had given them his horse, his food, his protection, and even a gun when his angry community had threatened to kill the Europeans in revenge for deaths of their own warriors.[197]

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[191] Sarah A. Carter, "McLean, Amelia Anne (Paget)," *Dictionary of Canadian Biography*, vol. 15, (University of Toronto/Université Laval, 2003–), accessed July 16, 2014, http: //www.biographi.ca/en/bio/mclean_amelia_anne_15E.html.
[192] Sarah A. Carter, "McLean, Amelia Anne (Paget)," *Dictionary of Canadian Biography*, vol. 15, (University of Toronto/Université Laval, 2003–), accessed July 16, 2014, http: //www.biographi.ca/en/bio/mclean_amelia_anne_15E.html. McLean published her book under her married name. See Amelia M. Paget, *The People of the Plains* (Toronto, 1909).
[193] Telegram for A. Power from Fort Qu'Apelle, 17 October 1885; Telegram for A. Power from Stony Mountain Penitentiary, 21 October 1885; Bedson at Stony Mountain Penitentiary to A. Power, 30 October 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[194] Telegram from Bedson at Stony Mountain to A. Power, 24 October 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.; Statement of W.B. Cameron, 11 March 1886, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[195] Telegram from J.G. Moylan to A. Power, 28 October 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[196] Telegram from S.L. Bedson to A. Power, 31 October 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[197] Sworn statement of Anne Amelia McLean, 28 October 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.

William McLean also gave a statement exonerating Mongrain. He corroborated his daughter's account of Mongrain's kindness and bravery. Then his testimony turned to Dressy Man. McLean said that Dressy Man had told him that "Cowan was not dead when he was shot but that he [Dressy Man] finished him with a club, he showed me the club which was bespattered with brains and blood, and boasted of the deed."[198] On 5 November 1885, Thompson wrote to the Governor General in Council to recommend that Mongrain's death sentence be commuted to life imprisonment, in light of the "courage and humanity" he showed toward the McLean and Mann families at Fort Pitt.[199] While Mongrain's sentence was being commuted to imprisonment, Sharp's letter to the Ministry of Justice accusing Dressy Man of cutting out Cowan's heart was being carried from Battleford to Ottawa.

Dressy Man and Mongrain represent the two poles of mercy, and the bifurcation in the judicial imagining of Canada's indigenous peoples. Thompson praised Mongrain for his "humanity" twice in the plea for his life. It may be that Thompson was employing the term unthinkingly, and that he would have been equally struck by a white man's 'humanity'. However, it is also possible that Louison Mongrain's extraordinary kindness toward his the settlers, and their enthusiastic championing of his cause, allowed Thompson to see Mongrain not as a primitive victim of superstition but as a man.

Amelia McLean saved Louison Mongrain's life by persuading Canadian legal authorities of his humanity, loyalty and generosity. By convincing Thompson that the *wendigo* killers were too scared of monsters to be held accountable for their actions, Sharp saved Ducharme and

[198] Sworn statement of W.J. McLean, 28 October 1885, Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.
[199] J.S.D. Thompson to the Governor General in Council, 5 November 1885 (copy), Louison Mongrain Capital Case File, LAC RG 13, vol. 1421, file 200A.

Dressy Man from execution.[200] After reading Sharp's letters about the *wendigo* case, Thompson wrote to the Governor General in Council, requesting that the execution be postponed until more evidence could be gathered about *wendigos*.[201] Thompson had not initially understood the horror that the Cree faced when they discovered a *wendigo* among them, or that their fear of cannibals rendered the "killing of such a person appear a commendable act."[202] Thompson blamed Rouleau for the oversight. "These features," he wrote, "were not developed in the evidence or explained by the magistrate who seems to have taken for granted that they would be known in the Department of Justice."[203] While the fate of Ducharme and Dressy Man hung in balance, Thompson tried to learn all he could about cannibals. In a longer report, Sharp divulged more about the case. She Wins had been refusing to eat for days before her execution, which was, in the Cree view, a classic sign of her transformation into a *wendigo*. *Wendigos* could eat nothing but human meat. She had also repeatedly asked for death, threatening to kill someone if she were allowed to live. There were rumours that even William James McLean feared that the *wendigo* would eat his children.[204]

Sharp also shared his own trial notes with Thompson, including the testimony of two additional witnesses from the camp. One, Mooswar, said, "On the day she [the old woman] was killed I heard her say that if she were not killed before sundown she would kill all the children & eat them."[205] Rouleau also wrote to Thompson to confirm the intensity of *wendigo* panic. He told

[200] W. Prescott Sharp to the Minister of Justice, 10 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[201] Thompson to the Governor General in Council, 16 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[202] L Thompson to the Governor General in Council, 16 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[203] Thompson to the Governor General in Council, 16 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[204] Sharp to Thompson, 24 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[205] Testimony of Mooswar, Sharp's trial notes, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.

Thompson "there was no doubt that the woman killed was crazy and threatened on several occasions to kill women and children, that herself asked the favor of being killed, in order to avoid such a calamity."[206] He sent this last letter on 27 November, the day that the Frog Lake rebels were hanged en masse in Battleford. Ducharme and Dressy Man were not among them. On 9 December 1885, following Thompson's revised recommendation for mercy, the Governor-General-in-Council commuted Ducharme's and Dressy Man's sentences to life imprisonment at Stony Mountain Penitentiary in Alberta.[207]

Mongrain, Ducharme, and Bright Eyes were transported to Stony Mountain in the fall of 1885. Dressy Man, however, was sent to the jail at Regina. With Mongrain's sentence commuted, Thompson faced the unpleasant prospect of having no one to hang for the crime of killing an NWMP constable. Sharp and McLean claimed that they had seen Dressy Man club the still-breathing Cowan to death, and then that Dressy Man had cut out the unfortunate man's heart. Sharp had only declined to prosecute Dressy Man for Cowan's murder in September; Dressy Man had not been acquitted of the crime. And so, Sharp was instructed to gather enough evidence to bring a case against Dressy Man for Cowan's murder. Meanwhile, Dressy Man waited. In May of 1886, Sharp left Canada for Europe, and transferred Dressy Man's case, still pending, to D.L. Scott, who had been junior counsel for the prosecution in Louis Riel's trial.[208]

Six months later, in November, Dressy Man was still in Regina, and still awaiting his second murder trial. Samuel Chapleau, the sheriff of Regina, wrote to Thompson to complain that there had been no progress in the investigation of Dressy Man's crime.[209] Finally, Dressy

[206] Rouleau to Thompson, 27 November 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[207] Report of the Privy Council of Canada, John J. Magee, Clerk, 9 December 1885, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[208] D.L. Scott to G.W. Burbidge, 25 May 1886, LAC RG 13, vol. 2132, part 13.
[209] Chapleau to the Minister of Justice, 19 November 1886, LAC RG 13, vol. 2132, part 31.

Man was tried for Cowan's murder on 11 March 1887. The judge in the case was Hugh Richardson, who had tried Riel and most of his allies in Regina in 1885. The prosecution struggled to locate witnesses, some of whom had died or moved away. In the end, the principal witnesses were François Dufresne, who had testified against Dressy Man in the *wendigo* case, and Dufresne's wife, Thick Wood Woman.[210] The evidence given at trial was patchy and unpersuasive, and the political imperative to convict the rebels had faded in the years since the Rebellion. Dressy Man was found not guilty, and sent to Stony Mountain to serve his manslaughter sentence for the killing of She Wins.[211]

Two years after Ducharme and Mongrain arrived at Stony Mountain, and a few months after Dressy Man finally joined them there, petitions began to arrive at the Ministry of Justice begging for their pardon and release. In November of 1887, the First Nations community at Onion Lake, in the district around Fort Pitt, petitioned for clemency for the Cree prisoners. Mongrain, they wrote, "always was a good Indian attending to his farming and was also good in saving the lives of other prisoners that Big Bear had in his camp."[212] Their arguments for freeing Ducharme and Dressy Man went to the heart of the colonial government's dilemma in the *wendigo* case. They wrote, "As the old woman was dangerous and wanted to kill some children, to eat, it was considered advisable to kill her, and it always has been the custom to kill them, with us: we did not consider we were doing wrong in doing so."[213] The petitioners even added that the prisoners

[210] NWMP Correspondence about R v Dressy Man, LAC RG 18, vol. 1075.
[211] Hugh Richardson's notes on Dressy Man's second trial, Saskatchewan Archives Board, Regina (SAB-Regina), Richardson Trial Notebook, R-E3633.
[212] Petition from the Onion Lake Cree, 16 November 1887, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[213] Petition from the Onion Lake Cree, 16 November 1887, Charles Ducharme Capital Case File, LAC G 13, vol. 1423, file 207A.

had been urged to kill the "witch" by the whole camp, including William McLean.[214] One of the Onion Lake missionaries, Père Merer, joined their plea, adding in his own letter that the Cree were among the most obedient and peaceable Indians he had ever met, and that the men had killed She Wins in legitimate self-defence. They had never committed murder in their hearts, wrote the priest, and the Cree were helpless before their powerful superstitions, and their crippling fear of *wendigos*.[215] Another priest who visited Bright Eyes at the penitentiary also wrote to Thompson asking for his release on the grounds that he and the others were incapable of resisting their community's pressure to kill She Wins, and their fear of her. Bright Eyes, especially, argued the priest, deserved pity because he had been so young at the time of the killing. Moreover, the priest was certain that She Wins had already died when Bright Eyes, terrified of the *wendigo*'s powers of resurrection, had pulled the trigger on her body.[216]

In 1887, the government was not yet ready to release its First Nations prisoners. Discussing the Onion Lake petition and other letters he had received that fall, the Indian Commissioner of the North-West Territories wrote to the Indian Affairs Superintendent in Ottawa. He believed that "the time for their release [was] not yet ripe. It occurs to me as very possible, that an opportunity may offer, when the exercise of clemency might be made to serve some important end, in connection with our relations with these Indians."[217] In 1889, however, the Canadian government began systematically to pardon and release Indians imprisoned at Stony Mountain for crimes committed during the Rebellion. From the beginning, the Crown had

[214] Petition from the Onion Lake Cree, 16 November 1887, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[215] Père Merer to D.H. McDowall, 17 November 1887, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[216] A. Lacombe to Thompson, 10 August 1889, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[217] Commissioner to the Superintendent, 8 December 1887, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.

intended to pardon the rebels as soon as it was politically expedient.[218] Four years after Riel's execution, the state decided that it had made its point.

However, as Cree prisoners began to stream from Stony Mountain back to their homes in Saskatchewan, Mongrain, Dressy Man, Ducharme and Bright Eyes were left behind. The other released prisoners had been charged with property offences and with treason-felony; only they were in prison for murder or, in Bright Eyes' case, for manslaughter. They began to lose hope. The prison surgeon, Sutherland, wrote to Bedson, the warden, to warn him that his First Nations prisoners were sick and dying. "Since the release of the last three Indians with whom they were largely associated," Sutherland noted, "they appear to have become downhearted and entirely discouraged at the prospect of their ever leaving here alive."[219] Sutherland urged Bedson to press for the men's release; they would not survive much longer at Stony Mountain. The surgeon was right. On 4 August, he informed Bedson that Ducharme, who at ninety was the oldest Indian prisoner by twenty years, had died the day before of "debility".[220] His death had "a very serious effect which is already apparent on the other three convicts mentioned in my memo... It will be the same end with these as with 68 provided something is not done for their release & that immediately."[221] It was too late for Ducharme, but the others were luckier. Dressy Man and Louison Mongrain were released just over a month later. Bright Eyes left Stony Mountain the following June.[222]

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[218] Burbidge to Campbell, 10 August 1885, LAC RG 13, vol. 2132, part 15.
[219] Memorandum from Sutherland to Bedson, 15 July 1890, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[220] Sutherland's report on Ducharme's death, 3 August 1890, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[221] Sutherland to Bedson, 15 July 1890, Charles Ducharme Capital Case File, LAC RG 13, vol. 1423, file 207A.
[222] Stony Mountain Penitentiary Admissions Book, 1885, LAC RG 13, T-11095. Bright Eyes was tried for another murder, this one committed at the Saddle Lake Agency, in 1918. See Re-Trial of Bright Eyes for Murder, LAC RG 10, vol. 7469, file 19118-3.

