

Making Sense of “Insanity”: A Genealogy of Canada’s Not
Criminally Responsible Subject

by

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Abstract

In 2014, Stephen Harper's Conservative government introduced the *Not Criminally Responsible Reform Act*. Amongst the handful of changes instituted by the legislation, the *Act* created the "high-risk accused" designation that, when applied, heightens measures in the detention of the accused and transfers authority for their release from provincial review boards to criminal courts. While the new laws reflect the Harper government's "tough on crime" policy, they also point to the Not Criminally Responsible on Account of Mental Disorder (NCR) subject who, within the broader history of Canadian insanity law reform efforts, is unique in its ontological stability and governability. This dissertation historicizes Canada's NCR subject by investigating the often-overlooked period that preceded its introduction in 1992. By examining a variety of historical materials related to the country's insanity law reform efforts during the second half of the 20th century, this project reveals that developments during this period played an important role in constructing the governable NCR subject of today.

Initially driven by the psy-entific optimism of the post-World War II era, failed efforts to reform the country's insanity laws grew increasingly problematic in the context of a number of changes, including the abolition of capital punishment, the deinstitutionalization of the psychiatric hospital, and a growing rights movement. In light of these mounting pressures, and combined with a move towards neoliberal rationalities of government in Canada beginning in the late 1960s, insanity law reform efforts shifted from attempts to decipher who the insane subject was, to questions regarding the best legal procedures and practices of its detention. In so doing, those deemed insane in the criminal legal context were increasingly understood as rights-bearing subjects that were amenable to constitutional logics. As a result, the NCR subject of today—who

is ontologically stable and manageable through risk-based governance—can be understood as a product of this history.

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List of Abbreviations

BNA Act	The British North America Act
CMHA	Canadian Mental Health Association
DNHW	Department of National Health and Welfare
DSM	Diagnostic and Statistical Manual of Mental Disorders
JHS	John Howard Society
LRA	Least Restrictive Alternative
LRCC	Law Reform Commission of Canada
MDP	Mental Disorder Project
MHD	Mental Health Division
MP	Member of Parliament
NCR	Not Criminally Responsible on Account of Mental Disorder
NCR Reform Act	The Not Criminally Responsible Reform Act
NGRI	Not Guilty by Reason of Insanity
RCCSP	The Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths
RCLI	The Royal Commission on the Law of Insanity as a Defence in Criminal Cases
RPM	Royal prerogative of mercy
SPJ	Structured professional judgment
WHO	World Health Organization

Preface

As I am sure is the case for anyone who has worked on a sustained writing project, a handful of titles bounced around in the back of my mind over the years. Choosing a title is an interesting process because its various incarnations all aim to communicate the essence of the work. Just as interesting then are the discarded options that, while likely still viable, presumably lack something. The evolution of potential titles is thus indicative of similar developments in the work itself. Early on, the options I came up with were pretty crude. I considered something along the lines of *From Illness and Criminal Responsibility to Rights and Risk* (although hopefully less clunky), since I thought this aptly summarized the history I was in the midst of writing. Looking back, I think it might oversimplify the period under examination and pre-ordain a route that was never inevitable. Similarly, I thought *The Illusion of Elusion* was catchy and to-the-point, but it only addressed one aspect of criminal insanity law, albeit a significant one: the guilty “getting off”. Needing a title for submission, and as many things are the product of necessity, I ultimately settled on *Making Sense of Insanity*.

Bruce Arrigo, who served as the external examiner for the defence of this thesis, brought attention to “the promise” embedded in the title of the project: “making sense of insanity” is a commitment to produce meaning. In one sense, this question was related to who I was writing for: who, if anyone, might actually read this work? Dawn Moore, my supervisor for this doctoral work, had advised me to keep my potential audiences in mind during the writing process (a point that was reiterated by Josh Greenberg, the internal examiner for the defence). I thus had some sense of the epistemological communities that might be interested in this project. The development of Canadian insanity law over the second half of the 20th century might appeal to historians of psychiatry and mental health. Legal experts, both domestic and abroad, might

similarly find some value in this work. Given the methodological approach, Foucauldian scholars interested in genealogy and governmentality could potentially find their own uses as well. Yet upon further reflection, I realized that the “making sense” promise was ultimately egoistic: the project was driven by my own interest in the management of individuals deemed mentally ill who come into conflict with the criminal law. This was rooted in my own experience of a kind of cognitive dissonance about how we identify and deal with persons found Not Criminally Responsible on Account of Mental Disorder, and how we understand our responses as legitimate forms of governance.

Initially, the project was propelled largely by genuine curiosity, and there was a certain degree of detachment that came with my interest in the field. As an outsider looking in, my understanding of the NCR system was buffered by an inflated sense of objectivity. Certainly, as a primarily historical project there is a documentative aspect that adds to this sense of objectivity, as does the surprising dryness of the particular story. Indeed, today’s NCR subject has historically been understood as an abstract problem requiring rational responses. Yet as the project progressed, and as others like Bruce Arrigo have shown (Arrigo, 2013; Arrigo & Milovanovic, 2009), I have to acknowledge my own role in present-day practices, even if it might be limited to simple complacency.

The question—who am I writing for?—thus remains pertinent, and perhaps more complex than initial appearances suggest. Even if this project was motivated largely by my own experiences and uncertainties, there is a political nature to this work that is unavoidable. This can be easy to forget since the problem of criminalized insanity, as will be seen in the ensuing chapters, has historically been a problem for experts. Those employed by the NCR system are of course essential to its existence, and they play a central role in the history that follows. But there

are also people for whom the NCR system is their life, and not by choice. It will likely become apparent to the reader that the voices of the NCR subjects, or the voices of those who have been devastated by the criminal acts for which the accused was ultimately deemed NCR, are largely absent. This is a byproduct of the main focus of the project: to detail the construction of the NCR subject as a governable subject. In order to be governable, the NCR subject needs to be knowable; this pithy maxim is helpful in understanding the ultimate shape of the project. As detailed in this study, the subject deemed both criminal and insane only became a problem of governance, and thus a problem of knowledge, in the mid-20th century. Prior to World War II, the close link between the insanity defence and capital punishment meant that discussions of criminalized insanity were imbued with a broad sense of benevolence. As these mechanisms of mercy grew increasingly problematic in the post-World War II period, the sense-making practices that had at one time tamed insanity no longer worked. What follows then is a history of the construction of a top-down ontology imposed on these individuals, and one that continues today in a way that allows our management of the NCR subject to be deemed rational, legitimate, and humane.

The aim of this project is not to villainize the various experts and authorities acting within the NCR system. Those deemed both criminal and insane have presented a complex and vexing problem throughout the late modern period that cannot be explained away by malice or professional interests (although there are examples of misrepresentation that, in the best case scenario, are cases of flagrant negligence). At the same time, our management of these subjects continues to be characterized by a sense of complacency and benevolence that is concerning. The ready and wide embracement of risk discourses, for example, at times appears to act as a thinly-veiled cover for notions of blame and danger that are problematic when applied to those deemed

NCR, yet the tenuous nature of risk assessment is often absent in these discussions. Similarly, the mere employment of a rights-based framework suggests that the resolution of more particular issues is necessarily ethical. Or, as Nikolas Rose (1985) put it, “such language provides no means of formulating objectives for substantive reforms or for implementing such reforms [...] it sidesteps the ethical issues, by smuggling in an unanalysed morality concerning the value and attributes of humans and the rules of just conduct” (pp. 214-215).

Framing this study as a genealogy was appealing because the method is characterized by a lack of assumptions. Genealogies question taken-for-granted truths, and in so doing they problematize belief-stabilizing heuristics. In this case, the history presented questions the extent to which a unique “criminally insane” subject can be said to exist. That being said, certain assumptions do exist within this project, and the reality of mental illness is perhaps the most blatant. This study did not delve directly into the contentious debate regarding the existence of mental illness. While the outright denial of mental illness can be damaging, even the most ardent proponent for the material existence of mental illness would have to question the expansion of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) since its first introduction in 1952. Now in its fifth edition, some of the more recent bona fide mental illnesses are, at the very least, fodder for debate (e.g. premenstrual dysphoric disorder). But my own research into the construction of the NCR subject suggests that a true appreciation for the realities of mental illness is what often seems to be lacking. Recognizing that certain acts, even brutal acts with devastating consequences, are sometimes the product of treatable mental illnesses can present hard truths, whether in the form of short custodial durations or in upsetting more convenient notions of good and evil.

Calling attention to the medical aspect of the NCR subject is far from a panacea for the troubling features of the NCR system, however, and can in fact play into some of its problems. Treatment, for instance, can offer a guise that misrepresents responses as more rational and neutral than they actually are. Speaking towards the pursuit of a “vast hygienist utopia”, Robert Castel (1991) writes, “[t]his hyper-rationalism is at the same time a thoroughgoing pragmatism, in that it pretends to eradicate risk as though one were pulling up weeds” (p. 289). Along with potentially exaggerating the abilities to identify and manage risk, emphasizing the medical aspect of the NCR subject might also reify problematic ontological categories. This is important to consider, although an issue that is not resolved within the following pages. Rather than proposing one ontological understanding of the NCR subject as best, the following project offers a history that traces the top-down construction and imposition of a particular ontology (although an ontology that can also allow for active participation). This in turn raises important questions— are genealogies inherently emancipatory (see Koopman, 2013)?—but ones that fall outside the scope of this dissertation. More than anything else, this project offers a starting point that seeks to understand the NCR subject that exists today. Perhaps in this case then, the genealogy is, above all else, documentary, and it is its clarifying abilities that fit into the initial motivation of this project: the (egoistic) pursuit of sense-making.

Chapter One: Introduction

In 2014, Stephen Harper's Conservative government passed *the Not Criminally Responsible Reform Act (NCR Reform Act; Bill C-14)*, legislation that set out to:

[S]pecify that the paramount consideration in the decision-making process is the safety of the public and to create a scheme for finding that certain persons who have been found not criminally responsible on account of mental disorder are high-risk accused (*Not Criminally Responsible Reform Act, 2014*).

The three broad changes instituted by the *NCR Reform Act* flow from this objective. First, the creation of the 'high-risk accused' (HRA) designation that, when applied, would increase potential wait-times between case reviews to three years and tighten the administration of hospital leaves. Second, public protection would be central in court decisions regarding NCR subjects. And third, the victim's perspective would be given more weight in any decisions made regarding NCR subjects. The legal requirement that review boards select the "least onerous and restrictive disposition" was also amended so that the disposition chosen "is necessary and appropriate in the circumstances" (Criminal Code, 1985, sec. 672.54).

The new legislation was criticized in different ways. According to Grantham (2014), the reforms emphasize an adversarial approach to the management of the NCR subject, a symptom of the criminalization of those experiencing mental illness. Lacroix et al. (2017), on the other hand, point to the lack of empirical evidence indicating that the amendments would further protect the public. The troubling aspects of the *NCR Reform Act* make more sense within the context of Harper's Conservative government.¹ Following the election of the new Prime Minister

¹ According to Rayside and Farney (2013), Canadian conservatism is homogenizing with international trends that stress neoliberal doctrines of individualism and free market principles: "[a]s in other countries, this is tempered by touches of nationalism or the occasional celebration of the traditional family, but these are grafts onto a neoliberal trunk" (p. 339). At the same time, the authors note that important distinctions remain. For instance, the moral traditionalism and neoliberalism of Canadian conservatism is less pronounced than in the United States but more prevalent when compared with much of Europe (pp. 339-340). For Lipset (1990), the differences between American

in 2006, Harper and his government pursued a tough-on-crime agenda that included measures like mandatory minimum sentences for crimes involving firearms (Bill C-10, 2006) and limiting credit for time served prior to trial (Bill C-25, 2009). According to Anthony Doob, Canadian criminal justice policy during the era of the Harper government was characterized by a piecemeal approach that lacked cohesion beyond its core value of punitiveness. Harper's own statements suggest that the NCR verdict provided a loophole for the guilty (Lacroix et al., 2017, p. 46), indicating that the NCR subject was not excluded from this framework.

Although Bill C-14 fits into the politics of the Harper government at the time, it stands out as unusual against the broader history of Canadian insanity law reform.² Up until 1992, the country's insanity laws had remained largely unreformed since their introduction in the 19th century. As a former British colony, the codification of the country's insanity laws in the first *Criminal Code* of 1892 was based largely on British practices. Generally speaking, these are divided around two major tasks. The first is identifying who should be excused from criminal responsibility on account of mental illness. Here, the first *Canadian Criminal Code* is based on Britain's substantive defence:

No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to

and Canadian conservatism can be traced back to the revolutionary and counterrevolutionary conditions in which each country was founded. The American Revolution (1765-1791) was informed by Whig liberalism—a reference to the Whig political faction that opposed the monarchy during the United Kingdom's Glorious Revolution (1688-1689; for more on the Glorious Revolution, see chapter six, footnote 103)—which stressed anti-statist, individual freedom. In contrast, Toryism—a reference to the Tories that opposed the Whigs' calls for a stronger Parliament in lieu of an absolute and sovereign monarch—supports state interventionism. In contrast to the founding role of Whig liberalism in the United States, Canada's gradual and counterrevolutionary break from Britain supported the Tory philosophy that envisioned a communitarian role for the state. As a result, there is a socialist slant to Canadian conservatism that is not comparable in the United States. In Lipset's words (1990):

[T]here is good reason to believe that social democratic movements are the other side of state conservatism; Tories and socialists are likely to be found in the same polity, while a dominant Lockean liberal tradition inhibits the emergence of socialism. (p. 149)

² Although a grating term, "insanity" is used throughout this project due to its historical significance. The concept's medical roots belie a largely legal notion, and this muddled picture is reflected in the conceptual obscurity of those labelled as such (see Tighe, 2005).

render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such act or omission was wrong. (Criminal Code, 1892, sec. 11)³

The second task is concerned with detaining those deemed ‘Not Guilty by Reason of Insanity’ (NGRI). On this matter, the *Code* stated that such subjects were to be detained at “the pleasure of the Lieutenant-Governor”, an arrangement that again followed the British example.⁴ In 1800, James Hadfield attempted to assassinate King George III and was subsequently acquitted on the grounds of insanity at trial. The criminal law had no authority over such individuals prior to this point, so the British Parliament rushed to enact the *Criminal Lunatics Act* (1800) which provided for the indefinite detention of insanity acquittees at the King’s discretion (Higgins, 1986, p. 10; R Moran, 1985a, pp. 35–36). In Canada, the same rationale grounded the Lieutenant Governor’s Warrant (LGW) except, given the provincial jurisdiction of matters of health, the authority was granted to the provincial Lieutenant Governors (Criminal Code, 1892, sec. 736).

This NGRI regime remained largely unchanged until the introduction of the NCR system in 1992. As described by Verdun-Jones (1994) two years later, this was a substantial shift:

³ The Canadian insanity defence is based on the M’Naghten Rules, a legal formulation of the defence of insanity that came out of a mid-19th-century British case, *R v M’Naghten* (1843). The major difference in Canada’s codification is that the country’s lawmakers substituted “appreciate” for “know”, a distinction that suggests a more complex cognitive process (Verdun-Jones, 1991, pp. 287–288). For more detail on the M’Naghten Rules see pp. 14–16.

⁴ Like the Governor General at the federal level, the Lieutenant Governor is the provincial representative of the British monarch. During Canada’s early history that followed Confederation in 1867, when the Constitutional jurisdiction of the federal and provincial governments was most ambiguous, Cheffins (2000) describes the Lieutenant Governor’s role as protecting the federal government’s interests within a particular province. As the working relationship between the federal and provincial governments stabilized, aided in large part by the work of the judiciary, the position of the Lieutenant Governor came to be defined by the royal prerogative: those various powers and capacities that remained within the discretion of the monarch. Many of the duties entrusted to the Lieutenant Governor today—the appointment and dismissal of Premiers and Cabinet ministers, final approval of legislation (i.e. Royal Assent), or the summoning and dissolving of the Legislature—are enacted on the advice of various Ministers, and are thus regarded as largely ceremonial. Yet as Cheffins points out, while Lieutenant Governors typically follow the instructions of their official advisors, a number of historical examples are reminders that they are not legally required to do so should they choose to act otherwise (p. 19).

Without a shadow of a doubt, more fundamental change has been achieved in this area within the brief span of the last 3 years than was accomplished in the whole of the century that has elapsed since Canada's *Criminal Code* was first enacted in 1892. (p. 175)

Indeed, a number of changes to the country's insanity laws arrived in the early 1990s. In *R v Chaulk* (1990), the Supreme Court overturned its previous decision in *Schwartz* (1976) and declared that the M'Naghten-based "wrong" was to be interpreted according to the moral consensus of society.⁵ In other words, the accused's simple knowledge of the illegality of their act did not preclude a successful insanity defence. The bulk of the law reforms during this time focused on the detention of those deemed insane in the criminal context. Most significantly, in 1991 the Supreme Court ruled in *R v Swain* (1991) that the indefinite and arbitrary detention of the LGW was unconstitutional. As a result, Parliament introduced Part XX.1 to the *Criminal Code* the following year, and the new requirement—that provinces introduce review boards to assess the detention of NCR subjects on an annual basis—forms the basis of today's NCR system.

The remarkability of the NCR system is most apparent when contrasted with the preceding NGRI system. More specifically, this comparison highlights the unique *governability* of the NCR subject that stands out against its history. As will be seen in the following chapters, insanity within the criminal legal context quietly emerged as a technical problem in Canada following the end of World War II. Rather than being driven by some headline-grabbing case, the problem was a by-product of broader efforts to overhaul the country's *Criminal Code* during the post-World War II period. Reflecting a psy-entific optimism that followed the expansion of the psy-ences during World War II,⁶ Canadian lawmakers assumed that advances in the psy-

⁵ The M'Naghten Rules are derived from the 1843 British criminal trial of Daniel M'Naghten, and they form the basis of Canada's substantive insanity defence by defining insanity that precludes criminal responsibility. The M'Naghten Rules are returned to throughout this project; for further detail, see pp. 14-16.

⁶ The term "psy-ences" is discussed on p. 43-44.

ences could be applied to the country's archaic insanity laws. While ensuing efforts during the 1950s produced little change, this was less problematic when the technical problem of insanity lacked any real urgency. Indeed, since the insanity verdict was still linked to avoiding capital punishment (Verdun-Jones, 1981, p. 210),⁷ the indefinite detention of the LGW was propped up on an air of benevolence. By the 1960s, however, the status of capital punishment was waning as a legitimate sentence, and the *detention* of subjects declared insane in the criminal legal context gradually came to dominate discussions of insanity law reform. By the 1970s, Canadian work on insanity law reform had largely shifted to focus on this problem.

It is within this historical context that the NCR system needs to be understood. Although the new system is often treated as a watershed moment in Canadian insanity law, its most significant achievement is often overlooked: the production of the governable NCR subject. As will be detailed in the following chapters, the ambiguity of the post-verdict LGW paralleled the obscurity of the subject deemed NGRI. But as the LGW grew increasingly problematic, so did the opacity of the subject under its authority. Yet despite the various efforts, law reform is surprisingly absent in the earlier NGRI period. The NCR period, on the contrary, is exceptional for its reformability. The aforementioned Bill C-14, for example, was preceded by Bill C-10 in 2005. The changes introduced by these earlier reforms, like increasing the potential time between review board hearings and the implementation of victim impact statements, certainly foreshadowed what was to come (Bill C-10, 2005). More importantly, however, they pointed to a subject that was unique upon the landscape of Canadian insanity law.

⁷ Kimberley White (2008) examined 66 of 579 capital murder cases in Canada between 1920 and 1950, and notes that pleading insanity only slightly offset the likelihood of execution (p. 147). While White's sample casts doubt on the empirical aspects of this link, chapters three and four will illustrate that the conceptual coupling of insanity and capital punishment in debates around the defence was important in its understanding as benevolent.

This project seeks to understand the construction of the NCR subject. In so doing, a significant proportion of this dissertation involves writing the history of insanity law reform, or more accurately, of insanity law reform efforts in Canada since work persisted in spite of little accompanying legal change. I focus on how this history is mobilized within the broader aim of understanding today's NCR subject. Rather than a nominal change, in the following chapters I suggest that the NCR subject is a distinct ontological figure that is illuminated by an investigation of its preceding history. Given the kinds of questions I am asking, as well as the utilization of history, this project is better conceptualized as a genealogy of Canada's NCR subject.

Before moving into a discussion of the genealogical methodology, I need to take a moment to reflect on my own position in relation to this project. I have no lived experience that relates directly to this project—both in regards to mental illness or its criminalization—but aim to give an empathic analysis of the NCR system as a whole. I am particularly interested in the ways that we make sense of the NCR subject, a figure that can be perplexing within the context of the criminal law. In so doing, my aim is not to undermine the experiences of those living with mental illness, nor to downplay the often-lingering effects of trauma that some victims in NCR cases have and will undoubtedly continue to endure. At the same time, the marginalization of those deemed mentally ill does not mysteriously end when the case crosses into the territory of the criminal law; on the contrary, those deemed NCR are often doubly damned as both 'mad and bad'.

1.2 Doing a Genealogy of Canada's NCR Subject

The unique governability of the NCR subject is most apparent in the risk-based governance embodied by Bill C-14. Indeed, the 2014 legislation is indicative of a kind of

complacency that characterizes the identification and management of this population today.

While the M’Naghten-based legal formulation for identifying the NCR subject has remained the same since its first Canadian codification in 1892, a history that will be returned to below, the dispositional aspect of the NCR system is now particularly reformable. Framed in this way, the NCR system poses a problem that evokes the Foucauldian genealogical methodology that aims at writing a “history of the present” (Foucault, 1977a, p. 31). According to David Garland (2014):

A history of the present begins by identifying a present-day practice that is both taken for granted and yet, in certain respects, problematic or somehow unintelligible – the reformatory prison in the 1970s, for example, or the American death penalty today – and then seeks to trace the power struggles that produced them. (p. 373)

As will be seen in the following chapters, those deemed NGRI in Canada during the second half of the 20th century posed a difficult problem for lawmakers. As the legitimacy of the practices regarding the detention of this population was called into question, it brought looming uncertainties about the identity of these subjects to the surface. In particular, it forced lawmakers to confront a variety of complex questions that ranged from the practical (were these subjects under federal or provincial jurisdiction?) to the more fundamental (were these medical or legal subjects?). As will be seen, the governance of this population depended on some kind of resolution to these ontological questions.

The basis of this study is historical. I propose that we can better understand today’s NCR subject by examining the various efforts of insanity law reform in Canada during the approximate half-century that preceded the NCR system. More specifically, this study is a genealogy in which the aim is to use this history to understand the present. This approach might be contrasted to the more typical historical account that is not oriented towards the present in the

same way.⁸ Instead, genealogy can be seen as “using history as a means of critical engagement with the present” (Garland, 2014, p. 367), or what Foucault termed a “history of the present” (Foucault, 1977a, p. 31). Foucault was influenced by Friedrich Nietzsche’s use of genealogy to unsettle present-day understandings of various phenomena. Nietzsche’s famous application of the methodology is *On the Genealogy of Morality* (1994), a work in which he revealed that then-contemporary understandings of right and wrong were the internalization of punishments that had been forgotten to history. In more general terms, genealogy aims to illuminate those struggles that inform the present but have since been long forgotten.

A good starting point is to ask: what distinguishes genealogy from more standard histories? While Foucault led largely by example, he also provided some direct discussion of genealogy. In his essay, “Nietzsche, Genealogy, History” (1977), Foucault is disparaging of the archetypal historical investigation that imposes a “suprahistorical perspective”, and in which the subsequent text provides something of an endpoint to the topic of study (p. 152).⁹ Such histories rely on important and often overlooked *a priori*s: “[t]his is only possible, however, because of its belief in eternal truth, the immortality of the soul, and the nature of consciousness as always identical to itself” (p. 152). In this way, standard histories tend to reflect a “presentism” in which the past is understood according to present-day values, ideas, conceptualizations, and practices. Genealogy, on the other hand, provides something of a reverse presentism in which the examination of history puts today’s conceptualizations at risk:

⁸ For example, Janet Tighe (2005), a historian of psychiatry, describes her work as striving for “a deep understanding of a past moment in time—to see that moment in time as much as possible on its own terms. Change over time is only clear when each moment is understood in its own context” (p. 253).

⁹ It might be said that Foucault is working with an unfair generalization of the standard historical text. While it is important to recognize that ‘history’ denotes a massive and complex field that cannot be adequately summarized here, the grand-narrative history that Foucault counterposes to genealogy is not uncommon.

It is no longer a question of judging the past in the name of a truth that only we can possess in the present; but risking the destruction of the subject who seeks knowledge in the endless deployment of the will to knowledge” (p. 164).

While identifying what a genealogy is *not* is helpful in understanding the approach, it is also important to identify its distinguishing characteristics. Central to genealogy is its anti-essentialist rejection of those universals on which other histories might stand. Following from this metaphysical skepticism, Foucault clarifies that genealogy is not a search for origins because that implies that some hidden element lying dormant in the birth of an object, subject, or practice will also reveal its present significance (p. 140). Foucault instead suggests that *Herkunft* and *Entstehung* are better descriptors of genealogy, although he refines their standard German-to-English translations as “origins” (p. 145). *Herkunft*, Foucault argues, is better understood as “stock” or “descent”, synonyms that draw attention to the heterogeneity of phenomena that are typically understood as singular and contained: “[w]here the soul pretends unification or the self fabricates a coherent identity, the genealogist sets out to study the beginning—numberless beginnings whose faint traces and hints of color are readily seen by an historical eye” (p. 145). In contrast to those teleological understandings that are often organized into presentist histories, genealogy traces those particular and far-from-inevitable circumstances that play a role in shaping the present (p. 146). Rather than providing any grand narrative, genealogy is “gray, meticulous, and patiently documentary” (p. 139).

Turning to *entstehung*, Foucault offers “emergence” as an alternative understanding to the typical translation of “origins”. *Entstehung* is a reminder that the present is not a final destination but an episode in the continually developing present:

In placing present needs at the origin, the metaphysician would convince us of an obscure purpose that seeks its realization at the moment it arises. Genealogy, however, seeks to reestablish the various systems of subjection: not the anticipatory power of meaning, but the hazardous play of domination. (p. 148)

According to Foucault, *entstehung*, or emergence, is the culmination but not the conclusion of interacting forces (pp. 148-149). It thus points to the history of dominations:

Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination. (p. 151).

Foucault thus describes genealogy as a combination of *herkunft*, *entstehung*, and history, all of which are reflected in my examination of insanity in the chapters that follow. Instead of suggesting that insanity is indicative of some medicolegal essence that resides in those declared insane, this genealogy points to a mixed complex of knowledges, problems, debates, dead ends, and possibilities that are contained within the concept. In echoing Foucault's *herkunft*, it is precisely the unknowability of those deemed insane in any singular, internalized way that makes this group such a complex governmental problem. Similarly, *entstehung*, or emergence, is also a recurring theme throughout this project. Chapter two, for example, begins with the emergence of insanity as a particular kind of problem in Canada following the World War II, although it re-emerges in different forms over the second half of the 20th century. While subjects deemed both criminal and insane are problematic because their identity straddles conceptions of sin and sickness, the particular problems that result from this intersection vary at different times and places in our country's history. Put simply then, the genealogy of the NCR subject traced here is led largely by the emergence and re-emergence of the various problems related to those deemed insane in Canada, and the subsequent attempts to make them governable.

1.2.1 Towards a "History of the Present"

As discussed above, genealogy is very much a "history of the present" in that it is far more likely to disrupt rather than substantiate the present state of affairs. David Garland's (2014)

extrapolation on Foucault's history of the present is particularly helpful since Foucault offered less discussion of the term itself (p. 368). To start, a brief terminological clarification between history of the present and genealogy is in order. The main distinction is that the genealogical methodology offers the means to produce a history of the present (Garland, 2014). However, this is not a hard and fast rule, and many histories of the present are simply referred to as genealogies. Nietzsche's genealogy of morality, for example, could have just as easily been labelled a history of the present. At the same time, there is something helpful about each term. History of the present offers a rich description in a compact form, one that provides a continual reminder of the purpose of the historical work being done. Genealogy, on the other hand, points to the act of shedding light on particular connections and linkages that, regardless of any conscious awareness of them, continue to inform the present.

Genealogical inquiry does not provide a fixed approach, a feature that aligned easily with Foucault's general approach to scholarship; in that sense, Foucault's uptake of the method is not surprising. Foucault described his work in the following way: "I would like my books to be a kind of tool-box which others can rummage through to find a tool which they can use however they wish in their own area... I write for users, not readers" (Foucault, 1974, pp. 523-524, as translated in Motion & Leitch, 2007, p. 2). My genealogy of the NCR subject is thus supplanted by a number of theoretical tools, some of which are more explicitly genealogical than the others. My use of Sheila Jasanoff's notion of co-production in chapter three, for instance, is not as commonly linked to the genealogical method as it is to historical ontology or problematization. However, I use co-production to serve my broader genealogical purpose of understanding the present. My analysis of the RCLI in chapter three traces the failed attempt to merge legal and psychiatric expertise around the problem of insanity in mid-1950s Canada. This failure, I argue,

illustrates the conceptually problematic notion of insanity, and it would inform the subsequent approach that emphasized the procedural and dispositional aspects of the problem.

Unlike co-production, historical ontology and problematization are more closely linked with the genealogical method, and I mobilize both throughout this study. Ontology is the branch of philosophy concerned with “being” and often prompts metaphysical conceptualizations of ahistorical subjects. Historical ontology rejects these commitments and instead understands various categories of being as reflecting their historical context. In his explication of the concept, Ian Hacking (2002) cogently asks: “if we are concerned with the coming into being of the very possibility of some objects, what is that if not historical?” (p. 2). But where Hacking deploys historical ontology across a variety of objects and sites (e.g. the objectification of child abuse (1999)), Nikolas Rose (1996a) is helpful for his focus on the concept in relation to subjectification, or those various ways that people “come to relate to themselves and others as subjects of a certain type” (p. 25). In particular, Rose shows that the heterogeneous configurations of “the self” need to be understood according to their mobilization in the various tasks of governance. Consequently, Rose contends that the effective myth of the unified and individualized self is actually better understood through a collection of practices and knowledges that exist across a wide array of sites.

Interestingly, Rose’s initial recognition of the significance of “the self” in relation to how we organize and understand ourselves did not simultaneously indicate how this area could or should be studied, and his resolution provides a valuable example on which to model the work here. One of the strengths of Rose’s approach is that it starts with only minimal assumptions, a point that is exemplified by his critical discussion of the psy histories that began to crop up in the 1960s. While these histories were helpful in questioning the whiggish structure that existing

histories of the discipline tended to follow (p. 43), these works tended to order themselves around their own cardinal anchor points in ways that could be problematic. It is not uncommon to find, for instance, that the expansion of psychiatry could be explained by professional interests and the pursuit of validation (e.g. Dowbiggin, 1991). While they remain valuable works, such understandings beg their own questions. For Rose (1996a), these kinds of explanations can often slip into one or two common pitfalls (p. 45-6). First, their placement in the past allows for certain events to be interpreted as aligning with broader interests that are only apparent given the benefit of the present. In other words, particular moves in the psy disciplines are more easily connected to broader interests provided by the vantage point of the present. Rose offers the example of psychology's post-war emphasis of the 'maternal instinct' as a symptom of larger efforts to return to the pre-war status quo, one in which women were mostly confined to the domestic realm. Second, they can be tautological in that their starting point is hard to distinguish from what they claim to explain. In histories of the psy disciplines, this often takes the form of particular theories producing certain effects which are then interpreted as the original motivating forces. Grob (1994) warned of similar interpretive dangers when writing psy histories. In discussing the relation of these disciplines to social control, Grob asks: "is control the primary motive or is it a necessary by-product or concomitant?" (p. 275). Interpreting such effects as the product of well-defined intentions undermines the complexity of the practices being examined. Explanations seeking to resolve questions of intent appear inherently ambiguous then, the takeaway here being that framing such a project around these kinds of questions may not prove to be the most fruitful approach.

Instead, this genealogy can be understood as a history of the problematizations of insanity. Problematization is an important element in the initial diagnosis that drives the genealogy (Garland, 2014). In Foucault's words:

Actually, for a domain of action, a behavior, to enter the field of thought, it is necessary for a certain number of factors to have made it uncertain, to have made it lose its familiarity, or to have provoked a certain number of difficulties around it. These elements result from social, economic, or political processes. But here their only role is that of instigation. They can exist and perform their action for a very long time, before there is effective problematization by thought. (1984b, p. 388)

While an important aspect of the conceptualization of genealogy, it is also an historical question that asks how an object, subject, or practice is presented as a particular kind of problem in different historical settings (Foucault, 2001, p. 172; Rose, 1996, p. 25). As will be seen in the chapters that follow, a genealogy of insanity traces the ways in which those deemed as such were problematic in particular ways and in particular times and places.

1.3 Setting the Scene: The Problematization of insanity in Contemporary Canada

In the following genealogy of Canada's NCR subject, I argue that those deemed insane emerged as a unique kind of problem within the "contemporary era of Canadian history".¹⁰ The project draws on a number of sources—archival documents, secondary histories, government reports, psychiatric studies—in order to understand how those deemed insane were conceptualized as a problem throughout the period of investigation. This timeframe requires some explanation, which begins with a brief history of Canadian insanity law prior to World War II. The M'Naghten Rules ("the Rules") form the basis of Canada's insanity defence.¹¹ In 1843, Daniel M'Naghten attempted to shoot the United Kingdom's Prime Minister Robert Peel, but in

¹⁰ The term is used to denote a segment of the modern period that begins with the end of World War II in 1945 and stretches to the present day.

¹¹ Although there is debate around the proper spelling of Daniel M'Naghten's name (Moran, 2000; Rix, 2016), I have chosen to use 'M'Naghten' because it is the most commonly used form in the literature.

a case of mistaken identity, killed his secretary, Edward Drummond. Both the public and Queen Victoria were outraged by the ensuing insanity verdict, and as a result, Britain's House of Lords¹² put five hypothetical questions to a panel of judges with the aim of clarifying the laws regarding "insane delusions." The Rules themselves derive from Lord Justice Tindal, who, writing for the majority, outlined the proper instructions for the jury where the question of insanity is raised:

[...] 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. (*R v M'Naghten*, 1843, p. 722)¹³

While the judges were clear that the pursuit of general principles to resolve all questions of insanity was misguided, and instead emphasized the importance of examining each instance on a case-by-case basis (pp. 720, 722), their answers continue to define exculpating insanity for much of the common law world (Roach, 2009). Importantly, the Rules brought closure to a tumultuous period in English history when conceptions of exculpating insanity were seen as threatening legal principles of guilt and responsibility. Ultimately, the Rules constrict conceptions of insanity in two major ways. First, they typically exclude cases of volitional insanity, that is individuals who understand their actions but, as the result of an impeded will, are unable to control their

¹² The upper house of the United Kingdom's bicameral Parliament.

¹³ Compare with Canada's insanity provisions which read:

16. (1) No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.

(2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has a disease of the mind to an extent that it renders him incapable of appreciating the nature or quality of an act or omission or of knowing that an act or omission is wrong.

(3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission.

(4) Every one shall, until the contrary is proved, be presumed to be and to have been sane. (Canada & Martin, 1955, pp. 55–56)

actions. This group is often described in legal settings as suffering from an “irresistible impulse.” Second, the Rules promote an all-or-nothing understanding of insanity that maps easily onto notions of guilt and innocence, an understanding that is further cemented where guilt means execution and insanity leads to a life sentence in hospital (Diamond, 1962, p. 200). As Mark Gannage (1981) explains, a contradiction arises between the law of insanity and the realities of mental illness: “[c]ontrary to what the established rules of Canadian criminal law suggest, however, responsibility is not an all-or-nothing quality. Rather, just as there are several shadings of mental stability, there are many degrees of responsibility for crime” (p. 301). This dichotomous conception can prevent, for instance, the consideration of mental illness in sentencing decisions where it has not met the threshold for an insanity verdict (ML Perlin, 2000a, p. 246).^{14,15}

As will be seen in the following chapters, the M’Naghten Rules formed the primary basis of insanity law discussions up until the mid-20th century in Canada. The vague powers of the LGW, which as noted above were derived from the even more antiquated *Criminal Lunatics Act* (1800), reflected the wide understanding of the insanity verdict as benevolent. It is therefore less

¹⁴ Where the accused does not meet the criteria for an insanity defence, a plea of diminished responsibility indicates that the presence of mental factors prevents the accused from being held entirely responsible for their criminal act or acts (Gannage, 1981). The doctrine of diminished responsibility dates back to the Scottish case of *Alexander Dingwall* (1867) when Lord Deas reasoned that the accused could not be held entirely responsible for the murder of his wife on account of his alcoholism. Consequently, the judge handed down a verdict of culpable homicide rather than murder. The introduction of diminished responsibility avoided reliance on the royal prerogative of mercy in cases where mental aspects demanded consideration but did not reach the threshold for an insanity verdict, and kept sentencing discretion with the judge (Boland, 1999, p. 100).

Certain jurisdictions have adopted diminished responsibility. Its incorporation into English law with the *Homicide Act* of 1957 allowed mental aspects of the accused to reduce a charge of murder to manslaughter. According to Kramar and Watson (2008), the introduction of Canadian infanticide laws in 1948—laws that initially set a maximum three-year sentence for mothers who killed their babies—reflected the principle of diminished responsibility. Gannage (1981) also argues that there is evidence of the defence in Canadian case law. However, the doctrine has never been formally adopted into Canadian law (Kramar & Watson, 2008, p. 248; Verdun-Jones, 1991, p. 285).

¹⁵ One important distinction in Canada’s insanity defence can be traced back to the introduction of the *Criminal Code* (1892) in which “appreciate” was substituted for “know”. Verdun-Jones (1991) explained in his case law review that where the former suggests a more complex cognitive process, the latter is closer to simple perception, although this would not be expounded upon by the Supreme Court until the 1980s (pp. 287-288).

surprising that the country's insanity laws remained largely stagnant until the introduction of the NCR system in 1992. Over the course of the second half of the 20th century, however, the various problems posed by insanity were debated, reworked, and articulated in new ways. In the years immediately following the War, insanity law reform was a technical problem for experts, a reflection of the psy-entific optimism that characterized this period. The subsequent Royal Commission suggested that, at least in the area of criminalized insanity, this optimism was inflated. Amidst the concern of government overreach in 1960s Ontario, two cases prompted public and political scrutiny regarding the indefinite detention of those deemed insane in the province; ultimately, the government was pressured to reform the laws. In the 1970s and '80s, the federal government picked up on the task of insanity law reform. These efforts were unique in that, unlike the ad hoc examinations that preceded them, insanity law reform now existed within a continued program of study and fit within a broader framework of criminal law reform.

All of these problems are linked in that they are attempts to construct those deemed both criminal and insane as governable subjects in the country. Governance, in turn, requires some knowledge about that which is governed (Curtis, 2002; Doerksen, 2019). As will become clear throughout the following chapters, the problem of knowing and governing Canada's insane subject is primarily ontological. As subjects of both medicine and criminal law, those deemed insane pose a very practical problem. In ethical terms, the morally non-responsible subject should not face criminal punishment for their acts. However, the assumption of dangerousness—especially pertinent in subjects deemed insane—offers a perilous category on which to justify detention. Similarly, certain aspects are unique to Canada. For example, the country's Constitutional division of powers, one in which provincial governments are responsible for

matters of health and the federal government for matters of criminal law, also adds a layer of complexity.

Interestingly, these complexities are less apparent in today's NCR system. Instead, I contend that the system has provided a taken-for-granted framework in which the NCR subject is understood as a rights-bearing subject that is governable by risk. This system is supported by re-arranged relations of knowledge and power in which the task of governing the NCR subject is divided amongst the judiciary, Legislature, and provincial review boards. In aiming to render this framework more visible, I contend that the stabilities of today are linked to those instabilities of the past. More specifically, the NCR subject of today is a product of the various problematizations of those deemed insane during the second half of the 20th century in Canada.

1.4 Chapter Layout

Chapter two opens this study by tracing the emergence of insanity as a problem in post-World War II Canada through three separate lines of inquiry: the *Canadian Criminal Code*, James Chalmers McRuer, and the psy-entific optimism of mid-20th-century Canada. As will be seen, these three sections are distinct but linked in understanding the problematization of insanity in Canada during the mid-century. In the first section, I trace the emergence of the country's insanity laws as a particular problem that followed in the wake of efforts to revise the *Criminal Code* more generally. As will be seen, Parliament's focus on revamping the *Code* played a pivotal role in garnering political attention around the need to reform the country's insanity laws. In so doing, the chapter does not reveal a continuous march of scientific progress or an increasing humanity on the part of lawmakers, but instead points to the unique historical circumstances that have shaped the problematization of the country's insanity laws. Insanity law reform was subsequently framed as a problem to be resolved by both psy and legal experts. In

the second section, the chapter examines James Chalmers McRuer, a figure who is of direct interest given his role as chairperson of the *The Royal Commission on the Law of Insanity as a Defence in Criminal Cases* (RCLI), the Royal Commission that is the focus of chapter three. In detailing the history behind his selection as chairperson, the investigation of McRuer's prior career also provides an opportune snapshot of how insanity was understood as a problem in Canada during the mid-20th century. As will be seen, McRuer's own work was indicative of the increasing prevalence of the psy-ences in Canada. While chapter three will further detail the psy-entific optimism that was at its zenith in post-World War II Canada, the third and final section of chapter two provides an important preliminary discussion of the development of the psy-ences, a term that refers to the various psy disciplines and the important roles they play in both how we understand ourselves as subjects, as well as how we are constituted as subjects of governance.

Chapter three picks up on this psy-entific optimism that underpinned the founding of the RCLI. As the federal government's first systematic study of insanity within the criminal context, the Commission undertook an in-depth examination of the problems posed by insanity in mid-20th-century Canada. Before discussing the RCLI itself, the chapter begins with a discussion of the new Canadian welfare state that was under construction following the end of World War II. Amidst worries that Canadians would return to the Depression-era quality of life that preceded the War's beginning in 1939, reconstruction efforts aimed at smoothly transitioning the country from a war to peace-time economy saw the Canadian government take a more active role in the lives of the populace. Given the central role of the psy-ences in these efforts, the chapter hones in on their transformation and application during World War II since it was their ability to categorize and administer subjects within a war setting that would lead to their subsequent expansion in post-World War II Canada.

It is within this historical milieu that the RCLI was established. As will be seen, the Commission's attempt to merge psy and legal expertise around the problems of insanity revealed the gap between the psy-entific optimism of the day and the realities of the disciplines at the time. While the Commission initially envisioned the medicolegal co-production of the insane subject, the opacity of the psy expertise it encountered meant that the Commission would ultimately endorse a primarily legal understanding of those deemed Not Guilty by Reason of Insanity (NGRI). Ultimately, its final report would only call for minimal changes to the country's insanity laws. In drawing attention to the complexities that were involved in attempting to integrate legal and psy-entific expertise around the problems of insanity, the Commission also highlighted the kind of problem that insanity presented at the time. More particularly, insanity presented a technical and abstract problem that was thought to be outdated according to the psy-entific optimism of the day. While psy expertise would not provide any clear sense of direction, the continued existence of capital punishment provided for a benevolent interpretation of the country's insanity laws. Consequently, the underwhelming conclusions of the RCLI reflected the absence of any urgent need for reform at the time.

Chapter four turns to 1960s Ontario where those deemed both criminal and insane prompted a statutory response from the province's Legislature. The chapter begins by tracing two broad movements in Canada during this period: the deinstitutionalization of the psychiatric hospital and the increasing prevalence of rights discourses. Deinstitutionalization troubled the use of psychiatric detention, and while driven by a variety of factors, it was the language of rights that came to dominate discussions of these changes. Increasingly, a shift towards legalism—the use of legal procedures to limit psychiatric authority—came to serve as the basis for a rights-based deinstitutionalization of the mental health system. Within this national context,

and amidst provincial circumstances in which Ontarians were weary of government encroachment into the rights of its citizens, two cases of psychiatric detention brought substantial public and political attention to the vague and absolute powers of the LGW. More specifically, the cases of Fred Fawcett and Peter Lay pressured the province to address the indefinite detention of those deemed both criminal and insane in the province. In spite of lingering questions regarding its jurisdictional authority, the Ontario government's statutory introduction of review boards was indicative of an increasing rights-based understanding of those deemed both criminal and insane. The Ontario example also foreshadows a shift in which complex medicolegal ontologies would be sidestepped through an appeal to rights discourses.

In chapter five, I examine the problematization of insanity law at the national level during the 1970s and '80s. This period, I argue, reflects an era of institutionalized insanity law reform that was distinct in the country's history. Unlike the previous ad hoc approaches to reform, the institutionalized period was informed by a comprehensive philosophy that I trace across three sites of investigation. In the first, I look at changes to the *Canadian Criminal Code* that reflected a shift from moralism to legalism. Under the guidance of the country's new Prime Minister Pierre Elliot Trudeau, the *Criminal Law Amendment Acts* of 1968-69 and 1972 underscored the Trudeau government's beliefs that the criminal law should not police private immorality; the partial decriminalization of homosexuality and liberalized access to abortion best exemplify this change. While I situate these reforms within the personal history of Trudeau since his then-unparalleled cultural influence was an important factor in making these changes possible, I also suggest that they are an early indication of emerging neoliberal rationalities that emphasized a restrained application of the country's criminal law. The secularization of criminal law initiated by Trudeau paved the way for a restrained criminal law that, while not inherently neoliberal,

reflects “an economy of scarcity” (Pratt, 1996) that is taken up easily within neoliberal penal policy. Furthermore, the secularization of the criminal law was in turn paralleled by a growing emphasis on security that is linked to neoliberal aims to provide the optimal conditions in which the market can operate (Bang, 2015, p. 196; Chagnon & Gauthier, 2013, p. 190).

The new rationality of restraint proved particularly useful for insanity law reformers and the final two sections of the chapter focus on the insanity law work of the Law Reform Commission of Canada (LRCC; 1975-76) and the federal government’s Mental Disorder Project (MDP; 1982-85). Within these sites, the rationality of restraint came to form an organizing philosophical principle that was translated as the “least restrictive alternative” (LRA), the idea that the management and detention of those deemed NGRI should be as minimally intrusive as possible. The chapter concludes by linking the new rationality to the construction of those deemed insane as governable subjects. Reflecting the trend identified in chapter five, the work of the LRCC and the MDP offer further evidence of a shift in which complex medicolegal ontologies were increasingly sidestepped through a rights-based understanding of insanity. Chapter six concludes the project by examining the NCR system that was introduced in 1992. By focusing on two constitutional cases (*R v Swain* (1991) and *Winko v British Columbia (Forensic Psychiatric Institute)* (1999)) and the legislation that introduced the NCR system (Bill C-30 (1992)), I contend that the rearranged knowledge and power relations that followed the introduction of the *Charter* proved effective in making the NCR subject governable. Drawing on the work of Manfredi and Kelly (1999), I argue that the Constitutional subject is an ontologically distinct subject that is conducive to the task of governance. More particularly, where chapter five drew attention to the problematic notion of dangerousness, the Constitutional subject was amenable to risk-based governance.

This project does not offer any specific recommendations or push for any particular legal reforms. Instead, my aim is to draw attention to the various ways in which we have and continue to make sense of insanity within the context of the criminal law. This pairing has always been uncomfortable since, within the framework of the criminal law, the existence of the guilty act without the guilty mind can be vexing. While the outrage that is not uncommon in the wake of headline-grabbing NCR cases might suggest otherwise, I propose that the NCR system provides a framework for sense-making that we take for granted. More specifically, there seems to be a complacency in which the NCR subject is understood as a Constitutional subject that can be governed by risk. In the following chapters, I investigate the period preceding the introduction of the NCR system to suggest that that the current way of doing things was never inevitable.

Chapter Two: The Problem of Insanity

The goal of this project is to better understand the NCR subject of today. Working with Foucault's "history of the present", Garland (2014) writes that such investigations typically start with some taken for granted practice of the day. Canada's NCR system appears both obvious and inevitable: those found NCR are not to be punished, but because they pose a threat to the public, are to be held until they can safely be returned to the community. Surprisingly, a stable arrangement based on this premise is a relatively recent phenomenon, and, to be discussed in more detail in chapter seven, was only achieved in the 1990s. If focused work on the problem of insanity law began as early as the 1950s, why did it take until the end of the century to see any change? Similarly, why has the NCR system, implemented in 1992, been the subject of two separate successful reforms when the preceding Not Guilty by Reason of Insanity (NGRI) system remained largely untouched for nearly a century? As will be seen over the following chapters, a significant amount of work was undertaken during the second half of the 20th century, although it produced little immediate change.

The Royal Commission on the Law of Insanity as a Defence in Criminal Cases (RCLI) was the first focused study of the medicolegal problem of insanity in Canada. With the work of the RCLI as the focus of chapter three, the current chapter investigates the conditions in which the RCLI emerged and was subsequently shaped. In so doing, the chapter hones in on three aspects of this story. First, it begins with an examination of the mid-20th-century efforts to reform Canada's *Criminal Code* since this problematized the country's existing insanity laws. As will be seen, insanity law reform emerged as a technical problem that was thought to be best resolved by both psy and legal experts. Second, the chapter takes a closer look at James Chalmers McRuer, the chair of the RCLI. McRuer was an important authority throughout these Commissions, so it

is important to determine how he was chosen for the position. As will be detailed below, his earlier career had helped to establish him as an effective law reformer and enabled him to forge important personal relationships with powerful figures. In examining McRuer's connection, I also discuss his preceding work on the Archambault Commission, a committee that is credited with transitioning Canadian prisons away from punitive ideals and towards a rehabilitative approach (the degree to which this shift took place is open to debate). In detailing the historical context of the RCLI, this chapter also provides a snapshot of the problematization of insanity in mid-20th-century Canada. Finally, the chapter ends by discussing the growth of the psy disciplines in the first half of the 20th century to help explain the psy-entific optimism that would characterize Canada's post-World War II period, a point that I will pick up again in chapter three. As will be seen, this optimism followed the application of the psy-ences in World War II, where these disciplines were seen as effective in categorizing and administering subjects in a military setting.

2.1 Canada's *Criminal Code*

During its Parliamentary debate, the mid-20th-century overhaul of the *Criminal Code* was framed as necessary on the grounds of legislative housekeeping. Speaking towards the recodification bill that was presented to Parliament in 1953, Justice Minister Stuart Garson described a general recodification of the *Code* as necessary from time to time given that its continual revision is standard practice (Macleod & Martin, 1955, p. 6). Indeed, Brown (1992) found that between 1893 and 1970, "there were only four sessions of Parliament in which bills were not introduced to change, augment, or cut down the [C]ode" (p. 43). In 1947, the Conference of Commissioners on Uniformity of Legislation in Canada—an annual meeting that began in 1918 with the purpose of working towards greater homogeneity in the country's

provincial legislation—"adopted a recommendation submitted by the Section on Criminal Law requesting the Minister of Justice to take the necessary steps toward the appointment of a [C]ommission to recodify and revise the Criminal Code and related statutes" (Conference of Commissioners on Uniformity of Legislation in Canada, 1947, p. 16). Combined with political support from John Diefenbaker, not yet Prime Minister, and then Minister of Justice James Ilesley (MacLeod & Martin, 1955b, p. 6; Mewett, 1993, p. 6), the recommendation was heard and Parliament created a Commission to study the *Code* in 1949 (Government of Canada. Royal Commission on the Revision of the Criminal Code, 1954). According to the Commission's terms of reference—terms that define the scope and limits of their investigation—the focus was the same as it had been in the original bid for codification: to provide a straightforward and cohesive *Code* of the criminal law. Given the continual revision of the *Code*, this task was largely defined by a kind of legislative housekeeping which involved cleaning up conflicting or unclear revisions that had been added to the *Code* since its introduction in 1892 (pp. 3-4).

This general renovation was achieved when the new *Code* was passed in 1954, evidenced in part by its now much shorter length (MacLeod & Martin, 1955, p. 11). Many provisions were found redundant because they were either covered elsewhere or by more general provisions, so many were removed. Given the breadth of the work, a handful of more complex problems were noted but not dealt with. These problems traversed four areas: the defence of insanity, capital punishment, corporal punishment, and lotteries.¹⁶ These were, according to a Special Committee that followed up on the work of the *Royal Commission on the Revision of the Criminal Code*, "questions... of such paramount importance that they could and should not be dealt with merely

¹⁶ The inclusion of lotteries in this list looks odd today, but it was only in 1985 that the *Criminal Code* was amended so that provinces, rather than the federal government, became the only authority granted the right to operate lotteries (Campbell et al., 2005; G Smith, 2014).

as incidentals to the consolidation or revision of the present Criminal Code”, and it was recommended that a Royal Commission or a Joint Parliamentary Committee be established to focus on these particular issues (Government of Canada. Royal Commission on the Revision of the Criminal Code, 1954, p. 64). In the House of Commons, Minister of Justice Stuart Garson further specified the recommendation:

After careful consideration, we [Royal Commission on Revision of the Criminal Code] reached the opinion that the defence of insanity to a charge involving criminal responsibility, as laid down by the law and applied by the courts, is a question involving expert legal and psychiatric knowledge in respect of which it seemed to us that it would be at least difficult in the first instance for a committee of laymen to reach a dependable opinion which would inspire confidence. (Garson, 1953, p. 941)

Evidently, the satisfactory standard for the examination of capital punishment, corporal punishment, and lotteries would not do in the case of insanity. Thus, while a joint committee made up of members of the House of Commons and the Senate was suggested for the first three questions, the *Commission on the Criminal Code* suggested that a Royal Commission should be utilized for the question of insanity because it could be comprised of legal and psychiatric experts. With the general call made, the particulars still had to be worked out.

The format of the Royal Commission offers a unique medium for investigation. Broadly speaking, the Royal Commission is an ad hoc body of inquiry established by the government’s executive branch in order to address a particular issue. They are not part of any branch of government and instead act as an independent group. As Inwood and Johns (2014) put it, “they are independent creatures existing in a shadowy realm of extra-governmental institutions” that offer a unique opportunity for the combination of public and expert participation (p. 8).¹⁷ The RCLI, as will be seen, was a combination of public and private hearings, although the majority

¹⁷ Inwood and Johns (2014) are speaking about “commissions of inquiry” generally here, of which the Royal Commission is but one type. The broad scope of this term makes precise definition difficult, but the discussion here can be grounded by reference to the specific format of the Royal Commission.

of participation was of the expert type, echoing Justice Garson’s understanding of the problem noted above. These bodies do not necessarily impact policy—their final report only provides recommendations—but their creation points to a deficiency in the existing structures of government (p. 9). Thus, while the Royal Commission is only given a finite lifespan, it is granted a not inconsequential degree of authority and independence. The Commission’s terms of reference then help the government control this freedom by defining the limits and scope of the examination. If and when the study of a particular Royal Commission makes it back to Parliament, these terms can open up.

This independence is part of the Royal Commission’s appeal, since its perceived objectivity helps to justify its use. The Royal Commission is understood as being removed from the partisanship that characterizes the activities of both the legislative and executive branch, a distance that is further bolstered by the use of expert knowledge. This can help to address “the erosion of public trust” that Inwood and Johns (2014) argue has been a problem for the executive and legislative branches in recent times (p. 10). Compared to the judiciary, the investigative nature of the Royal Commission allows it to deal in the hypothetical realm in a way that the courts are unable to. At the same time, the independence of the judiciary is often reflected in the Royal Commission. The role of the executive branch in creating the Royal Commission means that, for the most part, the government will attempt to appoint commissioners that do not overtly signal partisan bias (Johns & Inwood, 2014, p. 36). For these reasons, judges are often chosen to chair Commissions, an important role since they are not only in charge of the Commission’s activities, but can help to shape it in the first place (p. 37). Who, then, would be chosen to chair the RCLI?

2.2 JC McRuer

The answer is James Chalmers McRuer. A lawyer and judge by profession, McRuer's legacy today is defined most by his work in the area of Canadian law reform. In fact, the mid-20th-century revision of the *Criminal Code* would eventually lead to McRuer chairing two parallel but separate Royal Commissions on (1) *the Law of Insanity as a Defence in Criminal Cases* (RCLI) and (2) *the Criminal Law Relating to Criminal Sexual Psychopaths* (RCCSP). McRuer's position on these Commissions spoke not just to the professional and political ties he had forged since being called to the bar in 1914, but also to his legal credentials, and more specifically, his expertise on law reform in relation to mental health.

One such example of this expertise was a speech that McRuer gave in the summer of 1948. Prior to the 1953 call for a Commission to investigate insanity, McRuer gave a talk to the Canadian Medical Association (CMA) called "Insanity as Legal Defence" (Boyer, 1994; McRuer, 1949). He had become increasingly aware of the problem of insanity since becoming a judge, one that was only becoming more pressing "in light of new psychological theories" (p. 278), and had been requested by the CMA to talk about this particular issue. The lecture offers an opportunity to look at the future RCLI chairperson's views on insanity within the legal context, but it also provides a historical snapshot of the problem of insanity in mid-20th-century Canada. McRuer's address makes it clear that he was unsure of what to do about the various problems of insanity, a little unusual given the "bold statements calling for sweeping reform of Canadian law" that were not uncommon for him (p. 279). Even when hesitant, McRuer could be surprisingly definitive. Upon raising the issue of "irresistible impulse",¹⁸ for example, he said:

I have real fear that the introduction of the doctrine of the uncontrollable impulse into our criminal law would create such a confused state of the law that the result would be that in

¹⁸ A confusing medicolegal term that suggests that criminal responsibility may be lessened where the impulse for the act is not just unresisted, but irresistible (Finnane, 2012).

all cases where the defence of insanity is raised, a wide field of investigation would be opened up, the boundaries of which would be incapable of delineation. (McRuer, 1949, p. 494)

Irresistible impulse is both tricky and threatening to the authority of the criminal law because it widens the scope of who is deemed abnormal, and ultimately, legally non-responsible. Although McRuer presented a hard stance here, the next chapter will show that irresistible impulse was an important and common topic in the work of the RCLI, and exemplified the difficulty of dividing the insane from the sane.

