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Exemplary Practice: Inscribing Conduct Along Upper Canada's Early Frontier

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A thesis submitted in partial fulfillment of the requirements for the Doctor of Philosophy degree in Anthropology

EXEMPLARY PRACTICE: INSCRIBING CONDUCT ALONG UPPER CANADA'S EARLY FRONTIER

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by

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Abstract

This dissertation studies the inscription of social mores along Upper Canada's early frontier. It argues, first, that despite coming from the top and presuming the weight of tradition and religious sanction, prescriptions for conduct masked local circumstances that did not cohere, politically, culturally or socially, as neatly as the model of conduct being promoted. These prescriptions did not merely recognize messiness on the ground as their *raison d'etre*, but also helped constitute that complexity directly. The dissertation also argues, though, that the force of prescriptions does not lie only or even mainly in the brute top-down authority of a social elite, but draws much of its strength from resonance among social practices that were not obviously related. The spaces examined in this dissertation include survey methods, prescriptions about conduct in a provincial newspaper, domestic practices, geographic implementations of gender ideology, the practices of dueling and game hunting, and the nighttime prowl of a burglar. The argument is that their importance at the time owed much to their conceptual interdependence, which gave weight and character to the meaning of each.

Through examination of proper conduct, the mundane "dwelling house" emerges in this study as a core moral space in the society of early Upper Canada. Whether a stately mansion or a rented room, this space ranked even above a church in the intensity with which the law defended it. At the heart of this moral

protection resided a notion of fairness, whose overtones sounded in the wide range of practices noted earlier.

My theoretical baseline is the practice approach of Ortner (2006, 1989), which views action, embodied in individuals, as emergent in analytic tensions between public institutions, particular situations and moments, patterns in history and experience, and unpredictable, extra-systemic feedback. Since conduct is based in observation, and because the immanent structuring forces of practice entail relationships, I add to Ortner's model the necessary presence of multiple actors who are present to each other. This model helps unpack the concrete bodies, relations, moments, and constraints in which exemplars emerge, and also emphasizes their overall conservative tendency.

Keywords

Exemplar, Frontier, Practice theory, Ortner, Upper Canada, Upper Canada Gazette, Conduct, Crime, Burglary, Dwelling House, Domesticity, Gender, Female

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Table of Contents

List of Figures

List of Appendices

Preface

Standing below the Ambassador Bridge that joins Windsor and Detroit, looking up at its massive pillars, girders and cables and the progress of traffic they support, one is struck by a peculiar irony. This imposing construct, designed to connect two countries, is precisely where division between the two hardens into rigid, armed formality. Traffic lines, fences, booths, wait times, uniforms, questions, documents, shows of available force, all supported by past experience and an awareness of nation, conjure up a convincing obstacle. In this conjuring, the river itself—the raison d'etre for the bridge—plays the part of a line in the sand. So perfectly superimposed is this line upon alternative notions of a river that even the passage of container ships and the frisky slant of sailboats fail, in that moment, to suggest the connective possibilities of water.

How different this spot must have looked two centuries ago on the eve of war, with enemy troops squaring off across the water. It gives pause, gazing across today's banks in an effort to connect those two moments, so awesomely strange to each other one is reminded of Dorothy landing in Oz. One side of that mystical divide features a bustling metropolis of magnificent scale, built hundreds of feet skyward, interwoven across the water with other communities by bridges, a tunnel, busy flight paths and endless water traffic, insulated from even the most distant war drums by the cocoon of a long peacetime. In its scale, the imposing and reassuring solidity of its structures, and the buttressing effect

of living memory devoid of international aggression relevant to the place, the present banks invite one to imagine that things were always this way. The other moment, ostensibly identical in space, could hardly have been recognizable viewed from today, even ignoring the matter of war. The settled population along the Detroit River was something over three orders of magnitude smaller on the eve of war than it is now.[1] Relative to today, there was also no such thing as building vertically—either skyward in the form of skyscrapers (never mind air traffic), or into the earth in the form of massive, watertight traffic tunnels under the river. Perhaps "place" was judged in more planar terms without access to these vertical dimensions.[2] One imagines subtler differences too, such as a more direct connection to the processes, effort and liabilities of settlement materials and structures than people typically possess in today's huge urban spaces, vastly greater technological complexity, and the highly specialized divisions of labor characteristic of both. Not only were materials of the time hard-won in terms of effort, expense and time, the average settler had a more direct sense of what it took to obtain them and what it would take to obtain them again. This awareness, if one follows McGregor (1985), derived its specific hue in turn from a garrison mentality that viewed settlement as a kind of permanent pitched battle

[1] The closest census date (that I've found) for Detroit, for the year 1820, lists the population at 1422, about one-three-thousandth of the present population including the metro area, and that accounts also for significant population decline after 1950. The population on the Canadian side at the turn of the century is harder to find precise data for; what I've found so far is by county, but according to Statistics Canada, the entire population of Essex county in 1824 was 4,274

[2] This limitation of available dimensions—absence of technology to build vertically, as well as technology to expand surveillance beyond the visual—may have shaped the role that surfaces play in military strategy. Without access to vertical elevation that would allow one to see beyond, the tree line hardens as a barrier to line-of-sight and as a threat of hostile forces concealed beyond.

against wilderness, which always encroached and must be pushed back, if only a little.[3]

And one cannot ignore war, how the gleam of an enemy's cannon might have shaped appreciations of distance, how the presence of a hostile army, poised to do its worst, would reconfigure anyone's sense of everyday life. Among Upper Canada's migrants who had fled America after its war of independence, threats across the water also acquired the extra shading of personal memory. Far from the settled routines and expectations of a long peacetime, this lining up along the banks was the starkest of reminders that in moments of cataclysm, all bets for the future were off. If the primacy of embodiment and concreteness, as opposed to abstractions, has become the new theoretical normal, the awesome scale of stakes and consequences entailed by war—human lives, geo-political territory, community identity, international relations, individual rights, family narratives that get passed down through generations—elevates ubiquitous concreteness into something devastatingly poignant.

[3] Appropriately, given a discussion of a looming war, McGregor opens her argument with the view of landscape as seen from an isolated fort. The fort, McGregor argues, gets imposed through "art and laborious exertion to push back the forest a short distance and to maintain its safety" (5), which requires the protecting sweep of a cannon. Quoting Richardson's *Wacousta* she adds, "to have crossed the ravine, or to have ventured out of reach of the cannon of the fort, would have been to seal the destruction of the detachment. But the officer to whom their security was entrusted, although he had his own particular views for venturing thus far, knew also at what point to stop" (7). McGregor uses the term "langscape" to highlight the sense in which encroaching nature, and the maintenance of a safety zone, is an active social construction, which gets lost in a more passive idea of "landscape" as something independent of an observer and merely perceived. This fort and its cannon, she says, is "a correlative for the beleaguered human psyche attempting to preserve its integrity in the face of an alien, encompassing nature." (5) Her deeper argument is that this psyche entails a balance of imposition and accommodation, a practical acceptance that the forest can only be pushed back so far, and that social life must be eked out in view of that limit. This vision of encroaching nature and spirit of accommodation is a particularly Canadian recasting of Lockean notions of progress and property rights, neither of which stresses accommodation or real social limits imposed back on settlers by an active, encroaching nature.

How does one get from one place to the other, from the river of 1812 to the Detroit River of a customs line or sailboat today? Not, of course, by some presumed permanence of the river "itself", indelible and object-ified like ink that dries to become a map. The very idea of a river, and also its physical matter, gives the lie to any notion of permanence: rivers flow lengthwise and meander sideways; they swell, shrink, freeze over and break up; they breathe life into irrigable land and connect communities along and across its banks. They also bring quick death to any who forget their ever-changing demeanor. We get to today, then, through connections and continuities appropriate to the metaphor of a river.

And it is a metaphor, at least in a dissertation that is not really about the Detroit River, or the War of 1812. For a study that began by looking at constructions of gender along exactly those banks and at that time, the present focus on conduct prescribed by a government based in York, with special attention to the nature of burglary, seems many meanders from home. Like movement of a river, though, this new vantage point makes sense given the material and conceptual connections in between, which allow one to jump frame and see the project of research in new ways.

In one sense, I got to the present project by accident: I bumped into something I didn't expect to find, and it deflected me into directions I couldn't have anticipated. In the case of the Burton Historical Collection, where this accident occurred, the notion of accident acquires the added inflections of a complexly

and inconsistently organized mass of materials, where there's often no telling what you'll trip over along the circuitous route toward an intended or missing object. The problem with a notion of accident, though, is that it downplays the vitality of connections, that decisive moment of traction through which a new insight or project is stumbled upon, the "gee whiz!" moment as your attention shifts and lands in a new place. The word leaps over this crucial moment as if decreeing that the connection isn't itself important, only a brief sensation one quickly suppresses in returning to the archival business at hand.

My meander away from gender and the Detroit River began by bumping into a burglary trial transcript, which only caught my eye because someone left it out on a nearby table. What I really noticed was the sentencing, especially the metaphors it used in marching the culprit off to the gallows. The trial then removed to a back burner for several months, until I came across a newspaper column expressing outrage at the persistence of dueling in Upper Canada, and especially, the perfect tendency to acquit duelists of any wrongdoing, despite the clear letter of law to the contrary. The question suddenly wouldn't go away: what system of logic explains executing for stealing rum and a few furs, but acquits for killing in cold blood in a duel? By looking further into legal definitions of burglary and attitudes to dueling, the humble dwelling house began to move into the limelight. On close inspection, it helped explain legal orientations to dueling, burglary, and other high crimes such as rape and

robbery. It also gave purchase to an emerging gender ideology at the time that aligned women with domestic space.

The seeming disparity between practices of burglary, dueling, and everyday domestic life thus helped me imagine that the strength of ideals centered in a dwelling house had broad roots, and that other core ideals probably did too. The question became how to talk about these roots, this resonance across social spaces, in a way that accounts for its force, not only its presence. This is what I attempt to do in this study.

Chapter 1
Introduction

Through the lens of what it calls exemplary practices, this dissertation explores the inscription of social mores in Upper Canada from its formation in 1791 until 1820, when a wealth of new newspapers started to appear in the province.[4] Specifically, it examines notions of conduct handed down from the top, from a relatively small number of social elite who formed the government and attempted to fashion the new society according to their own conservative ideals. I argue, first, that this process of inscription, buttressed by rhetoric of enduring loyalty to a British homeland overseas and to a God above, attempted to mask local circumstances that were far less homogeneous, coherent, and politically aligned than the view of society being promoted. The deepest challenge to that alignment, indeed, was that wayward impulses usually ran oblique rather than counter to top-down inscription, and thus didn't even evoke its viewpoint through the clarifying structures of opposition. In this view, certainty about the society advertised in prescriptions on conduct betrayed deep unease about creative adaptability evident at local levels, where enforcement of conduct often

[4] Chapter 4's focus on the *Upper Canada Gazette*, the province's first newspaper, makes sense of the 1820 cutoff: until that decade, the *Gazette* had no real rivals among locally published newspapers, which makes talking about its positions, politics and audience easier. Noting, however, that politics in Upper Canada changed markedly after the War of 1812, especially with the rise of the Family Compact (for which see Chapter 3, note 54), this dissertation stresses the period before that war.

met with failure, and where practices in any case overflowed the tidy images being promoted.

Second, I argue that seemingly disparate social practices, not obviously related in terms of task, social purpose, geography or individuals involved, may resonate at a level below the narrower field represented by each. Just as an overtone series defines a particular timbre in sound, so culturally-specific overtones of meaning shared among far-flung social practices produces a deep signifier, a particular timbre of meaning perceptible only across social spaces, and not when taking the surface-level logic or specificity of each in isolation. The spaces examined in this dissertation include survey methods, prescriptions about conduct in a provincial newspaper, domestic practices, geographic implementations of gender ideology, the practices of dueling and game hunting, and the nighttime prowl of a burglar. The argument is that their importance at the time owed much to their conceptual interdependence, which gave weight and character to the meaning of each. From an analytical point of view, such interdependence is belied by the ease of imagining and explaining these spaces in mutual isolation.

In one sense, these two arguments pull against each other, the one a claim that top-down models of conduct were more tentative, wary and fragile than they purported to be, the other a basis for finding the top-down view more robust than it would appear from exemplars considered independently. But to question which aspect might trump the other, and in which circumstances, would miss the

larger moment behind each—the larger elephant hidden from the six blind men of Hindustan by the particularity of what each one senses. The point of the two arguments laid out here is that, together, they suggest a more detailed and complex sense of an exemplar's social force than either would do independently.

Another general claim of this study, one which unites "exemplar" and "practice", is that the habits and structures of interpretation manifested in exemplars are irreducibly concrete, a crystallization of particulars whose *sine qua non* is traction among what get perceived, mostly after the fact, as discrete standpoints. Traction is primary, the basis of distinction, and not a secondary effect of pre-existing bodies, histories, experiences and networks coming into contact. The underlying model of the world this implies is that traction, while highly variable, is also unavoidable, at least in the habitable world sequestered from the vacuum of space. Contact with particular things or people may be intermittent or occasional, but contact with matter generally speaking is not; we pass from one place to another by virtue of constant contact with air to breathe, environments that are controlled for comfort, safety and basic existence, access to supply lines where material necessities can be replenished, safe spaces in which to decompress or become periodically unconscious, and so on. As distinct moments, exemplars are thus defined not by the fact of traction, but by their capacity to draw attention away from their contingencies and entanglements and appear to stand by themselves.

Traction in this sense is similar to Bakhtin's notion of dialogic relations. As with Bakhtin, traction rejects the idea that people either exist or move in isolation. Identities don't relate: identity *is* relationship. Bakhtin further argues that differences of perception and experience between two people who are simultaneously present to each other are what drive an encounter. Indeed, there is nothing suggested by traction that is not also implicit in the dialogic principle. The difference is emphasis. Where Bakhtin's focus is on the dynamics of relationship, especially the complex dynamics internal to a person who is dialogically constituted, traction stresses the dynamics and irreducibility of grip among people in sight of each other, engaged in conversation or argument, at war with each other, or otherwise on the radar screen. It forces attention away from the hypothetical and the abstract, granting of course that language itself is abstraction.

My decision to sideline such a promising model of dialogue, and base this study instead on practice theory, recognizes that latter's particular emphasis on the integration of things usually conceived as separate. Except in certain specialized vocabulary, which I try to avoid here, practice theorists try to inject relations with heightened dynamism by playing opposing words off against each other. The effect of focusing so intensely on the co-dependence of push and pull, growth and inertia, subjective and objective, predisposition and feedback, individual bodies and immanent social structures, is to evoke a deeper appreciation of complexity and vital interdependence, locally and across scales.

As a basic frame, practice is thus congenial to both the concreteness of traction and broader interdependence suggested by timbre. In its use of rhetorical push and pull, practice also exposes the unavoidable crudeness of words as they struggle, through various circumlocutions, to produce a view outside themselves. In effect, they point out that there is no word for the thing they point to, whose utter immediacy is always just out of view and evident only as trace fossils.

Practice theory has a more specific advantage, too, in the context of early Upper Canada. If we imagine interaction between two people, one common form of traction in the province was mutual misperception of what the other was doing or saying; and since this study focuses on top-down efforts at controlling conduct, we are most interested in how the person on top—we'll call him a magistrate—misreads the one below. On various fronts—social or political station, vested legal authority, political loyalty, religious orientation, ethnic difference, (dis)connectedness to local affairs—the magistrate exercises his view of and on the person below. In the particular traction this brings into view, he does not grasp that his own view could be the problem. It is officially sanctioned, after all. He also views this encounter as oppositional in many cases where the local trajectories being confronted are actually more complex, oblique rather than starkly oppositional, and this misperception drives the encounter still further. Practice theory does not always capture well the minute articulations along which transformations tend to be small and conservative habits made durable,

but even when it only begs the question, that is exactly the right question to beg in studying how, against the evidence of a complex demographic and local circumstances, government authorities often reproduced their conservative views of loyalty, conduct and proper society.

Exemplary practice, then, refers in a specific way to how official standpoint in early Upper Canada crystallized locally and reverberated more widely. Using that model, the mundane "dwelling house" emerges in this study as a core moral space in the society of early Upper Canada. Whether a stately mansion or a rented room, this space ranked even above a church in the intensity with which the law defended it. At the heart of this moral protection resided a notion of fairness, whose overtones sounded in the wide range of practices noted earlier. Getting to those connections, of course, is the work of chapters to follow.

After a detailed consideration of the title's key terms in Chapter 2, Chapter 3 then provides a brief historical sketch of events leading to the new province's formation. "Event", of course, presupposes the capacity of certain moments—call these presuppositions "landmarks"—to shape things to come. The purpose here, however, is not to deconstruct historical narratives or to be comprehensive, only to provide basic context for discussions to follow. The chapter then offers a glimpse of the prior experiences, ideas and commitments of migrants to the province, as manifested in encounters with new people and situations in Upper Canada.

Chapter 4 moves on to the imposition of guidelines upon the province. Taking this word first in the sense of prescriptions for morality and proper conduct, it explores standpoints of the new administration evident in early issues of the *Upper Canada Gazette*, Upper Canada's first newspaper and mouthpiece for the government (and hereafter called the *Gazette*). The chapter then considers guidelines in a second, more literal sense: as survey lines that guided administrators and settlers in transforming undeveloped parcels of land into property. This second sense of guideline—produced in this case by David Smith, the first Surveyor General of Upper Canada[5]—may seem apples and oranges next to prescriptions in a newspaper. Below specific differences of task, purpose, place and people involved, however, lay a shared sense of boundaries, proper spaces and the basic value of property, and proper activities based on all of these. In language introduced a moment ago, this common ground, a feature of shared fields rather than any field in isolation, suggests the force of social overtones, the enculturated (and enculturating) timbre of a practice when it resonates in otherwise disparate fields.