Even the pressure of armed insurrection did not result in the banishment of cultural difference from the criminal courtrooms of the British empire. Although Riel and most of the Frog Lake killers died, most of the rebels lived, and even spent relatively little time in prison. In England as in the empire, pardoning and commuting death sentences was not evidence of the state's benevolence, but rather of its supreme self-confidence in the authority and integrity of its legal system.[223] However, there is more to the 1885 trials than state terror. In judicial and administrative writings about the *wendigo* case, it becomes clear that judging the mental states of non-white defendants, especially indigenous defendants, in criminal courtrooms and in the executive review of criminal convictions was profoundly troubling and troublesome for imperial officials. Assessing the intensity of Cree belief in cannibal monsters became a pressing legal issue in an imperial context in which legal authorities felt bound to apply the principles of English common law in the wilds of the Canadian West.

The *wendigo* remained important to the history of Canadian and British imperial law after 1885. In 1896, Machekequonabe, an Ojibwa man, was tried at Rat Portage in Western Ontario for killing his foster-father. Their community believed that they were being stalked by a *wendigo*, and the defendant had shot his father after mistaking him for the monster.[224] At the trial, Machekequonabe's lawyer, A.S. Wink, argued that his client suffered from a delusional belief in *wendigos* – "a form of insanity to which the whole tribe is subject."[225] The judge, Rose, disagreed. He declared that the defendant's belief in *wendigos* was "not insanity at all, but

[223] Douglas Hay has famously made this point about the dark side of pardoning: Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, 2nd ed. (London: Verso, 2011), 17–64. For an example of how one scholar has applied Hay's argument to the North-West Rebellion, see Ted McCoy, "Legal Ideology in the Aftermath of Rebellion: The Convicted First Nations Participants, 1885," *Histoire Sociale / Social History* 42, no. 83 (2009): 175–201.
[224] For documents related to the original trial, see: *The Queen v Machweekequonabe*, LAC, RG 13, vol. 2089. For the record of the case as it was appealed, see *R v Machekequonabe* (1897) 28 O.R. 309.
[225] Trial transcript, *The Queen v Machweekequonabe*, LAC, RG 13, vol. 2089.

superstitious belief."[226] "It does not seem desirable," said Rose in his instruction to the jury, "for the safety of the community, to allow the proposition to go forth as law, that because one has a superstitious belief or delusion he is justified in taking a human life."[227] Machekequonabe was convicted of manslaughter. The Ontario Divisional Court reviewed the case in 1897. J.K. Kerr, for the defence, contended that the defendant had never intended to harm a human being, and that his mistake, under the circumstances, had been reasonable.[228] The court held that the manslaughter conviction was based on sufficient evidence, and declined to order a retrial. The judgment in Machekequonabe's case, given by John Douglas Armour, C.J., was two sentences long. [229]

Machekequonabe has become one of the best-known 'Native law' cases in the common law world.[230] The case was interpreted as legal authority, both in Canada and elsewhere in the British empire, for the idea that indigenous peoples were bound by colonial law regardless of their religious and cultural beliefs.[231] However, *Machekequonabe* did not settle the question of whether, and to what degree, common law courts should treat religious and cultural beliefs as exculpatory. Sidney Harring, who has written extensively on the history of indigenous peoples' treatment under Canadian criminal law, notes that many whites were dismayed by the court's unwillingness to consider the genuine terror of Machekequonabe's community as they tried to

[226] Trial transcript, *The Queen v Machweekequonabe*, LAC, RG 13, vol. 2089.
[227] Trial transcript, *The Queen v Machweekequonabe*, LAC, RG 13, vol. 2089.
[228] *R v Machekequonabe* (1897) 28 O.R. 309.
[229] *R v Machekequonabe* (1897) 28 O.R. 309. For a short biography of Armour, see: Christopher Moore, *The Court of Appeal for Ontario: Defining the Right of Appeal in Canada, 1792-2013* (Toronto: University of Toronto Press, 2014), 212.
[230] Sidney L. Harring, "Liberal Treatment of Indians: Native People in Nineteenth Century Ontario Law, The," *Saskatchewan Law Review* 56 (1992): 322.
[231] For an example of a book in which the author makes this claim about *Machekequonabe*, see: Lesley Erickson, *Westward Bound: Sex, Violence, the Law, and the Making of a Settler Society* (Vancouver, BC: UBC Press, 2011), 53. For more on *Machekequonabe* and other *wendigo* cases, see: Harring, *White Man's Law*.

protect their families from the *wendigo* that stalked them in the night.[232] And yet, Harring sees *Machekequonabe* as proof that "the very real and intricate cultural world of the Ojibwa found no recognition in Ontario courts."[233] However, although Canadian criminal courts rejected the idea that Machekequonabe lacked *mens rea*, that he was insane, or that he had committed a legally exculpatory mistake of fact, they did not hold him fully responsible for the killing. Machekequonabe, like Bright Eyes, escaped with a non-capital manslaughter conviction, and was only sentenced to six months in jail.[234] *Machekequonabe* might not have resulted in the formal recognition of First Nations culture in common law courts, but it suggests, like other cultural defence cases from around the British empire, that colonial authorities did take account of a defendant's culture when they weighed his criminal responsibility and set his punishment. A narrow focus on the verdict in imperial criminal cases obscures the contingency and flexibility of charging, sentencing and, especially, pardoning, where the cracks in colonial self-confidence were most obvious.

Judges and administrators in colonial Canada faced the same legal-philosophical dilemma as they did in Australia, India, and in Britain itself: who was an appropriate subject of judicial punishment? In the Rebellion cases, the primary barrier to criminal responsibility was not jurisdictional, at least as traditionally understood. The Canadian government was confident in its legal authority to punish Cree, Métis and white defendants alike when they committed crimes, especially murder. The more difficult question was how to apply criminal law doctrines about culpability, such as the rules about insanity and self-defence, intention and guilt, to people whose minds and beliefs struck colonial authorities as fundamentally alien and, at times, unintelligible. Sometimes, administrators identified madness – a diseased and dysfunctional mind – as the

[232] Harring, "Liberal Treatment of Indians," 323.
[233] Ibid.
[234] Ibid.

reason a person should not be punished. Other times, as in the *wendigo* case, it was the 'cultured' mind that gave officials pause: the mind so 'primitive' or in the grip of such overwhelming superstition that the defendant could not be competent to be tried under British criminal law, or if he could be tried, incompetent to die on a British colonial gallows. Debates among officials about mercy and guilt, about malice, altruism and intention, both at trial and after, show how responsibility was bound up with ethnography, and ethnography with psychiatry, in British imperial criminal law.

CONCLUSION

As all living things are in a continual flux, never constant in one stay, but are by change brought to perfection and then by continuance of change to decay, it comes to pass that religions, like empires, decay and die, and that in the whirligig of time it is the lot of the distinguished saints of one religion to be accounted madmen or impostors by the partisans of a succeeding religion.
-Henry Maudsley, *The Pathology of Mind* (1895)[1]

"All crime is local," declared the Judicial Committee of the Privy Council in its judgment in *John McLeod v The Attorney General New South Wales*, an 1891 bigamy case. "The jurisdiction over the crime belongs to the country where the crime was committed, and except over her own subjects Her Majesty and the Imperial Legislature have no power whatever."[2] The Committee was, apparently, deaf to the irony of a court at the apex of a vast international legal network deciding an Australian case while declaring that criminal jurisdiction was 'local'. Even without the complicating context of empire, the idea of a 'local' law adapted to its environment and unchallenged by competing systems of legal norms was a fiction, concealing the legal pluralism that flourished in English port cities and country towns.[3] In the case of imperial criminal law, the idea that criminal law reflected the norms and values of its local context had little weight. The difficulties of administering British criminal justice in unfamiliar lands inhabited by equally unfamiliar people were perennial features of imperial legal thought and practice, both in the colonies and in London, in the nineteenth century.

It can be helpful to imagine criminal responsibility as a jurisdictional problem. Charles Sweet, a London barrister, defined jurisdiction in his 1882 *Dictionary of English Law*. Jurisdiction, he wrote, referred to "the power of a Court or judge to entertain an action, petition

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[1] Maudsley, *The Pathology of Mind: A Study of Its Distempers, Deformities, and Disorders*, 2.
[2] *John McLeod v The Attorney General New South Wales* (New South Wales) [1891] UKPC 31 (23 July 1891).
[3] See, for example: E. P Thompson, *Customs in Common* (New York: New Press : Distributed by W.W. Norton, 1991); and A. W. B Simpson, *Cannibalism and the Common Law : The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which It Gave Rise* (Chicago: University of Chicago Press, 1984).

or other proceeding" and also to "the district or geographical limits within which the judgments or orders of a Court can be enforced or executed."[4] Jurisdiction is about determining the scope of legitimate authority, and policing the boundaries of its application to people and places. When legal authorities encountered subjects whose cultures or minds, or both, seemed to remove them from the purview of English criminal law, officials struggled to generate and apply consistent standards for their jurisdictional inclusion or exclusion. Where jurisdictions in the British empire frayed or overlapped, jurists, lawyers, victims and defendants found themselves dwelling in the borderlands between indigenous and colonial legality, and between medicine and law.[5]

In jurisdictional disputes, judges quoted the legal maxim '*Extra territorium jus dicenti impune non paretur*' – 'one who exercises jurisdiction outside of his territory is not obeyed (disobeyed) with impunity.'[6] The maxim was a reminder that without jurisdiction, the law was toothless and could be disobeyed without legal consequence.[7] The British empire, with its many layers of imperial and colonial courts, its European courts and its confessional and customary courts, was striated with jurisdictions that moved and overlapped as the bedrock beneath them shifted over time. The nature of the legal complaint, the religion or ethnicity of the defendant or

[4] Charles Sweet, *A Dictionary of English Law, Containing Definitions of the Technical Terms in Modern Use, and a Concise Statement of the Rules of Law Affecting the Principal Subjects, with Historical and Etymological Notes* (London: H. Sweet, 1882), 464.

[5] Tomlins uses 'legality' rather than 'law', which he argues can seem to evade historiographical analysis because of its appearance of universality and singularity of meaning. Legality is, he writes, "a condition with social and cultural existence." I have used 'law' through this dissertation, but with a 'legality' bent. I use legality here just to suggest that colonial and indigenous criminal legal orders were not always formally in contest, especially in colonies where indigenous criminal law was not officially recognized, even though it did have the power to alter how colonial authorities understood the criminality of indigenous defendants. See: Christopher L. Tomlins, "The Many Legalities of Colonization: A Manifesto of Destiny for Early American Legal History," in *The Many Legalities of Early America*, ed. Christopher L. Tomlins and Bruce Mann (Williamsburg, VA: University of North Carolina Press, 2001), 2.

[6] Henry Campbell Black, *A Dictionary of Law, containing definitions of the terms and phrases of American and English jurisprudence, ancient and modern, including the principal terms of international, constitutional, and commercial law, with a collection of legal maxims and numerous select titles from the civil law and other foreign systems* (St. Paul, MN, 1891), 466.

[7] See: *John McLeod v The Attorney General New South Wales* (New South Wales) [1891] UKPC 31 (23 July 1891).

the litigants, the seriousness of the offence or the amount of the disputed sum, and the location in the empire where the case originated determined jurisdictions.