The speech also highlights the more fundamental issues that framed discussions of insanity in mid-20th-century Canada. With the exception of his comments on irresistible impulse, McRuer's speech was occupied more with understanding the problems posed by insanity rather than his views on particular legal reforms; inevitably, certain aspects of the insanity defence were more pressing than others. McRuer noted that discussions of insanity were limited by its connection to capital punishment, declaring that "if we had no capital punishment in Canada the subject I am now discussing would not likely have a place on your program" (p. 494). Indeed, it could be argued that insanity is unique during the period of contemporary history¹⁹ precisely for its gradual separation from the death penalty. McRuer's linking of capital punishment and insanity is not surprising since the first legal spaces for psychiatry revolved around matters of life and death. According to Foucault (1978b), the legal value of psychiatry was precisely in its ability to "tackl[e] the great criminal event of the most violent and rarest source" (p. 5). Kirk-Montgomery (2006) showed that the Canadian forensic psychiatric expert first entered the criminal courts in the late 19th century through capital cases, since it was the potential sentence of death that justified the monetary expense involved in proving insanity (p. 121). Similarly, the

¹⁹ "Contemporary history" is used to denote a segment of modern history that stretches from the end of World War II in 1945 to the present day.

indeterminate sentence that resulted from a finding of NGRI was only attractive when the alternative was severe, and so “historically, the insanity defence was developed as a means of evading the noose” (Verdun-Jones, 1991, p. 285). Even though capital punishment would be all but formally abolished in 1976,²⁰ mandatory minimum sentences for murder charges meant insanity pleas could still be attractive to those facing such charges. Along with the forensic hospital setting of insanity verdicts, the indeterminate nature of the sentence means that subjects may serve less time than if they had been found criminally responsible for their actions.

The insanity defence was not linked de jour to capital crimes. Prior to the NCR system, for instance, a common law rule allowed the judge or Crown to raise the issue of insanity even if it went against the wishes of the accused.²¹ But as McRuer notes, the insanity defence was rarely raised unless in relation to murder charges, both in practice and discussion. Given that during this time capital sentences had to follow guilty verdicts in murder cases, any discussion of the insanity defence was thus preoccupied with execution. This bias worked in two ways: the public did not want to see the morally culpable escape capital punishment on grounds of feigned mental illness, but they also did not want those who were incapable of criminal intent to be executed. As McRuer put it:

While there is a revulsion in the public mind against the execution of a man who commits murder while labouring under a disease of the mind, there is no similar revulsion in the case of one who is sent to prison for forging a cheque while under some delusion that would give him, if the facts believed were true, a right to sign the cheque. (p. 494)

²⁰ Military crimes were an exception to the reforms at this time. Governed by the *National Defence Act*, capital punishment would not be completely abolished until 1998.

²¹ *R v Swain* (1991) successfully challenged this practice by showing that it interfered with the accused’s right to control their own defence, a right that was now constitutionally protected by s. 7 of the *Charter*. The new common law rule established by the *Swain* Court allowed the Crown to raise the issue of insanity in two instances: (1) “after the trier of fact had concluded that he or she was guilty of the offence charged” (p. 939), or (2) “after the accused’s own defence has somehow put his or her mental capacity for criminal intent in issue” (p. 940).

Indeed, insanity has an odd relationship with capital punishment. Kimberley White (2008) showed that while a high standard of proof was required to secure insanity findings during capital trials, the post-trial sentencing stage and the royal prerogative of mercy (RPM) was much more flexible where the defendant's mental state raised doubts about their criminal responsibility. In fact, it appears that the stakes of capital punishment may have limited its actual use since its subsequent abolition has been linked to more severe custodial sentences. According to a 1987 Report by the Canadian Sentencing Commission:

[I]t can be said that the replacement of capital punishment by a mandatory sentence of life imprisonment (without eligibility for parole until 25 years of the sentence has been served) illustrates the tendency to compensate for the abolition of the death penalty by increasing the severity of the substitute sanction. (p. 34)

Fattah (1972) noted an international trend indicating that juries are more hesitant to convict the accused when the sentence is execution. In his own correlative examination of available Canadian data, Fattah found evidence that conviction rates for violent non-capital crimes were significantly higher than conviction rates for capital crimes in the last two decades that capital punishment was available (pp.180-188).²² Similarly, Walford (2006) argues that the abolition of capital punishment in 1976 provided a humanitarian shroud to justify severe prison sentences. Drawing on data supplied by Statistics Canada, Walford shows that between 1965 and 1971, three quarters of homicide charges were manslaughter, a sharp contrast from the rates for the 1977-1988 period in which 38% of all homicide charges were first-degree, 52% were second-degree, and 9% were manslaughter (p. 1). Similar findings have also been documented elsewhere. A 1979 publication from Canada's Parliamentary Research Branch reported that conviction rates for first-degree murder increased from below 10% for the 1960 to 1974 period

²² The government placed a moratorium on the practice in 1967, but there were some exceptions until its almost complete abolition in 1976 (see footnote 20).

to approximately 20% between 1976 and 1982 (p. 8), suggesting that Walford's post-abolition "get tough" approach extends to lay jury members. Findings by the Canadian Sentencing Commission (1987) also support this trend in reporting that the public perceived an increase in homicide rates following abolition even though this was not substantiated by data (p. 100). Ultimately, it appears that after 1976, first degree murder became both a more accessible and reasonable charge in the minds of the public, police, and legislators.

As will be seen in the following chapter's examination of the RCLI, discussions of insanity in mid-20th-century Canada were inextricably linked to the status of capital punishment. Within such a context, it is less surprising that McRuer only offered some tentative suggestions for reforming the laws around insanity in his 1948 speech; these ranged from providing judges with their own psychiatric experts to doing away with juries where the issue is raised (pp. 494-5). Instead, McRuer emphasized that they were no more than starting points for further discussion. His most conclusive recommendation was the need for medical and legal professionals to come together to tackle the problem of insanity, one he would have the opportunity of guiding five years later when appointed as head of the RCLI. As McRuer biographer Patrick Boyer (1994) notes, McRuer's speech was well received: it was reprinted in the *Canadian Medical Association Journal* and gained both national and international attention (p. 280). The initial requests for McRuer to give the talk indicate that he already established some degree of professional notoriety that gave his opinions on the problem of insanity some weight, and by 1954, he appeared to be an obvious choice for the St. Laurent government. Yet in order to best understand McRuer's candidacy for this position, it also requires looking at his early career.

2.2.1 McRuer's Early Career and The Archambault Report

According to Patrick Boyer (1994), when McRuer returned to Canada after World War I, his career as a young lawyer had gotten off to such a slow start that it left him in poor health. In hopes of remedying whatever ailed him, McRuer took a solo vacation to Northern Ontario. Here he met Billy Price and Peter White, two Conservative Party politicians who, through their association with Ontario's Attorney General William Raney, were able to help McRuer land the position of assistant Crown Attorney for Toronto and York County in 1920. Although Raney was a member of the United Farmers of Ontario, his political affiliations were not particularly strong and White's reputation as a successful lawyer proved to be a weighty reference in McRuer's application. McRuer's other reference, supplied by his parish priest, likely sat well with Raney as he was preoccupied with legally enforcing prohibition in the province. Shortly after securing the position, a number of successful high-profile cases in this office earned McRuer a reputation as a skilled and principled lawyer.

McRuer's most lasting legacy though, and certainly his most relevant for the story here, is his work in the area of law reform, a career that began when he crossed paths with Agnes Macphail. MP Macphail, the first woman to be elected to the House of Commons in 1921 and founder of the Elizabeth Fry Society of Canada (p. 102),²³ was tenaciously pursuing prison reform by the 1930s, efforts that would often result in conflict with the sitting Minister of Justice.

²³ The Canadian Association of Elizabeth Fry Societies advocates for the rights of criminalized women and gender-diverse individuals who are in conflict with the law. While local chapters provide front-line support, the national body identifies its own two-sided task as working to secure a more human prison system while also pursuing its abolition ('What We Do', nd). Elizabeth Fry, the namesake of the organization, was born in England in 1780. A Quaker, her religious beliefs underscored her pursuit of legal and social reform, not least of which included bettering the conditions of imprisoned women during the 19th century. While Vancouver had a branch as early as 1939, Agnes Macphail was central in the spread of the organization. Following a visit to a West Virginian women's prison that was thought to be very progressive at the time, Macphail gave a speech to a women's church group in 1951 that led to the founding of the Society in Toronto (Crowley, 1990, pp. 192–193; see also Stewart & Shackleton, 1959, pp. 293–294). For further discussion of the Elizabeth Fry Society, see chapter two, footnote 27.

In 1934, she pled the case of Charles Bayne to the House of Commons, a prisoner at Kingston Penitentiary that was suffering from tuberculosis who claimed that being denied transfer to a jail farm would cost him his life. But when the sinister details of Bayne’s offences were presented by then Minister of Justice Hugh Guthrie²⁴—details that had been denied to Macphail—she was both “personally devastated and publicly discredited” (p. 103).

There were a number of reasons Macphail and Guthrie did not get along. In more general terms, Macphail made life difficult for a number of justice ministers “by presenting allegations of corruption within the penitentiaries to the House of Commons—allegations that often led to sensational headlines in the country’s newspaper” (Boyer, 1994, p. 102). Yet, Macphail and Guthrie’s mutual dislike of one another went back further than that. Along with prison reform, Macphail was also an ardent advocate for the country’s farmers. When Guthrie tried to sell this group on a plan to increase tariffs, she denounced the plan as opposing their best interests (Wyatt, 2000, p. 69). It is also hard to imagine that Macphail’s gender did not play a role to some extent as well. Crowley (1990) draws attention to an early interaction between Macphail and Guthrie in the House of Commons during 1922, only shortly after she had become a Member of Parliament and many Canadian women had been enfranchised. The issue under discussion on March 29 of that year was whether non-Canadian women who were married to citizens should be eligible to vote. When Guthrie suggested that American women should be treated more leniently than those immigrating from elsewhere, Macphail was critical, noting that such distinctions only served to undermine the ultimate equality of all women and men (Macphail, 1922, p. 479).

With this in mind, it is less surprising that Guthrie’s public shaming of Macphail in 1934 was not enough for him, a fact that was illustrated by his efforts to have JD Dawson, senior

²⁴ Although Bayne was found guilty on a number of different charges, it was Guthrie’s devastating revelation that Bayne was homosexual—still a criminal offence at the time—that was the nail in the coffin (Crowley, 1990, p. 137).

inspector of penitentiaries, persuade Bayne to provide evidence that would further damage her reputation. During this mission at Kingston Penitentiary, Dawson made comments during an interview with a different prisoner, Dr. AG Hall, that was indicative of the planned character assassination. Specifically, it was alleged that Dawson said “Aggie had made a god damned fool of herself in the House but when we are through with her she will never be able to lift up her head in the House again” (Canada. Commission on the Truth or Falsity of Statements, 1935, p. 23). When Macphail caught wind of these comments and Guthrie was unable to produce evidence countering her claims, she was able to secure a Parliamentary inquiry to investigate the matter.

From the beginning, the deck was stacked against Macphail. While the services of RH Greer were secured to represent the government, Guthrie denied Macphail funding to cover the costs of her representation. When approached by a mutual acquaintance, McRuer agreed to take up the task free of charge. McRuer and Macphail knew a victory was unlikely, and they were right (Boyer, 1994, pp. 106–107). Much of the evidence boiled down to one person’s word against the other’s, and Judge Daly was quite disparaging of Hall’s character, Macphail’s key witness in the investigation (Canada. Commission on the Truth or Falsity of Statements, 1935). While Macphail lost this battle, the publicity of the Daly inquiry and the broader criticism of Canada’s prisons by different Canadian publications propelled the issue of penitentiary reform into the public realm during the 1930s.²⁵ With the help of Macphail’s persistence, *the Royal*

²⁵ Boyer writes that “hard-hitting exposés of prison conditions” published by the Toronto-based *Globe* newspaper and the nation-wide *Maclean’s* magazine helped to establish and maintain Canadian prison reform as a prominent issue during the 1930s (p. 102). *Maclean’s* was particularly active in this respect over 1933. Published over nine parts from August to December, “House of Hate” provided a sobering first-hand account of Austin Campbell’s experience as a prisoner of both the Kingston and Collins Bay Penitentiaries. A March article by DM Lebourdias described the pressing problem of prison riots, pointing the finger at the terrible state of “[p]rison treatment, [which] at best, lags far behind that which is due of even the lowest human beings” (p. 13). Lebourdias also mentioned the earlier efforts of Agnes MacPhail to see that Canadian prisoners were remunerated for their work, although she was

Commission to Investigate the Penal System of Canada, colloquially named ‘the Archambault Commission’ after its chair, was established in early 1936. Prison reform had nothing to do with McRuer taking on Macphail’s case. However, he had adopted the plight of those imprisoned across Canada during his experience as assistant Crown Attorney, a sentiment that only deepened through his work with Macphail (Boyer, 1994, p. 104). McRuer was not part of the original Archambault Commission, which included Quebec Justice Joseph Archambault as chair and RW Craig and Harry Anderson as commissioners. Soon after its establishment though, Harry Anderson, editor for the *Toronto Globe*, died in a plane crash (p. 120). He was replaced by Mel Rossie, editor of the *London Free Press*, but he also died before the Commission could get to work. It was only at this point that the Mackenzie King government selected McRuer for the Commission. According to Boyer, the choice was driven by three factors: (1) McRuer was “a reliable Liberal and Mackenzie King loyalist”; (2) he had a good public reputation and was at least somewhat familiar with penal reform; and (3) King was returning a favour while also cementing a relationship for the future (p. 120). Indeed, King and McRuer had been linked in the past. Impressed by McRuer’s work with Ontario’s Crown Attorney office, King had successfully

ignored. (A feature on MacPhail alone would come in the mid-June issue.) That even the fictional magazine entries referred to the matter indicates the pervasiveness of the topic at the time. Published on May 1, 1934, Frank Mann Harris’ “A Slip of the Tongue” opened with: “[t]his matter of prison reform, which occupies so much of our newspapers, is one of which I only know but little” (p. 14).

The Daly Inquiry itself was covered extensively in the papers, often serving as front page news for *The Globe* during the summer of 1935, a Canadian newspaper that would become today’s *Globe and Mail* following a merger in 1936. Coverage took a sceptical tone from the beginning. On May 23, it reported that Macphail was denied free counsel in a meeting that was suspiciously held in Ottawa but off of Parliament grounds (Marchington, 1935, p. 1). On July 30, an article following the release of the Daly report stated that Dr. AG Hall, the main witness for Macphail who was deemed largely uncredible by Judge Daly, was requesting a perjury trial so that the matter could be tried by a jury (“Hall Asks Perjury Trial”, 1935), although it appears this never happened. Less than a week later, a new article suggested that the Inquiry had served as a red herring to distract from the broader issue of prison reform, and offered the following characterization of the affair:

Hon. Hugh Guthrie, for reasons best known to himself, Superintendent Ormond and others, has seen fit to ignore Miss Macphail’s real purpose, and in endeavoring to bury it under a Commission which was no better than a mere pretense he has cast the full glare of public suspicion upon the whole administration. (“Suspicion Increased,” 1935)

Although the Daly matter was by no means sitting front and centre in post-Depression Canada, its publicity did no favours for the sitting Bennet government.

persuaded him to leave the position in the mid-1920s so that he could help the Canadian government win a case of corporate fraud (*R v Simington* (1926) 45 CCC 249). McRuer would also work on the campaign that had Liberal candidate Dugald Donaghy elected as MP in Vancouver.

Royal Commissions are generally understood as being expensive and producing little change (Chenier, 2008, p. 79), and this was partly why, at least according to Boyer (1994), McRuer was not your typical law reform commissioner:

He was certainly aware of the many ways in which politicians abused royal commissions by treating them as excuses for inaction, but he steadfastly believed that such independent bodies of inquiry formed an integral component of the British constitutional tradition. The custom of seeking the advice of experts on especially troublesome problems, McRuer believed, protected society from the machinations of unscrupulous politicians. (p. 121)

When published in 1938, the Archambault Report provided a major critique of the country's existing prison system. Although the Commission was made up of three members, Richard Craig was the odd man out since he had done little work and tended to disagree with the views of his colleagues (p. 127).²⁶ The Report was a major philosophical break from the existing practices of the time, with the Commission arguing that prisons should work towards rehabilitation instead of retribution. The call for such changes was not maintained on humanitarian grounds as much as it was utilitarian ones. Foreshadowing his involvement in the RCLI, McRuer would return to one question again and again: “[e]verywhere McRuer went he asked the professionals and inmates the same question: ‘In your opinion, what is the greatest cause of crime?’ And everywhere the answer was the same— ‘broken homes’” (p. 125). Rather than blindly pursuing retribution then, the Archambault Commission stressed that the purpose of

²⁶ Archambault also suffered a serious injury around the time that Commission was formed which impacted his mobility. While he still partook in research trips, when the Commission travelled to Europe to examine the prison systems there, much of the actual touring was left to McRuer.

prisons was, first and foremost, to prevent crime. Given that recidivism contributed to the majority of Canada's prison population, any goals of rehabilitation that predated the Commission's Report were clearly failing (Government of Canada. Parole Board of Canada., 2018). Not only were prisons unsuccessful in this respect, they were making those housed there worse before being released back into the community (Government of Canada, 1938).

It would be wrong to say that the Archambault Commission alone introduced the idea of reforming prisoners to Canada, or that it was a lone voice in the pursuit of prison reform at the time. According to Correctional Services of Canada (2014a), prisons received greater attention because the crime rate rose in the 1930s—arguably, as a response to the onset of the Great Depression—and prison populations increased accordingly. Smith (2016) questions this narrative, noting both the lack of consistent, centralized crime reporting that persisted in Canada until the 1960s, as well as the apparent decrease in crime noted in many American cities during this decade (p. 28-9). At the same time, there does seem to be more ground to the “spirit of compassion [that] persisted” according to the CSC. The John Howard Society, a voluntary association that advocates for a humane prison system and helps to reintegrate ex-prisoners, was founded in 1931, and the Elizabeth Fry Society, a similar association with a focus on women, was formed at the end of the decade.²⁷ Still, the Archambault Report “would become the bible for those who wanted to introduce modern methods to penology in Canada” (Government of

²⁷ Not only have the humanitarian motivations of the namesakes of these organizations been questioned (Sim, 1990, p. 4), but there has also been critical examination of what often overtly reads as progress. For instance, Kilroy and Pate (2010) show that the position of the Canadian Association of Elizabeth Fry Societies (CAEFS) has transitioned from one of reform to one of abolition. And while groups like CAEFS have brought attention to the many unjust incarceration practices impacting marginalized populations—for example, the overrepresentation of Indigenous populations in prisons, itself a reflection of colonialism (Marriner & Moore, 2006)—there is also concern that seemingly positive changes can have negative effects. Angela Cameron (2006) showed that pushes for the use of restorative justice models in Canada, including those coming from the John Howard Society of Canada, can promote dated models of Aboriginal justice that fail to reflect more contemporary approaches responding to modern problems faced by Indigenous populations.

Canada. Parole Board of Canada., 2018), ushering in an era that claimed allegiance to rehabilitation rather than punishment.

According to the Archambault Report (1938), the starting point in rehabilitation was proper classification and segregation (p. 100). The classification of prisoners had been a part of Canada's prisons since before Confederation, and it was addressed in various sources like legislation and investigative commissions. But the Commission argued that many of these proclamations were misguided. The Auburn model that characterized many of Canada's 19th-century penitentiaries used manual labour, solitude, and religious observance to morally rehabilitate the incarcerated, the failures of which were supported by high recidivism rates and increased rates of mental illness (Government of Canada, 1938, p. 168; see also Grassian, 2006, pp. 341–342). Other claims simply lacked substance. The Report offered the example of Collins Bay Penitentiary, funded on the grounds that it would serve only “the most reformable prisoners” (p. 104). As it turned out, the prison was only selecting the most physically able prisoners due to the intense manual work demanded of them. Obvious criticisms aside, the Commission did not suggest the task of classification was easy:

No categorical rules can be laid down which will be applicable in detail to the classification of all prisoners. Those whose duty it is to perform this task must apply a large measure of discretion and wisdom in carrying out this the task. (p. 105)

While this duty did not fall to the Commission, they did have some preliminary guidelines. For one, prison populations could be divided into three broad categories: “the accidental or occasional criminal, the reformable criminal, and the habitual or persistent offender” (p. 9). Since the final group would likely never return to the community and could have insidious effects on the reformable, they needed to be segregated. With that done, placement and treatment

of the first two groups should then be further detailed according to various factors like education, physical health, and prior record.

There were, however, other outlier groups that needed to be distinguished from these three groups. These included juveniles (i.e. under 24 years of age), the mentally deficient, and the insane (p. 105). The insane offender was not the focus of the Archambault Commission, but was unavoidable in the course of the study. Royal Commissions are limited by their terms of reference, and this specific committee was tasked with studying various aspects of the operation and functioning of Canadian penitentiaries. The Archambault Commission acknowledged its own limits; avoiding any comments on treatment, it instead focused solely on how those found NGRI were currently managed in penitentiaries. This approach framed insanity as a largely administrative task. For instance, the federal-provincial divide over institutional jurisdiction, with the former controlling penitentiaries and the latter mental hospitals, was noted as a complication for managing those with mental illness that came into conflict with the law. At the same time, these practical discussions inevitably drew out important philosophical positions. Those diagnosed with mental illness often poorly adapt to prison environments and create difficulty for those in charge of day-to-day operations; their presence is also problematic because the punitive elements of penitentiaries were not designed for those deemed not criminally responsible due to mental illness (p. 153). While the Report was clear on the Commission's position—namely that insane subjects are medical cases through and through—others supported the notion of criminal insanity, which meant there was a distinct medicolegal category that is neither captured by mental illness or criminal responsibility alone.

As will be seen in the following chapter, the RCLI would pick up on these unresolved issues. While the problem of criminalized insanity was peripheral to the work of the

Archambault Commission, the group's cursory observations—and in particular, their effort to properly categorize those deemed insane—foreshadowed the daunting difficulties that awaited the RCLI. As will be seen in chapter three, even the seemingly surface-level tasks like prisoner classification were often insurmountably complex in relation to the ontologically-obscure insane subject. Indeed, the work of the RCLI would only further highlight the difficulty involved in making sense of those deemed insane in Canada during the mid-20th century.

2.3 Building the Psy-entific Optimism of the Reconstruction Era

Although Royal Commissions have been identified as producing little change, the Archambault Report had momentum following its publication at the beginning of 1938 (Grudzinskas Jr. et al., 2009, p. 393). Further discussion was soon stalled by the onset of World War II in 1939, but the task of prison reform was taken up in Parliament with the War's end six years later. Several of the Archambault Report's recommendations, ranging from new institutions for incarcerated young adults to improved training for prison staff, were adopted as well (Government of Canada. Correctional Services Canada., 2014b). Indeed, the increasing application of the “psy-ences”, a term to be returned to shortly, was reflected in various ways in the criminal justice system that were not surprising given its new rehabilitative direction. The Archambault Commission's recommendations that psy professionals be used in Canadian prisons was gradually integrated in the post-World War II era. For instance, the classification scheme that was central to the new philosophy saw the creation of inmate classification officers, a role filled by workers that often had undergraduate training in psychology (Watkins, 1992, p. 15). In all likelihood, Canadian practices were influenced by trends in the United States where a similar prison classification system was instituted in New Jersey in 1918. The fact that the American system was designed by psychologists speaks to the standing of the field that had been bolstered

by its application in the country's armed forces during World War I (p. 9). Watkins' survey of the interwar literature on psychology in corrections confirms that the field was dominated by American professionals at the time. Evidence of Canadian research, on the other hand, only begins in the mid-1950s which aligns with the sub-disciplines apparent rise in the country only a few years earlier (p. 11).

The new rehabilitative orientation of Canadian prisons depended on properly identifying the root problems associated with criminality in the first place, so effective prisoner classification was a central component of the Archambault Report. This need played into the value of the "psy-ences", a term used by Raikhel and Bemme (2016) to identify "a set of arguments which link professional knowledge and expertise on the mind, brain, and behaviour with the wide range of ways in which people conceive of, act upon, and govern themselves and others under conditions of modernity" (p. 154). McAvoy (2014) uses the term "psy disciplines" in a similar fashion, and offers a definition worth quoting at length:

The knowledges and practices of the psy disciplines have become a central focus of attention within *critical* psychology because a recognition of the power the disciplines exercise in constructing and constituting people in particular ways; in labeling and shaping people; and in effecting the resources, opportunities, and restrictions accorded people. The psy disciplines are the professional, expert arenas where consequential judgements are made about people's mental health, behavior, cognitive capacities, personalities, and social functionality. (p.1527)

The post-World War II era in Canada was characterized by a certain optimism about the application of the psy-ences to issues that, up to that point, had traditionally been legal in nature.

In a 1947 speech to the House of Commons on the "habitual offender", MP John Diefenbaker said:

The recodification of our [C]riminal [C]ode is long overdue. It was done last in 1892. Since that time psychological and penological advances have been made which in considerable measure necessitate an early alteration in the law with respect to insanity, and also with respect to the principles of responsibility. (Diefenbaker, 1947, p. 5027)

This optimism was reflected in Canada's growing mental health sector that followed in the wake of the Second World War, as well as the important role the psy-ences would play in the welfare state that emerged in the country's reconstruction period. However, the application of the psy-ences had been growing since the beginning of the 20th century. The psychiatric profession, which was largely confined to the asylum for much of the 19th century, was finding new spaces at the turn of the century in the likes of child guidance clinics and the mental hygiene movement. As noted in the last chapter, the legal field was one of the first sites that appeared to recognize the value of psy application. For Foucault (1978b), it was psychiatry's ability to explain those vicious and unexplainable crimes that saw it seep into the courtroom, or in his words, to "tackl[e] the great criminal event of the most violent and rarest sort" (p. 5). In Ontario, Kirk-Montgomery (2006) traces the rise of forensic psychiatric experts in courtrooms during the late 19th century to capital cases, since it was only such circumstances that the monetary expense and potential stigma of a successful insanity plea could be justified. In Britain, Sim (1990) found that mental medicine worked its way into British prisons by offering scientific support to supplant disciplinary regimes. Some prisoners, for example, recognized psy diagnoses as providing the means to extend detention or deal with troublesome behaviours (pp. 69-70).

This earlier work in the psy-ences was limited by a lack of governmental funding that would only come following World War II, and then later with the financial backing of Big Pharma (Armstrong-Hough, 2015; Scull, 2011). The post-World War II expansion of the psy disciplines reflected their role in the reconstruction efforts that established the welfare state (Chenier, 2008; Dyck, 2011; Sim, 1990). Economically, the postwar reconstruction era was concerned with the continuation of wartime production and employment levels, so psy expertise grounded discussions of ability and disability (Dyck, 2011). For example, while women had long

been understood according to a patriarchal system of psy knowledge, this was especially pronounced when the goal was to re-substantiate their domestic role after participating in the wartime workforce (Sim, 1990). These kinds of concerns required greater government involvement in the lives of its polity and were thus linked to the expansion of the contemporary welfare state in many Western liberal democracies. This broad ideological reorientation required new social policy that was informed, at least in part, by the psy-ences. Like Rose (1996b), Sim acknowledges the heterogeneity of the psy-ences, with his study focusing more specifically on the problem of criminality in Britain. But in the years following World War II, this diversity was united in the broader reconstructive orientation that called for active intervention in the lives of the public. Sim writes: “[i]f crime could not be controlled then the social order, despite the advances made by the Welfare State, was in danger of collapsing” (p. 74). The same could be said of Canada. According to Chenier (2008), “[i]n both the United States and Canada, psychiatrists and psychologists exerted considerably more influence in the state organization of both the war effort and reconstruction than at any time in the past” (p. 29). This was seen in multiple ways including nation-wide efforts to educate the public on matters of mental health, increases in government spending on the mental health sector, and the expansion of training programs in the psy-ences (Chenier, 2008, pp. 29–30; see also Copp & McAndrew, 1990).

The two World Wars also made certain problems too big to ignore. “The shell shock epidemic”, an important diagnosis in the lineage of today’s post-traumatic stress disorder (PTSD), was a major lesson learned in the aftermath of World War I and prompted the wide-scale use of psychiatric screenings in World War II with the hopes of pre-empting a similar outcome (Scull, 2011). This faith in the psy-ences was reflected in the post-World War II British prison system where overtly disciplinary tactics were minimized in favour of approaches that

centred on the psy-based rehabilitation of prisoners (Sim, 1990). Corporal punishment was abolished and the prisoner was to be increasingly known in medical terms. This shift was evidenced by the increased use of psychiatric reports by the courts, psychiatric training for prison staff, and new institutional spaces in the prison, a group of reforms that together reflected the belief that the causes of crime could be known and treated.

The thirty-year gap between the close of the two World Wars also helps in explaining the markedly different responses to similar problems. When the environmental stresses of war were suggested as detrimental to the mental health of soldiers during World War I, degeneration theory was still a viable explanation (Eghigian, 2014). An ambiguous concept that was popularized by French psychiatrist Bénédict Morel in the mid-19th century, degeneration referred to a general degradation that could be seen in the symbiotic relationship of biological deficiencies and social problems. Class tensions had grown with industrialization and urbanization, and many problems associated with the indulgence of vice were explained in terms of individual pathology (Rimke & Hunt, 2002). As a result, degeneration easily supported eugenic policies that only faced widespread criticism when the practices of Nazi Germany came to light.²⁸ These degeneration-informed approaches were also attractive on the grounds of cost-effectiveness, given that the country did not experience an economic boom following the first World War like it would after the second.

While psychiatry might be “the dominant profession in the mental health sector” (Scull, 2011, p. 3), it does not constitute the psy-ences in their entirety. In particular, the field of applied psychology that emerged at the beginning of the 20th century also requires some discussion. Such

²⁸ Even then, eugenic policies persisted in different governmental activities. Sterilization policies, for example, remained in use in Canada well into the 1970s. In Sweden, women identified as amoral were prevented from having children (Rose, 2000, p. 23), and the Canadian provinces of British Columbia and Alberta had similar practices that were “based largely on mental incompetence or deficiency” (Dyck, 2011, p. 185).

disciplinary distinctions need to be treated with caution since the various psy-ences were not differentiated as clearly prior to World War II in Canada. At times, for instance, the Archambault Commission's Report conflated psychology and psychiatry and used the terms interchangeably. This is not surprising given the setting of 1930s Canada where professional distinctions between these groups were still a work in progress. For instance, while the American Psychological Association was created in 1892, its Canadian counterpart did not come about until 1939. Similarly, the American Psychiatric Association dates back to 1844, while the Canadian Psychiatric Association was not organized until 1951.^{29,30}

Similarly, while madness dates back to the ancient world, it was only in the late 18th century that psychiatry emerged as a distinct medical subdiscipline (Shorter, 1997). Even then, psychiatrists continued to struggle for acceptance amongst the wider professional community as practicing a legitimate branch of medicine. Scull (2011) attributes this in part to the swelling mental hospital populations that continued through the first half of the 20th century and the lack of biological treatments that only came in the second. Psychology, on the other hand, has a much briefer history as a distinct field of study. While its modern lineage traces back to the work of René Descartes exploration of reason and subjectivity in the 17th century (Danziger, 1990; Russell, 2004), the origins of modern psychology are typically traced to Wilhelm Wundt's

²⁹ There is good reason to compare the Canadian and American psy experience. According to Armstrong-Hough (2015), "psychiatrists in each country participated in a shared continental discourse and professional culture" by the beginning of the 20th-century (p. 211). These similarities stemmed from a comparable experience of asylum-based practice, shared journals, trepidation around state involvement, and attempts to move beyond asylum-based care to the rest of society (p. 212).

³⁰ Canadian psychiatrists participated in earlier voluntary organizations. The mental hygiene movement, which aimed to provide "a new kind of mental medicine that was to bring the psychiatrist out of the asylum and into the conversation with the social debates of the era" (Armstrong-Hough, 2015, p. 212), established a Canadian organization in 1918 (founded by Canadian psychiatrist Clarence Hincks, and Clifford Beers, the American psychiatrist that had founded the earlier movement in the United States). This voluntary association continues today as the Canadian Mental Health Association (CMHA). However, the CPA is distinct as the first organization focused on the profession of Canadian psychiatry.

Leipzig laboratory in 1879 (Danziger, 1990; Watkins, 1992).³¹ Descartes helped elevate the internal world of the subject as a central source of knowledge, but Wundt acted on the critique that this alone could not form the basis of a respected science (Danziger, 1990). Wundt thus introduced the world to experimental psychology. In contrast to the philosophical study of the mind and consciousness, experimental psychology was distinguished by its pursuit to systematically investigate subjectivity in the laboratory through an empirical approach (Asthana, 2015). By manipulating external conditions, Wundt argued that the processes of perception could become observable and standardized. It was this radical new method for examining consciousness that broke Wundt's ties to the philosophical discipline, although Asthana suggests that this disassociation came on the part of nervous philosophers that opposed an empirical approach rather than through Wundt himself (p. 244).

By design, Wundt's laboratory was insulated from the rest of the world. Both cautious and sceptical, Wundt was careful not to apply his research outside of the lab before he thought it was ready (Bartol & Bartol, 2013, p. 9). In contrast, others, like Wundt's one-time student Hugo Münsterberg, vehemently advocated for the potential of applied psychology (Bartol & Bartol, 2013; Sobel & Corman, 1992). While psychologists were divided on whether the discipline should be academic or applied, they continued to work primarily within universities at the beginning of 20th century (Sobel & Corman, 1992, p. 6). Real opportunity for the field's broader application only came with the onset of World War I, but even then it was largely limited to

³¹ Interestingly, Emil Kraepelin investigated the psychological aspects of mental illness in the Wundt lab. Although he believed mental illness was primarily biological, he left a laboratory focusing on the anatomical study of mental illness feeling that while biological answers would be ideal, they were unrealistic (Shorter, 1997, pp. 101–102). Kraepelin would later classify all mental illness into affective and non-affective psychoses, with prognosis taking the place of symptom content as the central concern in this model (Shorter, 1998, p. 107-108). According to Shorter, this became the distinction between the biological “medical model” and the psychoanalytically-oriented “biopsychosocial model”. Kraepelin is also often credited with identifying ‘dementia praecox’, the forerunner to schizophrenia (Maatz & Hoff, 2014), although this is a point of debate (Noll, 2012).

intelligence testing during the War years (Spring, 1972). The discipline evolved somewhat during the interwar period. While the psychologist's role as a post-secondary educator continued, they also began to be employed at law schools and increasingly came to be accepted as expert witnesses during this time as well (Bartol & Bartol, 2013). Still, the interwar psychologist had a limited function that was largely confined to testing (Sobel & Corman, 1992), especially when contrasted with the profession's postwar expansion. Here, psychology began to include therapy, the publication of research, and those other various signifiers of a discipline establishing itself (Chenier, 2008, p. 13; Rose, 1996b, pp. 104–105).

While the independent histories of the psy-ences are important, my project is interested in their involvement in the Canadian problematization of insanity. As McCallum notes in his genealogy of antisocial personality disorder (APD), “[b]y themselves, neither conventional psychiatric histories nor the more dispersed histories of penal law and criminality are helpful in formulating a perspective on these conditions and categories” (McCallum, 2001, p. 33). Joe Sim's examination of the development of medicine in English prisons (1990) is a reminder that such histories can overlook the important relations that go into the construction of the various psy disciplines and their findings. Such oversights can ultimately play into whiggish histories in which the revelation of objective medical truths are linked to their inevitability. Nikolas Rose (1996b) describes psy history in the following way:

These narratives establish the unity of the science by constructing a continuous tradition of thinkers who sought to grasp the phenomena that form its subject matter. Inescapably, from such a perspective the object of a science – the ‘reality’ it seeks to render intelligible – appears both ahistorical and asocial. It pre-exists the attempts to study it, it has always existed in the same form, and all these thinkers of the past have circled around a reality that has remained the same. Thus the works of these thinkers can be ordered into a narrative, arranged along a chronological dimension, which corresponds to a progress toward the object; disruption to this smooth progression can be reincorporated into the narrative via the notions of precursor, genius, prejudice and influence (p. 42).

Instead, I pay attention to the specific and localized emergences of psy knowledges. Drawing on Foucault, Rose (1996b) points out that particular “problematizations” are linked to various “surfaces of emergence”, a connection that recognizes the heterogeneity of the various dimensions of psy knowledge. Sim offers one such account in his examination of the development of medical services in British penitentiaries. According to Sim, the gradual but always incomplete “medical hegemony” dates back to important transformations in the second half of the 18th century, personified in particular by prison reformer John Howard. One significant change that Howard helped secure was the provision of healthcare in prisons; not surprisingly, his name is often equated with narratives emphasizing the humanization of prisons. In troubling this perspective, Sim shows that, from the beginning, prison medicine has fit into a broader rationale of discipline and punishment. Solitary cells and head shaving, for instance, contain synergistic medical (i.e. hygienic) and disciplinary (i.e. humiliating) purposes. As practices within the criminal justice system were legitimized by the psy-ences that offered new ways to know individuals across a wide spectrum of deviance, the psy-ences were in turn granted a new space to conduct research. This is especially valuable given the psy disciplines’ reliance on “categorization through observation”, a process that both helped in professionalizing the psy-ences while also playing into an understanding of deviance as linked to pathology (p. 10). Not surprisingly, findings of insanity in British penitentiaries only increased as medicine was given greater priority in prison administration (p. 41)

Sim’s analysis supports the idea that psy-entific understandings are shaped by their particular context and application. World War II, for instance, saw an increasing military concern with personnel classification and resource efficiency. As such, and to be explored in more depth in the next chapter, the sheer volume of psychiatric work had a major impact on the profession

since the limited number of psychiatrists meant a number of new ones had to be trained quickly. The application of psy knowledge in this site reflected the needs of war, and thus impacted notions of health and illness. As Copp and McAndrew (1990) show, abnormality was measured against the standard of the soldier and diagnostic labels were at times applied on the basis of poor military functioning alone (p. 42).

Sim, McCallum, and Rose all draw attention to the administrative gap filled by the psy-ences, a role that is linked to the proliferation of liberal democratic systems of governance beginning in the 18th century. The administration of individuals—the ability to categorize, manage, and act upon a number of different subjectivities—depends on knowledge claims that are grounded in truth. Psy offers truth claims that are not only based on medical and expert authority, but that are understood as rooted in those internal truths that constitute the individual to be governed; consequently, power acts through rather than upon persons. The heterogeneity of psy means that one does not find a monolithic theory of the individual or the self, but that the various branches of psy all offer a source of different theories, knowledges, experts, and vocabularies to articulate different aspects of these various selves. As Rose explains, the psy-ences increasingly comprise the conditions against which we come to know and understand ourselves. Such an approach does not need to be regarded as all good or all bad, but it is critical to maintain an awareness of the psy-entific lens through which we understand ourselves. What may have simply been evil in the past can now often be understood as pathological, and as such, much more amenable to individualized, therapeutic intervention. The scientific underpinnings of the psy-ences offer “a neutral, rational, technical expertise of authority” (Rose, 1996b, p. 14) that can sanitize the practices that might follow. Put another way, in focusing on the revelatory

understanding of the psy-ences, that is as a heterogeneous mix of disciplines that reveal various truths about ourselves, its unique function in tasks of governance be easily overlooked.

2.4 Conclusion

This chapter has followed three distinct but related lines of inquiry: the history of the *Canadian Criminal Code*, the career of JC McRuer, and the development of the psy-entific optimism that characterized post-World War II Canada. Each of these phenomena play an important role in the emergence of insanity as a Canadian problem in the mid-20th century, and help to set the scene for the more contained and localized focus of chapter three: the RCLI. As discussed above, the *Criminal Code* was significant in the particular problematization of the country's insanity laws since its more general reform shed light on the issue. As will be seen in the following chapter, the existence of the *Code* would continue to influence discussions of insanity law reform given that codification requires a kind of rigid certitude that those working on insanity law reform were not unaware of.

The emergence of insanity as a problem that followed from the broader efforts to reform the *Criminal Code* also brought attention to the figure of JC McRuer. In the following chapter, I detail McRuer's vital role as chair of the RCLI, the federal government's first in-depth examination of the country's insanity laws. This chapter's discussion of McRuer thus provides important context for his work on the aforementioned Commission and highlights his selection as chairman based on his past Commission work and the personal connections he had formed. This examination also provided a historical snapshot of the problem of insanity in mid-20th-century Canada. Most importantly, it illustrated the important link between insanity and capital punishment. As highlighted in McRuer's 1948 speech to the Canadian Medical Association,

discussions of insanity law reform during this time were framed largely by the defence's relation to capital punishment, an association that was only starting to be questioned in the 1950s.

Finally, the emergence of the problem of insanity is indicative of a certain psy-entific optimism that was evident in post-World War II Canada. The application of the psy-ences that grew during the first half of the twentieth century boomed at the conclusion of World War II. As will be explored in more depth in the next chapter, the postwar period in Canada was optimistic about what the psy-ences could offer in their application to law and the criminal justice system. Yet as will be seen, this hopeful outlook was stifled by the federal government's attempt to merge legal and psychiatric expertise around the particular problems presented by insanity in the criminal legal context. The minimal reforms brought in by the RCLI only highlighted the complexity of Canadian insanity law reform, and, as future chapters will show, foreshadowed its translation into particular, more urgent, and more manageable problematizations. Instead of reflecting the inevitable march of science, postwar medicolegal developments are thus better understood by investigating the ways in which Canadian legal and psy professionals attempted to work together around the problem of insanity, precisely what McRuer rallied for in 1948.

Chapter Three: The *Royal Commission on the Law of Insanity as a Defence in Criminal Cases*

Returning again briefly to Member of Parliament (MP) John Diefenbaker's comments on the "habitual offender", he told the House of Commons:

The recodification of our criminal code is long overdue. It was done last in 1892. Since that time psychological and penological advances have been made which in considerable measure necessitate an early alteration in the law with respect to insanity, and also with respect to the principles of responsibility. (Lang, 1972, p. 5027)

Diefenbaker's statement offers a telling snapshot of the problem of insanity in mid-20th-century Canada. First, it reflects a Bentham-like faith in the potential of the written law, and in this case, the *Canadian Criminal Code*. Second, Diefenbaker explicitly links the problem of insanity to criminal responsibility. Third, and perhaps most importantly, his words are indicative of a certain psy-entific optimism that was prevalent in Canada following the Second World War, and reflects the growth of psy during World War II as well as the role it would play in the country's post-World War II reconstruction period.

The emergence of the welfare state that followed WWII saw the federal government play an increasingly active role in attempting to secure the well-being of its population, and this in turn meant a more centralized approach to the problems of the post-World War II world. As will be detailed below, the exponential growth of the psy-ences during World War II—and psychiatry in particular—simultaneously boosted their profile and laid the groundwork for their soon-to-be expansion that reflected their place in Canada's reconstruction plans. However, by examining the work of the *Royal Commission on the Law of Insanity as a Defence in Criminal Cases* (RCLI), I will show that there was a significant gap between this sense of optimism around the psy-ences and what they could actually offer. While the Commission would begin its work with the understanding that the subject of its investigation was medicolegal in nature, and thus a problem

for the collaborative efforts of medicine and law, it would soon become clear that the two disciplines were not suited for a symbiotic relationship. Ultimately, the Commission would conclude that in contrast to its original position, insanity had to be understood and addressed as a legal problem, at least for the time being.

This chapter begins by offering a description of the growing federal role that was part-and-parcel of the emerging welfare state in Canada. Typically understood as peaking during the 1960s, this period saw the federal government take an increasingly active interest in the health and welfare of the Canadian population. This new mentality was driven by post-World War II reconstruction efforts that aimed to transition the country from a war to peacetime economy, while at the same time avoiding a reemergence of the preceding Depression-era standards of living endured by many Canadians. As such, the Canadian welfare state gradually grew in a “piecemeal” fashion with the introduction of various programs and policies aimed at providing a universal social safety net for its citizens (Blake et al., 1997, p. 121). This process typically saw provincial and federal governments negotiate the terms of new arrangements before introducing the legislation to Parliament (Karimi, 2017, p. 125). Rather than reflecting a simple sense of responsibility on the part of governments, Karimi (2017) argues that the comprehensive nature of the welfare state was indicative of the aim to transform socioeconomic class tensions—heightened by ideological threats encountered during World War II—into a sense of Canadian nationalism.

I then track the growth of psychiatry during World War II, which in turn sets the stage for the federal government’s involvement with the psy-ences during the country’s reconstruction efforts. This background provides the context for my examination of the work of the RCLI. First, I briefly outline the creation of the RCLI and discuss the medium of the Royal Commission in

general. I then move on to the work of the RCLI itself, and begin with its troubling of the historical link between insanity and capital punishment. Like insanity, the mid-20th-century efforts to reform the *Canadian Criminal Code* had named capital punishment as one of the areas in need of focused examination. Although insanity was not exclusively linked to capital cases, I show that the connection between the two had, up to this point, helped authorities navigate the unique problem posed by those deemed insane. The RCLI would affirm this link throughout its hearings, while foreshadowing the problems to come. As capital punishment increasingly lost favour before its almost total abolishment in 1976, the RCLI confronted many of the complexities that would surface as a result of the weakening link between insanity and capital punishment. In this way, the chapter lends support to the idea that insanity emerged as a unique kind of problem in the “contemporary era of Canadian history”.

Far from establishing any hybridized legal-psychiatric knowledge, the RCLI would draw attention to the incompatibility of these two disciplines as the Commission worked to address the problem of insanity in criminal law. This was, broadly speaking, a product of two factors. First, fundamental differences between law and psychiatry created an impasse that would only be highlighted by the RCLI. Legal understandings of insanity as expressed in the hearings of the Commission emphasized the concept as one related primarily to responsibility, a notion that was not easily reconciled with the medical vocabulary of psychiatry that spoke in terms of illness and symptoms. Second, discordance between the psychiatric subdisciplines during the mid-20th century meant that the field was problematically heterogeneous at this time. Tensions between psychodynamic and biological psychiatry were furthered by the lack of any standardized, overarching order, which made it difficult to translate psychiatric concepts into ideas that were accessible to lay and legal audiences. While these problems would gradually subside over the

coming decades—particularly as biological psychiatry would come to dominate the field, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) would impose order, and the development of forensic psychiatry would become an important form of expertise for addressing medicolegal problems—they could not be overcome during the time of the Commission in a way that would produce any meaningful partnership. Instead, the RCLI drew attention to the substantial hurdles that remained.

3.1 Reconstruction and the Canadian Welfare State

3.1.1 *Expansion of the Federal Government*

Expedited by World War II, the postwar reconstruction era saw the federal government take a more active role in securing the well-being of its population, a shift contentiously referred to as the founding of Canada's welfare state (e.g. Valverde, 1995). While remnants of this new approach remain today even after the neoliberal turn of the 1980s—comprehensive healthcare is perhaps the most obvious example (e.g. Moran, 2000)—early efforts sprung from the crisis of the Depression and focused more narrowly on unemployment and financial relief for the poor. Yet as Blake, Bryden, and Strain (1997) point out, “by the end of the Second World War, the public expected government to solve ‘social problems’ and generally believed that it had the capacity to do so” (Blake et al., 1997, p. 1). This was a marked departure from its responsibilities prior to that point; not only was the state a limited player in securing the quality of life of its population, but this was especially true of the federal government. According to David Guest (1997), the Constitutional arrangement of the *British North America Act* (1867; BNA Act)—legislation that created the federation of Canada—shows that matters of “health and welfare” were not high on the list of priorities for the drafters of Confederation since they were dealing mostly with rural and self-sufficient communities at the time (p. 8). Such areas were largely left

for provincial and municipal authorities by default, but the limited support available through these channels reflected the widespread belief in the abilities of individual enterprise and the free market. Consequently, to be in need was to admit a kind of personal moral failing, a view that was further bolstered by a Protestant belief in hard work as protecting the worthy from poverty.

Guest summarizes the situation as follows:

In the nineteenth century, and well into the twentieth, it was commonly held that the family and the private market were the two ‘normal’ channels of help for individuals and families faced with the loss of income or an income that was inadequate to cope with certain non-discretionary items of expenditure. (p. 3).

The complicated federal-provincial relationship established by the BNA Act,³² Guest continues, did not help either. This could be attributed, at least in part, to the fact that the process of Confederation had taken place in the shadow of the American Civil War. Upon the Civil War’s conclusion in 1865, some prominent colonists were concerned about American expansion into the underdeveloped west, and believed that this could be avoided if the British North American colonies united into a larger whole (p. 7). At the same time, Confederation also had to strike an agreeable balance of powers that simultaneously persuaded the colonies to join and avoided an excessively weak central government, the latter of which many believed was an important factor in causing the American Civil War in the first place. Thus, in its original form, the BNA Act was not conducive to federal involvement in the welfare matters of its population.

This would change as Canada shifted from a “residual” model of social welfare to an “institutional” model of social welfare whereby the federal government was expected to provide for the well-being of its entire population (Guest, 1997, pp. 3–4). This institutional model describes the welfarist approach that characterizes Canadian government policy following World

³² The *British North America Act* (now the *Constitution Act*) (1867) marked the confederation of the colonies of Nova Scotia, New Brunswick, and the Province of Canada to form the Dominion of Canada in 1867. The BNA Act divides the various fields of governance between the federal and provincial powers.

War II, beginning in the so-called reconstruction era of its history. Prior to this point, the preceding “residual” model provided limited support only for those in need, which reflected an understanding of poverty as the responsibility of the individual. This can be contrasted with the universal approach that offers support and services for all citizens, one that, according to Karimi (2017), was an important tool in building a sense of Canadian nationalism following the Second World War. Not surprisingly then, obtaining social assistance was a demeaning experience: in Neatby’s words (2003), “[t]o be on the dole was to be something less than human in the Canada of the 1930s” (p. 26). However, this began to change as the Depression pressed on. The gradual intervention of the Canadian government aimed at securing relief for its population ultimately served as an important catalyst in shifting to the new institutional welfare model (Strikwerda, 2013).

Neatby (2003) offers an unusually precise moment for the change that would characterize Canada’s post-World War II period: the 1938 federal budget. It was at this point, under the watch of Prime Minister William Lyon Mackenzie King, that the influence of Keynesian economics was clear for the first time. In Keynes’ 1936 book, *The General Theory of Employment, Interest and Money*, the author advocated for governmental intervention in the economy when market forces were unstable. The uptake of this economic philosophy in Canada saw a significant shift in federal fiscal policy: instead of pursuing a balanced budget, the government would now take on financial deficits in order to stimulate the economy. Given that the Depression had immediately preceded the onset of World War II, there was widespread anxiety that similar conditions would reemerge with the close of the war. Reconstruction efforts were focused on the smooth transition from a war to peacetime economy. In so doing, the federal government was taking a big leap forward in what constituted its’ responsibility towards Canadians.

The Canadian experience reflected widespread trends at the time. In England, economist William Beveridge released his influential work, *Social Insurance and the Allied Services* (1942). The Beveridge Report drew heavily on Keynesian economic theory and was an important source in the creation of the post-World War II welfare state in Britain. Although the British government invested to some degree in health and unemployment measures prior to World War II, it was nowhere near the scale that Beveridge recommended for the post-World War II era (Cutler et al., 2003, p. 21). This widespread shift in thought had important theoretical implications. Cutler, Williams, and Williams (2003) argue that Keynes and Beveridge “share a common political *a priori*” here:

Beveridge and Keynes are separately engaged on the common task of re-inventing liberalism; they reject the old liberal *laissez-faire* position of general hostility to state intervention in a market economy. With the presumption against state intervention suspended, the task of the new liberal is to make a reasoned demarcation of the proper sphere of state action. (p. 8-9)

According to Tillotson (2008), this meant that what had long been the territory of private concern was now public, although he also notes that a clearly demarcated line between the two is unrealistic. Valverde (1995) offers an important word of caution, warning against origin stories of the Canadian welfare state that hinge on singular, transformative moments. Her examination of the historical role of charities in Ontario disrupts oversimplified versions of the birth of the welfare state that is typically identified as emerging with World War II. She concludes that the philanthropic organizations that were the main sites of social assistance prior to this point operated on “mixed economies”, a finding that troubles narratives in which social assistance transfers from the private to public sphere at a particular moment in time. Instead, as Valverde makes clear, government authority was already exercised in this realm in a number of ways, such as in choosing which organizations to fund. At the same time, one is able to talk about a

Canadian welfare state that expanded in the post-World War II years. Its apex in the mid-1960s is evidenced by federal involvement in Canadian healthcare, where the *Hospital Insurance and Diagnostic Services Act (HIDS)* of 1957 and the *Medical Care Act* of 1966 were instrumental in establishing universal healthcare in the country. Valverde (1995) also points to a preoccupation with the minimization of the welfare state in the political rhetoric of the 1980s and '90s as signaling its continued significance (p. 35). On a global stage, this is most often associated with the governments of Margaret Thatcher in Britain and Ronald Reagan in the United States, but Prime Minister Brian Mulroney made similar revisions in Canada at the time as well.

Endpoints aside, the close of World War II witnessed a broad change in mentality whereby social ills became the concern of government. This reorganization was important because it recognized a new role for the Canadian federal government, although one that continues to be complicated by the federal-provincial divisions of power outlined in the country's Constitution. Those deemed Not Criminally Responsible (NCR) today remain complicated by their medicolegal status, a problem that was only coming to the fore in the discussions of the RCLI. Given the federal jurisdiction of criminal law and the fact that healthcare was and largely continues to be under provincial authority today, the Commission was confronted by the dual status of these subjects as wards of both the federal and provincial governments. As will be seen, the restructuring of the Canadian welfare state provides an important context for the problem of insanity as it emerged in mid-20th-century Canada. This would go hand-in-hand with the development of the psy-ences that were also deeply impacted by the Second World War and underwent significant changes during the postwar period.

3.1.2 Canadian Reconstruction and the Psy-ences

Both of the World Wars were a stimulus for matters of health in Canada. World War I drew attention to the scarcities in Canadian healthcare and the early interwar years saw the first federal-provincial collaboration around issues of public health. When the Federal Department of Health was created in 1919, venereal disease (VD) accounted for one of its most pressing problems and prompted “the first shared federal-provincial health program” in the country’s history (Rutty & Sullivan, 2010, sec. 3.8). The success of these efforts was reflected in the drastic reduction in rates of VD between the First and Second World Wars (MacDougall, 1994, p. 60). Not only had cooperation around this problem provided some loose guidance and optimism for plans of a national approach to the problem of mental health (Stogdill, July 10 1946), it was the urgency of VD that led to the quick creation of the Federal Department of Health in 1919 (Rutty & Sullivan, 2010, sec. 2.20). Its establishment also produced the Dominion Council of Health—made up of the Federal Minister and Provincial Chief Officers of Health, as well as a five-member board taken from various organizations in the community (sec. 2.21)—that would call for the creation of the Mental Health Division (MHD) in May of 1945 (Chisholm, July 17 1946). As Chenier (2008) put it, by the end of the Second World War “the federal government had made mental health a cornerstone of its reconstruction program” (p. 29)

The Department of National Health was a part of the newly formed Department of National Health and Welfare (DNHW) which reflected the government’s broad post-World War II policy that was summarized by the Mackenzie King government’s inaugural Speech from the Throne³³ in 1944: “while the post-war objective of our external policy is world security and

³³ From Canada’s House of Commons website:

Traditionally, the Speech from the Throne reveals the reasons for summoning Parliament. It begins with an assessment of social and economic conditions in the country. It then declares the Government’s goals and intentions, and outlines its policies and legislative agenda. (‘Speech from the Throne’, nd)

general prosperity, the post-war objective of our domestic policy is social security and human welfare” (Mr. Speaker, 1944, p. 2). These aims were embodied in the creation of three new departments during World War II: the aforementioned DNHW, the Department of Veteran’s Affairs, and the Department of Reconstruction. Evidently, the federal government was not simply taking a larger role in the health of the nation, but working with a broader conception of health. This was exemplified by G Brock Chisholm, a Canadian psychiatrist who became Deputy Minister of National Health in 1944. Chisholm also played an influential role in the establishment and early years of the World Health Organization (WHO), where, rather than taking a narrow medicalized view of illness and disease, he emphasized the social and economic dimensions that were essential aspects of health (Farley, 2008, p. 111). This viewpoint was reflected in the WHO’s constitution, adopted in mid-1946, and remains today. Although Chisholm was by no means its sole author, he played a key role as leader of the group that defined health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity” (LAC, RG 29, vol. 996, f. 337-2-2, pt. 2 as cited in Farley, 2008, p. 19).

The Mental Health Division illustrates the significance that the federal government assigned to all things mental health in the post-World War II era. In the words of the Division’s first leader, Dr. Charles G Stogdill, the MHD was established to:

[H]ave a hand in revising the reports of mental hospital statistics for the Dominion Bureau of Statistics, in making some plans for furthering training of psychiatrists in Canada, and in surveying working conditions and training facilities of psychiatrists, nurses and attendants in mental hospitals across the country with a view to perhaps setting minimal standards. (Stogdill, October 25 1946)

This description is somewhat limited though, as an organization chart showed a number of broad tasks all pointing towards a cohesive mental health program that would coordinate federal-

provincial relations, promote and support research and training, guide other government departments in psychiatric matters, and educate the public (Organization Chart, January 16 1947). This last job was especially important if mental illness was going to be diagnosed and treated, or better yet, prevented. Broadly speaking, such an undertaking was a significant demand on resources which reflected the importance assigned to matters of mental health in post-World War II Canada. In one of the Division's early press releases, Stogdill cites a 50 percent increase in Canada's mental hospital population over just 15 years (Advisory Group On Mental Health Ottawa's Plan, 1947; Advisory Committee on Mental Health, September 13 1947), a statistic relied upon more than once to indicate the growing urgency of diagnosing and treating mental illness (Cameron, September 16 1947). It was hoped that the communal efforts accompanying the prioritization of mental health as a national concern would be more effective than the disjointed and solitary provincial work that was going on prior to World War II.

Planning around the development of Canada's mental health sector was underpinned by an optimistic belief in psy intervention. While working to establish a conference between the federal government and the provincial Mental Health Directors, Stogdill informed the Deputy Minister of National Health that "[t]he advances in our understanding of mental illness in the last few years indicate that a radically different approach must be made in both preventive and therapeutic efforts" (Stogdill, July 17 1947). Mental illness was increasingly seen as a major threat to the population at this time, and the recent experiences of World War II were thought to justify intervention. Indeed, federal involvement was seen as a "duty" since mental illness was not just preventable but often curable, especially when caught early (Activities - Mental Health Division, March 6 1947). This sense of curability was still prevalent in 1953, the same year that the RCLI was called (Progress in Mental Health, February 1953, p. 8).