Chapter 5 then looks at conduct defined in Upper Canada's criminal code, specifically as revealed through a burglary trial. It is here, finally, that the loaded concept of a dwelling house takes the limelight. Once again, juxtaposition with discussions of guidelines in Chapter 4 may seem incongruous. What *does* a land

[5] Simcoe appointed him "Acting Surveyor General" in 1792, a title that became "Surveyor General" in 1798. Throughout this time he functioned as chief surveyor, a position responsible for producing all the townships in the province.

survey have to do with burglary, other than setting up the evolution from vacant land into property one can steal? How, beyond obvious suspicions that a burglar is probably also disloyal, do acts of burglary connect to discussions about loyalty to Britain? And what do associations between female and domestic space really have to do with burglars at night, other than their opportunistic potential to sensationalize the vulnerability of women? By working through the trial and toward a focused notion of a dwelling house, the chapter argues that these apparently disparate elements have a great deal to do with each other—at the level of timbre, where they would also have the deepest influence.

This sets the stage, in a concluding Chapter 6, to appreciate connections among the various realms of social practice considered here. The abstract point behind an exploration that covers newspaper content and order, survey lines and grids, literature on female conduct, and a burglary trial (with its look at duelling and game hunting), is that meaningful connection among diverse social realms goes beyond their administration and beyond legal or social decree, into a realm of shared basic orientations to proper and productive human lives and communities. Committing to these orientations in one place resonates in others, thus deepening the idea and commitment to it. As a final note, the dissertation returns to the issue, raised in the preface, of doing anthropological fieldwork in an archival setting.

Chapter 2
Parsing the Terms

To help set a foundation for ideas to come, this chapter parses three key words—exemplar, practice, and frontier—in the dissertation title. The terms overlap substantially, but it may be clearer, after the discussion that follows, to propose that they are really three ways of articulating the same larger idea. A first step involves distinguishing commonsense meanings of the terms from the more specific usage deployed here.

2.1 Exemplary…

Although my sense of example and exemplar developed through encounters with archival materials I used, credit for the impulse to look for them at all goes to a story from grade school, which a judge's report on a rape crime prompted me to recall. The story begins moments after a modern-day sixteen-year-old boy has been stabbed, then left on the sidewalk to bleed to death. He was a member of a gang called The Royals, which is all the identity he gets from either his attacker or from the policeman who finds him at the end, after he is already dead. The reader, of course, gets an insider's view of the real boy, Andy, through his musings, which form the body of the story. The premise is that categories—"Royal", "gang member", "criminal"—entail erasure: the coherence of category comes at the expense of details that are singular rather than generalizable to

other people or groups; it hides complexity and ignores messiness and contradictions. It also favors objective formality over subjective consideration.

The letter that provided a springboard to that recollection dates to September 22, 1820, and like the story, involves a victim, a felon, and the categorical judgment of formal authority. Writing to the Governor's secretary, Judge William Dummer Powell tells about a group of men who had raped the wife of a comrade after catching her alone at home. Powell recommended that the law, which defined rape as a capital offence, should hold firm to the letter rather than grant exceptions. When the rape victim herself and her husband, based on knowing the rapists personally, appealed to Powell for leniency, Powell responded: "I cannot consistently, with my sense of duty, second the application of the injured party…. Example is necessary for the protection of females, whose occupation retains them alone in their houses, in the absence of their husbands, fathers and brothers." The rapists were duly convicted, and as with Andy, no fuller information about their identity was known, sought, or publicized in making examples of them, whatever else may have been known in other contexts.

So it is with examples: they are always *of* something, either to be emulated or avoided, and clarity requires that they be schematic in reproducing a moral formula. As a schematic, divergent and extraneous detail would be particularly out of place—examples are no place for the meandering incongruities of a life story. The schematic is also figured in advance of actual examples, as tokens that

presume an existing type; examples do not embody new ideas or ways of thinking. In this sense they are conservative, not radical. And owing to this reduction of detail on one hand, and conformity to something already shaped on the other, examples are not *about* individuals or individuality at all, although sleight of hand causes them to appear so. In being singled out and named, located in specific bodies, entered as case information, and passed along as news, examples and exemplars seem to stand out from the crowd. Their sheer visibility easily distracts from the carefully crafted, structured, and omission-based aspect of the narratives that prop them up to serve as warnings or monuments. Andy was a Royal, which in turn exemplifies violent gangs. He wore the jacket, and one needs no further explanation to make easy sense of the attack. The rapists, in juxtaposition to their female victim, represented a class of violent felony as categorically obvious as it was universally abhorred. Making examples of the perpetrators required the public reproduction of both that category and the abhorrence in the form of a legal verdict and associated punishment. Further information would only hinder that purpose.

Another dimension of exemplars and examples appears if we consider the female victim. She was certainly visible—obscenely so, in fact. No doubt she was the subject of much news by word of mouth at the time, in addition to disclosures in a courtroom. But what makes her a victim rather than exemplar (at least in the absence of detailed case information) is that her role in the event was passive: the crime was done *to* her, not by her own hand. And in the making of

exemplars and examples—the perpetrator of a deed, the courageous act of a patriot, the defense of honor in a duel—the active voice turns out to be critical. At a basic level, this is supported in legal discourse through the distinction between criminals and victims. But action gets parsed more finely than simple agency by considering culpability as well, the main foundation of which is intention. Throughout the Magistrate's Manual—the legal bible for Upper Canada as of its publication in 1835 (and hereafter the *Manual*)—one finds crimes defined or distinguished through close consideration of intention. In one illustration of culpability for killing someone, the *Manual* imagines a cart driver causing the death of a child by running over it. If the driver saw the child and drove on heedless, it is murder. If he didn't see the child but drove carelessly, it is manslaughter. But if he drove with due care and the child came out of nowhere, then it is homicide by misadventure, which removes culpability from the driver. Wrongdoing is thus graded according to how intention associates with the outcome: intention to do wrong, simple lack of intention to drive safely, and sure intention to drive safely that gets circumvented in ways beyond the driver's control. In keeping with this scheme, one murder trial from the court records of Oyer and Terminer[6] describes how a young man named Louis Roy threw a stone that ended up killing his friend, Francis Lalonde. Through the trial, it emerged that four young men were simply horsing around by throwing things,

[6] The court of Oyer and Terminer and General Gaol Delivery tried the most serious criminal cases in early Upper Canada, while lesser crimes often landed in other courts in the court circuit. On the structure and evolution of Upper Canada's court system, see Riddell (1918).

and one particularly unlucky throw proved fatal, in part because the victim rushed toward the stone after it had been launched, and if not for this would have remained out of range. Satisfied that there was no intention even to harm, and that playing in reasonable good fun also ruled out a judgment of carelessness, the judge ruled the event as homicide by misadventure, which assigns no culpability to Roy.[7]

Similar distinctions occur in burglary scenarios. Given burglary as a breaking and entering into a dwelling house by night with intention to commit a felony, each aspect of the definition is measured by intention. As the *Manual* states, every entering is not a breaking, as when a door stands open and the offender walks in. Even stealing at that point would not make it a burglary. For that crime to apply, there must be intention to destroy or undo something that fastens the entry closed. A door that is simply latched but not locked, therefore, is a breaking if the offender pulls back the latch. Entering is necessarily by intention in the case of burglary, otherwise a plan to commit crimes inside would make no sense. Night is also by intention, of course, since one chooses the time of action. And the condition on which all else rides: for it to be burglary, all this breaking and entering into a dwelling at night must happen with the intention of committing a

[7] For a summary of this trial, see Riddell (1926:345-346). Note that while no culpability was assigned to Roy for a verdict also called "excusable homicide by misadventure", the courts nonetheless leveled a fine, which Roy was to pay or do jail time until he could. Not having the fee at hand, he was remanded into custody of the sheriff. This inconsistency between excusing Roy of all culpability, and fining or incarcerating him anyway, seems to be a casualty of mixed traditions where a newer definition of culpability *mostly* replaced an older system that downplayed intention in assessing the act.

felony. An intention merely to trespass, for example, would not make the event a burglary (*Manual* 86).

Intention also accretes to accidental felonies, where a perpetrator intends to commit one felony but accidentally commits a different one. The *Manual* (222) introduces this idea by imagining a man shooting at a deer in his own field, whose arrow goes astray and kills a child he didn't know was there. This, again, is homicide by misadventure. But if he shoots at a deer in someone else's field, intending to steal it, and accidentally kills a child he didn't see, then it becomes murder because intention to commit a felony applies to whatever felony actually unfolds.[8] In the case of burglary, moreover, intent to commit a felony measures the crime whether the intent was acted upon or not (*Manual* 82).[9] It also accretes to the actions of a person who was admitted properly into a dwelling house, and

[8] This only applies when one felony is intended, and then another one occurs. It does not seem to apply when one did not originally intend a felony at all. The crime of burglary is not charged, for example, when someone breaks and enters a dwelling house with the intention merely to beat the owner, and then contrary to intention, the owner is killed. (See *Manual* 86.) Murder and manslaughter are felonies, but beating is not. Such a culprit would thus be susceptible to a charge of homicide for the killing, and a separate charge of breaking and entering, but not of burglary since relevant intent was lacking both when breaking and entering, and when applying the violence. One thing to stress is that burglary was among the most heinous crimes in existence, and following Blackstone's caution about death sentences, the onus was squarely on the legal system to define this crime carefully. One sees this in exhaustive reference to precedents in burglary cases, including cases where comparable circumstances were interpreted in conflicting ways. Although one strives for consistency (a main purpose of precedent) and although fair judgment depends upon profound legal understanding, the ultimate arbiter in heavy cases seems to be conscience. We observed this, for example, in William Dummer Powell's letter to the Governor's secretary regarding leniency over rape, which appealed to his *sense* of duty in taking the stand he did.

[9] Although intent is probably hard to measure if the felony is not actually carried out, this severe stance on culpability reflects how serious the crime of burglary was taken to be. As the MM says later in the same passage, "the law will not endure to have its justice defrauded by . . . evasions" (83). Perhaps it stamps out just such an evasion in clarifying that accessories, who merely stood watch from a distance and did not perform the breaking, entering, or felony within, are nonetheless guilty as principals. We will observe this uncompromising stance on accessories again when discussing the practice of dueling, where seconds on both sides are to be charged as principals to homicide if someone is killed.

once there, decided to commit a felony and then broke *out* of the house during the night to escape.

Taking all such cases as examples before the law, what emerges is a sense of exemplars as narratives of commitment to intention. It thus sifts out events, however awful, that were innocent of any improper intention, like killing a child in the wrong place and time. The cart driver did his full duty as a member of society as long as he drove with due care and, despite that, could not avoid the child. On close inspection, however, legal emphasis on intention exposes a gulf between individual and society at the heart of the British legal system, particularly when read against specific definitions of human rights that form the underlying premise of English law. This gulf helps make sense of the stress on appearances that one observes in conduct literature, notions of gender and domesticity, and defense of honor in duels. It also helps illuminate egregious violations of conduct, as in the crime of burglary.

The relevant notion of human rights comes from William Blackstone, an eminent eighteenth-century English law professor and legal scholar whose "Commentaries on the Laws of England" became a main interpretive standard on English law. The four-volume work is also referenced ubiquitously throughout the *Manual* and also in court records from Oyer and Terminer, where the burglary case examined later in this dissertation was tried. Human rights, in Blackstone's view, divide into absolute rights, which are due every person independently of anyone else, and relative or civil rights, which describe a

limited curtailment of absolute rights for the sake of a greater communal good when masses of people start to live together. Absolute rights acknowledge "man" (his language) as being possessed of free will, and guided by God-granted discernment that knows good from evil. But this free agency, left unchecked when people having diverse interests and priorities live together, would become ineffective or even dangerous when one person's act of will impinges on someone else's right to security, liberty or property. Thus the compromise system of civil law.[10]

Blackstone (I, I, 119) also observes a close interrelationship between rights and duties. To illustrate, he notes that allegiance is the right of a magistrate and the duty of the people; and that conversely, protection is the right of the people and the duty of the magistrate. Not only does a particular right only exist in connection to a related duty, but a converse set of rights/duties is entailed by the first set. A similar interrelationship exists between magistrates and the king they serve, and ramified throughout society, one appreciates intricate webs of reciprocal rights and duties binding people together. As far as the reach of law

[10] Blackstone actually uses a four-fold system that includes absolute versus civil rights on one axis, and rights versus wrongs on the other. This results in separate discussions for absolute rights, absolute wrongs, civil rights and civil wrongs. He seems to parse absolute versus civil as meaning private versus public. Keeping in mind that human law has no access to completely private, non-social elements like private drunkenness that never emerges into public, "absolute" or "private" in the context of human law really means issues that concern only specific individuals rather than the public at large. He uses the example of disagreement over ownership of a field to illustrate this: the issue does matter to the particular people involved, but not to anyone else in a legal sense. A murderer on the loose, by contrast, is a danger to everyone, and is thus a public matter. Crimes and misdemeanors are defined in Blackstone's system as civil wrongs.

goes, this mutual relationship between rights and duties concerns only their relative rather than absolute forms, for as Blackstone says,

> Public sobriety is a relative duty, and therefore enjoined by our laws: private sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction (I, I, 120).

Crucially, private matters that are out of sight from the public are not merely beyond law's jurisdiction: human law is actually blind to that which is not shared socially. As far as law goes, then:

> Let a man be ever so abandoned in his principles, or vitious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws (I, I, 120).

The law, this suggests, is a science[11] of interpreting observable human behavior (that is, behavior that is not merely available to be observed, but actually is) in order to produce and ensure an orderly society designed for the greatest good of its members, both individually and in their social membership. What opens a gulf between individual and society is that the measure of these observable behaviors is intention, which is not directly observable: it can only be inferred, interpreted through lenses of language, protocols that measure integrity, and the weight of supporting or conflicting evidence.

[11] This is Blackstone's own word in introducing his Oxford lectures that became the published commentaries: "The science thus committed to [my] charge, to be cultivated, methodized, and explained in a course of academical lectures, is that of the laws and constitution of our own country" (I, intro, I, 4). Given a preamble that sets human laws within a larger conversation about other laws of the universe, including gravitation, this term is not intended casually.

This conundrum deepens when we hear Blackstone say that private duties (sobriety in private, for example) cannot be measured and hence are out of reach of laws, whereas with private rights, "human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him considered as related to others" (I, I, 120). Didn't we just hear him exclude from legal purview the individual considered in isolation, beyond relationship to others? A way to make sense of this is to note another distinction between rights and duties: duties must be performed in order to exist, while absolute rights are intrinsic to people, whether trespassed upon or not, and whether the person acts or not. They are defined as being part of what makes us humans, and as such, exist equally whether isolated or socialized. The purpose of a legal system that does not see beyond the social, but nonetheless depends conceptually on—indeed has its raison d'etre in—the existence of an independent human nature, is to safeguard that essential nature of the human being through acute attention to observable conduct.

Although intention can distinguish between the substances of acts that appear on the surface to be the same, as it did in judging culpability of the cart driver, many everyday acts are not so readily distinguished. Proper conduct in routine matters, for example, may obviate scrutiny of behavior by conforming to expectation. A goal in greeting someone properly, or dressing in a seemly way, or speaking within ones social station, is to ruffle no feathers on account of those behaviors; or ideally perhaps, to be considered exemplary, an instantiation of

ideal behavior whose social significance was determined far in advance by tradition and convention. In such cases where acts conform to convention, there seems little practical difference between proper intention, and thus virtuous conduct, residing below appearances on one hand, and the appearance of propriety possessing a virtue of its own on the other. Treating appearances *as if* they are virtuous blends seamlessly into them actually possessing virtue, and either case loads enormous weight onto proper conduct and its observation by others.

A risk in this discussion of Blackstone is that complexity of his ideas can hide whole forests behind trees, or get misrepresented (as perhaps here) in attempts to simplify. The gist, though, is that his view of English law, and thus of anyone depending on him, adds an exclamation point to the importance of observing conduct, and opens another node of resonance with stress on observation elsewhere in society, beyond the technical musings of a legal scholar. This helps give substance to obsessions over appearance in the discussion to follow on notions of conduct, ideas of domesticity, centrality of the dwelling house, and dueling. It also helps anticipate Chapter 5 by foreshadowing a key aspect of the crime of burglary: it thwarts observation by taking place at night when the eyes of society are closed. This places the culprit—as indeed our culprit, Josiah Cutan, will be placed—completely outside the bounds of human society, and thus also beyond the redemptive possibilities of law.

2.2 Practice…

As a baseline for understanding a practice approach, I follow Ortner's (1989:96ff) response to critics of her 1984 paper, *Theory in Anthropology since the 1960s*, and her 2006 update on practice theory. Although Bourdieu, noted below, is usually credited with outlining the theory as such, Ortner has the advantage of equal brilliance combined with greater clarity, and in her deployment of history, also greater finesse.

I thus take "practice" to denote a genre of social analysis having several key features. First, it sees asymmetry in political and social relations as axiomatic, and thus exposes its machinery as a basic part of analysis. Instead of presuming balance and stability in the operation of structure, action, actor or history, and thus hiding mechanisms by which they might be transformed or their balance shifted, the presumption of asymmetry makes constraints on runaway instability the thing to explain. Given dissonance, difference, conflicts of interest and bodies that simply move further apart—and these happen, in no small part, because feedback enters the system—a practice approach also offers insight into both impulses toward transformation and where to look for them.