Although British authorities were often willing to allow indigenous communities to exercise customary jurisdiction over private matters, the judgment and punishment of crime was usually reserved for imperial courts applying English common law.[8] However, criminal law, even when applied by British judges, was not imposed without regard to colonial circumstances.[9] Most of the subjects of British law were not British, and sometimes this difference was enough to convince judges, jurors and administrators that a strict application of common law standards would be inappropriate and unjust. Criminal insanity cases are not typically understood as raising jurisdictional issues. And yet, debates over a defendant's sanity were, in essence, debates about his status as a person whom the law had the legitimate authority to punish. Viewed in this way, responsibility cases involved challenges to jurisdiction of the common law over classes of persons. These jurisdictional issues, as this dissertation shows, did not fade away as soon as the jury left the courtroom and the defendant was escorted back to jail or to the asylum. The debate about the limits of common law jurisdiction over problematic criminals continued in appeals to the executive for mercy, and in appeals to higher imperial courts for justice, and were compounded by questions about where and whether such appeals should lie. Imperial criminal law was always flexible for some and to some degree. The question for legal authorities was when to bend, and how far.

Academic histories are often stories of change over time. But what is most remarkable about the jurisprudence of criminal responsibility is its failure to change. From 1843 to the

[8] See: Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Oxford: Oxford University Press, 1998).
[9] Although it is important to note that these acts would later come under judicial scrutiny, particularly child marriage.

present, *M'Naghten* has continued to define the contours of legal insanity in almost all common law jurisdictions. In the past hundred and seventy-two years, the British empire reached its apex and then collapsed under the weight of two global wars and epic campaigns of anti-colonial resistance. Psychiatrists can now observe a living brain at the cellular level using machines Henry Maudsley imagined would reveal, once and for all, the physical causes of insanity. "The time will come," he wrote in *Responsibility and Mental Disease*, "when by the invention of improved instruments of research the insensible movements of molecules will be as open to observation as are the molar movements of the heavens, and when those that come after us will not fail to discover the physical causes of derangements."[10] However, despite the passing of the British empire and scientists' ability to observe the "insensible movements of molecules", *M'Naghten* lives on. The Law Commission of the United Kingdom, a statutory body with a mandate to review English law, recommended sweeping reform of insanity law in a 2013 report, because "both the test for unfitness to plead and the insanity defence are founded on nineteenth century legal concepts which have not kept pace with developments in medicine, psychiatry and psychology."[11]

Part of the reason for *M'Naghten*'s persistence is the concern, voiced so often by Victorian jurists, administrators and even psychiatrists, that a more liberal definition of insanity would allow violent individuals to escape the most severe punishment, undermining the deterrent force of the law and endangering the public. How could the law function if those who were most dangerous were removed from the jurisdiction of the justice system? As knowledge of the brain develops in the twenty-first century, a renewed anxiety that cognitive science will prevent the

[10] Maudsley, *Responsibility in Mental Disease*, 44.
[11] Law Commission Discussion Paper (23 July 2013), *Criminal Liability: Insanity and Automatism*, s. 1.4, p.1.

criminal justice system from punishing the most serious offenders blooms.[12] As activists, physicians and patients work to de-stigmatize mental illness, however, a general dissatisfaction with the persistence of nineteenth-century definitions of insanity grows.[13] This tension between condemnation and compassion, between impulses to punish and to treat, has endured alongside *M'Naghten*. Nineteenth-century debates about the meaning of criminal responsibility in a diverse and scientifically sophisticated world share so much with present-day debates that century-old cases, treatises and newspaper articles often seem arrestingly contemporary. Nineteenth-century legal insanity has been preserved in the amber of the common law as the world has evolved around it.

The formal law on the role of culture in determining a defendant's criminal responsibility has also failed to change. Now as in the nineteenth century, there is no distinct cultural defence under the common law. However, cultural considerations play, as they did over a century ago, an overlooked but critical role in how judges, jurors and political officials imagine and apply criminal responsibility standards. Today, scholars of Anglo-American law debate the merits of introducing such a defence, and wonder whether it already exists covertly.[14] Some have argued, for instance, that judges, jurors and legal scholars routinely imagine the 'reasonable man' as the white, middle-class, heterosexual man, and unfairly expect all defendants to think and act he

[12] See, for example: N. J. Schweitzer and Michael J. Saks. "Neuroimage Evidence and the Insanity Defense." *Behavioral Sciences & the Law*, 29 (2011): 592-607.; Joseph R. Simpson, *Neuroimagining in Forensic Psychiatry: From the Clinic to the Courtroom* (Chichester, West Sussex: Wiley-Blackwell, 2010); and Smith, Steven R. "Neuroscience, Ethics and Legal Responsibility: The Problem of the Insanity Defense." *Science and Engineering Ethics* 18 (2012): 475-481.

[13] See, for example: Jennifer L. Skeem, Sarah Manchak, and Jillian K. Peterson. "Correctional policy for offenders with mental illness." *Law and human behavior* 35, no. 2 (2011): 110-126.; Risdon N. Slate, Jacqueline K. Buffington-Vollum, and W. Wesley Johnson, *The Criminalization of Mental Illness: Crisis and Opportunity for the Justice System* (Durham, N.C.: Carolina Academic Press, 2013).

[14] See, for example, Deborah Woo, "Cultural 'anomalies' and Cultural Defenses: Towards an Integrated Theory of Homicide and Suicide", *International Journal of the Sociology of Law* 32 (2004): 279-302; Taryn F. Goldstein, "Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a 'Cultural Defense'?", *Dickinson Law Review* 99 (Fall, 1994): 141-168.

would. [15] British imperial authorities shared this ambivalence about both cultural defences and the law's supposedly universal norms.

"Now it is a fact, abundantly exemplified in human history," observed Maudsley, "that a practice often lasts for a long time after the theory which inspired it has lost its hold on the belief of mankind."[16] Maudsley was referring to the *M'Naghten* definition of insanity which, in his opinion, judicial practice had entrenched even though it had long since lost its medical credibility. However, the *M'Naghten* definition of insanity was never meant to comport with psychiatric understandings of mental illness. From the beginning, it was a legal concept designed to guard against spurious irresponsibility claims – which is why it was so unpopular among mad doctors from the moment the rules were declared. The *M'Naghten* rules marked the outer boundaries of responsible legal subjecthood; they articulated a minimum standard for responsibility, not a set of medical diagnostic criteria. Unless a person's mental illness were so debilitating that it impaired her ability to understand her actions or their morality, she remained a subject, and subject to punishment.

In 1857, John Kitching, the superintendent of the Friends' Retreat asylum near York, wrote, "The venerable institution of the gallows is in no danger of being paralysed by the certificate of the mad doctor."[17] Kitching was not quite right. Mad doctors' certificates did keep countless defendants from the gallows. Their interventions in insanity cases, in the press and in the academic community framed the debate over insanity as a medico-legal one, rather than as

[15] See, for example, J. Dressler, "When 'Heterosexual' Men Kill 'Homosexual' Men: Reflections on Provocation Law, Sexual Advances, and the 'Reasonable Man' Standard," *The Journal of Criminal Law and Criminology* 85 (1995); Andrew Ashworth, "The Doctrine of Provocation." *The Cambridge Law Journal* 35 (1976): 292-320; and See, for example, Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (New York: NYU Press, 2003). For a historical perspective, see Susanna L. Blumenthal, "The Default Legal Person," *UCLA L. Rev.* 54 (2006): 1135.
[16] Maudsley, *Responsibility in Mental Disease*, 11.
[17] John Kitching, *The Principles of Moral Insanity, Familiarly Explained in a Lecture* (London: W. & F.G. Cash, 5, Bishopsgate Street Without, 1857), 38.

purely philosophical or jurisprudential. However, the insanity defence was only an instantiation of the far more wide-ranging problem of responsibility in an age of social scientific innovation and imperial expansion. Dismantling *M'Naghten* would have required a sweeping re-evaluation of responsibility as a legal, and moral, concept, and perhaps the jettisoning of retributive models of punishment altogether. Cases involving cultural evidence show how Victorian doubts about the integrity of common law approaches to criminal responsibility extended beyond legal insanity. Psychiatrists could not advocate for the reform of the insanity defence without simultaneously, whether intentionally or not, calling for the wholesale renovation of the jurisprudential concept that was keeping criminal law across the empire standing.

Kitching had good reason to believe that the common law's system of punishment would withstand mad doctors' criticism. As long as criminal jurisprudence rested on fault as a precondition for serious punishment, challenges to responsibility would be challenges to the power and coherence of criminal law as a whole. Although responsibility creaked and swayed in the late nineteenth century, lawyers, politicians and doctors rushed to its support. The alternatives that they imagined were bewildering: defendants acquitted in droves for minor psychiatric complaints, and entire global populations declared immune to common law punishment; the adoption of a fault-blind jurisprudence in which the unlucky and the insane were hanged alongside the malicious. And so, the jurisprudence of criminal responsibility remained, officially, static.

However, as the cases in this dissertation suggest, the law was much more flexible in practice than its doctrine suggested. Jurors acquitted defendants who, by most measures, could not meet the *M'Naghten* standards. Judges counselled jurors to trust their instincts in the face of medical and legal controversy, and wrote to government officials to request mercy for the

convicted. Politicians solicited medical and legal opinions on the moral dessert and competence of prisoners, and often used their powers to divert the condemned from the scaffold to the asylum, the prison yard or, in some cases, to freedom. Lawyers and doctors made impassioned pleas for the lives of their clients and patients, and sometimes risked their salaries and reputations in their efforts to change the legal orthodoxy. Arguments about the effect of culture on a person's mind, or subtle forms of insanity on a person's moral sense or self-control, swayed the highest authorities in the British empire.

Sally Falk Moore writes, "although universality of application is often used as one of the basic elements in any definition of law, universality is often a myth."[18] Criminal responsibility was not interpreted universally or consistently across cases or jurisdictions in the nineteenth century British empire. The *M'Naghten* rules did not, in practice, represent the only legally meaningful understanding of insanity. Culture did, in fact, operate as both an inculpating and a mitigating factor in criminal cases. In responsibility cases, officials bargained in the shadow of the law, as in Maltby's case, when they shunted the criminally insane directly to asylums in order to avoid controversy or the appearance of legal brutality. Judges and jurors, conversely, bargained in the shadow of the prerogative of mercy, calculating that they could uphold rigid responsibility standards because the sting of a guilty verdict would be dulled by a respite after trial.[19] In the end, Britain and its colonies clung to *M'Naghten* and to a narrative of a united and universal criminal law, regardless of the cultural and racial diversity of the empire. However, the real story of responsibility in the empire is one of doubt and accommodation, conflict and

[18] S. F Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," *Law & Society Review* 7, no. 4 (1973): 734.
[19] See: Robert H. Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," *Yale Law Journal* 88 (1979 1978): 950.

negotiation, as the professionals who administered criminal law in the British world confronted the possibility that their justice system was, perhaps irremediably, unjust.

Historians of science think carefully about what it means to write a history through cases, and to write the history of professions in which knowledge is transmitted primarily through the study of cases.[20] "One learns how to do science," writes John Forrester, "not by learning the rules or principles or concepts and then applying them to concrete situations; rather, one learns how to do science by learning how to work with exemplars: extending them, reproducing them, turning a novel situation into a version of a well-understood exemplar."[21] Forrester describes how law schools, especially Harvard's under the leadership of Christopher Columbus Langdell, revived case-based study in the late nineteenth century. Medical schools followed suit, and returned to the Hippocratic model of the narrative, clinical case study as a pedagogical tool.[22] Law and medicine are connected through medical jurisprudence – through autopsies, expert testimony, criminal insane asylums, and coroner's inquests – but also through both professions' devotion to thinking, and learning, in cases. To understand how nineteenth-century lawyers in the common law tradition 'did' law, as Forrester's aspiring scientists learn to 'do science', one has to work with exemplars, and to build a sense of the work of lawyering by working with narratives. Forrester does not elaborate on what he means by 'doing' science, but his choice of words seems to distinguish 'doing' from 'knowing' science. There is an emphasis on the world of practice, rather than theory alone. This dissertation is about how government officials, doctors, and

[20] See, for example: Angela N. H. Creager, Elizabeth Lunbeck, and M. Norton Wise, *Science Without Laws: Model Systems, Cases, Exemplary Narratives* (Durham, NC: Duke University Press, 2007). For another famous article on case histories, see: Carlo Ginzburg, "Morelli, Freud and Sherlock Holmes: Clues and Scientific Method," *History Workshop Journal*, 1980, 5–36.
[21] John Forrester, "If P, Then What? Thinking in Cases," *History of the Human Sciences* 9, no. 3 (1996): 7.
[22] Ibid., 14–16.

lawyers did their jobs in the late nineteenth century, which they could not do in responsibility cases without confronting the fantastically complicated question of whether the person whose case they were arguing, testifying in, or reviewing deserved to die. The strategies and theories that they used to answer, or to avoid answering, this question in individual cases, taken together, reveal the doing of criminal law in Britain and abroad and, by extension, the work of imperial governance.