At the same time, it was obvious that the psy fields—and psychiatry in particular—were in the midst of a significant period of internal transition. When Lieutenant Colonel J Matas of the Royal Canadian Army Medical Corps reached out to Chisholm in early 1946, Chisholm replied: “I regret that the psychiatric field in Canada is at the moment so unsettled that it is difficult to give you any clear-cut information” (Chisholm, January 28 1946). Chisholm was undoubtedly referring to the major changes that World War II had brought to the psy disciplines. To understand the post-World War II role granted to the psy-ences, their growth during World War II needs to be discussed first.

3.1.3 World War II and the Psy-ences

The emergence of the psy-ences in the post-World War II reconstruction period highlights three important points regarding their expansion during the Second World War. First, the growth and transformation of the psy-ences during World War II had lasting impacts on the associated fields. Psychiatry in particular experienced an important re-organization whereby psychiatrists working in mental hospitals came to play a more prominent role in the discipline. Second, this growth reflected a gradual acceptance that the application of the psy-ences increased the overall efficiency of the war effort. Although costly up front, it was believed that the proactive approach prevented more significant problems later. Third, it was the abilities of the psy-experts to classify behaviour that proved most beneficial in the war setting. Rather than their ability to treat and cure, their effectiveness was derived from their capacity to ‘know’ a heterogeneous group of subjects that could help to legitimate ways of acting upon them. The aftermath of World War I provided an important lesson about the impacts of war on mental health. Even if shell shock—or ‘war neurosis’ as it was commonly known at the time—was understood by many during this period as indicating a weak constitution in those it afflicted (e.g.

Grinker & Spiegel, 1944), the problem was no less real in that these individuals could not contribute to the war effort. Prophylactically, the Canadian military had used only basic and minimal medical screening. Any specialist knowledge, including psychiatric, was deemed unnecessary. Instead, general physicians were trusted with determining whether or not a potential recruit was mentally and physically suitable for service (Copp & McAndrew, 1990, pp. 11–12). Little had changed by the opening of World War II. Unlike in the United States, where delayed entry into World War II had allowed the application of recently developed intelligence and psychiatric screenings to prevent a substantial number of men from enlisting (Gleason, 1999, p. 32; Scull, 2015; Spring, 1972), the Canadian military was resistant to any special psy-based screenings that would inevitably decrease the number of available soldiers. Eventually, however, the Canadian army gradually followed suit. The Canadian Psychological Association (CPA) offered its services, and, in spite of the lukewarm reception it received, designed a new intelligence test that leaned on the earlier American work (Copp & McAndrew, 1990, p. 28). Its uptake in 1941 reflected a developing wartime ethos that saw psy-entific application as a cost-effective measure that would ultimately save resources down the line.

Intra-professional conflict within the field of Canadian war psychiatry would prompt a re-organization of the psychiatric discipline that would continue into the post-World War II period.³⁴ According to Copp and McAndrew (1990), neuropsychiatrists sat at the top of the discipline's hierarchy at the beginning of World War II. As neurologists who specialized in

³⁴ Copp and McAndrew's professional categories are not mutually exclusive. CK Clarke for instance, who the authors identify as one of the founding leaders of the mental hygiene movement, was also one of Canada's most well-renowned psychiatrists. Along with his involvement in mental hygiene, Clarke worked extensively in the asylum over his nearly 40-year career (Mott, 1924, p. 219). He began as clinical assistant in the Toronto Hospital for the Insane in 1874, before moving on to the position of assistant superintendent at the Hamilton Asylum for the Insane. He then took up the same position at the Rockwood Asylum for the Insane in Kingston, before being promoted to superintendent. Finally, he ended his career as superintendent of the Toronto Hospital for the Insane in 1911.

psychiatry, neuropsychiatrists posited that mental illness should be reflected in observable brain abnormalities. Since mental illnesses with such evidence were few and far between in practice, Edward Shorter (1997) notes that when neuropsychiatrists could neither explain nor help those exhibiting psychiatric symptoms, patients would be sent off to the asylum doctors. The growing prestige of this latter group was aided by perceptions of treatment efficacy that could be measured in the return of afflicted soldiers back to battle (Grob, 1991, p. 427), although this was more true of the American and British experience since Canada tended to transfer these individual to non-combat positions (Copp & McAndrew, 1990, p. 153). More than any therapeutic contributions, however, it was in the administrative aspects of military life that psychiatry proved most valuable. As the Second World War progressed, the Canadian military gradually accepted the notion that pre-empting psychiatric casualties was the more efficient approach, and practices were adopted accordingly. Where medicine previously provided a myriad of diagnoses to prompt the un-enlistment or transfer of soldiers (e.g. flat feet (Copp & McAndrew, 1990, p. 150)), psychiatry now provided the primary tool for ensuring that the military was comprised of a certain calibre of soldier who could meet the demands of contemporary warfare. According to Brock Chisholm, Director of Personnel Services in the Canadian Army during World War II (and eventual head of the Mental Health Division), psychiatrists were dealing with the decisions of training officers (p. 150). Rather than treatment and cure, it was the ability of the psy-ences to know, classify, and act upon problematic subjects that stood out during the Second World War.

The application of psychiatry during World War II was not understood as an act of empty labelling though, and the problems associated with psychiatric casualties during World War II were taken seriously as they carried over into the postwar period (Dyck, 2011, p. 191). The

federal government's investment in psychiatry during the reconstruction era is testament to the fact that, at least to authorities of the day, the psy-ences were transitioning from a niche set of disciplines to playing a fundamental role in the international rise of the welfare state. Yet as I argue in the remainder of the chapter, the RCLI would show that efforts to integrate legal and psy expertise around the problems of insanity presented a major hurdle in mid-20th-century Canada. In many ways, the Commission can be understood as marking the beginning of the contemporary era of insanity law in Canada since it was an early indication of the kinds of problems that would be of central importance in the near future. In particular, the Commission would draw attention to the increasingly problematic link between insanity and capital punishment, a pairing that historically imbued the defence with an humanitarian and merciful air. Far from providing solutions, the Commission foreshadowed the problematizations of insanity that, as will be detailed in the coming chapters, surfaced in the subsequent decades.

3.2 *The Royal Commission on the Law of Insanity as a Defence in Criminal Cases*

3.2.1 *The Royal Commission as an Inquisitorial Body*

As discussed in the last chapter, the *Royal Commission on the Law of Insanity as a Defence in Criminal Cases* (RCLI) was an outgrowth of mid-20th-century efforts to reform the *Canadian Criminal Code*. Picking up on the draft Bill created by the *Royal Commission on the Revision of the Criminal Code*, the *Special Committee of the House of Commons on Bill No. 93* (1954) stated that, although within their jurisdiction as outlined by the terms of reference, the defence of insanity, capital punishment, corporal punishment, and lotteries³⁵ were “of such paramount importance that they could and should not be dealt with merely as incidentals to the

³⁵ See chapter two, footnote 16 for an explanation of the inclusion of lotteries.

consolidation or revision of the present Criminal Code embodied in Bill 93” (p. 64). Where joint Parliamentary committees were established to deal with the last three issues, insanity was deemed a question of both legal and psychiatric expertise and, as such, was better suited to the investigation of a Royal Commission (Garson, 1953, p. 941).

Royal Commissions are ad hoc bodies of inquiry created by the government to investigate a particular issue or set of issues. Created according to the *Inquiries Act* (1985), they enjoy a substantial degree of autonomy in their operation since they act independently of any branch of government, although this freedom is tempered by a number of features. For one, the executive branch is central in shaping the specific Royal Commission since the Governor General appoints commissioners based on the advice of the Prime Minister and Cabinet. At least in origin then, the Commission is not as politically insulated as the process may suggest. These bodies also only provide recommendations in a final report where it is not uncommon for them to die on the page (Hodgetts, 1963, p. 476). This fact has played into criticisms that Royal Commissions are wasteful and inefficient (Courtney, 1969; Hodgetts, 1968), although some have suggested that this might be appealing to governments wanting to give the appearance of action without needing to produce any actual change (Courtney, 1969; Hodgetts, 1963). The temporary nature of the Royal Commission is important as well because it limits the body to the assigned task that is defined by the Commission’s terms of reference—handed down by the executive branch—which also establish the scope of the investigation. In this way, the terms of reference can be significant in how they articulate and circumscribe a Royal Commission’s investigation of a particular problem or problems. For instance, the terms of reference assigned to the British Royal Commission that investigated the status of capital punishment in the country during the mid-20th century were crafted in a way that excluded the possibility of its abolition, even in light

of a strong abolition movement at the time (Block & Hostettler, 1997, pp. 122–123). It is for this reason—for its capacity to frame the way in which problems are understood—that Royal Commissions can be important “site[s] of sense-making” (Inwood & Johns, 2014, p. 8).

Although less common in recent years, Royal Commissions remain unique bodies and their creation points to a need that cannot be covered by the existing branches of government or alternative investigatory bodies. Their potential to incorporate a variety of opinions into their investigation, whether lay or expert, combines with their public nature to promote the medium as an exercise in democracy. The heavy reliance on outside expertise also points to the oft-touted objectivity said to underlie their work. In Courtney’s words (1969), they offer “cool, sober, detached reflection on policy matters by people not in the public forum of day-to-day politics” (p. 212). Writing of them in the late 1960s, Hodgetts (1968) suggested that “probably the Royal Commission remains as the most outstanding instrumentality for bringing knowledge to the service of public power in Canada” (p. 271).

It should also be noted that the RCLI did not take the contemporary format of the Royal Commission that began to develop in the 1930s. This contemporary iteration saw the Royal Commission transform into “sizable, temporary departments staffed by social scientists representing every discipline” (Hodgetts, 1968, p. 273) that would be expected to produce publication-grade research by the end of the twentieth century (Jenson, 1994, p. 43). Instead, the RCLI took the approach of the traditional model that Hodgetts’ summarized as follows:

They were nearly always small in size, often relying on a single commissioner; they invariably drew on the bench and bar for commissioners and staff; they pursued their inquiries by means of public hearings, frequently travelling across Canada for that purpose; their reports were based on the “evidence” in the transcript; their findings were placed before the executive as formal reports addressed to His Excellency the Governor General. In composition, procedures, and reporting, the traditional Royal Commission was akin to an *ad hoc* circuit court with carefully delineated terms of reference. (1968, p. 272)

The RCLI was established by an order-in-council on March 2, 1954, and the appointed five-member Commission personified the medicolegal understanding of the problem. It included: James Chalmers McRuer, chief justice of the High Court of Justice of Ontario and chairperson of the Commission; Dr. Gustave Desrochers, assistant superintendent at St. Michel Hospital in Quebec City and vice chairperson of the Commission; Helen Kinnear, county court judge for the county of Haldimand in Ontario; Dr. Robert O Jones, professor of psychiatry at Dalhousie University in Halifax, Nova Scotia; and Joseph Harris, a distinguished businessman from Winnipeg, Manitoba. The Commission also retained the services of James Worrall who would serve as its counsel and take an active role in examining the witnesses coming before the RCLI.

The Commission held a mix of both public and private hearings that spanned across 13 Canadian cities between June 1954 and April 1955. It is not entirely clear why the RCLI adopted the traditional approach as described above, but as the more economical option, cost appears to have been a factor (Boyer, 1994, p. 281; Hodgetts, 1963). The choice was by no means dated either; even though the contemporary method became increasingly popular in the post-World War II era, the traditional model persisted alongside it. The terms of reference assigned to the RCLI defined the task as follows: “to inquire and report upon the question [of] whether the criminal law of Canada relating to the defence of insanity should be amended in any respect and, if so, in what manner and to what extent” (Privy Council Office, 1956, p. vi).

As the remainder of this chapter will show, the RCLI’s initial ambition of the medicolegal co-production of insanity was stunted by the discordance between psychiatric and legal knowledges at the time. Gradually, the Commission became aware that psychiatry—the predominant psy-ence throughout these hearings—would not provide any of the fundamental and decisive answers it initially hoped to receive, and instead problematized fundamental

assumptions that propped up criminal law. While the Commission would begin its investigation with the bright-eyed, psy-entific optimism of the day, it would conclude that, at least for the time being, insanity was best approached primarily as a legal problem.

3.2.2 Insanity and Capital Punishment

While insanity as a legal defence was not limited to capital crimes, the two had long been linked. For Foucault (1978b), psychiatry was first taken up in the courtroom because it could offer explanations for those extreme cases that appeared to defy explanation. According to Kirk-Montgomery (2006), early use of forensic expertise in late-19th-century Canadian criminal trials was seldom employed and it was only financially justified when the accused was facing a capital charge (p. 121). When execution was not on the table a prison sentence was often preferable to the indeterminacy and stigma of a mental hospital sentence (ibid). Verdun-Jones (1981) reasoned that given the horrendous conditions of many asylums during the 1800s, “it is... hardly surprising that the insanity defence appears to have been employed primarily as a means of evading the noose and to have been generally confined to a small number of murder trials” (p. 210).

As chairperson of the RCLI, McRuer was evidently aware of this relationship, which persisted into the mid-20th century. In 1948, during his invited lecture before the Canadian Medical Association on the topic of Canada’s insanity defence, he stressed the connection by stating that it was the existence of capital punishment that made the problem of insanity such an important issue. In his words:

[W]hile there is a revulsion in the public mind against the execution of a man who commits murder while labouring under a disease of the mind, there is no similar revulsion in the case of one who is sent to prison for forging a cheque while under some delusion that would give him, if the facts believed were true, a right to sign the cheque. (McRuer, 1949, p. 494)

While a concern in theory, many were confident that the mentally non-responsible were just not executed. This certainty was derived from a combination of the executive branch's in-depth review of all capital sentences and the simple abhorrence of such a notion. William Belmont Common, the Director of Public Prosecutions in Ontario's Attorney-General Office, said as much when speaking to the Commission:

What I am getting at is this – take a capital case where the defence of insanity has been raised, I do not know of any case where I can honestly say that the sentence of the Court has been carried out where there has been any doubt as to the sanity of the convicted man. (*Public Transcripts*, 1954-1955, p. 1235)

The Report of Nova Scotia's Sub-Committee on the Rules in McNaghten's [*sic*] Case, a reworked draft of which was presented by Louis McDonald, Director of the Criminal Division of the Attorney-General's Department, argued that this mechanism allowed lawmakers to avoid more complex discussions about the relationship between insanity and criminal responsibility. More specifically, the Sub-Committee argued that the country's M'Naghten-based laws, to be returned to shortly, needed to be amended in order to officially recognize those suffering from "irresistible impulse". Irresistible impulse proposes a volitional understanding of insanity in which mental disease prevents individuals from resisting their criminal compulsions. The continued denial of the phenomenon was growing more problematic, the Sub-Committee argued, because the existence of such a category of persons was now unquestionable (*Public Transcripts*, 1954-1955, p. 465). The refusal also appeared archaic since irresistible impulse was increasingly recognized internationally (p. 476). The reason that lawmakers could continue to ignore the concept of irresistible impulse was because the royal prerogative of mercy was considered in all capital verdicts, the belief being that any subjects deserving of mercy but falling outside the narrow confines of M'Naghten-defined insanity would be reprieved (pp. 466, 468, 469). The

arrangement was perhaps even preferable for many who thought that the introduction of the doctrine would be at high risk of abuse.

Until 1961, capital punishment was the automatic sentence for anyone found guilty of murder in Canada (Chandler, 1976, p. 13). It remained in use until the Canadian government placed a moratorium on the practice in 1967, and it was all but completely eradicated nine years later.³⁶ Thus, considering the abolition of capital punishment was not unrealistic when the RCLI began its work in the mid-1950s. As noted above, capital punishment was one of the four areas flagged for closer consideration following the work to revise the *Criminal Code*, and the RCLI would repeatedly return to the issue throughout its work. Debate around the sentence was also not limited to Canada, as Britain was also questioning the validity of the sanction at this time. The beginnings of a British Royal Commission to examine the topic were evident in late 1948 and it would eventually publish its findings in 1953, although the terms of reference limited the commissioners to examining the potential alteration of the sentence rather than its possible abolition (Block & Hostettler, 1997, p. 122). As a result, the British Commission was largely concerned with better detailing the various dimensions of criminal responsibility so as to further specify the kinds of individuals that should not face execution. Its final report further illustrated the connection between capital punishment and insanity, with the majority in favour of doing away with the century-old M’Naghten Rules entirely,³⁷ or at least expanding their scope to enlarge the group of persons ineligible for execution on these grounds.

It is not surprising, then, that McRuer raised the issue of insanity within the context of capital cases early on in the RCLI’s organization meeting of March 29, 1954, noting that Allen

³⁶ Military crimes were an exception to the reforms at this time. Since capital punishment was also governed by the *National Defence Act*, it would not be completely abolished until the reform of this legislation in 1998.

³⁷ The M’Naghten Rules form the basis of Canada’s substantive insanity defence, and will be covered in more detail in the following chapter.

Joseph Macleod, a representative for the Justice Department in attendance that day, had agreed to prepare a memorandum for the Commission on the details around the process in such cases (p. 10). After moving on to other matters, McRuer quickly returned to the general subject of insanity and capital punishment, a product of his drafted agenda, at which point Worrall took the opportunity to clarify that the defence of insanity in criminal cases was not limited to capital cases alone (p. 18). Agreeing, McRuer clarified for the rest of the commissioners that their work was on the problem of insanity in criminal cases generally; regardless of the offence the accused is charged with, the same law applied. At the same time, he took the opportunity to double down on the capital connection, pointing out that unlike any institutional sentence, the inalterability of execution meant that it demanding greater certainty (p. 18).

Following McRuer's request for a presentation on the country's use of execution, Minister of Justice Stuart Garson spent his time before the Commission explaining the process of capital cases, a major aspect of which was the use of the royal prerogative of mercy (RPM). It was no accident that Garson was the first witness before the Commission; McRuer thought it would be best for them to start with an explanation of the procedure taken in deliberations of executive clemency (*Private Transcripts*, 1954-1955, p. 70). This might be why Garson presented during the morning public session in Ottawa, even though a private session was held that afternoon. It is likely too, however, that the optics of such a decision were an important factor in the choice. The Commission discussed the two kinds of sittings available to them during their organization meeting—public and private—with the main difference being whether or not the media could attend (pp. 61-63). All of the commissioners stated their preference for private hearings and concerns were raised about asking specific individuals to speak to the Commission without providing them the comfort of privacy; McRuer felt judges in particular were at risk of

misrepresentation in the media. Harris was the first to mention the negative political connotations to this approach, and Worrall, drawing on his own experiences, agreed. Given the preference for private hearings, the volume of material produced in the public hearings is surprising. In terms of raw quantity alone, the private transcripts barely surpassed 300 pages while the public sittings amassed well over 1800.

McRuer was aware that discussing RPM was a delicate matter given that its deliberation took place in the Cabinet away from public view. When the Commission's counsel James Worrall wondered if it would be possible for each commissioner to get a written summary of the general process, McRuer responded:

I think it would be. A memorandum like that must be kept very secret. That is one thing that must not get into the hands of the press or the newspapers because, after all, executive clemency is a very wide right of the Crown and it is kept very confidential. One must be very careful to keep it confidential. (*Private Transcripts*, 1954-1955, p. 71)

Garson's presentation, which he clarified was largely recycled from the one he had given before the *Joint Committee on Capital and Corporal Punishment and Lotteries*, is telling in terms of why the context of capital punishment is an effective approach to manage and deal with the complexities presented by the problem of insanity. RPM, also known as executive clemency, allows the monarch to pardon in full or in part any subject under his or her domain. It is a throwback to a time when "[r]oyal discretion was integral to the sovereign's power: to question the King's decision to spare or condemn was to question the King himself" (Strange, 1998, p. 184). Given the severity of the sentence, all capital verdicts were reviewed by the Cabinet with the task of determining, on a case-by-case basis, whether or not an individual should be granted mercy. In her examination of Canadian capital cases between 1920 and 1950, Kimberley White (2008) found that the various dimensions of criminal responsibility were more easily taken up after legal guilt was established. As discussed in chapter one, substantive insanity law in Canada

is based on the M’Naghten Rules which came from the British House of Lords in 1843. Canada’s *Criminal Code* in 1892 read:

No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such act or omission was wrong. (s. 11)

Although there can be flexibility in the interpretation of the M’Naghten Rules, they have been routinely criticized for being too narrow.³⁸ As White showed, deliberations of mercy that followed capital convictions allowed for more interpretive breadth to consider and potentially act on any doubts around the mental responsibility of the condemned.

Where Garson provided a surprising amount of detail in terms of the general process of mercy considerations, the particularities of its application remained elusive. The power of clemency combined an absolute right of the sovereign with a discretionary element that was resistant to clear explication, an elusiveness that only further illustrated this distinctive and absolute ability. It was also important that the question was one of mercy—no more and no

³⁸ The history behind the M’Naghten Rules helps to explain their narrow “cognitive” understanding. According to Toole (2012), the increasing appearance of psychiatric expertise in British courtrooms at the beginning of the 19th century was precipitated by two developments. First, the development of the adversarial criminal trial in England during the 18th century saw an increasing concern with expanding the role played by defence lawyers and implementing rules of evidence. Second, psychiatry was only starting to establish itself as a medical discipline towards the end of the 1700s (Foucault, 2006; Shorter, 1997). As psychiatric expertise found its own place within courtrooms during the first half of the 19th century (Toole, 2012, p. 83), its scope often troubled foundational legal principles of guilt and responsibility.

By the mid-19th century, a handful of cases in Britain had prompted widespread concern that psychiatric evidence was exculpating those who were in fact guilty (Eigen, 2003; Toole, 2012). Eigen (2003) recounts the public outcry that followed M’Naghten’s verdict—M’Naghten had been found Not Guilty by Reason of Insanity for mistakenly assassinating Edward Drummond, the secretary of British Prime Minister Robert Peel—with many voicing their concerns that he was the third subject in less than fifty years to be found insane for the attempted assassination of a significant political figure (p. 6). That Queen Victoria was counted amongst the outraged regarding M’Naghten’s verdict added to the urgency brought on by the case; her input in the matter would see the use of antiquated legislation to put the issue before the judges in the House of Lords (the upper house of the United Kingdom’s bicameral Parliament) who would ultimately formulate the influential M’Naghten Rules (Ornrod, 2001; Shea, 2001). This was, and continues to be, an important moment in the legal articulation of insanity. As Joel Eigen put it (2003), “[b]y stressing the mind’s cognitive faculties, the McNaughtan Rules affirmed the common law’s traditional construction of the forensic *person*: a rational, purposeful being capable of perceiving the consequences of his acts” (p. 7). Consequently, those understood as volitionally insane and unable to control their defective will are excluded from cognitive understandings of insanity.

less—so as to not undermine the authority of the judiciary and instead reaffirm the separation of government powers. In other words, the executive branch of the government could only consider the question of whether or not to grant mercy rather than “questions of either law or fact” so as to respect the independence of the judiciary (*Public Transcripts*, 1954-1955, pp. 17–18). This in turn meant that questions of responsibility could often be translated into either-or questions of mercy. Garson’s authoritative comments clearly resonated with the Commission as they were cited extensively in its final report—fittingly, this was the first issue the report dealt with—to reiterate that this was a discretionary power that, by its nature, defied expression in any prefabricated formula.

McRuer was not wrong for his insistence on the connection between insanity and capital crimes. The Commission’s final report (1956) argues that it provided essential context for the proper understanding of insanity law, writing that “neither the law nor procedure can properly be considered without a complete knowledge of the procedure in Canada where the death penalty has been imposed” (p. viii). While it was acknowledged that insanity as a criminal defence was not limited to capital offences, the two were commonly counterpoised throughout the hearings. The link meant that there was a preoccupation with balancing the risk of executing the non-responsible on the one hand, while avoiding an easy escape for those deserving of the sentence on the other. Although insanity was often equated with irrationality (e.g. *Public Transcripts*, 1954-1955, p. 1226A), use of the insanity defence was regarded as strategic. Since it was understood as generally being employed when there was an overall cost-benefit for the defendant, that is when execution would be exchanged for a prison or mental hospital sentence, it

was always at threat of abuse.³⁹ Evidently, the Commission concluded that this was not just a potential threat, but a very real one, a belief that propped up a humanitarian interpretation of the insanity defence. The group concluded in its final report that it could not be said that insanity law had ever failed the accused, but rather that many benefitted from findings of insanity even where there was no basis for it (p. 15).

Consequently, the status of capital punishment loomed over the broader discussion of insanity throughout the hearings. For instance, the rationality of the insanity defence was a fundamental underpinning of the position put forward by the Saskatchewan Division of the Canadian Mental Health Association, which echoed the belief that where fitness to stand trial was not an issue, a plea of insanity was only attractive for the purposes of avoiding execution (*Public Transcripts*, 1954-1955, pp. 734–735). This meant that complex questions of responsibility and sanity were generally only found in murder cases. Echoing concerns that the insanity defence was providing a refuge for the guilty, the group argued that abolishing the death penalty would help rid the courts of those questionable cases in which the presence of insanity was hard to establish by making the defence less attractive. Without capital punishment, the defence would only be raised when “the prisoner’s mental incompetence was so clear-cut and unequivocal as to leave no doubt in the minds of any members of the court as to the true state of affairs” (p. 735).

The Canadian Psychiatric Association (CPA) also recognized the significance of capital punishment in its discussion of insanity and structured its presentation to the Commission

³⁹ Perlin (1991) argues that fear of malingering—here, referring specifically to fake claims of mental illness to avoid punishment—is a significant “pretextuality of law” that makes for excessively strict standards in regards to legally establishing insanity. What is more, he (1989) argues that malingering is notably rare, with its reverse being more common: accused persons often “feign *sanity*... even where the evidence of insanity might serve as powerful mitigating evidence in death penalty cases” (p. 716, emphasis in original).

accordingly. The brief was divided into three categories: (1) where capital punishment was retained, (2) where capital punishment was abolished, and (3) recommendations regardless of the status of capital punishment (*Public Transcripts*, 1954-1955, pp. 92-93-E). Echoing Worrall's point during the initial organization meeting, the third category recognized that insanity needed to be considered in all types of criminal trials, noting an increasing use of psychiatric evidence in summary conviction trials in particular (p. 93-D). Still, it was clear that the capital sentence was of fundamental importance to the submission, which summarized Canada's insanity defence in capital cases as the following:

In existing trials, where an accused person is charged with murder and the defence is insanity, the result is that the accused is hanged if the plea is unsuccessful, where he is held at the pleasure of the Lieutenant-Governor (which usually means life detention in a mental hospital) if the plea is successful. In other words, the result of insanity means life or death for the accused. (p. 92).

Alternatively, the CPA argued, abolishment of capital punishment would be transformative for the insanity defence in capital cases because it would no longer see "psychiatric evidence being used primarily to avoid the death sentence" (93-B). In these conditions, psychiatry would be able to focus on whether or not the accused should go to prison or a mental hospital. Here, the CPA imagined a strong separation between the legal and psychiatric issues before the court, suggesting that all psychiatric evidence could be withheld unless the jury found the accused guilty, at which point it would become relevant in sentencing (p. 93-C). Interestingly, the CPA argued that such a situation would allow for the complete removal of the M'Naghten Rules since the trial court would not concern itself with the psychiatric aspects of criminal responsibility, and psychiatric experts would not have to worry about legal culpability in their work. Most importantly, the CPA suggested that the removal of capital punishment would change the focus of insanity in capital case trials, opening it up beyond narrow considerations of mercy to

complex sentencing decisions that included more nuanced understandings of responsibility and difficult choices concerning the proper institution for criminalized subjects. In other words, the CPA argued that without capital punishment as its counterpart, the complexities of insanity would inevitably rise to the surface.

The RCLI's discussions of capital punishment highlight the important interpretive framework that the sentence provided in the workings of the insanity defence during the mid-20th century. While some witnesses like the CPA thought the link stood in the way of the judiciary's proper consideration of psychiatric issues, others thought it provided a loophole for those who were deserving of execution. Regardless of how groups and individuals differed in their understandings of the relationship between the insanity defence and capital punishment, the significance of the relationship went unquestioned. As the RCLI's work forced the Commission to consider the insanity defence without the context of capital punishment—even if only hypothetically—it was confronted with a complex phenomenon that it struggled to make sense of.

3.2.3 Confronting Insanity

3.2.3.1 A Problem for Psychiatry and Law

Rather than forcing interdisciplinary communication, the CPA proposed that legal and psychiatric knowledges could not only be applied separately to the problem of insanity, but that this was the best approach. This compartmentalized method essentialized understandings of insanity as either medical or legal. The earlier work of the Archambault Commission, which included McRuer as one of its three members, declared a similar position when it gave clear instructions for how these particular subjects should be conceived:

Your Commissioners are of the opinion that there is no class of persons who can be termed “criminally insane.” Those who have committed, or are likely to commit, violent or unlawful acts by reason of their insanity are essentially a medical problem and not a legal one. They are, in no sense, criminals, because their violent tendencies are due to mental disease. As diseased persons they are necessarily a responsibility of the province. (Government of Canada, 1938, p. 156)

Historically, understanding such subjects as primarily medical entities was far from a given.

White (2008) notes that medicine and law had little interaction prior to the nineteenth century (p. x), and that a legal openness to psychiatric expertise was not obvious until the early 20th century (p. 36). Indeed, the judges that formulated the influential M’Naghten Rules were clear that while medicine played an important supporting role in cases of insanity, the fundamental question was one of law rather than science. The increasing prevalence of the psy-ences in the post WWII era, however, troubled this position.

It was clear from the work of the RCLI that insanity was a problem for law *and* psychiatry. While the Commission was not bound to hearing only medical and legal opinions, these accounted for the vast majority of the testimony. The absence of non-medical and non-legal opinions contrasts with the concurrent *Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths* (RCCSP), a three-member Commission that ran parallel to the RCLI and shared McRuer, Desrochers, and Kinnear as commissioners. Given the call for a review of insanity law, Minister of Justice Stuart Garson felt that a review of the recent criminal sexual psychopath legislation was also in order (Canada. Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths, 1958, p. ix). McRuer accepted Garson’s request to lead the inquiry, but clarified that the insane and the criminal sexual psychopath would require two distinct Commissions (Boyer, 1994, p. 281).

The RCCSP offered an important point of comparison for the RCLI. While a review of the criminal sexual psychopath legislation was sparked by the study of Canada’s insanity laws,

the former captured the public's attention to a much greater degree. The majority of witnesses before the RCCSP were medical experts (Chenier, 2003, p. 92) and participation in the two Commissions was not mutually exclusive so some witnesses were involved in both; lay interest in the CSP was obvious. A number of different kinds of organizations participated in the Commission hearings, with a blend of religious, educational, and women's groups all showing their concern for the welfare of women and children, the primary victims of the criminal sexual psychopath. The introduction of CSP legislation in 1948 was the result of public pressure that mobilized around the problem of sexual offences against women and children following the close of World War II (Chenier, 2003, 2008). A product of both "sensational media coverage of sexual assaults" and a handful of high-profile murder cases in which the victims were children (Chenier, 2008, pp. 17–18), the introduction of CSP legislation marked a transition in which such perpetrators were understood through a medical rather than criminal lens. Ultimately, it saw that those designated as such were indefinitely sentenced in federal penitentiaries until they were deemed safe for release back into the community (p. 4).⁴⁰

⁴⁰ It is worth noting that although the CSP was a medicolegal subject, individuals deemed as such were sentenced to prisons and not hospitals. At a practical level, the Constitutional arrangement laid out in the *British North America Act* (1867) meant matters of health fell to provinces, and the federal government could not mandate their cooperation (Chenier, 2003, p. 92). According to Chenier, there were no federal research or treatment programs targeting the CSP population until 1971 (the CSP was known as the "dangerous sex offender" by this point) (p. 92). While Chenier highlights some resistance to the medicalization of those who committed violent sexual assaults on children (and to a lesser extent women)—she writes that judges "were often reticent to accept the central principle behind criminal sexual psychopath legislation: that perpetrators of sex crimes were unable to control their sex impulse" (p. 92)—she points to two factors underlying the medical understanding of this problematized group. First, the Depression had negatively impacted the traditional family and, as a result, a new abundance of aimless men posed a threat to women and children (p. 79). Second, the growth of the scientific study of sexuality during the 1930s played into a medical understanding of sexual activities that were perceived as abnormal (p. 79). However, psychiatrists openly acknowledged that the CSP presented a problem for which there was very little medical treatment (p. 84, 85, 88). While there was hope that CSP legislation would enable research into treatment and cures, the laws were ultimately prophylactic in providing for the indefinite detention of a largely untreatable subject that lacked criminal responsibility. As Chenier notes, the release of CSPs in Canada required psychiatric assessments stating that they were unlikely to offend again (p. 79).

Even with the understanding of insanity as a unique medicolegal problem, the absence of any parties during the RCLI that were neither legal nor medical in nature was surprising. As is common in the Royal Commission process, the RCLI toured a number of Canadian cities holding public hearings that were advertised in the local newspapers ahead of time, and anyone was able to apply to testify (The Royal Commission on the Law of Insanity as a Defence in Criminal Cases, 1956, p. viii). Yet the transcripts and final report reveal that this was, almost exclusively, a discussion between the Commission and legal and psychiatric professionals, albeit with the odd exception. Although Donald M Clouston was the president of the Newfoundland branch of the John Howard Society (JHS), he testified in his capacity as a private citizen and even submitted a brief based on views that were expressly his own. While he acknowledged that he held no relevant university degree, he had personally “delved deeply into mysticism, analytical psychiatry, spiritual psychiatry, Dianetics and Scientology⁴¹” (*Public Transcripts*,

⁴¹ As a springboard for Scientology, Dianetics is a form of psychotherapy invented by L Ron Hubbard that was most thoroughly outlined in his 1950 book, *Dianetics: The Modern Science of Mental Health*. Evoking Sigmund Freud’s tripartite division of the mind (i.e. the id, ego, and superego) (McCall, 2007), Hubbard proposed that all mental anguish is the result of tensions between the analytical and reactive mind, and ultimately expressed by the somatic mind. While the analytical mind is inherently capable of achieving a person’s maximum potential, it is hindered by the reactive mind that is bogged down by any number of negative events (“engrams”) that have taken place over the course of that person’s life. Through a process known as “auditing”, an auditor applies the principles and teachings of Dianetics to discover these unconscious memories in the therapeutic subject. Then, by having him or her re-experience them, they lose their effects on the reactive mind, and in turn, the analytical one as well.

The predominantly psychological and pseudo-scientific approach of Dianetics soon gave way to the religious Scientology that is recognizable today, marked by the creation of the Church of Scientology at the end of 1953. While the current tax-exempt status of Scientology is a product of its identification as a religious organization (Halupka, 2014), Christensen (2005) notes that the early popularity of Dianetics with the general public was a result of its redirection towards a lay audience following its early dismissal by the American Medical Association and the American Psychiatric Association, an experience that would also play into the organization’s anti-psychiatric views that continue today (p. 1047). Compared to its predecessor, Scientology would take a decidedly eclectic approach that ranged in influence from Eastern religions to science fiction, the literary genre in which Hubbard had initially honed his writing craft (Scientology also continues to use Dianetics) (Urban, 2011). Both Dianetics and Scientology have been the subject of criticism, although Scientology admittedly has more material to work with. Noted psychoanalyst Eric Fromm (1950) condemned Dianetics for dangerously oversimplifying the human mind and experience by narrowly locating all problems in the concept of engrams, as well as the hyperbolic claims it made in regards to the effects of the new therapy. Scientology has been the subject of a number of exposés and attacks in the general media in particular, but scholarly sources have also criticized the religion for, amongst other things, its reliance on pseudoscience (Kent & Manca, 2014), its self-identification as a religious organization in the name of profit (Lewis, 2015), inadequate responses to logical and scientific critiques (Menadue, 2018), and the use of coercion in retaining Church followers (Heil, 2017).

1954-1955, p. 523). Clouston also listed “the examination of, to a greater or lesser degree, some one hundred or more people who were confessedly mentally ill and approximately 50 discharged criminals” amongst his credentials, presumably based on his position at the JHS (p. 523). His position equated all criminality with insanity and understood both as a symptom of lacking social attachments to society at large. At the same time, Clouston recommended abolishing the insanity defence while gradually phasing out criminal sanctions and replacing them with scientific treatments aimed at curing those who transgressed the law. Clouston was aware that his ideas were radical, opening his presentation with a request to the Commission that they “suspend any prejudice or pre-conceived ideas that you may bring to this matter” (p. 408). One wonders if Clouston felt this actually happened given that the Commissioners failed to ask him any questions, which is quite unusual when compared to other witnesses; notably, he was not referenced in the final report.

One can only speculate as to why the Commission responded to Clouston as they did. As Chenier (2008) showed in her examination of the parallel RCCSP, psy experts clearly had an advantage in discussing the issue of homosexuality since it fit into the burgeoning sciences of sex and sexuality. But homosexuality had yet to be even partially decriminalized in Canada, so even the average citizen could speak in its relation to a public sense of morality (pp. 94-96). By contrast, insanity—even where discussions focused on distinguishing the morally culpable from the non-culpable—was very much a technical issue. The most glaring aspect of Clouston’s presentation was that he appealed to an esoteric kind of expertise that did not align with his identification as a private citizen. Regardless of what precisely drove the Commission’s limited reception of Clouston, he was an interesting witness for a number of reasons. As already noted, the Commission’s scant reception to his testimony was atypical and suggested that the group was

hesitant to accept him as an ‘expert’ witness; Clouston, however, readily disclosed that he was not “an authority on psychiatry or mental science” (*Public Transcripts*, 1954-1955, p. 409). Yet the scientific treatment of deviancy was a central component of the plans he proposed to the Commission whereby those convicted of criminal acts became the subjects of therapeutic rather than punitive interventions. Evidently, such treatments did not currently exist, and Clouston instead relied on a vague sense of optimism regarding the inevitable progress of science:

Eventually when remedial treatment and the practical means to effect it in mass numbers has been found, as it undoubtedly will be, the whole attention of law can be devoted to periods of detention for the cure of deranged minds instead of punishment for action which the perpetrator cannot help himself in performing. (pp. 531-532)

In many ways, it is not surprising that the Commission seemed to pay his presentation no mind. The only response to his submission was whether or not the Commission should mention the organizational activities of the John Howard Society for the transcripts. Yet while Clouston’s testimony may have been radical, some of its claims were not so different from many of the more well-received presentations. The broadness of the issues facing the Commission meant that its investigation of insanity often led to wider discussions of the link between mental abnormality and criminal responsibility that posed critical questions for many foundational propositions in both law and psychiatry.

While consensus was typically easy to achieve in abstract terms, differences of opinion followed when attempting to outline more specific and practical solutions. For instance, there was general agreement by those participating in the RCLI that crime was an inherently antisocial act and that the mental “normality” of anyone who committed a crime was necessarily under question (e.g. *Public Transcripts*, 1954-1955, pp. 353, 572). Where many witnesses limited just how far they were willing to accommodate such tensions, often stopping where public order and social control were compromised, Clouston thought that “no practical problem, no matter how

great or expensive in solution, should be an excuse for avoidance of the truth” (*Public Transcripts*, 1954-1955, p. 531). His non-expert status also provided a unique perspective to the Commission. Since he did not subscribe to either a medical or legal approach, his comprehensive consideration of the problem of insanity was unencumbered and left him free to follow his reasoning to what he felt was its natural resolution, no matter how extreme these suggestions might be. On the one hand, the limited consideration of Clouston’s testimony was to be expected. There can be little doubt that the vague details regarding an essential component of his plan—the scientific treatment of deviancy—only hurt his case, and his unique independent status as a witness before the Commission likely did not help either. At the same time, his presentation cannot be overlooked in that it directly challenged one of the core philosophical building blocks common in the pursuit of justice, namely moral agency.

Clouston’s holistic approach to the problem of insanity reflects the vastness of the concept, even when limited to the context of the criminal law. Consequently, establishing the boundaries of the discussion was a continual work in progress for the Commission. During its organization meeting in March of 1954, the issue of the group’s name came up. Although a mouthful, McRuer thought it would be hard to improve upon the then-temporary and eventual official title of the group: The Royal Commission on the Law of Insanity as a Defence in Criminal Cases. Commission counsel James Worrall suggested dropping “on the law” and “in criminal cases”, but McRuer overruled, insisting that “[w]e really are engaged with the law” (*Private Transcripts*, 1954-1955, p. 16). In a moment foreshadowing the hearings to come, vice chairperson Dr. Desrochers proposed using the term “criminal responsibility” instead, but McRuer promptly shut this down noting that the focus of the Commission was insanity, not criminal responsibility (p. 16).

While McRuer was technically right, insanity proved to be a particularly difficult concept to define. Part of the confusion was that it was primarily a legal term defined by an absence of criminal responsibility, which was not easily translated into terms of mental health medicine. The brief of the Saskatchewan branch of the Canadian Mental Health Association (CMHA) argued that insanity referred to the legally relevant aspects of mental illness. The group's support for retention of the term springs from its broader opinion that, where insanity is concerned, psychiatry is there to support an essentially legal process (p. 740). But the duality of the term meant that the legal dimensions were typically discussed in terms of criminal responsibility, while the medical aspects were understood in terms of illness. Where the Saskatchewan group saw a clear hierarchical medicolegal relationship—one in which psychiatry served the needs of law—many did not think that dialogue between the two would be so easy. As will be seen, these gaps in communication would prove insurmountable.

3.2.3.2 The Limits of Medicolegal Convergence

Both the founding and the work of the RCLI made it clear that insanity was a unique problem. Unlike those other areas of law that the revision of the *Criminal Code* flagged as requiring further study—namely, capital punishment, corporal punishment, and lotteries—the problem of insanity necessitated a Royal Commission that could allow for the combination of medical and legal expertise not achievable with a Parliamentary committee. Unlike the parallel *Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths*, the RCLI was composed almost entirely of medical and legal experts. In this way, the RCLI speaks more broadly to the interaction of law and psy-ence, which, according to Sheila Jasanoff (2005), “are two of the most important sources of authority for modern governments” (p. 49). Both, for instance, claim to derive their command from a rational approach to facts that underwrite their

power with logic, distinguishing them from other institutions like religion; experts in these fields are recognized in a similar manner (1995, p. 8). Yet the hearings would illustrate that legal and psychiatric knowledges were not easily combined and forging this alliance was a job that was beyond the scope of the RCLI. Throughout the hearings, it would become clear that psychiatry could not provide many of the answers many legal experts expected it would.

Even though there was little direct convergence between legal and psychiatric knowledges up to this point, the growing impact of psychiatry on the legal field was obvious. This was exemplified in the testimony of Raoul Mercier, a Crown attorney for Carleton County, who noted the recent pattern “of psychiatrists trespassing in the sacred land of law to a great extent” (*Public Transcripts*, 1954-1955, p. 44). While Mercier described psychiatry as fashionable and “a la mode”, he did not regard it as a flash in the pan of pseudoscience; on the contrary, he understood psychiatry as an established discipline that legal experts needed to take seriously. In particular, he recommended that insanity law be amended to recognize “psychopathic personality” and, recognizing his own limitations on the subject, “a lot of learned words that import something along the same line” (p. 44). The suggestion was telling of Mercier’s faith in the science of psychiatry, and particularly striking when juxtaposed to his later query: “I have always been wondering: How does medical science arrive at the conclusion that the accused person suffers from delusions, from irresistible impulse, when he is very intelligent or intelligent in other matters?” (p. 45). Evidently, Mercier’s own failure to understand how such subjects are identified did not prevent him from advocating that the law be reformed to recognize this category of person.

The assumption of psychiatry’s capabilities that grounded Mercier’s testimony illustrates the gap between the optimism around and the reality of the discipline at the time, as well as the

convenient solutions it could provide. Chenier (2003, 2008) highlighted such a trend in her examination of CSP legislation that began with an “epistemological shift” following the close of World War II whereby many Canadians came to understand those charged with sexual offences as requiring medical rather than legal intervention. The purported failure of legal sanctions to stem the perceived problem of sexual attacks on women and children saw the adoption of a psychiatric perspective that in turn demanded psychiatric solutions: in this case, indefinite detention aimed at curing (or at least indefinitely detaining) the criminal sexual psychopath. Yet while the psychiatric community was hesitant, not only in supporting the notion of sexual psychopathy, but also in claiming that any effective treatments existed, the approach was popular amongst the public and lawmakers that saw this as the best way to deal with the newly identified criminal sexual psychopath. A similar phenomenon is recognizable in the hearings of the RCLI, where psychiatry is seen as providing a convenient solution for managing the unmanageable. Mercier, for instance, would suggest that a diagnosis of psychopathic personality disorder was enough to justify indeterminate detention, even where no crime had been committed (*Public Transcripts*, 1954-1955, pp. 51–52). Like the criminal sexual psychopath, the application of mid-1950s psychiatric knowledge to the problem of insanity was strained at best. Medicolegal agreement around the ideal handling of insanity in the abstract sense was easy: those who are not mentally responsible for their crimes should not be punished (e.g. *Public Transcripts*, 1954-1955, p. 815). Nor was insanity problematic where it manifested in extremes; here, as the Quebec branch of the John Howard Society pointed out, you only needed “common sense” (*Public Transcripts*, 1954-1955, pp. 1226-A6). But such cases were rare and the vast majority instead lay in the grey area between sanity and insanity. While the RCLI hoped that psychiatry would help to clarify these in-between cases, it would become clear through the course of the

hearings that more nuanced medical descriptions of points along this spectrum were hard to establish, a reality that was not helped by the heterogeneous state of psychiatric nosology at the time.

Mercier's recommendation that a diagnosis of psychopathic personality should justify indeterminate detention exemplifies the opacity of psychiatric knowledge during the mid-20th century. The foreword to the first edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), published in 1952, noted that psychopathic personality initially classified “[r]elatively minor personality disturbances, which became of importance only in the military setting” (American Psychiatric Association, 2013, pp. vi–vii). Updating the terminology to “antisocial reaction”, the DSM described such subjects as:

[C]hronically antisocial individuals who are always in trouble, profiting neither from experience nor punishment, and maintaining no real loyalties to any person, group, or code. They are frequently callous and hedonistic, showing marked emotional immaturity, with lack of sense of responsibility, lack of judgment, and an ability to rationalize their behavior so that it appears warranted, reasonable, and justified. (p. 38)

Applied to the criminal law, many suggested that the scope of insanity could be broadened to incorporate such individuals. Like Mercier, Chief Justice Michaud agreed that this might be a good idea, but again the medical aspects of the argument were unclear. When McRuer asked how this change could be made without providing an easy out for the criminally responsible, Michaud specified that there would have to be some underlying “mental condition” or “impairment” to justify the diagnosis (p. 129). When asked to further specify, he said that this was a matter for the doctors.

Many of the psychiatric experts offered little help in filling these gaps in knowledge. Michaud suggested that the law could be widened to include “a class of people who are sometimes described as schizophrenics and sometimes as psychopaths or psychopathic cases”

(*Private Transcripts*, 1954-1955, p. 126); Mercier also conflated these terms (*Public Transcripts*, 1954-1955, p. 49). Unlike psychopathy, schizophrenia is characterized by psychosis, a break from reality that, at least in theory, fits into the existing M’Naghten Rules. The clarity of this distinction may be a consequence of hindsight though. While Commission member Dr. Jones was clear that the two diagnoses were distinct (*Public Transcripts*, 1954-1955, p. 182), Dr. Alexander Murchison, director of PEI’s Mental Health Division and superintendent of the Falconwood Hospital, struggled to offer the Commission any definition beyond that. Yet Murchison maintained that psychiatrists were fairly clear on the terms but that it was their application within the court—as part of the adversarial process or in their translation for the lay mind—that was problematic (pp. 181-2). Dr. Stevenson, a psychiatrist and professor with experience as superintendent at various mental hospitals in Ontario, provided a bit more detail when he offered the following definition for psychosis: “a disease of the mind in which a person has, irrespective of all the symptoms that may enter into it – has lost the capacity for self-understanding, for insight” (*Public Transcripts*, 1954-1955, p. 791). He clarified though that this definition was spontaneous and could be improved upon.

Given the problems inherent in trying to define psychiatric terms—or as Dr. Whitman put it: the need for “a sort of ‘dictator’ with our psychiatric nomenclature” (*Public Transcripts*, 1954-1955, p. 852)—one might expect that the American Psychiatric Association’s DSM would be referenced more. While the Canadian version of this organization was only founded the year before, Canadian psychiatrists did account for a portion of the survey group that provided feedback during the production of the DSM. Throughout its modern history, the beginning of which can be roughly located at the end of the eighteenth century (Foucault, 2006; Shorter, 1997), psychiatric nosology was largely an activity of continental Europe (Shorter, 2015). An

American interest in the systematic classification of mental illness began just prior to the First World War, but this was motivated more by the collection of statistics and the administration of mental hospitals than it was with clinical and diagnostic purposes (Grob, 1991a; Horwitz, 2014; Kawa & Giordano, 2012). The *Statistical Manual for the Use of Institutions for the Insane* (1918) served these purposes, but quickly became inadequate with the application of psychiatry in World War II; this dissatisfaction would eventually culminate in the creation and publication of the DSM in 1952.

Given that the first DSM was only recently available at the time, its absence throughout the RCLI hearings is less surprising. While there is no denying its significance today in terms of the contemporary classification of mental illness (e.g. Follette & Houts, 1996) and its linking of such a system to clinical psychiatry (Grob, 1991a; Shorter, 2015), at the time it highlighted the instability and unrefined nature of mid-20th-century psychiatric knowledge. The primary division imposed by the DSM was to divide all mental illnesses into “organic” and “functional” disorders. The first category refers to all those psychiatric symptoms for which there is an identifiable biological or physiological cause (e.g. neurosyphilis, epilepsy). The second category is for illnesses in which there is no known cause and includes all those diagnoses organized by psychiatric symptoms. This functional category was further divided into Psychotic Disorders, Psychoneurotic Disorders, and Personality Disorders.

It is important to note that in the first edition of the DSM there is a strong influence from psychodynamic and psychoanalytic psychiatry.⁴² William Menninger, the American military’s

⁴² The terms “psychoanalytic psychiatry” and “psychodynamic psychiatry” are often ambiguous and can be difficult to pin down in the literature. At times they are used interchangeably (e.g. Grob, 1991), but where a distinction is made psychoanalysis tends to refer to the specific theories of Sigmund Freud (e.g. Kawa & Giordano, 2012). Freud was said to expect dogmatic adherence to his new school of thought that stressed conscious and unconscious tensions within the psyche as the foundation of mental disturbances, so psychodynamic psychiatry refers to similarly

Director of Psychiatry during the Second World War and president of the APA beginning in 1948, was an influential figure in American psychiatry during this period (Scull, 2011; Shorter, 2015). His professional orientation towards psychoanalysis impacted the psychiatric nosology he helped develop during World War II, which would in turn serve as a foundational document for the DSM (Shorter, 2015). Still, Menninger's influences were varied. As Shorter points out, inclusion of "neuroses" was indicative of the psychoanalytic influence, while the framing of psychiatric symptoms as "reactions" reflected Adolf Meyer's model that incorporated biological, psychological, and social factors in the understanding of mental illness. Even placed next to Freud, Meyer was a significant figure in psychiatry with Scull and Schulkin (2009) describing him as "the most prominent and influential American psychiatrist of the first half of the twentieth century" (p. 5). Meyer, however, saw his own psychobiological understanding of mental illness as being at odds with codification: "I wish it were possible to get rid of the words and get the sense to unprejudiced readers" (quoted in Meyer & Lief, 1948, p. viii). While Meyer was referring to his own work, his comment is interesting given his influence on early editions of the DSM. Rather than pointing to illness validity, the DSM would offer reliability in the diagnosis of various mental illnesses—a fact that does not necessarily speak to their validity (Szasz, 2004, p. 167)—which would serve an important organizational and legitimating function in the years ahead.

Without the DSM or any similarly influential systematic structuring of mental illness, psychiatry lacked an intradisciplinary harmony throughout the hearings. Indeed, use of the DSM

rooted theories that are not strictly Freudian in nature (e.g. the work of Carl Jung, former collaborator and eventual dissident of Freud). Historically, the term psychodynamic psychiatry is often used in contrast with a biological understanding of psychiatric illness. With the widespread de-medicalization of psychoanalysis that was linked to the concurrent rise of biological psychiatry, a shift that is perhaps best illustrated with the publication of the DSM-III in 1980, psychodynamic understandings of mental distress are now used primarily in the context of psychological forms of treatment.

today helps to ensure an individualizing medical lens is used to understand mental illness in those who come into conflict with the law (Chitsabesan & Hughes, 2016, p. 121). Instead, the heterogeneous state of the field drew a muddled picture of the mid-20th-century psychiatric subject and the RCLI gradually discovered just how contentious and potentially vast the discipline's understanding of insanity could be. In practical terms, the Commission was interested in distinguishing between mental illness that precluded criminal responsibility and mental illness that did not, yet resulting discussions would show just how difficult this was to do. For example, "psychoneurosis" existed on the same spectrum as psychosis, but it was less severe and reflected a "noninstitutionalized" group (Horwitz, 2014, p. 1). The DSM of the day offered a concise definition that reflected its Meyerian influence:

Grouped as Psychoneurotic Disorders are those disturbances in which "anxiety" is a chief characteristic, directly felt and expressed, or automatically controlled by such defenses as depression, conversion, dissociation, displacement, phobia formation, or repetitive thoughts and acts. For this nomenclature, a psychoneurotic reaction may be defined as one in which the personality, in its struggle for adjustment to internal and external stresses, utilizes the mechanisms listed above to handle the anxiety created. (American Psychiatric Association, 1952, pp. 12–13)

Yet as psychiatrist Dr. John Lucy explained to the Commission, "there is really no absolutely clear-cut dividing line between the milder forms of psychosis and the more severe forms of neuropsychosis" (*Public Transcripts*, 1954-1955, p. 629). Dr. Nicholson, who split his time between his private practice and his position as Assistant Professor at Dalhousie University, would problematize psychosis alone, contending that although both were useful, psychosis and insanity were equally vague (*Public Transcripts*, 1954-1955, p. 256). For Dr. Clyde Marshall, chief of the neuropsychiatric division for Nova Scotia's Department of Health, insanity was synonymous with psychosis, but if "disease of the mind" was to be used instead as some had suggested, then psycho-neurosis would also be included, and possibly even psychopathic

personality (*Public Transcripts*, 1954-1955, p. 363). Yet psychiatry was far from indicating a clear conception of those suffering from any of these illnesses, and this left the Commission with little to work with.

3.2.3.3 Medicine or Law: An Impasse

It would also become clear that psychiatric experts not only lacked clear answers to many of the questions encountered during the hearings, but that psychiatry could potentially undermine fundamental legal values. Given the incompatibility of psychiatric knowledge and criminal responsibility, witnesses tended to take a medical or legal approach to the problems of insanity. Dr. Menzies, for instance, was noteworthy in his satisfaction with the current state of insanity law. When the possibility of incorporating the notion of ‘irresistible impulse’ in Canadian criminal law was raised, Menzies did not understand how it could exist within “a civilized society” (*Public Transcripts*, 1954-1955, p. 130). Based on his experiences as the superintendent of the psychiatric hospital in Lancaster, New Brunswick, Menzies came to the conclusion that those struggling with impulse control were quickly able to control their behaviour when introduced to the asylum, even “before treatment occurs” (p. 129). Pleased with the M’Naghten Rules as they were, Menzies was notably old-fashioned in many of his views. He preferred the term “alienist” as his professional title, an archaic label that was replaced by the increasing popularity of “psychiatry” at the beginning of the 20th century, and was noticeably anachronistic by the middle of it (Bogousslavsky & Moulin, 2009; *Public Transcripts*, 1954-1955, p. 126). He also had no problem with the continued use of the term “insane”, arguing that superficial vocabulary changes would do nothing to address the underlying stigma of psychiatric diagnoses (pp. 121-2). Similarly, his own experience with a significant number of capital cases appeared to help in those instances where it was difficult to draw a line between the mad and the bad. When

Worrall suggested that legally recognizing diminished responsibility could reduce a charge of murder to manslaughter, Menzies was quick to point out that these questionable cases were already covered by the federal government's power of executive clemency (pp. 130-1). In other words, where criminal responsibility was questionable on the grounds of *mens rea*, mercy was granted to prevent any unjust executions. In expanding on the danger of the doctrine of irresistible impulse, Menzies argued that there is an inherent abnormality in anyone who commits a capital crime and as such he could likely have any capital charge of murder reduced to manslaughter if given the opportunity before a jury.

Menzies' alignment with the current state of insanity law was aided by his fundamental disagreement with psychiatry at the time. Menzies told the Commission that psychiatry called philosophical "absolutes" into question—absolutes like "free will and reason"—and that these "were essential to civilization and an ordered way of life" (*Public Transcripts*, 1954-1955, p. 135). Menzies' point helps to clarify why experts struggled to find ways to merge psychiatric and legal knowledges throughout the hearings; at times, psychiatric fact conflicted with legal pursuits of social order. Unlike Menzies, psychiatrists more commonly expressed a feeling that their profession clashed with the law, which often sprung from foundational differences between the psychiatric and legal professions. Dr. Murchison's opinion that the law was unable to focus on the individual in the way medicine could reflected his need to articulate rules that pursued justice and social order (*Public Transcripts*, 1954-1955, p. 191). Often characterized as an unencumbered field that was continually advancing, the application of psychiatry in the courtroom left many psychiatrists feeling that they struggled to tell the "whole truth" (*Public Transcripts*, 1954-1955, p. 473). Where psychiatrists tended to speak in terms of illness and symptoms, the law was looking for answers in terms of responsibility. This contrast is perhaps

best illustrated by comparing the testimony of Menzies and Clouston, discussed above. Menzies prioritization of law and order left little room to doubt those philosophical first principles that allowed justice to be done. Clouston, on the other hand, took the opposite approach and explicitly warned against sacrificing truth for function; as a result, he questioned the legal reliance on moral agency altogether. The limited recommendations that the RCLI would ultimately make clearly favoured Menzies' approach.