Second, practice theory views structure as inextricable from action, and especially given the presumption of asymmetry and imbalance, this changes the meaning of each term from their isolated (or at least isolable) versions. The liability of isolable structure is not so much that it doesn't interact with other

dimensions, including function or action or agents, or that intimations of structure can't be traced historically, but that isolation grants structure ontology prior to the interactions being analyzed. By separating its being from its interactions, a static "being" emerges, a realm apart from and impervious to the dynamism of actions, agency, events, as well as more nebulous dynamics conveyed by notions of momentum or inertia. Movements thus become kinetic, like a clash of billiard balls, precisely because the existence of balls in the first place is a separate and untheorized issue. Severed from dynamism beyond kinetics, isolated structure is no help in explaining how structures themselves change; it merely poses change as a conundrum. Ortner emphasizes how structure in practice theory differs from its counterpart in structuralism by "containing an active assumption" (102), exampled in Bourdieu's notion of *habitus*. On one hand, as Bourdieu's own parsing of oppositions in a Kabyle house shows, *habitus* is structure a la structuralism; without explanations, Bourdieu's diagram would be perfectly at home alongside those of Levi-Strauss. Ortner stresses, though, that *habitus* is doubly practiced: "it is both lived in, in the sense of being a public world of ordered forms, and embodied, in the sense of being an enduring framework of dispositions that are stamped in and on actors' beings" (102). The result of this dynamic embedding of actors and connection of scales is not that the issue of prior ontology is circumvented, as if one might do an end run around existence, but that recognizing prior ontology as well as its potentialities for change become the point; it is what the reconfiguration of

familiar terms in practice theory (sometimes conjoined through neologisms) attempts to parse.

"Action" suggests a similar contrast: "action" that somehow exists independently of structural constraints and potentialities has different basic parameters from action whose very being depends upon and emerges through those structural forces. The puzzle in this case would be, if action, conceived as independent, is studied for its effects on or through structure, this presumes that "action" is brought *to* the engagement with structure. From where? From what? In what sense is action, abstracted free of all worldly entanglements, even measurable in the sense one must presume in a kinetic model of interaction? As I'll elaborate in the next section, this radical sense of free agency is not only challenged by practice theory, but has been having a rough time of it recently through much of the intellectual world, which dwells increasingly on connections among things previously viewed in isolation. In practice theory, linking action radically to structure—to its constraints as well as potentialities—are among the key forces through which "free" impulses come into being in the first place. Action conceived in isolation, which thus evades this sense of freedom, is different in kind from action conceived as practice.

Third, this complex of asymmetries, emergent in a mutually entailing nexus of structure and action, gets sedimented in concrete particulars that manifest over time as inertia. Analysts may notice and assemble some of these particulars as details of place, people, standpoint, environment, choice, occurrences, moments

and so on, always retroactively perceived, into chronological assemblages known broadly as "history". In this sedimentation resides the overall conservative tendency of structured action, evident in how many details appear patterned and acquire limited predictive power. Although one can describe certain principles in the abstract, as Bourdieu did in *Outline of a Theory of Practice*, such abstractions can serve as anthropological analysis only to the extent that they are viewed in their messy particularity, not simply as a discussion of principles that admit concrete examples only as long as they behave. Unlike preceding theories, such as structuralism or functionalism, or looser categories of analysis like voluntarism and transactionalism, whose interpretive stability before the fact rendered historical details tokens of a systematic type, concrete, accumulated detail in practice theory is supposed to generate the analysis.[12]

The fourth keystone of practice theory, in Ortner's model, is the so-called actor, the physical and psychical bodies in and through whom all other elements are manifested. Answering critics of her 1984 theory paper, Ortner stresses that this actor is neither the unconstrained free agent just dismissed above, nor mere drones in the unfolding of structural constraint, historical momentum or

[12] Bourdieu's *Outline* illustrates this point. As abstraction, it does the work of portraying the theory in question, but because it engages historical particulars only as examples, and rarely at that, it does no real analysis of particulars in the world. On the surface, his unpacking of the Kabyle house seems an exception, in offering deep insight into the mutual reinforcement of everyday identification of things, people and spaces, related functional behavior, and an underlying cosmological blueprint that makes sense of it all. Even here, however, despite so much exactness detailing the geography of spaces, things and activities, there are still no bodies, and thus no embodied history or exposure of living encounters and their feedback effects that a practice approach now presumes. Indeed, Bourdieu's analysis, though included as an appendix in *The Logic of Practice*, evokes a static notion of structure more akin to structuralism, and not the radical rethinking of structure that happens only when it gets yoked to embodied action, history and particular people.

biological programming. These poles "evade the problem of adequately theorizing the actor, and leaves the scene to reductionist theories in which people are either overly rationally calculating or overly propelled by biological and/or psychological drives" (104). Nor, I would argue, does the practice actor suggest limited freedom that might fall in between these two poles, both of which result from denying the radical dynamism of elements whose origin is mutual entanglement, not separation. Being radically dynamic instead, the actor in practice theory is therefore not part of the spectrum these two poles imply—unconstrained free agency or pre-programmed drone—but a different trajectory altogether.

Before moving on to "frontier", the third problem term in the dissertation title, it is worth pondering the radical sense of connectivity that practice theory entails. For although the expediency of explaining and rendering as discrete paragraphs means separating terms temporarily, and thus necessarily misconstruing them to a degree, it should already be obvious that their intended sense depends on the inseparability of all when taken together, rather than just a string of indivisible binaries. In this, practice theory reflects a much wider reverberation through the intellectual world, and arguably far beyond it too. As a way into this point, consider another distinction Ortner makes: practice theory, she says, always involves a subjectivist moment of logics spun by thinking and acting agents, and an objectivist moment constituted by logics beyond those people's immediate perceptions (1989:112). While she says practice theory

always attends to these two moments, it attends most of all to "the ways in which it plays on the margins between them, examining those processes by which the one side is converted into the other. Thus we watch actors in real circumstances using their cultural frames to interpret and meaningfully act upon the world, converting it from a stubborn object to a knowable and manageable life-place" (113). This process goes both ways: "At the same time we watch the other edge of this process, as actors' modes of engaging the world generate more stubborn objects (either the same or new ones) which escape their frames and, as it were, re-enter ours" (113). It is precisely this relationship, she concludes, that generates the interesting questions for practice theory.

Few terms and oppositions have seen the breadth of challenge sustained against the pairing of subjectivity and objectivity, and much of the difficulty has come from trying to figure out which was king of the hill. As on the playground, it is this premise of contest requiring a victor and a loser that precludes the alternative of mutual entailment that practice theory takes advantage of. Through much of the twentieth century, objectivism enjoyed the limelight through a broad stress on scientific procedures of deduction and experimentation which, despite contrary insights by the likes of Einstein, Godel and Heisenberg, sought its conclusions as if the observer didn't matter, at least in principle: all s/he had to do was proceed carefully and get the facts right. If "objectivity" as a term was often limited by its abstractness to specialized audiences, "nature", predicated on the same privileging of a world as it really is,

was far more congenial to lay audiences and thus gave the assumption a much wider circulation. Testifying to the truth of that assumption of an objective world was a vast, industrialized array of things it had produced: automobiles, airplanes, bridges, skyscrapers based on new understanding of materials, even trips to the moon. Subjective minds had long imagined such things, even written great stories about them, but it was a grasp of and commitment to objective principles and materials, to properties imagined as not depending on the presence, perception, experience or history of an observer, that actually achieved them. As part of this objectivist world, anthropology offered its own specialized insights into people-objects by measuring society and culture as objects, and generalizing about them in ways that yielded, not completeness, but at least accuracy as far as it went. The humility of this anthropology lay in human limits that keep completeness always out of range, and not in the inescapably subjective cast of observation per se.

Then the academic pendulum swung the other way with the emergence of a negative counterview, a dangerous Mr. Hyde lurking within the objectivist assumptions that seemed so congenial and productive before. In a strange reflexive light, cumulative understanding became the threat and fact of systematic misunderstanding, hidden agendas were seen lurking behind every statement as they acquired political loading, and seemingly innocuous institutional structures were revealed as engines of privilege and inequality. Anthropology's take on this new reflexive emphasis was to stress how analytic

categories, and also styles of writing and presentation, relate to both disciplinary and personal history, as well as to persistent forces introduced by colonialism and capitalism.[13] This general project of ending the myth of innocent, neutral observers and frameworks of analysis resonated, partly through disciplinary overlap and partly by drawing on similar theoretical source material, with broader intellectual impulses such as postcolonialism, deconstruction, feminisms, and practice theory. Indeed, overlap and resonance often makes it difficult, perhaps even wrongheaded, to distinguish among the strands of theory.

Although some early stages of (over)reaction to previous dismissal of subjectivity amounted to sinning in the opposite direction by limiting available horizons to ones navel, the enduring fallout from this shift has been heightened overall awareness of standpoint, including that of observers and how their perspectives as well as presence shapes both what gets noticed and the very process of observation. Even "nature" got recast in constructivist terms—by Haraway (2008:159), for example, who argues that "Nature cannot pre-exist its construction, its articulation in heterogeneous social encounters where all of the actors are not human and all of the humans are not 'us', however defined. Worlds are built from such articulations." That is not to insist that trees in forests don't fall or make sound if no one observes them, only that those hypothetical (non)events are completely unavailable to perception, never mind analysis: even

[13] Canonical contributions to this effort include Clifford and Marcus (1986), Marcus and Fischer (1986), and for a complementary feminist view curiously absent from the first two, Behar and Gordon (1996).

proposing them in order to produce the familiar conundrum depends on conjuring a tree, a forest, and events of falling and sounding, all of which depend in turn on particular, historically and experientially loaded systems of understanding, however naturalized and invisible these may be.

Thinking has moved, in other words, in the direction of reintegrating subjects with the social, physical, geographical, historical, exteriorized worlds once viewed as an opposing pole. A basic axiom of practice—its necessary enganglement of subjectivist and objectivist moments is part of this integrationist shift. As with the other terms she parses, the product of this integration for Ortner is not the same subject and object as before, only brought together, which would simply return us to the kinetic world of pre-existing billiard balls. The condition of mutual entailment, and refusal to force sides of the contrast into a hierarchy, reconfigures what gets evoked. The takeaway point in all this is not to achieve a better, more defensible definition of subjective and objective, but to appreciate how far the integrationist view reaches, to hear some of its resonances. One main site for this in Ortner, in others who use practice theory, and in practitioners of other theoretical approaches, is how one side of a contrast is made to play descriptively off the other in order to evoke a more profound dynamic. Ortner calls for examination of processes by which one side is converted *into* the other; she infers a reciprocal process of actors using their cultural frames to interpret and act meaningfully upon the world on one hand, while at the same time, also sees these modes of engagement generate more

stubborn objects. She sees dispositions stamped "in and on actors' beings". The writer/analyst, Ortner stresses, is not exempt from this emergence of a new product out of multiple presences. Pondering who shapes texts produced in the intersection of sahibs, sherpas and ethnographer, Ortner (1990:19) says,

> When we read sahibs' characterizations of the Sherpas, we are aware of the degree to which those characterizations are conditioned by both the social position of the writer and the discourses within which the writer is writing. At the same time I have argued that it would be absurd to suppose that what is written is unaffected by the actual characteristics of the people being written about, or to turn the point around, that the people being written about are unable to affect what is written about them.

Looking beyond Ortner, a similar dynamic shapes the established language of practice theory though constant reminders of mutual entanglement, the reciprocity of being shaped and shaping, constrained and constraining, constituted and constituting. Most famously perhaps, Bourdieu renders practice as the immanence of "structured structures predisposed to function as structuring structures" (1972:72), a phrase whose force lies in binding together in a single dynamic moment already-structured forms and predispositions that carry their influence forward. This integrative moment is part of what Bourdieu captures with the term *habitus*, which succeeding decades shows has the advantage of dropping baggage that re-deployment of familiar words must deal with.

Not everyone viewed practice theory as a breakthrough. Maurice Bloch, who admits to playing a bit of devil's advocate, sees the approach at best as a

reminder of what people including but not limited to anthropology have thought for a long time, and more cynically as just one more fashion, a simple repackaging in some new terms. "Marxist theory", he writes,

> …has always been centrally concerned with the issue of practice and praxis…there is nothing to be gained and much to be lost in seeing "practice anthropology" as a new fashion. Of course this is not to say that it is not very useful to remind people of this old and central issue, but pretending that something dramatically new is being born runs the risk that we shall waste all the important work that has already been done in advancing and defining the issues and that we shall entangle ourselves in brambles which have already been cleared (1989:8).

Indeed much would be lost in seeing practice anthropology as a new fashion, but not, I think, because it is one. If it is actually more, then viewing it as fashion would trivialize it, and contra Bloch, it does seem that something new is born in the approach. He cites Marx as a major precedent, specifically "his demonstration of the historical specificity of the idea of maximizing choice and of its unsoundness when it was separated from historical process" (9). He sees as the fundamental Marxist theoretical advance "the refusal to separate individual motivation from historical process" (10). Ortner (2006:8), too, stresses the importance of seeing the articulations of structures, action and agents as tied to specific historical moments.

But a few things differentiate Marx's work from practice theory. One is that Marx proposed a teleology where social forms, driven by class struggle, went through a series of modes of production culminating in communism. Practice in the more recent sense admits transformation because predispositions are never

total, and the new, non-conforming impulses are unpredictable. But such a scheme is not teleological, even granting the conservative inertia of *habitus*. Another difference is that Marx views society in terms of classes and their relations, in which individuals are analyzed mostly as tokens of those relations. As emphasis at least, they are collectivity writ small. As Marx put it, "Society does not consist of individuals, but expresses the sum of interrelations, the relation within which these individuals stand" (1865:265). Such a view follows from his political and especially reformist goals, and expresses his deep belief that in their essence humans are communal beings. The closest that practice theory gets to an actual emphasis on collectivity is recognition that the ordered forms of structures, which help constitute predispositions, are public. But practice theory—in the most astute forms at least—balances this insight with equal emphasis on particular bodies in and through which such forms emerge. And the relation between these two describes a more fundamental difference between Marx and practice theory, and that is the constitutive tension in the latter, which is missing in Marx. According to the third and fourth of his eleven *Theses on Feuerbach*:

> The materialist doctrine concerning the changing of circumstances and upbringing forgets that circumstances are changed by men and that the educator must himself be educated. This doctrine must, therefore, divide society into two parts, one of which is superior to society. The coincidence of the changing of circumstances and of human activity or self-change can be conceived and rationally understood only as revolutionary practice.

> Feuerbach starts out from the fact of religious self-estrangement, of the duplication of the world into a religious world and a secular one. His work consists in resolving the religious world into its secular basis. But that the secular basis lifts off from itself and establishes itself as an independent realm in the clouds can only be explained by the inner strife and intrinsic contradictoriness of this secular basis. The latter must, therefore, itself be both understood in its contradiction and revolutionized in practice. (Cited in Marx 1998[1845]:569-570)

In the first passage, Marx's second thesis, he stresses the capacity of people to act on their circumstances to produce change, to take their future in their own hands instead of leaving it with the other half of a divided society. This does go beyond the kinetics of billiard balls, which describes passive responders to untheorized action. One of Marx's main points was to make people, especially among the proletariat, conscious of their own agency, to jolt them out of passivity. This is clear in the "*coincidence* of the changing of circumstances and of human activity" (my emphasis), and also in the underlying philosophy of dialectical materialism, which weds Hegel's view that meaning resides in oppositions, and the materialist's view that everything, from action to thought, belongs to the material world of substance—no free-floating, abstracted ideals a la Hegel. As Marx says elsewhere, "industry is the real historical relationship of nature to man and therefore of the natural sciences to man" (1844:23).

Human agency is also evident in the second passage, the fourth thesis, in the "inner strife and intrinsic contradictoriness" of the secular basis which, when ignored, leads to the alienation of spirit that gives religion its raison d'etre. Where Feuerbach argues that resolving the distinction between religious and

secular worlds would end estrangement, Marx goes the further step of locating the source of estrangement in secular, material conditions of inner strife and contradictoriness, glossed elsewhere as alienation. There could hardly be a more poignant image of individual agency than a grand theory about the inequalities, oppression and surrenders of power that follow from an individual's loss of wholeness when labor gets isolated from its products, and humans isolated from each other in false communities of religion or state citizenship.

In practice theory, of course, there is no program for resolving the failure of predispositions to totalize, or of the capacity of individual actors to be unconstrained. Resolve this and you're in a different theory altogether, for as Ortner (2006:2) notes, the relations of practice theory are dialectical, a set of mutual entailments, rather than a simpler opposition that imagines apriori things turning themselves to the task of opposing something. More critically, the contradictions, encounters, and (re)connections in Marx lack the immanence of predisposition and patterning that is simultaneously constraint and potential for something outside the pattern. They also lack the diachronic implications of this immanence, which practice theory gauges as both a conservative tendency and a capacity for transformation. Practice theory also provides an actual mechanism for observing connections between scales—between particular actors, for example, and a pervasive, public world of ordered forms.

But the core difference between these two positions, perhaps, is that practice theory offers a reconfigured "I". It is not the formulaic "I" in Marx, where the

analyst has figured out in advance what "I" needs to focus on and do, and where that adjustment will lead. It is also not an "I" born out of oppositions per se—"appositions", which admit vectors that are oblique, might be closer. Most of all, being constituted in engagement, in the emergence of immanent tensions, renders "I" both more radically individuated and more radically social than in Marx. That is, what I just called immanent tensions is internal to the individual, which is what makes embodiment mean what it does. By comparison, Marx's takes properly functioning individuals as wholes (and categorical ones at that): individual activity and recognition of self entails change, yes, and that gives them agency, but no complex of internal tensions is even hinted at which might take analysis below the individual's skin, to a sense of creativity and emergence that suggests the first person. For all his talk of individuals, Marx's work seems to contain individuals in the third person only, individual bodies one can point to and talk about. The refinements of individual and social are expression of practice theory's profound emphasis on integration. Perhaps as further expression of all these points, the "I" in practice theory is also much harder to talk about, much harder to pinpoint and be precise about.