There are also risks involved in writing case-based histories. In a different essay, Forrester explores the difficulties inherent in the psychoanalytic reporting of cases in which the psychoanalyst becomes, through his interactions with the patient, part of the case itself. Psychoanalytic writing, he argues, "is not just writing *about* psychoanalysis; it is writing subject to the same laws and processes as the psychoanalytic situation itself. In this way psychoanalysis can never free itself of the forces it attempts to describe."[23] While it is much easier for a historian to achieve some degree of remove her subject than it is for a Freudian psychoanalyst, some of the same perils exist. Writing about doctors and lawyers by describing the cases they encountered makes it easier to understand and explain their professional travails, but also encourages the writer to stand in their shoes, and to peer into the condemned cell in the same way they did. Responsibility cases involved defendants who were often vulnerable – confused, disturbed, hounded by colonial authorities. Telling their stories requires a violation of their privacy through perusal of their medical records, letters to family, and photographs. This is the kind of intrusion from which we try, today, to protect the mentally ill.

Perhaps more discomfiting can be telling the stories of crimes which were sometimes brutally violent and from which, as the introduction to this dissertation suggests, the lives of

[23] John Forrester, "The Psychoanalytic Case: Voyeurism, Ethics, and Epistemology in Robert Stoller's Sexual Excitement," in *Science Without Laws: Model Systems, Cases, Exemplary Narratives*, ed. Angela N. H. Creager, Elizabeth Lunbeck, and M. Norton Wise (Durham, NC: Duke University Press, 2007), 189.

victims were largely omitted in the archive. "Exhibitionism," write Angela Creager, Elizabeth Lunbeck and M. Norton Wise in their summary of Forrester's argument, "is thus a formal characteristic of the case in its written, transmissible form. Readers of the case necessarily participate in the perversion of looking in on forbidden scenes."[24] In this dissertation, I don't turn away from the violence of responsibility cases because the legal authorities involved in the cases I describe didn't, or couldn't. This necessarily places me, and my readers, in the position of voyeurs, in the same way that doctors and lawyers who observed and reported on prisoners were voyeurs, and narrators of violence. In my opinion, the historiographical benefits of populating the history of criminal jurisprudence outshine these darker aspects. But forbidden scenes can be forbidding.

Foucault, who himself told the stories of killers and their keepers, offered another warning about writing and thinking through case narratives. In *Discipline and Punish*, he reflected on the examination, in which authorities deployed 'scientific' observation and detailed record-keeping in order to "capture and fix" the bodies and minds of individuals.[25] "This turning of real lives into writing is no longer a procedure of heroization," he wrote, "it functions as a procedure of objectification and subjection. The carefully collated life of mental patients or delinquents belongs, as did the chronicle of kings or the adventures of the great popular bandits, to a certain political function of writing; but in a quite different technique of power."[26] Asylum superintendents and government officers carefully collected and preserved the medical and legal files of defendants accused of homicide, and were especially diligent in their record-keeping when the prisoner or patient was the subject of responsibility-based controversy. The narratives in this dissertation only rarely venture outside these records, and so only capture a defendant's

[24] Creager, Lunbeck, and Wise, *Science Without Laws*, 15.
[25] Foucault, *Discipline and Punish: The Birth of the Prison*, 188.
[26] Ibid., 192.

life when he or she had been captured, or at least accused of a crime and pursued by police. Ultimately, though, this project is primarily about the men – and they were all men – who filled in the patient intake forms, who wrote the memoranda, and who interviewed the witnesses. It is about the efforts of educated, middle-class men of British extraction to know and to control the people over whom Britain claimed legal jurisdiction, and about the common law system that carried them, and their faith and their doubts, around the world.

BIBLIOGRAPHY

PRIMARY SOURCES

Archives and selected fonds

Archives of Ontario, North York (AO)
Berkshire Records Office, Reading (BRO)
Bethlem and Royal Hospital Archives, Bethlem Museum of the Mind, Beckenham, Kent
- Criminal Case Books (CBC)

Bibliothèque et Archives nationales du Québec, Montréal & Québec City (BAnQ)
Cambridge University Library, Department of Manuscripts and University Archives (CUL)
Library and Archives Canada, Ottawa (LAC)
Lincoln's Inn Library, Special Collections
National Archives of Australia, Canberra (NAA)
Proceedings of the Old Bailey, 1674-1913 (*Old Bailey Online*)
Public Record Office Victoria, Melbourne (PROV)
Saskatchewan Archives Board, Regina & Saskatoon (SAB)
State Library Victoria, Special Collections (SLV)
The British Library, London (BL)
- Additional Manuscripts Collection (Add. MS)
- Carnarvon Papers
- India Office Records and Private Papers (IOR)

The National Archives, Kew
Domestic Records of the Public Record Office (PRO)
- Records of the Admiralty (ADM)
- Records of the Central Criminal Court (CRIM)
- Records of the Home Office (HO)
- Records of the Ministry of Health (MH)

Government documents and publications

Debates of the House of Commons (HC Deb)
Debates of the House of Lords (HL Deb)

Law reports

English Reports (ER)
Privy Council Reports (PC)
Reports of the Court of Queen's Bench (QB)
United Kingdom House of Lords (UKHL)
United Kingdom Privy Council (UKPC)

Medical journals and professional publications

Australian Medical Journal
Journal of Mental Science
Journal of Psychological Medicine and Mental Pathology
Medical Times and Gazette
The Lancet
The Zoist

Newspapers and periodicals

Argus [Melbourne]
Barrier Miner [Broken Hill, NSW]
Bendigo Advertiser [Bendigo, Vic.]
Bendigo Independent [Bendigo, Vic.]
Bombala Times [Bombala, NSW]
Bowral Free Press and Berrima District Intelligencer [Bowral, NSW]
Brisbane Courier [Brisbane]
Clarence and Richmond Examiner [Grafton, NSW]
Cornwall Chronicle [Launceston, Tas.]
Daily News [Perth]
Daily Post [Liverpool]
Derby Mercury [Derby, England]
Derbyshire Times and Chesterfield Herald [Chesterfield, England]
Freeman's Journal [Sydney]
Geelong Advertiser [Geelong, Vic.]
Huddersfield Chronicle and West Yorkshire Advertiser [Huddersfield, England]
Hull Packet and East Riding Times [Hull, England]
Inquirer & Commercial News [Perth, WA]
Launceston Examiner [Launceston, Tas.]
Liverpool Mercury [Liverpool]
Maitland Mercury & Hunter River General Advertiser [Maitland, NSW]
Manchester Guardian [Manchester]
Manchester Times [Manchester]
Morning Chronicle [Sydney]
Mount Alexander Mail [Mount Alexander, Vic.]
Narromine News and Trangie Advocate [Narromine, NSW]
Nepean Times [Penrith, NSW]
Newcastle Courant [Newcastle-upon-Tyne]
Newcastle Guardian and Tyne Mercury [Newcastle-upon-Tyne]
Nottinghamshire Guardian [London]
Observer [Adelaide]
Richmond River Herald and Northern Districts Advertiser [Richmond, NSW]
Riverine Herald [Echuca, Vic.]
South Australian Chronicle [Adelaide, SA]
*South Australian Registe*r [Adelaide]

Sydney Morning Herald [Sydney]
The Advertiser [Adelaide]
The Globe [Toronto]
The Mercury [Hobart]
The Queenslander [Brisbane, Qld.]
The Times [London]
Wagga Wagga Advertiser [Wagga Wagga, NSW]
Warwick Examiner and Times [Warwick, Qld]
Western Times [Exeter, England]

Digital repositories and resources

19th Century British Library Newspapers Database, British Library
Australian Dictionary of Biography [online edition]
Dictionary of Canadian Biography [online edition]
Old Bailey Online: The Proceedings of the Old Bailey, 1674-1913
Oxford Dictionary of National Biography [online edition]
Trove, National Library of Australia [Australian historical newspapers]

Books and pamphlets

Addison, Henry Robert, Charles Henry Oakes, William John Lawson, and Douglas Brooke Wheelton Sladen. *Who's Who*. A. & C. Black, 1899.

Ballantine, William. *Some Experiences of a Barrister's Life*. New York: Henry Holt and Company, 1882.

Black, Henry Campbell. *A Dictionary of Law: Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* ... The Lawbook Exchange, Ltd., 1891.

Blackstone, William. *Commentaries on the Laws of England: In Four Books*. 13th ed. 4 vols. London, 1800.

Bucknill, John Charles. *Unsoundness of Mind in Relation to Criminal Acts*. London: Samuel Highley, 32, Fleet Street, 1854.

Chevers, Norman. *A Manual of Medical Jurisprudence for Bengal and the North-Western Provinces*. Calcutta: Carbery, 1856.

Clarke, C.K. "The Case of William B. - Moral Imbecility." *The American Journal of Insanity* 43, no. 1 (1886): 83–103.

Clarke, C.K., and J. Webster. "The Case of Wm. B. - Moral Imbecility." *Bulletin of the Ontario Hospitals for the Insane* 7, no. 4 (July 1914): 207–31.

Clouston, T.S. "The Developmental Aspects of Criminal Anthropology." *The Journal of the Anthropological Institute of Great Britain and Ireland* 23 (1894): 215–25.

College, Cheltenham. *Cheltenham College Register, 1841-1889*. Bell, 1890.

Darwin, Charles. *The Descent of Man and Selection in Relation to Sex*. 2nd ed. New York: D. Appleton and Company, 1896.

Dunn, Robert. "Some Observations on the Psychological Differences Which Exist Among the Typical Races of Man." *Transactions of the Ethnological Society of London* 3 (1865): 9–24.