Psychiatric knowledge was also epistemologically problematic in the legal arena. As Dr. MacLeod, Assistant Professor in McGill's Department of Psychiatry, explained, application of psychiatric knowledge in the courts raised the stakes and meant that a formal diagnosis would likely require a higher standard of certainty than it would in private practice (*Public Transcripts*, 1954-1955, pp. 1018–1019). Evidence supporting a psychiatric diagnosis was often very different from what constituted legal fact, albeit with some exceptions. There seemed to be less contention when psychiatry was presented as akin to other medical specialties, like when psychiatric symptoms were the product of identifiable neurological disorders or could show some kind of scientific peculiarity such as an abnormal electroencephalogram (EEG) reading.⁴³ Not surprisingly then, some of the psychiatrists stressed this analogy before the Commission. Ontario psychiatrist Dr. Stevenson argued that mental illness needed to be understood in the same way as cancer in that even a few cancerous cells produce a cancer diagnosis (*Public Transcripts*, 1954-1955, p. 762). Such recognition was welcome since science, with its basis in the natural world, is thought of as representing an independent and objective field of knowledge (Jasanoff, 1995). Given the nonexistence of 'mental illness cells', Stevenson's argument points to the continued struggle of psychiatry to establish itself as a medical science, a struggle that

⁴³ EEG readings communicate electrical brain activity.

persists today. Edward Shorter (1997) offers a partial explanation of this by tracing an historical trend in which the discovery of an organic basis for psychiatric symptoms sees these illnesses become the terrain of neurologists. However, this only covers a handful of disorders and psychiatrists continue to study the remaining ‘functional’ disorders that lack the same kind of verification. Consequently, the objectivity of psychiatric evidence is often called into question (Loughlin & Miles, 2014), especially when it is of a forensic nature (Abdalla-Filho, 2013).

Thus, while psychiatry and law could agree in theory, it was difficult to move beyond that point into more specific discussions. The Quebec branch of the JHS said as much, submitting that while the lawyer and psychiatrist can agree that mental illness can detract partly or completely from criminal responsibility, it struggles beyond that since “no meaningful dimensions and scales have been worked out” (*Public Transcripts*, 1954-1955, pp. 1226A-A6). Dr. Joseph Weil was concerned that a psychiatrist’s method to establish mental illness may not hold up in a court of law. For example, a psychiatrist may determine a particular diagnosis—one that plays an important role in court proceedings—by relying on his or her interpretation of the accused’s dream, an opinion that could be difficult to prove if attacked under cross-examination (*Public Transcripts*, 1954-1955, p. 240). Alternatively, many psychiatric experts that gave testimony before the Commission represented their expertise as esoteric, whether implicitly or explicitly. Dr. Allister MacLeod argued that psychiatric symptoms and diagnoses were slippery, telling the Commission that “delusions themselves are very hard to define and are really only an expression of opinion by the individual’s social and intellectual peers that his reasoning is defective” (*Public Transcripts*, 1954-1955, p. 1011). Later, he would say “a doctor’s opinion is always an opinion, and a doctor’s diagnosis is an opinion in the field of mental health” (p. 1022). More often than not, psychiatrists struggled to communicate their expertise to anyone outside of

that expert community. When “psychosis” was suggested as an alternative to “insanity”, Dr. Murchison replied that even though the medical community was largely in agreement, the lay person probably could not understand the concept (*Public Transcripts*, 1954-1955, p. 182). Unlike legal evidence, there was a fluidity to psychiatric knowledge that was resistant to any dogmatic rule-making as illustrated by the fact that general theories were always at the mercy of the details of each individual case (p. 299).

For a number of reasons that became clear throughout the hearings, the Commission struggled to merge psychiatric and legal expertise around the problem of insanity. Many of the characteristics of psychiatric expertise presented throughout the RCLI made their uptake difficult in the legal setting. The lack of clear boundaries in conceptualizations of mental abnormality clashed with legal notions of justice and responsibility. Even where clear psychiatric opinions might be expressed, they were epistemologically problematic and difficult to validate within the legal context. The Commission was thus left with a muddled picture from which to draw its conclusions; unsurprisingly, the Commission would recommend no significant changes to the country’s insanity laws.

3.2.3.4 Inconclusive Conclusions: The Commission’s Final Report

Far from providing solutions, the medicolegal dialogue contained within the RCLI pointed to the numerous problems that prevented any meaningful integration of both psychiatric and legal knowledges. Instead, the Commission had to work around those fundamental sticking points that sprung from psychiatry’s quasi-scientific status characterized by truth-seeking and the law’s prioritization of justice (Jasanoff, 1995). The incompatibility of the opinions presented by the various psychiatric and legal experts meant that the Commission was left with the significant task of translating the evidence into its own conclusions. Unable to equate criminal responsibility

with psychiatric terminology, the Commission had to establish its own common ground. In so doing, it would at times rely on its terms of reference to avoid troublesome entanglements. When Dr. Stevenson suggested that insanity would be easier to deal with if capital punishment was not the automatic sentence for those found guilty of murder, the Commission clarified that such a suggestion was beyond the scope of their investigation (*Public Transcripts*, 1954-1955, p. 766). More often though, the Commission would pose the same question to a number of witnesses. One particular question that was returned to repeatedly throughout the hearings was whether or not the witness felt that the current state of the law resulted in “miscarriages of justice”; with the overwhelming majority answering in the negative, the Commission was left with confidence in the current state of affairs.

In his biography of McRuer, Boyer (1994) states that the limited recommendations of the RCLI’s report ran counter to the man’s reputation as being aggressive in the field of legal reform. In this case however, “McRuer concluded that the best protection of individual rights and society in general lay in the judicious application of proven legal procedures” (p. 283). An examination of the work of the RCLI shows that the conservative outcome was unsurprising. Without the urgency prompted by high-profile cases and the resulting public pressure, as was the case in the passage of the CSP legislation, there was no need to force drastic conclusions. The hearings made it clear that legal and psychiatric discourses were working with two largely incompatible languages. The uncertain and indecisive nature of psychiatric knowledge at the time led the Commission to instead adopt a legal understanding of insanity:

The problem before us cannot be considered as other than a legal one. We are not concerned in defining “insanity”, “mental disease” or “mental illness”. We are concerned with a law that defines criminal responsibility in such a language as a jury or laymen can understand and apply to the facts of a given case before them and that will not be subject to grave distortion in the courtroom. A courtroom cannot under our procedure be converted into a medical clinic. (1956, p. 15)

The Commission advised against any significant changes to the law of insanity, such as recognizing the doctrine of irresistible impulse. Yet the few recommendations for change that were made reflected the continued importance that psychiatry played in the problem of insanity. These mostly revolved around better establishing the place for psychiatry in capital cases, including Executive deliberations around the royal prerogative of mercy. In foreshadowing the problem of detention that would gain traction in the 1960s,⁴⁴ one recommendation also suggested establishing a standard practice for reviewing the cases of all those being held indefinitely in mental hospitals on verdicts of not guilty by reason of insanity (p. 46).

Although it would continue to garner some interest in the legal, medical, and academic communities following its publication, the immediate response to the Commission's report was lackluster, and it was out of print by the early 1960s (McRuer, September 26 1962). McRuer bemoaned the scant attention paid to the Commission's report in a letter to Dr. Kenneth Gray, a prominent forensic psychiatrist in Ontario, noting that the media was preoccupied with the changing government at the time of its publication (McRuer, August 13 1958). Indeed, the timing was far from ideal; while the Commission completed its report by October of 1956, the government sat on it for months before making it public on June 14, 1957. Four days prior to its release, John Diefenbaker and the Conservative party were voted into power. While a federal election is generally headline-grabbing, Diefenbaker's election was all the more newsworthy since it was the first time in more than 20 years that a Conservative government was running the country. As a result, the Commission's work was overshadowed.

⁴⁴The emergence of the detention of those deemed insane as a pressing problem will be the focus of chapter four.

3.3 Conclusion

While the RCLI was significant as the country's first systematic study of insanity within the criminal context, it pointed to the complexities that were involved in attempting to integrate legal and psy-entific expertise around the problems of insanity in mid-20th-century Canada. Although the Commission did call attention to the continued need for psychiatric and legal experts to work together in this area of the law, it only made minimal recommendations in its final report that served to uphold the status quo. The nominal impact of the RCLI was telling of the kind of problem that insanity posed to Canadian lawmakers during the mid-20th century. As detailed above, the country's insanity laws emerged as a technical and abstract problem that was thought to be best suited to the specialized expertise that was enabled by a Royal Commission. This approach was underscored by a certain psy-entific optimism that was prevalent in Canada following World War II. However, the limitations of psy expertise quickly became apparent in the work of the Commission. Unlike the application of the psy-ences in World War II that helped to classify, administer, and 'know' individuals within a military setting, the Commission was unable to construct a clear image of the insane subject through its psy expert witnesses. Consequently, it would endorse a largely legalistic understanding in its final report.

Along with highlighting the complexities of insanity, the minimal conclusions of the RCLI show that insanity law reform is closely linked to the particular problematization of insanity. Insanity emerged as a general and ill-defined problem through particular efforts to reform the *Criminal Code*. The country's longstanding insanity laws appeared particularly archaic amidst the psy-entific optimism of the day, but its incidental surfacing meant that it was a technical problem that lacked real urgency. Furthermore, capital punishment remained a viable sentence throughout the work of the RCLI, which meant that a benevolent interpretation of the

insanity defence remained largely unproblematic. In chapter four, I trace the emergence of a new kind of problematization of those deemed insane in Ontario during the 1960s. As the link between capital punishment and insanity grew more troublesome, unique provincial circumstances placed pressure on the government to address the ambiguous and indefinite detention of those deemed both criminal and insane. The Ontario story foreshadows a broader shift in which insanity law reformers increasingly focused on the management, rather than the identification, of those deemed insane in the criminal context.

Chapter Four: "... a clear authority for holding them; a paucity for letting them out": Problematizing the Lieutenant Governor's Warrant in 1960s Ontario

In the 1960s, Ontario was the first province to pass legislation that created review boards to consider the potential release of those held on Lieutenant Governor's Warrants (LGW). Following a verdict of insanity, subjects were placed on an LGW and held indefinitely at the "pleasure" of the province's Lieutenant Governor. While review boards today are taken for granted as an essential component in the management of those deemed Not Criminally Responsible on Account of Mental Disorder (NCR), their emergence in Ontario during the mid-20th century points to their historical contingency. As will be explored in this chapter, the institution of review boards reflects a growing demand that the detention of these subjects be justified. The introduction of institutional review boards in Ontario during the 1960s was an important early moment in the attempt to "rationalize" the LGW (e.g. Law Reform Commission of Canada, 1976a, p. 38), and they would become a central feature of Canadian insanity law reform during the 1970s and '80s.

Ontario's review boards were not particularly novel as similar bodies were already in use in Saskatchewan (Canadian Mental Health Association. Committee on Legislation and Psychiatric Disorder., 1973, pp. 168–169). The statutory implementation of these boards, on the other hand, and the patient's right to a review was unique to Ontario, and marked a significant step in the management of those found Not Guilty by Reason of Insanity (NGRI) for two reasons. First, no prior legislation had addressed the vague and absolute power of the Lieutenant Governor's pleasure. Second, the new laws confronted the confusing jurisdictional status of the LGW. As will be seen, provincial pressures prompted Ontario's Legislature to introduce review boards despite its questionable constitutional authority to do so. This tension would soon be

resolved when Ontario's reforms were reflected in the *Canadian Criminal Code* in 1969. Pierre Trudeau originally introduced these *Criminal Code* reforms as Minister of Justice, but Bill C-195 died on the Order Paper at the end of the Parliamentary Session in April, 1968 (Chambers, 2010). Following his election as Prime Minister on June 25th of the same year, Pierre Trudeau and Justice Minister John Turner introduced Bill C-150, and the subsequent *Criminal Law Amendment Act, 1968-69* would usher in these amendments. Given the importance of the new *Criminal Law Amendment Act* for both the country's criminal and insanity law, I will examine this legislation in greater depth in the chapter five.

In the current chapter, I argue that Ontario's statutory introduction of review boards was significant because it reveals a fundamental shift in the problematization of Canada's legal approach to those who are simultaneously criminalized and deemed insane. Put simply, Foucault employs "problematization" as a genealogical analytic⁴⁵ to investigate "how and why certain things (behavior, phenomena, processes) became a *problem*" (Foucault, 2001, p. 171). The current chapter will show how the problematization of those deemed criminal and insane in 1960s Ontario prompted the re-invention of these individuals as, first and foremost, rights-bearing subjects. With this objective in mind, the chapter is organized into three main sections.

The chapter begins with a discussion of "historical ontology". Although Foucault introduced the term in relation to the problematization of ourselves (Foucault, 1984a, 1984c), his limited discussion of the concept meant that it was more fully developed by Foucauldian scholars

⁴⁵ Koopman and Matza (2013) distinguish between the use of concepts and analytics within a Foucauldian framework. "Concepts specify the formulations through which Foucault made sense of the objects of inquiry", such as discipline or biopower (p. 822). Foucault often employed what the authors describe as "operational concepts" since they "make sense of how something operated in a given field" (p. 825). Analytics, on the other hand, "refer to the methodological constraints, limits, and assumptions by which inquiry can be conducted in coherent fashion" (p. 825). It might be helpful to think of analytics as offering form where concepts offer substance. The analytic is more easily deployed across a variety of sites, while concepts emerge from the application of the analytic and are thus tied more closely to the specific site of investigation.

(e.g. Hacking, 2002, p. 3). In this chapter, Ian Hacking and Nikolas Rose's separate discussions of "historical ontology" are helpful in highlighting the historical and anti-essentialist nature of various subjectivities. As will be seen, ontological assumptions about those deemed criminal and insane are closely related to the kind of problem they pose. Prior to Ontario's legislative reforms that are the focus of this chapter, discussions of insanity in Canada were primarily concerned with identifying *who* was insane. Drawing on James Moran's history of the institution (2001), a brief look at the Rockwood Criminal Lunatic Asylum will offer one early but noteworthy example of this approach. During the years of Confederation, those deemed both criminal and insane were understood as an institutional problem since they were declared unsuitable for both the mental hospital and the prison (p. 141). As will be seen, the construction of Rockwood reflected a contemporaneous belief in an ontologically distinct group—the "criminally insane"—but its short run reflected the fragility of such hybridized conceptualizations.

This brief foray into Canada's experimentation with criminal insanity provides a helpful point of comparison to the problematization of the population in the mid-20th century. In 1960s Ontario, it was the detention of those deemed criminal and insane—and specifically, the indefinite detention powers of the Lieutenant Governor's Warrant (LGW)—that became an urgent problem. In order to properly understand the historical emergence of this problem, the second section of this chapter looks at two broad movements in Canada: the deinstitutionalization of the country's psychiatric hospitals, and the increasing prevalence of rights discourses. In blurring the traditional boundaries between those deemed mentally ill and the rest of the population, deinstitutionalization troubled the use of psychiatric detention and emphasized the distinction between voluntary and involuntary patients. While deinstitutionalization would be driven by a number of economic, medical, and ideological

factors, it was the language of rights that came to dominate discussions of these changes. Increasingly, a shift towards legalism—the use of legal procedures to limit psychiatric authority—came to serve as the basis for the rights-based deinstitutionalization of the mental health system.

In the third and final section, the chapter turns to the case of Ontario where these national trends would combine with unique provincial circumstances to prompt local insanity law reform, which would eventually be reflected in the federal *Criminal Code*. At this point, a brief summary of this argument will be helpful. Beginning in the late 1950s, Ontario aggressively advocated for deinstitutionalization under the watch of provincial Health Minister Matthew Dymond. While initially optimistic, these discussions quickly took on a negative tone following the Robarts government's attempt to pass Bill 99 in 1964. To be detailed below, the failed legislation was aimed at the problem of organized crime—the extent to which organized crime presented a threat in the province during this time remains in question—and would have provided extensive police powers over its citizens. The proposed legislation ultimately prompted widespread concern amongst Ontarians regarding the province's encroachment upon individual rights. In the wake of the Bill 99 incident, two separate cases of unjust psychiatric detention—those of Fred Fawcett and Peter Lay—sparked intense criticism both in and outside of Ontario's Legislative Assembly. In spite of its questionable constitutional authority over such matters, mounting pressure would force the Robarts government to pass legislation that would address those held on LGWs.⁴⁶

⁴⁶ According to Section 91 of the BNA Act (1867), the criminal law and penitentiaries fall under the jurisdiction of the federal government, and Section 92 assigns hospitals and asylums to provincial governments. While those found NGRI are subjects of federal jurisdiction prior to the verdict, once found insane they became wards of the province that are held at the pleasure of the Lieutenant Governor. The division of powers under the BNA Act can cause confusion when it comes to the hybrid medicolegal subject of those deemed both criminal and insane, and scholars have raised concern over disparities in the management of those deemed NCR. For instance, Crocker et al. (2015) discovered important provincial differences in the likelihood that review boards would grant conditional or absolute discharges to those subjects under their authority.

While review boards had limited powers in their initial formulation, they would gradually become central in governing those deemed criminal and insane.

The Ontario story reveals an ontological transformation of those deemed criminal and insane that produced a more manageable identity for lawmakers. As the province was forced to legitimate the detention of this population, it would bypass complex questions of “insanity” by focusing on a rights-based subjectivity. Unlike in Rockwood where attempts to govern the population derived from medicolegal ontologies, the language of rights would provide the primary identity for engaging with those deemed both criminal and insane. As will be seen in the following chapters, this conceptual shift in Ontario would be an enduring characteristic of insanity law reform moving forward. Gradually, questions of process and detention, grounded in the rights of those deemed insane, would come to supplant efforts aimed at defining insanity. The persistence of this trend, I argue, is linked to the governability of the new rights-based ontology and rights-based subjects.

4.1 Historical Ontology and the Criminal and Insane

The investigation in this chapter is framed by the concept of “historical ontology”. Ontology is concerned with “being” in the most general sense of the word; it seeks to answer what exists, and by extension, what does not. As a branch of philosophy reaching back into the ancient world, ontological discussions often work with ahistorical and transcendental understandings of the world. Historical ontology, on the other hand, rejects the existence of pure forms of objective knowledge (Hacking, 2002, p. 6; Rose, 1996b, p. 24). Following Foucault’s example, Hacking (2002) emphasizes the historical nature of all things ontological: “if we are concerned with the coming into being of the very possibility of some objects, what is that if not historical?” (p. 2).

Ian Hacking and Nikolas Rose use “historical ontology” to investigate the various ways of making up people (Hacking, 2002; Rose, 1996b). Hacking (2002) is helpful for his explicit discussion of the concept. He describes historical ontology as “the ways in which the possibilities for choice, and for being, arise in history” (p. 23); these possibilities provide the conditions in which we can constitute ourselves as particular kinds of persons (p. 2). Thus, historical ontology can be helpful in pursuing the genealogical objective of doing a history of present-day practices (Foucault, 1977a, pp. 29–31; Garland, 2014). Hacking’s mixed bag of historical studies, from the emergence of statistics (1990) to the objectification of child abuse (1999), indicates that a wide array of ideas, institutions, practices, and objects play important roles in how we come in and out of being as subjects. His wide application of the concept is precisely why Rose, who focuses exclusively on the self, is helpful.

Rose (1996b) pushes back against universal understandings of the ‘human being’ and calls attention to the historical nature of its ontological underpinnings. The concept of historical ontology is central to his “genealogy of subjectification”, a project that “takes this individualized, interiorized, totalized and psychologized understanding of what it is to be human as the site of a historical problem, not as the basis for a historical narrative” (p. 23). Here, Rose draws on Foucault’s concept of “subjectification” to refer to those various ways that people “come to relate to themselves and others as subjects of a certain type” (p. 25). These relations are themselves historical, and the genealogist seeks to bring them to the foreground. Importantly, however, Rose distinguishes these endeavours from the grander sociological explanations in which these relations are the product of “‘more fundamental’ historical events located elsewhere” (pp. 24-25). Instead, like Hacking (2002, p. 23), Rose argues that “the history of subjectification is more practical, more technical, and less unified” (p. 25).

The previous chapter showed that Canadian lawmakers struggled with the simultaneously criminal and insane subject. The hybrid identity of this group was particularly difficult for the RCLI which struggled to combine psychiatric and legal expertise around the problem of insanity. Post-World War II discussions of insanity revolved largely around questions of substantive law that focused on defining the concept itself; these tended to manifest as debates around the best insanity test. In the following chapter, I trace a significant ontological transformation that occurred in Ontario during the 1960s, whereby those deemed criminal and insane were identified as rights-bearing subjects. Following Foucault, Hacking, and Rose, I use historical ontology in an anti-essentialist manner: instead of denoting a static and metaphysical substance that is declarative of identity, historical ontology refers to what is thought to be known about the identity of those deemed criminally insane in a particular time and place.

4.1.1 Ontology or Epistemology?

Hacking and Rose's use of historical ontology reflects Foucault's original interest in the historical ontology of the self, or selves, which he organizes around the axes of knowledge, power, and ethics: "[h]ow are we constituted as subjects of our own knowledge? How are we constituted as subjects who exercise or submit to power relations? How are we constituted as moral subjects of our own actions?" (Foucault, 1984, p. 49; see also Hacking, 2002, pp. 11–12). This constitutive element of historical ontology means that it categorically differs from traditional ontology in which universal constants are discovered and deciphered. Consequently, historical ontology is not as easily distinguished from epistemology since it radically alters the metaphysical commitments that tend to accompany ontological discussions. Ideas about what does and does not exist are intimately linked to how we claim to know and justify particular beliefs and practices. It is for this very reason that Hacking (2002) sees the application of

historical ontology—a term he describes as “too self-important by half” (p. 1)—as more fruitful in the social rather than that natural sciences: unlike subjectivities, or human categories of being, atoms exist regardless of human intervention (p. 11).

There is an important epistemological slant to the ontologies that are investigated in this project. Hacking (2002) took time to distinguish historical ontology from what he called “historical meta-epistemology”, a field of historical philosophy that examines the ideas “we use to organize the field of knowledge and inquiry” (p. 8). Historical meta-epistemological studies reveal that forms of knowledge thought to be universal and timeless are actually local and situated (p. 8). Distinguishing historical ontology from this approach is, at least on Hacking’s part, by design. Even though Foucault had initially used the term ‘historical ontology’, Hacking was one of the first to extrapolate on the concept, and in so doing he aimed to maintain the link between historical ontology and Foucault’s three axes of knowledge, power, and ethics (p. 11, 16).⁴⁷ More importantly, however, is that historical ontology is better for my purposes here since its central concern is with the constitution of objects and subjects (p. 16). Undoubtedly, ideas are of central importance to such an investigation. The idea of rights, for example, plays an important role in my examination of making sense of those deemed insane. While the notion of rights is not limited to the modern world, the rise of human rights was very much a phenomenon of the post-World War II era. As I argue in chapter six, the introduction of Constitutional rights in 1982 had a significant impact on how we understand and manage today’s NCR subject.

My project is not epistemological at its core though. Instead, Canadian insanity law reform reflects the belief that essence precedes existence and epistemological questions follow from ontological presumptions. There is little pushback to the claim that there are certain people

⁴⁷ Since my own investigation is not explicitly concerned with the self-regulating ethical subject, it is the first two questions that are most applicable to this project. However, this division was not utilized in this project.

who should not be held responsible for criminal behaviour on account of mental illness; the problems come in deciding how to respond accordingly. Along with the historical aspect of ontology, Arrigo (2006) is helpful in drawing attention to its social and interactive nature. In noting that “[r]eliance on theory commits us to believe in a certain kind of reality” (p. 42), ontological understandings—and particularly socially constituted ontologies—are often sites of collective sense-making. He offers the case of John Hinckley Jr. as one potent example. In 1982, Hinckley was found Not Guilty by Reason of Insanity for the attempted assassination of President Ronald Reagan, a case that had a major impact on insanity law reform in the United States (p. 43). Ultimately, public outcry played an important role in the ensuing federal and state-level law reforms that “were designed to either limit the use of the NGRI doctrine or to make it appear less attractive as a defense strategy option” (p. 62). Yet as Arrigo (1996) points out elsewhere, the insanity law discussions that followed in the wake of Hinckley were fundamentally ontological: “[a]t the core of the debate was deep-seated suspicion: how could such persons as Hinckley avoid criminal culpability?” (p. 61).

In Canada, there has been a surprising absence of public outcry in driving insanity law reform, although there are exceptions. In an unusual reversal of things, the current chapter will show how public concern over the ambiguous detention of those deemed mentally ill helped to secure procedural rights for Ontario’s psychiatric population in the 1960s. In chapter six, I note the less surprising example whereby Stephen Harper’s Conservative government passed problematic and restrictive NCR legislation that was grounded, at least partially, in recent high-profile NCR cases. However, criminal insanity law has largely existed as a technical and abstract problem for experts, and one in which epistemological complexities involved in identifying and managing the criminalized insane have been a symptom of an obscure medicolegal ontology. My

examination of the Rockwood Criminal Lunatic Asylum in this chapter shows one optimistic attempt to discover the essence that distinguished the “criminally insane” from those understood as either criminal or insane in late-19th-century Canada. Debates around the best insanity test similarly suggest that certain substantive defences offer better descriptions of the already-existing insane subject. More recently, critics of Canada’s high-risk accused designation point out that it does “not identify a subgroup of persons found NCRMD who present an elevated risk of harm to others” (Goossens et al., 2019, p. 102), a critique that is ontological in nature. Anne-Marie Mol (1999) goes so far as to suggest that multiple ontologies can exist within a single object or phenomenon at any single time, and that the emphasis of one ontology over another has important effects in the real world. While my own project does not consider the multiple ontologies that might co-exist within those deemed insane in the criminal context, like Mol my use of ontology refers to a fluid notion that is more closely related to epistemology than traditional ontology. More specifically, I suggest that our efforts to know and govern those deemed insane—to make sense of insanity—are inextricably linked to our ontological understandings of these subjects.

4.1.2 An Historical Ontology of Insanity: A Case Example

Problematization offers one entry point into the historical ontology of subjectivities that is particularly useful in this chapter (Rose, 1996b). For Foucault, thinking about a particular kind of person, object, or practice is often predicated on them/it being problematic in some way:

Actually, for a domain of action, a behavior, to enter the field of thought, it is necessary for a certain number of factors to have made it uncertain, to have made it lose its familiarity, or to have provoked a certain number of difficulties around it. These elements result from social, economic, or political processes. But here their only role is that of instigation. They can exist and perform their action for a very long time, before there is effective problematization by thought. (Foucault, 1984b, p. 388)

Rose (1996b) frames problematization as a question: “[w]here, how, and by whom are aspects of the human being rendered problematic, according to what systems of judgment and in relation to what concerns?” (p. 25). This is an historical question as particular problematizations emerge within particular historical contexts (Foucault, 2001, p. 172). It is also a practical question in that problematization drives a study of the various intellectual and practical techniques that have allowed for the creation of different subjectivities (p. 24). As Rose (1996b) explains, this is very much an empirical process: “[w]hile a genealogy of subjectification is concerned with [the] human being as it is thought about, therefore, it is not a history of ideas: its domain of investigation is that of practices and techniques, of thought as it seeks to make itself *technical*” (p. 23).

Such endeavours are important since different subjectivities play a foundational role in a number of different settings, be it the hospital, the courtroom, the school, and so on. Various conceptions of those deemed criminal and insane—whether as a hybrid medicolegal entity or one that is understood primarily in terms of rights—are not only reflective of their own historical milieus, they also shape the ways in which it is possible to engage with the subject. As will be shown, the projected ontology is closely related to the specific problem presented by the population. James Moran’s history of the Rockwood Criminal Lunatic Asylum (2001) offers a prime example of this connection. Opened just outside of Kingston, Ontario, in 1855, the institution’s existence was a response to a growing group that fit neither into the prison nor the mental hospital. Supported by broader developments in psychiatry and criminology, Rockwood embodied an attempt to solve this problem by discovering and articulating the unique and hybrid identity that was “criminal insanity”. Indeed, the construction of the asylum presupposed the subject that was expected to populate it. Put another way, those deemed criminally insane were

thought to present an ontologically distinct category of subject that required its own institution. While this conclusion preceded the actual segregation of the group, their subsequent detention would provide the opportunity to further clarify the unique characteristics of the subject.

In Moran's words (2001), Rockwood's opening "marked the official recognition of a new category of deviancy – criminal insanity" (p. 152). Initially, it was thought that the institutional acknowledgement of this new class of individual would not only solve the administrative difficulties posed by the group, but reflect an ontologically real mental disease; the proper facilities would simply allow for its elaboration:

The criminal lunatic asylum was to be a laboratory for the study of the etiology of criminal insanity and of how best to cure various manifestations of the disease. Theoretically, criminal insanity was to be firmly entrenched within a medical/scientific framework. (JE Moran, 2001, p. 153)

Rockwood's confirmation of the distinct medicolegal subject would have legitimated its own existence. As D'Arcy (2007) observes, ontological conceptions of identity are both "overtly descriptive (because it picks out people fitting a certain description) and covertly prescriptive (because when we concede that the label applies to someone, we tacitly concede that certain kinds of responses to that person are in order)" (p. 242).

Instead, the institution's short lifespan is indicative of its failure to discover and delineate criminal insanity. According to Moran (2001), Rockwood's closure in 1877 was prompted by a number of issues, not least of which was the ontological instability of "criminal insanity". While the institution was conceived by a cross-disciplinary consensus that criminal insanity was its own distinct disease during the 1850s, the concept remained fragile throughout its existence.

Rockwood's first superintendent, John Palmer Litchfield, gradually came to understand criminal insanity as far less different than its generalized counterparts over the tenure of his position, a view that was upheld by his subsequent replacement, John Dickson. In the late 1870s,

Rockwood's criminally insane patients were removed and transferred back to Kingston Penitentiary, and the asylum officially became a general mental hospital. Despite its initial ambitions, the hybrid ontology was unsustainable: "criminal insanity was temporarily classified as a specialized psychiatric disorder in need of a separate medical institution....However, for a variety of reasons, this tenuous psychiatric construct was short-lived and the institutionalized treatment of the criminally insane was soon abandoned" (JE Moran, 2001, p. 165).

This brief look at Rockwood provides a helpful point of comparison against the main focus of this chapter: the developments in Ontario's mental health legislation during the 1960s. Situated against Rockwood, two important distinctions come to light. First, like Rockwood, the debates in Ontario's Legislature reveal a close link between the subject's ontology and the practices around its detention. In 1960s Ontario, however, the group was problematized according to the indefinite nature of the LGW rather than the type of institution use for detention. In a second similarity to Rockwood, those attempting to resolve the situation found themselves confronted by a largely unknown subject. Unlike Rockwood, where this obscurity would play into the institution's ultimate undoing, the legislative debates point to an enduring ontological transformation of the subject that evolved in two parts. First, those deemed both criminal and insane were identified as a subset of the general psychiatric population, which was undergoing important changes related to the new philosophy of deinstitutionalization. Second, confirmation of those deemed both criminal and insane as medical subjects enabled the emergence of their new primary ontology as a rights-bearing subject. The perseverance of this new subjectivity—a claim that will be developed over chapters five and six—is owed to its governability.

4.2 A Canadian Framework for Problematizing Indefinite Detention

The problematization of detaining those deemed criminal and insane in 1960s Ontario was related to unique provincial circumstances during the period. As will be seen, two particular cases of psychiatric detention—those of Fred Fawcett and Peter Lay—became the focus of significant public and parliamentary attention in the middle of the decade. The strong reaction was related to a heightened sensitivity to rights during the years of the Robarts government, much of which materialized as a response to the Bill 99 fiasco. Combined with an aggressive position towards questions of federalism and the constitutional division power, the passage of legislation that dealt with the detention of the criminal and insane in Ontario was eventually reflected in Canada’s *Criminal Code*.⁴⁸

These events in Ontario were themselves predicated on two broader movements at both the national and international level. First, deinstitutionalization introduced significant philosophical and practical shifts in the organization of the mental health system. This move towards community-based treatments and psychiatric units in general hospitals, as opposed to long-stay, standalone mental hospitals that had served as the primary mode of psychiatric treatment, has been attributed to a number of factors. However, the uptake in both Canada and Ontario was closely related to a second development, what has since been identified as a “rights revolution” in the country. Before moving into Ontario’s story, it is important to examine these two movements more generally.

⁴⁸ The *British North America Act* (1867) assigned powers over the criminal law to the federal government, while matters of health were left to provincial governments; consequently, there could be jurisdictional uncertainty in regards to those found NGRI.

4.2.1 Deinstitutionalization, Generally

Deinstitutionalization, as the process would come to be known, refers to a number of reforms that substantially reduced the size of the psychiatric population in mental hospitals (Novella, 2008, p. 303; Talbott, 2004). For a number of reasons that I will return to shortly, the institutionalized model of psychiatry that grew over the 19th and early 20th centuries was swiftly abandoned for an increasingly community-based approach. Where the asylum was inextricably linked to psychiatric treatment in the old model, there was broad consensus amongst psychiatrists that patients belonged in the community. This meant that treatment would take place both in and outside of the hospital.

The new philosophy of community treatment was pervasive during the second half of the 20th century (Novella, 2008, p. 303). The United States and England were some of the first adopters, with evidence of these changes as early as the mid-1950s (Lamb & Bachrach, 2001; Novella, 2008, p. 303; Scull, 2015, p. 367). Given the prevalence of the new approach, there were significant regional differences in implementation. Under the leadership of psychiatrist Franco Basaglia, Italy pursued aggressive reforms that rapidly and drastically reduced the role of the traditional psychiatric hospital (Carabellese & Felthous, 2016, pp. 452–453). Germany, on the other hand, took more gradual steps (Bauer et al., 2002; Stubnya et al., 2010), while Hungary's sudden and unplanned transition was largely a phenomenon of the 21st century (Stubnya et al., 2010). All, however, revolved around the same basic premise that psychiatric treatment had outgrown the traditional, isolated asylum. Instead, efforts were made to establish and maintain links with the community since, ideally, this is where the psychiatric subject would reside. The new model was not without criticism. In the United States, for instance, Sherl and Macht (1979) argue that the preoccupation with the point of delivery eclipsed a focus on the

types of patient being treated (Scherl & Macht, 1979, p. 600). While the transition helped to address conditions in the old-style asylum system that were often horrific, it led to new problems for many in need of psychiatric services, such as lapses in treatment continuity and endless cycles of discharges and re-admissions (Talbot, 2004, p. 1113).

A number of causes have been identified as driving the widespread deinstitutionalization of mental hospitals, many of which are interrelated: a post-World War II humanitarianism (Grob, 2011; Novella, 2008, p. 305; Piccinelli et al., 2002, p. 538; Wasylenki, 2001, p. 95) that was prompted in part by the atrocities of the Holocaust (Bauer et al., 2002, p. 32); pervasive criticism of the existing asylum system (Novella, 2008, p. 305); the evolution of an increasing belief in the efficacy of community-based treatment (Novella, 2008, p. 304; Piccinelli et al., 2002, p. 538; Scherl & Macht, 1979, p. 599; Talbot, 2004, p. 1112); developments in psychopharmacological (Novella, 2008, p. 305; Piccinelli et al., 2002, p. 538; Scherl & Macht, 1979, p. 599; Talbot, 2004, p. 1112) and non-psychopharmacological psychiatric treatments (e.g. psychodynamic therapy) (Scherl & Macht, 1979, p. 599); the legal articulation of principles regarding proper treatment (Talbot, 2004, p. 1112); funding rearrangements (Fierlbeck, 2011, pp. 202–205; Scherl & Macht, 1979, p. 600; Talbot, 2004, p. 1112); and fiscal opportunism made all the more apparent by under-funded community-based alternatives (Goering et al., 2000; Niles, 2013; Wasylenki, 2001, p. 95).

As will be seen later in the chapter, deinstitutionalization as a reflection of rights discourses was central to Ontario's insanity law reforms during the 1960s. For the moment, it is worth taking a brief look at one of the more popular explanations from this list: the role of psychopharmaceutical advancements. First, understanding deinstitutionalization as a by-product of new antipsychotic medications is illustrative of the kind of oversimplification that can be

common in attempts to understand deinstitutionalization *in toto*. Second, while the antipsychotic explanation holds an intuitive appeal for making sense of the shift, it is not without criticism. Such myopia can promote reductive biological and individualistic understandings of mental illness, as well as legitimize the under-funding of resources elsewhere. Beyond these risks, Novella (2008) doubts the consistency of the hypothesis since many countries began to empty their asylums before the first generation of antipsychotics arrived (p. 306). Statistics too, only tell part of the story (Scull, 2015, pp. 368–369). Many point to 1955 as the beginning of deinstitutionalization in the United States because the country’s mental hospital population was at its height and steadily declined thereafter (Lamb & Bachrach, 2001, p. 1039; Novella, 2008, p. 306; Scherl & Macht, 1979, p. 602; Talbott, 2004, p. 1112). Novella (2008), on the other hand, cites a study by Warner (1994) who found that, in per capita terms, the height of treating Americans in psychiatric hospitals was 1945 (p. 306). According to Novella, this timeline is supported by a number of other studies which conclude that the introduction of psychotropic drugs could support, but not drive the trend towards deinstitutionalization (p. 306). In yet another interpretation of the statistics, Scherl and Macht (1979) suggest that, while its distribution might have differed, the percentage of the U.S. population in any kind of institution was the same in 1950 and 1970 (p. 602). Rather than releasing the one-time asylum resident into the community, this understanding proposes that these individuals were simply “transinstitutionalized” and warehoused elsewhere (Sealy & Whitehead, 2004; Talbott, 2004, p. 1113).

More important than any specific cause was the widespread promotion of the new approach. Continuing with the American example, the goals of deinstitutionalization were furthered by John F Kennedy’s introduction of the *Community Mental Health Act* in 1963, which provided funding for the construction of community-based psychiatric treatment centres. Two

years later, national health insurance programs were established under the administration of Lyndon B Johnson. Known as Medicaid and Medicare, these initiatives helped entrench the shift away from care in standalone mental hospitals. Rather than a single cause then, the proliferation of variables lends support to Scherl and Macht's (1979) claim that deinstitutionalization proceeded prior to "any explicit broad social consensus or understanding" (p. 599); instead, a number of factors (e.g. burgeoning philosophy of community care, psychopharmacological and non-psychopharmacological developments, articulation of legal principles regarding psychiatric detention and treatment, funding re-arrangements, fiscal opportunism) played a role in the formulation and fortification of policies promoting deinstitutionalization (Talbot, 2004, p. 1112).

4.2.2 Deinstitutionalization in Canada

In Canada, deinstitutionalization is best understood as a long-term and fragmented process that continued into the 21st century (Dyck, 2011, pp. 190–191). While a singular starting point to the transition would be misleading, due in no small part to the provincial nature of these reforms (Dyck, 2011, p. 190; Sealy & Whitehead, 2004), the national movement is typically identified as taking off in the 1960s. In broad-stroke numerical terms, the number of beds available in the nation's psychiatric hospitals was at its most rapid decline between 1975 and 1981 (Sealy & Whitehead, 2004, p. 250). However, this trend reaches back into the preceding decade, with Canada's mental hospital population reaching its peak in 1960, before decreasing by more than forty percent over the next ten years (Kedward et al., 1974, p. 521).

Sealy and Whitehead (2004) suggest that Canadian deinstitutionalization predated 1960, but an absence of data prior to this point makes such analysis difficult (p. 250). Certainly, the idea started percolating during the 1950s. The development of nationalized health insurance and

the subsequent funding arrangement first introduced by the *Hospital Insurance and Diagnostic Services Act* (HIDS, 1957) undermined the use of provincial mental hospitals, a direction that would be further cemented with the *Medical Care Act* (“Medicare”, 1966). Gold (1988) writes that between 1947 and 1959, the World Health Organization (WHO) and the Canadian Mental Health Association (CMHA) heralded many of the values underlying deinstitutionalization, like making psychiatric treatment available outside of hospital (pp. 210-211). Dyck (2011) also notes that Canadian medical professionals were discussing “the importance of connecting individuals with the community” as far back as 1955; however, these ideas had spread substantially by the mid-1960s when they were taken up by a variety of academics and thinkers (p. 191-192). It is for good reason then that many trace the movement to the 1960s in Canada (Crocker & Côté, 2009, p. 356; Fierlbeck, 2011, p. 202; Hector, 2001, p. 60).

4.2.2.1 The Macnaughton Resolution

The long-term detention of those deemed mentally ill grew increasingly problematic as the values of deinstitutionalization permeated the Canadian political landscape. In an early indication of the shift on December 5, 1960, Alan Macnaughton, Liberal Member of Parliament (MP) for Quebec’s Mount Royal riding, introduced a Private Members’ resolution that called for an investigation of mental illness at the national level.⁴⁹ The “Macnaughton resolution”, as it came to be known, stated:

That, in the opinion of this house, the government should consider the advisability of co-operating with the provincial authorities and such professional and other groups as may be interested, in making a national survey of the extent of mental illness, its causes, problems and methods of treatment. (Macnaughton, 1960, pp. 487–488).

⁴⁹ Framed as a resolution, Macnaughton’s motion offered a general direction for the government rather than a specific course of action; this was signaled by his wording: “[t]hat, in the opinion of this house, the government should consider [...]” (Marleau & Montpetit, 2000, Private Members’ Motion section, para. 1). Since Macnaughton was not a Minister, introducing the motion as a resolution also allowed him to propose a plan that would involve spending public funds, evidenced by his phrasing for the government to “consider the advisability of” (para. 1).

Throughout his speech, Macnaughton made it clear that the new approach was not just a practical question of how to most effectively administer the country's mental health system, but an ethical problem that reflected on the morality of the nation. Evidently, the lessons of World War II still loomed heavy; Canadians had to be careful not to underestimate the challenges they faced, as had been the case with Hitler (p. 488). The country's inadequate treatment of those deemed mentally ill was all the more problematic amongst its international peers—specifically, the United States and United Kingdom—whom Macnaughton commended for taking mental health seriously (pp. 490-491). The US was in the midst of publishing findings from a government-funded commission tasked with investigating the state of mental illness in the country. In the UK, a British Royal Commission completed similar work, and legislation aimed at deinstitutionalizing the mental hospital had already been passed. While Canada invested in mental health in those immediate post-World War II years, Macnaughton claimed that “enormous development in scientific knowledge concerning the nature and treatment of mental illness” meant the country's most recent 1951 survey was outdated (p. 491). As a result, Macnaughton declared that “[u]nfortunately we lag behind other countries, some smaller and less affluent than Canada, both in our attitude and in our resolve to deal realistically with the problem” (p. 488).

While the typical explanations of underfunding and poor facilities were partly to blame (p. 489), Macnaughton identified stigma as a major hurdle standing in the way of the improved treatment of those deemed mentally ill; that public opinion recently allowed for psychiatric units in general hospitals was evidence of “progress [that was] pitifully small when compared with the magnitude of the problem” (p. 488). The MP did not villainize the old-style mental hospital, and took a moment to criticize the national healthcare of the day, the HIDS Act, for not covering

patients in mental hospitals. At the same time, his address spoke clearly to the ideals of deinstitutionalization: those confined in mental hospitals were a vulnerable and overlooked group, but recent psychiatric advancements meant that treatment could be delivered effectively and humanely, whether in the community or through short-term hospital stays.

Macnaughton's motion received unanimous approval, a surprising outcome, as more than one commentator observed, since the recommendation came from the opposing Liberal party (Gifts for 5,000 Mental Patients, 1960; Griffin, 1961, pp. 57–58). Support of the Diefenbaker government served to show that mental illness was accepted as a pressing and non-partisan issue in 1960s Canada. It also affirmed that this was a problem facing *all* Canadians, something Macnaughton highlighted with daunting statistics: one out of every twelve to sixteen Canadians born that year would be treated in a mental hospital at some point in their lives; three to four people out every 1,000 were confined in mental hospitals; admissions to mental hospitals were increasing by 20 to 25 percent each year (p. 492).

Macnaughton's use of statistics pointed to the subtle reformulation of mental illness as a problem that reflected and reinforced the deinstitutionalized approach, and his speech provides an early look at how conceptualizations of mental illness shifted with deinstitutionalization. Drawing on a Foucauldian toolbox, these statistics can be understood as a discursive mechanism that helped to cast mental illness as a particular kind of problem to be identified and managed by the state (Stevenson & Cutcliffe, 2006, p. 716). The statistical presentation of mental illness helped not only in constructing the problem as one of objective knowledge (Hacking, 2002, p. 8), but also as a societal constant. While mental illness remained an individual abnormality, its numerical understanding suggested its normality at the population level (Hacking, 1990). Macnaughton's description of mental illness was underscored by a kind of "statistical fatalism"

that involved the entire nation (Hacking, 1990). This new conceptualization, one in which psychiatric illness was an inherent feature of the Canadian population, would prompt new categorizations beyond the historical distinctions between those deemed mentally ill and those who were not. Increasingly, self-governance would come to distinguish between different kinds of psychiatric subjects. As such, old models of treatment also came to be seen as antiquated. The Tyhurst Committee, a group appointed by the Canadian Mental Health Association's National Scientific Planning Council (NSPC)⁵⁰ to investigate the state of Canada's mental health system, would further develop this perspective. Its subsequent report, *More for the Mind*, proposed substantial changes to the country's mental health system.

4.2.2.2 More for the Mind

Not long after Macnaughton's resolution, the *Royal Commission on Health Services* was established and the mental health sector fell within its purview. Under the leadership of Supreme Court Justice Emmett Hall,^{51,52} the Commission completed its report in 1964. The document would influence the passage of the *Medicare Act* in 1966, which expanded the coverage provided by the preceding HIDS legislation. In the area of mental health, the Hall Commission was an important vehicle for submissions from the Tyhurst Committee in particular (Canadian Mental Health Association. Committee on Legislation and Psychiatric Disorder., 1973, p. xvi), which released its findings as a standalone publication in 1963.

⁵⁰ Crainford (1970) describes the NSPC as a voluntary "group of professionals[...] representative of the various disciplines concerned with mental illness, and of other organizations, both professional and voluntary, in the health and welfare field" (p. 418). For a brief history of the CMHA, see p. 47, footnote 30.

⁵¹ Hall was appointed to the Supreme Court shortly after being appointed as chair of the *Royal Commission on Health Services*.

⁵² Emmett Hall and Saskatchewan Premier Tommy Douglas are typically credited as introducing Canada's Medicare system, as provincial developments in Saskatchewan came to influence the creation of Canada's nationalized health insurance program.

More for the Mind was prompted by discontent amongst Canadian psychiatrists regarding the current state of the country's mental health services. Gordon and Lenkei (1964) frame the Tyhurst Committee as a domestic response to an international concern with the proper response to mental illness, although the international context they describe is once again limited to the British and American example (p. 1130). In 1955, the NSPC appointed the Committee on Psychiatric Services. Under the leadership of Dr. James Tyhurst, Professor of Psychiatry in the University of British Columbia's Department of Psychiatry, the Committee was tasked with investigating the state of mental health services in Canada, and if possible, proposing alternatives. The Committee struggled for financing before securing funding from two American foundations (Tyhurst, 1963, p. vi), a point that Macnaughton regarded as an international shame to Canada (Macnaughton, 1960, p. 491).⁵³ The Committee's report has been praised as an early moment in recognizing the autonomy of those diagnosed with mental illness, and as providing "a rallying point for proponents of deinstitutionalization" (Trainor et al., 2017, p. 272). Several authors have since identified it as the "blueprint" on which the delivery of Canadian mental health care services was modelled (Crainford, 1970, p. 420; Pomeroy et al., 2002, p. 11; Ronquillo, 2009, p. 24).

Macnaughton's resolution and *More for the Mind* both signaled a shift in how mental illness is understood and treated in Canada. To use Macnaughton's words, it could be "as mild as a common cold or as severe and crippling as some cancers" (p. 489), a comparison that got even more mileage because cancer was, until that time, experienced as a source of shame for many families (p. 488). Yet the link between mental and physical illness was more than a simple

⁵³ The foundations were the Milbank Memorial Fund and the Commonwealth Fund of New York, two separate funds with an interest in healthcare. Both were founded by female philanthropists—Elizabeth Milbank Anderson and Anna M Harkness respectively—during the Progressive Era in the United States (1890-1920).

analogy; *More for the Mind* was pivotal in promoting the idea that “mental illness should be dealt with in precisely the same organizational, administrative framework as physical illness” (Tyhurst, 1963, p. 38).

More for the Mind did face some criticism. The report was authored by an eight-member team that was comprised exclusively of psychiatrists (Lurie & Goldbloom, 2015, p. 10). While the committee employed a group of representatives to speak to other relevant fields like social work, psychology, and nursing, some felt these disciplines were not properly accounted for in the final product (Marshall, 1964, p. 3). It also utilized a broad conception of mental illness (p. 3), a wide scope that required more nuanced understandings of the psychiatric population. This was reflected in the deinstitutionalized and dispersed model of treatment, which troubled categorical distinctions between those deemed mentally ill and those who were not. Interestingly, Macnaughton presented his resolution in a way that did not clearly distinguish between mental health and mental illness, something that Percy Vivian, the Conservative MP for Durham, faulted him for (Vivian, 1960, pp. 493–494). Vivian was to be a lone voice of opposition though; Harold Winch, representative for Vancouver East and member of the Co-operative Commonwealth Federation party, was quick to defend Macnaughton’s vague terminology, and the House of Commons ultimately supported the motion.

Such an approach—one that views mental illness on a continuum of mental health—grew increasingly common during these years. As Bertolote (2008) points out, “mental health” is very much a term of the post-World War II world, although not entirely new. Given its “polysemic nature”, the phrase dates back to earlier public health efforts. Most obviously, it is at work in the early 19th century concept of ‘mental hygiene’, which, more than treating mental illness,

encompassed efforts to prevent it (pp. 113-114).⁵⁴ Grounded in discourses of degeneracy and heredity, the mental hygiene movement's approach to social problems like immigration prompted eugenics policies that spoke to the fears of the Anglo upper and middle classes in particular.⁵⁵ While such principles persisted well past the end of World War II—sterilization laws based on intellectual disabilities persisted in some Canadian provinces until the 1970s (Dyck, 2011, p. 185)—the links between the mental hygiene movement and eugenics became especially problematic in the wake of the atrocities committed by Nazi Germany. That the Canadian National Committee for Mental Hygiene rebranded as the Canadian Mental Health Association in 1950 offers support to Bertolote's etymology.

The new concept of mental health was more than a euphemism. As seen in chapter three, World War II disrupted clear demarcations between mental health and illness. The etiological role of extreme environmental factors in mental illness, particularly the less severe neuroses, questioned assumptions of the inherent abnormality of psychiatric subjects, and the effectiveness of preventive screening and psychodynamic therapies underpinned calls for wider access to a range of treatments (Grob, 1991). Similarly, the rise of psychoanalysis lent further credence to the new spectrum-based conceptualization of mental illness (Pierre, 2012, p. 652).⁵⁶ For Bertolote (2008), a post-World War II emphasis on mental health moved beyond hygienic practices to refer to a holistic state of being that merged the mental, physical, and social (p. 114). Just as important as the theory was its widespread promotion through the United Nations. The preamble of the World Health Organization's first Constitution, adopted at the International

⁵⁴ For a discussion of the evolution of the mental hygiene movement in Canada, see chapters two and three.

⁵⁵ According to McLaren (2016), eugenic thought did not have the same appeal in the Francophone community since the eugenic standard appeared to refer to white, English-speaking Canadians (p. 25). Its uptake was further limited by Roman Catholic beliefs that promoted unfettered reproduction (p. 25).

⁵⁶ For the distinction between psychodynamic and psychoanalytic psychiatry, see page 93, footnote 42.

Health Conference in New York during the summer of 1946, opened with the declaration that mental health was a positive state that fell within the scope of the new language of human rights:

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition. (World Health Organization, 1948, p. 2)

That mental health would emerge alongside human rights was fitting. Both, for instance, would be criticized for their imprecision (Bertolote, 2008, p. 113; Erk, 2013; Langlois, 2004). Yet, as will be shown in the examination of Ontario's reforms, the rights discourses that were increasingly common in 1960s Canada would be particularly conducive to the growing calls for deinstitutionalization. While deinstitutionalization began with a focus on the general psychiatric population in the province, it quickly gave way to the more bewildering case of those deemed NGRI, whose criminal-medical identity was not only problematic jurisdictionally, but also ontologically. When this population emerged as a problem of some urgency in Ontario during the mid-1960s, it was a rights discourse that was used to frame both the problem and its solution. Importantly, the language of rights bypassed many of the ontological difficulties presented by those deemed both criminal and insane, and simultaneously drove legislative reform in the face of jurisdictional complexity. Before moving into the Ontario example, it is important to provide some context by briefly looking at the history of rights in Canada.

4.2.3 Canada's "Rights Revolution"

Prior to the *Charter's* expansion of Constitutional rights in 1982, Canada's rights tradition was historically divided between civil liberties and human rights. As a former colony of Britain, Canada has a lengthier engagement with civil liberties that can be traced back to the medieval period. The *Magna Carta* in 1215, for instance, was an important moment in limiting

the power of the sovereign and recognizing the due process rights of their subjects. Civil liberties have crudely been characterized as negative rights since they tend to focus narrowly on an individual's freedom from state power. Clément (2016) describes them as “rights that date back to the early stages of state formation and that are necessary to the functioning of a liberal capitalist democratic state: due process, voting, speech, religion, association, assembly, and free press” (p. 12). Gradually, they have come to include equal treatment under the law as well (p. 12).

Human rights, on the other hand, tend to be more expansive, incorporating but moving beyond the traditional scope of civil liberties to include positive rights like education, social security, and employment (Clément, 2016, p. 12). They are also very much a modern phenomenon, with many citing the United Nations' Universal Declaration of Human Rights (UDHR) in 1948 as the beginning of a global rights revolution (p.19). World War II was troubling for a number of reasons. There was widespread concern that this was already the second major war of the century (Hilderbrand, 1990, pp. 5–6) and the Holocaust was shocking in its brutality (Lauren, 2013, p. 183). The Canadian government is also responsible for rights abuses on its own soil, having imprisoned and deported Japanese Canadians en masse shortly after the bombing of Pearl Harbour, and denying the legal rights of suspects in the Gouzenko affair shortly after World War II ended. The UDHR thus attempted, on an international scale, to recognize those inalienable and essential human rights that were undoubtedly abused during the War.

The philosophical distinctions between human rights and civil liberties are illustrated by their historical development. The post-World War II emergence of human rights was, as Christopher MacLennan (2003) shows, a reformulation of natural rights that were popular

amongst political theorists during the 17th and 18th centuries. The declarations of the French and American Revolutions reflected a belief that rights were inherent to the subject. This perspective was increasingly criticized by figures across the political spectrum, and a legal positivist approach, one in which rights are based in the laws of the state, became predominant by the time of Confederation in 1867 (pp. 7-8). World War II, however, would force a re-examination of this approach:

The shocking realization that the home of Goethe, Kant, and Beethoven, a democratic Western state governed by a constitution and the rule of law, could popularly elect a government that could systematically and legally destroy the rights of its own citizens reignited the arguments in favour of natural rights, or as they were to be referred to, universal human rights. (MacLennan, 2003, p. 7)

Not surprisingly, human rights have been faulted for lacking a strong theoretical basis (Erk, 2013; Langlois, 2004), a critique that draws attention to the moral and reactionary conditions of their initial development.

The distinction between civil liberties and human rights helps to situate the state of rights in Canada during the mid-20th century. While the federal government was resistant to human rights discourses—it begrudgingly signed on in support of the UDHR (Clément, 2016, p. 67; MacLennan, 2003, pp. 61, 75)—Diefenbaker’s Conservative government managed to pass the quasi-constitutional *Canadian Bill of Rights* in 1960.⁵⁷ Although it faced a number of criticisms, from its narrow focus on legal and political rights to its limited federal jurisdiction, managing to codify a bill of rights was in itself a substantial achievement given the context of British justice. Since such a code would tie the hands of future legislators, efforts to entrench Canadian rights legislation in the pre-*Charter* era were largely undermined by the principle of Parliamentary

⁵⁷ The quasi-constitutional status of the *Canadian Bill of Rights* means that it is broadly interpreted, and, generally speaking, defeats conflicting legislation (MacDonnell, 2016a, p. 510).

sovereignty. Instead, Parliament, with the support of the judiciary, was the primary protector of Canadians' rights (MacLennan, 2003).

Needless to say, rights were on the forefront of the public and political consciousness by the 1960s (Ignatieff, 2007, p. 1). Outside of the Constitution and judiciary, the technical distinctions between civil liberties and human rights were not particularly important and the latter came to be the common catch-all term, at least for the time being (MacLennan, 2003, p. 10). More than a philosophical school of thought, it was the underlying moral imperative that mattered, and rights became the vehicle for expressing values that were previously expressed in other ways (e.g. Christian principles) (Clément, 2016, p. 5). As will be seen in chapter six, the particular mode of rights would become more important following the introduction of the *Charter* in 1982, when questions that traditionally fell under the domain of the criminal law were translated into the “constitutional register” (Berger, 2014). However, the rights claims that popped up in the problematization of those deemed criminal and insane in 1960s Ontario were neither as developed nor as clear, and instead offer an early Canadian moment in the emergence of rights discourses as the “common vernacular for framing grievances” (Clément, 2016, p. 5).

4.2.4 Psychiatric Patients' Rights and the Shift Towards “Legalism” in Canada's Mental Health System

The indefinite detention of the LGW grew problematic as the institutionalization of the general psychiatric population was increasingly understood as infringing on the rights of those under its authority. This was an important development; those deemed NGRI had, for a long time, presented a confusing medicolegal ontology that was difficult to act upon. My examination of the aforementioned Royal Commission revealed that psy experts, speaking in a language of mental illness, struggled to collaborate with legal experts who focused on criminal responsibility.

While theoretical alignment between the two professions was possible, practical change was limited on a number of fronts. For example, the Commission's allegiance to the term "insanity" made it difficult for psychiatrists to participate in these discussions since, as the Quebec branch of the John Howard Society noted, "no meaningful dimensions and scales have been worked out" to adequately explain and categorize what that term entails (*Public Transcripts*, 1954-1955, pp. 1226A-A6). Ultimately, psy experts discussed the subject within a medical epistemology while legal experts focused on a legal epistemology. As the rights of all psychiatric patients became a growing topic of concern, so did the rights of those deemed psychiatric *and* criminal. Similarly, as institutionalization was increasingly questioned as the best response to the general psychiatric population, the logic would extend to those held on LGWs. Thus, the medical aspect of the hybrid ontology of those deemed criminal and insane allowed for their indefinite detention to become a pressing and actionable problem in Ontario.