One shortcoming of the schematic of practice theory is the "actor", usually noted in the singular. The category can be fleshed out and multiplied in actual analyses of course, but it seems important even at the schematic level to highlight how actors are present to each other, specifically. The lone actor is no more visible or analyzable than the tree in the forest that no one sees fall. Presence *to*

others is surely the primary node through/in which identity and value emerge as such, and what brings the internal dynamics into analytical view. Another liability, which might have been more of a strength than it was, is the re-deployment of familiar oppositions and terms so that tension becomes constitutive rather than analytically antagonistic. The danger, which proved real and present, was that despite the rhetoric of tension, interpreters would default back into the same oppositions as before. Ortner laments exactly that in a response to critics of her 1984 theory paper, where she argues that even some of the top minds—Maurice Bloch among them—managed to miss this intended reconfiguration and criticize the terms of practice in their isolationist senses. As Ortner writes,

> The problem is that even the attempted syntheses in the current situation get heard as one or another pole of the opposition. Mention the actor, and get heard as another form of transactionalism. Mention the importance of the cultural construction of anything at all, and get heard as another form of "culturology" or "subjectivism". Mention the importance of theorizing anything at all and get heard as another form of objectivism (1989:106).

This matter of distinguishing particular, especially new uses of a term, and connotations of prior usage that apparently come along for the ride, seems trickier than simply stating the problem would make it out to be. A further hindrance to broader application of practice theory concerned timing: about the same time practice theory gathered steam, postcolonialism, deconstruction and feminisms mounted challenges against anything that smacked of grand theory. Combined with the difficulty of taking the theory's terms beyond isolationist

space, words like "actor", "action", "structure", and "history", however reconfigured in principle, started to sound like part of the problem, not a solution.

And yet, returning to the notion of resonance, practice theory is alive and well—more vital than ever, perhaps—if not taken whole the way it once was. Its terms, from specialized kinds like *habitus* to the keywords just noted to the word "practice" itself, pepper theoretical and ethnographic work across disciplines, topics, standpoints, genders and political persuasions. The playful tensions of language where terms pull against each other to evoke new analytic space are almost de rigeur across such wide swaths as postcolonialism, postmodernism, deconstruction, feminisms[14], gender studies, cultural studies and film theory, and the list could surely be extended. Integrationism and a reconfigured "I", in the senses produced through practice theory, have remained center-stage in the decades since, although forms and styles of getting at them have meandered.

Its critical emphasis on integration, and recognition of a genuine first person emergent in internal dynamic, also has much in common with Bakhtin's notion of dialogue. Like practice theory, the starting point in dialogism is that people

[14] Singling out feminism as another site of integrationist thinking and language risks engendering a false distinction. If feminism began as a relatively consistent stance against a monolithically perceived patriarchy, it didn't stay that way long, and these days, a common criticism of feminism is that it represents no common cause at all, evident as much by the extent to which feminists argue with each other as by the myriad different trajectories they pursue and stances they take. Feminists also employ diverse theoretical tools, including bits of practice theory, dialogism, deconstruction, psychiatric theory, gaze theory, and others. Yet they deserve mention as an assemblage for two reasons: they have generally in common a focus on gender, particularly constructions of females (leaving that term un-deconstructed for present purposes), which are often ignored or under-represented in other work; and the sheer volume represented by a feminist assemblage, however internally diverse or argumentative, adds a great deal to the momentum of the integrationist tendency I am trying to describe.

are always already embedded in their worlds; abstracting them into an analytical cocoon where they can be studied like variables or controls in an experiment would miss the entire premise of dialogue, for it is only through that embedding that people are able to perceive, make choices, act and speak. Dialogism parses differently the balance between creative impulse and constraint, and between individual and collective: although practice theory, too, reveals internal dynamics within a single person, dialogism is more emphatic and precise in this. Indeed, in contrast to a more casual sense of dialogue as interaction *between* people, dialogism in Bakhtin's sense focuses specifically on the echoes, double voicing, experiences, and linguistic encounters within a single person, with the definitive caveat that these internal dynamics depend utterly on multiple bodies that are simultaneously present to each other, for it is in those engagements that inner conditions are realized. As Holquist (2002:19) says, the dialogic self is first of all a relation; "in Bakhtinian scenarios, the simple yet all-important fact should be stressed again that [protagonists] always enact a drama *containing more than one actor*" (18—emphasis in original). Dialogism thus gives definitive emphasis to "I", which is not merely a unique entity, or one that simply needs other people around in order to distinguish and talk about. The dialogic "I" is also not just the fact of two "I"s being simultaneously present to each other, although that is critical. In addition, each I is internally complex and dynamic, and these dynamics are what emerge through co-presence.

Hanks (1996:207) notes that for Bakhtin, all speech is dialogic since it draws its value from the ideological horizons of society, and one might extend that observation far beyond speech as well. Ubiquity, of course, would mean that "dialogue" doesn't say anything distinctive about an interaction; as we shall claim for the term "frontier", problems of meaning are sure to crop up when an insight appropriate to specific conditions gets applied beyond them.[15] But that push for a broad application of dialogism, however diluting of analysis some of it may be, certainly helps suggest the breadth and strength of recent commitment to integration and a radical sense of "I".

These specific models of integration and "I" belong to a more general intellectual view that one is always embedded, and that embedding makes one partial in both senses of that word. Recognition of this manifests as a growing agnosticism about how, and how far, one's actions ripple outward into a wider world. The view that individual actions and orientations are consequential, that they promote certain ideas by virtue of excluding others, that ideologies and their institutional structures are deeply imbricated within society, contingent upon and emergent in interaction, and that visible boundaries are therefore highly permeable, is incompatible with presumptions that society is reducible to elements, or that only certain relationships are relevant. A given analysis may choose—indeed must choose—to look only at certain things, but it cannot

[15] For a specific discussion of this relevant to Bakhtin's notion of dialogue, see Bernstein (1989).

presume, in principle, that those it does not mention are irrelevant. The postmodern recognition of personal standpoint contradicts that very principle.[16]

Going further out on a limb, this general integrationist impulse may also register in non-intellectual practices such as the growth of interdisciplinary activity and interest in supporting it institutionally, the proliferation of new departments, increasing crosstalk between nation states, challenges against the idea of a nation state[17], new security threats that are global in scale and unconstrained by national boundaries, increasing and immediate access to global events, instant communication around the world, and through it all perhaps, a growing sense that things happening over there actually do make a difference here, to me. The point is not to call all of these trajectories practice, of course, but to tune in to the profound stress on integration, and perhaps on a radicalized "I" (which might include its plural form, "we") occurring today. With his usual flair, Sahlins once said of the long run that we are not just always dead, but always wrong too. A more congenial and perhaps illuminating way to say that is, ideas are important to the time(s) in which they arise, especially if they sound from so many different corners simultaneously. One misses everything about that importance and what the ideas are doing in the world by discarding them in advance to the dustbin of a long run. Integration, and perhaps the radical "I", are profoundly significant, and the thing to figure out is how, and perhaps why.

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[16] This claim dovetails with the sense, offered by Marcus (1986:192), LaCapra (2001:21) and others, that postmodernity is rooted in indeterminacy and incompleteness.

[17] According to Swazo (2002), for example, given the compression of nations upon a finite globe, the traditional logic of statecraft becomes ever more of a hindrance, and increasingly dangerous.

Among the many threads of this larger idea, no single one constitutes a weak link which, if broken, drops the whole idea. Peirce says

> "to trust rather to the multitude and variety of its arguments than to the conclusiveness of any one. Its reasoning should not form a chain which is no stronger than its weakest link, but a cable whose fibers may be ever so slender, provided they are sufficiently numerous and intimately connected." (Collected papers, 5.264)

As a final point, the rigors of language, including the ordering of sentences and thoughts into discrete moments, is an inescapable liability in evoking the radical sense of integration being argued here. The basic problem, as Bakhtin noted with his view of an "event", is that thinking, let alone writing, is always a crystallization after the fact. By the time we notice a thought or idea as such, the contingencies in which it emerged have already moved on. The study of events is therefore a study of trace fossils, of impressions that our emergently familiar predispositions allow us to make in sedimented moments. Like Bakhtin said of events, we cannot get at the heart of practice's dynamism directly; even using words like "force", "element", "predisposition", "person", "body", "individual", and any others used in the preceding paragraphs, conjures the spectre of an unexamined prior ontology that *frames* the focus of analysis. The rhetorical solution when using these familiar terms has been to evoke a tension between opposites, to see that tension as primordial rather than a consequence of things supposedly brought together, and to look the other way when the words' prior histories dirty the scene with prior, isolationist meanings. Such words dirty the

scene for the same reason we think to use them in a new way to begin with instead of inventing a new, arcane jargon: if new jargon has the dubious advantage of making a clean semantic break and thus allowing a fresh start, familiar terms have both the advantage and the liability of being easily understood already, which can be a powerful springboard into new territory when done well. Although it has been done better by some than others, the telling thing is the sheer number and breadth of people doing it.

2.3 Frontier…

The most contentious of my three keywords, I choose "frontier" over alternatives because some of its baggage proves useful to my analytic purpose, and because no one needs another new term. In distinguishing my sense of frontier from prior usage, it will help to touch briefly on the latter, beginning with Fredrick Jackson Turner's 1893 essay, *The Significance of the Frontier in American History*. This highly influential work almost singlehandedly brought "frontier" to the fore of American historiography, where it has since suffered on three fronts: challenges to the concept itself, disagreement over what Turner and others mean by the term, and vague or unreflective usage that obscures issues buried in the word. Some advocate continued use of the term after accommodating insights gathered through the fruitful century since Turner. Others, preferring terms such as border, borderline, borderland and contact zone, argue that "frontier" is inherently loaded in ways that make

accommodating it wrongheaded. Still others take up positions between these two poles, and differ in their kind and degree of accommodation.

Turner's basic thesis is that a westward-moving frontier, along which settlement, increasing density of population and related shifts in ideals prevailed over a sparsely populated, unsettled wilderness, definitively shaped and produced the America of Turner's day. According to Pierson (1942:49), who surveyed 106 people[18]—mainly established scholars and professionals in history or allied disciplines—Turner's frontier is generally taken to be a zone rather than a line. "The effect of this zone was change, the change showing particularly in personal character, in the fostering of individualism, democracy, energy, optimism, inventiveness, coarseness, materialism, idealism, etc." That is, "change in the character and attitudes of the people is more essential and noticeable than change in institutions" (50). In any case, this frontier contrasted sharply in kind with counterparts in Europe, which tended instead to consist of fortified borders running through more densely populated areas. Granting this modest agreement about what Turner said, respondents to the survey embodied a deep divide over the details and merits of the thesis; as Pierson notes, "fifty years after its formulation historians are still not agreed on either the contents or the validity of the celebrated frontier hypothesis" (48). Indeed, almost sixty years after Pierson's essay, a special forum in *The American Historical Review*[19] returned once again to

[18] Pierson sent out 220 letters for the survey, but about half did not reply.
[19] Vol. 104, No. 3 (June 1999)

the larger issue of how to think and talk about cultural, geographical, demographical, economic and political conjunctures, beginning with a re-appraisal of Turner's model of a frontier.[20]

Without getting stuck in this debate, suffice to say here that the thesis was both wildly popular within and also beyond the academy[21], and deeply problematic, and retains today a considerable capacity to generate discussion. Some argued that Turner's obsession with an advancing frontier, mainly in terms of population density, geography and politics, while probably important, had blinded him to other influences on American development, notably ideas, traditions and arts. And even many of Turner's own supporters[22], observe Adelman and Aron (1999:814), acknowledge the imperialist suppositions of a thesis that cast the movement of American settlement and influence from east to west as a transition to civilization. Some scholars find Turner's conception of a frontier too vague to be useful. Others are more pointedly critical. Wade (1959), for example, suggests that it was not farmer/pioneers at the edge of settlement

[20] For a general review of the acceptance and influence of Turner's thesis, see Billington (1971). For a discussion that puts Turner's thesis in the context of broader developments in American historiography, see Bender (2002:129-153).

[21] Theodore Roosevelt, for example, used Turner's work as a lens for appreciating the 1890 US Census. Roosevelt saw the declaration of a moribund frontier as reason, in effect, to seek new frontiers overseas. The term also became a general metaphor for seeking new horizons that would continue to push the envelope of American expression, as when John F. Kennedy promoted his political vision, which included exploration into space, as a New Frontier.

[22] Support, Pierson (41) observes, often tended to be emotional, a defense of the hypothesis as if Turner the man were under attack. This irrational loyalty, and opposing emotions ranging from irritation to outright hostility to the hypothesis, mark prejudice as a decisive obstacle to both understanding and fair assessment of Turner's ideas and influence. Appropriately, Pierson devotes a separate section of his essay to "the obstacle of prejudice".

that drove westward expansion, but urban centres such as Cincinnati, Pittsburgh and Louisville. In this view, Turner looked mostly in the wrong places.

Perhaps Turner's sharpest critic is Limerick (1987), who doesn't merely call Turner's frontier notion "an unsubtle concept in a subtle world" (25), but stresses that the unsubtle point the term makes is exactly the wrong one. By agreeing with the 1890 census that the Western frontier had closed, she argues, Turner effectively blocked what he considered his discipline's goal of "understanding what came into the present from the past…. For the present is simply the developing past" (Turner 1891, cited in Limerick 1987:17). What sounds in this quote like attention to continuity gets blocked, Limerick suggests, by the closure of a frontier that was deemed finished, whose process was based on limited-time openings and opportunity for some that came at the expense of contractions and closures for others. Such a scheme, she says, serves poorly as an explanation of change into present-day (circa 1893) American identity. A closure model downplays the complex mixing, syncretic adaptations and newly opened opportunities that tend to emerge in cross-cultural space. Limerick conceives instead of a West that, although changed, continues today, and where the analysis of myriad threads recognize multifaceted, complex regions rather than a homogenized, homogenizing "West".

Some, such as Riley (1984) and Georgi-Findlay (1996), fault Turner's thesis not for its imperialist aspect, but for how it promoted an exclusively male vision of westerly movement. Riley considers how women's experience prior to that move

constituted a different experience of frontier, different kinds of relations there, and to a degree a different project than the unmarked "male" vision recognizes. Georgi-Findlay, drawing on private letters, diaries, memoirs and fiction by women who moved west, again stresses how these sources differ from the far more visible, and historiographically influential male-oriented view—and even subtly reshaped it sometimes—but also how, despite these differences, women nonetheless colluded in the civilizing process through commitments to spread Christianity and Christian-based morality.

Responding to Limerick in particular, Adelman and Aron (1999:815) caution that obsessing over continuity and adaptation can create blindness where radical transformation or attention to dissonance deserves the emphasis. As noted at the outset of this section, definitions and models should be assessed with respect to the analytic problems they are used to illuminate. Failure to do this results in a reified concept, which seems to attach directly to "facts on the ground" instead of to an act of problem solving undertaken by situated analysts. As Adelman and Aron point out, a continuity approach may be less sensitive than Turner's frontier model—for all its shortcomings—to decisive transformations in the wake imperial expansion. Indeed, its general point was to stress how Europeans, migrating to eastern America and then westward across the country, were not thereby simply transplanted Europeans, but a new product created in the cauldron of place, people and circumstance. Granting that all products have roots that can be traced, there is potential value in marking the emergence of a

people and spirit that eventually commanded master narratives about the history of a country, regardless of the empirical credence of such narratives. Furthermore, if Turner's particular stress on closures lacked subtlety, it doesn't follow that decisive moments of transformation cannot be analyzed with greater finesse. Philips (2008), for example, shows how in the Pacific Northwest a hegemon, influenced by the cumulative creep of migration, changing circumstance and particular individual characters, may act decisively to set new precedents on communal behavior, thus transforming local society with the stroke of a pen.

The point is not that continuity in such moments fails: the problem is that everything may be described as continuous, whereby the word distinguishes nothing, including moments that may be the point of analysis to distinguish. If detaching a term from specific analytical issues and problems leads to reification of the concept, detaching it from concrete particulars on the ground leads to undue generalization[23], either by leaving the term detached and apparently ubiquitous, or by misapplying it to different particulars where it fits badly. An emphasis on continuity may also be a sign of present analytical times. Noting, with Schmidt-Nowara (1999:1226), that "rivalries among empires, states, and peoples manifest themselves not only through trade and warfare but also through the interpretation of those struggles", one might expand the statement

[23] Overgeneralization is the main charge that Schmidt-Nowara (1999) and Haefeli (1999) level against Adelman and Aron, whose model of frontiers, borders and borderlands rely too much on American sources written in English, which could be readily challenged by examples from Latin America.

to include interpretations of something other than rivalry; a spirit of accommodation, for example, may manifest itself as an interpretive tendency toward continuity rather than disruption or power struggle.

One major trajectory of redress to the notion of a frontier has been to reformulate it more explicitly as a zone, either using the same term or by deploying others, most notably borderland. This alternative is more emphatic and intuitive than frontier in suggesting a three-dimensional expanse, an in-between space that opens up possibilities for mixing, accommodation, creativity, and potential to shape emerging interactions in unpredictable, unsystematic ways. The main impulse for this shift was Bolton's (1921; 1930) work on Spanish borderlands, which detailed the complexity of relations not only between American and Spanish forces, but also nuances of Spanish occupation as well as relationships with Native communities. Coupled with the wealth of archival detail Bolton mined, this borderlands approach opened the land up like an exploded diagram, revealing complexities and analytical possibilities not previously imagined. But neither Bolton's own work, nor the fact of a more congenial term, make "borderland" inherently less susceptible to vague usage, or application to such drastically different situations that the use of a single cover term itself becomes misleading. One distinctive aspect of North America, Haefeli (1999:1224) observes, is that compared to most places in the world, its political edges were remarkably unstable and fluid: "In North America . . . forts, frontiers and boundaries rose, fell, and shifted drastically within the span of a single

lifetime", which makes most of North America (excepting the Spanish borderlands in the Southwest, which proved more stable) a poor type specimen for identifying and talking about borderlands elsewhere. Or more to the point, it argues against any search for type specimens.