Ellis, Havelock. *Studies in the Psychology of Sex: Sexual Inversion*. Watford: University Press, 1897.
———. *The Criminal*. 3rd ed. London: Walter Scott Publishing Company, 1903.
Esquirol, Étienne. *Mental Maladies*. Translated by E.K. Hunt. Philadelphia: Lea and Blanchard, 1845.
Forbes, John. *The Cyclopaedia of Practical Medicine: Comprising Treatises on the Nature and Treatment of Disease, Materia Medica and Therapeutics, Medical Jurisprudence, Etc. Etc. Eme - Isc*. Vol. 2. 4 vols. Sherwood, Gilbert, and Piper, 1833.
———. *The Cyclopaedia of Practical Medicine: Comprising Treatises on the Nature and Treatment of Disease, Materia Medica and Therapeutics, Medical Jurisprudence, Etc. Etc. Sof - Yaw, Supplement*. Vol. 4. 4 vols. Sherwood, Gilbert, and Piper, 1835.
Forde, John Leonard. *The Story of the Bar of Victoria: From Its Foundation to the Amalgamation of the Two Branches of the Legal Profession, 1839-1891: Historical, Personal, Humorous*. Melbourne: Whitcombe & Tombs Ltd., 1913.
Foster, Joseph. *Men-at-the-Bar: A Biographical Hand-List of the Members of the Various Inns of Court: Including Her Majesty's Judges, Etc*. Reeves and Turner, 1885.
Georget, Etienne Jean. *De la folie, considérations sur cette maladie ...* Chez Crevot, 1820.
Grey, George. "A Report upon the Best Means of Promoting the Civilization of the Aboriginal Inhabitants of Australia." In *Further Information Respecting the Aborigines*, by The Aborigines' Committee of the Meeting for Sufferings. London: Edward Marsh, 84, Houndsditch, 1842.
Gribble, James Dunning Baker, and Patrick Hehir. *Outlines of Medical Jurisprudence for Indian Criminal Courts*. 2nd ed. Madras: Higginbotham and Co., 1891.
Haggard, Henry Rider. *The Poor and the Land: Being a Report on the Salvation Army Colonies in the United States and at Hadleigh, England, with Scheme of National Land Settlement and an Introduction*. Longmans, Green, and Company, 1905.
Hayes, Henry Gillespie, and Annie J. Dunn Guiteau Dunmire. *A Complete History of the Trial of Guiteau, Assassin of President Garfield*. Philadelphia: Hubbard Bros., 1882.
Holmes, Oliver Wendell, Jr. "Privilege, Malice, and Intent." *Harvard Law Review* 8, no. 1 (April 25, 1894): 1–14.
Holmes, Oliver Wendell. *The Common Law*. The Lawbook Exchange, Ltd., 1881.
Huxley, Thomas H. *Evolution and Ethics*. New York: D. Appleton and Company, 1899.
Kitching, John. *The Principles of Moral Insanity, Familiarly Explained, in a Lecture*. London, 1857
Lubbock, John. *The Origin of Civilisation and the Primitive Condition of Man Mental and Socil Condition of Savages by John Lubbock*. Longmans, Green, 1870.
Lyon, Isidore Bernadotte. *A Textbook of Medical Jurisprudence for India*. Calcutta: Thacker, Spink & Co., 1889.
Malinowski, Bronislaw. *Crime and Custom in Savage Society*. London: Kegan Paul, Trench, Trubner & Co. Ltd., 1926.
Marc, Charles Chrétien Henri. *De La Folie, Considérée Dans Ses Rapports Avec Les Questions Médico-Judiciaries*. Paris: J.-B. Baillière, 1840.
Maudsley, Henry. *Body and Will: Being An Essay Concerning Will in Its Metaphysical, Psychological, & Pathological Aspects*. London, 1883.
———. *Responsibility in Mental Disease*. London: H.S. King, 1874.

———. *The Pathology of Mind: A Study of Its Distempers, Deformities, and Disorders*. London: Macmillan and Co., 1895.
Mayo, Thomas. *Medical Testimony and Evidence in Cases of Lunacy: With an Essay on the Conditions of Mental Soundness*. Parker, 1854.
Melbourne, University of. *The Melbourne University Calendar*. The University of Melbourne, 1879.
Morel, Bénédict Auguste. *Traité Des Dégénérescences Physiques, Intellectuelles et Morales de L'espèce Humaine et Des Causes Qui Produisent Ces Variétés Maladives*. Paris: J.B. Baillière, 1857.
Orange, William. "Presidential Address, Annual Meeting of the Medico-Psychological Association, 27 July 1883." *The Journal of Mental Science* 29, no. 127 (October 1883): 329–54.
Paget, Amelia M. *The People of the Plains*. Toronto, 1909.
Prichard, James Cowles. *A Treatise on Insanity and Other Disorders Affecting the Mind*. Philadelphia, 1837.
———. *On the Different Forms of Insanity in Relation to Jurisprudence*. London: Hippolyte Ballière, 1842.
———. *The Natural History of Man*. London: H. Bailliere, 1843.
Renton, Sir Alexander Wood. *The Law of and Practice in Lunacy: With the Lunacy Acts 1890-91 (consolidated and Annotated) ...* Wm. Green, 1897.
Safford, Frank, and George Wheeler. *The Practice of the Privy Council in Judicial Matters: In Appeals from Courts of Civil, Criminal and Admiralty Jurisdiction in the Colonies, Possessions, and Foreign Jurisdictions of the Crown, and in Appeals from Ecclesiastical and Prize Courts...* London, 1901.
Savage, George H. *Insanity and Allied Neuroses: Practical and Clinical*. London: Cassell & Company, Ltd., 1884.
School, Harrow. *The Harrow School Register, 1801-1893*. Longmans, Green, 1894.
Skae, Francis. "On Insanity Caused by Injuries to the Head and by Sunstroke." *The Edinburgh Medical Journal* XI, no. Part II (June 1866): 679–94.
Spencer, Herbert. *Social Statics; Or, The Conditions Essential to Human Happiness*. New York: D. Appleton and Company, 1873.
Stephen, James Fitzjames. *A History of the Criminal Law of England*. Vol. 2. 3 vols. London, 1883.
Stephen, Leslie. *The Life of Sir James Fitzjames Stephen, Bart., K.C.S.I., a Judge of the High Court of Justice*. Smith, Elder & Company, 1895.
———. *A General View of the Criminal Law of England*. London, 1863
———. *A History of the Criminal Law of England*. Vol. 1. 3 vols. London: Macmillan and Co., 1883.
———. *A History of the Criminal Law of England*. Vol. 3. 3 vols. Cambridge: Cambridge University Press, 2014.
———. *Selected Writings of James Fitzjames Stephen: A General View of the Criminal Law*. Edited by K. J. M. Smith. Oxford: Oxford University Press, 2014.
Sweet, Charles. *A Dictionary of English Law, Containing Definitions of the Technical Terms in Modern Use, and a Concise Statement of the Rules of Law Affecting the Principal Subjects, with Historical and Etymological Notes*. London: H. Sweet, 1882.
Tallack, William. *Howard Letters and Memories*. London: Methuen & Company, 1905.

Taylor, Alfred Swaine. *A Manual of Medical Jurisprudence*. 8th American Edition. Philadelphia: Henry C. Lea's Son, 1880.
The Ludgate. H. Marshall & Son, 1894.
The Phrenological Journal, and Magazine of Moral Science, for the Year 1844, 1844.
The Queen vs. Louis Riel: Accused and Convicted of the Crime of High Treason. Ottawa, 1886.
The Sketch: A Journal of Art and Actuality. Ingram brothers, 1895.
The Trial and Respite of George Victor Townley, for Wilful Murder. With Original Documents and Correspondence ... ;Dr. Winslow's Analysis of the Convict's Mind, Portraits, Autographs, and Plan. Derby: W. Bemrose & Sons, 1864.
"Treason Felony in the North-West." *The Canada Law Journal*, June 1, 1885, 205–7.
Tribes, Great Britain Parliament House of Commons Select Committee on Aboriginal. *Report of the Parliamentary Select Committee on Aboriginal Tribes, (British Settlements.)*. Society, 1837.
Tuke, Daniel Hack, ed. *A Dictionary of Psychological Medicine*. 2 vols. London: J & A Churchill, 1892.
———. *Prichard and Symonds in Especial Relation to Mental Science: With Chapters on Moral Insanity*. J. & A. Churchill, 1891.
Wakefield, Edward Jerningham, and John Ward. *The British Colonization of New Zealand: Being an Account of the Principles, Objects, and Plans of the New Zealand Association, Together with Particulars Concerning the Position, Extent, Soil and Climate, Natural Productions, and Native Inhabitants of New Zealand*. John W. Parker, 1837.
Winslow, Forbes. *The Plea of Insanity in Criminal Cases*. London: H. Renshaw, 1843.
Winslow, L. Forbes. *Recollections of Forty Years*. London: John Ouseley, Ltd., 1910.
Yule, Sir Henry. *Hobson-Jobson: A Glossary of Colloquial Anglo-Indian Words and Phrases, and of Kindred Terms, Etymological, Historical, Geographical and Discursive*. Edited by Arthur Coke Burnell. London, 1903.

SECONDARY SOURCES: BOOKS AND ARTICLES

Adelman, Jeremy, and Stephen Aron. "From Borderlands to Borders: Empires, Nation-States, and the Peoples in Between in North American History." *American Historical Review*, 1999, 814–41.
Anderson, Clare. *Subaltern Lives: Biographies of Colonialism in the Indian Ocean World, 1790-1920*. Cambridge: Cambridge University Press, 2012.
Anderson, Warwick, Deborah Jenson, and Richard C Keller. *Unconscious Dominions : Psychoanalysis, Colonial Trauma, and Global Sovereignties*. Durham, NC: Duke University Press, 2011.
Arnold, David. *The Tropics And the Traveling Gaze: India, Landscape, and Science, 1800-1856*. University of Washington Press, 2011.
Asfar, Dan, and Tim Chodan. *Louis Riel*. Edmonton: Folklore, 2003.
Ashworth, A. J. "The Doctrine of Provocation." *The Cambridge Law Journal* 35, no. 02 (November 1976): 292–320.
Backhouse, Constance. *Carnal Crimes: Sexual Assault Law in Canada, 1900-1975*. Osgoode Society for Canadian Legal History, 2008.
———. *Colour-Coded: A Legal History of Racism in Canada, 1900-1950*. Toronto: University of Toronto Press, 1999.

———. *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada*. Osgoode Society, 1991.
Bailkin, Jordanna. "The Boot and the Spleen: When Was Murder Possible in British India?" *Comparative Studies in Society and History* 48, no. 02 (2006): 462–93.
Bashford, Alison. *Purity and Pollution: Gender, Embodiment, and Victorian Medicine*. Macmillan, 2000.
Bayly, C.A. *Imperial Meridian: The British Empire and the World, 1780-1830*. London and New York: Longman, 1989.
———. *The Birth of the Modern World, 1780-1914: Global Connections and Comparisons*. Malden, MA: Blackwell, 2004.
Beattie, J. M. *Crime and the Courts in England, 1660-1800*. Princeton, N.J.: Princeton University Press, 1986.
Belich, James. *Replenishing the Earth: The Settler Revolution and the Rise of the Angloworld*. Oxford: Oxford University Press, 2011.
———. *The New Zealand Wars and the Victorian Interpretation of Racial Conflict*. Auckland: Auckland University Press, 1986.
Benton, L. "Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State." *Comparative Studies in Society and History* 41, no. 3 (1999): 563–88.
Bewley, Thomas. *Madness to Mental Illness: A History of the Royal College of Psychiatrists*. Trowbridge, Wiltshire: Cromwell Press Ltd., 2008.
Bhabha, Homi K. *The Location of Culture*. Routledge, 2012.
Bhatnagar, Rashmi Dube, and Renu Dube. *Female Infanticide in India: A Feminist Cultural History*. SUNY Press, 2012.
Birla, Ritu. *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India*. Durham, NC: Duke University Press, 2008.
Bishara, Fahad Ahmad. "Paper Routes: Inscribing Islamic Law across the Nineteenth-Century Western Indian Ocean." *Law and History Review* 32, no. 04 (2014): 797–820.
Bishop, Charles A. "Northern Algonkian Cannibalism and the Windigo Psychosis." In *Psychological Anthropology*, edited by Thomas R. Williams, 237–48. The Hague: Mouton, 1975.
———. *A Dictionary of Law, containing definitions of the terms and phrases of American and English jurisprudence, ancient and modern, including the principal terms of international, constitutional, and commercial law, with a collection of legal maxims and numerous select titles from the civil law and other foreign systems*. St. Paul, MN, 1891.
Blainey, Geoffrey. *The Tyranny of Distance: How Distance Shaped Australia's History*. History Book Club, 1968.
———. "The Mind of a Moral Agent: Scottish Common Sense and the Problem of Responsibility in Nineteenth-Century American Law." *Law and History Review* 26, no. 1 (2008): 99–159.
Blumenthal, Susanna L. "The Default Legal Person." *UCLA L. Rev.* 54 (2006): 1135.
Boast, Richard, and Richard S. Hill. *Raupatu: The Confiscation of Maori Land*. Victoria University Press, 2010.
Boast, Richard. *Buying the Land, Selling the Land: Governments and Maori Land in the North Island 1865-1921*. Victoria University Press, 2008.