The particular problematization of those deemed NGRI was itself a consequence of the growing acknowledgement of the rights of the broader psychiatric population. According to Grob (1994), a recognition of patients' rights in American mental hospitals during the 1960s began to intrude upon discussions that were, up to that point, focused on psychiatrists' needs. Although the self-directed psychiatric survivors movement would not be in motion until the 1970s (Reaume, 2002), these earlier efforts emerged from a varied group of advocates that Grob loosely sorted into two categories. In the first, Grob describes a group that was distinctly legalistic in their approach to psychiatric patients' rights.⁵⁸ This tradition grew out of the American civil rights movement, expanding on its initial efforts towards racial equality to include other disenfranchised groups (1992, p. 16; 2011, p. 407).

⁵⁸ There can be overlap between these two categories. Thomas Szasz, for example, dealt extensively with the concept of rights in relation to psychiatry (e.g. 1963).

The second group fell under the scattered category of “anti-psychiatry”. For historian Edward Shorter (1997), these authors start from the same fundamental premise that mental illness is constructed from the “social, political, and legal” rather than the medical (p. 274). Crossley (1998) offers a handful of characteristics to define the genre. He suggests that writings in this vein totally reject the existing psychiatric profession, and that the style of critique extends beyond psychiatry to apply to society more generally (p. 878). More often than not, the term is used to refer to a handful of writers that came to prominence in the 1960s. Canadian sociologist Erving Goffman is typically included for his publication of *Asylums* in 1961, a study of Washington DC’s St. Elizabeth’s psychiatric hospital in which he expounds on the “total institutionalization” of the patients within. Thomas Szasz is often included on the shortlist, with his best-known work, *The Myth of Mental Illness*, also issued in 1961. While the book’s provocative title was indicative of the claims within, it was the outcome of the ill-defined notion of mental illness—that is, the intrusion upon the autonomy of the psychiatric subject—that was most problematic according to Szasz (2004, p. 159). Finally, 1961 also saw Michel Foucault publish the original French version of his history of madness, although an abridged English translation of *Madness and Civilization* was still a few years away. In the dense and enigmatic work, Foucault examined the cultural understandings of madness within a tripartite division of history. Narrowing in on 18th- and 19th-century France, he traces the top-down articulation of madness whereby modern notions of mental illness are teased out from a newly confined mixed bag of social deviancy.⁵⁹

⁵⁹ Given Foucault’s centrality in framing the investigation of this chapter, it is worth taking a moment to discuss *History of Madness* in more depth since it is his most extensive study of mental illness. Most important to the purposes here, *History of Madness* mobilizes Foucault’s archaeological method, which precedes his genealogical period during which he would develop the concept of problematization that I use extensively. On this point, I have three comments to make. First, *History of Madness* was one of Foucault’s earliest works and certain aspects of it are

While these critical commentaries substantially differ in form and substance, they all generally aligned with a philosophy of deinstitutionalization, or at the very least, heavily criticized the old institutional model.⁶⁰ According to Reaume (2002), both the legal approach and the anti-psychiatry view were influential in the deinstitutionalization movements in the United States and Canada (p. 414). In Canada, the ideals of these reforms were commonly framed within the language of rights. In late March 1964, the Medical Action for Mental Health conference was held in Ottawa following the publication of *More for the Mind* (Iacovetta, 2006). Sponsored by the Canadian Medical Association (CMA), the Canadian Mental Health Association (CMHA), and the Canadian Psychiatric Association (CPA), the conference focused on deinstitutionalization in Canada, and more specifically, integrating Canada's mental health services into the nation's general hospital system (Gingras, 1964, p. 181). Like the broadened conception of "mental health", the new merger blurred the boundaries of mental illness while bringing its importance into focus. This process, the conference would clarify, required a more holistic approach to the individual, one recognizing that both mental and physical health needs to underpin the treatment of all patients (p. 182). In combining the psychiatric and non-psychiatric

at odds with his later methodological developments. For instance, Foucault's use of broad periodizations suggests, as Hacking (2002) points out, that there was a purer and better kind of madness at earlier points in time. This kind of metaphysical presumption would be troubling in a genealogy. Not surprisingly, Hacking notes that Foucault quickly abandoned this notion (p. 7). Second, while *History of Madness* preceded his writing on problematization, the concept does inhabit the work which shows how a problematic group was re-invented according to changing theoretical and explanatory tools and the circumstances of the time. Those who would be deemed mentally ill in the modern period were recognized as problematic prior to psychiatry, but were lumped into a larger, homogenous group of undesirables. These mad subjects remained a problem throughout the development of psychiatry, but the medical conceptualization of the mentally ill changed the underlying assumptions of and efforts to manage the population (i.e. medical illness that needs to be cured). Finally, *History of Madness* can stand outside of the Foucauldian oeuvre as a standalone study of madness/mental illness/psychiatry like others in that field (e.g. histories by Edward Shorter, Roy Porter, Gerald Grob, Andrew Scull, etc.), particularly since Foucault would not address the subject in the same kind of depth again. Even in this more limited scope, and while recognizing his limitations as a historian, he provided important early contributions to the discussion (e.g. custodial practices as enabling construction of the psychiatric subject).

⁶⁰ Deinstitutionalization is not necessarily an improvement over the older, asylum-based model. In her discussion of those living with intellectual disabilities, Ben-Moshe (2011) argues that the full effects of deinstitutionalization are undermined when the necessary community-based resources and attitudinal shifts are lacking.

populations into one system, the merger also drew attention to significant disparities between the two. Speaking on the invalidated rights of psychiatric subjects, Dr. Rhode Chalke, Professor of Psychiatry at the University of Ottawa, stated: “[u]nfortunately, these deprivations are often unclear and certainly unlike anything that happens when one is admitted as physically ill” (In-Patients Deprived Of Many Rights, 1964). The conference concluded with 13 resolutions, many of which promoted the effective collaboration of those involved in all levels of psychiatric and non-psychiatric medicine. On the specific issue of the rights of psychiatric subjects, which the conference recognized as a “legitimate concern to all citizens of Canada”, it resolved that the CMA, the CMHA, and the CPA should all be involved in the production of any legislation regarding these matters (p. 187).

The CMHA⁶¹ was particularly active in this regard and it would undertake an important review of mental health legislation throughout the 1960s. Over the course of the decade, its Committee on Legislation and Psychiatric Disorder published three reports that reflected the same evolution that played out in Ontario. The first, released in 1964, examined mental hospital legislation in light of the widespread shift towards deinstitutionalization. The second, published in 1967, focused on the civil rights of those detained in mental hospitals. And the final report in 1969 looked specifically at mental illness within the criminal process. Taken together, the publications are indicative of a shift towards ‘legalism’ in mental health law.

Legalism contrasts medicalism, an approach in which psychiatric discretion dictates the treatment of those deemed mentally ill, and psychiatric authority is regarded as acting in the best

⁶¹ The National Committee for Mental Hygiene became the Canadian Mental Health Association in 1950. As noted in chapter three, the Canadian mental hygiene movement was a shell of its former self by the end of World War II, a product of its “exaggerated claims” (Copp & McAndrew, 1990, p. 6) and its link to eugenics that “was thrown into disrepute by the excesses of the Nazis” (McLaren, 2016, p. 127). This is not to say that eugenic-based thought and policy disappeared from the post-World War II Canadian landscape, but that explicit allegiance to the movement was rendered problematic (Grekul, 2011; McLaren, 2016, pp. 157–158; Wong, 2016).

interests of the patient (J Brown, 2016, p. 1). Legalism addresses the inherent paternalism of the medical approach by formalizing this relationship and emphasizing the legal rights of the psychiatric subject (J Brown, 2016; Fennell, 1999; Gostin, 1983; Rose, 1985). Questions that were traditionally left to medical authorities—particularly those regarding detention—are subsequently reoriented around the principle of due process. For Brown (2016), it is a fundamental shift in mental health law whereby patients’ rights are placed ahead of treatment concerns (p. 1). Jones (1980) describes it in the following way:

[T]he battle between legalism and discretion, between systems founded on the application of a body of law within an institutional framework and systems based on the flexible interpretation of human needs in given situations, has ranged over a number of issues loosely linked by the concept of civil liberties. (pp. 1-2)

Jones, a vocal proponent of the medical approach, argues that legal and procedural safeguards prevent the effective treatment of mental illness. Others have drawn attention to the reactive quality of traditional legalism that only allows for the restriction of psychiatric power (Fennell, 1999; Gostin, 1983, pp. 48–49; Rose, 1985). This narrow libertarian view of psychiatric rights is reflected in subsequent observations of deinstitutionalization as little more than the “depopulation” of the mental hospital (GA Awad, 1987, pp. 442–443). Inadequate follow up, characterized by limited access to psychiatric treatment and social services, created its own problems. This could mean the criminalization of the former psychiatric patient (Davis, 1992), or the new entitlement of the one-time institutionalized to “die with their rights on” (Treffert, 1973). By the 1980s, Gostin would develop a ‘new legalism’ that was more akin to the ‘positive rights’ approach discussed above (Gostin, 1983; see also Fennell, 1999). Here, traditional concerns of legalism are expanded upon to incorporate an “ideology of entitlement [in which] access to health and social services should not be based upon charitable discretion or professional discretion, but upon enforceable rights” (Gostin, 1983, pp. 49–50).

Discussions of a ‘new legalism’ in mental health law have typically remained in the European context (J Brown, 2016; Fennell, 1999; Gostin, 1983). Gostin’s focus on reforming British mental health legislation also included appeals to the European Convention on Human Rights and the European Court on Human Rights throughout the 1970s and ‘80s. Here, the right to liberty was coupled with a positive obligation on the state to provide a range of treatment alternatives (Fennell, 2010, p. 18). Reflecting the more typical approach, Canadian lawmakers concentrated primarily on the negative rights of its psychiatric patients (Zuckerberg, 2010, p. 326; Kaiser, 2009). While “[t]here is no single narrow explanation for Canadian mental health law [...] being prevented from advancing a more ambitious agenda” (Kaiser, 2009, p. 153), a number of observations have been made. According to Zuckerberg, this is due in part to the unique vulnerability of those deemed mentally ill since rights efforts are often pursued through third parties (Zuckerberg, 2010, p. 326). There is some skepticism too that even if legal entitlements are secured, they would translate into any meaningful practices (Kaiser, 2009, p. 140; Zuckerberg, 2010, p. 326). The language of rights also maps more easily onto claims to freedom, which is especially true of post-*Charter* Canada (Redden, 2002). Although the same can be said of the human rights framework (Zuckerberg, 2010, pp. 325–326), it is more conducive to entitlement claims that build on traditional legalism. Given the prevalence of human rights jurisprudence in Europe, it is thus not surprising that Gostin’s advocacy for a ‘new legalism’ centred in Britain (Gostin, 2004).

For geographical and temporal reasons then, the Canadian focus of this chapter reflects the concerns of traditional legalism. As will be seen, debates in Ontario’s Legislature during the mid-1960s were influenced by limited rights discourses that merged with an overarching concern with deinstitutionalization. While early discussions of deinstitutionalization in the province

painted a rosy picture of community treatment, these quickly gave way to concerns that slow and insufficient reform meant a number of psychiatric subjects were being unjustly detained.

4.3 The Criminal and Insane in Mid-1960s Ontario

While the rights of psychiatric subjects were discussed at the national level, the constitutional division of powers meant that matters of health fell primarily to provincial governments. The introduction of review boards to Canada's *Criminal Code* in 1969 was the result of debates that played out at the provincial level in Ontario during the mid-1960s. For a number of reasons that I explore below, the indefinite detention of the LGW emerged as problematic in Ontario during the middle of the decade. While reflecting the broader national context of deinstitutionalization and an increasing rights awareness, the problematization that surfaced in Ontario during the 1960s was the result of a number of unique provincial conditions.

As will be seen, the Robarts government saw the province as sitting on the forefront of the deinstitutionalization movement, with Health Minister Matthew Dymond proudly presenting the shift as a testament to Ontario's progressive and humanistic social policy. By the middle of the decade, however, these discussions had taken on a more critical tone. Although critics in later years would hone in on the inadequate preparation of deinstitutionalized mental health services (e.g. Sealy & Whitehead, 2004), the policy failures in mid-1960s Ontario revolved around deprivations of liberty, evidenced by the continued institutionalization of many of the province's psychiatric subjects. Following a poorly received legislative amendment known as Bill 99 in 1964, Ontarians were keenly sensitive to government encroachments on personal rights and freedoms. In this socio-political climate, two separate cases of psychiatric detention—those of Fred Fawcett and Peter Lay—would draw significant backlash in and outside of the Legislative Assembly. Since Fawcett and Lay were held on criminal charges, the Robarts government was

forced to pass legislation dealing with this group's complex jurisdictional status that, up to that point, was largely avoided in Canada. Culminating with the statutory introduction of review boards in Ontario, this change would soon follow in the federal *Criminal Code*.

4.3.1 *Deinstitutionalization in Ontario*

It was in the context of deinstitutionalization that the LGW—and by extension, those deemed both criminal and insane—was recognized as problematic in Canada, and Ontario played a particularly important role in this process. Under the leadership of Health Minister Matthew Dymond, who was appointed to the position on December 22, 1958, Ontario was on the forefront of deinstitutionalization by the end of the 1950s. Less than two months into his tenure, he gave a detailed speech in the provincial Legislature on the state of mental health and its treatment, during which he spoke directly to the ideals of deinstitutionalization. Ontario, he was proud to report, already had a number of accomplishments to its name, including a recently opened community health centre in Cobourg that offered services that struck a unique balance between the totalizing nature of institutionalization and the potential isolation of community treatment; Dymond claimed that it was the first of its kind in a rural North American setting (1959, p. 287). Many ongoing developments also gave reason to be optimistic for the future. The Ontario government took steps to address an absence of formal training opportunities by supporting the development of post-graduate psychiatric programs in many of the province's universities (p. 288) and allocated funding for the development of research units in hospitals. While progress on this secondary front was largely in its infancy, research would take on a more significant role as it would gradually carve out a place in the province's future funding plans. The efforts Dymond described were aimed at the entire spectrum of mental illness, from the minor to the most severe. While broad in scope, Ontario's program was united by the principle of effective and humane

treatment that was guided by the goal of returning those suffering from psychiatric ailments to the community:

All of the plans I have outlined call for one particular which I have not yet mentioned at any length, but to which I have come over and over again; that is the great importance of keeping the community in touch with the patient—may I emphasize this—at all times during his illness and until he has again been fully rehabilitated. (Dymond, 1959, p. 295)

Dymond was persistent in his message (e.g. *Mental Illness Biggest Health Problem*, Dymond, 1963). In a speech to the Empire Club of Canada two years later, he characterized mental illness as “Ontario’s Number One health problem” (Dymond, 1961).⁶² While not as deadly as cancer or heart disease, the Health Minister grounded his claim in the economic cost, personal impact, and widespread prevalence of mental illness. According to Dymond, half of the province’s hospital beds were utilized for psychiatric cases (para. 7), a statistic that was all the more concerning since hospitalization rates were increasing in general.⁶³ On a more positive note, Dymond stated that the problem of mental illness was undergoing significant transformations in both medical and social terms. These stemmed from a “new recognition and acceptance that these mentally disordered are sick, people in need of and deserving of the very best we can provide for them by way of care and treatment” (para. 17; see also *Better Deal For Mentally Ill*, 1962). The new standard of treatment disregarded the custodial warehousing of the

⁶² Initially forming at the beginning of the 20th century as a forum to discuss Canada’s foreign relations, the Empire Club of Canada developed into a general assembly that hosts a variety of speakers ('About The Empire Club of Canada', nd). The Empire Club provides a platform for domestic and international leaders in various fields to present their own perspectives on a range of issues, and describes their members and presenters as “leaders in various professions, businesses, labour, education, government, and cultural organizations” ('About The Empire Club of Canada', nd); however, membership is also available for purchase at the individual and corporate level. Historically, these speeches were presented to larger audiences of between 200 and 1200 people, although the Club has also started to offer smaller engagements in recent years. The Empire Club has hosted a variety of familiar names, including but not limited to: Winston Churchill, Audrey Hepburn, Margaret Mead, Pierre and Justin Trudeau, Vladimir Putin, Christopher Plummer, and Bill Gates.

⁶³ The recent passing of nationalized hospital insurance (i.e. the HIDS Act) was important in boosting the number of hospitalizations. By 1964, Dymond would be dealing with a shortage of hospital beds in Ontario (Dr. Dymond’s Hollow Easter Egg, 1964; Dymond Loan Will Ease Bed Crisis Hospitals Agree, 1964).

past, and, just as he had told Ontario's Legislature earlier, reoriented around the goal of maintaining links to—or even better—returning these individuals to the community altogether.

The approach could, at least in part, be attributed to a flourishing and mixed group of mental health professionals. While psychiatry remained the mainstay of mental health treatment, experts from a broad range of fields like nursing, psychology, and social work were all important to the progress being made (Dymond, 1961, para. 16). Just as importantly though, the Health Minister credited an ongoing shift in the public's attitude as underpinning the modern approach to mental health treatment that was developing in the province. Like Macnaughton, Dymond was presenting a relatively new conceptualization of mental illness that stressed both its social and medical aspects. Far from the historical degenerative discourses that linked its manifestation to a moral failing or personal weakness, mental illness was a medical disease, meaning that those who are afflicted are unfortunate but largely blameless victims:

No matter what our attitude may be, nothing can alter the fact that mental disorder is no respecter of persons. It does not single out its victims from any particular social, economic, or cultural stratum. It cuts across all lines—racial, cultural religious, or economic. Recognition of this in our time is, perhaps, one of the most encouraging advances yet made. (para. 10)

Macnaughton and Dymond presented a similar conceptualization of mental illness that was still relatively new at the time, and one that both reflected and reinforced the new deinstitutionalized approach. Foucault's notion of biopower (1978a, 2003) helps to make sense of this shift. Biopower, according to Foucault, is marked by “an explosion of numerous and diverse techniques for achieving the subjugation of bodies and the control of populations” (p. 140). Here, the positive form of biopower was exercised less through the reality of death, and increasingly through the life and health of the individual (“anatomy-politics”) and population

(“biopolitics”). Most importantly, biopower refers to techniques of management and intervention aimed at the level of the population.

Rose and Rabinow (2006) suggest the conceptual application of biopower relies on the presence of three features (pp. 197-198). First, there are “one or more truth discourses about the ‘vital’ character of living human beings, and an array of authorities considered competent to speak that truth” (p. 197). These vital characteristics are those aspects of humanity that are relevant to the life, health, and mortality of the population (p. 197). Second, there are interventions at the collective level that are driven by matters of health. Finally, practices are available that encourage and even coerce individuals to work on themselves and others in the name of health. With these criteria in mind, biopower underscores the new conceptualization of mental illness in the deinstitutionalized mental health system. Speaking to the first point, the unnerving statistics and range in severity underpinning understandings of mental illness at that time, namely that it exists as an inevitable feature of the population, was recognized by medical, political, and legal experts. Reflecting the second point, the new conceptualization aligned with new modes of management. With the entire Canadian population at risk of various psychiatric illnesses, a deinstitutionalized approach provided a more flexible and dispersed strategy of treatment. And regarding the third point, an integral feature of the deinstitutionalized approach was the notion of self-governance: in the reorganized system, the ideal psychiatric subject would take initiative and seek out the help and services they felt they required. The deinstitutionalized strategy thus demanded new, more complex demarcations between subjects. As a number of commentators would later note, the new model assumed a level of self-sufficiency that would overlook those who had spent much of their lives in psychiatric institutions or struggled with chronic mental illness (Bachrach, 1978; Scherl & Macht, 1979; Talbott, 2004). New distinctions

would thus emphasize the difference between the voluntary and non-voluntary psychiatric patient, and a rights-based approach would emerge as central in legitimizing psychiatric detention in the deinstitutionalized system.

The views endorsed by Macnaughton and Dymond were still fairly new at the time, however, and the shift towards a mental health system characterized by biopower was gradual. Changing public opinion, for instance, remains an ongoing project to this day. In the meantime, Dymond would make other efforts to alleviate the injustices that were inevitable following a major re-organization of the mental health system; most importantly, addressing the psychiatric detention of those who did not require it. In March of 1961, the same month he spoke to the Empire Club, Dymond told the Ontario Legislature that all of the hospitalized psychiatric subjects in the province were being re-assessed with the intention of sending as many home as possible (Re-Assess All Mental Patients, 1961). Given the context of deinstitutionalization, it was the involuntary detention of the psychiatric population that was most at issue during this period. Long-term hospitalization was subsequently problematized in a number of ways. Economically, the old mental hospitals were expensive and ineffective. Medically, the custodial warehousing was itself antitherapeutic. Yet it was the ideological problematization—the political and popular recognition that those deemed mentally ill were sick, vulnerable, and worthy of better treatment—that was most apparent in 1960s Ontario, and increasingly, one that was framed in a language of rights.

4.3.2 Rights Discourses, Bill 99, and Ontario's Mental Health Law

While rights discourses had an international and Canadian presence in the 1960s, they were particularly visible in Ontario under the leadership of John Robarts. In continuing the Progressive Conservative party's control of the province's government, Robarts introduced a

number of progressive social policies and public works projects during his tenure as Premier between 1961 and 1971 (see McDougall, 1985; see also Paikin, 2005). His government also made significant advances in the domain of rights. Under Robarts, Ontario passed the *Human Rights Code* in 1962, the first human rights legislation in the country (Clément, 2016, p. 77). It also created the *Royal Commission Inquiry into Civil Rights*, what was perhaps the pinnacle of the Robarts government's rights work. Established in 1964, the provincial Commission was assigned broad terms of reference that included the review of existing laws to determine whether or not they encroached on the rights, freedoms, and liberties of its citizens, and, where this was found to be the case, to make recommendations for improvements (McRuer, 1968, p. viii). Robarts selected James McRuer as the sole Commission member, who, with the help of a support staff, would carry out these duties over the next seven years.⁶⁴

Over the course of three reports, published between 1968 and 1971, McRuer discussed a number of different issues, ranging from an examination of specific provincial statutes (report 3, volume 5) to the advisability of introducing an ombudsman (report 2, volume 4). There was a distinct flavour to McRuer's work: he highlighted the importance of individual rights and the rule of law, but did so without straying far from the Canadian, and very much British, tradition of Parliamentary sovereignty. Naturally, there were criticisms (e.g. Schindeler, 1969), but the overall importance of the investigation was not questioned. Well aware that Royal Commissions could serve as stalling tactics, Schindeler praised the Robarts government for performing "a public service of major significance, the impact of which will be felt for many years" (p. 131). With over half of the recommendations from his civil rights Commission eventually adopted ("Hidden Hell-Raiser," 1992), this is hard to dispute.

⁶⁴ McRuer also chaired the *Royal Commission on the Law of Insanity as a Defence in Criminal Cases*, the focus of chapter three, as well as the *Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths*.

More important than the Royal Commission itself, at least for the purposes here, was its reflection of a certain rights consciousness that was apparent in 1960s Ontario. Although the progressivism embodied by McRuer's *Commission into Civil Rights* was not at odds with the Robarts government, it was the result of an early misstep by the Premier (Boyer, 1994; McDougall, 1985, pp. 112–127; Schindeler, 1969). Robarts dealt with the perceived threat of organized crime in the province since his initial election in 1961 (McDougall, 1985, p. 115). Shortly after first taking office, the opposing Liberal party voiced concerns that the government was not taking the issue seriously (Boyer, 1994, p. 298). In response, Robarts established a Royal Commission, led by Ontario Justice Wilfred Roach, to investigate these claims. By the end of 1962, the well-publicized Roach Commission concluded that there was no threat of organized crime in Ontario.

A month after Robarts re-election in September 1963, Attorney-General Fred Cass introduced a controversial piece of legislation to Ontario's Legislature. Bill 99, and specifically section 14, would amend *The Police Act* to force individuals to give evidence to police in secret or face jailtime. The potential law was seen as an attempt to target organized crime, the threat of which was declared non-existent the year before, thus leading to major backlash in March 1964. Legal scholar Alan Mewett (1965), who praised the press' critical response to the law (and condemned the legal profession that said little about this), published an article the following year that provides a helpful snapshot of the period:

In spite of the incredibly contradictory reports, statements, and charges about the existence of organized crime in Ontario, there can now be no doubt in anyone's mind that it does represent a serious and rather urgent danger. But no one can be naïve enough to think that organized crime can exist without corruption and graft; not necessarily among high placed persons, nor necessarily on the provincial government level, but necessarily because of either insufficiency or incompetence on those levels. A totalitarian tribunal of political appointees is a pseudo-cure of the worst variety. Our courts do, it is true, have

extremely wide powers, but our judges are to be trusted, and in any case there are the built-in safeguards against abuse. (p. 185)

Public concern in Ontario quickly shifted from organized crime to oppressive government tactics (McDougall, 1985, p. 122). Members of Robarts' own Cabinet began to denounce the law shortly thereafter, and Cass himself publicly criticized the proposed law that was condemned as an attack on the liberties of all Ontarians (Boyer, 1994, p. 299). Within a week, Robarts had gone from supporting the amendments to ousting Cass from his position as Attorney General. Although the controversial measure was quickly removed from the reworked Bill, the affair left a blemish on Robarts' leadership. In full damage control, the Premier took two steps (pp. 299-301). First, Fred Cass was replaced with Arthur Wishart as Attorney General. Second, he established the *Royal Commission Inquiry into Civil Rights* and appointed McRuer as chair.

Given the bad press of the "Police Act Incident" (Schindeler, 1969, p. 131), there was a keen sensitivity to the rights and liberties of Ontarians, both in and outside of the government, during the early to mid-1960s. According to Robarts' biographer, AK McDougall, "[t]he Bill 99 furor was a sharp, dramatic beginning of the deepening attitude of the 1960s and 1970s that governments were the real menace to the freedoms of the individual" (McDougall, p. 122). The affair had a lasting impact on the Robarts government, with the Premier consciously adopting a more hands-on approach with his Cabinet (p. 127). This increasing rights awareness was also apparent in discussions of deinstitutionalization. While discussions of the policy in Ontario during the late 1950s and early '60s spoke to a progressive and humanitarian policy, a new urgency following Bill 99 shifted the focus onto the injustices that were the result of slow and inadequate reforms. Dymond previously characterized Ontario as proactively addressing the broad problems of mental health and illness at the beginning of the decade, but the issue took on

a narrower and negative tone by June, 1964: “I’m concerned the system may be denying mental patients their rights as patients or even as criminals” (Mental Health Inquiry, 1964).

As a result, Dymond appointed Barry Swadron to head up an inquiry into the conditions surrounding the detainment of the province’s psychiatric patients in mid-1964. Swadron was a young lawyer who had recently obtained a Master of Laws (LLM) from Osgoode Law School in Toronto. He published his master’s thesis as a book, *Detention of the Mentally Disordered*, in 1964, and in which he examined Canada’s laws regarding the detainment of those deemed mentally ill, both in the civil and criminal settings (Swadron, 1964a). Swadron would leave a doctoral program at the University of Pennsylvania’s Law School to give full attention to his new position as Director of Ontario’s Study Project on Mental Health Legislation (Mental Health Inquiry, 1964). Mentioning the category of those found Unfit to Stand Trial in particular, Dymond appointed Swadron to lead the two-year study on June 25, 1964, with the aim of producing new mental health legislation for the province.

One goal of Swadron’s work was to address the stigma associated with psychiatric treatment; the hope was that public attitudes would continue to improve and mental health services could largely be obtained on a voluntary basis (Dexter, 1964). Regardless, the rights of those committed for psychiatric treatment, whether voluntary or not, needed to be respected. Although Swadron expected to encounter some constitutional issues of jurisdiction, given that his study examined those detained in both the criminal and civil mental health system (Mental Health Inquiry, 1964), the two groups were united on principle: involuntary detention needed to strike the proper balance between government and medical intrusion on the one hand, and individual liberty on the other. It quickly became apparent that these matters were most easily articulated within a language of rights (Dexter, 1964). Fittingly, the *Toronto Daily Star* would

report that successful completion of Swadron's work would essentially provide a "Bill of Rights" for those detained in the province's psychiatric hospitals (Dexter, 1964).

4.3.3 Fred Fawcett and This Hour Has Seven Days

Before Swadron could complete his work, the government's proactive approach to the rights of psychiatric subjects was overshadowed by a number of negative headlines regarding the case of Fred Fawcett. Jennifer Bazar (2015) describes Fawcett's story as that of one Oak Ridge patient that brought national attention to the issue of indeterminate sentencing in psychiatric hospitals. On the surface, the case fit easily into the post-Bill 99 paranoia that was concerned with government authority eclipsing individual rights. A closer look reveals that Fawcett's case also expedited a subtle transformation in how insanity was understood as a problem. In what can be called a shift from questions of substance to questions of procedure, Fawcett points to a change in which a preoccupation with identifying *who* was insane was replaced by questions regarding the appropriate management of such cases.

Fred Fawcett, a farmer living in the area of Owen Sound, Ontario, was fed up with the township's refusal to provide him with an access road, and stopped paying his taxes in protest (Bazar, 2015). He staked his position in his possession of the Crown grant for his home, arguing that provincial laws did not apply to him because the deed preceded Confederation (*Fawcett v Attorney-General for Ontario*, 1962, p. 10). In the first incident for which Fawcett was criminally charged, he allegedly shot at tax assessor Henry Seabrook's car when he showed up to his property on August 28, 1961. When police attempted to arrest Fawcett at his farm the following September 18, he allegedly disobeyed their orders while brandishing a rifle. Fawcett denied these accusations, but, before facing trial, a magistrate remanded Fawcett to a psychiatric hospital for observation in accordance with section 524(1a) of the *Criminal Code* (*Fawcett v*

Attorney-General (Ontario), 1964). He was sent to the Ontario Hospital at Penetanguishene where he was held under the provincial *Mental Hospitals Act* thereafter. He appealed his detention up to the Supreme Court of Canada, which dismissed his case in June 1964.

While Fawcett pursued his case in the courts, Swadron, along with McKnight and Mohr, published a study of the Oak Ridge forensic population in the *Criminal Law Quarterly* in 1962. Oak Ridge was a division of the Ontario Hospital, Penetanguishene, and, from its opening in 1933 to its closing in 2014, offered the only maximum-security forensic psychiatric unit in the province. Beyond an overview of Oak Ridge and its subjects, the article criticized the focus of medical and legal attention that was, until that point, preoccupied with the various aspects of criminal responsibility. This direction came at the cost of examining the “detention, care and release of the mentally ill offender” (p. 248), and served to underscore the overwhelming and daunting nature of the LGW that sprang from the fact “many patients under the present system have little hope of being released” (p. 250).

The problematic nature of the LGW was furthered by international comparisons. Swadron, McKnight, and Mohr (1962) pointed to legislative reform in the United States and England—specifically, the American *Durham* decision (1954) and the British *Mental Health Act* (1959)—as prompting the need for Canada to review its own laws. Canadian insanity law stood in stark contrast to reforms in the United States and Britain during the 1950s, and the authors’ reference to the American and British examples is interesting on two counts. First, as was evident in the *Royal Commission on the Law of Insanity as a Defense in Criminal Cases* (RCLI), it illustrates that international comparisons in Canadian discussions of insanity law during the mid-20th century tended to focus on these two countries in particular. Second, it points to the unique status of the criminalized insane as both a unique forensic group *and* as members of the

general psychiatric population. While the *Durham* ruling⁶⁵ in the United States applied to the criminalized insane by expanding the scope of the substantive insanity test, Britain's *Mental Health Act* deinstitutionalized the country's general mental health system by relocating treatment from the asylum to the community.

The problem outlined by Swadron, McKnight, and Mohr in the *Criminal Law Quarterly* would receive national attention in 1965 when Fred Fawcett's case was featured as a story on *This Hour Has Seven Days*, an avant-garde investigative news program that aired for two seasons on the Canadian Broadcasting Corporation (CBC) (Bazar, 2015).⁶⁶ Influenced by the emerging *cinéma vérité* movement, a documentary style of filmmaking that attempted to better capture the reality of the events it recorded (Leiterman, 1966, p. 11; Rutherford, 1990, pp. 407–408), Patrick Watson and Douglas Leiterman set out to merge journalism and entertainment in an effort to make public affairs interesting to the public (Leiterman, 1966, p. 29; Rutherford, 1990, p. 411). The approach proved effective in shining a light on Fawcett's plight. "Many reporters could, and did, write in 1965 that Fawcett was insane", Leiterman (1966) explained in an article penned for *Maclean's* magazine shortly after the show's cancellation, but it was the video interview with Fawcett himself—part of the segment which barely made it to air—that convinced the public of this (pp. 29-30). In methods mirroring the insurgent nature of the show, Leiterman describes how Fawcett's interview was obtained:

The famous interview with Fred Fawcett, an inmate of Ontario's Penetanguishene Hospital for the Criminally Insane, did get on the air, however. Although denied permission, a 'Seven Days' crew smuggled its equipment into the hospital (in picnic baskets), posing as friends of Fawcett's sister on a visit to her brother. The segment was

⁶⁵ Where the M'Naghten Rules provide a knowledge test that focuses on the lack or abnormal reasoning of the accused, the Durham Rule broadened the understanding of exculpating insanity by introducing a new standard: "an accused is not criminally responsible if his unlawful act was the product of mental disease or defect" (*Durham v United States*, 1954).

⁶⁶ Mohr (1978) would later fault the Law Reform Commission of Canada for abandoning any in-depth discussion of the relation between mental disorder and criminal responsibility.

the catalyst for a special inquiry into Fawcett's case, which resulted in his eventual release. (Rutherford, 1990, p. 413)

The episode revealed the haphazard and arbitrary nature of Fawcett's detention, which begged the question as to whether or not there were others in the same situation. It also did little to reinforce the idea of psychiatry as a science within viewers' minds and cast doubt over the profession as an effective arbiter of involuntary detention. The segment included an interview with Dr. Boyd, director of Penetanguishene, who along with three other psychiatrists, testified that Fawcett was insane; three others testified that he was not. According to Boyd, this was typical:

It's quite usual. It could have been a 1-2 split, or it could perhaps have been a 5-7 split. If necessary, more and more psychiatrists could have been brought in and make it appear even more ludicrous than it is with a 4-3 split. (Canadian Broadcasting Corporation, 1965; see also Bazar, 2015)

The questionable method that underpinned Fawcett's detention fared no better when the program turned to an interview with Ontario's Attorney General, Arthur Wishart. Introduced as "the man who can answer for keeping Fawcett locked up", the conversation between Wishart and *Seven Days'* reporters Warner Troyer and Peter Pearson quickly took on an almost farcical tone:

Wishart: [...] I think the psychiatrists agree, that it's only in the area, the geographical area of his farm that this paranoia appears.

Troyer: Well, could he get out if he sold the farm and rented an apartment in Toronto?

Wishart: [Chuckles] Well, I...

Troyer: Would the Attorney General's Department drop its case against him, would you be happy to have him out?

Wishart: You put it very simply—"if he sold the farm"—I... I'm... I think the psychiatrists then would say, this is what I read in their evidence, that if this farm situation were removed from his mental area, that the paranoia would disappear.

Troyer: If he sold his farm, if his farm was sold tomorrow, could he get out of the Ontario mental hospital the next day, and rent an apartment in Toronto and live a normal life as a free man?

Wishart: Well then, I don't think it would be quite that simple, I think he would... if he sold his farm, and if he came forward then with an application, I think psychiatrists would then say this, they've all said those that have said he's mentally deranged in this

area, would say this no longer exists and I think he would be freed. (Canadian Broadcasting Corporation, 1965)

Following the back-and-forth, *Seven Days*' host Patrick Watson concluded the segment by noting that Fawcett had already taken his case to the Supreme Court of Canada, and that "he does not know how he can prove to the officials that he is sane."

4.3.4. *Fred Fawcett and the Legislative Assembly of Ontario*

The *Seven Days* segment helped to make Fred Fawcett's case a topic of intense public and political scrutiny during the spring of 1965. On March 15 in Ontario's Legislature, less than a week before the airing of Fawcett's *Seven Days* story, Ken Bryden, NDP representative for the Woodbine area, asked Attorney General Wishart if he would consider appointing a commission to investigate Fawcett's detention (Ontario, March 15 1965, pp. 1263–1264). Wishart was quick to dismiss the idea, citing the already extensive judicial history of the case (p. 1295). Bryden repeated the request the next day, with Health Minister Matthew Dymond denying it for the same reasons. On March 21, Fawcett's *Seven Days* segment aired. Two days later, Bryden again asked if Wishart would appoint a panel of psychiatrists to review Fawcett's case, which Wishart and Dymond again denied (pp. 1482-1483). The conversation continued, and a number of issues were raised. In a remark that was all the more poignant following the Bill 99 fiasco, Bryden thought it was odd that the majority of the psychiatrists supporting Fawcett's detainment were government employees, while those opposed were not (p. 1482). Referencing the Attorney General's remarks during his *Seven Days* appearance, MPP Oliver asked Wishart if Fawcett could be released if he sold the farm. Wishart tried to distance himself from the claim, suggesting that it was momentary conjecture based on Justice Spence's legal reasoning in Fawcett's 1962 case (p. 1483; see also Spence, 1962). MPP Stephen Lewis, the NDP representative for

Scarborough West who would become a vocal proponent for Fawcett, suggested that it was a rights issue, although the specific formulation was at that point unclear. Lewis wondered if Fawcett's case should be handled by the *Ontario Human Rights Code*—a topic that was scheduled for discussion in the Legislature later that day— or, perhaps, the Canadian Bill of Rights, but Labour Minister Rowntree clarified it was not covered by the former, and that the latter was federal jurisdiction (pp. 1483-1484).

In a lengthy speech on April 9, Lewis provided an extensive overview of the peculiarities of Fawcett's case. The Legislature's discussion of Fawcett was telling, Lewis pointed out, since the branch tended to focus on laws at the general level. Given the circumstances, Lewis felt the Robarts government was not treating Fawcett's case with sufficient urgency (Ontario, April 9 1965, p. 2127). The original violent incidents that precipitated Fawcett's committal were never tried in court, a deficiency that was all the more glaring given that the corroborating evidence was questionable and the accused and other eyewitnesses denied the events altogether (pp. 2128-2131). The psychiatric evidence also raised questions, even beyond the well-publicized and divided opinions. One committing doctor inexplicably changed his stance on Fawcett's capacities (p. 2131), while another was unaware of the issues relating to the road allowance, Crown grant, and tax payments when supporting his committal (p. 2132). Indeed, Lewis felt that the publicity of the case was detrimental to the psychiatric profession's reputation (p. 2133). Legal and psychiatric issues aside, the government's response to the case was sloppy. One hundred and seventy-one residents in Fawcett's town signed a petition supporting Fawcett's return to his farm that was delivered to the Attorney General's department in January 1962; however, according to Wishart, he was hearing about it for the first time in 1965 (pp. 2134-2135).

The details of Fawcett's case were undoubtedly important. Worst case scenario, they revealed that Fawcett was being detained as a result of malice on the part of the provincial authorities; best case scenario, a lack of procedural protections in Ontario's mental health system were compounded by incompetency within the judiciary, psychiatric profession, and Robarts government. Whether the consequence of conspiracy or carelessness, the government's improper encroachment into individual rights was especially problematic in post-Bill 99 Ontario. Donald Macdonald, MPP for the York South riding, pointed to the optics of the situation when he urged Premier John Robarts to look into the matter in mid-March:

In view of all the far-reaching ramifications of it, and since it hinges on many departments, would the hon. Prime Minister himself consider intervening to give special consideration to this? It would seem to me that it is in the interest of the government that this should be done. The government may think it is on strong ground but an overwhelming proportion of the population of the province does not think so, and the issue is going to get publicity. It would seem to me to be in the government's interest to want to resolve it. Would the hon. Prime Minister consider this? (Ontario, March 22 1965, p. 1484)

Macdonald was right; newspaper coverage was extensive beginning in March. The *Toronto Daily Star* in particular published a number of articles over the next few months, many of which were penned by Sidney Katz. A staff writer with an interest in medical stories, Katz was openly critical in his reporting of the Fawcett case. He published a number of articles over March and April of 1965 that characterized Fawcett as the victim of an unjust and absurd system. He interviewed Fawcett's family, friends, and acquaintances to reveal not just a sane man to the public, but an upstanding and honest farmer who, by that point, had lost three and half years in custody, with no end in sight. Katz's work even made it into Ontario Legislature conversation. Like Ken Bryden, Katz (1965a) was suspicious that the psychiatrists in favour of detaining Fawcett were overwhelmingly employed by the government, while those supporting his release were not (p. 2). Lewis quoted Katz on this controversial point during his April 9 speech (p.

2134), something he was comfortable doing given his high opinion of the responsible reporting that he felt characterized the city's newspapers (p. 2128).⁶⁷

The *Seven Days* segment, legislative debates, and media coverage all overarchingly endorsed a narrative in which Fawcett was wrongfully detained with no way to prove either his innocence or sanity. Legal, medical, and administrative complexities aside, the story was both simple and outrageous in lay terms. It also had an obvious response: review Fawcett's case. Following Lewis' speech on April 9, Robarts assured a group of reporters that he would action the matter; whether this meant establishing a formal inquiry into Fawcett's case or a general board to review the cases of all those committed to Ontario's mental hospitals was unclear at that point (Neighbors' Petition News to Him, 1965). Ten days later, the Premier announced that an advisory committee on the detention of patients for the province—with Barry Swadron as its secretary and apparent spokesperson (Katz, 1965b)—would review Fawcett's case within the next three months, a plan that contradicted Dymond's earlier response in the Legislature (Plan Review On Fawcett By Board, 1965). The newly established advisory committee was not used in Fawcett's case, however, and his release—which was front page news in Toronto—was a “domestic decision” of Penetanguishene superintendent Dr. BA Boyd (Katz, 1965b).

4.3.5 Peter Lay and Ontario's Shift Towards “Legalism”

Fred Fawcett's case brought attention to the problem of psychiatric detention, but the individualized solution that resulted in his release did little for those that might be held under similar circumstances. One *Toronto Daily Star* article asked: “how many friendless and impoverished patients are there in Ontario mental hospitals who might be free if they had access to the same kind of objective advisory board that will hear the Fawcett case?” (Are There Other

⁶⁷ Bryden already made this same point in the Ontario Legislature, but Lewis chose to quote Katz.

Fawcett's, 1965). Fawcett's case review was the result of a lengthy and hard-fought battle that garnered widespread attention. With Swadron still in the midst of his work on Ontario's mental health laws, pressure was mounting that the ensuing reforms would adequately address the apparent legislative gaps. As MPP Lewis put it in the Legislature, "it has become evident to everyone that *The Mental Hospitals Act* needs some amendment, that the review procedure desperately needs amendment" (Ontario, April 9 1965, p. 2136).

Progress was slow, however, and Fawcett's case appeared to be an exception to the rule. Beyond the burdensome and "extraordinary" *habeas corpus* applications via the judiciary, psychiatric subjects still lacked any mechanisms that allowed them to appeal their detention or initiate review of their cases (Swadron, 1964a, pp. 171–172). In Ontario, psychiatric subjects were released if the hospital superintendent deemed them "sufficiently recovered", or if they were a more appropriate fit for another institution (e.g. home for the aged) (p. 172). The delayed legislative response was indicative of the significant shift from medicalism to legalism, meaning that legal procedure would come to regulate psychiatric discretion (Fennell, 1999; Jones, 1980) in the management of the province's mentally ill. Ontario's general psychiatric population had, to that point, existed largely under the scope of medical paternalism. The increasing recognition of these subjects as rights-bearing individuals was a major turning point in terms of how this group was conceptualized, and the legislator—especially in the pre-*Charter* period of Parliamentary sovereignty—was left to resolve the situation. As Swadron wrote in the introduction of his aforementioned book:

With advances in psychiatry, no doubt the number of patients for whom compulsory confinement is required will decrease. Nonetheless, there are currently in Canada thousands upon thousands of persons detained in mental hospitals. Even those who advocate open-door policies and informal treatment on an out-patient basis, must admit that there are some persons who must be confined for their own, and for society's good.

There must be laws to govern these unfortunates, whether they number one hundred thousand, one thousand, or even ten. (1964a, p. ix)

Almost a year after Fawcett's case was resolved, Lewis again raised the issue of psychiatric detention, this time in regards to Peter Lay. In December 1964, Lay faced criminal charges for assaulting his wife. Once in court, he was remanded to a mental hospital for observation where he was certified and committed on the authority of two psychiatrists. Lay's subsequent *habeas corpus* application was denied by the Ontario Supreme Court, and he was still in hospital in early 1966. On March 18 of that year, Lewis, directing his questions to Health Minister Dymond and the absent Attorney General Wishart, inquired as to what options remained for Lay to have his detention reviewed (Ontario, March 18 1966, p. 1671). Given the striking similarities between Fawcett and Lay, Lewis wondered if Lay could apply to the tribunal that was originally going to review Fawcett's case, but Dymond was unprepared to provide any answers that day. The following Monday, Wishart was present to express his support for the institution of review boards, but Dymond was away and thus unavailable to provide any details on progress in this area (Ontario, March 21 1966, p. 1695). A few days later, Dymond introduced a bill to amend the province's *Mental Hospitals Act*, which would provide "for the establishment of boards of review to consider requests by or on behalf of certificated and other patients for discharge or probation from Ontario mental hospitals" (Ontario, March 24 1966, p. 1853). In providing psychiatric patients the right to appeal their detention, or to have someone appeal it on their behalf, the Health Minister endorsed a shift towards legalism in the mental health system, something he resisted during the Fawcett debacle (Ontario, March 22 1965, p. 1483).

Less than a week after the announcement, Peter Lay committed suicide while in hospital. After spending over a year in custody, Lay was apparently on the brink of release, pending someone who would take responsibility for his care (Probation from Hospital, 1966). His death

was frontpage news (Freedom Seemed Near, 1966) and a potent example of the dangers of arbitrary psychiatric detention. The outcome only added to the already contentious debates in Ontario's Legislature and brought increased scrutiny to Dymond's new Bill. An obvious moral outrage, the Lay case also drew attention to the second major issue that complicated mental health law reform: the constitutional status of those deemed both criminal and mentally ill. Consequently, it was unclear if Lay would have actually qualified for review under Dymond's proposed legislation.

Given the constitutional division between matters of health and matters of criminal law, this jurisdictional problem always existed in Canada. Historically, the link between capital punishment and insanity meant that even a literal life sentence in a mental hospital was infused with an air of benevolence. Discussions of insanity during this time typically manifested as debates regarding the best insanity test; as a result, there was little concern about the rights of subjects following verdicts of insanity in criminal cases. As the philosophy of deinstitutionalization and an increasing recognition of the rights of psychiatric patients led to a growing interest in psychiatric detention—not to mention, the gradual movement towards the abolition of capital punishment—the indefinite nature of the LGW became more problematic.

While the widespread recognition that arbitrary psychiatric detention was morally objectionable drew attention to the problem in 1960s Ontario, it did not address the legal nuances of the subject. Swadron warned of potential constitutional issues when first starting his work (Mental Health Inquiry, 1964) and Lay's criminalized status likely would have excluded him from the jurisdiction of the proposed new review boards. The confusion reflected poorly on the Robarts government and Dymond quickly went into damage control. On April 6, 1966, he clarified that ninety-nine percent of the those detained in mental hospitals were covered by the

new Bill. However, the remaining one percent, the hybrid cases deemed both criminal and mentally ill, were not eligible for review under the new legislation, and cases like Lay's fell somewhere in between (Ontario, April 6 1966, p. 2327). The problem was that those deemed mentally ill and detained under the authority of the criminal law were outside the jurisdiction of provincial lawmakers. In other words, the constitutional division of powers meant that granting reviews to those held under the *Criminal Code* was *ultra vires* the provincial legislature. As the Health Minister explained, those on court-ordered remands to mental hospitals for observation would not be entitled to review boards while under the authority of the *Criminal Code*, but would have access if committed on provincial legislation thereafter. Ironically, as Lewis pointed out, the one percent driving the legislative reforms in the province—"the Fred Fawcetts of this world"—were the same ones excluded from rights' protections (Ontario, April 6 1966, p. 2329). Confidence in the new legislation was lacking and this was reflected in the press coverage (Mental Patient's Suicide, 1966). During one heated moment in the Legislature, Lewis suggested that Dymond did not even understand his own legislation (p. 2329).

Outside of Swadron's examination, discussions of psychiatric detention in Ontario blurred the technical distinctions between criminalized and non-criminalized populations. Dymond made particular mention of those found unfit to stand trial as requiring study ("Mental Health Inquiry to Cover All Ontario," 1964, p. 27) and the Fawcett and Lay cases presented unusual hybrids, neither purely criminal nor civil in nature. However, these distinctions were subsumed under the prevalent logic of deinstitutionalization, which was itself narrowing in conceptualization. Different scholars have shown that the "community" in community-based approaches to mental health is open to a number of interpretations (Ben-Moshe, 2011; Carey, 2011; J McKnight, 1995). While early discussions of deinstitutionalization in Ontario reflected a

progressive policy that embodied a new mode of treatment for all mental health needs, the emerging recognition of the rights of psychiatric subjects and the impact of the Fawcett and Lay cases meant that the concept increasingly served as the counterpoint to arbitrary psychiatric institutionalization. By the mid-1960s, discussions of deinstitutionalization in Ontario's Legislature meant little more than an absence of hospitalization.

While the authority of provincial legislators was unclear when the grounds for psychiatric detention were criminal, the attention surrounding the Fawcett and Lay cases forced the Robarts government to confront this jurisdictional confusion. Its legislative response, embodied in the *Mental Health Act* of 1967, also reflected another aspect of the Robarts government: its aggressive position towards issues of federalism in the second half of the 1960s. According to McDougall (1985), the Premier was long-concerned about Ontario's relationship with the federal government. Around the time of the Bill 99 incident, Robarts believed that Lester B Pearson's Liberal government was favouring Quebec's demands, evidenced in particular by discussions surrounding the soon-to-be introduced Canadian pension plan (pp. 128-133). Robarts also felt that the federal government pursued its own plans, like the nationalized health insurance program *Medicare*, with disregard for the financial burdens it placed on Ontario (Bryden, 2017, pp. 153–154; Robarts, 1967). Amidst these tensions, Robarts called for the unprecedented *Confederation of Tomorrow Conference* in 1967. Held in Toronto, it was the first federal-provincial conference to be called by a provincial government (McDougall, 1985, p. 179). As Robarts organized the event against Prime Minister Pearson's wishes, the federal government did not participate, opting to send observers instead (Bryden, 2017, p. 159).

Ontario's jurisdictional assertiveness was thus reflected in its legislative response to those deemed both criminal and mentally ill during the 1960s. Aware of the constitutional

complexities, Dymond pursued provincial reforms with the hope that the federal authorities would make the needed legislative changes on their end (Ontario, April 6 1966, p. 2327).

Following concerns that the reforms to the *Mental Hospitals Act* in 1966 would not apply to cases like Lay's, the Robarts government introduced a reformed *Mental Health Act* the following year. Modelled on a handful of principles that were the result of Swadron's two-year study, the new act passed laws aimed at protecting the rights of all those detained on psychiatric grounds (Ontario, May 19 1967, pp. 3637–3638). Importantly, this included those held on LGWs:

I am pleased to report that patients under warrant of the Lieutenant-Governor will enjoy the right of an independent review on a regularized legislative basis. Such reviews will be considered automatically at least once in every year. I take pride in mentioning that Ontario is the first province to move forward in this way. It now can be said that no patient detained in any psychiatric facility in this province will be without the opportunity of receiving an independent review of his case. (p. 3639)

The changes brought in by the new *Act* impacted both the civil and criminalized psychiatric populations and reflected a shift towards legalism in Ontario's mental health policy. Changes affecting the civil system reigned in the paternalistic nature of psychiatric committal; as one observer described it, the preceding "welfare standard" that allowed for commitment on the grounds of "observation, care, and treatment" was replaced by a "safety standard" in which a subject could only be detained out of concern for their safety or that of others (Frankenburg, 1982, p. 174). Aiming to address those concerns in the criminal context that were brought to the fore by Fawcett and Lay, the *Act* also ensured that those held on LGWs would automatically come before a review board on an annual basis. As Swadron would stress to the Legislature, the rights of all psychiatric patients were central in the new legislation (May 19 1967, p. 3638). Dymond was also correct in assuming that federal reforms would follow. Shortly after the introduction of Ontario's new *Mental Health Act* in 1967, the *Criminal Code* was amended to

provide provinces with the right to establish review boards that could assist the Lieutenant Governor in making decisions surrounding the release of those held on LGWs.

4.4. Conclusion: Constructing the Rights-Bearing Psychiatric Subject

Although fought at the provincial level, Ontario's creation of review boards for those held on LGWs was important for the entire country. The statutory authority for these bodies was the first of its kind in the nation (Canadian Mental Health Association. Committee on Legislation and Psychiatric Disorder., 1973, p. 169), a point of pride for Health Minister Dymond (Ontario, May 19 1967, pp. 3638–3639) and a significant step in legitimizing the detention of those held on such warrants. The changes at the federal level faced significantly less resistance than they did in Ontario. Part of this was because they were included in Trudeau's famous omnibus bill—to be discussed in greater depth in the following chapter—that would introduce major reforms to the *Criminal Code* in 1969. The provision for LGW review boards was only one part of the *Criminal Law Amendment Act, 1968-69*, that would, amongst other things, decriminalize homosexuality in very particular circumstances,⁶⁸ liberalize access to abortions, and impose laws on drinking and driving. The implementation of mental health review boards also appealed to the procedural aspects of managing insanity that were more amenable to reform. MP Andrew Brewin, for instance, introduced a bill in the House of Commons that aimed to broaden the scope of the substantive insanity defence, but it failed to pass (McRuer, 1966). Brewin's proposal was part of a reaction to concurrent debates on the status of capital punishment (Abolitionists Turning

⁶⁸ The amendments were minimal: acts of buggery, bestiality, and gross indecency were no longer illegal when committed in private between two consenting adults who were both at least twenty-one years of age (*Bill C-150*, 1968, clause 7). Scholars disagree on the proper interpretation of these reforms. While Kinsman and Gentile (2010) suggest that this “partial decriminalization” was a step in the right direction (p. 221, 222), Hooper (2019) argues that the *Act* recriminalized homosexuality in Canada since it “did not change the fundamental ways that queers interacted with the justice system” (p. 259). The amendments to homosexuality will be returned to in the following chapter.

to Sanity Loophole, 1966; *The Danger of Executing the Mentally Ill*, 1966). The abolition of capital sentences appeared to be off the table prior to the moratorium in 1967,⁶⁹ so subsequent efforts aimed to broaden the scope of insanity in order to enlarge the group ineligible for execution.

The introduction of mental health review boards to federal law was not entirely surprising either. Barry Swadron, who argued for a shift in focus from determinations of insanity to the processes following such verdicts (Swadron, 1964b), was also involved in similar work at the national level. He served as Research Director of the CMHA's Committee on Legislation and Psychiatric Disorder, which, as discussed above, published three reports over the course of the 1960s. These national efforts mirrored the developments in Ontario: the 1964 report examined mental hospital legislation in light of the widespread shift towards deinstitutionalization; the 1967 report focused on the civil rights of those detained in mental hospitals; and the 1969 report looked specifically at mental illness in the criminal process. The CMHA also collaborated with the Canadian Committee on Corrections to help produce the "Ouimet report" in 1969, with Barry Swadron authoring the chapter that urged for some kind of reviewing bodies for those with a mental disorder who came into conflict with the criminal law. The *Criminal Code* amendment was thus responsive to the CMHA's recommendations, which aptly summarized the state of those held on LGWs: "[t]here has been a clear authority for holding them; a paucity of authority for letting them out" (1969, p. 6).

The legislative changes in Ontario and at the federal level were minimal. The review boards provided for in the *Criminal Code* were not a requirement, but simply an option that was

⁶⁹ As described in chapter two (p. 31, footnote 20; p. 32, footnote 22), the Canadian government placed a moratorium on the practice of capital punishment until its near-total abolishment in 1976. Military crimes remained an exception to the rule since they were governed by the *National Defence Act*; the practice was completely eliminated following amendments to this legislation in 1998.

left open to provincial discretion. Similarly, the safety standard introduced to Ontario's civil mental health system in 1967 was open to some interpretation and the commitment criteria was refined towards the end of the 1970s in an effort to further advance individual liberty (Schneider, 2015, p. 5). More important than the specific reforms of the 1960s was that they pointed to the beginnings of the psychiatric detainee as a rights-bearing subject.

This new rights-based approach proved effective in the management of those deemed both criminal and insane, a group that Canadian lawmakers previously struggled with. The vague power of the LGW was long-enabled by the link between the insanity defence and capital punishment. Yet, as the indefinite detention of those deemed criminal and insane surfaced as problematic in 1960s Ontario, rights emerged as the dominant vocabulary for making sense of a space that was, up to that point, largely ungoverned. At first glance, the translation appears straightforward and one-way: “[a]s dominant conceptions of the relationship between rights and freedom maintain, freedom is a property of the individual human subject and rights are a mechanism for protecting that freedom” (Golder, 2013, p. 6). Indeed, rights are often thought of as revelatory; in correcting longstanding injustices, they do not create, but rather discover a feature that can mask their productive power. In rejecting an ontological and ahistorical conception of rights, one in which they are an essential aspect of humanity, Golder shows that they can be constitutive of the very subjectivities they seek to protect. Drawing on a Foucauldian understanding of power, Golder highlights “the political ambivalence of rights” in which they can serve as both a means of resistance and subjugation:

Far from being unproblematic tools for the protection of the subject's freedom, rights emerge in this account as conflicted and ambivalent mechanisms which subjectify and regulate the would-be subject of rights even as they claim to protect that subject or to enlarge the domain within which that subject moves. (p. 7)

Nikolas Rose (1985) recognizes that the cultural currency of rights discourses in Western liberal democracies can make them effective in certain circumstances. The recognition of rights in Ontario's mental health system during the 1960s was shaped largely by the context of deinstitutionalization, and undoubtedly, there were benefits to this shift. Not least of which, the one-time asylum population could avoid many of the brutalities of the standalone mental hospital. Similarly, those detained under the LGW were at least now provided with machinery for annual case review. Yet Rose also warns of the limited application of rights discourses, noting that "such language provides no means of formulating objectives for substantive reforms or for implementing such reforms [...] it sidesteps the issues, by smuggling in an unanalysed morality concerning the value and attributes of humans and the rules of just conduct" (p. 214). Coupled with the increasingly under-funded provincial mental hospitals, the lack of community-based resources that followed deinstitutionalization meant that many individuals were left with little support. As Treffert (1973) put it, the shift entitled many to die with their rights on.