A further liability of borderland in Adelman and Aron's model is what seems to be a sequence from frontier, which was "a meeting place of peoples in which geographic and cultural borders were not clearly defined" (815); to "borderland", referring to "contested area between colonial domains"; to "bordered land", characterized by a "shift from inter-imperial struggle to international co-existence" (815). The process is not cast as a manifest destiny, but one hears echoes of Turner's imperialist teleology in this narrative about the emergence of colonies and then nation states: "Thus, as colonial borderlands gave way to national borders, fluid and 'inclusive' intercultural frontiers yielded to hardened and more 'exclusive' hierarchies" (816). The words "gave way to" and "yielded" imply struggles that produce winners and losers, those who gain at the expense of others. And putting the critical terms in the plural generalizes this march of some over others. As Haefeli (1999:1223) asks, "must a trajectory always be from borderlands to borders?"; and, "can a region not go from a frontier to a borderland and back again?" What of frontiers, as in Egypt, China, the Middle East, the Andes and Mesoamerica, and unlike most of North America, that form along harsh ecological boundaries and remain stable for centuries?

Schmidt-Nowara also stresses that the trajectories of imperial expansion and interaction can look different depending not only on which empires one is talking about, but also on who is thinking about them. Cuban intellectuals, he notes, understood deep differences in the rationales and effects of Spanish versus British colonialism: although economic exploitation characterized them both, Spanish colonies pursued racial intermixing as a strategy—emphatically not the case for Britain. If religion was a key motivator for the Spanish, British colonists were driven more by commerce. Haefeli also disagrees with Adelman and Aron about the status of the Great Lakes region as a borderland in the centuries prior to the War of 1812; arrival of the British and thus emergence of a borderland, he contends, heralded an end to the complex negotiations that had characterized the region. Furthermore, Haefeli and Schmidt-Nowari both argue, Adelman and Aron make much of English language scholarship about America, and very little of scholarship in other languages about other regions, where articulations between peoples read and played out very differently.

For the regions bordering what would become Upper Canada, White (1991) is worth special mention as illustration of what a meticulous, region-sensitive unpacking of historical materials can produce, and of risks that attend specialized terms. Contra Turner, who envisioned a steadily advancing imperial frontier and an equally steady retreat on the other side, and thus the overall upperhand of empire, White argues that from 1650 until 1815, in the Great Lakes region of the *pays d'en haut*, there existed a particular situation between various

natives and European settlers in which no side could achieve a decisive advantage militarily or politically. On this leveled playing field involving peoples who were radically different in their cultural traditions, politics, language and senses of history, there emerged what White calls a "middle ground" of uneasy, often violent accommodation in order to achieve a common ground where productive interaction, especially trade, could occur. It was a zone where accident and contingency led to invention and convention, which in turn created new purposes, and so on. Also characteristic of this zone was a "willingness of those who created it to justify their own actions in terms of what they perceived to be their partner's cultural premises" (52), even to the point of advancing deliberate misunderstanding where this proved expedient. Such emergence depended substantially on new generations being born into this inter-cultural conjuncture, who were thus not identical to any one side in isolation. The resulting space was complex, unpredictable and often contradictory; it expressed life lived from the ground up, and with only a bit of ground in view at any moment. An "advancing frontier", in contrast, presumes to see both the wider country and where it is headed. Seeing "advance" isn't merely teleological, of course, but depends for its teleology on looking backward from the imagined end point (as the inevitability of "bordered lands" also seems to do), and also on assuming that because the end point supposedly came to pass, things were always headed there. That, in turn, presumes a developmental and narrative

structure, and either fits on-the-ground contingencies, relations, and perceptions into that mould, or if they don't fit, filters them out as noise.

If one follows Limerick's view that frontier comes loaded with opposition, and openings for some that mark closings for others, then it is an awkward choice of term for the kind of unpacking White does. But a major lesson of White's study is that analysis of any border zone—however called—must be grounded in time and place. White's portrait of unfolding relations in the Ohio valley between 1650 and 1815 is not intended as a template for understanding border zones elsewhere—a mistake by those who apply the term "middle ground" without acknowledging the grounded specificity of White's argument.[24] Looking at negotiators in Pennsylvania up till about 1750, for instance, Merrell (1997) demonstrates that frontier space was not everywhere marked by the same kinds of negotiation or the same ultimate goals. Where White's middle ground was a place where negotiators looked past differences in order to eke out a common ground, Merrell portrays a space where natives used negotiation to maintain

[24] Wagoner, for example, describes frontier settlement practices involving Lakotas in what is today Bennett County, and notes how recent ethnohistorical approaches to a middle ground have helped challenge models based on facile dichotomies between self and other. Such studies, she says, "locat[e] the field of analysis in fluid interstices" in which "processes of accommodation, assimilation and acculturation become salient"; the approaches "highlight moments when groups in early contact situations are forced into tenuous alliance through 'a process of creative, and often expedient, misunderstandings'" (1998:141). The problem is certainly not that White succeeded in inspiring challenges to previous analyses of cross cultural interaction over time, and recognition of fluid interstices, creativity and expediency pinpoints an aspect of White's continuing relevance. But the term "middle ground" should be applied very carefully, especially when quoting White as Wagoner does. One should remain sensitive to the extraordinary historical specificity that locates his research in the Ohio valley and nowhere else, and which is a sublime achievement of that book. That sensitivity isn't obvious, for instance, when applied to Lakota without any reference to White's central proposition that the middle ground emerged in the absence of a military upperhand.

Another way of saying this, perhaps, is that there are two senses of the term "middle ground": one that appreciates all the subtlety and specificity of the term as White conjured it, and another that is much looser, a cover word for whatever generalities may be gleaned from White. The problem with this second term is, it is not always obvious that this is the intended meaning, and if it is, those generalities are not enumerated.

distance from non-natives, and where the overall trajectory on the other side was not persistent misunderstanding of the "other", but long run failure to overcome prejudices inherent in the "self".

What any of these terms for emerging relations mean about a given region must also account for who is meaning it. White's analysis, for example, is not only specific to the Ohio valley, but also a function of the specific—mostly written, largely colonial—materials he uses. As Trigger (1982:11) points out, analysis that relies on colonizer documents easily mobilizes the same biases inherent in those documents: the blind spots, the willful omissions and the exaggerations—a charge often enough leveled at Turner. Using different evidence, including substantial emphasis on Ojibwe oral traditions, Chute (1998) extends the notion of a middle ground in Sault St. Marie into the early twentieth century. Indeed, she argues that prior to 1830, a middle ground in White's sense did not characterize the Sault. "Relatively untrammelled by external laws or social mores, it conformed poorly to modern frontier social models, for it fitted neither the image of an exclusively fur trading hunter-gatherer society, nor that of a cohesive multiethnic community similar to those identified by Richard White" (272:n1). Although Chute does observe a deterioration of supposedly equal relations between natives and non-natives during the nineteenth century, she also argues that from the Ojibwe standpoint, equality and respect were still understood to be the goal of negotiations; this was not lost with the dissolution of a middle ground. Kugel (1998:199) makes a similar point:

> Unlike the American public, the employees of the Bureau of Indian Affairs, and Christian missionaries and reformers, the Ojibwe at the century's end did not contemplate their impending demise. They did not see themselves as vanishing. They did not see themselves as a conquered people . . . nor did they consider their culture and belief system as deficient to those of the Americans and in need of replacement.

And the Ojibwe, Kugel goes on to observe, did not see their fundamental relationship with the Americans as having changed in the wake of shifting politics; such shifts "did not alter their insistence that they had created a reciprocal political relationship between equal partners" (1998:199). In this sense, White's model of a middle ground, based on the disappearance of equal relations, under-represents a Native perspective.

Much more can be said about the language used to analyze border areas, however conceived. Two more brief points will suffice. First, just because current analytical sensibilities prefer to conceive of frontiers as zones of complexity rather than straightforward lines in the dirt, doesn't make the line metaphor inappropriate. At certain times, notably the War of 1812, provincial boundaries hardened to a saber edge, one that slashed, retreated and lunged with the convulsions of battle. Lines don't get any starker than when opposing armies face off across a river, where movement across that line defines invasion and the start of a war. Recognizing complex relations in the zones leading up to that river does not detract from the significance of the line as such or the act of crossing it. And whatever present-day preferences of terms and concepts might be, one should credit natives of an earlier society and time with a capacity to say what

they mean with a reason for meaning it, as when William Robertson writes to John Askin on March 26, 1792:

> "It is said that the Americans will *insist* upon the posts as the means of enabling them to chastise with effect the Indians; while on the other hand, there appears no disposition *here* to comply with such a requisition—at the same time a new line has been suggested for a frontier between the Indians and the Americans…" (Citied in Quaife 1928 vol.1:408).

The other point touches again on the issue of ubiquitous application of a term. Reacting to overemphasis on the divisive, isolating aspect of border, the current tendency is to stress permeability.[25] Permeability, of course, like division and isolation, is a heuristic, a way of framing something in order to draw attention to particular features. Given that frame, one focuses on the ways in which no society is ever hermetically sealed against its neighbors, and that even aggression against intrusion is a form of contact. Stressing this point brings useful attention to the complex processes by which neighboring societies negotiate their co-existence; it reveals, as critics of Turner have done, what gets hidden by imagining hard lines representing isolation, rejection of the "other", or a line of advance of A over B. At the same time, categorical emphasis on permeability can obscure moments when exclusion and reduction to schematic simplicity are salient characteristics and even engines of change. The degree to which one might generalize permeability depends, again, on the particular problem being studied, and also on what historians have called scales of observation.[26] Given

[25] For the Great Lakes region see, for example, Bukowczyk, Faires, Smith and Widdis (2005).
[26] For discussion of this, see Revel (2010).

enough time depth or spatial expanse and a dedicated eye for cumulative evidence of crosstalk along a border, every border that ever existed shows abundant crosstalk. A different view, set of questions, evidence and conclusions may emerge by restricting to a much narrower scale.[27]

The liability of a term, in sum, does not reside in its limitations: definitive limitations on a term—particular configurations that hone meaning to a fine edge—are precisely what make the term useful. Liability arises, rather, in the quest for encompassing terms that pretend to slip their ties to context and concreteness and become general to a whole discipline. No term is perfect, or perfectly bad, for all cases. Even Turner's sense of a moving line of opposition between settlement and wilderness, for all its anachronisms, its blinders to syncretic adaptation, accommodation and continuity, manages to capture something about the sheer presence and influence of imperial ambition. While one probably wants to deconstruct its implicit notions of "event" and "narrative", the point is not to seek a retelling that avoids narratives and events, but to understand more about this unavoidably human mode of *making* sense, to shed light on previous narratives by making new ones that allow a deeper sense of what got said before, and why, and therefore—with a final nod to Turner—where present ideas came from.

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[27] A good example of relating scales of observation is Tsing (2005), who shows how local economic affairs in Kalimantan, and Indonesia more broadly, emerge in the engagement—the grip—between local perspective and global ambitions, particularly those related to natural resource exploitation that gets tagged globally as development. This ethnographic stance, and the metaphor of friction itself, makes sense given a project of "refusing the lie that global power operates as a well oiled machine".

With that backdrop, this dissertation uses the term "frontier" to suggest the various media and moments in which core ideas, beliefs, practices and traditions relating to proper conduct, represented by Upper Canada's new government, crystallized as part of a social and physical landscape. Wherever located geographically, on whichever side of a geopolitical border, frontiers in this sense are the moments when government officialdom pushed its standpoints and a world pushed back; as traction, such moments do not bring standpoint *to* the new scene, but are the very conditions of its emergence. Although the "media" just noted can in principle include anything—even the medium of a hangman's noose, a last line of defense guarding society's civilized edge—the present study focuses mainly on newspapers, advertisements and books; proclamations circulated through print and mandated to be read publicly; moralizing anecdotes, fiction and poetry; the creation of settlement land through the surveyor's scribe; and legal court rooms, jails and instruments of punishment, through which the most basic fundamentals of social living emerged from the vague half-light of background assumption into the spotlight of intense public scrutiny and remembrance.

It is worth stressing that a frontier in the sense used here does not map in any direct, conformist way onto the geo-political boundaries (however defined) of a new province. To be sure, ideas and ideologies always occur in space, are always located in place, bodies, social contexts and the constraints of sedimented or fragmented history, but nothing beyond habit or kneejerk assumption fixes those

locations according to legal jurisdiction, survey grids or militarized borders. Thus we find vectors of Upper Canadian moral identity being inscribed in prospective emigrants from England, Ireland, Scotland, France and Germany who, guided by well-informed emigration guides, may collude in their moralizing stance about work ethic and courage, proper practices and risks for settler women, religious obligations toward others, implicit civilizing missions, and transformation of property as a basis for acquiring rights to it. We note Upper Canada's vision of conduct in Loyalists south of the border, even those who never managed to migrate north; being Loyalist made them, in a sense, metonymical extensions of Upper Canada. Of course we also find the Upper Canadian vision of conduct inscribed in conduct literature printed in the *Gazette*, the source for which in most cases was newspapers from the States or overseas, or books, many of which were printed abroad. And we see Upper Canada's core ideals of conduct recreated in criminal trials in England, whose discourse underwrote criminal categories and legal procedures in the colony.

What makes these unities of moment, media and context a frontier is the traction in which they emerge. Refusing once again the "billiard-ball" notion of interaction, we should not imagine moments of engagement as a meeting of "things" or even standpoints that become visible under certain circumstances, as if they somehow exist invisibly in nowhere space until that moment: moments of recognition are the scene where, in and through which the thing recognized gets created. Exemplars, a particular kind of recognition, take form through the grip

of contrast to alternatives, something like how lexical choices along a "metaphoric pole", according to Jakobson (1960), depend for their meanings upon alternative words not chosen in that moment; without this implicit contrast, meaning would be impossible. Similarly, exemplars signify as such only through implicit contrast to other choices of conduct: meaning *is* the contrast. Witnessing the sentencing of Josiah Cutan for burglary is not just a condemnation of contemptible behavior, but a finely parsed delineation of what burglary was, how it was not robbery, or larceny. It was this fine parsing of the act that provided the sharp sense of society's edges, and of what lurked beyond. Frontier, for all its loaded history, evokes a sense of this grip of difference that "borderland" does not. It also evokes a sense of edges, and thus the project of pushing and defending core ideas, of defining precisely where conduct transgresses the threshold between acceptable and not—a project that was both self-conscious and urgent in carving out a new province. Exemplars, in being conservative rather than radical, in contributing to inertia *against* change and experimentation, are one aspect of frontiers where collective representations get worked out. Such moments of traction, we noted, do not correspond in any simple way to geo-political borders, which is not to suggest that frontiers, otherwise defined, wouldn't relate meaningfully to those borders.

Such a frontier, Tsing (1995:32) says, is not "a place or even a process but an imaginative project capable of molding both places and projects." Exemplary conduct practices relating to Upper Canada do just that: as concept, they imagine

a limited suite of places relevant to settlement, with dwelling house as moral center and beasts of prey stalking the periphery. They also locate the concept geographically, sometimes by naming and describing the place called Upper Canada, as dedicated emigration guides do, or by evoking a sense of shared virtues among Upper Canadian communities. Exemplary practices also imagine and help shape projects, from creation of the *Gazette* as a government mouthpiece, conceived in the future Lieutenant-Governor's moral vision for the new province; to failed projects such as the Queens Rangers, in whose imagined wake Simcoe envisioned the natural growth of settlement and moral structure. In each case, exemplary practices crystallize alongside the spectre of their shadow side, tokens of the disorder that administrators imagined as being kept at bay by frontiers of proper conduct.

Chapter 3
Roads to Upper Canada

This chapter provides a snapshot of circumstances on the ground leading up to and during the earliest years of Upper Canada. The point is not to be comprehensive or even balanced, but to establish context for a discussion of certain institutions and events in subsequent chapters. Because we are concerned here mainly with British-derived notions of conduct, we likewise highlight British threads of influence in areas that would become Upper Canada. After noting a few canonical landmarks in this process, we briefly survey the criminal court system, which will set the stage for the burglary trial explored in Chapter 5.

The chapter then suggests a sense of how plans and unknowns might have looked to those who participated in forging the province. What ideas and practices did people arrive with, and how did these help constitute what they saw and shape what they did? How did this same legacy of practice help produce (rather than just recognize) obstacles and demand unforeseen and perhaps unwanted adjustments? I try to get at these issues in two ways. The first, based largely in the abstract, considers the socially and conceptually loaded idea of "empty land", as settlers and administrators alike often imagined frontiers.

The second window onto these issues, grounded more in the concrete words and actions of early Upper Canadians, finds a gap between the province's

frontiers (physical, demographic, institutional, ideological) as understood and enacted by government authorities on one hand, and by non-elite, more locally-tuned settlers on the other. Drawing on insights from de Certeau, I suggest that the former, which one can imagine as power imposed from the top, owed much of its visibility and structure to misfit rather than a more straightforward capacity to impose. It was not just the subordination of ordinary settlers, or even their resistance, that crystallized the visible forms of social prescription, although these occurred too. More fundamentally and pervasively, prescriptions expressed unease, even jitteriness, about limits to how effectively or far the diverse momentums of a real population could be brought into alignment with the formal purity of Britain's moral system and constitutive hierarchies.

3.1 Road to Upper Canada

The new province of Upper Canada materialized through the Constitution Act of 1791, which divided what had been the province of Quebec into a lower and upper province, defined in terms of position relative to the headwaters of the St. Lawrence, with the Ottawa River serving as the east-west divide. In the creation of any new territory, of course, a great deal is not new, but expression of deeply-rooted assumptions, cultural lenses and filters, articles of faith, habitual practices, and specific threads of intellectual lineage. One of the difficult and defining aspects of Upper Canada was that these various elements were diverse, not

homogeneous, despite enduring attempts by the new government to imagine it otherwise and to force that imagination into reality.