Bowker, W.F. "Stipendiary Magistrates and the Supreme Court of the North-West Territories, 1876-1907." *Alberta Law Review* 26 (1988): 245–86.
Bowler, Peter J. *Evolution: The History of an Idea*. 3rd ed. Berkeley: University of California Press, 2003.
———. *The Eclipse of Darwinism*. Baltimore: The Johns Hopkins University Press, 1983.
Bracton, Henry de, and Samuel Edmund Thorne. *On the Laws and Customs of England*. Vol. 2. 3 vols. Cambridge, MA: Belknap Press, 1976.
Brightman, Robert A. "The Windigo in the Material World." *Ethnohistory* 35, no. 4 (October 1, 1988): 337–79.
Bumsted, J. M. "Louis Riel and the United States." *American Review of Canadian Studies* 29, no. 1 (1999): 17–41.
———. *Louis Riel v. Canada: The Making of a Rebel*. Winnipeg: Great Plains, 2001.
Burbank, Jane, and Frederick Cooper. *Empires in World History: Power and the Politics of Difference*. Princeton, N.J.: Princeton University Press, 2010.
Burton, Antoinette M. *Burdens of History: British Feminists, Indian Women, and Imperial Culture, 1865-1915*. Chapel Hill: University of North Carolina Press, 1994.
Cain, P. J, and A. G Hopkins. *British Imperialism, 1688-2000*. Harlow, England; New York: Longman, 2002.
Canaday, Margot. *The Straight State: Sexuality and Citizenship in Twentieth-Century America: Sexuality and Citizenship in Twentieth-Century America*. Princeton: Princeton University Press, 2009.
Canguilhem, Georges. *The Normal and the Pathological*. New York: Zone Books, 1989.
Chakraborty, Usha. *Condition of Bengali Women Around the Second Half of the Nineteenth Century*. Calcutta, 1963.
Chatterjee, Partha. *The Nation and Its Fragments: Colonial and Postcolonial Histories*. Princeton: Princeton University Press, 1993.
Claes, Erik, and Jogchum Vrielink. "Cultural Defence and Societal Dynamics." In *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*, edited by Marie-Claire Foblets and Alison Dundes Renteln, 301–19. Portland, OR: Hart Publishing, 2009.
Clune, Frank. *Jimmy Governor: The True Story*. Melbourne: Horwitz Publications, Inc., 1959.
Cohn, Bernard. *Colonialism and Its Forms of Knowledge: The British in India*. Princeton, NJ: Princeton University Press, 1996.
Colley, Linda. *Captives: Britain, Empire and the World, 1600-1850*. New York: Anchor Books, 2004.
———. *The Ordeal of Elizabeth Marsh: A Woman in World History*. New York: Pantheon Books, 2007.
Collingham, E. M. *Imperial Bodies: The Physical Experience of the Raj, C. 1800-1947*. Cambridge, UK: Polity Press ; Blackwell Publishers, 2001.
Comaroff, John L. "Colonialism, Culture, and the Law: A Foreword." *Law & Soc. Inquiry* 26 (2001): 305.
Cooper, Frederick, and Ann Laura Stoler. *Tensions of Empire Colonial Cultures in a Bourgeois World.* Berkeley: University of California Press, 1997.
Creager, Angela N. H., Elizabeth Lunbeck, and M. Norton Wise. *Science Without Laws: Model Systems, Cases, Exemplary Narratives*. Durham, NC: Duke University Press, 2007.
Darnton, Robert. *The Great Cat Massacre: And Other Episodes in French Cultural History*. Basic Books, 2009.

Darwin, John. *The Empire Project: The Rise and Fall of the British World-System, 1830-1970*. Cambridge, UK; New York: Cambridge University Press, 2009.
Davies, Brian. *The Life of Jimmy Governor*. Ure Smith, 1979.
Davis, Natalie Zemon. *Fiction in the Archives: Pardon Tales and Their Tellers in Sixteenth-Century France*. Stanford, Calif.: Stanford University Press, 1987.
De, Rohit. "The Two Husbands of Vera Tiscenko: Apostasy, Conversion, and Divorce in Late Colonial India." *Law and History Review* 28, no. 4 (2010): 1011–41.
Dorsett, Shaunnagh, and John McLaren. *Legal Histories of the British Empire: Laws, Engagements and Legacies*. London: Routledge, 2014.
Dorsett, Shaunnagh. *Law and Politics in British Colonial Thought: Transpositions of Empire*. Palgrave Macmillan, 2010.
Dubber, Markus Dirk, and Lindsay Farmer. *Modern Histories of Crime and Punishment*. Stanford, CA: Stanford University Press, 2007.
Duff, R.A. *Answering for Crime: Responsibility and Liability in the Criminal Law*. Oxford: Hart Publishing Limited, 2009.
Eigen, Joel Peter. "Lesion of the Will: Medical Resolve and Criminal Responsibility in Victorian Insanity Trials." *Law & Society Review* 33, no. 2 (1999): 425–60.
———. *Unconscious Crime : Mental Absence and Criminal Responsibility in Victorian London*. Baltimore: Johns Hopkins University Press, 2003.
———. *Witnessing Insanity: Madness and Mad-Doctors in the English Court*. New Haven: Yale University Press, 1995.
Ellinghaus, Katherine. *Taking Assimilation to Heart: Marriages of White Women and Indigenous Men in the United States and Australia, 1887-1937*. Lincoln: University of Nebraska Press, 2006.
Erickson, Lesley. *Westward Bound: Sex, Violence, the Law, and the Making of a Settler Society*. Vancouver, BC: UBC Press, 2011.
Ernst, Waltraud. *Mad Tales from the Raj: Colonial Psychiatry in South Asia, 1800-58*. London: Anthem, 2010.
———. "Personality Disorders: Social Section." In *A History of Clinical Psychology: The Origin and History of Psychiatric Disorders*, edited by German E. Berrios and Roy Porter, 645–55. London: Athlone, 1995.
———. *Mad Tales from the Raj: The European Insane in British India, 1800-1858*. London; New York: Routldedge, 1990.
Fabian, Johannes. *Out of Our Minds: Reason and Madness in the Exploration of Central Africa*. University of California Press, 2000.
Farmer, Lindsay. *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present*. Cambridge: Cambridge University Press, 2005.
Finnane, Mark. *Colonisation and Incarceration: The Criminal Justice System and Aboriginal Australians*. Sir Robert Menzies Centre for Australian Studies, 1997.
———. "'Payback', Customary Law and Criminal Law in Colonised Australia." *International Journal of the Sociology of Law* 29 (n.d.): 293–310.
Flanagan, Thomas. *Louis "David" Riel: Prophet of the New World*. Toronto: University of Toronto Press, 1996.
Foblets, Marie-Claire, and Alison Dundes Renteln, eds. *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*. Portland, OR: Hart Publishing, 2009.

Ford, Lisa. *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836*. Cambridge, MA: Harvard University Press, 2010.
Forrester, John. "If P, Then What? Thinking in Cases." *History of the Human Sciences* 9, no. 3 (1996): 1–25.
———. "The Psychoanalytic Case: Voyeurism, Ethics, and Epistemology in Robert Stoller's Sexual Excitement." In *Science Without Laws: Model Systems, Cases, Exemplary Narratives*, edited by Angela N. H. Creager, Elizabeth Lunbeck, and M. Norton Wise, 189–210. Durham, NC: Duke University Press, 2007.
Foss, Arthur, and Kerith Lloyd Kinsey Trick. *St. Andrew's Hospital, Northampton: The First 150 Years (1838-1988)*. Granta Editions, 1989.
Foucault, Michel. "About the Concept of the 'Dangerous Individual' in 19th-Century Legal Psychiatry." Translated by Alain Baudot and Jane Couchman. *International Journal of Law and Psychiatry* 1, no. 1 (1978): 1–18.
———. *Discipline and Punish: The Birth of the Prison*. Translated by Alan Sheridan. New York: Vintage Books, 1977.
Fournier, Pascale. "Ghettoisation of Difference in Canada: Rape by Culture and the Danger of a Cultural Defence in Criminal Law Trials, The." *Man. LJ* 29 (2002): 81.
Francis, Mark. "The 'Civilizing' of Indigenous People in Nineteenth-Century Canada." *Journal of World History* 9, no. 1 (1998): 51–87.
Gardner, John. *Offences and Defences: Selected Essays in the Philosophy of Criminal Law*. Oxford; New York: Oxford University Press, 2007.
Garland, Maurice John. *Jimmy Governor: Blood on the Tracks*. Melbourne: Brolga Publishing, 2009.
Gatrell, V. A. C. *The Hanging Tree: Execution and the English People 1770-1868*. Oxford University Press, 1996.
Geertz, Clifford. *The Interpretation of Cultures: Selected Essays*. New York: Basic Books, 1973.
Gibson, Mary. *Born to Crime: Cesare Lombroso and the Origins of Biological Criminology*. Westport, CT: Praeger, 2002.
Ginzburg, Carlo. "Morelli, Freud and Sherlock Holmes: Clues and Scientific Method." *History Workshop Journal*, 1980, 5–36.
———. *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller*. Baltimore: The Johns Hopkins University Press, 1980.
Girard, Philip. *Canada's Legal Inheritances: The Maritime Provinces, 1850-1939*. University of Manitoba, Faculty of Law, 1992.
———. *Lawyers and Legal Culture in British North America: Beamish Murdoch of Halifax*. University of Toronto Press, 2011.
Goel, R. "Can I Call Kimura Crazy - Ethical Tensions in the Cultural Defense." *Seattle J. Soc. Just.* 3 (2004): 443.
Goldstein, Taryn F. "Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a Cultural Defense." *Dickinson Law Review* 99 (1994): 141–68.
Goulet, George R. D. *The Trial of Louis Riel: Justice and Mercy Denied, a Critical, Legal and Political Analysis*. Calgary: Tellwell, 2005.
Green, Thomas A. "Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice." *Michigan Law Review* 93, no. 7 (June 1, 1995): 1915–2053.
Green, Thomas Andrew. *Freedom and Criminal Responsibility in American Legal Thought*. Cambridge: Cambridge University Press, 2014.

———. *Verdict According to Conscience : Perspectives on the English Criminal Trial Jury, 1200-1800*. Chicago: University of Chicago Press, 1985.
Haldane, R.B. "The Work for the Empire of the Judicial Committee of the Privy Council." *The Cambridge Law Journal* 1, no. 2 (January 1, 1922): 143–55.
Hall, Catherine, and Sonya O Rose. *At Home with the Empire: Metropolitan Culture and the Imperial World*. Cambridge, UK; New York: Cambridge University Press, 2006.
Hall, Catherine. *Civilising Subjects: Colony and Metropole in the English Imagination, 1830-1867*. Chicago: University of Chicago Press, 2002.
Halliday, Paul Delaney. *Habeas Corpus: From England to Empire*. Cambridge: Harvard University Press, 2010.
Hämäläinen, Pekka, and Samuel Truett. "On Borderlands." *Journal of American History* 98, no. 2 (September 1, 2011): 338–61.
Harring, Sidney L. *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century*. Cambridge: Cambridge University Press, 1994.
———. "Liberal Treatment of Indians: Native People in Nineteenth Century Ontario Law, The." *Saskatchewan Law Review* 56 (1992): 297–372.
———. *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*. University of Toronto Press, 1998.
Hartog, Hendrik. *Man and Wife in America: A History*. Cambridge, Mass.: Harvard University Press, 2000.
———. *Someday All This Will Be Yours*. Cambridge: Harvard University Press, 2010.
Hay, Douglas, and Paul Craven, eds. *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955*. Chapel Hill: University of North Carolina Press, 2004.
Hay, Douglas, Peter Linebaugh, John Rule, E. P Thompson, and Calvin Winslow. *Albion's Fatal Tree : Crime and Society in Eighteenth-Century England*. London: Verso, 2011.
Hay, Douglas. "Property, Authority and the Criminal Law." In *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, 2nd ed., 17–64. London: Verso, 2011.
Heath, Deana. *Purifying Empire: Obscenity and the Politics of Moral Regulation in Britain, India and Australia*. Cambridge University Press, 2010.
Heddle, J.F. "A Selection of Cases of Violent Death Which Have Formed Subjects of Investigation Before the Coroner of Bombay." In *Transactions of the Medical and Physical Society of Bombay*, 1:296–311. Bombay: The American Mission Press, 1838.
Hedican, Edward J. *Applied Anthropology in Canada: Understanding Aboriginal Issues*. University of Toronto Press, 2008.
Heller, Joseph. *Catch-22: 50th Anniversary Edition*. New York: Simon and Schuster, 2010.
Helmholz, R. H, and John H Baker. *The Oxford History of the Laws of England*. 13 vols. Oxford; New York: Oxford University Press, 2003.
Hesketh, Ian. *Of Apes and Ancestors: Evolution, Christianity and the Oxford Debate*. Toronto: University of Toronto Press, 2009.
Hoffenberg, Peter H. "'Nothing Very New or Very Showy to Exhibit'?: Australia at the Great Exhibition and After." In *Britain, the Empire, and the World at the Great Exhibition of 1851*, edited by Jeffrey A. Auerbach and Peter H. Hoffenberg, 93–122. Aldershot, Hampshire: Ashgate Publishing, Ltd., 2008.
Horder, Jeremy. *Excusing Crime*. Oxford: Oxford University Press, 2007.
Howard, Joseph Kinsey. *The Strange Empire of Louis Riel*. Toronto: Swan, 1970.