It is important then to recognize the productive ability of rights discourses. In her examination of human rights law, Gozdecka (2015) shows that human rights discourses are constitutive of those subjectivities it aims to protect. Again, her utilization of a Foucauldian conceptualization of power is fundamental:

This form of power applies itself to immediate everyday life which categorizes the individual, marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him which he must recognize and which others have to recognize in him. (Foucault, 1983, p. 781)

Rights discourses can provide the framework in which the truth of the subject can be established, and ultimately produce the ways in which she can be known to herself and others. The events in 1960s Ontario reveal an early moment in which those deemed criminal and insane were recognized, first and foremost, as rights-bearing subjects, around which the psychiatric and

criminal elements could revolve. This shift produced ontological stability that would be more receptive to law reform efforts. Unlike the confusing concept of “insanity”, rights provided a familiar ontology that both legal and psychiatric discourses could engage with. In the following chapters, a distinct trend emerges in insanity law reform efforts; namely that increasingly, questions of procedure, detainment, and risk would eclipse past discussions that focused on reconciling notions of criminal responsibility with mental illness.

Chapter Five: Rationalizing Canadian Insanity Law and the Least Restrictive Alternative

In the previous chapter, I examined the emergence of insanity in the criminal legal context as a pressing provincial problem in 1960s Ontario. Amidst the broader context of a growing rights movement and the deinstitutionalization of the psychiatric hospital, two separate cases—those of Fred Fawcett and Peter Lay—brought attention to the unique form of detention imposed on those deemed both criminal and insane. In spite of questions regarding the province’s constitutional authority to do so, the Ontario government enacted legislation that created review boards to provide some oversight of those held indefinitely on Lieutenant Governor’s Warrants. In the current chapter, I trace the emergence of a similar problematization, but through the federal government’s efforts of insanity law reform over the 1970s and ‘80s. As will be seen, the detention of those deemed both criminal and insane also became the primary focus of the insanity work done at the national level, and it yielded similar results: those declared insane increasingly came to be understood as rights-bearing subjects.

I trace the development of this problem across three historical sites in Canada. First, I examine the *Criminal Law Amendment Act, 1968-69*, and to a lesser extent, the legislation of the same name in 1972. The *1968-69 Act* declared that while certain activities like homosexuality and abortion may be held as immoral, they fell outside the authority of the criminal law. In so doing, the *Act* is seen as recalibrating the scope of the criminal law from a moral to a legal standard (e.g. Chambers, 2010). My discussion of the *Act* highlights two important elements of this shift. First, I situate *Bill C-150* within the personal history of Pierre Trudeau. Trudeau played an integral role in the passing of the legislation, first in his capacities as Justice Minister and then as Prime Minister, and it spoke to the significant influence he exerted on the country’s political agenda during this period. The *1968-69 Act* needs to be understood within Trudeau’s own

experiences growing up in the Quebec of Premier Maurice Duplessis. Frustrated by the shortcomings of the post-Duplessis Quiet Revolution, Trudeau's personal commitment to pluralism would drive his ambitions to limit the scope of the criminal law. Just as importantly, however, the Trudeau-led reforms are an early indication of the country's shift from welfare to neoliberal political rationalities. Drawing on the work of Nikolas Rose (1990) and John Pratt (1996), I show that Canada's decriminalization of vice is an early indication of the shift away from welfare rationalities of government. In their place, neoliberal rationalities would increasingly rely on modes of governance that act upon the image of an autonomous individual who freely chooses his or her own values and moral codes.⁷⁰

The final two historical sites are both instances of institutionalized efforts of insanity law reform in the country. The first looks at the Law Reform Commission of Canada's (LRCC) work on insanity law in the mid-1970s and the second examines the Justice Department's Mental Disorder Project (MDP) of the mid-1980s.⁷¹ An often-overlooked period in the country's history of insanity law reform, this chapter will show that efforts during this time can be understood as working towards the "rationalization" of the country's insanity laws that were increasingly seen as irrational. Importantly, these examinations of insanity law existed within institutionalized efforts of criminal law reform in the country. In contrast to the preceding ad hoc studies of

⁷⁰ Rose and Miller (2010) describe this autonomy as "a kind of regulated freedom" in which "[p]ersonal autonomy is not the antithesis of political power, but a key term in its exercise" (p. 272).

⁷¹ Although the MDP will be discussed in more detail in its corresponding section below, it is worth providing some context here since, as I argue, it reflects a period of "institutionalized" insanity law reform work in the country. Led by Ontario-based lawyer Gilbert Sharpe, the MDP worked through the first half of the 1980s, releasing three reports annually between 1983 and 1985. The MDP was one of several projects included under the Criminal Law Review (CLR), a collective undertaking between the federal and provincial governments that began with discussions to overhaul the *Criminal Code* in 1979. The CLR quickly evolved to become the first time that the federal government committed itself to a continued systematic and principled approach to criminal law reform in the country (Healy, 1984, p. 24). For my purposes, the CLR and the MDP are significant in extending the Canadian Law Reform Commission's philosophical framework for criminal justice policy, as well its approach to insanity law reform.

insanity law, federal efforts in the 1970s and '80s were informed by a broader, comprehensive approach to criminal law reform that was itself shaped by neoliberal rationalities. More specifically, both the LRCC and the Justice Department adopted the normative position that the criminal law should be applied according to the principle of restraint. In the area of insanity law reform, this was quickly translated into the “least restrictive alternative” (LRA).⁷² While the LRA is open to interpretation, its application in both the civil and criminal setting holds that legal intervention into the lives of those deemed mentally ill should be minimal. In Canada’s institutionalized efforts of insanity law reform, the principle would have significant ontological implications in constructing those deemed insane as rights-bearing subjects.

The chapter concludes by examining the link between the political rationality that grounded the LRCC and the MDP’s efforts of insanity law reform and the accompanying technologies utilized to construct a governable subject. In this way, I take seriously O’Malley’s claim (1996) that governmental technologies need to be understood through their animating political rationality. In focusing largely on questions of detention, an important problem emerged in the insanity work of both groups: psychiatric experts could not predict the future dangerousness of subjects deemed insane. While the most obvious articulation of the LRA saw detention as justified by the presumed dangerousness of the criminally insane subject, the MDP confirmed the widespread consensus that psychiatric predictions of dangerousness were unreliable in 1980s Canada. Instead, the Project grounded the LRA in a rights-based understanding of the insane subject. Working during the introduction of the *Charter of Rights and Freedoms* in 1982, the MDP refined the construction of those deemed insane as, first and foremost, constitutional subjects.

⁷² The principle is referred to by a number of similar names (e.g. least onerous setting, least intrusive means, least restrictive mechanism). For the sake of simplicity, “least restrictive alternative” is used here.

Although the current chapter ends prior to any legislative reform, the next and final chapter picks up on the revamped system that was introduced in 1992. While these reforms followed in the wake of *R v Swain* (1991), a case that deemed several aspects of the preceding Not Guilty by Reason of Insanity (NGRI) system unconstitutional, the developments traced in this chapter provided an important foundation for the succeeding system. In particular, the LRA would legitimize the application of the criminal law on those now declared Not Criminally Responsible on Account of Mental Disorder (NCR). While this chapter illustrates the difficulties of governing insanity on the grounds of danger, the following chapter shows that the constitutional subject was governable on the grounds of risk. The transition towards risk-based governance, however, depended first on the construction of the constitutional subject. While the introduction of the *Charter* was a significant moment in this transformation, it served to confirm a process that had already begun in the country's institutionalized insanity law reform efforts.

5.1 The Criminal Law Amendment Act, Twice

In the current section, I examine two incarnations of the *Criminal Law Amendment Act*. The first *Act* in 1968-69 is the more significant break with tradition, but the second, in 1972, confirmed the new direction away from moralism and towards legalism. Before moving into these broader discussions however, it is worth detailing their separate amendments to the country's insanity laws. The most significant of these was the *1968-69 Act's* introduction of review boards for those held on Lieutenant-Governor's Warrants (LGW). The review boards reflected concerns about the detention of those deemed criminal and insane, and provided some oversight to the Lieutenant-Governor's otherwise absolute authority. However, since review boards were provincial bodies, the effect of the new law was undermined by the fact that it could not mandate the creation of review boards but simply granted provinces the ability to do so. And

even where the boards were established, the Lieutenant-Governor was not required to follow their advice. While the codification of review boards was not without merit—it offered some clarity in the murky federal-provincial jurisdiction that encompassed this population—the toothless legislation provided no guarantees to those held on LGWs.

On June 15, 1972, Parliament passed another omnibus *Criminal Law Amendment Act*. Following two of the recommendations from the Ouimet report, and more specifically, the Barry Swadron-authored chapter regarding those with mental illness who came into conflict with the criminal law, the wide-reaching *Act* made limited changes to Canada’s procedural insanity laws. First, eligible time for psychiatric observation following court-ordered remands was increased from 30 to 60 days. While MP Andrew Brewin voiced some reservations to this change—as noted in previous chapters, Brewin was one of the more vocal representatives when it came to insanity law reform during this period—it was thought that the extra time would produce better-founded psychiatric opinions (*Standing Committee on Justice and Legal Affairs*, 1972, pp. 28–30). The Ouimet Committee was also cognizant of the fact that the federal *Criminal Code* applied to a vast and disparate territory, and many communities, particularly those in rural areas, would benefit from more time in order to secure the specialized services (p. 28).

Second, the wide authority of the Lieutenant Governor was clarified. Where review boards were introduced to institute some checks and balances on the purview of the LGW, the Ouimet Committee recommended that the laws be amended in order to make the absolute authority of the Lieutenant Governor clear: “[t]he Committee recommends that section 526 of the Code be amended so as to remove any doubt that an order of the lieutenant-governor may encompass a broad scope of disposition, including discharge from custody in the initial instance” (Canada. Ouimet., 1969, p. 231). Historically, concerns indicated that the Lieutenant Governor’s

role worked against the freedom of those held on LGWs, but the Ouimet Committee suggested that amending section 526 of the *Criminal Code* would allow for immediate release. This was all the more important since the Committee determined that, in many cases, the offence preceding an LGW was not serious in nature (however, clear and decisive data on this point was elusive; pp. 230-231). Regardless, the Committee concluded that clarifying the Lieutenant Governor's ability was crucial in an increasingly deinstitutionalized psychiatric system: “[f]lexibility of disposition is essential. The reinforcement of community psychiatric facilities is making it more and more possible for a greater number of individuals to be treated and cared for in the community” (p. 231).

While the insanity amendments are indicative of a shift towards the procedural aspects of insanity within the criminal context, a point that will be returned to later when discussing the LRCC's work on insanity, the *Criminal Law Amendment Acts* reflected an increasingly comprehensive and holistic approach to criminal law reform in Canada. During *Bill C-2's* second reading in the House of Commons,⁷³ Justice Minister Otto Lang placed the legislation in a lineage that began with Trudeau's 1968-69 reforms three years earlier:

In all of these moves to amend the law we have been conscious of the view that there is an important distinction between law and morality, that not everything which some of us may regard as wrong or undesirable need be included within the prohibitions of law. The law does not have to interfere in everything that is regarded as wrong: it need not be overzealous in this regard. (Lang, 1972, pp. 1698–1699)

Indeed, the *Criminal Law Amendment Act, 1968-69* reformed the country's criminal laws in a major way. Given the breadth of the legislation, some of the items were more significant and thus received more attention than others. Amongst the momentous changes was the partial decriminalization of homosexuality in particular circumstances, the legalization of abortion

⁷³ Bill C-2 was the vehicle for the enactment of the *Criminal Law Amendment Act, 1972*.

under certain conditions, the clarification of drunk driving as an offence (standardized by the breathalyzer), the introduction of stricter gun laws, and granting provinces the authority to run lotteries. Amendments of less notoriety included increasing judicial discretion in the levying of conditional sentences, implementing laws around the detainment of witnesses of crimes, and the aforementioned right for provinces to establish review boards for those held on LGWs.

5.1.1 Pierre Elliott Trudeau

The momentous changes encapsulated in the *Criminal Law Amendment Act, 1968-69* cannot be separated from the sociopolitical context of the period. At the national level, the late 1960s were dominated by the presence of Pierre Trudeau. Following his appointment as the country's Justice Minister in 1967 by Prime Minister Lester B Pearson, Trudeau would subsequently replace his former boss the following year. Elected on a wave of "Trudeaumania", the Beatles-inspired portmanteau created to describe his election-run fanfare is indicative of the youthful exuberance behind it, although his shine did not belie substance. His personal and political beliefs spoke to the burgeoning anti-establishment morality of the mid to late 1960s, while his ideals of a united Canada directly opposed the growing threat of Quebec nationalism. As historian Paul Litt (2016) explains, he also offered something of a response to "[t]he glamorous Kennedy presidency that had impressed Canadians deeply in the early 1960s" (p. 15). In a number of ways, Trudeau offered a political symbol that many were keen to get behind.

The passing of the *1968-69 Act* was a significant break with the past and the cultural and political force that was Pierre Trudeau is important in understanding its broader acceptance. Not surprisingly, for Trudeau, the *Act* "was the most natural thing in the world" (Trudeau, 1993, p. 80). The policy shift reflects a rational approach that was based on a concern for individual rights within a pluralistic society (Standing Committee on Justice and Legal Affairs, 1969, p. 659), a

problematic that Trudeau had come to terms with early on in his life. According to Trudeau, his philosophical beliefs were cemented during his time as a university student abroad. Rejecting “absolute liberalism”, the former Prime Minister drew on the works of Jacques Maritain and Emmanuel Mounier to embrace the views of “personalism”, a school of thought he described as:

[A] philosophy that reconciles the individual and society. The person, according to these two teachers, is the individual enriched with a social conscience, integrated into the life of the communities around him and the economic context of his time, both of which must in turn give persons the means to exercise their freedom of choice. It was thus that the fundamental notion of justice came to stand alongside that of freedom in my political thought. (Trudeau, 1993, p. 40)

Trudeau’s interpretation of personalism informed his political philosophy, which was also linked to his own experiences as a native of Quebec. As an international student, Trudeau knew he would return to his home province one day. He left Quebec when the heavy-handed government of Premier Duplessis was in power and returned to the same. Trudeau subsequently became active in provincial politics with a mission to unite the opposition around the goal of “making Quebec a genuine democracy, and getting rid of the government machinations that were endangering people’s freedom” (Trudeau, 1993, p. 70). Duplessis brazenly disregarded the civil liberties of Quebec’s citizens on a number of occasions (e.g. the padlock law, *Roncarelli v Duplessis* (1959)), and on a more personal level, intervened to prevent Trudeau from securing three separate professorships (pp. 63-64). The province entered the Quiet Revolution upon Duplessis’ death in 1959, a period of marked social change that Trudeau described in the following way: “[t]he times favoured change, pluralism, tolerance, moderation. In short, politics was headed in the direction of which we had dreamed all our adult lives” (pp. 71-72).

Trudeau’s political activism in the federal government is thus intertwined with Quebec’s history. Trudeau was disheartened to see the quick rise of provincial nationalism during the 1960s which drove calls for provincial sovereignty and the separatist movement, and it is against

this sociopolitical backdrop that Trudeau came to endorse his own brand of personalism, one that envisioned the collective project of citizenship as revolving around the neoliberal values of individual freedom and choice. The fact that one of his first main projects involved overhauling the *Criminal Code* was also related to his first position in the Canadian government as Minister of Justice. He has since commented that, as a young Justice Minister, he wanted to attack the most difficult problems head on (Trudeau, 1993, pp. 80–83), although others have suggested that the focus on criminal law reform allowed him to avoid more complex issues (see Kimmel & Robinson, 2001, p. 147).

Specific intentions aside, the reforms were unequivocally ambitious. Trudeau initially introduced the *Criminal Law Amendment Act, 1968-69* at the end of 1967 as the country's Justice Minister, but the Bill's discussion was postponed due to its scope and gravity and on account of the upcoming Christmas break (Trudeau, 1967, p. 5722). Trudeau was Prime Minister by the time Parliament returned to the matter a year later, so Justice Minister John Turner was left to formally introduce the Bill, which he did enthusiastically: "I speak this afternoon with the confidence that this legislation is the most important and all-embracing reform of the criminal and penal law ever attempted at one time in this country" (1969, p. 4717). Beyond the particular amendments themselves, the government saw the Bill as recalibrating the country's criminal law to reflect the modern values of Canadians that it had arguably fallen out of touch with. According to the Trudeau government, this required a fundamental reevaluation of the role and scope of the criminal law.

5.1.2 From Moralism to Legalism

Bill C-150's partial decriminalization of homosexuality is a prime example of the new approach that sought to distinguish between moralism and legalism (Chambers, 2010).⁷⁴ The Trudeau government's partial decriminalization of homosexuality followed in the vein of the Wolfenden Committee in the UK, with Minister of Justice John Turner quoting the Committee's report during the Bill's second reading in Parliament:

Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality. (The Committee on Homosexual Offences and Prostitution, 1957, p. 24 as cited in Turner, 1969, p. 4723)

Like the Wolfenden Committee, the Trudeau government clarified that the removal of offences from the *Criminal Code* did not condone behaviour that could still be immoral; it simply indicated that such behaviour did not fall under the scope of the criminal law. Despite its germinal appearances, the Trudeau government's position on the criminal law was surprisingly extensive. Even if somewhat rudimentary at the time, their refusal to break down the first *1968-69 Act* indicated that the reforms reflected a cohesive and comprehensive vision (J Turner, 1969, p. 4719), central to which was a morally neutral, or at least, a morally limited criminal law. Indeed, as Chambers (2010) highlights, the *Act* helped establish Trudeau as "the symbol for democratic rationalism" (p. 263), and as will be seen, this new rational approach would be further developed by the LRCC (Law Reform Commission of Canada, 1972, pp. 8–9; see also Alexander, 1972, p. 1797).

⁷⁴ It is important to clarify that the 1968-69 amendments only partly decriminalized sexual activities associated with homosexual men. Even following these reforms, laws remained more restrictive than they did by contemporaneous heterosexual standards (see Chambers, 2010; Hooper, 2019; Kinsman & Gentile, 2010, 2010; Smith, 2020).

5.1.3 Neoliberalizing Canada's Criminal Law

While Trudeau is an integral aspect in understanding the country's criminal law reforms of the late 1960s and early '70s, his personal values also aligned with a shift from welfare to neoliberal rationalities of government. For Foucault, "political rationality" refers to the mentalities and justifications that underlie the ways in which we govern ourselves and others (1979, 1991b, pp. 78–82). A number of scholars have worked to further develop Foucault's concept. Dean (2010) describes political rationalities as the ways in which we think about governing. For Dean, rationality does not refer to an idealized and perfect form of "Reason", but it does privilege systematic ways of thinking about and responding to problems that often draws upon various kinds of expert knowledge (p. 24). According to Rose and Miller (2010), knowledge is at the core of modern forms of government since it is central to "the very formation of its objects, for government is a domain of cognition, calculation, experimentation and evaluation" (p. 273). Rose and Miller thus offer the following definition of political rationalities:

[T]he changing discursive fields within which the exercise of power is conceptualised, the moral justifications for particular ways of exercising power by diverse authorities, notions of the appropriate forms, objects and limits of politics, and conceptions of the proper distribution of such tasks among secular, spiritual, military and familial sectors. (p. 273)

As Foucault explains, "[t]he government of men by men... involves a certain type of rationality", so political rationality has one particular problem at its core: "how are such relations of power rationalized?" (Foucault, 1979, p. 254).

Within this analytic framework, Trudeau's reforms are indicative of a new way of rationalizing the way in which people are governed.⁷⁵ Importantly, Trudeau's personal and

⁷⁵ It warrants mentioning that I am working with a particular aspect of Trudeau's political thought. Attempting to encapsulate his political philosophy in its entirety is both beyond the scope of this chapter and references an ongoing debate that is not particularly important to my purposes. For example, although he is often identified with various

political beliefs aligned with neoliberal rationalities of government that were emerging on the international stage in the second half of the 20th century. For Rose (1990), the decriminalization of vice in the United Kingdom during the late 1950s and 1960s was the first indication of such a shift (pp. 224–225; see also Pratt, 1996).⁷⁶ The Wolfenden report best exemplified this transition that clarified the distinction between the public and private realms, and limited the reach of the criminal law to the former. According to Rose, it was at this point that “legal measures and statutory enforcement of moral codes [took] second place to the utilization of other techniques to generate the commitment of selves to values and forms of life supported by authorities” (p. 225). This new hyper individualism questioned the totality of the welfare state; the uptake of certain values was now the product of a personal free choice, a logic that was clearly enunciated by Justice Minister John Turner (1969) when he stated that “[i]ndividuals will continue to be responsible to themselves for their moral behaviour” (p. 4723). Of course, recognizing individuals as morally self-regulating subjects does not equate to the dismantling of the welfare state. At the same time, such autonomy does play an important role in the economic rationality of neoliberalism, and more specifically, the conceptualization of governmental responsibilities in relation to entrepreneurial subjects that co-exist within the inherent fairness of the market. In a point that will be returned to shortly, the secularization of criminal law was paralleled by its growing expression within discourses of security, a development that is linked to neoliberal

forms of liberalism, Firmini (2015) argues that failing to recognize the classical republican underpinnings of his thought accounts for many of his supposed political inconsistencies. Instead, it is those strands of his political thought that are relevant to Canadian insanity law reform efforts during the 1970s and ‘80s that need to be examined here. Most importantly, in attempting to reconcile individual freedom within an increasingly pluralistic society, Trudeau pushed for a secularized and limited criminal law that appeared to be grounded in a detached and objective rationality (Derfler, 2012, p. 177).

⁷⁶ Canada liberalized many of its laws in those same areas noted by Rose (1990), including homosexuality, gambling, abortion, and divorce (p. 225).

rationalities that aim to provide the conditions in which this market can operate (Bang, 2015, p. 196; Chagnon & Gauthier, 2013, p. 190).

While Rose draws attention to the self-governing citizen that followed in the wake of neoliberal policy, the shift from moralism to legalism prompted important questions regarding the role of the criminal law in Canada. Like the Wolfenden Committee, Canadian lawmakers soon found that they struggled to clearly define what ought to fall under the scope of the criminal law. As will be seen, the LRCC would address these broad questions in tandem with more particular areas of law reform. For the moment, it is sufficient to recognize that the *1968-69 Act* was an important moment in foreshadowing Canadian criminal law reform over the next two decades, and of which two features stand out. First, the Trudeau government initiated a move away from the piecemeal revision of the criminal law to a more comprehensive approach that promoted a holistic understanding of the *Criminal Code*. The government resisted calls to break down *Bill C-150*, suggesting that the whole was greater than the sum of its parts: “[t]he government is of the opinion that this bill stands for the general principle of criminal and penal law reform and should be dealt with by the house on that basis” (Turner, 1969, p. 4719).

This went hand-in-hand with the second feature: although rudimentary, Trudeau’s reforms point to an emerging philosophy that the criminal law be used in as limited a capacity as possible. According to Pratt (1996), this restricted application is indicative of the transition from welfarist to neoliberal penal rationalities. Signified by “an economy of scarcity”, the neoliberal penal system is reserved for the severely delinquent while the rest “are to be dealt with in cheaper ways, sometimes outside of the penal system altogether” (p. 30). Although the actual implementation of this reasoning is open to question, the ideological shift informed the LRCC over the next twenty years and played an important role in the legislative reforms it would

propose. This was particularly apparent in the area of insanity law. As will be seen, the development of this principle of restraint within the continuing work of the LRCC provided shape and direction to the study of insanity law reform that had, up to that point, been largely disjunctive.

The link between the *Criminal Law Amendment Acts* and neoliberalism is somewhat tenuous at this point and the categorization of these reforms as such could be disputed. Given that the emergence of neoliberal political rationalities in Canada are typically relegated to the 1980s (D Moore, 2007, p. 8), the *Acts* may be better understood as a sign of what was to come. Economically, Trudeau's influence on this shift was indirect; it might be argued that his government's spending prompted the fiscal restraint of the Mulroney and Chrétien governments (Clarkson, 2000, p. 592). At the same time, and while remaining cognizant of the risk of reading the present into the past, the criminal law reforms introduced by Trudeau's government are indicative of a secularism that would pave the way for neoliberal conceptions of the subject. In particular, the focus on "real crimes" suggests a utilitarian shift that Chagnon and Gauthier (2013) associate with neoliberal rationalities:

Hence all moral considerations are pushed aside in favour of a cost/benefit analysis in which the only enduring social dimensions that must be taken into account have to do with state/public security. This evolution of the law towards issues of security is a main feature of neoliberalism's effect on politics, social life and the law. (p. 190)

Indeed, it would not be long before the Trudeau government would introduce its "Peace and Security Package". Amidst the gradual abolition of capital punishment, the Package included a number of measures that aimed to protect the public against violent crime, including new dangerous offender laws, increased gun control, expanding police use of electronic surveillance, reforming the procedures involved in the release and supervision of those convicted of violent offences, and severe mandatory minimum sentences for the new categories of first and second

degree murder (Solicitor General of Canada, 1976, pp. 2–4). Petrunik’s description (1982) of the new dangerous offender legislation as an individualized response with little empirical support (pp. 241-242) is reflective of Chagnon and Gauthier’s description of neoliberal criminal justice policy. In fact, the underscoring neoliberal logic of crime prevention (O’Malley, 2009, p. 5) was so pervasive in the Peace and Security Package that the inclusion of an amendment for victimization surveys—notable here for having little to do with crime prevention—was argued for in these terms (Rock, 1986, p. 53).⁷⁷

It is important not to generalize these changes as indicating nothing more than neoliberalism. The shift in criminal law traced above is broad in scope, and it is likely that the more specific reforms are linked to a multitude of rationalities and historical practices (D Moore, 2007, p. 29); it would not be unreasonable to expect that the independent analysis of each of these changes would reveal a similar degree of nuance and heterogeneity. At the same time, the secularized framework of security suggests that neoliberalism was a dominant theme in this particular context. While I am not contending that the LRCC can simply be equated with the neoliberalization of Canadian criminal law, the emerging rationality provided a cohesive philosophy to guide criminal law reform, which was reflected in the LRCC’s calls for the restrained application of a secularized criminal law. This approach proved to be particularly conducive to the task of insanity law reform on two counts. First, it provided a thread of continuity that, as seen in previous chapters, addressed the ad hoc and temporary nature of earlier insanity law reform efforts. And second, it fit easily into discussions of insanity law reform that were evolving in a particular way. In chapter four, I showed that the focus of reform was shifting

⁷⁷ While victim-centred criminal justice policy can be indicative of neoliberal rationalities (O’Malley, 2009, p. 6), Rock’s example is interesting because the abolition of capital punishment prompted a preoccupation with crime prevention. As Rock points out, those pursuing the implementation of victimization surveys only adopted this reasoning as a means of convincing legislators to endorse the practice (p. 53).

from a preoccupation with identifying the insane to the practices regarding their detention and management. As will be seen in the following section, the Commission's work would crystallize this new direction which, in turn, required the NGRI subject to be constructed as governable in ways that were not necessary in the recent past. In this regard, the institutionalized period of insanity law reform examined in this chapter is an early indication of the risk-based forms of governance that are dominant in the NCR system today.

5.2 The Law Reform Commission of Canada

Central to the LRCC was its incorporation of the political rationality embodied in Trudeau's *Criminal Law Amendment Act, 1968-69*. According to Foucault (1991b), the particular political rationality of an institution or set of practices is not some hidden logic waiting to be unearthed by the historian, but an "explicit programme" attempting to deal with one or multiple problems in a calculated and rational manner (Foucault, 1991, p. 80; see also 1979, p. 242). Rose and Miller (2010) indicate that political rationalities can be identified by three features: (1) they take a moral form; (2) they are epistemological in presenting certain assumptions about the subjects and objects they aim to govern; and (3) they provide a linguistic foundation that serves to construct the problem and solution (pp. 276-7). As the authors summarize, political rationalities "are morally coloured, grounded upon knowledge, and made thinkable through language" (p. 277). The role for criminal law propagated by the Trudeau government and developed by the LRCC reflects these three characteristics. First, the new approach limited the scope of the criminal law and held that moral policing was not part of its function. Second, the minimized role of the criminal law reflected an understanding of Canadians as morally self-regulating, or at the very least, entitled to private immorality. In those cases of last resort where the penal apparatus was necessary (e.g. Law Reform Commission of Canada, 1976b, p. 16), it

should be utilized in as limited a capacity as possible in order to recognize the rights of those within its domain. And finally, in articulating a normative vision for the criminal law, the Trudeau government provided a prescriptive and comprehensive ideal that provided a framework for future law reform.

As discussed above, particular programmes of government are more specific materializations of their underlying political rationalities (Foucault, 1991b, p. 80). In seeking to keep the country's laws in line with contemporary values, the Trudeau government created the Law Reform Commission of Canada (LRCC). The formation of the LRCC is integral in understanding its subsequent influence on Canadian insanity law. As I will show, it initiated a period of institutional law reform in the country that was conducive to the Trudeau government's position that the country's criminal law should reflect a comprehensive approach. Interestingly, the cohesive criminal justice policy that would subsequently come out of the LRCC may have been surprising even to the Trudeau government, since this was not a key component of the original vision. During his introduction of the *Law Reform Commission Bill (Bill C-186)*, Justice Minister John Turner described the Commission's primary objective "to study and keep under review on a continuing and systematic basis the statutes and other laws and to make recommendations for their improvement, modernization, and reform" (Turner, 1970, p. 3961); as such, the Commission was supposed to be responsive to the needs of law reform as they emerged. Similarly, limiting the tenure of Commission members was designed to keep it focused on needs that were informed by the present (p. 3960).⁷⁸ As will be seen, however, the Commission would adopt a "dialectical" approach that involved establishing a general

⁷⁸ Full-time members would be limited to seven years, and part-time members to three years (Turner, 1970, p. 3960).

framework to direct more particular studies of the law, which subsequently shaped its interpretation of criminal justice policy.

Since the general would inform the particular and vice versa, this dialectical framework also helps to explain why the LRCC was not decidedly neoliberal. Certainly, the founding of the Commission has been identified as a product of welfarist rationalities, just as neoliberal cost-cutting has been attributed to driving its (temporary) closure in 1992 (M Moore, 2018, p. 254; Murphy, 2004a, p. 10). What is clear, however, is that this general framework reflected a neoliberal rationality that would not only impact the Commission's subsequent work on insanity law, but the Justice Department's Mental Disorder Project in the 1980s. As will be seen, the LRCC would endorse a principle of restraint that, in the area of insanity, would materialize as an "economy of scarcity" (Pratt, 1996). Similarly, in shifting the focus of its insanity work to the "effects" of mental disorder, the Commission foreshadowed an increasing preoccupation with the technocratic management of risk for those deemed insane in the criminal context (e.g. Hannah-Moffat, 1999).

Canadian insanity law reform during the 1970s and '80s was thus closely linked to the institutionalization of criminal law reform and the establishment of the LRCC. The creation of independent bodies like the LRCC aimed to address the disjointed approach to law reform that was the preceding standard (Murphy, 2004b). The LRCC took its cue from the British experience, although the first permanent law reform commission in either country was established in Ontario in 1964 (Murphy, 2009, p. 110). The Canadian Commission, however, was thought to be the first law reform commission to exist anywhere at the federal level, a point the LRCC was proud to report (Law Reform Commission of Canada, 1972, p. 2).

Parliament established the LRCC in 1971 to systematically review and advise on the reform of the country's federal law (Law Reform Commission of Canada, 1972, p. 1). In his history of the institution, Murphy (2004b) points to the broader political and cultural climate as a major impetus for the founding of the Commission:

The late 1960s and early 1970s were in many respects a turbulent and even, for some, traumatic period. The post-war generation – the baby-boomers – was maturing into adulthood and shaking the foundations of all institutions. Conventional views, such as those on the social use of drugs, the war in Vietnam, sexual freedom, technology, prostitution, gambling, abortion and homosexuality were now subject to close examination and serious questioning. Traditional structures, including those that supported long-established laws, were under siege. (p. 906)

Beyond these large scale shifts, there were also growing concerns that maintaining an up-to-date and cohesive set of laws was too much to ask of the legislature alone (Murphy, 2004b, p. 902). While the law-making branch had the support of different investigatory bodies like Royal Commissions and Parliamentary Committees, these too were quickly becoming antiquated. Their status as temporary, ad hoc bodies undermined their official independence, which meant they were often “forced to concentrate chiefly on technical aspects of the law and to avoid more complex social issues” (p. 901). Like other fixed law reform commissions, the LRCC was predicated on the belief that informed law-making required active and ongoing legal research. To avoid granting the Canadian Commission too much authority, it was set up to act in a purely advisory capacity that would complement the existing branches of government (Law Reform Commission of Canada, 1972, p. 1). This would also help in preserving Canada's principle of Parliamentary sovereignty, which, prior to its disruption with the enactment of the *Canadian Charter of Rights and Freedoms* in 1982, held that there were no limitations placed on Parliament's ability to create or amend legislation (Lovell, 2017). At the same time, the LRCC's

fixed and independent status meant that it would be able to undertake the kind of research that was thought to be necessary in the production of informed and effective federal legislation.

The limitations on the LRCC's authority were significant as it was instead envisioned as more of a knowledge resource. Certainly, law reform was the aim and it did eventually arrive—the Commission's first final report took five years, and new legislation based on its proposals took a decade (Murphy, 2004, p. 907)—but the Commission only acted in an advisory role. This suited the fundamental educative role of the Commission since law reform began with the production and publication of research (Linden, 1990, pp. 292–295). However, certain steps were taken to ensure that the Commission's work was not in vain. For example, the Justice Minister was required to table all of the Commission's reports in the House of Commons, with the aim being that “the activities of the Commission become the property of the people of Canada” (Turner, 1970, p. 3961). Even with such measures in place, it is possible that the LRCC could have been for naught, although, as will be seen, the LRCC did influence the work of the Justice Department in the 1980s. While the ultimate extent of this impact remains unclear, this question is beyond the scope and purposes of this chapter. Instead, my claim is that the LRCC institutionalized an approach to criminal law reform that was evident in the later work of the Justice Department, and more specifically, that its normative framework of a restrained criminal law would be influential in the country's insanity law reform work of the 1970s and '80s. The subsequent effect on insanity law in particular appears to derive, at least in part, from the construction and application of a cogent and comprehensive underlying philosophy, something that was lacking prior to this point.

The founding of the LRCC marked a period of institutional law reform that would stress cohesion and continuity in the study and revision of criminal law. As discussed above, the

Criminal Law Amendment Act, 1968-69 was an early indication of this shift, with the wide-reaching omnibus bill predicated on the distinction between moralism and legalism. Minister of Justice John Turner, who oversaw the passing of the 1968-69 amendments, was also a strong advocate for a national law reform commission. Indeed, Murphy (2004b) traces the LRCC's beginnings back to a speech by Turner at Toronto's Osgoode Law School in February 1967, during which he called for such an agency (p. 905). He would expand on this in his 1968 book, *Politics of Purpose*, citing a number of factors like the outdated machinery of legal research, overburdened legislature, evolving social values, and the need for interdisciplinary expertise as demanding a national commission (Murphy, 2004, pp. 905–906; Turner, 1968). While sensitive to the principle of Parliamentary sovereignty, the Justice Minister continued his campaign during his introduction of the 1968-69 *Criminal Code* amendments: “[t]he government intends to establish an independent national law reform commission having as its principal term of reference the continuous reform of federal statutes, giving us the ability as well to plan ahead in the development of our law” (p. 4725). By the summer of 1971, the Commission was in operation.

5.2.1 Institutionalizing Canadian Insanity Law Reform

In the remainder of the chapter, I will examine the institutionalization of insanity law reform in Canada, beginning with the work of the Law Reform Commission of Canada (LRCC). As will be seen, the Commission marked a kind of “epistemological break” in the Canadian approach to insanity law reform. This conceptualization of the LRCC's insanity is informed by Abi-Rached and Rose's genealogy of the neurosciences (Abi-Rached & Rose, 2010; Rose & Abi-Rached, 2013), whereby the discipline's birth can be traced to an “epistemological break” during the 1960s in which a collaborative, interdisciplinary and molecular approach came to

dominate brain research. Instead of understanding the neurosciences as the inevitable outcome of the study of the brain, the authors argue that it is the product of a number of developments that occurred at the national and international level. For instance, an abundance of governmental and philanthropic funding for brain research in post-World War II United States played a significant role in driving the development of the field. Equally important, however, were then-recent advances in particular scientific disciplines like biophysics and molecular genetics, as well as a scientific community that was actively pursuing a common approach to brain research. The result was an epistemological shift whereby the brain, in all its complex capacities and functions, would be understood according to a molecular approach. This new “neuromolecular gaze” reduced the mysteries of the brain to a shared language that spoke in terms of “material processes of interaction among molecules in neurons and the synapses between them”, which could be further broken down into the “biophysical, chemical, and electrical properties of their constituent parts” (Abi-Rached & Rose, 2010, p. 9).

I propose a similar understanding of Canadian insanity law reform efforts here, albeit in a more localized setting. While Abi-Rached and Rose were concerned with the international birth of a particular field of study, the epistemological break that I outline traces a transformation in the approach to questions of insanity law reform in Canada during the 1970s and ‘80s. I make this argument on two related points. First, the LRCC’s work on insanity was the first in a period of institutionalized insanity law reform in the country.⁷⁹ This institutionalized approach was

⁷⁹ My reference to “institutional law reform” is adapted from Marcus Moore’s use of the term (2018) for those bodies with an “established organizational pursuit of the object of law reform” and from which “the central organs of government are excluded” (p. 227). Although the LRCC fits easily into Moore’s definition, the CLR, which picked up on the work of the LRCC (Government of Canada, 1982, “preface”), was housed within the federal government’s Department of Justice. But while the structure of the MDP means it might be excluded from Moore’s categorization, the institutionalization of insanity law reform during this period meant the LRCC and the CLR shared common theoretical ground. As will be seen, the insanity work of both of these groups was united by the broader, normative position that the criminal law should be applied according to a principle of restraint.

reflective of the underlying political rationality, discussed above, which provided an overall coherence and direction to questions of insanity reform. Where previous efforts were defined by their temporality—whether in the form of Royal Commissions (see chapter three) or in provincial responses to local urgencies (see chapter four)—the institutionalized approach meant that insanity law reform work was shaped by the policies endorsed by the broader group. This meant that the insanity work of the LRCC was influenced by the broader decisions of the LRCC and the MDP was guided by the directions taken by the Department of Justice. As will be seen, the insanity work of the LRCC and the MDP reflected the principle of restraint that was taken up by both the Law Reform Commission and the Department of Justice.

Second, the LRCC consciously excluded questions of criminal responsibility in its insanity work. As a result, its focus on all the other aspects of the defence had significant implications for the legal understanding of the insane subject. As will be seen, while the LRCC did not deny the importance of questions regarding the relationship between mental illness and criminal responsibility, the choice to divide the field of insanity law reform introduced important metaphysical assumptions. More specifically, in avoiding the complex medicolegal problem contained within debates over the proper insanity defence, the subject of the Commission's work took the form of a legal, rights-bearing ontology.

5.2.2 The LRCC and Insanity

The LRCC's work on insanity came early in the history of the Commission when it published two reports—*The Criminal Process and Mental Disorder – Working Paper 14* (1975) and *A Report to Parliament on Mental Disorder in the Criminal Process* (1976). While these reports did not directly lead to legislative change, they were influential to the efforts of the Mental Disorder Project. Importantly, the LRCC's discussion of mental illness within the

criminal legal context shifted the focus from substantive to procedural questions of insanity law reform. These two reports considered a range of issues, including but not limited to: pre-trial issues like potential diversion from the court system, peri-trial matters like fitness to stand trial, and post-trial concerns like disposition and release. Notably absent was the question of insanity itself. According to the Commission's *Working Paper* (1975b), the problem of insanity—essentially a question of criminal responsibility—was both so fundamental and so insignificant that the group declined to cover it. The Commission recognized the broad consensus that mental illness impacts criminal responsibility, but experts were divided on how this principle was best enacted; contention around whether or not there should be an insanity defence at all demonstrates this point (p. 30). Adding to the complexity of these questions was the fact that “[l]ittle in criminal law engender[ed] as much or as heated debate as the effect of mental disorder on criminal responsibility” (p. 30). At the same time, the Commission saw the matter as largely unimportant. Given the increasing rarity of the defence in practice, something the Commission chalked up to “the virtual abolition of capital punishment, the decreasing severity of sentences and the introduction of parole and probation” (p. 31), the group concluded that it was mostly a theoretical concern. As a result, the Commission redirected attention from issues of criminal responsibility—a topic that was the subject of an “enormous amount of academic energy” with little to show for it (p. 12)—to the *effects* of mental disorder in the criminal process (p. 8). Its final report on the subject, *Mental Disorder in the Criminal Process*, would uphold these views when submitted to Parliament a year later.

By focusing on the effects of mental disorder, the Commission was able to bypass questions pertaining to complex medicolegal ontologies without denying their existence. This was an important shift because it would be conducive to risk-based forms of governance that, as

will be seen in the following chapter, would be central to the new set of insanity laws introduced in the early 1990s. Less concerned with identifying who is insane, Canadian law reform efforts today revolve largely around managing the threat these subjects pose to the community. The LRCC's insanity work is thus an early indication of this change in focus. Indeed, the Commission (1975b) concluded mental illness was a question for doctors, and "[i]t matters not whether we believe that sanity is only mental disorder put to good uses, that we are all mad in varying degrees, or that mental illness is a myth" (p. 8). The insanity defence would later be considered by the LRCC in its 29th Working Paper that examined liability and defences. Published in 1982, the Paper proposed two alternative forms of the insanity defence (p. 50), one of which was included four years later in the report, *Recodifying the Criminal Law*.⁸⁰ It was not adopted into law. Regardless, with the vexing task of clarifying when mental illness precluded criminal responsibility postponed, the Commission turned its attention towards all those other aspects of mental illness within the criminal context. Where criminal responsibility was raised, its consideration was indirect. For instance, the Commission (1976a) advised the government that insanity should "be reaffirmed as legal", and that care should be taken so that psychiatric professionals are not expected to speak beyond their own expertise (p. 47). More importantly, it would also conclude that, as a general policy, there should be no involuntary psychiatric treatment (p. 47), and that detention should never be indeterminate (p. 42), a finding that radically questioned the continued use of the Lieutenant Governor's warrant (p. 49).

Just as significant as the Commission's propositions was its formulation of the problem, since its insanity work during the mid-1970s served as an important reference point for Canadian

⁸⁰ The proposed new test: "[n]o one is liable for his conduct if, through disease or defect of the mind, he was at the time incapable of appreciating the nature, consequences or legal wrongfulness of such conduct [or believed what he was doing was morally right]" (Law Reform Commission of, 1986, p. 30).

discussions of insanity law reform going forward.⁸¹ Yet as LRCC commissioner Hans Mohr pointed out, the group's distinct approach to the problem of insanity was never inevitable. In 1978, two years after *Mental Disorder in the Criminal Process* was released, Mohr published a critique of the Commission's work on mental illness, a portion of which is worth quoting at length:

If one traces the Commission's work from its statements in the First Research Programme through preparatory papers and memoranda to the published reports, an evolution becomes discernible. A quest for general principles defining the mental elements of offenses, responsibility and mental illness shifted to a study of process. This shift is brutally noticeable when one sees that in the final Report a scant one and a half pages has been devoted to the issue of responsibility and the issue of insanity, both key issues in the traditional relationship between law and psychiatry. It is not that no attention was paid to these issues. Their study and analysis absorbed the major part of the available man and brain power and resulted in hundreds of pages of exposition. It involved a good deal of struggle and unhappiness when work into which people put all they had was abandoned. (p. 51-52)

Mohr's criticism, that the Commission had "not philosophized enough" during its work on mental disorder (p. 55), differs from the position laid out in the organization's reports, suggesting that the official rationale may not have been quite so deliberate. Regardless of the particular reasons, the Commission acknowledged and pursued a distinct approach to mental disorder in the criminal context. This decision was not lost on observers, amongst whom opinion was divided. Justice EL Haines (1976), a judge on Ontario's Supreme Court and chair of the province's Lieutenant Governor's Advisory Review Board, refrained from judgment, but noted that section 16 provided a false sense of certainty on the relationship between mental illness and criminal responsibility. Harvard legal professor William Curran (1978) praised the decision at a Toronto-based conference on psychiatry and the law in 1977. Cognizant of his outsider status, Curran thought the choice was "refreshing" in avoiding the all-too-common rabbit hole of

⁸¹ This will be seen later in the chapter when the Canadian government's Mental Disorder Project is examined.

“criminal responsibility, *M’Naghten’s Rule*, diminished responsibility, and all sorts of new rules” (p. 101). In a special issue of the *Ottawa Law Review*, Eugene Ewaschuk (1976) contended that the insanity defence was not particularly important given its rarity in practice. Instead, he suggested that where insanity did exist within the criminal process, its resolution was largely collaborative and “non-adversarial” (p. 371).

Richard V Ericson (1976), on the other hand, wrote a scathing review in the same issue, arguing that the mental health system operates as a reserve apparatus of social control for those who do “not ‘fit’ within the requirements of a just criminal control system” (p. 365). According to Ericson, the Commission’s failure to consider the broader “‘crime-responsibility-punishment’ framework” legitimized the psychiatric control of these subjects, a move that was all the more suspicious since discussions of legal responsibility were present in many of its other contemporaneous publications (p. 365). Ericson’s problematization of the LRCC’s avoidance of criminal responsibility was echoed by Dyer (1983), who noted that when the Commission finally considered the defence in its 29th Working Paper, it did so “rather superficially” (p. 266-7).

5.2.3 Historicizing the LRCC’s Approach to Insanity

The Commission’s approach to insanity can be attributed, at least in part, to the historical milieu in which it emerged. As Murphy (2004b) explains, the creation of the LRCC reflected the social upheaval of the 1960s and early 1970s (p. 906), with Trudeau’s *Criminal Law Amendment Act, 1968-69* offering one indication of the swing towards moral pluralism in the country. These ethical divisions were paralleled by a distrust of the “traditional structures” of law reform, and the Commission provided an alternative approach (p. 906). According to Canadian legal scholar Roderick Macdonald (1997), discussions of law reform began to reflect this skepticism:

Fact-based law reform foundered when the contingency of apparently objective facts was exposed. In the lexicon of scholarship, there could be no empiricism that was not a critical empiricism; in the lexicon of law reform, deregulation, privatization and procedural due process became the holy trinity of those who gave up on substantive law. (p. 844)

While the Commission's work on insanity during the early-to-mid-1970s reflected its historical setting, the broader ethos of the organization needs to be considered in order to properly understand its particular approach to insanity. Importantly, the focus on procedure that permeated the LRCC's insanity work reflected the philosophical framework of the entire Commission. As was common throughout its various publications, the Commission stressed the need for its studies to be read within the context of its developing oeuvre (e.g. 1987, pp. 1–2; 1976c, p. 3), and its insanity work was no different (1975b, p. 3). In *Mental Disorder in the Criminal Process* (1976a), the Commission saw the piecemeal approach that characterized historical efforts of insanity law reform as problematic (p. 1). The Commission aimed to rectify this by undertaking a holistic review of the criminal laws affecting those with mental disorder (minus the insanity defence itself), and this comprehensive approach was informed by the broader philosophy of the LRCC. In the same year that the Commission completed its work on mental disorder, it published *Our Criminal Law*, a 1976 report that questioned both the philosophical grounding and social purpose of the criminal law. The Commission's independent and advisory role made it conducive to radical critiques of the topics it investigated (Law Reform Commission of Canada, 1976b; Ryan, 1976, p. 4; Sutherland, 1983, p. 193), and rather than simply tinkering with the technical, the organization examined the fundamental principles and approaches underlying the criminal law. For instance, dubious of the efficacy of deterrence and reform, the Commission also questioned rehabilitation, noting that “[i]t is hard to rehabilitate offenders without being sure what it is to *habilitate* them” (Law Reform Commission of Canada,

1976b, p. 3). Undeterred in its idealism, the LRCC would argue that crime should be prevented through a sense of mutual respect rather than fear, and as such, the criminal law was picking up on a job better left to “parents, teachers, churches, and all other socializing agents” (p. 5). In other words, the role of the criminal law should be as minimal as possible.⁸²

This limited role of the criminal law was an extension of the secularism initiated by the Trudeau government (e.g. Law Reform Commission of Canada, 1976b, p. 16), and served as a recurring mantra throughout the Commission’s work. Roberts and von Hirsch (1992) write that “[p]erhaps the Commission’s most important contribution to the criminal law reform debate in general — and sentencing in particular — concerns the principle of restraint or moderation” (p. 331).⁸³ Its report on the *Criminal Code* (1987) offers a prime example of this reasoning. Like its report on mental disorder, its study of the *Criminal Code* was informed by the entirety of the Commission’s work, which, by the time of its publication in the late 1980s, was substantial (p. 1). Here too, the same principle of restraint rings throughout. In a statement that could just as easily have come from Pierre Trudeau in the late 1960s, the Commission wrote that the *Code* “over-extend[ed] the proper scope of the criminal law” (p. 1). Its discussion of a preamble offers more of the same, with two of the three principles contending that:

- [1] the criminal law should be used only in circumstances where other means of social control are inadequate or inappropriate;
- [2] the criminal law should be used in a manner which interferes no more than necessary with individual rights and freedoms. (p. 8)

⁸² *Our Criminal Law* is perhaps best summarized by the Thomas Fuller proverb it opened with: “the more laws, the more offenders.”

⁸³ The principle of restraint was central to the Commission’s work on sentencing, and while the LRCC did not provide a clear rationale beyond that, Roberts and von Hirsch (1992) note that it did support “a modified just deserts sentencing rationale” (p. 331). In a policy statement on sentencing (1984), the government of Canada identified the absence of sentencing standards or principles as problematic. Although efforts were made to address these gaps in common law, the Canadian government concluded that since these “are issues of public policy which are of fundamental importance, Parliament is the most appropriate forum for their articulation” (p. 33). According to Meyer and O’Malley (2005), this situation was conducive to a variety of carceral logics (i.e. rehabilitation, protection, retribution, and deterrence) (p. 203).

While the preamble was only supported by a minority of the Commission and ultimately excluded from the *Criminal Code*, the decision was based on the general role of such a section rather than the suggested content (p. 7). Agreement on the propositions themselves was not surprising given their alignment with the Commission's persistent philosophy of restraint, as well as with its view that the *Code* was "a comprehensive and distinctly Canadian statement of the law that crucially concerns our own society's fundamental values" (p. 7). Indeed, there is good reason to believe that there was at least some preliminary moral consensus on criminal justice policy during this time. As Anthony Doob (2012) summarized, a number of the Canadian government's criminal justice reports over the second half of the 20th century were united by the principle of a restrained criminal law, and importantly, this finding was consistent across Liberal and Conservative governments (paras. 23–30).

5.2.4 Institutionalizing the Least Restrictive Alternative

The LRCC's approach to law reform, whether in regards to insanity specifically or the criminal law generally, reflected its institutional design. According to Marcus Moore (2018), Canadian law reform commissions sit in a difficult position because governments tend to favour ideological alignment over practical change in law reform (pp. 239-240). Consequently, commissions face a "political trilemma": (1) focusing solely on the practical runs the risk of being ignored by governments; (2) focusing on the conceptual with little concern for policy can undermine their initial purpose; and (3) attempting to do both can insinuate political bias that can put the commission in jeopardy following changes in government (p. 240). Ultimately, however, Commissions will take one of these three approaches and the LRCC was explicit in its commitment to the final option. In its second annual report (1973), the Commission identified strategy as its first problem with two possible solutions: "an immediate start on specific laws or a

preliminary search for principles and criteria to evaluate the laws – a practical or a theoretical approach” (p. 7). The Commission chose to address both in tandem, the idea being that theory could impact its practical research and vice versa. It concluded, “[a] dialectic between the general and particular was essential” (p. 8). Incidentally, Doob’s finding that the Commission’s work was philosophically consistent across successive governments suggests it was able to avoid overt political partisanship.

The Commission’s methodology was significant because it operationalized the prevailing political rationality that the criminal law be applied with restraint. In mobilizing this underlying logic, the Commission can be understood as what Rose and Miller (2010) refer to as a “centre”: “[t]he enactment of legislation is a powerful resource in the creation of centres, to the extent that law translates aspects of a governmental programme into mechanisms that establish, constrain, or empower certain agents or entities and set some of the key terms of their deliberations” (p. 287). As has been shown, the rhetoric of a minimized criminal law informed the Commission’s investigations of various problems; however, it was not decisive of the particular course taken. Illustrating this point, Rose and Miller write, “[e]mbodiment of the principle of ‘the best interests of the child’ in law may not *determine* the decisions of social workers and the courts, but it sets one of the terms in which those decisions must be calculated and justified” (p. 287). As will be seen, the Commission’s core value of a limited criminal law did not dictate a particular course of action, but it did provide the framework that would shape the investigations of the various problems of insanity. Indeed, this principle would prove particularly useful when dealing with a group that lacked legal guilt.

At this point, it is important that I clarify the scope of my claim. I am arguing that a neoliberal political rationality shaped the sites of institutional insanity law reform investigated here, but my claim ends there. On this point, I heed Dawn Moore's (2007) advice:

While practices and rationalities certainly do change over time and across jurisdictions, there are no tidy ways to delineate one genre of changing people from another. Typically, there is a messy constellation of practices and rationalities that may privilege a certain mentality but that still mobilizes assumptions and pursuits from other times and places. (p. 29)

A neoliberal political rationality, and specifically its materialization as the principle of restraint in Canadian criminal justice policy during the 1970s and '80s, was particularly useful in making sense of those deemed insane in the criminal legal context. Punitive and retributive logics, for example, struggled to take hold of a subject that lacked legal culpability. And as will be seen, rehabilitative and risk-based reasoning was difficult to operationalize on account of inadequate expertise. If, on the other hand, the criminal law was applied in as restrained a manner as possible, it could be seen as being legitimately exercised on the subjected population.

The Commission's philosophical and practical orientation thus helped to make sense of the various problems that mental disorder posed in the criminal legal context. Returning to the aforementioned conference in Toronto during 1977, Ed Turner, Consultant in Psychiatry for the LRCC, gave some background to its choice: "[i]nstead of concentrating on the previous keystone debates between law and psychiatry, *mens rea*, and responsibility, the Commission and Mr. Justice Hartt wanted dialogue: response-ability, the ability to respond, rather than responsibility" (p. 98). Rather than attempting to resolve this historical impasse, the approach acknowledged and sidestepped the problem that "law and psychiatry are *not* 'internally consistent entities'" (p. 98). The Commission's subsequent focus on the effects of mental disorder within the context of

criminal law was, by design, thought to better enable the dialogue between legal and psychiatric experts.

The LRCC's approach to focus on process had important ontological implications for the figure at the centre of its work. While the Commission did not directly engage in the problem of mental illness and criminal responsibility, it worked from the assumption that those deemed insane were primarily legal entities, and more specifically, rights-bearing subjects. The framework of rights can be appealing since they form the basis of a collective project for all involved. On the surface, rights provide a morally-charged language in which their mere acknowledgement can indicate a kind of victory. The introduction of the *Canadian Charter of Rights and Freedoms Charter* in 1982, a moment that will be returned to towards the end of this chapter, is perhaps the best example of this. The *Charter* prompted widespread optimism that the entrenchment of constitutional rights would significantly improve the lives of those living with disabilities, including psychiatric diagnoses. Contrary to expectations, many have since been disappointed that "the Charter has not achieved the far-reaching social change that was expected initially" (McColl et al., 2016, p. 185). In this sense, it is indicative of Lauren Berlant's notion of "cruel optimism" (2011), which she describes as "the condition of maintaining an attachment to a significantly problematic object" (p. 24). As will be seen in the following chapter, constitutional rights have become the indispensable vernacular for governing those deemed insane in the criminal context today. This is not to say that rights are inherently problematic, but a reminder that they are inherently "ambivalent" (Golder, 2013), a point that can easily be forgotten beneath their popular conception.⁸⁴

⁸⁴ One article from the Toronto-based psychiatric survivor's publication, *Phoenix Rising*, illustrates this point succinctly. Following an article in which the author ponders the implications that the then-one month old *Charter* might have on the right to treatment, the publication's editorial team notes that their priority lies in the right to refuse treatment (Newman, 1982, p. 34).

Rights, as noted in the previous chapter, offer a tool that can be effective in bypassing difficult moral issues (Rose, 1985, pp. 214–215). Rather than having to deal with a complex medicolegal subjectivity, the more familiar rights-bearing subject fits easily into the broader political rationality of the LRCC. This translation, which made the insane subject more governable, relied on the institutional design of the Commission’s insanity work. The focus on the law’s “response-ability” rather than the accused’s responsibility saw a focus on procedure and management that emphasized a legal and rights-based understanding of its subject. Similarly, like Rose and Miller’s (2010) “best interests of the child” doctrine, the Commission’s normative position of a limited criminal law provided a general guideline for its work on insanity, and this would quickly be translated into the concept of the “least restrictive alternative”.

5.2.4.1 A Brief History of the “Least Restrictive Alternative”

Discussions of insanity law reform in Canada during the 1970s and ‘80s were grounded in the LRA, with the Commission’s work on insanity providing one early implementation in Canada. The LRA first emerged in the United States, with its initial formulation appearing in *Shelton v Tucker* (1960). Here, the United States’ Supreme Court ruled that an Arkansas law requiring teachers to disclose all organizational affiliations was unconstitutional. The Court reasoned that, although reflecting a legitimate concern, the legislation was overbroad in its design. The first application of the LRA in the mental health context came with *Lake v Cameron* (1966). In 1962, Catherine Lake was found wandering the streets and was subsequently confined to St. Elizabeth’s Hospital,⁸⁵ a state mental hospital in Washington DC. During Lake’s appeal of her detention, Justice Bazelon reasoned that the court was not limited to a binary choice between release and confinement, but needed to consider a broad continuum of care that reflected the

⁸⁵ St. Elizabeth’s was also where Erving Goffman conducted his research for his 1961 publication, *Asylums*.

parallel principles of deinstitutionalization.⁸⁶ Writing for the majority, Bazelon concluded that it was the state's responsibility to explore both the availability and appropriateness of alternatives.