Starting points are always arbitrary, of course, but a convenient one for the story of Upper Canada is the Royal Proclamation of 1763.[28] Its conditions helped shape the future province in several ways. First, it restricted the sale of Indian land so that only the Crown could buy and dispose of it. On one hand this inhibited (but did not actually prevent) sales between individuals, unmediated by the government. One supposes that had this inhibition not been in force, settlement in future Upper Canada might have looked quite different, and required some different measures to deal with, by the time the province came into being. At the same time, this condition gave the Crown the means for acquiring native land as needed, and a basis for negotiating Indian reserves, some of which would shape the landscape in Upper Canada. In other words, the proclamation's decree on Indian land gave the Crown an instant monopoly.[29]

Put in geographic terms, the proclamation decreed that all land west of the Appalachians belonged to Indians, and was thus prohibited for settlement. One

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[28] Just to stress the arbitrariness of starting points, this proclamation only makes sense in light of the French and Indian War to which it serves as a culmination of sorts. That North American war, in turn, can only be understood in the context of conflicts overseas, not only between Britain and France, but also Austria, Sweden and Prussia. And so it goes, with each "event" an outcome of myriad prior and concurrent influences on one hand, and of an analyst's narrative habits and choices on the other.

[29] Sir William Johnson, an Irish trader who was awarded a baronetcy for military services against the French, and who later married into Mohawk society, wrote in 1973 that "they were amused by both parties with stories of their upright intentions, and that they made War for the protection of the Indians rights, but that they plainly found, it was carried on, to see who would become masters of what was the property of neither the one nor the other." Cited in Calloway (2006:48). An irony of Britain's ostensible protection of Indian land, then, was that those supposedly protected saw it as a sham, and on top of that, the move angered masses of American settlers, many of whom had experienced Indian violence on the frontier during the French and Indian War and thought *they* were the ones deserving of protection.

notable effect of this condition, which sat poorly with settlers already deep into plans to migrate west and even more poorly among those already in place, was that it fueled the resentment against Britain that would eventually explode into revolution and then independence. That outcome, of course, would directly and profoundly affect the demographic and ideological make-up of the new province through waves of migrating Loyalists, whose loyalties then helped distinguish and shape attitudes and policies toward late Loyalists and others. More basically, the revolution also helped shape attitudes to Americans and the idea of democracy they represented. Errington (1987:36) suggests that "the best way to characterize colonial attitudes toward their southern neighbors is to describe them as ambivalent." No doubt some were, but the problem with that claim is the blanket category of "colonial attitudes", which ranged from staunchly pro-American to exactly the opposite. Indeed, much of the clamoring about Americans was over this lack of a united front.

The prohibition against westward expansion, whose line in future Upper Canada ran from southern Lake Nipissing to a point on the St. Lawrence just west of Montreal, also helped create an internal division between west and east. As Douglas (2001:2) explains, existing posts in the western regions, including Detroit, had no provision for civil government since they were, literally, guests of the Indians according to the new provision. It was the job of military commanders to provide rule, both civil and military. Relative isolation of the west deepened after the new province's inception—through the checkerboard

layout of crown and church reserves just east of the Detroit River, for example, which made communication with the east awkward. The natural inclination of settlers facing road blocks to points east was to find their hub in Detroit instead.[30] Douglas (7) goes so far as to suggest that this inward-looking identity along the river and the southwest shore of Lake Erie persists among some communities even today. Suffice here to say that division of west and east was not incidental but a pattern that got reinforced on multiple levels, from royal decree to the social geography resulting from land surveys, which also combined to separate the western frontier politically from Loyalist heartlands to the east.

The Royal Proclamation also set boundaries for Quebec, which at that time included all of present-day Quebec as well as Ontario up to the western limit just noted. It was from this vast territory that Upper Canada would later be carved. Although the proclamation stipulated that English civil as well as criminal law should apply, a few timely visionaries including Attorney General Charles Yorke, Solicitor General William de Grey, and James Murray, the appointed governor of Quebec, realized that uprooting the present civil administration also meant uprooting the seigneurial system, the embedded social system, and also the Custom of Paris which governed property inheritance (Calloway 2006:119)—in other words, wreaking social and political havoc and sowing widespread, grassroots resentment. Governor Murray, appointed to enforce a sweeping

[30] The John Askin Papers, a major window onto economic and social life along the Detroit River up to 1815, reveals a web of relations as people routinely worked, traded, socialized and married across the river, especially prior to the repossession of Detroit by an American garrison in 1796.

Anglicization of Quebec and initially committed to this task, deserves special mention for his advocacy of the French social cause, even against the stated interests of his own superiors. As Browne (2000)[31] observes, Murray's actions gave the succeeding governor, Guy Carleton, a precedent for ratifying the French civil system into law. So it was, in any case, that these French elements remained intact in Quebec, and would form a key contrast to Upper Canada when Quebec got divided a few decades later.

The next landmark on this fly-by tour, just alluded to, is the Quebec Act of 1774, which was in large part an attempt at damage control following the Royal Proclamation. Some of that damage—the upheaval and resentment that would surely have followed from implementing the letter of the Royal Proclamation in Quebec—was averted thanks to the wisdom and determination of Governor Murray, as well as Charles Yorke and William de Grey. The Quebec Act simply made these moves official: the civil and social system remained French, while English law applied to the criminal sphere. The other element of damage control with this move—an ulterior motive behind concessions to the French way and people—again derived from the impending blow-up wrought by the Royal Proclamation: with the drums of war now sounding on the near horizon, British authorities feared the prospect of an internal French population siding with Americans, and therefore sought to appease them. The real goal though,

[31] Cited online on 2 March 2011 at http://www.biographi.ca/009004-119.01-e.php?&id_nbr=2085&interval=15&&PHPSESSID=hpod4oehjlfl554kittjfnm4o6

suggested in a letter from Guy Carleton to General Gage on 4 February 1775, was not merely non-aggression from the French, but capacity to sign up their aggression for service against America. While the French seemed content with concessions made to them in the Act, Carleton reports that

> …the Gentry, well disposed, and heartily desirous as they are, to serve the Crown, and to serve it with Zeal, when formed into regular Corps, do not relish commanding a bare Militia, they never were used to that Service under the French Government…. as to the Habitants or Peasantry, ever since the Civil Authority has been introduced into the Province, the Government of it has hung so loose, and retained so little Power, they have in a Manner emancipated themselves, and it will require Time, and discreet Management likewise, to recall them to their ancient Habits of Obedience and Discipline. (Cited in Shortt and Doughty (1918:660).)

Another fateful component of the Quebec Act, which stoked the ire of Americans and Indians alike, was its retraction of the Royal Proclamation's promise to protect Indian land and rights to it. With this new act, the previous western boundary—beyond which supposedly lay Indian land—retreated all the way to the Mississippi and Ohio rivers, with the exception of patches around the Great Lakes. So much for protection, based either in word or in writing. American settlers, meanwhile, were incensed that Britain would unilaterally decree ownership of lands the settlers thought already belonged to *them*. As an act of granting concessions to an existing French settlement population—which dwarfed any British counterpart—the Quebec Act was astute. As an attempt at reversing some of the major problems with the Royal Proclamation, the Quebec Act could not have failed more massively. Indeed, that act would be named one

of the so-called Intolerable Acts, cited by Patriots as a basis for going to war against Britain.

Next, of course, came the Revolution itself. For present purposes, suffice to note its denouement in the Treaty of Paris in 1983. With this treaty, the western boundary of Quebec moved east again, this time to a line (the conceptual fuzziness of "lines" would generate quibbles and skirmishes over its exact location) running through the middle of Lakes Ontario, Erie and Huron, and through the navigable channels connecting them. It thus set what would become the western boundary of Upper Canada. The change of political scene south of the border also urged British Loyalists north in droves, which gave future Upper Canada most of its initial population and part of its political slant. Another condition in the treaty, noted in Article 5, was restoration of losses suffered by British Loyalists during the advance of Patriot causes:

> Congress shall earnestly recommend it to the legislatures of the respective states to provide for the restitution of all estates, rights, and properties, which have been confiscated belonging to real British subjects; and also of the estates, rights, and properties of persons resident in districts in the possession on his Majesty's arms and who have not borne arms against the said United States.[32]

Earnest recommendation, however, apparently did not amount to an order, even when it came from Congress. When this restitution failed, Britain responded by holding onto ports it already occupied on the American side of the new border (Douglas 2001:3). These minor aggressions would help escalate relations once

[32] Full text of Treaty of Paris cited online on 2 March 2011 at http://www.earlyamerica.com/earlyamerica/milestones/paris/text.html

again toward war in 1812, during which the international border migrated several more times. By the end, however, it settled back to the same place it began before the war: the boundary set by the Treaty of Paris.

In 1788, Lord Dorchester (Guy Carleton) issued a proclamation dividing the western part of Quebec into four districts, intended to facilitate administration of a far-flung population, which was growing from migrations following the revolution. With a largely French population concentrated in eastern Quebec and increasing concentrations of English-speaking Loyalists in the middle and western parts, the Constitution Act of 1791 took a further step toward effective administration by splitting Quebec into two provinces, with the Ottawa River as a divide between Lower Canada in the east and Upper Canada to the west. The act also held back from settlement a certain amount of land in every township, equal to two-sevenths of the total, for future sale by the Crown to raise money for the government and for the church (of England) (Douglas 2001:6). These reserves, so-called Crown and Clergy reserves, typically occupied a checkerboard pattern, except around more densely settled areas where they had to be clustered together in blocks on the township's perimeter in order not to interfere with existing settlement. Ironically, given this apparent deference to settlement, the checkerboard pattern proved much worse for social cohesion by actually preventing it. Where the large blocks of an assembled block pattern avoided settlement by design, the checkerboard, being laid out in more sparsely settled areas, inhibited dense settlement from forming. Sparse settlement in turn

made communication among farms difficult. As noted earlier, the presence of checkerboard patters just east of the Detroit River helped isolate river settlements from the rest of Upper Canada, encouraging them instead to look to Detroit.

In the Constitution Act, one observes sedimented influences of the several landmarks just reviewed. The division of Quebec into large districts under Lord Dorchester was part of a larger recognition, also addressed in the formation of two provinces, that Quebec was both vast and internally complex, and on both counts difficult to administer. The Quebec Act's recognition of French presence in what would become Lower Canada helped formalize distinctions with its Upper counterpart, where English models became the basis of both criminal and civil law; French settlers in what became Upper Canada, meanwhile, gave shape to social geography and attitudes, not least of all attitudes to the French. At the same time, that act was decisive in marching the American colonies to war, whose cataclysms *were* the birth pains of a new Quebec, and then of two provinces. If the Quebec Act thus served, in effect, as a declaration of war, all of these landmarks derived from conditions laid out in the Royal Proclamation of 1763.

Looking back on the Royal Proclamation from the view of what transpired, it would be tempting to say that it conceived a fatal discontent, recognition of a gulf so wide that only independence could redraw relations in a way that would allow the two powers to coexist as neighbors. But "fatal" would be a judgment not knowable at the time by those busy being angry and recalcitrant. Getting

pissed off comes long before getting massively organized about it. Humility about hindsight, of course, opens the door to subjunctive history: What if this had happened instead of that? What if Pontiac had won his rebellion? What if Prussia had been victorious overseas in the Seven Years War? What if, in achieving victories on both sides of the ocean, Britain hadn't been so devastated economically that they had to impose heavy taxes to recover their wealth—another major factor leading to the American Revolution? What if that revolution therefore hadn't occurred?

Such questions, either asked outright or invited in identifying decisive landmarks of history, seem to be valued[33] as a way of appreciating contingency and context, as assurance that the landmarks are genuine, or simply as a class activity.[34] Another potential use of the subjunctive is drawing attention to what goes into making a landmark, which leads one to notice not just that the generative force of things lies in their being irreducibly concrete, but also to

[33] A polemical Cambridge based group calling themselves "The Quadrangle", on the other hand, calls the exercise foolish and pointless by wasting time on things that didn't happen or are not the case, when more attention to things as they are would improve people's engagement with the world. As a self-help attitude to everyday life, which is really where the article goes, that may be. The article also tries its best to be impudent and polemical, and manages to be patronizing on top of that, and is not a fair example of serious thinking. But it does ask a certain question that makes an unintended valuable point. "What if Obama weren't black", it asks in order to stress the pointlessness of the question in real life. But this question, like others in the subjunctive, is one way of asking something that is poignantly relevant to "this" world: what is it that causes us, today, to recognize Obama as black? How is blackness constructed, assigned and used in cases, like his, where ancestry is ambiguous according to metrics used by the mainstream? How does that mainstream choice, or perhaps sleight-of-hand, relate to other social practices in the news today, like raising obstacles to gay rights? The subjunctive thus has great potential to raise questions about how we see things, and how we choose what questions to ask.

[34] A google search on subjunctive history, for example, brings up several outlines for questions appropriate to class activities in a history class. Separate, more serious consideration of subjunctive questions also takes place in philosophy, especially in work on modal logic, for which a key recent figure is Saul Kripke. Specialization of the discipline and its language, however, makes much of that work inaccessible to lay readers, who would probably not think to look for it in any case.

wonder about the possibility of making a different narrative out of the same concrete data. Narrative itself comes under scrutiny. On both counts, intimations of the subjunctive should humble anyone who seems too sure about their grasp of historical forces that connect the dots of data. Like the exaggerated wobbliness when balancing a stick held the wrong way around, slight adjustments can bring massive change—the more so when a narrative lines up a whole string of these hyper-finicky conditions so that each amplifies the next. The point, though, is not that what we see as having occurred is unthinkably unlikely, but that issues of likelihood evade a better insight about what concreteness means. This insight is not some algorithm for calculating chance or ranking material articulations by their importance, but recognition of infinitesimally minute connectedness whose totality would super-saturate narrative beyond all recognition. Such musings invite one to ponder the mystical processes of attention, recognition, exclusion and habit by which this elemental traction gets cast as narrative. We hear of Brock's fall at Queenston Heights, but rarely consider, compared to today's weapons, the crude targeting capacity represented by a musket ball, even in a case where parties aren't charging, on a hill, in the adrenalin frenzy of battle. The question "What if the musket ball had missed Brock?" is, in this discussion, not an invitation to wonder what else he might have accomplished in the War of 1812 had he lived, but the barest flash of a hint that coalescing so much minute detail into a coarse aggregate must come at a cost to understanding nuances. If

nothing else, the obscurity of those minute connections can discourage reading backward with a comforting sense of inevitability.[35]

3.2 Framing the wilderness

Although much was new to those who moved into the region of Upper Canada, comprehension always depends upon, and to a large degree reproduces the standpoints and inertia of whatever background brought the traveler to that circumstance. Indeed, it is engagement with difference—in this case, exigencies on the ground that fail to satisfy expectations and perceptions based in another place—that crystallizes as awareness of self. Such encounters helped guide, force, and grow the colony, sometimes grudgingly, into its own thing.

To say it differently, there is no such thing as *territorium nullius*, to use the phrase deployed by Chief Justice Marshall in several key US Supreme Court decisions, notably in 1823 and 1832.[36] This was first, as Marshall notes, because the land in the so-called New World was not empty of people prior to the arrival of Europeans, or even empty of people who mattered, but had been long inhabited by people with original rights to the land. Rights of so-called (European) discovery, or in our case, formation and settlement of a new province

[35] In the spirit of not over-valuing boundaries, I recall a cogent remark by Martin Pearlman, artistic director of the Boston Baroque period orchestra. In his introduction just before performing Beethoven's 2nd symphony, Pearlman noted that at that time, this *was* Beethoven's last symphony: he was not leading inevitably toward anything, let alone the radical stylistic innovation represented (in hindsight) by the next symphony, which ushered in the Classical style. One can only truly understand what creativity even is by appreciating that locus in time; a narrative of development overwrites—precludes—the radical creativity needed to achieve.

[36] These cases were *Johnson and Graham's Lessee vs. McIntosh*, and *Worcester vs. Georgia*, respectively.

in only broadly charted territory[37], do not annul rights that pre-existed those of the newcomers. More abstractly though, *territorium nullius* is also an impossible idea, a paradox of sorts, a victim of logic similar to the famous phrase, "this sentence is false." To imagine the land at all is to imagine it in specific ways, informed by particular notions of land, nature, wilderness, their relation to human society, their capacity to spark wonder and focus ambitions, their ramifications through metaphor, our own individual and familial history, our sense of and position within class structures, the broader history of our homeland, and countless other elements that constitute our perceptions, most of them below any threshold of awareness. In this sense, *territorium nullius* is a specific expression, or rendering, of lands that are brimming with history, people and conventions; the pre-figuring required to conceive of "empty" land is impressive indeed.

And yet, something about this or any "new" land *is* empty, of the newcomer at least, until the moment she enters. Or better to say, it consists of things beyond whatever experience had shaped her up till then, and "new", if one wishes to keep the word, refers to moments of running into those things that are beyond. In a climate of deconstructive criticism, too much is sometimes made of difficulties in describing these encounters, of the futile compulsion to circumvent radical subjectivity by postulating a truly independent object, or worse, the

[37] As Slattery (2005:50) notes, the effects of Marshall's rulings rippled across the border into Canada, and indeed through and beyond the Commonwealth.

"real". Perhaps one can simply grant that subjectivity can never be escaped, as a first step to accepting that it *can* be transformed, and that words like "real" and "objective" may usefully describe forces evidenced by the transformations they produce. Such forces are evident regardless of—or perhaps because of—our partiality when describing or understanding them. As noted in Chapter 1, we want to avoid proposing "reality" that is simply there, ready for newcomers to run into. A tenable sense of "real" is dialectical rather than ontological. It describes the capacity we have to discover that when we push the world, it pushes back, in large part *because* our partiality enables circumstances to overflow it. We run into things that alter our trajectories and raise bruises. A winning approach to those moments is not to think the bruises away by focusing sufficiently hard on navels or other distractions, but to adapt our subjectivities so that bruising gets reduced in the future.