Hulsebosch, Daniel J. "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence." *Law and History Review* 21, no. 03 (2003): 439–82.
Hunter, Ann. "Boundaries of Colonial Criminal Law in Relation to Inter-Aboriginal Conflict (Inter Se Offences) in Western Australia in the 1830s-1840s." *Australian Journal of Legal History* 8 (2004): 215–36.
Hussain, Nasser. *The Jurisprudence of Emergency: Colonialism and the Rule of Law*. University of Michigan Press, 2009.
Hyam, Ronald. *Understanding the British Empire*. Cambridge: Cambridge University Press, 2010.
Hynd, Stacey. "Killing the Condemned: The Practice and Process of Capital Punishment in British Africa, 1900–1950s." *The Journal of African History* 49, no. 03 (2008): 403–18.
Ibhawoh, Bonny. *Imperial Justice: Africans in Empire's Court*. Oxford: Oxford University Press, 2013.
Jackson, Mark. *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550-2000*. Ashgate Publishing, 2002.
Kamali, Elizabeth Papp. "Felonia Felonice Facta: Felony and Intentionality in Medieval England." *Criminal Law and Philosophy*, 2013, 1–25.
Keller, Richard C. *Colonial Madness: Psychiatry in French North Africa*. Chicago: University of Chicago Press, 2007.
Keneally, Thomas. *The Chant of Jimmie Blacksmith*. Angus and Robertson, 1972.
Kercher, Bruce. *An Unruly Child: A History of Law In Australia*. St. Leonards, NSW: Allen & Unwin, 1995.
Kilday, Anne-Marie. *A History of Infanticide in Britain, C. 1600 to the Present*. Palgrave Macmillan, 2013.
King, Peter. *Crime, Justice, and Discretion in England, 1740-1820*. Oxford University Press, 2003.
Kolsky, Elizabeth. *Colonial Justice in British India*. Cambridge: Cambridge University Press, 2010.
Kriewaldt, Martin. "The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia." *University of Western Australia Law Review* 1, no. 20 (1962 1961): 1–50.
Kymlicka, Will, Claes Lernestedt, and Matt Matravers, eds. *Criminal Law and Cultural Diversity*. Oxford: Oxford University Press, 2014.
Lacey, Nicola. *Criminal Justice*. Oxford: Oxford University Press, 1994.
Lacey, Nicola. *Women, Crime, and Character: From Moll Flanders to Tess of the D'Urbervilles*. Oxford: Oxford University Press, 2008.
Laidlaw, Zoë. *Colonial Connections, 1815-45: Patronage, the Information Revolution and Colonial Government*. Manchester, UK: Manchester University Press, 2005.
Lambert, David, and Alan Lester, eds. *Colonial Lives Across the British Empire: Imperial Careering in the Long Nineteenth Century*. Cambridge; New York: Cambridge University Press, 2006.
Langbein, John H. *The Origins of Adversary Criminal Trial*. Oxford; New York: Oxford University Press, 2003.
Law Times, the Journal and Record of the Law and Lawyers. Office of The Law times, 1865.
Lee, Cynthia. *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom*. NYU Press, 2007.

Levine, Philippa. *The British Empire: Sunrise to Sunset*. Routledge, 2013.
Lombroso, Cesare. *Criminal Man*. Edited by Mary Gibson and Nicole Hahn Rafter. Durham, NC: Duke University Press, 2006.
Loughnan, Arlie. *Manifest Madness: Mental Incapacity in the Criminal Law*. Oxford: Oxford University Press, 2012.
Loughnan, Arlie. *Manifest Madness: Mental Incapacity in the Criminal Law*. Oxford: Oxford University Press, 2012.
Luongo, Katherine. *Witchcraft and Colonial Rule in Kenya, 1900–1955*. Cambridge University Press, 2011.
Mackay, R. D. *Mental Condition Defences in the Criminal Law*. Oxford: Clarendon Press, 1995.
Mahone, Sloan, and Megan Vaughan. *Psychiatry and Empire*. Basingstoke; New York: Palgrave Macmillan, 2007.
Mani, Lata. *Contentious Traditions: The Debate on Sati in Colonial India*. University of California Press, 1998.
Marano, Lou. "Windigo Psychosis: The Anatomy of an Emic-Etic Confusion." *Current Anthropology* 23, no. 4 (August 1, 1982): 385–97.
Marland, Hilary. "Disappointment and Desolation: Women, Doctors and Interpretations of Puerperal Insanity in the Nineteenth Century." *History of Psychiatry* 14, no. 3 (2003): 303–20.
Martin, Robyn. "Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury, A." *Anglo-Am. L. Rev.* 23 (1994): 334.
Mawani, Renisa, and Iza Hussin. "The Travels of Law: Indian Ocean Itineraries." *Law and History Review* 32, no. 04 (2014): 733–47.
May, Allyson Nancy. *The Bar and the Old Bailey, 1750-1850*. Chapel Hill: University of North Carolina Press, 2003.
McCoy, Ted. "Legal Ideology in the Aftermath of Rebellion: The Convicted First Nations Participants, 1885." *Histoire Sociale / Social History* 42, no. 83 (2009): 175–201.
McCulloch, Jock. *Colonial Psychiatry and "the African Mind."* Cambridge: Cambridge University Press, 1995.
McDonagh, Josephine. *Child Murder and British Culture, 1720-1900*. Cambridge University Press, 2003.
McHugh, P. G. "The Common-Law Status of Colonies and Aboriginal 'Rights': How Lawyers and Historians Treat the Past'(1998)." *Sask. L. Rev.* 61 (n.d.): 393.
McHugh, Paul G. *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination*. Oxford: Oxford University Press, 2004.
McLaren, John. *Dewigged, Bothered, and Bewildered British Colonial Judges on Trial, 1800-1900*. Toronto, ON: Published for the Osgoode Society for Canadian Legal History by University of Toronto Press, 2011.
Metcalf, Thomas R. *Imperial Connections: India in the Indian Ocean Arena, 1860-1920*. University of California Press, 2008.
Mills, James H. *Madness, Cannabis and Colonialism: The "Native Only" Lunatic Asylums of British India, 1857-1900*. New York: St. Martin's Press, 2000.
Mnookin, Robert H., and Lewis Kornhauser. "Bargaining in the Shadow of the Law: The Case of Divorce." *Yale Law Journal* 88 (1979-1978): 950.
Moore, Laurie, and Stephan Williams. *The True Story of Jimmy Governor*. Allen & Unwin, 2001.

Moore, S. F. “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study.” *Law & Society Review* 7, no. 4 (1973): 719–46.
Moran, Richard. “The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800).” *Law and Society Review*, 1985, 487–519.
Muller, Hannah Weiss. “Bonds of Belonging: Subjecthood and the British Empire.” *Journal of British Studies* 53, no. 01 (2014): 29–58.
Mungello, D. E. *Drowning Girls in China: Female Infanticide in China since 1650*. Rowman & Littlefield Publishers, 2008.
Nandy, Somendra Chandra. *History of the Cossimbazar Raj in the Nineteenth Century*. Calcutta: Dev-All Private Ltd., 1986.
Norrie, Alan. *Crime, Reason and History: A Critical Introduction to Criminal Law*. London: Weidenfeld and Nicolson, 1993.
Norrie, Alan. *Crime, Reason and History: A Critical Introduction to Criminal Law*. London: Weidenfeld and Nicolson, 1993.
Nworah, Kenneth D. “The Aborigines’ Protection Society, 1889–1909: A Pressure-Group in Colonial Policy.” *Canadian Journal of African Studies / Revue Canadienne Des études Africaines* 5, no. 1 (January 1, 1971): 79–92.
Ogborn, Miles. *Global Lives: Britain and the World, 1550-1800*. Cambridge: Cambridge University Press, 2008.
Otis, Laura. *Literature and Science in the Nineteenth Century : An Anthology*. Oxford University Press, 2002.
Parker, Kunal M. “‘A Corporation of Superior Prostitutes’ Anglo-Indian Legal Conceptions of Temple Dancing Girls, 1800–1914.” *Modern Asian Studies* 32, no. 03 (1998): 559–633.
Partridge, Ralph. *Broadmoor: A History of Criminal Lunacy and Its Problems*. London: Chatto & Windus, 1953.
Pierson, Coen Gallatin. *Canada and the Privy Council*. London: Stevens, 1960.
Porter, Roy. *Madness: A Brief History*. Oxford; New York: Oxford University Press, 2002.
———. *Mind-Forg’d Manacles: A History of Madness in England from the Restoration to the Regency*. London: Penguin Books, 1990.
Posner, Richard A. “The Romance of Force: James Fitzjames Stephen on Criminal Law.” *Ohio State Journal of Criminal Law* 10, no. 1 (2012): 263–75.
Pound, Leslie. “Mother’s Tragic Crime Exposes A Culture Gap.” *Dallas Morning News*, June 10, 1985. http://articles.chicagotribune.com/1985-06-10/features/8502060678_1_first-degree-murder-suicide-fumiko-kimura.
Price, Polly J. “Natural Law and Birthright Citizenship in Calvin’s Case (1608).” *Yale JL & Human.* 9 (1997): 73.
Radzinowicz, Leon, and Roger Grahame Hood. *A History of English Criminal Law and Its Administration from 1750, Vol. 5, The Emergence of Penal Policy*. London: Stevens, 1986.
Rafter, Nicole. *The Criminal Brain: Understanding Biological Theories of Crime*. New York: New York University Press, 2008.
———. “The Unrepentant Horse-Slasher: Moral Insanity and the Origins of Criminological Thoughts.” *Criminology* 42, no. 4 (2004): 979–1008.
Raman, Bhavani. *Document Raj: Writing and Scribes in Early Colonial South India*. Chicago: University of Chicago Press, 2012.
Reed, John R. *Victorian Will*. Athens: Ohio University Press, 1989.