Since its initial introduction in *Lake v Cameron*, Perlin (2000) writes that the LRA “has remained one of the core staples of mental disability law” (p. 1000). This is due in no small part to its versatility; the principle has been applied to a range of issues, including but not limited to involuntary detention, both in the civil and criminal context, the right to treatment, and the right to refuse treatment (ML Perlin, 2000c, pp. 1000–1001). This short list provides some insight into its prominence: its versatility is linked to its ambiguity. Munetz and Geller (1993) warn that the LRA is deceptively simple, particularly in a “postinstitutional” context in which restrictiveness cannot easily be determined by setting alone. Similarly, Schwartz and Costanzo (1987) argue that an overemphasis on the location of treatment undermines a proper consideration of how psychiatric treatment can impose upon an individual's rights. Instead, the authors suggest other measurements, like voluntariness, may better gauge levels of restrictiveness (pp. 1355-1357). While appealing in principle, Lin (2003) argues that the operationalization of the LRA can actually disenfranchise those deemed mentally ill. For instance, a hyper focus on individual freedom can come at the expense of other values, like access to treatment (p. 868). Indeed, the uptake of neoliberal values within health care systems has been linked to poorer health care delivery, particularly amongst marginalized populations (McGregor, 2001; Mooney, 2012; Whiteside, 2009). While individual choice is valorized within neoliberal approaches to governance, the accompanying policies of fiscal restraint limit the provision of mental health services which can undermine this right in the first place (Gooding, 2016; Morrow et al., 2008, p. 3; Swigger & Heinmiller, 2014, p. 249). Recognizing that the principle may have potential in

⁸⁶ Justice Bazelon is a noteworthy proponent of psychiatric patients' rights. His formulation of the Durham rule, a broadened insanity test (see p. 152, footnote 65), had some influence in the United States.

reducing deprivations of liberty through outpatient commitment, Arrigo (1996) also raises the issue of the locus of decision-making, noting that hospitals will more than likely opt for a precautionary approach (pp. 84-85). Thus, whether the principle forms the letter of the law or simply offers a vague guideline, its initial appeal may be misleading.

5.2.4.2 The LRCC and the LRA

Unlike in the United States where the principle of the least restrictive alternative is traceable through case law (see Arrigo, 1992), it is difficult to pinpoint with certainty when the LRA emerged in Canadian insanity law. At the same time, it can be said that the LRCC's incorporation of the principle is one of the earliest expressions in the country. Here, Foucault is helpful in making sense of its emergence:

But we have to understand very clearly, I think, that a given problematization is not an effect or consequence of a historical context or situation, but is an answer given by definite individuals (although you may find this same answer given in a series of texts, and at a certain point the answer may become so general that it also becomes anonymous). (Foucault, 2001, p. 172)

The LRA was the result of the Commission's aim to "rationalize" the country's insanity laws, a process that began with recognizing the problems of earlier law reform efforts. According to the Commission (1975b), one major limitation of past attempts was the piecemeal and ad hoc approach that meant reformers were "not seeing the forest for the trees" (p. 12). This was compounded by the absence of any clear philosophical direction; it was not that previous lawmakers worked from problematic forms of reason, but rather that there was no underlying rationale at all. As the Commission warned: "[u]ntil basic policy questions are answered, treatment of the mentally disordered in the criminal process will be dominated by often irrational and unacknowledged social objectives, and confused and inappropriate procedures" (pp. 20-1). The Commission would therefore examine the system in its entirety, or near entirety given the

exclusion of criminal responsibility, and this would allow for the development of comprehensive, coherent, and rational policy (pp. 12-13, 20).

The LRA is a narrower expression of the political rationality underlying all of the Commission's work on the criminal law, which, it concluded, served two purposes. First, the criminal law protects the public from harm. Second, and more importantly according to the Commission (1975b), it embodies and expresses Canadians' "essential social values" (p. 7). Along with the newly-pervasive standard of a restrained criminal law, the Commission cited two of its separate reports—*The Meaning of Guilt* (1974) and *Limits of Criminal Law* (1975a)—to outline a criminal justice system underpinned by the neoliberal-aligning rational choice theory: "[s]uch a view treats individuals as responsible persons with rights and obligations, who may choose to do wrong and risk the consequences" (1975b, p. 7; see also Bell, 2011, p. vii; O'Malley, 1996, pp. 197–198). Yet this is precisely why those deemed mentally ill are problematic subjects for the criminal law. Recognizing that mental illness could detract from criminal responsibility but avoiding the discussion in detail, the Commission was left with a rights-bearing subject in its insanity work, and a justice system in which the criminal law should be used as a last resort.

Although germinal in appearance throughout its two reports, the LRA provided a framework that shaped the Commission's understanding of insanity as a problem for criminal law. In attempting to "rationalize" the country's insanity laws, the Commission was seeking to legitimize the authority of the criminal law over those deemed mentally ill. Or, to put it another way, the Commission (1975b) needed to justify any imposition of criminal powers on the rights and liberties of those deemed mentally ill (p. 19). Not surprisingly, while the Commission was confronted with a variety of problems, it was the detention of this population in particular that

emerged as a prominent issue. The group was concerned that “all procedures seem to be used interchangeably to achieve the same end—the indeterminate detention of the mentally ill offender” (p. 11). Whether being used for those found Unfit to Stand Trial (UST), those declared not guilty by reason of insanity, or for prisoners transferred on hospital orders, the LGW was particularly irrational in automatically and indefinitely confining subjects without any guarantees of review.

As Foucault (1991b) pointed out, particular practices only become irrational within “a certain regime of rationality”:

The ceremony of public torture isn't in itself more irrational than imprisonment in a cell; but it's irrational in terms of a type of penal practice which involves new ways of envisaging the effects to be produced by the penalty imposed, new ways of calculating its utility, justifying it, graduating it, etc. One isn't assessing things in terms of an absolute against which they could be evaluated as constituting more or less perfect forms of rationality, but rather examining how forms of rationality inscribe themselves in practices or systems of practices, and what role they play within them, because it's true that 'practices' don't exist without a certain regime of rationality. (p. 79)

The arbitrary detention of the LGW clashed with a system that intended to apply the criminal law to a rights-bearing subject in a restrained manner. In the work of the Commission, the LRA came to provide the terms of reason to articulate this problem. At times, the principle's expression was explicit. For instance, the Commission found the automatic detention of those found UST to be problematic and to be avoided wherever possible. Instead, a number of alternatives should be available, with “the least intrusive form of disposition” selected (1975b, p. 41). Similarly, any remands for psychiatric observation prior to or during a trial should adhere to the same standard (1976a, p. 33). At other times, the principle was implied. The extremely arbitrary and capricious nature of the LGW for those deemed insane so offended the LRA that the Commission recommended abolishing the Warrant altogether (1976a, p. 49). In its place, the Commission

recommended that the verdict be treated as a true acquittal and that these subjects be managed according to provincial mental health commitment procedures (p. 22).

Importantly, the LRA worked both ways; it problematized the arbitrary detention of psychiatric subjects under the criminal law, but also defined the circumstances in which custody was legitimate. By informing the kinds of solutions that should be pursued, it shifted attention to new problems. But while the LRA was clear as an abstract rule, its application was not. One major complication was the inability to predict dangerousness, a fundamental issue since it was the primary point on which those declared insane were detained (Law Reform Commission of Canada, 1975b, p. 14). Throughout the Commission's work, the problem of dangerousness sat in tension with the principle of the LRA. Historically, successful insanity pleas had an air of mercy since they typically counterpoised capital punishment. This association was weakening by the mid-1970s, however, as evidenced by the Commission's conclusion that:

[W]e pretend we are doing the mentally disordered offender or accused a favour by sending him away for long periods of time to mental institutions. We seem to think that he will be "better off" than if he were released or sent to prison. (1975b, pp. 14–15)

In contrast to the extensive but inconclusive literature on the relation between mental illness and criminal responsibility, the Commission noted the general consensus that psychiatrists could not predict future dangerousness (1975b, p. 19). Contrary to widespread belief amongst the public (pp. 14, 20), there was also no apparent connection between mental illness and violence (p. 21). Consequently, the automatic and indefinite detention of those declared insane appeared unsubstantiated: "[o]ur fear of persons doubly tainted with mental illness and criminality and the restrictive procedures we use in dealing with them are only justified if our perception of the uniquely dangerous criminal madman is true" (p. 18). In other words, the Commission confronted the fact that even if this population was "uniquely dangerous", there was no way to

know. The validity of such claims was not especially concerning to lawmakers in the late 1950s and early 1960s (Petrunik, 1982, p. 232). As I showed in the previous chapter, developments over the 1960s—an increasing rights awareness and the deinstitutionalization movement, in particular—began to problematize the arbitrary detention of those deemed mentally ill in both civil and criminal settings. By the mid-1970s, the LRCC recognized the inability to predict dangerousness as an important limitation in its work on insanity.

The Commission drew on the Baxstrom patients in particular to make this point. In 1959, Johnnie Baxstrom was found guilty of assault and sentenced to a New York prison. He was declared insane while serving his sentence and sent to Dannemora State Hospital, an institution that was also under the authority of the New York Department of Corrections. Despite his efforts to be transferred to a civil mental health hospital, Baxstrom remained there for four years past the expiry of his prison sentence. In 1966, the United States' Supreme Court determined that he had been denied his Fourteenth Amendment right to equal protection under the law since a jury had not reviewed his psychiatric commitment, a legal entitlement that was granted to anyone facing civil commitment in the state of New York. As Morris (2004) summarized, the Court required that “sentence-expiring convicts receive the same procedural safeguards that all others receive in the civil commitment process” (p. 1179).

The Baxstrom patients attracted a significant amount of attention. Following the verdict, all of the “so-called ‘dangerous patients’” were either released or transferred to civil mental health settings (Greenland, 1969, p. 345). Henry Steadman, who along with Joseph Cocozza would publish a number of studies on the limitations of psychiatric predictions of dangerousness during the 1970s and ‘80s (e.g. Cocozza & Steadman, 1974, 1978, 1983; Steadman & Cocozza, 1978), wrote extensively on the population (Cocozza & Steadman, 1974; Halfon et al., 1971;

Steadman, 1973; Steadman & Keveles, 1972). Four years after the Supreme Court's decision, Steadman (1973) reported that only 26 of the 967 Baxstrom patients had been returned to either Dannemora or Matteawan, a similar psychiatric hospital operated by the Department of Corrections (p. 317). At the same time, one third of the population was living in the community, and the rate of release amongst the Baxstrom patients was higher than their non-Baxstrom, civil counterparts (p. 317). While Steadman identified two unique features of the returning population—they tended to be younger and have more serious criminal history ratings—the low re-committal rate defied accurate prediction (p. 317).

The Baxstrom population made it clear that the dangerousness of psychiatric subjects could not be predicted in any meaningful way. Given the centrality of dangerousness to the detention of those deemed insane, the LRCC (1975b) was remarkably candid about the problem, recognizing that “the limitations of our predictive ability in this area must be frankly faced” (p. 19). Since dangerousness was unpredictable, research indicated no correlation between violence and mental illness and the LGW emphasized safe custody (p. 14); the Commission concluded that there was “no rational foundation for the element of preventive detention” (p. 19). Yet the Commission's simultaneous reliance on the concept suggested its necessity: “[d]angerousness should and must be considered, but there should be not be a blanket assumption that all mentally ill persons are prone to violence” (p. 19). In other words, while experts could make no claims that those declared insane were uniquely dangerous, common sense suggested otherwise. Lawmakers were thus left in a difficult position: if dangerousness provides the criteria for detention, but it cannot be predicted, how could the principle of restraint ground the law's response to those declared insane?

Taking stock of the situation at hand, the Commission provided three general guidelines for lawmakers in this area (1975b, pp. 21–22, 1976a, pp. 6–7). First, the Commission stressed the role of pre-trial diversion to ensure that the criminal law is used as a last resort for those suffering from mental disorder. According to Pratt (1996), such an approach reflects the neoliberalization of the criminal justice system in two related ways: avoiding the use of expensive penal resources also distinguishes between serious and non-serious penal subjects (p. 30). Second, for those subjects that required the use of scarce penal resources, the Commission emphasized a rights-based ontological understanding that mirrored the legal subject who did not suffer from mental illness: “[m]entally disordered persons are entitled to the same procedural fairness and should benefit from the same protections of personal liberty as any other person” (1976a, p. 7). And finally, where detention was necessary, it should never be indefinite.

As will be seen in the final section of this chapter, the Commission’s recommendations informed the approach taken in the Mental Disorder Project. In the historical tension between medicalism and legalism, the Commission largely endorsed a legalistic approach as providing the means to fairly deal with criminal subjects deemed mentally ill.⁸⁷ Given that the Commission’s specific recommendation—that the NGRI verdict be treated as a true acquittal and provincial civil commitment laws serve in the place of the LGW— would not be followed, the Commission’s work indicated that a rational system would treat those deemed insane as, first and foremost, rights-bearing subjects.

5.3 The Mental Disorder Project

In the early 1980s, the Mental Disorder Project (MDP) picked up on the insanity work of the LRCC. Led by Gilbert Sharpe, an Ontario-based lawyer who would subsequently serve as the

⁸⁷ See chapter four (pp. 137–40, 159) for a discussion of medicalism and legalism.

long-term Director of Legal Services for the province's Ministry of Health, the group released a working paper in 1983, a discussion paper in 1984, and a final report in 1985. At the core of the MDP were several of the same themes that had animated the LRCC's insanity work, although now at different points of germination. As will be seen, the MDP explicitly endorsed the LRA that had offered a looser, guiding principle in the LRCC's insanity reports. While the MDP would rely on the preceding insanity work of the LRCC, the ideological alignment between the two was a product of their similar methodology. Like the insanity work of the LRCC, the MDP was informed by broader criminal justice policy at the time, and in particular, the Canadian Government's white paper,⁸⁸ *Criminal Law in Canadian Society* (CLCS). The CLCS echoed the LRCC's calls for a restrained criminal law and this principle would in turn shape the reports of MDP. Thus, even where the MDP did not specifically rely on the prior insanity work of the LRCC, the similar framework that was prompted by the institutionalization of Canadian criminal law reform meant that the two drew strikingly similar conclusions.

The MDP was one of more than fifty projects undertaken by the Criminal Law Review (CLR) (Ministry of the Solicitor General, 2002, p. 120), which was itself created when the federal and provincial governments agreed to a thorough review of the *Criminal Code* (Daubney & Parry, 1999, p. 31).⁸⁹ The Review's preliminary discussions took place over October 25th and 26th, 1979, and marked the first time that all of the country's ministers involved in the justice system met together with a common purpose (Ministry of the Solicitor General, 1979, p. iv). The conference proceedings indicate that these meetings were seen as the culmination of a trend that had been developing over the course of the 1970s, one in which all legal professionals were seen

⁸⁸ Doerr (1982) defines a white paper as "a document which provides information on what the government is doing or intends to do on a policy matter" (p. 367).

⁸⁹ The review of the *Criminal Code* would expand to the criminal law more generally by the time the CLCS was published (Healy, 1984, p. 19).

“as being part of an overall system – the criminal justice system” (p. iv). Recognition of this cohesive apparatus, however, only drew attention to the lack of any official underlying policy.

While the LRCC released *Our Criminal Law* as a normative critique of the proper scope of the criminal law, it only provided the views of an independent body that sat outside of the government itself. For this reason, the Canadian Government (1982) described the Department of Justice-led CLCS as an unprecedented document in the country’s history:

Never before has the Government articulated such a comprehensive and fundamental statement concerning its view of the philosophical underpinnings of criminal law policy. (“preface”)

According to Healy (1984), the Criminal Law Review was a unique undertaking in Canadian legal history because the government was actively participating in a systematic project of incremental law reform that was both “pragmatic and principled” (p. 24). For Healy, the history of law reform in the country can be loosely categorized as balancing an *ad hoc* and deductive approach. Prior to the founding of the LRCC, the *ad hoc* model was predominant and emphasized a piecemeal approach to law reform. By contrast, the deductive model that emerged at the end of the 1960s would establish general principles to drive more specific reforms, an approach that is more conducive to “systematic and comprehensive” change (p. 9). The institutionalization of law reform in Canada in the 1970s and ‘80s reflected an increasingly deductive approach that implemented general principles across different bodies of law reform. As a result, while the CLCS was a unique expression of the government’s position on criminal justice policy, the message was not entirely new.

Indeed, the government placed the CLCS and the project of the Criminal Law Review that it spoke to within the lineage of law reform discussed throughout this chapter. The report was described as “an official government response to the major Law Reform Commission

recommendations concerning the general direction and purpose of the criminal law” (Government of Canada, 1982, p. 68), and the CLCS subsequently endorsed many of the Commission’s fundamental philosophical positions. It echoed the Commission in calling for the identification of “real” crimes in order to narrow the focus of the criminal justice system and held that the criminal law could not be used as a catch-all to fix social problems or police private immorality. Of course, many of these same conclusions were now also propped up by neoliberal rationalities that spoke to fiscal conservatism, crime prevention, and a “nothing works” mentality that shifted focus from rehabilitating prisoners to managing the risks they posed (pp. 19-20, 25-26). The CLCS only provided broad guidelines that did not dictate the particular policies that would follow. The report noted, for instance, that the doctrine of restraint did not simply call for “laxity or leniency”, but instead for “the need to examine carefully the appropriateness, the necessity, and the efficacy of employing the criminal law” (p. 41). Most importantly, however, the CLCS reflected the institutionalized approach to insanity law reform in which a broad framework of a restrained criminal law would shape responses to the more particular problems of insanity law.

Insanity law reform efforts over the 1970s and ‘80s thus reflected significant practical and ideological continuity. By design, the CLCS “provided a basic framework of principles within which the more specific issues of criminal law policy could be addressed and assessed” (Canada, 1990, p. vii), and the MDP (1985) acknowledged that “the CLCS document establishes a blueprint from which much of the philosophy behind the discussion in this paper flows” (p. 5). Like the LRCC’s insanity work, the MDP was the product of a deductive model in which specific responses were formulated within a broader policy framework. The principle of restraint that grounded the Criminal Law Review, which could be traced back to the late 1960s (Canada,

1969; Healy, 1984, p. 7), was central to the MDP (1985, p. 5), with the Project's Discussion Paper (1983) reiterating "that one must always be mindful of the doctrine of restraint" (p. 8). Given this foundation, it is not surprising that the largest section of the MDP's Final Report (1985) dealt with the LGW (pp. 2-3, 33).⁹⁰ Like the LRCC, the MDP characterized the LGW as problematically arbitrary on a number of fronts (pp. 2-3, 33-34): the court was forced to order automatic confinement for those declared NGRI;⁹¹ the accused had no recourse to have their detention reviewed; where review boards were established, their annual reviews only provided recommendations that the Lieutenant Governor could ignore; and there was no procedure to limit the Lieutenant-Governor's wide authority.

Like the LRCC, the concept of dangerousness was fundamental to the work of the MDP since it played a central role in legitimizing detention. Little had changed since the LRCC's problematization of the concept in the mid-1970s, however, and the inability to predict dangerousness continued to present a major hurdle for the MDP (1983, p. 234). The limited advancements in the area were confirmed by a separate Department of Justice-funded study in 1983. The same year the MDP released its first Discussion Paper, Christopher Webster and Bernard Dickens (1983), two criminologists at the University of Toronto, confirmed much of what had already been said on the topic. The study was undertaken at the request of the Justice Department and involved a review of the existing legal and scientific literature to determine

⁹⁰ While the MDP did provide some discussion of the insanity defence itself, like the LRCC, it declared early on that the "philosophical problems of the impact of mental disorder on theories of criminal responsibility... are almost intractable" (1979, p. 7).

⁹¹ The LGW was problematic regardless of the group it was used on, including those found Unfit to Stand Trial (UST) and prisoners transferred from carceral institutions. My focus is on those declared Not Guilty by Reason of Insanity. Where NGRI is a verdict that follows from the trial of the accused's guilt or innocence, UST precedes such a finding in declaring that the accused cannot adequately participate in their own trial (e.g. unable to communicate with their lawyer). While many of the issues can be similar (e.g. justifying detention), their resolutions can differ (e.g. right to refuse treatment can differ between these groups).

whether or not mental health professionals could predict the future violent behaviour of “Dangerous Offenders” (p. vii).⁹² Canada’s adoption of Dangerous Offender legislation in 1977 was an amalgamation of Criminal Sexual Psychopath and Habitual Offender laws that were first introduced during the 1940s. According to section 688 of the *Criminal Code*, an application could be made to have an individual categorized as a dangerous offender if he or she was convicted of a serious personal injury offence⁹³ and the court was satisfied that it was either of such a brutal nature or formed part of a pattern of behaviour that it justified incapacitation through indefinite detention.

While Dangerous Offenders differed from those deemed NGRI, Webster and Dickens’ report (1983) draws attention to their similarities. A successful application to have someone labelled as a Dangerous Offender required psychiatric testimony, so the question of whether or not psychiatric experts could predict dangerousness was at the core of their study (p. 3). Deceptively simple on the face of it, the authors noted that research in the area was stunted by a number of factors: the infrequency of violent behaviour undermined its prediction; the understandable reluctance of potential subjects to self-report violent behaviour hindered data-

⁹² The Dangerous Offender offers an interesting point of comparison in the context of this chapter. While an argument could be made that the construction of the Dangerous Offender did reflect the principle of restraint—Petrunik (1982) argues that such measures were deemed appropriate following the country’s abolition of capital punishment in 1976 (p. 239)—the connection is tenuous at best. Instead, the comparison is reflective of the various practices and rationalities that co-exist within a single justice system, and reinforces the idea that the principle of restraint was particularly useful in making sense of the long-vexing group of those deemed both criminal and insane.

⁹³ Section 687 of the *Criminal Code* defined a “serious personal injury offence” as:

- (a) an indictable offence (other than high treason, treason, first degree murder or second degree murder) involving
 - (i) the use or attempted use of violence against another person, or
 - (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person.and for which the offender may be sentenced to imprisonment for ten years or more, or
- (b) an offence mentioned in section 144 (rape) or 145 (attempted rape) or an offence or attempt to commit an offence mentioned in section 146 (sexual intercourse with a female under fourteen or between fourteen and sixteen), 149 (indecent assault on a female), 156 (indecent assault on a male) or 157 (gross indecency).

A similar definition continues today under section 752 of the *Criminal Code*.

collection; and the inability to release those thought to be dangerous for research purposes presented only some of the difficulties (p. 14). Given the reliance on naturally occurring opportunities to study dangerousness, Webster and Dickens' historical review began with Steadman and Cocozza's aforementioned examination of the Baxstrom patients. As described above, the Baxstrom studies made it clear that psychiatric experts could not predict dangerousness in any meaningful way, especially if authorities were concerned with the high ratio of false positives (pp. 14-15). In other words, incapacitating those who would commit violence in the future came at the expense of detaining a large group who would not. Such an approach was not only an affront on the rights of the imprisoned, but on "the precious and *exclusive* penal resources of the state" (Pratt, 1996, p. 32). Webster and Dickens (1983) pointed to a handful of Canadian and American studies that reached similar conclusions (pp. 15-19). Along with the assigned literature review, Webster and Dickens also took it upon themselves to conduct interviews with various forensic psychiatrists, forensic psychologists, forensic nurses, and criminologists to round out their study. These discussions indicated that, at least amongst the sample group, mental health professionals were not only unable to preemptively identify the dangerous, but they did not claim otherwise.

The notion of dangerousness subsequently informed the MDP's work, but in a limited capacity given its shortcomings. The ontological assumption that both the dangerous and the non-dangerous exist underlies the Project's reports, but it is coupled with an awareness that these classifications are of minimal use. For instance, the MDP (1985) problematized the court's automatic detention of those found NGRI since it disregarded "the nature of the offence or the dangerousness of the individual" (p. 2), while elsewhere highlighting experts' inability to identify the dangerous. The persistence of dangerousness in the MDP's work points to an

increasingly glaring disparity between particular rationalities and technologies that was coming to the fore in the 1980s. By the time of the MDP, it was apparent that the least restrictive alternative—again, a narrower expression of the restrained criminal law that I have traced back to Trudeau’s *Criminal Law Amendment Act, 1968-69*—was a rationality hindered by an inability to predict danger.

Certainly, there were inklings of hope on the horizon. Webster and Dickens (1983) were optimistic about a shift from dangerousness to “risk assessment.” Risk assessment, they argued, offered potential as an actuarial approach, in part because it took the probabilistic statements that were seen as a weakness of clinical predictions of dangerousness as their core truth (p. xi).

Interestingly, it was the public that Webster and Dickens suggested might stand in the way of the developing science:

Unfortunately, principles derived from this seemingly detached, ‘rationalized’, approach to decision-making are unlikely to appeal to the members of the public who mistakenly believe that a maximum degree of personal protection is achieved through the court-regulated application of the more or less intuitive judgements of mental health and criminological specialists. (pp. xi-xii)

As will be seen in the next chapter, the concept of risk would play a pivotal role in legitimizing the detention of those deemed both criminal and mentally ill following the introduction of the NCR system in the 1990s. Risk, which can be understood as a neoliberal reconceptualization of danger, was part of a shift in penal focus from rehabilitation to incapacitation (Castel, 1991; Pratt, 1996). In its reliance on actuarial methods, this new technology was conducive to “modernity’s ever-present goals of rationality and certainty” (Pratt, 1996, p. 33). During the mid-1980s, however, the shift from dangerousness to risk was still in its early stages. In both the work of the MDP and the study by Webster and Dickens, it is apparent that, in its then-present form, the technology of risk assessment remained inadequate.

5.4 Conclusion: Towards the “Constitutionalization” of Canadian Insanity Law

The sequence of events outlined in this chapter aligns with Pat O’Malley’s claim that governmental technologies need to be understood according to the dominant political rationalities of the time. In his look at the rise of actuarial-based responses to crime, O’Malley (1996) concludes “that the relative prominence and roles of different social technologies depends rather on the political rationalities ascendant in any social setting” (p. 190). A similar evolution was traced here. The principle of a restrained criminal law informed the understanding of those deemed both criminal and insane in Canada during the 1970s and ‘80s; in the area of insanity law reform, this rationality ascended as the doctrine of the LRA. The problem was that those deemed insane, and perhaps more importantly, those assumed to be dangerous were unidentifiable and thus inaccessible through existing psy knowledges. While both the LRCC and the MDP acknowledged the inadequacy of dangerousness as a governmental technology, its theoretical persistence points to its fundamental role in implementing the LRA (Canada. Department of Justice., 1985, pp. 38–39). As seen above, both groups continued to work from the assumption that the dangerous and non-dangerous existed, but that the category offered little functional application.

To fill the gap, rights surfaced in the MDP’s work as the primary technology for rationalizing Canadian insanity law. The Project’s reliance on rights reflects the “messy actualities” in which political rationalities emerge (O’Malley, 2001). The principle of restraint was hindered by the unpredictability of danger, but its subsequent articulation in a rights-based vernacular is a reminder of the contingent way in which rationalities materialize. Indeed, rights discourses were particularly prevalent during this time in Canada. The patriation of the

Constitution in 1982 introduced the *Canadian Charter of Rights and Freedoms*, a document that advanced the articulation of rights in the country and influenced the country's legal culture:

The gestation of the Charter therefore took a generation, and it is not surprising that its themes have also provided general guidance to the Department over the past decade and longer: an emphasis on due process; efforts to minimize the severity of the disruption of lives through the exercise of the law (minimum interference); and efforts to buttress individual rights and freedoms through a variety of approaches. (Sutherland, 1983, p. 191)

The *Charter* served as an anchor for the MDP and provided the means for making sense of the various problems of insanity law reform. Given its recent entrenchment, the *Charter's* broad influence on the group's work was speculative, so there was a conjectural tone to the work. The MDP (1985) specifically drew attention to the sections dealing with "fundamental justice (s.7), arbitrary detention (s.9), cruel and unusual treatment (s.12), and equality before the law (s.15(11))", and these provided touchstones for directing their proposals (p. 6).⁹⁴ The group was aware, for instance, that "vague, paternalistic concepts" like dangerousness would likely face a *Charter* challenge. Instead, the group emphasized the similarly vague but decidedly non-paternalistic principle of the LRA. Indeed, the imprecision of the rule appeared to be helpful in navigating the complex area of insanity law. As an abstract principle requiring interpretation, the MDP could avoid making declarative statements where it leaned on the LRA. For example, the group noted that consideration of the principle could nonetheless support burdening the accused with proving their own non-dangerousness (1983, pp. 8–9). Similarly, while dangerousness appeared to play a central role in determining the least restrictive alternative, the exact formula

⁹⁴ Section 7 of the *Charter* reads: "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". The term "fundamental justice" was chosen instead of "due process of law" in order to avoid an expansive interpretation of the right, as had been the case in American jurisprudence (Hogg, 2012, p. 196). Even so, the Canadian Supreme Court has applied section 7 broadly, meaning "[t]he principles can deal with the procedural content of the law, such as a fair hearing, or with the substantive content of the law, such as the requirement of mens rea as a constituent part of a crime" (Tremblay, 1984, p. 252).

had yet to be worked out. This meant that the inability to predict dangerousness did not undermine the LRA, and the MDP was free to propose possible alternatives, like the treatability of the diagnosed mental illness, the availability of proper resources, and consent to treatment (1985, p. 39).

Beyond its ambiguity, the appeal of the LRA was indicative of its alignment with the “constitutionalization” of criminal law that followed in the wake of the *Charter*, a process that can be seen in a number of developments (Berger, 2014). According to Berger (2014), there is “an inclination for coherence between criminal and constitutional logics” (p. 21), and the inherent rationality of the LRA fit easily into the country’s emerging constitutional reason. In aiming to balance societal and individual rights, the LRA was expressed in a manner that reflected the constitutional “aspiration to see all legal judgment, all justice, bound by a legal rule” (p. 10). It also spoke to the broader principle of proportionality that ascended as dominant in post-*Charter* Canada, an occurrence that Berger is again helpful in understanding: “[t]he constitutional logic of proportionality appeals to something genetic in criminal law theory, the influential idea of proportionality as the philosophical lodestar for just punishment” (p. 9).

Given the *Charter*’s impact on Canadian criminal law, it is not surprising that the eventual enactment of the LRA was the result of the constitutional invalidation of certain aspects of the NGRI system. *Bill C-30* (1991), the legislation for the new NCR system, followed the Canadian Supreme Court’s ruling in *R v Swain* (1991) that the automatic and indefinite detention of those deemed insane was unconstitutional.⁹⁵ Since these events will be discussed in more depth in the following chapter, for the time being it is sufficient to recognize that the translation of criminalized insanity into the “constitutional register” (Berger, 2014) was conducive to the

⁹⁵ The new legislation would not receive Royal Assent until 1992.

task of making such subjects governable. There are three reasons this is the case, some of which are clearer than others at this point.

First, the constitutionalization of criminal law provided the means for implementing the vision of a restrained criminal law, a rationality that was prevalent in the country's institutionalized efforts of insanity law reform throughout the 1970s and '80s. As discussed above, the principle of the LRA, which was evident in the LRCC's insanity work and was explicit throughout the MDP, translated easily into the constitutional register. The LRA, itself a more particular application of the principle of restraint, was a response to the country's insanity laws that were seen as increasingly irrational. Constitutional rights, in turn, provided an effective technology for the implementation of this rationality since rights are themselves "ambivalent" tools of subjectivation (Golder, 2013). This characterization aligns with O'Malley's (1996) claim that "technologies... undoubtedly have their own internal dynamics of development, but these are neither perfectly autonomous nor do they have intrinsic effects that follow automatically from their nature" (p. 202). Instead, these technologies can accord to "the problematics of rule", what Nikolas Rose (1996a) describes as "the ways in which those who would exercise rule have posed themselves the question of the reasons, justifications, means and ends of rule, and the problems, goals or ambitions that should animate it" (pp. 41-2).

Second, constitutional rights made the insane subject knowable, and, as a result, governable (Foucault, 1991a, p. 96; see also Doerksen, 2019). As I showed in the previous chapter, those deemed both criminal and insane in Canada were increasingly understood as rights-bearing subjects during the second half of the 20th century, but this ontology remained vague. For example, discussions in Ontario's Legislature revealed that provincial lawmakers were confident that the indefinite detention of those deemed mentally ill was a rights issue, but

struggled to specify beyond this general claim.⁹⁶ Working within the framework of a restrained criminal law, both the LRCC and the MDP emphasized the role of the LRA in rationalizing the country's insanity laws. It was the MDP, however, that provided an early look at the translation of insanity into the constitutional register, which, as will be seen in the following chapter, was a significant turning point in making sense of those deemed both criminal and insane.

Constitutional rights offer an ontological clarity because they imply a kind of indivisible essentialism about their subject (Berger, 2014, p. 6), which in turn constructs the kinds of problems at hand. As Berger points out, the constitutionalization of criminal law has meant that many problems have been translated into “issues of fundamental freedoms, rights to equality and liberty, and the scope of permissible state interference in such rights and freedoms” (p. 12). In other words, constitutional rights become the vernacular for both the problematization of insanity law *and* its resolution.

Finally, the constitutionalization of criminal law established a dialogue that had long been pursued in governing the insane. While this claim is less substantiated at this point, the following chapter will show how the introduction of the *Charter* upended the principle of Parliamentary sovereignty and balanced the lawmaking capacities of the Legislature and the Supreme Court of Canada. This rearrangement established an unprecedented period of dialogue between these two branches of government that was conducive to effectuating insanity law reform. Where reform efforts up to this point emphasized collaboration between legal and psychiatric experts, the new debates took place between the Court and the Legislature. The introduction of the *Charter* meant that “[c]ore questions of criminal law theory have become irreducibly constitutional, guided by claims of rights and the basic norms of the legal order”

⁹⁶ See chapter four, p. 155.

(Berger, 2014, p. 2). As such, psychiatric knowledge would come to play a largely supportive role in an essentially legal dialogue.

It was during these institutionalized reform efforts of the 1970s and '80s that a particular rationality emphasizing a restrained criminal law crystallized. As will be seen in the following chapter, this rationality was central to the introduction of the NCR system. Remaining sensitive to the fact that multiple rationalities can coexist within penal policy and practice (D Moore, 2007, p. 29), I contend that the primacy of restraint was particularly effective in making sense of a population that long perplexed legal authorities. Punitive and retributive logics struggled to take hold of a subject that lacked legal culpability and rehabilitative and risk-based reasoning was difficult to operationalize on account of inadequate technologies of governance. If, however, the criminal law was applied in as restrained a manner as possible, it could be seen as legitimately exercised on the subjected population. Rights, and more specifically, constitutional rights ascended as the technology for governing those deemed both criminal and insane. As will be seen in the following chapter, the construction of those deemed insane as not just rights-bearing subjects, but constitutional subjects, would prove conducive to risk-based forms of governance.

Chapter Six: Constructing the NCR Subject Through the ‘Constitutionalization’ of Risk

In the following chapter, I argue that the constitutionalization of Canadian law enabled the emergence of an ontologically-stable Not Criminally Responsible on Account of Mental Disorder (NCR) subject.⁹⁷ This stability was derived from the post-*Charter* “regime of truth” (1984, 2003) that provided a framework within which true (and false) statements regarding the NCR subject could be validated. The new NCR system that was introduced by Bill C-30 in 1992 was an extension of the institutionalized insanity law reform efforts that were the focus of chapter six; more specifically, the new legislation embodied the “least restrictive” rationality that was central to the preceding period. As will be seen, however, the constitutionalization of Canadian law was fundamental in providing the mechanism to not only implement this agreed-upon rationality, but, more broadly, to introduce a regime of truth in which the NCR subject was a rights-bearing Constitutional subject that could be governed according to risk.

Fundamental to the NCR system is that it detains and manages those deemed NCR on the grounds of risk. Building upon the argument I developed in the previous chapter, I suggest that the ascendance of risk as the basis for detention depends on a technology of rights that enables the risk-based governance of those deemed insane. In other words, I argue in this chapter that the application of risk relies on the ontology of the NCR subject that is grounded in Constitutional rights. To say the current NCR system is underpinned by Constitutional rights is to state a fact, not a claim. In this chapter, I excavate the Constitutional framework that I contend is taken for

⁹⁷ As was the case in chapter five, the ontology referred to here is an “historical ontology”. According to Ian Hacking (2002), historical ontology refers to “the ways in which the possibilities for choice, and for being, arise in history” (p. 23). In this way, historical ontology offers an anti-essentialist approach that does not require the same metaphysical commitments as traditional ontology, and instead emphasizes the historical nature of the various ways in which we understand ourselves. As I argue in this chapter, the Constitutional ontology of the NCR subject is fundamental to its governance. For further discussion of “historical ontology”, see chapter four, pp. 109-113.

granted in making sense of those deemed NCR. Where previous chapters have shown that insanity within the context of the criminal law presented a number of significant hurdles for those pursuing law reform, this chapter illustrates that the translation of these problems into the constitutional register was conducive to the task of making sense of and ultimately governing insanity.

Macdonald's remarks on the post-Constitutional landscape of legal education offers some insight into the seismic impact of the *Charter*. Following Canada's patriation of the Constitution in 1982, Macdonald (2007) wrote, "[f]ew are the constitutional law teachers today who do not sacrifice their teaching of history, politics, institutions, practices, conventions and federalism on the altar of the Charter" (p. 76). Like Macdonald, this chapter highlights the transformative effects of the *Charter*. In particular, it details how the constitutionalization of criminal law was conducive to implementing the risk-based governance of insanity. While a number of scholars note a shift in the late 20th century towards risk-based governance (Beck, 1992; Castel, 1991; Feeley & Simon, 1992; Garland, 2001), its implementation in the field of Canadian insanity law is puzzling given that institutionalized efforts of insanity law reform were previously hampered by an inability to identify dangerousness. As discussed in chapter five, the insanity work of the Canadian Law Reform Commission and the federal government throughout the 1970s and '80s was hindered by the widespread consensus that dangerousness could not be predicted. Given the problematic notion of dangerousness, this chapter aims to answer *how* this transformation was achieved in the field of Canadian insanity law.

This chapter traverses well-known terrain, focusing on two constitutional cases (*R v Swain* (1991) and *Winko v British Columbia (Forensic Psychiatric Institute)* (1999)) and the legislation that introduced the NCR system (Bill C-30 (1992)). While these sites have already

been the subject of scholarly attention, I aim to offer a new perspective in revisiting them. More specifically, I examine the NCR period to show how an ontologically-stable subject emerged, and notably, one that is governable by risk. In so doing, I argue that the indivisibility of the Constitutional subject is central to the governability of the NCR subject. Indeed, Berger (2014) has stated that the constitutionalization of criminal law has meant that “[c]ore questions of criminal law theory have become irreducibly constitutional, guided by claims of rights and the basic norms of the legal order” (p. 424).

The Constitutional ontology of the NCR subject grounds the new “regime of truth” that was introduced by the NCR system. I draw on Michel Foucault’s concept of “regime of truth” (1984) in order to understand why the NCR subject is unique in its governability. Similar to the notion of historical ontology, Foucault’s “regime of truth” embodies an anti-essentialist approach in which the concern is not with the discovery of objective truth, but instead with its particular, historical function:

There is a battle “for truth,” or at least “around truth”—it being understood once again that by truth I do not mean “the ensemble of truths which are to be discovered and accepted,” but rather “the ensemble of rules according to which the true and the false are separated and specific effects of power attached to the true,” it being understood also that it’s a matter not a battle “on behalf” of the truth, but of a battle about the status of truth and the economic and political role it plays. (Foucault, 1984, p. 74)

Ultimately, I argue that the governability of the NCR subject reflects the new truth regime of the NCR system that bypasses those problems which, as noted above, hindered previous unfulfilled efforts of insanity law reform. On the contrary, central to the new NCR regime is the ability to speak “truth” in the governance of insanity in a way that was previously impossible. Most importantly, the new regime enables risk-based governance that itself rests on the implementation of the least restrictive rationality that previously proved problematic. As outlined in chapter five, while the logic of the least restrictive rationality emerged to legitimize

the detention of those deemed insane in the 1970s and '80s, its implementation was limited by psy-experts' inability to predict dangerousness. Rather than reflecting significant advances in psychiatric risk assessments, I argue in this chapter that the risk-based governance of the NCR system is indicative of a regime of truth that is characterized by stabilized relations of power and knowledge between the judiciary, the Legislature, and the provincial psychiatric review boards.

It is worth noting a certain peculiarity in my argument here: far from highlighting an inability to predict dangerousness, I suggest that risk serves to stabilize the NCR system, and by extension, the NCR subject. In some ways, this claim counters more popular narratives. For example, the Harper government's passage of Bill C-14 in 2014—a point that will be returned to in the conclusion of this chapter—was predicated on the position that lax NCR laws allowed the guilty to escape unpunished; the subsequent *Not Criminally Responsible Reform Act (NCR Reform Act)* was thus framed as addressing a weak system that put the public at risk. Yet in a somewhat paradoxical manner, it is this flexibility, or *reformability*, that speaks to the stability of the new NCR subject. Unlike the preceding NGRI subject that was detained through increasingly irrational and illegitimate practices, the NCR subject is made governable through a dialectic of rights and risk assessment. As I show below, the shortcomings of risk assessments are enveloped by a regime of truth—a re-organization of power and knowledge relations—that enables risk to function as a governable “truth”.

6.1 Governing Through Risk

Many of the developments embodied in the new NCR system reflect a broader shift towards risk-based governance in the criminal justice system that several scholars began to identify towards the end of the 20th century. In *The Culture of Control*, David Garland (2001)

argues that risk is one outcome of an increasing emphasis on penal modalities that respond to the perceived shortcomings of welfarist approaches to crime:

The penal mode, as well as becoming more prominent, has become more punitive, more expressive, more security-minded. Distinctively *penal* concerns such as less eligibility, the certainty and fixity of punishment, the condemnation and hard treatment of offenders, and the protection of the public have been prioritized. (p. 175)

The penal-welfarism of the 1960s and '70s, which was preoccupied with trying to identify and address the pathologies and social needs of those coming into conflict with the law, was pushed aside for an offence-oriented penal approach that emphasized economically-efficient modes of social control. But as the solutions of the past became the problems of the present (p. 174), new ways of thinking did not simply replace older practices, but instead reinterpreted and decentred their place in present-day arrangements. Far from describing a clean historical break, the transition from welfarist to neoliberal rationalities reflects an ebbing and flowing of particular styles of thought. For example, Garland notes that rehabilitation fit easily into the older welfarist models that sought to change prisoners, but that it sits precariously within post-welfare penal regimes that stress efficiency and risk-reduction. In his words, rehabilitation became “an investment rather than a standard entitlement”, and one that provides “a means of managing risk, not a welfarist end in itself” (p. 176).

Unlike the United States, the shift away from welfarist penal policy of correctional rehabilitation has not been as totalizing in Canada. The striking climb of the national incarceration rate in the United States that began in the 1970s was not matched in Canada where numbers have remained relatively stable over the same period (although there is provincial variation) (Webster & Doob, 2018). Webster and Doob (2018) hypothesize that this difference reflects a fundamental difference in the “penal optimism” of each country. Even during the rehabilitative era of corrections prior to the 1970s, use of indeterminate sentences in the

American context juxtaposed the Canadian focus on proportionality in sentencing (pp. 125-6), a distinction that pointed to fundamental philosophical differences: “[i]n contrast with the United States, the Canadian government and those responsible for developing criminal justice policy have generally been pessimistic about the ability of the criminal justice system to solve society’s crime problems” (p. 126).⁹⁸ As Webster and Doob (2015) point out, the air of penal pessimism that historically characterizes Canadian criminal justice policy is rooted in a social understanding of crime and those who commit them, a position that has important policy implications: “[a]s the causes of crime are socially rooted, the solutions to it do not reside exclusively, or even predominantly, with the criminal justice system” (p. 303-304).⁹⁹ At the same time, it is important to recognize that penal policy can defy simple categorization, and practices that appear to be welfarist can also be neoliberal. Hannah-Moffat (1999), for instance, illustrates that attending to prisoners’ needs can constitute a mode of risk management in which the prisoner becomes responsible for attending to his or her own needs, and by extension, the risk they embody.

As Garland (2001) points out, there is a kind of looseness in identifying these macrolevel trends in the criminal justice system: “[t]hese recipes are not articulated theories or legal guidelines but instead habits of thought and routine styles of reasoning that are embedded in the precedents and practices of the institution” (p. 188). In a similar manner, Feeley and Simon (1992) note that, as early as the 1970s, a new form of risk-thinking was increasingly taken up in various aspects of the criminal justice system. Along with shifting concerns from rehabilitation to social control, Feeley and Simon identify the growing prevalence of actuarial language within

⁹⁸ Restraint has been a central principle in Canadian penal policy for the second half of the 20th century (Doob, 2012). For further discussion, see chapter five.

⁹⁹ One clear exception to the principled and restrained approach to criminal justice policy was during the administration of Stephen Harper’s Conservative government that initiated “tough on crime” reforms between 2006 and 2015 (Doob, 2012; Doob & Webster, 2016; Webster & Doob, 2018, pp. 157, 166).

this transition (p. 454). Rather than reflecting a cohesive philosophical approach to criminality, Feeley and Simon’s “new penology” refers to widespread and various reforms that coalesce around particular points of agreement. These include: (1) new discourses in which risk and probability come to supplant diagnosis, rehabilitation, and retribution; (2) newly “systemic” objectives in which traditional targets are pursued almost exclusively through a focus on internal processes;¹⁰⁰ and (3) new techniques that emphasize aggregate rather than individualized conceptions of carceral subjects (p. 450). This new penology—one in which “the task is managerial, not transformative” (p. 452)—can be contrasted with its older iteration that emphasized intention and guilt (p. 451). Indeed, previous chapters have traced similar developments in Canadian insanity laws. While the focus of reform efforts during the mid-20th century was on “responsibility, fault, moral sensibility, diagnosis, or intervention and treatment”, the beginning of the 1970s saw an increasing emphasis on “techniques to identify, classify, and manage groupings sorted by dangerousness” (p. 452). The introduction and reform of the NCR system, which largely concentrated on the management of those deemed NCR, amplified this trend.

Like Garland, Feeley and Simon (1992) understand their new penology as somewhat amorphous, offering the following explanation for their identification of an increasingly prevalent “strategy”:

By *strategy* we do not mean a conscious and coherent agenda employed by a determinate set of penal agents or others. Just as structural elements in a building conjoin to create a pattern of force relations quite different from their individual properties, the loose set of

¹⁰⁰ According to Feeley and Simon (1992), the new penology treats elements of the criminal justice system as apparatuses that demarcate their own indicators of success and failure and in which there is a “decoupling [of] performance evaluation from external social objectives (p. 456). In the old penology, recidivism offered an independent and extrinsic factor for measuring the success of carceral practices: “[h]igh rates of parolees being returned to prison once indicated program failure; now they are offered as evidence of efficiency and effectiveness of parole as a control apparatus” (p. 455). The development also points to a shift away from welfarist penal rationalities of rehabilitation and towards a focus on the identification and management of risk (pp. 455-456).

interconnected developments that we call the new penology increasingly shapes the way the power to punish is exercised. (pp. 449-450)

In a similar manner, this chapter traces the shifting relations of knowledge and power that have enabled and legitimized the risk-based governance of the NCR subject. In previous chapters, I have detailed the various historical problematizations of those deemed insane in Canada, and in so doing, I have shown that the insane subject was conceptualized as a problem that increasingly required more complex modes of governance. This need drew attention to the shortcomings of existing knowledges, and of psy-entific knowledges in particular, in regards to the insane subject. In chapter three, my examination of the RCLI during the 1950s revealed that the psy knowledge of the day presented an esoteric and opaque form of expertise that was difficult for law reformers to work with. The persistence of Canada's M'Naghten-based insanity defence is a reminder that identifying the insane—once the great preoccupation of debates in psy and legal discussions of insanity—was gradually replaced by a growing emphasis on managing those declared as such. In chapters four and five, I traced the emergence of this new direction, first in 1960s Ontario and then in the federal government's insanity law reforms efforts of the 1970s and '80s. Yet in shifting directions, insanity law reformers were quickly met with a new problem: psy experts were unable to predict dangerousness.

The subsequent introduction of the NCR system is, I argue, indicative of the shift from dangerousness to risk in governing those deemed insane in Canada. In characterizing the transition in this way, I am drawing on Robert Castel's (1991) claim that the psychiatric system evolved from a focus on dangerousness to a focus on risk. According to Castel, dangerousness refers to an inherent quality of the individual, and one that is thought to be particularly threatening when it presents as a symptom of mental illness. The irrational unpredictability that is often associated with such illnesses means that, even if there is no evidence of danger in an

individual case, dangerousness is treated as dormant rather than nonexistent (p. 283). When faced with decisions about confining subjects, psychiatrists have thus historically “opted for the all-out prudence of preventive interventionism... [because] [w]hen in doubt it is better to act” (p. 283).

While this logic could persist well into the 20th century, as Castel notes, there was a troubling arbitrariness underlying this approach. In previous chapters, I have detailed the arbitrariness of the Lieutenant Governor’s Warrant—itsself based on Britain’s *Criminal Lunatics Act* of 1800¹⁰¹—that grew problematic in 1960s Canada against a backdrop of deinstitutionalization, a burgeoning rights movement, and the abolition of capital punishment. In contrast to danger, risk provides a much more workable concept. Central to risk is the ‘factorization’ of the individual in which “new strategies dissolve the notion of a *subject* or a concrete individual, and put in its place a combinatorial of *factors*, the factors of risk” (p. 281). The heterogeneous accumulation of factors that characterizes risk is more conducive to governance than the singular status of dangerousness (p. 287), and psychiatric knowledge is increasingly used to identify risky behaviours and attitudes in order to serve the largely administrative purpose of risk and thus security categorizations (pp. 290-291). Assessments of risk, as opposed to dangerousness, have also increasingly incorporated dynamic factors. As a result, where prior assessments of dangerousness were for identification purposes, risk informs treatment and management decisions (Garrington & Boer, 2020; Ogloff & Davis, 2020). It is perhaps on account of this focus on manageability, especially at the population level, that Castel (1991) links the emergence of risk-based governance in psychiatry to the post-welfare period (p. 281).

¹⁰¹ For a discussion of the *Criminal Lunatics Act* (1800), see pp. 2-3.

Following Castel, I emphasize the distinction between dangerousness and risk, but this requires further clarification. In the psy-ences, the transition from danger to risk reflects “a switch from a reliance on clinical assessments of dangerousness to actuarial prediction models for assessing risk” (MacAlister, 2005, p. 20). In other words, psy experts’ unstructured and intuitive judgements of a subject’s dangerousness are supplanted by the statistically-informed weighting of factors that are thought to predict danger (Costanzo & Costanzo, 2013, p. 254). In practice, the shift just as often refers to the use of structured professional judgment (SPJ) rather than a purely actuarial approach. SPJ combines the clinical and actuarial approaches and systematizes psy experts’ assessments of risk: “[i]n comparison to either pure clinical or actuarial tools, SPJ tools then guide the assessor to consider a range of factors, form a judgment of risk and assist with case planning and treatment interventions” (Garrington & Boer, 2020, p. 147). One often touted advantage of SPJ is that, unlike actuarial assessments that only incorporate static (i.e. fixed) variables, SPJ allows for the inclusion of static *and* dynamic (i.e. fluid) factors (Garrington & Boer, 2020; Ogloff & Davis, 2020). As Garrington and Boer (2020) describe the hybrid assessment approach, SPJ requires “static actuarial factors to form the basis to which SPJ dynamic factors are added” (p. 148).

These new generations of risk assessment have been criticized for different reasons: the inherent difficulty of predicting rare events, a lack of evidence supporting their predictive accuracy, conceptual imprecision, and for falsely inflating a sense of neutral and objective assessment (Silva, 2020, pp. 269–270). Beyond their shortcomings, the uptake of actuarial- or SPJ-informed approaches by review boards is unclear, although existing research suggests it has been limited. In their examination of Ontario Review Board decisions between 1992 and 1999, Hilton and Simmons (2001) found that actuarial assessments had little influence on decisions

that were made primarily on the basis of clinical judgement. McKee, Harris, and Rice (2007) similarly found that actuarial data did not have a significant impact on clinicians' or tribunal's determinations of risk, and that factors informed decision-making irrespective of their empirical validity. In their examination of a selection of Review Board hearings occurring in Quebec between 2004 and 2006, Crocker et al. (2011) concluded that dynamic variables—the subject of clinical expertise—formed the basis of the Board's decisions. While the authors noted that dynamic variables “are less established in the literature” and poorer at predicting the long-term risk of violence, they also deemed the approach appropriate since they can better inform treatment and risk-management (p. 299). In one more recent study of Ontario Review Board hearings, Hilton, Simpson, and Ham (2016) found that while “the psychiatrist's testimony... with respect to recommended security was the sole statistical contributor to the disposition”, actuarial risk assessments appeared to have some influence on this testimony.

These studies question the extent to which the NCR system is shaped by new forms of risk knowledges. Certainly, there are important qualitative differences between conceptualizations of danger and risk that are important. In the previous chapter, I noted that Webster and Dickens (1983) saw the shift from dangerousness to risk assessment as offering potential precisely for the actuarial element of the new approach (p. xi). As I will argue in the following chapter, the factorization and manageability of risk, which contrasts with the dichotomous and internal state of dangerousness, is important to its uptake in the NCR system. However, there is also an important nominal and arbitrary element to the risk framework that characterizes the NCR system. For example, as will be discussed below, the new NCR legislation that followed the *Swain* decision also included the counterbalancing amendments of sentencing caps and a ‘Dangerous Mentally Disordered Accused’ (DMDA) category. Where the

former would set time limits on NCR dispositions, the latter would provide for the indefinite detention of those defined as such. Following the *Winko* Court's validation of risk, however, the two amendments which had never come into force were regarded as unnecessary. The shelving of these proposed legislative amendments suggest that important features of today's NCR system, like the legitimized indefinite detention of the NCR subject, could have been pursued through the language of danger. In a similar vein, the *Winko* Court used a wide vocabulary of like terms—risk, threat, harm, danger—in a largely indistinct manner, suggesting that the different concepts can at times be used interchangeably.

My distinction between dangerousness and risk is as much historical as it is essential. Where Castel emphasizes the qualitative transformation between knowledges of risk and danger, I focus on the shifting relations of knowledge and power amongst the judiciary, the Legislature, and the provincial review boards that have accompanied the shift towards risk in Canada's NCR system. In drawing attention to this nominal element, I am as interested in the "circuits" of risk knowledges and their effects within the NCR system as I am with the content of these risk knowledges (Valverde et al., 2005, p. 89). Framing the chapter in this way reflects what Valverde, Levi and Moore (2005) call the "non-normative study of risk knowledges in law":

Knowledges are always circulating, changing, being taken apart, and reassembled in new shapes by new actors. The goal of scholarship, in this perspective, is not to discover that concept X or norm Y is originally, and hence truly, the property of this or that group or institution, but rather to capture this creative movement in our analyses. In this way, we can highlight the flexibility of knowledge resources, illuminating the byways of power/knowledge while refraining from the temptation to use our own texts to police how others use governance resources, including knowledge resources. (p. 89)

Like these scholars, my interest in risk knowledges follows from particular problematizations (p. 93). In this case, my focus on risk is a consequence of my own investigation of the various attempts in Canada to make sense of those deemed insane within the

context of the criminal law. As I detail below, the shift towards a risk-based framework in the NCR system—both in its qualitative and nominal sense—relies on an understanding of the NCR subject as a rights-bearing subject. In the following chapter, I contend that the dangerous subject is not simply replaced by the risky subject, but by the Constitutional subject about whom truth claims can be made regarding his or her risk. With this understanding, I begin with a discussion of Canada’s rights framework.

6.2 The Canadian Bill of Rights

Fundamental to the new NCR regime is Canada’s Constitutional subject, a figure that is defined by the rights outlined in the *Canadian Charter of Rights and Freedoms* (1982). Before discussing the *Charter*, however, which was introduced in 1982, a brief foray into Canada’s history of rights legislation is worthwhile. Not only will this slight detour contextualize the transformative effects of the *Charter*, it also serves as an important reminder of the historical nature of the new framework. Indeed, while the *Charter* was monumental in advancing the country’s rights culture, it was not the first rights legislation passed by the Canadian government. The Diefenbaker government introduced the *Canadian Bill of Rights* in 1960, quasi-constitutional legislation that, although enacted like other laws, was not eclipsed by newer, conflicting statutes. Yet while the *Bill of Rights* is indicative of a post-World War II rights consciousness, it has been widely criticized as having a minimal effect since it only applied to federal laws (Clément et al., 2012, p. 13), included a short list of protected rights (Clément, 2016, p. 81), and was understood by many judges as providing a mere “interpretive aid” (Strayer, 2013, p. 247). According to Janet Hiebert (2012), some of these limitations were deliberately built into the *Bill*’s original conception since Diefenbaker envisioned that Parliament, rather than the judiciary, would play the primary rights-protecting role (pp. 88-90). While the approach

reflected an optimistic vision in which the protection of rights was a cohesive project involving all branches of the government, Hiebert points to three limitations of the Diefenbaker government's plan for "legislative rights review" (pp. 90-91). First, the *Bill of Rights* requires the Justice Minister to notify Parliament if any proposed legislation might conflict with any of the enumerated rights.¹⁰² The problem with this approach is that it does not account for those instances in which the Minister provides no such a report. In such circumstances, an ill-informed and inexperienced Parliament is nonetheless expected to play an active role in rights protection. Second, rights protection was placed squarely within "the adoption of good administrative and political practices" (p. 91). This procedural method did not address the numerous other ways that incongruencies could occur, like through fundamental disagreements on the scope of the enumerated rights (p. 91). And finally, Hiebert points to the post-*Bill of Rights* legal landscape that was not anticipated by the Diefenbaker government:

As it turned out, the Supreme Court's decision not to interpret the *Bill of Rights* as imposing new norms for constraining use of state power, but as a recognition of the rights that already existed (*R v Robertson*), along with the validation of almost all federal legislation challenged, provided little incentive for policy and political officials to question rigorously the merits of legislative initiatives from a rights perspective. (pp. 90-91)

¹⁰² The case of Edgar Schmidt, a former lawyer for Canada's Department of Justice, brought widespread attention to the chronic limitations of legislative rights review. Schmidt took the Department to court in 2015, claiming that it was using an inappropriate standard for reviewing legislation that might conflict with the *Canadian Bill of Rights* or the *Charter* (this duty is outlined in the following pieces of legislation: *Canadian Bill of Rights* (1960, sec. 3); *Department of Justice Act*, RSC, 1985, c. J-2, sec. 4.1; and the *Statutory Instruments Act*, RSC, 1985, c. S-22, sec. 3). Schmidt contended that the Justice Department incorrectly interpreted its statutory obligation, stating that since 1993, government lawyers have been instructed to approve legislation if there is at least a five per cent chance of approval (Curry, 2013). Schmidt's case was ultimately dismissed by both the Federal Court (*Schmidt v Canada (Attorney General)*, 2016) and the Federal Court of Appeal (*Schmidt v Canada (Attorney General)*, 2018); he was also denied a hearing by the Supreme Court of Canada (leave to appeal to SCC dismissed, 2019 CanLII 38179). Schmidt's case suggests that judicial and Parliamentary sovereignty may not be best understood as opposing forces in a zero-sum game. MacDonnell (2016) argues, for instance, that there is "an important connection between the intensity of judicial review and the degree to which Parliament focusses on the constitutional issues raised by a law during the legislative process" (p. 13). Instead, the post-*Charter* Canadian legal landscape might be better conceptualized as providing a flexible rights regime that has different implications for the heterogeneous and particular tasks of governance.