This is the sense of real—of obstacles and bruising on one end, and sense of "power over" and "power to" on the other[38]—that I try to evoke in this dissertation. As far as possible, I speak not of kinetic obstacles that new

[38] Wartenberg (1992) uses these intuitive terms to contrast a sense of power as authority and subjugation on one hand, and inner capacity to act on the other. (These terms align roughly with Foucault's (1977) distinction between negative and positive power, respectively.) If both terms describe the active voice—someone acting rather than being acted upon—they differ in that power over is overly relational and hierarchical; it entails a passive person in the same sense that a slave receives directives from the master. (Foucault's insight, very close to Hegel's on this particular point, is that even passivity is an active choice, and not a necessary one, which renders the authority figure critically dependent on those who are subjugated—something that authoritative regimes do all in their power to hide.) Power to, while also relational in the philosophical sense that everything must be, describes moments when individuals—whether magistrates or poor tenant farmers—seize and use their own capacity to direct themselves. In the sentence leading to this footnote, both of these kinds of power, measured as evidence of shaping something according to plan, form a contrast to the unplanned, unwanted bruising that happens plans fail in their design, or fail to give advance notice of obstacles.

immigrants, from lawmakers to fugitive Loyalists to opportunistic American settlers, bump into and bounce off of according to the constraints of prior experience. I imply real insofar as obstacles or other sensations of an outer world emerge through and as partiality of the subject.

3.3 Walking on the frontier

In seeking an idea of what the early province was like, one plausible tack is to contrast the view from institutions and conditions of privilege on one hand, and views closer to the local, everyday ground of settlement and settlers on the other. A danger with this, perhaps reflected in a tendency to frame history too much in terms of landmarks of legislation, actions of politicians, bureaucrats, military commanders and other "notables", is that anyone else gets seen, imagined or ignored, and in this sense ranked, relative to a specific model of achievement.[39] Ordinary settlers, unendowed with privilege, are harder to locate and hear, and when located, they serve mainly to flesh out a framework already laid out by canonical landmarks. They are the details that may get added to the basic survey grid of canonical narratives.

Too much emphasis on privilege also overlooks considerable unease about life on the ground that lurked behind the swagger and righteousness of some elites. Through the optics of that unease, the intensity and repetitiveness of rules about

[39] In a study on criminal boundaries between Upper Canada and the United States, Murray (1996:341) notes that traditional histories of that border tended to be from the top down—the border as derivative of relations between states. A focus on the perspectives and agency of criminals upsets that top-down view by observing that criminals, no less than officials who were after them, used the border for their own ends, in their own ways.

moral conduct suggest a level of damage control, or at least of acting defensively rather than always adaptively—reactively rather than actively or even pro-actively. They reflect limits to the capacity of hierarchal authority to impose its visions of/for the province, and show that forces bubbling up from street level also imposed on *them*.

I use "street" here in de Certeau's (1984) sense that contrasts a view from high up a building[40], whose products are large-scale planning, mapping and top-down bureaucracy that exercises power to implement this vision, and a view from street level, which de Certeau (98) calls "a space of enunciation". By this he doesn't just mean agency relative to the designs and impositions of city planners, a capacity to react, resist, conform or defy. He evokes a more profound kind of subjectivity that is generative and original rather than a crystallization of top-down structure. Walkers of the street cut across boulevards, follow intuitions through deflections and detours, pursue their own interests and relationships, and in doing so, create stories and places for themselves that don't occur on any map. Crucially, this is not defiance or rebellion, although street-level acts can include those. Street level subjectivity does not reduce to an opposition with the city-as-object rendered on city plans. The power of street walking is its obliqueness to hierarchy, and the feedback-driven creation of unpredictable,

[40] De Certeau's inspiration for the contrast was a trip up New York City's Empire State Building—a view infused, no doubt, with a priest's sense of God looking down from above.

local-level places, relationships and narrative that follows. Mere resistance would not confound planning to nearly the same degree.

De Certeau's point, of course, was that these two should be better integrated in planning a city, that planning should somehow harness the native subjectivities of walkers in the city. My point is that in early Upper Canada, the recurrence of official proclamations on proper conduct, the rapid growth of articles on conduct (especially female conduct) in the *Gazette*, obsession over the political loyalty of its printers, and the compulsion for magistrates to enforce laws beyond their local means to do so, suggest that official views of conduct and how to produce and enforce it were often out of touch with local lives. This view goes beyond mere opposition, the sort where presence and enforcement of law would point to violations and violators, or resistance, or laziness, or contempt for the law; all such imputations express the administrative view of non-compliance. The provocation for that view, though, was not opposition but obliqueness, and a tendency for it to be misconstrued as such through attempts to impose conformity. Like de Certeau's street level, ground-level Upper Canada was enormously complex; exigent, adaptable, and opportunistic to a degree that stress on conformity filters out; driven by deflections and diversions of the moment; alive with lateral relationships; organized and re-organized by an accumulation of street-level narratives; and tactical where administrators were

strategic.[41] In part, what drove engagement of these different spheres was incompatibility between their worldviews, coupled with asymmetries of access, resources and broad-scale power to implement those views.

With this basic contrast between views of the land in mind, we may consider a transplanted legal system along two categories of relation. One is tension between levels of authority, in particular between rules coming from the top and local-level practices, often contrary, bubbling outward and upward from the ground. The former includes top-down proclamations such as Simcoe's "Proclamation for the Suppression of Vice, Profaneness and Immorality", printed in the first several issues of the *Gazette*. This proclamation represented a long tradition of enforcing Christian piety and conduct, both in Upper Canada and in the British colonial administration that preceded it. Looking into the future, one finds the publication of similar proclamations, including the "Proclamation for the Encouragement of Piety and Virtue, and for the preventing and punishing of Vice, Profaneness and Immorality", issued by King William IV and printed in the *Gazette* on September 23, 1830. Looking the other direction, a parallel stance on Christian conduct occurs in instructions to the new Governor of Quebec, James

[41] For de Certeau, strategies presumed that things had their place, defined through institutions, locations, rules, hierarchies, and an underlying separation of the "other". Relationships (business, social, governmental, etc.) are then defined in view of those proper places. Strategies also presumed a separation of subject (like a city) from its environment—insulation from sources of feedback that would soon threaten the order of things. Tactics, meanwhile, are highly sensitive to context and thus adaptable and opportunistic, and their localization exigent and fleeting rather than proper. Tactics also evade categorical "others": its distinctions among people are porous, expedient and flexible. In a sense, tactics are what would follow from reconnection to environment: they are fundamentally about feedback.

Murray, on August 13, 1763;[42] thirty years later, Simcoe would quote item forty of that instruction set almost verbatim in his inaugural proclamation in the *Gazette*. Such a durable government stance on Christian morality gets explained in another top-down source of law and order: Keele's *Magistrate's Manual* of 1835, which states that "The Christian religion, according to high authority, is part and parcel of the law of England. To reproach or blaspheme it, therefore, is to speak in subversion of the law . . ." (387).[43] Indeed, as the last chapter noted, Christian ideals wove society together not just in being wedded to law, but also through the grassroots role of teaching youngsters to read: because teaching materials were excerpts from Christian scripture, and ultimately the whole Bible, learning to read—and thereby achieving social and economic competence—entailed becoming Christian.

This prescriptive stance on conduct, urged on magistrates, justices and even the lieutenant governors to enforce, could look quite different from ground level. Murray (2002:75ff) records a court deposition about a magistrate, one Bartholomew Tench who, out walking along the Welland Canal on Sabbath, saw a group of laborers working on a house and tried to put a stop to it. He was, to put it mildly, unsuccessful. Not only did the workers, especially an edgy fellow named Joel Skinner, flaunt Tench's incapacity to enforce the rule of law and religion, but the latter's attempt at a follow through—charging the workers with

[42] For the complete text of these instructions, see Shortt and Doughty (1918:181-205).
[43] Accordingly, the MM (79) defines the crimes and corresponding punishments for blasphemy and profaneness, as well as breaking the Sabbath by working..

violation of and contempt for the laws of Sabbath—did not result in prosecution at court, only a bond of fifty pounds for Skinner to keep peace with Tench for a year. As Murray (76) observes, "this must have been little compensation for the public ridicule Tench had endured"—especially, as this dissertation suggests, given the particular significance of appearances discussed in Chapter 2.

Worth noting is the political and religious background of the two men: Tench was Roman Catholic and Irish, while Skinner was Protestant and a United Empire Loyalist. Murray probably underplays this aspect of the confrontation in saying "there are undertones of religious and ethnic rivalry here" (76). The idea of undertones doesn't capture the energizing, generative capacity such bitter historical rivalries can have, or their capacity to bubble up in myriad forms—so readily, indeed, that particular forms don't explain their flexibility or their source in a much broader antagonism.[44] The takeaway point of this example for the present discussion, though, is not the religious or political inclinations of two particular men, but the vulnerability of top-down law to forces that are multifaceted, oblique to hierarchy, and specific to a location, individual presence, and context. These forces might include differences of class, ethnicity or religion, individual personalities and rivalries, everyday economics, social connections, history of events specific to place, and so on. Such vulnerability is exactly what makes local practice messy rather than neat and categorical.

[44] Friction between Ireland and Britain occurred further up the administrative hierarchy too, perhaps most notably between judge and politician Robert Thorpe and various English rivals in the government, including then Lieutenant-Governor Francis Gore, an Englishman of considerable peerage. See Patterson (2000). Cited online on March 1, 2011 at http://www.biographi.ca/009004-119.01-e.php?BioId=37818.

Conspicuous defiance of order imposed from the top, of course, was just one mode of negotiating everyday life on the ground. Heavyweight prescriptions in the *Gazette*, the tendency to appoint a king's printer based on loyalty rather than training, the rapid blossoming of conduct articles (especially relating to female conduct) in the *Gazette*, and legal directives to enforce Sabbath and other conduct laws even when prospects for success were dim, evoke a rather black and white, all or nothing sense of loyalty to the British crown and the vision of proper conduct it entailed. From that vantage point, appreciation of American ways easily generated suspicion, and this brings us to the second kind of relation for considering a transplanted legal system: not as opposition between levels of hierarchy, but as obliqueness between them generated when those on top think oppositionally (as a spectrum between opposition and conformity) while those below are doing something else entirely much of the time. From that standpoint, the scene is complicated and messy, not non-conformist. It is messy and full of shifting, wayward impulses not out of uncertain loyalty, but out of settlers' sensitivity to where and among whom they are, and to the need to adapt quickly and creatively when things got confusing. From street level they are not wayward but nuanced, perceptive and adaptable, skilled at thinking on the fly, able to embrace difference and contemplate ambiguity without resolving them into contradictions, at least to a point.

At street level, even political loyalty was not so exclusive: loyalty to Britain did not crystallize as homogeneous opposition to America and Americans, or even

necessarily wariness of them. As Errington (1994:35) notes, it would be oversimplification to characterize early Upper Canada as "a bastion of British conservatism and the home of virulent anti-Americanism." That is, not everyone was a British conservative anyway, and being British conservative did not require that one be anti-American. As she explains, physical proximity to the United States, and a swelling American demographic in Upper Canada as waves of settlers (by no means limited to Loyalists or even late Loyalists) migrated north, makes a sweepingly oppositional view of relations difficult to sustain.

The moment of Britain's defeat in the American Revolution was, to be sure, a tense one for many Loyalists suddenly stranded in the States, a state of mind suggested in part by their massive and headlong flight north. Being Loyalist south of the border at that moment must, for many, have been like waking up in a hostile eagle's nest. Mackinnon (1995) relates the harrowing stories of New England Loyalist women in particular who, without husbands and some with children in tow, used their own wiles, devices, worldly wisdom and sometimes guns to run whatever gauntlets lay between them and the Upper Canadian frontier.[45] Men could have it just as hard, as the father and family of Richard Cartwright, Sr. did at home in Albany when in 1777, his son Richard Jr. was discovered to be a Loyalist. Father negotiated for his son and niece to migrate

[45] Worth noting, as a footnote for now, that these same women then acquiesced where needed, and against all evidence from their recent journeys, to prevailing models of conduct that associated women with domestic work and with a sensibility best suited to life at home. As Mackinnon notes, this conspicuous moment of agency, and the irony it held, was missed by British administrators and, until recently at least, by mainstream histories of the era.

north to British territory, where Richard Jr. became a leading entrepreneur, judge in the court of common pleas, and member of Upper Canada's first legislative council. The taint to family left behind in Albany, however, soon resulted in personal abuse against them, violence against their property, and finally their removal under guard.[46] It does not follow, though, that being Loyalist entailed a complete split from everything and everyone they had known, from relatives and friends to formative experiences in local, customary ways of life. It is worth stressing a sense, as Gourlay (1822:10) does, in which these migrants were "*Americans* who adhered to the royal cause" and "removed into Canada with their families" (emphasis mine). Connections worked in the other direction too, particularly in states that had adopted English common law as the basis of state law (214).[47]

Early travelers through the region confirm this sense of political and social complexity, and suggest not only that the province's early population—the "fabric" of Upper Canada—was substantially American, but that this worked reasonably well overall. Traveling through Upper Canada in the mid to late

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[46] See Rawlyk and Potter (2000), cited online on Feb. 25, 2011 at http://www.biographi.ca/009004-119.01-e.php?&id_nbr=2315&&PHPSESSID=b0befejm13l846ufcflg1fg616.

[47] Patterson (2000) offers a contrasting picture of relations between Upper Canada and America. "At the ideological level," he writes, "politics were therefore characterized by the noisy opposition of a rhetoric of republicanism and one of loyalty to government established by law, a conflict made the more intense by threat of war with the United States." (Cited online on March 1, 2011 at http://www.biographi.ca/009004-119.01-e.php?BioId=37818.) The stress on politics, though, suggests that he talks mostly about opinions and debates in the government. Even there, opposition to America and Americans was far from universal or homogeneous in nature. In 1817, dissenters in the government of Francis Gore pushed to open the international border once again to American immigration, and in Wise's (2000) view, would have succeeded if Gore hadn't prorogued the legislative assembly at that moment. (Cited online on February 26, 2011 at http://www.biographi.ca/009004-119.01-e.php?BioId=38587.)

1790s, Isaac Weld relates the strong presence of American settlers to availability of land:

> In the United States, at present, it is impossible to get land without paying for it; and in parts of the country where the soil is rich, and where some settlements are already made, a tract of land, sufficient for a modern farm, is scarcely to be procured under hundreds of dollars. In Canada, however, a man has only to make application to the government, and on his taking the oath of allegiance, he immediately gets one hundred acres of excellent uncleared land, in the neighborhood of other settlements, gratis; and if able to improve it directly, he can get even a larger quantity. (Weld 1799:235)[48]

Weld (loc. cit.) backs this up with at least a sense of statistics: "But it is a fact worthy of notice…that great numbers of people from the States actually emigrate to Canada annually, while none of the Canadians, who have it in their power to dispose of their property, emigrate into the United States…" Robert Gourlay supports this in his *Statistical Account of Upper Canada*. After estimating the total population of the province at 76,984 at time of writing,[49] he adds, "I have no data for estimating the proportions of persons of different ages and sexes, or the exact ratio of increase," the latter being "affected by accessions from Europe and the lower province, and still more from the United States." As explanation for this

[48] This impression of costly land in the United States, and the premium associated with better land, also comes across in Liancourt. Describing settlements along the road from Chippeway to New York, he writes: "The houses, entirely built with logs, are better constructed, and more cleanly than in most other parts of the United States.. The common price of land in this neighborhood is one pound, New York currency, or two dollars and half an acre…. Peculiar circumstances, a favorable situation, more extensive buildings, etc., enhance the price." (1799:224)

[49] Gourlay adds that this number should not be relied upon as exact but can suffice as general information. A footnote to that disclaimer adds that in 1806 one Mr. Heriot (probably George Heriot the artist and travel writer) estimated the total population at 80,000.

flux he evokes a sense of sheer opportunity awaiting anyone who decides to emigrate:

> A fair understanding of the real state of the country in respect to climate and soil, the cheapness of land, the security of titles, the value of labour, the lightness of taxes, and the protection of property, will, under the continuance of a wise and liberal policy toward settlers, promote emigrations, and accelerate the progress of population. (1822:140)

As to attitudes toward Americans, it depended on who got asked, and when, but attitudes overall would be more hidden than revealed by an image of rejection, bitter rivalry or other oppositional model. These had their moments, particularly during cataclysms like during the War of 1812, and to a lesser extent the rebellion of 1837. In the wake of war, provincial administration under Lieutenant-Governor Gore supported an imperial ban on land grants to Americans. But soon after the war, dissenters in the same administration thought the ban should be lifted, and Gore had to prorogue the legislative assembly to prevent it happening and also dismiss a legislative councilor who was granting oaths of allegiance to prospective American settlers. In these examples and many others, conflict over views of American attitudes was remote from the ground of ordinary settlement: they occurred among the social elite in halls of government, and they trafficked in ideology rather than individuals. Gore's rigidity about American settlers, Mealing (2000)[50] observes, depended on a Toryism that was

[50] Cited online on March 1, 2011 at http://www.biographi.ca/009004-119.01-e.php?BioId=38063.

"conventional and unimaginative" in its utter incapacity to see any form of dissent as legitimate.