Reid, Jennifer. *Louis Riel and the Creation of Modern Canada: Mythic Discourse and the Postcolonial State*. Albuquerque: University of New Mexico Press, 2008.
Renteln, Alison Dundes. *The Cultural Defense*. New York: Oxford University Press, 2004.
Rhook, Nadia. "Listen to Nodes of Empire: Speech and Whiteness in Victorian Hawker's License Courts." *Journal of Colonialism and Colonial History* 15, no. 2 (2014). http://muse.jhu.edu/journals/journal_of_colonialism_and_colonial_history/v015/15.2.rhook.html.
Robinson, Daniel N. *Wild Beasts & Idle Humours: The Insanity Defense from Antiquity to the Present*. Harvard: Harvard University Press, 1998.
Robinson, R. E, J. Gallagher, and A. Denny. *Africa and the Victorians: The Official Mind of Imperialism*. Vol. 131. Macmillan, 1961.
Roderick, Colin. *John Knatchbull: From Quarterdeck to Gallows*. Sydney: Angus & Robertson, Ltd., 1963.
Rosenberg, Charles E. *The Trial of the Assassin Guiteau: Psychiatry and the Law in the Gilded Age*. University of Chicago Press, 1968.
Rothschild, Emma. *The Inner Life of Empires: An Eighteenth-Century History*. Princeton: Princeton University Press, 2011.
Sadowsky, Jonathan. *Imperial Bedlam: Institutions of Madness in Colonial Southwest Nigeria*. Berkeley: University of California Press, 1999.
Sass, H., and S. Herpertz. "Personality Disorders: Clinical Section." In *A History of Clinical Psychology: The Origin and History of Psychiatric Disorders*, edited by German E. Berrios and Roy Porter, 633–44. London: Athlone, 1995.
Schirmann, Felix. "Badness, Madness and the Brain–the Late 19th-Century Controversy on Immoral Persons and Their Malfunctioning Brains." *History of the Human Sciences* 26, no. 2 (2013): 33–50.
Schlag, Pierre. "Problem of the Subject." *Tex. L. Rev.* 69 (1990): 1627.
Schweitzer, N. J., and Michael J. Saks. "Neuroimage Evidence and the Insanity Defense." *Behavioral Sciences & the Law* 29, no. 4 (July 1, 2011): 592–607. doi:10.1002/bsl.995.
Scorgie, Michael E., and Somendra Chandra Nandy. "Emerging Evidence of Early Indian Accounting." *Abacus* 28, no. 1 (1992): 88–97.
Scott, Rebecca J. "Paper Thin: Freedom and Re-Enslavement in the Diaspora of the Haitian Revolution." *Law and History Review* 29, no. 4 (2011): 1061–87.
Scull, Andrew, Charlotte MacKenzie, and Nicholas Hervey. *Masters of Bedlam: The Transformation of the Mad-Doctoring Trade*. Princeton: Princeton University Press, 1996.
Sharafi, Mitra. *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772-1947*. Cambridge: Cambridge University Press, 2014.
Showalter, Elaine. *The Female Malady: Women, Madness, and English Culture, 1830-1980*. Penguin Books, 1987.
Siggins, Maggie. *Riel: A Life of Revolution*. Toronto: HarperCollins, 1994.
Simpson, A. W. B. *Cannibalism and the Common Law : The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which It Gave Rise*. Chicago: University of Chicago Press, 1984.
Simpson, A. W. B. *Leading Cases in the Common Law*. Oxford: Clarendon Press, 1995.

———.*Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which It Gave Rise*. Chicago: University of Chicago Press, 1984.
Simpson, A.W.B. *Legal Theory and Legal History: Essays on the Common Law*. London: The Hambledon Press, 1987.
Simpson, Joseph R. *Neuroimaging in Forensic Psychiatry: From the Clinic to the Courtroom*. Oxford: John Wiley & Sons, 2012.
Singha, Radhika. *A Despotism of Law: Crime and Justice in Early Colonial India*. Oxford: Oxford University Press, 1998.
Skeem, Jennifer L., Sarah Manchak, and Jillian K. Peterson. "Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction." *Law and Human Behavior* 35, no. 2 (2011): 110–26.
Slate, Risdon N., Jacqueline K. Buffington-Vollum, and W. Wesley Johnson. *The Criminalization of Mental Illness: Crisis and Opportunity for the Justice System: Second Edition*. Durham, NC: Carolina Academic Press, 2013.
Smallman, Shawn. "Spirit Beings, Mental Illness, and Murder: Fur Traders and the Windigo in Canada's Boreal Forest, 1774 to 1935." *Ethnohistory* 57, no. 4 (September 21, 2010): 571–96.
Smith, K. J. M. *James Fitzjames Stephen: Portrait of a Victorian Rationalist*. Cambridge University Press, 2002.
Smith, Roger. *Free Will and the Human Sciences in Britain, 1870-1910*. London: Pickering & Chatto, 2013.
Smith, Steven R. "Neuroscience, Ethics and Legal Responsibility: The Problem of the Insanity Defense." *Science and Engineering Ethics* 18, no. 3 (September 29, 2012): 475–81.
———. *Trial by Medicine: Insanity and Responsibility in Victorian Trials*. Edinburgh: Edinburgh University Press, 1981.
Smith-Rosenberg, Carroll, and Charles Rosenberg. "The Female Animal: Medical and Biological Views of Woman and Her Role in Nineteenth-Century America." *The Journal of American History*, 1973, 332–56.
Smith-Rosenberg, Carroll. "The Hysterical Woman: Sex Roles and Role Conflict in 19th-Century America." *Social Research*, 1972, 652–78.
Spiller, Peter, Jeremy Finn, and Richard Boast. *A New Zealand Legal History*. Brookers, 2001.
Stanley, Amy Dru. *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation*. Cambridge: Cambridge University Press, 1998.
Stanley, George F.G., ed. *The Collected Writings of Louis Riel*. 5 vols. Edmonton: University of Alberta Press, 1985.
Stanley, Matthew. *Huxley's Church and Maxwell's Demon: From Theistic Science to Naturalistic Science*. Chicago: University of Chicago Press, 2015.
Stepan, Nancy. *The Idea of Race in Science: Great Britain, 1800-1960*. Hamden, CT: Archon Books, 1982.
Stephens, Julia. "An Uncertain Inheritance: The Imperial Travels of Legal Migrants, from British India to Ottoman Iraq." *Law and History Review* 32, no. 04 (2014): 749–72.
———. "The Phantom Wahhabi: Liberalism and the Muslim Fanatic in Mid-Victorian India." *Modern Asian Studies* 47, no. 01 (2013): 22–52.
Stevens, Mark. *Broadmoor Revealed: Victorian Crime and the Lunatic Asylum*. Barnsley, South Yorkshire: Pen & Sword Social History, 2013.

Stocking, George W. *Colonial Situations: Essays on the Contextualization of Ethnographic Knowledge*. Madison: University of Wisconsin Press, 1991.
———. *Victorian Anthropology*. New York; London: Free Press ; Collier Macmillan, 1987.
Stone, Lawrence. "Prosopography." *Daedalus*, 1971, 46–79.
Strange, Carolyn, and Tina Loo. *Making Good Law and Moral Regulation in Canada, 1867-1939*. Toronto, ON: University of Toronto Press, 1997.
Strange, Carolyn. "Masculinities, Intimate Femicide and the Death Penalty in Australia, 1890–1920." *British Journal of Criminology* 43, no. 2 (2003): 310–39.
———. *Qualities of Mercy: Justice, Punishment, and Discretion*. Vancouver, BC: University of British Columbia Press, 1996.
Swan, Ruth, and Edward A. Jerome. "The History of the Pembina Métis Cemetery: Inter-Ethnic Perspectives on a Sacred Site." *Plains Anthropologist* 44, no. 170 (November 1, 1999): 81–94.
Swinfen, D. B. *Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833-1986*. Manchester, U.K.; Wolfeboro, N.H., U.S.A.: Manchester University Press, 1987.
Tadros, Victor. *Criminal Responsibility*. Oxford: Oxford University Press, 2007.
Theriot, Nancy. "Diagnosing Unnatural Motherhood: Nineteenth-Century Physicians and 'Puerperal Insanity.'" *American Studies* 30, no. 2 (October 1, 1989): 69–88.
Thompson, E. P, and E. P Thompson. *Customs in Common*. New York: New Press : Distributed by W.W. Norton, 1991.
Thompson, E. P, and Great Britain. *Whigs and Hunters: The Origin of the Black Act*. New York: Pantheon Books, 1975.
Thompson, Seymour D. "Homicide in Self-Defence." *American Law Review* 14 (1880): 545.
Thomson, Colin A. *Swift Runner*. Calgary: Detselig, 1984.
Thorn, Jennifer. *Writing British Infanticide: Child-Murder, Gender, and Print, 1722-1859*. University of Delaware Press, 2003.
Tobias, John L. "Canada's Subjugation of the Plains Cree, 1879–1885." *Canadian Historical Review* 64, no. 4 (December 1, 1983): 519–48.
Tomlins, Christopher L. "The Many Legalities of Colonization: A Manifesto of Destiny for Early American Legal History." In *The Many Legalities of Early America*, edited by Christopher L. Tomlins and Bruce Mann. Williamsburg, VA: University of North Carolina Press, 2001.
Turner, Frederick Jackson, and John Mack Faragher. *Rereading Frederick Jackson Turner: The Significance of the Frontier in American History, and Other Essays*. New York, N.Y.: H. Holt, 1994.
Turner, Frederick Jackson. *The Frontier in American History*. Frederick Jackson Turner, 2014.
Turrell, Rob. "«It's a Mystery»: The Royal Prerogative of Mercy in England, Canada and South Africa." *Crime, Histoire & Sociétés/Crime, History & Societies*, 2000, 83–101.
Tylor, Edward Burnett. *Primitive Culture: Researches Into the Development of Mythology, Philosophy, Religion, Art, and Custom*. J. Murray, 1871.
Valverde, Mariana. *Diseases of the Will: Alcohol and the Dilemmas of Freedom*. Cambridge: Cambridge University Press, 1998.
Vaughan, Megan. *Curing Their Ills: Colonial Power and African Illness*. Stanford, Calif.: Stanford University Press, 1991.
Volpp, L. "(Mis)Identifying Culture: Asian Women and the Cultural Defense." *Harv. Women's LJ* 17 (1994): 57.

Walker, Nigel. *Crime and Insanity in England: The Historical Perspective*. Edinburgh: Edinburgh University Press, 1968.
Ward, Damen. "A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia." *History Compass* 1, no. 1 (January 1, 2003): 1–24.
Weaver, Rachael. *The Criminal of the Century*. Melbourne: Arcadia, 2004.
Welke, Barbara Young. *Law and the Borders of Belonging in the Long Nineteenth Century United States*. Cambridge: Cambridge University Press, 2010.
Westen, Peter. "Getting the Fly out of the Bottle: The False Problem of Free Will and Determinism." *Buffalo Criminal Law Review* 8, no. 2 (January 2005): 599–652.
White, Stephen. *What Queen Victoria Saw: Roderick Maclean and the Trial of Lunatics Act, 1883*. Barry Rose Law, 2000.
Wiener, Martin J. *An Empire on Trial: Race, Murder, and Justice under British Rule, 1870-1935*. Cambridge; New York: Cambridge University Press, 2009.
———. *Reconstructing the Criminal: Culture, Law, and Policy in England, 1830-1914*. Cambridge [England]; New York: Cambridge University Press, 1990.
Willrich, Michael. *City of Courts: Socializing Justice in Progressive Era Chicago*. Cambridge: Cambridge University Press, 2003.
Wilson, Jan. "'An Irresistible Impulse of Mind': Crime and the Legal Defense of Moral Insanity in Nineteenth Century Australia." *Australian Journal of Law & Society* 11 (1995): 137–68.
Wilson, Kathleen. *A New Imperial History: Culture, Identity, and Modernity in Britain and the Empire, 1660-1840*. Cambridge, UK; New York: Cambridge University Press, 2004.
Winter, Alison. *Mesmerized: Powers of Mind in Victorian Britain*. Chicago: University of Chicago Press, 1998.
Woo, Deborah. "Cultural 'anomalies' and Cultural Defenses: Towards an Integrated Theory of Homicide and Suicide." *International Journal of the Sociology of Law* 32, no. 4 (2004): 279–302.
Yahaya, Nurfadzilah. "Legal Pluralism and the English East India Company in the Straits of Malacca during the Early Nineteenth Century." *Law and History Review*, n.d., 1–20.
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