Indeed, *R v Robertson and Rosetanni* (1963), the case noted by Hiebert, offers a helpful illustration of the limited impact of the *Bill of Rights*. Robertson and Rosetanni were two Americans who opened a bowling alley in Toronto. Observing what they thought was a prime business opportunity, the defendants tried to operate their business on Sundays, a violation of the *Lord's Day Act*. In a decision that was indicative of the scope of the *Bill of Rights*, the Supreme Court ruled that the *Act* was compatible with the right to religious freedom. The majority of the Canadian Supreme Court reasoned that “[t]he *Canadian Bill of Rights* was not concerned with ‘human rights and fundamental freedoms’ in any abstract sense, but rather with such ‘rights and freedoms’ as they existed in Canada immediately before the statute was enacted” (p. 652). Speaking to its limited impact, Dominique Clément (2016) notes that “[o]f the thirty-five claims brought under the legislation between 1960s and 1982, only five were successful and only one led to the striking down of legislation” (p. 65). Far from initiating a rights revolution, the *Bill of Rights* was effective in maintaining the status quo.

6.3 The *Charter*, Dialogue Theory, and the End of Parliamentary Sovereignty

Given the limited scope of the *Bill of Rights*, it is not surprising that the *Charter* introduced a new rights era in Canada. Given the Diefenbaker government’s focus on legislative rights review, the *Charter*’s promotion of the judiciary in this process has significantly impacted the country’s legal and political cultures. In contrast to the *Bill of Rights*, the *Charter* opposed the principle of Parliamentary sovereignty. A practice rooted in England’s Glorious Revolution (1688-1689),¹⁰³ Parliamentary sovereignty holds that Parliament is supreme in its lawmaking

¹⁰³ By the mid-17th century, England was in the midst of a civil war (1642-1651). The sitting King Charles I was a Roman Catholic, and his impact on the Church of England did not sit well with many Protestants in the country, a Christian sect that had grown since the Reformation in the 16th century. Fiscal tensions also brought Parliament’s displeasure with the monarch to the surface. Even though the monarchy would use its power to secure loans that

abilities. The introduction of Constitutional rights for Canadians in 1982 upended this principle since the Supreme Court now had the ability to strike down laws as unconstitutional. In 1997, Hogg and Bushell introduced their influential dialogue theory as a way of understanding this new relationship between Parliament and the judiciary. Dialogue theory contends that the new constitutional arrangement enables a back-and-forth discourse in which both Parliament and the courts are engaged in the co-production of constitutionally-valid legislation.

Two years after Hogg and Bushell introduced dialogue theory as a framework for understanding the constitutionalization of Canadian law, Manfredi and Kelly (1999) put forth a number of critiques of the conceptualization. For example, amongst their empirical assessments, Manfredi and Kelly point out that Hogg and Bushell provided no selection criteria for the lower court decisions they included beyond those they subjectively determined to be “important” (p. 516). Manfredi and Kelly also criticized Hogg and Bushell’s inclusion of judicial nullifications from lower courts, even when these were overturned on appeal. The result, they contend, is a watered-down notion of what constitutes genuine dialogue (p. 517).¹⁰⁴ Turning to their normatively-grounded critiques, Manfredi and Kelly point out that in almost one out of every five cases in Hogg and Bushell’s sample, the “legislative sequel” preceded the final court decision (pp. 522-523).¹⁰⁵ This finding suggests that “courts are at least as interested in asserting their supremacy over constitutional interpretation as [they are] in engaging in a dialogue about

were skewed to its own interests, it still had to rely on Parliament at times to garner funds through other means (North & Weingast, 1989). These mounting religious and economic tensions saw Charles I executed in 1649, and England was subsequently governed as a republic until the restoration of the monarchy in 1660. However, history repeated itself when James II took power in 1685, and both Catholic-Protestant and Monarchy-Parliament conflict led to his ousting with the Glorious Revolution (1688-1689). One important effect of this was the establishment of the principle of Parliamentary sovereignty: the notion that its legislative abilities are not limited by other branches of government (Cherry, 1956).

¹⁰⁴ Judicial nullification refers to courts’ invalidation of legislation.

¹⁰⁵ Hogg and Bushell (1997) use the term “legislative sequel” to refer to those instances in which Parliament has responded to the Court’s invalidation of legislation (p. 82).

constitutional norms” (p. 522). Most importantly, Manfredi and Kelly argue that the dialogue between the judiciary and legislature is undermined by the fact that the discussion is not about the *Charter* itself, but about the court’s interpretation of the *Charter* (pp. 523-524). The subsequent “judicial monopoly” of the *Charter* undermines genuine dialogue since the courts become the ultimate gatekeepers (p. 523).

Discussions of dialogue theory, like those cited above, traditionally revolve around the democratic validity of post-*Charter* judicial review. For example, Manfredi and Kelly’s description of the emerging judicial sovereignty is worrisome because it tips the constitutional scales away from the elected members of Parliament and towards the appointed judiciary. Although these are important concerns, the consideration of dialogue theory in this chapter is related to its role in constructing a governable NCR subject. There is also debate regarding the extent to which Parliamentary sovereignty has been upended following the introduction of the *Charter* in 1982. Lipset (1990) notes that Canada’s new Constitutional rights do not protect the individual like the American *Bill of Rights*. For example, Americans enjoy a degree of protection against double jeopardy that Canadians do not (p. 102). More pertinent to the topic at hand, section 33 of the *Charter*—the notwithstanding clause—offers one clear example of Parliamentary sovereignty since it allows Canadian governments to maintain Constitutionally-invalid legislation (pp. 103-104). Yet in writing less than a decade after the introduction of the *Charter*, Lipset was aware that only time would reveal its true impact:

In emphasizing the continuing differences between Canada and the United States after the enactment of the Charter of Rights and Freedoms, it may be that I am underestimating the potential for change in Canadian values and behavior that will develop as the Charter is implemented by the courts. Although favored more by the left than the right, it probably goes further toward taking the country in an American direction than any other enacted structural change, including the Canada-U.S. Free Trade Agreement. The Charter’s stress on due process and individual rights, although less stringent than that of the U.S. Bill of Rights, should increase individualism and litigiousness north of the border. (p. 116)

According to Berger (2013), the *Charter* has been so influential because it instituted a second Constitutional logic into the Canadian legal landscape. Between 1867 and 1982, the Supreme Court of Canada operated under a logic of the “particular” that maps onto the historical conditions of the country’s Constitution. In 1982, the *Charter* introduced the “universal” logic of metaphysical rights “that if well enough crafted... should be largely transportable to any other polity as an expression of universal truths of the just relation between state and citizen” (p. 322-323). For Berger, we gain insight into the unique culture of Canadian Constitutionalism when these two logics collide. He offers section 93 of the Constitution, which provides for the public funding of Catholic schools in three provinces and three territories, as an example. While this differential treatment of religious groups clashes with the freedom of religion outlined in the *Charter* (sections 15(1) and 2(a)), the disparity is maintained since the Constitutional provision for Roman Catholic schooling resolved the historical tensions that otherwise may have prevented Confederation. In this case, the Constitutional logic of the particular trumps the universal. More generally, however, the new universal Constitutional logic provided a new means for the Supreme Court to engage with the will of Parliament:

Rather than curating or sustaining the political, the Court’s voice in Constitutional matters would now involve limiting or containing the political. In its new role enforcing rights, the judiciary would now speak substantive truth in response to interest and will. The universals of rights and categorical claims of just state-citizen relations could and would now hollow out a space in the antecedent sphere of parliamentary (read political) supremacy into which no expression of will, no manifestation of political interest, could encroach. (p. 330)

Berger (2013) is not claiming that certain issues of Constitutional law are purely universal or particular in nature, but that each instance “has a dominant inflection” (p. 322). As I argue in this chapter, the second Constitutional logic of the universal has played an integral role in the development of the NCR system. While criminalized insanity has raised important Constitutional

problems of the particular—whether those deemed both criminal and mentally ill fall under federal or provincial authority is the best example—the figure of abstract rights that emerged with the *Charter* has been especially conducive to efforts of insanity law reform in the country.

I contend that the constitutionalization of the insane subject is conducive to insanity law reform for two reasons. First, the *Charter* brought an ontological clarity to subjects deemed both criminal and insane in Canada. The history of Canadian insanity law reform that I have traced in the preceding chapters shows that there is a close link between the problematization of those deemed insane and understandings of their identity. Discussions of insanity law reform during the mid-20th century focused largely on the issue of criminal responsibility; although little progress was made in this area, the context of capital punishment that coloured the insanity defence meant the indefinite detention of the LGW was less problematic. Gradually, the management of those deemed insane became the central issue, a point that was illustrated in chapter five when the LRCC shifted their focus from issues of criminal responsibility to issues of process. Yet the hybrid status of the criminalized insane as both medical and criminal subjects made it difficult to address mounting concerns that this population was being treated unfairly, primarily in regards to the ambiguous and indefinite nature of their detention. As will be seen below, the Constitutional subject helped bypass the medical-criminal duality by providing an ontology that could ground discussions and practices of governance.

Second, the introduction of the universal Constitutional logic provided a new means for the Supreme Court to be involved in constructing laws to govern the insane subject. Like the discussion of dangerousness and risk above, it is likely that insanity law would have been reformed even if the *Charter* had never been introduced. However, the new collaborative approach of the post-*Charter* era was conducive to the task for different reasons. Macdonnell

(2016) has made the more general observation that the Constitutional framework promotes law reform since the Legislature's Constitutional conscientiousness during the lawmaking process has an inverse relationship to the intensity of judicial review. In the specific case of insanity law, the discourse of Constitutional rights provided a common vernacular that allowed the Court to speak to the truth of the NCR subject. This is most evident in the shifting emphasis on risk. For example, and to be expanded upon below, Parliament's initial approach to cap the sentences of those deemed NCR was counterbalanced by the indefinite detention of those declared as DMDA. However, these amendments would be declared as unnecessary when, following its ruling in *Winko*, the Supreme Court would uphold the indefinite detention of all NCR subjects on the grounds of risk. Here, the Supreme Court could validate risk-based governance through the universal Constitutional logic, while the particulars of its application could be blackboxed within review boards. The eventual passing of Bill C-14, and more specifically the high-risk accused designation, would build on this validation of risk.

The constitutionalization of insanity, which I suggest is integral in the various attempts to make sense of insanity within the context of the criminal law, began with the Constitutional invalidation of the existing NGRI system. While the introduction of the *Charter* brought with it a number of changes that were conducive to governing the problematic notion of insanity, *R v Swain* (1991) was significant as an early constitutional challenge to the country's existing insanity laws. I thus turn now to an examination of this case.

6.4 *R v Swain*

While *R v Swain* (1991) was an early moment in the country's new *Charter*-based insanity law, it was not the first of its kind. The year prior, *R v Chaulk* (1990) drew important conclusions regarding the insanity defence as outlined in section 16 of the *Criminal Code*. Here,

the majority ruled that the *M’Naghten*-based defence should be interpreted as referring to the accused’s understanding of the perceived “wrong” in moral terms. The ruling thus declared that individuals can know that their actions were against the law and still be found insane. *Chaulk* also concluded that the requirement that the accused prove their own insanity on a balance of probabilities was constitutionally valid. This “reverse onus” was found to violate section 11(d) of the *Charter* (the right to the presumption of innocence), but was upheld as a legitimate limitation according to section 1.¹⁰⁶

While *Chaulk* was undoubtedly an important ruling, *Swain* was central to the introduction of the new NCR system, in large part because of the dialogue it initiated between the judiciary and Parliament. On October 30, 1983, Owen Swain was charged with assault and aggravated assault for attacking his wife and infant children at their home. The admittedly bizarre behaviour—a series of events that involved the accused swinging his nude son above his head—was later determined to be the result of psychosis: Swain believed that he was protecting his family against attacks by devils (*Regina v Swain*, 1986, paras. 26–34). He was subsequently treated with antipsychotic medication at Penetanguishene Mental Health Centre, and, with his condition responding to treatment, was transferred back to jail and released on bail. At Swain’s trial on May 3, 1985, the Crown brought evidence that the accused was insane at the time of the crime, and the District Court of Ontario found Swain Not Guilty by Reason of Insanity (NGRI). Following the verdict, the defence unsuccessfully challenged the constitutionality of the Lieutenant Governor’s Warrant (LGW) and Swain was automatically and indefinitely detained at the pleasure of the Lieutenant Governor. The Ontario Court of Appeal dismissed Swain’s initial appeal, but on March 26, 1987, Swain’s application to appeal to the Supreme Court was granted.

¹⁰⁶ Section 1 of the *Charter* allows the limitation of Constitutional rights if it reflects “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

Swain's Supreme Court case revolved around the constitutionality of two main issues, and the Court's resolution of each is indicative of how the constitutionalization of the criminal law lends itself to making sense of insanity. First, the Court had to decide if the common-law rule allowing the Crown to raise evidence of the accused's insanity was a violation of the individual's *Charter* rights. The Court affirmed that the rule violated section 7 of the *Charter*, which states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" (*Canadian Charter*, 1982, s 7). One principle of fundamental justice entitles individuals to the right to control their own defence; in this case, the Court determined that the prosecution's invocation of insanity evidence could unduly damage the accused's credibility in this capacity. In both problematizing and resolving the issue, the Court invoked the least restrictive rationality that, as discussed in the previous chapter, was both increasingly prevalent in making sense of the insane subject *and* a defining feature of constitutional criminal law (Berger, 2014, pp. 429–430). In *Swain*, this rationality emerged within the application of the Oakes test, a formula used to determine whether or not a violation of a *Charter* right can be validated under section 1. Established in *R v Oakes* (1986), the test is comprised of two criteria, with the second portion broken down into three sub-questions. First, is the legal objective pressing enough to justify overriding the impugned *Charter* right? If so, the second part of the formula investigates whether or not the means to achieve that objective are justified. This tripartite criterion asks: (1) are the means rationally connected to the objective; (2) do the means impair the impugned right as minimally as possible; and (3) are the effects of impugning the right proportional to the objective to be achieved.

In applying the Oakes test, the Court determined that the reasons for the common-law rule—to avoid convicting the mentally non-responsible while also protecting the public—were both “pressing and substantial” and rationally connected to their ends (*R v Swain*, 1991, p. 938). However, the Court determined that the rule did not employ the least intrusive means possible. On account of judicial deference, Parliament is only required to “come within a range of means which impair *Charter* rights as little as possible” (p. 939), but the Court ruled that it failed to do so in this case. Rather than returning the task to Parliament, the Court re-wrote the common law rule to be constitutionally sound. Recognizing that, without the luxury of judicial deference, it was required to provide the least restrictive common law rule possible (p. 939); the Court then determined that the Crown could only raise the insanity evidence if the accused had already done so, or following a guilty verdict (pp. 939-940).

The second issue that *Swain* presented to the Supreme Court was whether or not the indefinite detention of the LGW was a violation of the accused’s *Charter* rights. After determining that this legislation was within the federal government’s authority,¹⁰⁷ the Court ruled that requiring the trial judge to automatically and indefinitely detain those declared NGRI violated Swain’s section 7 right to liberty, as well as his section 9 right not to be arbitrarily detained (*R v Swain*, 1991, p. 944). On this issue, the Court was confronting a problem that Canadian law reformers had been grappling with since the 1960s: how to legitimately detain a population that is assumed to be dangerous. It is less surprising then that the majority of the Court determined that requiring the judge to automatically and indefinitely detain the accused found NGRI was a violation of the accused’s *Charter* rights. The lack of any hearing regarding

¹⁰⁷ Recalling the kind of question that occupied the majority of pre-*Charter* Canadian constitutional law (Berger, 2013), the concern was whether or not the federal government was authorized to make such a law (i.e. whether or not it was within (“*intra vires*”) or outside (“*ultra vires*”) the federal government’s powers).

the decision was found to be a violation of the principles of fundamental justice (s. 7), and the lack of any criteria to determine whether or not detention was required was found to constitute arbitrary detention (s. 9).

The resolution of both of these issues points to the way in which the Constitutionalization of Canadian criminal law is conducive to the task of making sense of and governing insanity. For example, in chapter five I traced the development of the least restrictive rationality (LRA) in the federal government's insanity law reform efforts of the 1970s and '80s. In so doing, I showed that the logic of the LRA emerged as central to the governance of a group in which traditional carceral logics like retribution and rehabilitation could be problematic. In extending this reasoning, *Swain* illustrates how the translation of those deemed insane in the criminal legal context into the Constitutional register was simple since, as evidenced by the Oakes test above, the least restrictive rationality is a core tenet of Canadian Constitutional law.

The convergence of these least restrictive rationalities points to one way that the translation of the NCR subject into the Constitutional register is conducive to making it governable. It is important to recognize that this is not a superficial translation, but rather one that is indicative of a new regime of truth that is central to articulating and managing the NCR subject of today. According to Foucault (1984):

Each society has its regime of truth, its "general politics" of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true. (p. 73)

Unique to the NCR subject is the ability to make statements that can be accorded the status of truth in a way that was not previously possible. The Constitutional status of this subject—and more specifically, the various Constitutional rights that define this status—serves as an

uncontested truth that the Court only interprets. Indeed, in reflecting Manfredi and Kelly's critique of Canada's new constitutional dialogue (1999), the Supreme Court did not construct a subject in the *Swain* ruling, but instead deciphered it (pp. 523-524).

The idea that the Supreme Court is offering clarification of a distinct ontological subject is related to the governability of those deemed NCR. While the Court might play a fundamental role as the ultimate gatekeeper of this subject, it is nonetheless one that is assembled through a collaborative (even if antagonistic) process that involves the judiciary, legislature, and psychiatric review boards. The new regime of truth that *Swain* introduces reveals a fundamental re-organization of who can speak to what truths, and how they can be verified. Prior chapters showed that reform efforts during the preceding NGRI period centred mainly on the lawmaking branch of the government, whether this was in the Legislature itself or in its advisory bodies. The *Swain* decision, by contrast, foreshadows the NCR period that is characterized by the re-organized power and knowledge relations of the post-*Charter* Canadian legal landscape.

6.5 Parliament's Response: Bill C-30 and the NCR System

At the centre of the dialogue initiated by *Swain* was the same problem that long hindered Canadian insanity law reform: how could those deemed insane—a population that was assumed to be dangerous but was not identifiably so—be legitimately detained? As will be seen, the subject that would emerge from this problem reflects the stable relation that was established upon the new “grid of intelligibility” (Foucault, 2003, p. 164) that characterized the NCR system. The unanswerable question of whether or not the subject was dangerous was gradually replaced by a much more manageable one that asked if detaining the subject on the grounds of dangerousness was a violation of his or her rights. The new stability was not established in one fell swoop, but instead relied on the new constitutional dialogue between Parliament and the

judiciary, which was essential to the ontological and fundamental truth of the newly formed Constitutional subject.

While the Supreme Court invalidated the LGW system through the *Swain* decision, it acknowledged the collaborative relationship it envisioned with Parliament. The Court ruled that a six-month transitional period would be granted in order to prevent the mass release of all those held on LGWs (*R v Swain*, 1991, p. 1021). Yet the delay imposed a deadline to have new legislation by November 2, 1991, which prompted the government to act in an area where it was historically hesitant to do so. Indeed, the motivation served as a point of some criticism in Parliament. John Nunziata, Member of Parliament for the York South-Weston region, shamed Justice Minister Kim Campbell in particular for forcing Parliament's hand and putting the public at risk (1991, p. 3303). Similarly, Bill Blaikie, MP for the Winnipeg Transcona riding, noted that many had expected a *Charter* challenge for some time (p. 3302). Delays aside, however, there was wide support for reform in the area.

Bill C-30, *An Act to amend the Criminal Code (mental disorder)*, was in many ways an extension of the period of institutional law reform discussed in the previous chapter. It was placed in the lineage of the Law Reform Commission's insanity work and the Mental Disorder Project, and was based on a subsequent draft bill that was briefly introduced in 1986. As such, it entrenched the direction that developed over this period. The defence itself, for example, was determined to "work reasonably well"; the only change being the need to update the terminology from "insanity" to "mental disorder" (Campbell, 1991, p. 3296). Interestingly, while the amendment was thought to reflect modern language, the Justice Minister noted that it also aligned better with public sentiment and that the wording did not allow these individuals to "delude themselves into thinking they have done nothing wrong" (p. 3296). In other words, the

new NCR terminology was thought to better articulate the idea that these subjects were not entirely non-responsible.

Still, the new NCR system that came into force in February of 1992 was a major overhaul of the previous laws. The NCR defence was no longer limited to indictable crimes and included summary conviction offences as well. Many of the reforms revolved around the detention of these subjects in the newly created Part XX.1 of the *Criminal Code*, the urgency of which was brought to the fore by *Swain*. The new legislation meant that the court was no longer required to automatically detain individuals found NCR; where it did not absolutely discharge the accused, the review board would need to make their own ruling within 90 days. The role of the Lieutenant Governor was abolished and review boards were instituted in all provinces with the requirement that they review all cases under their jurisdiction annually, with subjects now able to appeal decisions to the appropriate appellate court.

Along with these procedural amendments, Bill C-30 also instituted a clear rationality to guide the new decisions. This was an outgrowth of the rationality that emerged during the period of institutional law reform in the 1970s and '80s, as discussed in the previous chapter. The court and review board now had three dispositional options open to them: absolute discharge, conditional discharge, and detention in hospital. Section 672.54 of the *Criminal Code* clarified that dispositions were to reflect a range of variables including the need to protect the public from dangerous subjects, the mental condition of the accused, the reintegration potential of the accused, and any other needs of the accused. Considering these factors, the court or review board was now required to select the option “that is the least onerous and least restrictive to the accused.”

Although apparently favouring the NCR accused, the section was nonetheless ambiguous, as evidenced by the inclusion of a handful of more controversial amendments that aimed to deal with the problem of indefinite detention. A pair of proposed amendments included “capping” the sentences of those deemed NCR, as well as the creation of a new category for the ‘Dangerous Mentally Disordered Accused’ (DMDA). Although a number of procedural elements were included to deal with the indeterminate nature that persisted in Part XX.1 of the *Criminal Code*, these two reforms provided a direct response to the problem. The capping provisions suggested a range of maximum sentences for individuals declared NCR, with the proposed caps ranging from two years to life depending on the offence the subject was convicted of (Bill C-30, 1991, pp. 26–27). Fearing that such a change could lead to the release of dangerous individuals, even in spite of provincial civil commitment laws, the drafters of Bill C-30 sought to counterbalance the revision with a new DMDA category. Similar to the general dangerous offender provisions, the prosecution could apply to the court to impose indefinite detention on an individual found NCR for a “serious personal injury offence”.¹⁰⁸

Yet while Bill C-30 was enacted in early 1992, this pair of provisions never came into force. Instead, indefinite detention remained a problematic grey area and continued to characterize the detention of the those deemed NCR throughout the decade. Only in 1999, in *Winko v British Columbia (Forensic Psychiatric Institute)*, did the issue come before the Supreme Court. In ruling that indefinite detention was constitutionally sound, *Winko* was an important moment in validating the new truth regime of the NCR system and securing the ontological stability of the NCR subject.

¹⁰⁸ For a discussion of the Dangerous Offender laws, see chapter six, pp. 48-49. For a definition of “serious personal injury offence”, see chapter six, footnote 22.

6.6 *Winko v British Columbia (Forensic Psychiatric Institute)*

Winko v British Columbia (Forensic Psychiatric Institute) (1999) was significant in stabilizing the NCR subject by confirming that risk-based governance was a valid form of managing the NCR subject. The ruling arose from Ronald Winko's Constitutional challenge of the NCR system that was developed in response to the *Swain* decision. Winko was arrested for attacking two individuals on the street, one of whom he stabbed behind the ear. Winko experienced auditory and visual hallucinations during and after the incident—determined to be the result of schizophrenia—and he was found NCR. According to section 672.54 of the *Criminal Code*, Winko was detained under the authority of the review board. The board conditionally discharged Winko in 1995 and following the accused's subsequent legal challenge regarding the constitutional validity of the section the Court of Appeal dismissed his case. Winko then appealed to the Supreme Court on the grounds that the indefinite detention provided for by section 672.54 violated his Constitutional rights, and more specifically section 15(1) (the right to equal protection and equal benefit of the law without discrimination) and section 7 (the right to life, liberty and security of the person). While Winko was granted a conditional discharge, he argued that he should be granted an absolute discharge in which the review board would cease to have any control over him.

Winko illustrates the new truth regime of the NCR system in which it is easier to speak to the “truth” of the risk posed by the NCR subject. As seen in the previous chapter, acknowledging psy professionals' inability to predict danger hindered insanity law reform efforts during the 1970s and '80s. Little changed by 1999, as evidenced by the psy-entific literature that supported the majority opinion of the court.¹⁰⁹ Included amongst the sources was Coccozza and Steadman's

¹⁰⁹ For further discussion of this literature, see chapter six.

work from the 1970s, which, as discussed in the previous chapter, did not support the claim that psy experts were able to predict dangerousness in any meaningful way. Similarly, the work of Chris Webster was drawn upon to question clinical predictions of dangerousness.¹¹⁰ This is not to say that the concept of risk had not evolved; indeed, its ‘factorization’ was central to its use by the Court. Robert Castel (1991) describes a shift in which psychiatry re-oriented around the notion of risk over the late 20th century. Central in the move “from dangerousness to risk” is the *factorization* of the individual in which essential and internal characteristics are supplanted by a range of abstract yet actuarializable, or at least empirically-validated, factors. According to the majority in *Winko*, the review board arrived at the appropriate decision by selecting the appropriate disposition according to assessments of the four factors laid out by Parliament in section 672.54 of the *Criminal Code*: public protection, the mental condition of the accused, the reintegration of the accused, and the other needs of the accused (*Winko*, 1999, pp. 663–664). Thus, the factorization that underpinned the review boards’ subsequent decisions was an important element in the Court’s validation of review boards themselves.

Thus, while *Winko* gives some indication of this shift from dangerousness to risk, risk nonetheless remained a problematic truth in terms of governance. Like the notion of danger, determining the risk posed by the NCR subject was equally difficult. The Supreme Court accepted that risk assessment was a limited activity, drawing on others’ characterizations of the “protean concept” (Rennie, 1978, p. xvii, as cite in *Winko*, 1999, p. 664) that “concerns probabilities, not facts, and involves estimations based on moral, interpersonal, political and sometimes arbitrary criteria” (Menzies, Webster and Sepejak, 1985, p. 67, as cited in *Winko*, 1999, p. 664). Although the Court accepted that there was little evidence suggesting psychiatric

¹¹⁰ Like Coccozza and Steadman, Chris Webster also conducted an important study that confirmed the psy experts’ inability to predict dangerousness. For further discussion, see chapter six.

experts could predict dangerous behaviour in any meaningful way, it concluded that the task was nevertheless necessary: “it is unrealistic to expect absolute certainty from a regime charged with evaluating the impact of individual, human factors on future events” (*Winko*, 1999, p. 666).

Indeed, the absence of guilt left the Court to conclude that the preventive aspect of the criminal law was the only logic justifying the detention of subjects deemed NCR (p.627).

In its isolated form then, risk was problematic. However, *Winko* reveals that these limitations are less problematic when risk is grounded in the new truth regime of the NCR system. Essential here is a new grid of intelligibility that allows for the production of governing truths that are validated by the Constitutional subject. This regime is in turn reflected in the new knowledge and power relations—spread across the judiciary, Legislature, and review boards—that together govern the NCR subject. “Parliament”, the Court stated, “has ensured that its members have special expertise in evaluating fully the relevant medical, legal and social factors which may be present in a case” (p. 664). Accepting that review boards hold a special kind of expertise, risk-based governance could thus be operationalized at a distance through the blackbox of the review board.¹¹¹

Review boards, which need to include some combination of psychiatric and legal experts (*Criminal Code*, 1985, s 672.39), are not entirely opaque, and have been the subject of some academic study. While Crocker et al. (2015) suggest that provincial differences may undermine a

¹¹¹ There are also concerns that review boards might be unduly influenced. The high-profile case of Matthew de Grood offers one such example. De Grood was declared NCR for the killing of five of his university classmates at an end-of-year house party in 2014. At the time, de Grood was suffering from schizophrenia that caused a number of delusions and hallucinations involving, amongst other things, vampires, the Illuminati, and Adolf Hitler (*R v de Grood*, 2016). In 2019, the Alberta Review Board faced significant blowback for its decision to grant de Grood more freedoms. Counted amongst the critics was the province’s Justice Minister Doug Schweitzer who, upon the subsequent resignation of the Review Board’s chairperson, replaced three of its members with affiliates of Alberta’s United Conservative Party (Wakefield, 2021). Since then, the Alberta Court of Appeal has overturned three of the Review Board’s decisions that it deemed overly restrictive, including the de Grood case (Wakefield, 2021; see also *R v de Grood*, 2021).

uniform application of the laws, Simpson et al. (2018) argue that few reports of serious violence amongst those discharged by review boards points to an effective system. Castel's factorized risk also seems to play an important role since, as noted in *Winko* (1999), a past offence cannot be used as the sole criterion for determining whether or not the NCR subject poses a "significant threat" in the future (p. 628).^{112,113} At the same time, in lieu of any marked advance in forensic psychiatrists' abilities to predict individual dangerousness, the value of review boards is most obvious within the re-worked power and knowledge relations of the NCR system's truth regime. More than revealing new knowledge about risk, review boards play an important role in the new division of labour that indicates who can speak, and to what truth (Foucault, 1984, p. 73).

This new relationship between the judiciary and review boards is what allowed the *Winko* Court to focus on the presence of elements and principles it deemed essential without having to concern itself with their particular implementation. While the Court could relinquish itself from the complex particulars of risk-based governance of the NCR subject, it also had a unique capacity to validate many of these integral elements and principles. As the Court described its task, it was concerned with striking a "reasonable and justifiable" balance between the rights of the NCR subject and those of society (*Winko*, 1999, p. 671), achievement of which would depend on the "least restrictive" rationality. In the previous chapter, I traced the emergence of the least restrictive rationality throughout the country's institutionalized insanity law reform efforts during the 1970s and '80s. As seen in chapter five, the least restrictive philosophy guided these efforts, but lawmakers struggled to actually implement the approach. With the upheaval of Parliamentary sovereignty, the Court was now in a unique position to validate the LRA that was

¹¹² The presence of a "significant threat" is the standard that justifies the review board's authority over the NCR subject.

¹¹³ There has also been more recent concern that the operation of review boards is open to politicization. For this discussion, see p. 254, footnote 123.

introduced by Bill C-30, itself a response to the constitutional dialogue initiated by *Swain*. In fact, the least restrictive rationality now provided a fundamental criterion that was integral to the symbiotic relationship between the divided authority over the NCR subject. As discussed above, the *Swain* decision pushed Parliament to introduce Bill C-30, which in turn required the court or review board to order the disposition “that is the least onerous and least restrictive to the accused”. For the Supreme Court, the abstract and constitutionally-sound standard could then be operationalized through the specialized expertise of the review board, and the Court could be satisfied that the presence of this principle provided an important procedural safeguard for the NCR subject.

In this way, *Winko* is indicative of shift similar to that initiated by the LRCC during the 1970s in which insanity work switched from substantive to procedural concerns (see chapter five). Similarly, the Supreme Court sidestepped the problematic notion of risk by focusing primarily on the validity of legal processes surrounding the risk-based governance of the NCR subject. Framing the problem in this way allowed the Court to deal with the much more familiar constitutional subject. Instead of dealing with the actual riskiness of the NCR subject, the Court translated the problem into a much more manageable form: is the risk-based governance inherent in the NCR system a violation of the NCR subject’s *Charter* rights?

Winko thus illustrates how the constitutionalization of Canada’s criminal law is conducive to the task of making insanity governable. More particularly, in validating the risk-based governance of the rights-bearing NCR subject, *Winko* was a significant step in the ontological stabilization of the NCR subject. As seen in previous chapters, those deemed insane were problematic in different ways. In the mid-20th century, Canadian lawmakers attempted to identify a medicolegal identity, one that would recognize such subjects as both medical and

legal. By the 1970s and '80s, efforts increasingly focused on governing these subjects according to their inherent dangerousness, but this proved to be a difficult quality to measure. In the NCR period, the productive aspect of knowledge is less obvious. As Manfredi and Kelly (1999) observe, the Constitutional subject pre-exists any discussion or intervention (pp. 523-524). Instead, the Legislature, judiciary, and review boards all work towards the governance of the ontologically distinct NCR subject.

As has been seen, the constitutionalization of Canadian criminal law was essential to this process in a number of ways. The division of labour amongst Parliament, the judiciary, and the review boards sidesteps the shortcomings of risk assessment by dividing and demarcating expertise that can speak to particular truths of the NCR subject and which can be validated against a rights-based ontology. Unlike the insane subject of the preceding NGRI system, the NCR subject is a Constitutional one that exists within a new grid of intelligibility that enables the veridiction of formerly problematic truths. Risk, for example, can now govern the ontologically distinct entity that is revealed by the collaborative efforts of the judiciary, Legislature, and review boards. These re-organized relations have thus provided a way to speak to the “truth” of insanity in a way that was not possible before. This fact is perhaps most clear in the implementation of practices that were previously problematic; specifically, the new position of Canada’s judiciary in relation to Parliament allowed for the implementation of the least restrictive rationality, which plays a fundamental role in justifying the preventative detention of a subject that is detained purely on the grounds of the potential risk they are seen to pose.

6.7 Conclusion

This project began with an interest in a particular set of reforms that altered Canada's NCR system. Bill C-14, the *NCR Reform Act*, received royal assent in April of 2014, and is summarized as follows:

[T]he *Criminal Code* and the *National Defence Act*... specify that the paramount consideration in the decision-making process is the safety of the public and to create a scheme for finding that certain persons who have been found not criminally responsible on account of mental disorder are high-risk accused. (*Not Criminally Responsible Reform Act*, 2014)

The three broad changes instituted by the *NCR Reform Act* flow from this objective. First, the creation of the 'high-risk' (HRA) designation, which, when applied, would increase potential wait-times between case reviews to three years and tighten the administration of hospital leaves. Second, public protection would be central in court decisions regarding NCR subjects. And third, the victim's perspective would be given more weight in any decisions made regarding NCR subjects. The legal requirement that review boards select the "least onerous and restrictive disposition" was also amended so that the disposition chosen "is necessary and appropriate in the circumstances" (Criminal Code, 1985, sec. 672.54).

The new legislation introduced a number of new problems that can be broadly characterized as criminalizing the mentally ill (Grantham, 2014). The increased focus on the victim, while certainly an important consideration, can shift focus away from the non-adversarial nature of the review board proceedings. The allocation of limited mental health resources prioritizes criminogenic rather than mental health needs (p. 81). There is also a lack of any empirical evidence to suggest that these reforms will increase public safety; instead, they appear to be a reactionary response to a small number of high-profile cases (Lacroix et al., 2017;

Petrunik, 1982, 2002). And although not yet challenged, the amendments may contradict certain rights set out in the *Charter of Rights and Freedoms* (Lacroix et al., 2017).

In one sense, the *NCR Reform Act* can be understood within the context of Stephen Harper's Conservative government. Following Harper's election as Prime Minister in 2006, his government pursued a "tough on crime" agenda that included various measures, like harsher mandatory minimum sentences for crimes involving firearms (Bill C-10, 2006), limiting credit for time served prior to trial (Bill C-25, 2009), and eliminating expedited parole eligibility for non-violent, first-time offenders (Bill C-59, 2011) (Comack et al., 2015, pp. 5–6). In his examination of sentencing policy in Canada, Anthony Doob (2012) described May 4, 2006—the day that Harper's government introduced the aforementioned Bill C-10, as well as a separate proposal to hinder the use of conditional sentences (Bill C-9)—as marking the moment that "[p]rincipled sentencing began a steep decline toward death" in the country (para. 52). For Doob, Canadian sentencing discussions during the second half of the 20th century were characterized by two features (para. 21). First, an "integrated approach" to the country's criminal justice system meant sentencing should fit into broader criminal justice policy. Second, there was widespread agreement on the values that should inform such policy during this time; in particular, the principle of restraint was central to these discussions.¹¹⁴ In contrast to an approach that emphasized a comprehensive framework for criminal justice policy, Doob concludes that much of the Harper government's activity in criminal law reform was politically motivated. He points to the prevalence of "single issue bills" as one indication of a new piecemeal strategy that ran counter to a carefully measured approach (para. 58).

¹¹⁴ See chapter six for an historical examination of the principle of restraint in Canadian criminal justice policy.

The methodological departure Doob describes is important since, as discussed in the previous chapter, Canadian insanity law reform efforts during the 1970s and '80s reflected a comprehensive approach to criminal justice policy. Under the Harper administration, those deemed NCR were now also subject to the new disjointed approach. Lacroix et al. (2017) draw attention to one of Prime Minister Harper's tweets during November 2013 in which he characterized the verdicts of Allan Schoenborn and Vince Li—two separate cases whereby the accused were found NCR on murder charges—as failures of the justice system (p. 46). But while Bill C-14 fits into the Harper government's "tough on crime" approach, in another less obvious sense, these reforms are indicative of an NCR subject that is distinct in its ontological stability. As seen in this chapter, the NCR period is distinguished from the preceding NGRI era in its *reformability*. Following the introduction of the NCR system in 1992 (Bill C-30), the law was amended in 2005 (Bill C-10), and again in 2014 (Bill C-14), and these reforms have reflected a trend towards an increasingly restrictive NCR system. While Bill C-14's introduction of the high-risk accused designation is the prime example, other amendments have also limited the rights of the NCR subject that were brought in with the new system in 1992. Bill C-10, for instance, allowed review boards to extend annual reviews to every two years if the accused had been convicted of a "serious personal injury offence" and the board felt relevant information supported the decision. The Bill also introduced victim impact statements, a debatable amendment since it provides victims of NCR offences the choice to be heard but potentially criminalizes those who have been deemed Not Criminally Responsible. Aside from the HRA designation, the most noteworthy change instituted by Bill C-14 is the altered standard for detention of the NCR subject. Formerly, NCR accused were supposed to be detained in "the least onerous and least restrictive" fashion. However, Bill C-14 now requires review boards to select

the disposition that is “necessary and appropriate in the circumstances”, a change that reflects a shift from balancing the rights of the NCR subject with those of society to focusing first and foremost on public safety.

While Bill C-14 is certainly related to a particular government’s approach to criminal justice policy, it also speaks more broadly to the regime of truth introduced by NCR system in which the NCR subject can be understood as a rights-bearing subject who can be acted upon through risk-based governance. The constitutionalization of Canadian criminal law has provided the means for a new flexibility and reformability in the laws governing the NCR subject. Rather than a particular administration, Bill C-14 is indicative of a dialectic of risk and rights that now characterizes Canada’s NCR system, and by extension, the NCR subject. Bill C-14’s removal of the requirement that review boards select “the least onerous and least restrictive” disposition undermines the therapeutic, non-punitive logic that legitimized the indefinite detention of the NCR system. As noted above, lawmakers had considered introducing sentence caps and a DMDA provision to address the issue of indefinite detention, but the *Swain* Court’s Constitutional validation of risk made such changes redundant. In validating risk as a legitimate criteria of detention, the Supreme Court noted the important role of the “least restrictive and least onerous” rationale in distinguishing the practice from punishment and in respecting the rights of the accused. Bill C-14’s removal of this right was quickly recognized as open to *Charter* challenge (Lacroix et al., 2017), although as of this writing the statute remains in force. Evident amidst all these developments is the essential role of the “constitutional register” (Berger, 2014) in making sense of insanity within the NCR system.

The unreliability of psychiatric predictions of dangerousness ultimately questions the underlying claims to expertise and suggests that the concept functions as a consensual blind spot

between medical and legal authorities in depriving the liberty of psychiatric subjects (Arrigo, 1992a, pp. 144–145). Although it might be argued that risk-based governance is a necessary evil, recent developments suggest that the NCR system has evolved so that we are now complacent in the application of the problematic notion of risk. The ‘high-risk accused’ designation introduced by Bill C-14 best exemplifies the questionable application of a concept that remains ambiguous. Critics have pointed to a lack of supporting evidence for the reforms (Lacroix et al., 2017) and discovered that they do not identify a unique subgroup amongst those deemed NCR (Goossens et al., 2019). Similarly, risk suggests a neutral and technocratic approach that is at odds with its politicization (Wakefield, 2021). A simple first step then would be to follow Foucault (1977) in a genealogical project that seeks to illuminate the historical in the seemingly ahistorical. As detailed in chapters five and six, the history behind the shift from danger to risk in the governance of insanity suggests that knowledge advancements in the prediction of threats may be limited. Other observations also provide the basis for further critique. For instance, the constitutional dialogue between the judiciary and Parliament provided for a flexibility that can be problematic, and perhaps pushing for legislative rights review would be helpful. While these narrower assessments are important, more fundamental examinations that question the framework of Constitutional rights themselves may also be in order. Regardless of what direction might be taken, we must continue to critically dialogue and examine our understanding and application of risk assessment. In claiming to render the future calculable in the present (Rose, 1999, pp. 246–247), risk-based governance presents its own iatrogenic dangers. Resulting strategies might embody epistemological violence through problematic interpretations of individuals’ behaviours (Kilty & Lehalle, 2019), or further marginalize disadvantaged groups by

conflating risk and need (Hannah-Moffat, 2005; Kilty, 2006). As Castel warns, it is easy to become overconfident in our abilities to predict risk:

Thus, a vast hygienist utopia plays on the alternate registers of fear and security, inducing a delirium of rationality, an absolute reign of calculative reason and a no less absolute prerogative of its agents, planners, and technocrats, administrators of happiness for a life to which nothing happens. This hyper-rationalism is at the same time a thoroughgoing pragmatism, in that it pretends to eradicate risk as though one were pulling up weeds. (p. 289)

In the NCR system, the high-risk accused designation is the clearest example of a seemingly neutral technology manifesting in punitive ways. As seen in the discussion above, risk provides a flexible concept that serves to legitimate the NCR system by enabling new power relations that masquerade as advancements in knowledges of risk.

Chapter Seven: Conclusion

On April 23, 2018, Alek Minassian drove a van onto a sidewalk and into a group of unsuspecting pedestrians in the North York district of Toronto, killing 10 people and injuring another 16. In an attempt to make sense of the tragedy that would come to be known as the city's worst mass killing, the news cycles of the day speculated over the different possible motivations for such an attack (Hasham, 2021; Porter, 2021). Deliberations over Minassian's possible links to terrorism quickly narrowed in on his online presence as a member of the 'incel movement'. A reference to the 'involuntary celibacy' of its mostly-male membership, the incel subgroup self-identifies as romantically and sexually frustrated individuals that commiserate over their collective and unmerited rejection, typically by the cisgendered heterosexual female population. Not surprisingly, 'incels' are often associated with a kind of misogyny that is not uncommon amongst the ranks of those who remain anonymous online. It has also been connected with more extreme acts of violence; most infamously, Elliot Rodger's attacks at the University of California, Santa Barbara in 2014 that left six people dead and 14 more injured. In the Toronto attack, mental illness emerged as a central talking point, especially when it became clear that Minassian would plead Not Criminally Responsible on Account of Mental Disorder (NCR) in response to the charges. Public concern in such cases typically reflects fears that the guilty will go unpunished, with the intensity of such pushback paralleling the notoriety and media coverage of the crimes. In Minassian's case, contention centred largely on the defence team's attempt to link the NCR defence to Autism Spectrum Disorder (ASD; Coletta, 2020; Yousif & Hasham,

2020).¹¹⁵ Ultimately, however, Minassian was unsuccessful in his plea and found guilty on 10 counts of murder and 16 counts of attempted murder (*R v Minassian*, 2021).¹¹⁶

The point is not that Minassian should have been found NCR, but rather that his case serves as an important reminder of the widespread fear that the culpable will mangle their way out of just punishment. According to Michael Perlin (2000b), this concern stands in stark contrast to reality: “[t]here is virtually no evidence that feigned insanity has ever been a remotely significant problem of criminal procedure, even after more liberal substantive insanity tests were adopted” (p. 232). Yet Justice Anne Molloy’s conclusion in the *Minassian* decision that ASD *can* qualify for a section 16 defence—in her words, it “merely opens the door” for future consideration (*R v Minassian*, 2021, pp. 7–8)—was itself a point of criticism. Advocates for Canada’s autism community in particular were justifiably concerned that the link would only further alienate a group that struggles with stigmatization (Gollom, 2021). While the attention surrounding Minassian’s NCR plea was exceptional given the public and extreme nature of the case, it is indicative of the multifaceted threat that the NCR subject poses: to the integrity of the justice system, to the safety of the public, and to the reputation of those with the same medical diagnosis. It also fits into a pattern that I have traced throughout this project whereby Canada’s substantive insanity law remains rigid and exclusionary.

On the flipside are those who have been declared NCR and, lacking legal guilt, become subjects governable only by risk. Where there is widespread concern that the guilty will get off with an undeserving NCR finding, the discharge of those declared NCR can be met with equal

¹¹⁵ According to the fifth edition of the American Psychiatric Association’s Diagnostic and Statistical Manual, autism spectrum disorder is characterized by varying degrees of limited social communication and interaction, as well as “[r]estricted repetitive patterns of behavior, interests, or activities” (sec. 299.00).

¹¹⁶ Minassian’s sentencing hearing is pending at the time of this writing (Associated Press, 2021).

outrage. The case of Vincent Li is exemplary here. Like Minassian, the shocking nature of Li's offences meant his case received national attention and further illustrates the template of outrage that tends to characterize NCR verdicts.¹¹⁷ In the summer of 2008, Li beheaded and consumed parts of Tim McLean, a 22-year-old man who just happened to be sitting next to him on a Greyhound bus. The gruesome murder was later determined to be a product of Li's undiagnosed schizophrenia that caused him to believe McLean was a threatening alien ("Vince Li Speaks," 2012), and Li was subsequently found NCR. Although the verdict itself was met with controversy (Rimke, 2016, pp. 178–179), the Manitoba Review Board's decision to incrementally increase his freedoms was covered extensively in the press, and while there was some support (Welch, 2015), there was widespread condemnation that only intensified upon his absolute release in early 2017 (Bonokoski, 2017; Pauls, 2015; Urback, 2017).

Some scholars suggest that risk is an increasingly fundamental aspect of contemporary society (Beck, 1992; Douglas, 1992; Giddens, 1999), so simply denying that certain risks exist seems to be shortsighted. Similarly, risk awareness can be beneficial. Capurro et al. (2018), for instance, note that the moral inflection common amongst news reporting of disease outbreaks can help to encourage the immunization practices that are essential for herd immunity (although the authors also note such moralizing discourse risks further entrenching the views of anti-vaxxers) (p. 41). But it is also important to note that the risk embodied by the NCR subject is somewhat iatrogenic in nature:

Although surveillance practices are commonly rationalized as a way of addressing what are perceived to be extant problems (e.g., fraud, crime, terrorism), we argue that the implementation of surveillance systems also often leads to or exacerbates a range of other political and social problems (e.g. poverty, over-policing, suspicion, exclusion) under the guise of managing risk and reducing harm. (Hier & Greenberg, 2009, p. 14)

¹¹⁷ Vincent Li has since changed his legal name, and although it has been published, I am refraining from using it in respect of the anonymity I can only assume he is seeking.

Interestingly, criticisms of allegedly lax NCR laws are often in response to the potential of risk rather than its actual materialization. These reactions are not limited to the high-profile cases either. In one telling case, Zhebin Cong—an individual found NCR for the murder of his roommate in 2014—used an unescorted community pass as an opportunity to board an international flight while under the authority of the Ontario Review Board. The action was not entirely surprising since Cong had been adamant about his plans to return to China (Humphreys, 2019), however it did incite a brief media panic (Farooqui, 2019; Jones, 2019; McQuigge, 2019). In appealing to the commonsense notion of risk, Ontario Premier Doug Ford later responded to the news on a Toronto radio station: “[s]omeone’s going to be answering because if you’re calling this low risk, what is high risk?... These crazy, crazy people that want to go around chopping people up, they’re out on the streets” (Jones, 2019). The Premier’s reaction is particularly disconcerting given that the NCR system aims to safely reintegrate those under its authority.

While frantic responses to individual cases like those of Minassian, Li, and Cong suggest a kind of unpredictability in Canada’s NCR system, in reality they point to a fairly predictive pattern that NCR cases follow. First, access to an NCR ruling is protected by a high standard of criminal non-responsibility that is embodied in the substantive defence itself. Second, where the NCR verdict is handed down, the ambiguous notion of risk provides a flexible form of governance that can be shaped by popular and political sentiment. As discussed in chapter seven, the changes introduced by Bill C-14 signify the ascendance of this model; most notably, the new ‘high-risk accused’ designation suggests a clarity that belies a contentious and obscure conceptualization. In questioning the now prevalent risk-based governance of the NCR

population, my genealogical study has aimed to investigate Canada's NCR subject by providing a 'history of the present'. David Garland (2014) describes such histories in the following way:

A history of the present begins by identifying a present-day practice that is both taken for granted and yet, in certain respects, problematic or somehow unintelligible – the reformatory prison in the 1970s, for example, or the American death penalty today – and then seeks to trace the power struggles that produced them. (p. 373)

I contend that the riskiness of the NCR subject is, in Garland's words, "both taken for granted [and] somehow unintelligible". Recognizing that the riskiness of risk assessment is perhaps most apparent in the complacent acceptance of its foundational role in governing those deemed NCR, my focus has been to show how we make sense of that which seems nonsensical within the framework of our criminal justice system. Today's NCR subject is unique in its ontological clarity that is enabled by a dialectic of rights and risk. The stability that is provided by the NCR system contrasts with the preceding NGRI period, the examination of which forms the bulk of this project. It is this earlier era of Canadian insanity law, roughly aligning with the second half of the 20th century, in which a quiet instability emerges amidst the newly problematized NGRI population. As seen in chapters four and five, one fundamental turning point came when questions focusing on identifying the insane were supplanted by questions regarding their management. The shift was indicative of an ontological transformation in which the contested medicolegal subject was replaced by one that was defined primarily in terms of rights. A post-World War II rights discourse and the deinstitutionalization of the Canadian psychiatric hospital, both of which ramped up in the 1960s, drew critical attention to those detained on grounds of mental illness. In Ontario, provincial circumstances focused attention on the plight of those deemed both criminal and mentally ill. In an odd change of pace, two particular cases—those of Fred Fawcett and Peter Lay—proved instrumental in establishing procedural safeguards for all those deemed mentally ill, including the criminalized psychiatric

patient. The continuing influence of this shift is apparent in today's NCR system where, as discussed above, it is the release of those deemed NCR that is now often the focus of outrage and reform.

A handful of other observations are also worth noting here. One surprising aspect of this genealogy has been its relative mundaneness. Although Foucault's description of genealogies as "gray, meticulous, and patiently documentary" (1977b, p. 139) foreshadows such an experience, 'criminal insanity' lends itself to visceral and reactionary responses that one might assume would also colour histories of the subject. One reason for the subdued nature of the history detailed here is that aside from those 1960s cases that problematized the indefinite detention of the criminalized psychiatric subject, my research suggests that the singular case of the mad and dangerous criminal was largely absent from federal efforts of insanity law reform prior to the NCR period.¹¹⁸ Historically speaking, 'insanity' within the criminal legal context provides an abstract and narrow legal category. As discussions of insanity law reform emerged in Canada during the mid-20th century, these conversations were almost exclusively left to psy and legal experts. The *Royal Commission on the Law of Insanity as a Defence in Criminal Cases*, discussed at length in chapter three, is evidence of this point. By contrast, the parallel Royal Commission examining the country's criminal sexual psychopath offered a more specific figure for discussion and garnered substantially more public interest.

Similarly, the emergence of insanity as a problem in post-World War II Canada was not the result of any major event or public outcry, but a matter-of-fact surfacing that followed the Canadian government's broader re-examination of the *Criminal Code*. As detailed in chapter

¹¹⁸ This stands in contrast to the United States, and in particular, the case of John Hinckley Jr. who's attempted assassination of then-President Ronald Reagan would ultimately lead to legislation that reigned in the scope of the country's insanity laws.

two, along with capital punishment, corporal punishment, and lotteries, insanity law was flagged as an important enough topic that it required its own investigatory body. The recent expansion of the psy-ences during World War II and their place in Canada's reconstruction efforts only furthered the assumption that the longstanding M'Naghten-based defence was out of date. The subsequent Royal Commission, the subject of chapter three, revealed a technical, medicolegal problem, and highlighted the difficulties involved in the integration and application of psy and legal expertise. At the same time, however, the Commission's minimal recommendations, as well as the negligible response to those recommendations, was indicative of the relatively inconsequential problem that criminal insanity law posed in mid-20th-century Canada.

This genealogy has also pointed to a certain air of benevolence that often permeates Canadian insanity law. This benevolence is closely related to Michael Perlin's notion of "sanism" (2003), a phenomenon he defines as "an irrational prejudice of the same quality and character as other irrational prejudices that cause and are reflected in prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry" (p. 684). Indeed, declarations of insanity often provide an illusion of elusion in which a cunning defence is seen as allowing the guilty to "beat the rap" (ML Perlin, 1989, p. 613). The period examined in this project is unique because it is characterized by a nagging uncertainty regarding the compassion of Canadian insanity laws. Or, put another way, a growing consensus around the unfavourable treatment of those deemed both criminal and mentally ill—particularly in regards to the indefinite and procedurally unprotected nature of their detention—destabilized existing insanity laws. In chapter three, I showed that the post-World War II decoupling of insanity and capital punishment was an early and significant development in this shift. In the past, insanity pleas were typically utilized "as a means of evading the noose" (Verdun-Jones, 1981, p. 210). However, as already noted, the

federal government's *Criminal Code* review problematized the areas of criminalized insanity and capital punishment. By the time a moratorium was placed on executions in Canada in 1967, the merciful tone of the automatic and indefinite detention of the Lieutenant Governor's Warrant was wearing thin.

The decoupling of insanity and capital punishment points to one final observation I want to make regarding Canada's insanity laws: the idiosyncrasies of the Canadian context. Not surprisingly, the evolution of Canadian insanity law is intertwined with the broader history of the country. Some of the relevant historical developments are remarkably specific, with the insanity-capital punishment connection being one of them. As a point of comparison, in the United Kingdom insanity law reform was closely linked to debates regarding the abolition of capital punishment following World War II. Since the British government of the day favoured retention of the death penalty, it carefully crafted the terms of reference for the *Royal Commission on Capital Punishment* so as to exclude the possibility of abolishment. British abolitionists of the day, in turn, sought to broaden the legal scope of insanity in order to expand the group that would be deemed ineligible for execution. This culminated in the passage of the *Homicide Act* in 1959, legislation that endorsed the existence of 'diminished responsibility' and, in so doing, provided for a lesser form of insanity that troubled black-and-white notions of criminal responsibility. By contrast, the Canadian government established two distinct committees during the 1950s which separated the issues of insanity and capital punishment completely. Where this overlap was an important driver of British reform, the two Canadian Commissions avoided any comparable discussions so as not to encroach on each other's exclusive subject matter.

With that being said, broader aspects of the country's history were also fundamental in the development of Canadian insanity law. Chapter six focused on the post-*Charter* legal

landscape whereby those deemed insane came to be understood first and foremost as constitutional subjects. Not only was the ascendance of the new rights-based vernacular effective in clarifying the ontological status of those deemed insane, but it upended the historically dominant principle of Parliamentary sovereignty. In its place, the new dialogue between Parliament and the Supreme Court of Canada proved effective in the task of insanity law reform; indeed, the NCR system of today is notable for its reformability.

In essence, this genealogical investigation aims to problematize the complacency that characterizes the current NCR system. Reforms exist within an ahistorical framework of rights and risk that remains largely unquestioned. Yet, as this project has shown, the stability of the NCR system reflects the struggles that began to emerge in the country's post-World War II period. A number of directions might be pursued moving forward. More specific efforts might focus on the effects of the new relationship between Parliament and the Supreme Court of Canada. Vanessa MacDonnell (2016b) has shown that judicial review may be more flexible in cases where Parliament is seen as "proactive about securing and promoting constitutional rights" (p. 15). Perhaps then it might be worth revisiting a checks-and-balances approach to the Legislature's role in protecting Canadians' rights, similar to what Diefenbaker envisioned for the 1960 *Bill of Rights* (Hiebert, 2012, pp. 88–90). Or, given the potential for the politicization of review boards, a reexamination of the selection criteria for its members might be in order. On the other hand, it may be that more fundamental questions need to be asked. Are constitutional rights the best way to ensure the fair treatment of those deemed NCR? Is the criminal law's continued authority over those found NCR appropriate, or should such subjects be recognized entirely as medical patients? Regardless of which avenue might be pursued, an in-depth understanding of

the problems at hand is essential. Fundamental to this task is the recognition of the history that continues to inform the system we apply today.

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