Given Gore's heavy-handedness here and the absolutism that drove it, Richard Cartwright, Jr. offers a telling contrast case. As with Gore, Cartwright's loyalty to British government was immovable bedrock. Compared to Cartwright, though, Gore's loyalism seemed impervious to, and in that sense detached from people, events and consequences on the ground. And maintaining that loyalty was a practice that justified what could otherwise be considered shady means, as when he intercepted mail of apparent dissenter Robert Thorpe and even bribed the postmaster to pull this off (Mealing 2000).[51] Cartwright, on the other hand, was not merely connected to the world of people, places, geography, economics and demographics, but thought primarily in terms of these. It didn't make his loyalism any less strict, but it allowed his thinking and politics to reflect specific characteristics of Upper Canada, especially its contrast to the homeland overseas. In a letter to Isaac Todd dated 1 October 1794, Cartwright reacts to charges by colleagues in the legislative assembly that his opposition to the Marriage Act and the Judicature Bill showed his disloyalty to Britain. In indignant but careful language, he explains how Upper Canada's demographics, scarce population, vast territory, religious diversity[52] and rudimentary infrastructure simply can't

[51] Cited online on 1 March 2011 at http://www.biographi.ca/009004-119.01-e.php?BioId=38063.
[52] One source of insinuation about Cartwright's disloyalty was his criticism of the extensive privileges, including better access to land grants, enjoyed by Anglicans (notably those constituting the Family Compact) given a majority population committed to other faiths. Cartwright's views would prove well founded a few decades later, however, as resentment against the Compact grew violent. Although the

support everything that was possible or sensible in Britain, and that merely copying the homeland in every respect would only hurt the colony (1876:56-64). His loyalism, as ardent as anyone's, differed from Gore's in being empirically based, and thus in grasping that the best way to serve Britain's plan for a sound colony was to understand their differences. In a 16 June 1794 speech responding directly to the Judicature Bill, he notes that the British parliament also expressly condoned such understanding:

> There is no maxim more incontestable in politics than that a government should be formed for a country, and not a country strained and distorted for the accommodation of a preconceived or speculative scheme of government; that in all the several departments of it the arrangements should be calculated for performing the business of the department in a manner the least tedious and embarrassing to the public, rather than for conferring splendour and emolument upon individuals…. And as the British Legislature has left us unrestrained in everything that does not militate with the constitution they have given us, I apprehend we are at perfect liberty, in the present instance, to pursue this principle to its full extent. (1876:67)

On the matter of American presence, however, even Cartwright, grounded and empirical as he is, ends up tripping over his own prejudice. The following excerpt comes from a letter, dated 23 August 1799, in which Cartwright explains to the new Lieutenant-Governor of Upper Canada, Peter Hunter, the problem with American immigration to Upper Canada. First setting the scene, Cartwright

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immediate causes of the 1837 Rebellion were complex, including economic hardship brought on by bad harvests a few years earlier, and the cumulative immediacy of democratic ideals not only across the border but within Upper Canada's population, the discontent over second-class citizenry assigned to other religions was one site where factions crystallized. It was no coincidence that one of the main fomenters of the rebellion, William Lyon MacKenzie, was Scottish Presbyterian, a group that was not only among the religiously disaffected, but whose principles included commitment to the separation of church and state.

observes that while originally immigration was limited to proclaimed Loyalists, Dorchester in 1788 opened this up to include "persons, who, although they had not joined the Royal standard, were, however, well affected to the British Government." (1876:94). As a result,

> …a great portion of the population of that part of the Province which extends from the head of the Bay of Kenty upwards is composed of persons who have evidently no claim to the appellation of Loyalists. I will not disguise from your Excellency the opinion which I have always entertained, and on every proper occasion expressed, that this ought never to have been permitted. (95)

But Cartwright finds plenty to admire about Americans.

> It must be admitted that the Americans understood the mode of agriculture proper for a new country better than any other people, and being, from necessity, in the habit of providing with their own hands many things which in other countries the artizan is always at hand to supply, they possess resources in themselves which other people are usually strangers to; and boldly began their operations in a wilderness, when the dreary novelty of the situation would appal an European." (96).

"But", he goes on, "their political notions in general are as exceptionable as their intelligence and hardihood are deserving of praise." This is political, not individual, he stresses: "I am not, however, inclined to impute to such of them as emigrate to this Province either hostile or treacherous views." That is, he will impute it to ideas, but not to actual people: "It would be cruel and invidious to point this to individual instances." But then he calls this problem "a radical disease which it would have been easier to prevent than it will be to cure." Ideas like pure loyalty can live in the abstract. So can a disease, perhaps, but only after being identified—not just speculated about—in the flesh. Even an abstract

disease first needs bodies to ravage—in this case, real disloyal Americans, not just the idea of them (derived, ironically, from real people deserving of substantial praise for their settlement practices). In any case, his solution to this crisis of emigration, this disease-ridden exodus from the south, was to settle tried and true Loyalists among these Americans, to have at hand proper sorts "who have been bred up in habits of subordination, in sufficient numbers to discountenance that affectation of equality so discernible in the manner of those who come to us from the American republic." (97)[53]

Cartwright's unflinching loyalty to Britain, combined with his sensitivity to an empirical ground ignored or perhaps invisible to some of his elite contemporaries, makes him a telling figure here. He reveals the extent to which even a fair minded, scrupulously honest, profoundly Loyalist (in a visionary rather than merely stubborn sense), widely read, deeply principled, empirically driven politician can nonetheless depend on ideas that blind him to awareness of attitudes and distinctions within a settler population. This made it hard even for him to judge settlers on their own merits and identities.

A basic difficulty for Cartwright, and also for analysts looking back from the perspectives of today, is to find a workable balance between grounding in the local and particular on one hand, and capacity to generalize in a way that

[53] The Scottish doctor and writer, John Howison, levels a similar blast against apparent dilution of British hierarchy and order. "Many of the emigrants I saw had been on shore a few hours only, during their passage between Montreal and Kingston, yet they had already acquired those absurd notions of independence and equality, which are so deeply engrafted in the minds of the lowest individuals of the American nation." (1822:46-7)

accounts for that particularity and grounding. In Cartwright's case, a key generalization was loyalty to British forms, ideals and principles, which he imagined as necessary templates for a successful colony. For the colony to be successful, however, templates and ideas needed the reality tests of exposure to life on the ground in Upper Canada. They needed the local world to push back, to bestow bruises, and thus teach administrators about differences between the homeland and the colony.

One imagines a similar challenge for today's analyst, who must find plausible space between a narrative framed by canonical moments—acts of legislation, dazzling political figures, decisive battles led by inspiring commanders, etc.—and one where flow and coherence get hijacked by detail. Take abstraction and generalization too far and particularity becomes token detail in the implementation of analytical types, a fault leveled at anthropological theories such as functionalism, structuralism, and in at least some of its incarnations, practice theory as well. The charge might apply equally to the stubbornness of a top down colonial administration whose vision of social and legal order, in being cultivated abroad and also embedded in privilege, could be particularly resistant to alternatives.[54] Resist generalization too much, though, and description loses

[54] This was particularly true of the legislative council, whose seats were appointed by the Lieutenant-Governor, for life, and inheritable to eldest sons—an ideal recipe for durable structures of privilege. Indeed, this very structure of appointments to the legislative council, in duplicating various members also appointed to the executive council, foreshadowed the Family Compact, a close-knit, York-based Tory oligarchy that matured after the War of 1812. Note that not all scholars use the term, or even see it as viable. See Akenson (1984) for a rigorous assessment of the term's usefulness for the discipline of history. Among its problems is disparate and confusing usage, and also its questionable explanatory power; as Akenson suggests, a

itself in a kind of junkyard particularity, a flea market of observations whose only organizing element is the physicality of the page they all end up on.[55]

useful term is not easily replaceable by another. The notion of family may also mislead, given that most members of the Compact were not related by blood or marriage. On the other hand, these slippages of meaning also make the term suggestive rather than precise, which might have its own uses—in evoking centers rather than boundaries, rules and formal structures. There *was* a closeness among the eastern elite, and also a compactness to the society even without a formal compact. Faulting the term for lack of literalness would miss these more suggestive, figurative possibilities. For a look at how the term evolved, see Brode (1984), especially 142ff.

[55] Neither extreme is pure, of course. Even the grandest abstraction bumps into a world beyond, in the sense used above—through readers and audiences, through increasing stresses of shifting sensibilities about the world and ways of theorizing about it, and so on. On the other end, to the degree that language itself is always metaphorical, a set of connections to words and ideas beyond the immediate, particularity is never absolute.

Chapter 4

Provincial Guide Lines

Having devoted Chapter 3 to a selective historical overview of Upper Canada's formation, this chapter considers how its authorities imposed grids of social order over the new province. Looking first at the *Gazette*[56], we note some of its strategies for regulating conduct among its audience, particularly given its status as the province's first newspaper and its role as official mouthpiece of the new administration. In addition to frequent deployment of official proclamations, moralizing anecdotes, and bits of prose and poetry on the theme of proper behavior, the paper also regulated conduct indirectly through government interventions that shaped its political slant and chose managing personnel, both of which mobilized an assumption that proper conduct would follow from being properly British. These strategies targeted a broad range of conduct, but we focus here on three aspects: Christian morality, loyalty to Britain, and associations between female conduct and domesticity, all of which become significant later in appreciating a dwelling house.

Next, we consider land surveys, whose grid lines, largely insensitive to physical geography, did not describe land but established a conceptual and physical frame for the unfolding of settlers' everyday lives. Thus was

[56] In 1807, the new printer, James Cameron, changed the name of the newspaper to *York Gazette*, which lasted until a subsequent printer, Robert Charles Home, changed the name back in 1817. For more detail on name changes, see Tobin (1993:25).

reproduced, first in the abstract and then as immigrating bodies and social relationships, a view of land as passive, something to shape, fill, improve, and thereby own.

What I attempt throughout this chapter is, first, to evoke a sense that while the organizing frameworks of prescriptions in the *Gazette*, and of survey and boundary lines did not directly impose a notion of dwelling, they did reinforce the ideological substrate on which dwelling was practiced. Recognizing this substrate will help establish dwelling as a core moral practice, and the dwelling house as a core moral place. Second, I build further toward a sense of prescription and imposition as emergent contingencies of the moment rather than the more straightforward, top-down forces that administrative agencies apparently took them to be. Their worlds of prescription took shape against a world beyond the prescriptive view, one that pushed back when pushed and which thus gave the coherent structure of prescription its raison d'etre. Such moments were among the frontiers noted in Chapter 2: As suggested in the previous chapter, this "pushing back" ran oblique to formal order rather than simply against it, which made success in organizing (against) it fragile and often misguided rather than durable.

In part, these limits to control resulted from misperception: to the extent that a prescriptive view of order, based in loyalty to Britain, tended to register alternatives to that order as disloyalty (we saw this last chapter with charges of disloyalty against Richard Cartwright), it missed many nuances about locality

and, indeed, about the demographic constitution of the new province, which featured diverse backgrounds, sensibilities, skills and loyalties. The complex feedback this misperception produced helps illuminate a sense, suggested earlier, in which inertia *is* movement. If the inertia of English traditions and ideas was a kind of bedrock in setting up the new province, it is worth loading that metaphor with the dynamism of its literal half: as always in motion, sometimes explosively, through articulation along its myriad frontiers.[57]

4.1 Interrogating the Gazette

The task of measuring any aspect of the *Gazette*'s influence seems particularly daunting. Administrative machinery of the new province, the particular geometries rendered through survey, the mix of migrants that inhabited those spaces, their diverse reasons for coming and staying, the presence of politically contentious neighbors to the south, and the unpredictable, emergent, real world traction between strong personalities (not least Lieutenant-Governor Simcoe), were all uncharted waters, and chartable only as trace fossils. How does one gauge the influence of a single entity amidst such profound sea change? The present task is far more limited, fortunately. Beyond making a case for the

[57] This admittedly cheap attempt to haul a title word into the conversation does help expose the limited capacity of metaphor to excite new insights. In this case, "bedrock", "articulation" and "frontier" all conjure a sense of boundary that is a fact of analysis, not of nature. Zoom in closely and it becomes unclear where the rock ends and interface begins; zoom in still further and a whole new domain opens up that makes previous versions of boundary fuzzy and then wrongheaded. Defined in terms of boundary, bedrock is thus a consequence of resolution. As with bedrock, one needs a coarser level of resolution to see English traditions as having unambiguous edges—the level of a social class, for example, or a government legislative institution, or a court system, or even an individual who gets stereotyped as a monolith incapable of internal contradiction or capacity to adapt.

pervasive reach of the paper in early Upper Canada, my purpose is simply to glimpse the kind of inertia just mentioned: moments when tradition and prescription emerge as traction between divergent standpoints, habits, impulses and interests, with consequences to all parties. It is in such moments of traction, collected in these chapters and considered in aggregate, that the harmonics of dwelling are constituted.

A benefit of focusing on early issues of the paper is relative visibility of governmental purpose: through proclamations, speeches, official notices, statements of laws and other government business, early issues of this government publication were front-loaded with official standpoint about what society was and how it was to be achieved. These basic legal, social and moral building blocks would be especially clear in early issues for the same reason structure is most obvious in the building stages of any endeavor, when not yet obscured by facades, refinements and the blinding effects of established routines. An example of this clarity, which we'll study shortly, is Simcoe's proclamation in the inaugural issue, which charges the new population to uphold proper conduct, and to be vigorous in addressing those who don't. In view of this clarity and urgent sense of moral purpose, the words in these issues are hardly what Kesterton (1967:9), looking at the emergence of early newspapers in Canada, characterizes as "a pallid, neutral, harmless sheet without any vital role to play in the social and political life of the community."

Conspicuous lack of rival local papers no doubt enhanced this clarity of purpose. Not only was the *Gazette* the first newspaper in Upper Canada, it remained so until the appearance of the Kingston Gazette in 1810. Compared to later years, especially the newspaper boom time starting in the 1920s, absence of rivals ought to have translated into greater readership. It does not follow, of course, that everyone was reading or even talking about this newspaper. There were rivals—papers from Quebec, Albany, Philadelphia, Boston, and through these, excerpts from papers overseas—but none of them were local.[58]

4.1.1 Assessing audience

A defining aspect of any paper, of course, is its audience. In the absence of subscription lists, which might indicate names of subscribers and perhaps some clue about their occupations or other demographic details, guesswork and generalization become overextended in suggesting concretely whom the paper reached in its early years.[59] For the present purpose, however, which is to show a serious attempt by the new government to reach a wide audience with its moralizing publication, a good starting metric would be level of literacy at the time. Although contents would not be limited to readers in an oral-based society,

[58] Ironically, what early issues of the *Gazette* were particularly short on was local news. And for news from elsewhere, it depended almost entirely on other newspapers.

[59] Even if one had a full list of subscribers, of course, it would not reflect actual numbers of people who accessed the newspaper, since a single copy would disguise differences in sizes of household, and also a practice, perhaps common, of passing copies among friends or acquaintances. Such a list would provide merely a minimum number which actual readership could be assumed to exceed.

literacy at least estimates the size of conduit through which literary contents entered society.

Scholarship on colonial North America distinguishes two basic prongs of literacy, namely reading and writing. As Monaghan (2006) observes, the two were not merely different, but helped distinguish both gender and class given that writing was usually taught only to boys, that it involved a substantial apprenticeship (unlike reading, which could be taught at home), and that it thus selected for gender in filling some of the most publicly respectable jobs. More basically, notes Monaghan (404), it was a job-related skill whose gender-based teaching supported a pervasive idea that girls were to be groomed for life at home rather than out in public. Materials to teach writing, she adds (408), were also relatively expensive and hard to find, which would have further entrenched a gender divide where expensive resources in materials and tutelage for public vocations were largely reserved for males.[60] Monaghan and Saul (1987:88) point out, moreover, that writing was really about penmanship rather than anything to do with composition, which also sets it apart from notions of the "printed" word, as one reads coming off the press at the office of the *Gazette*. So we must be clear, first, that as far as perusing pages of the *Gazette* is concerned—as far as assessing its "audience"—writing is irrelevant.

[60] Monaghan further notes (406) that tutelage in writing sometimes, and increasingly into the 1700s, included girls as well, but that gender distinction remained obvious. Also see Koehler (1980) for a general discussion of associations between responsibility and power on one hand, and gender on the other, in 1600s New England. Even given a rise in the admission of girls into some town schools, differentiation of schools themselves helped resist change to the underlying gender role status quo. Schools that boasted tutelage in Latin, which Monaghan calls the true hallmark of a grammar school, were tightly restricted to boys.

Regarding reading literacy, several basic difficulties challenge the use of signatures and marks as measures of literacy and illiteracy, respectively. The assumed importance of the signature in assessing capacity to read follows from sequence of instruction: reading was always taught before writing, so it is argued that any amount of writing, including a signature, presumes a fair grasp of reading.[61] With the mark, one senses that lack of more definite evidence relating to reading ability has sometimes lead to hopeful over-interpretation. One indication that the relation is at least uneven, and possibly quite misleading, is that different studies that examine the use of marks for overlapping geographical area come up with dramatically different results. Looking at a sample of three thousand wills signed in colonial New England, Lockridge (1974) estimates that from the mid 1600s to the late 1700s, male literacy rose from 60% to around 90%, while female literacy, always lower, rose from 31% to only 46%. A study by Auwers (1980) focuses more narrowly on Windsor, Connecticut but expands source material to include deeds as well as wills, and shows that female literacy during the same interval rose from 27% to about 90%--on a par with men. Brown (1989:12), also looking at colonial New England, goes even further (though without reference to hard numbers) in suggesting that by the late 1700s, virtually all the Anglo-American population—men and women—were literate; by the early nineteenth century, he says, "difference between male and female literacy

[61] For an overview of argument for and against the validity of signatures as measures of reading ability, see Kaestle (1985).

rates became negligible". Such discrepancy shows that estimates may depend closely on the specific population being sampled, and also on the kind of documents used: if wills may be skewed by loss of a steady hand with which to write or by making the will before literacy got acquired later in life, deeds may be skewed in the other direction if regular prosecution of deeds encourages some, as Magnuson (1992:103) suggests may have been true of merchants and craftspeople in Quebec, to learn rudimentary writing for purely business reasons. Transacting a narrow bit of business, especially if routine, may not have required or motivated full literacy, either reading or writing. There is a further danger, suggested by the generalities of Brown's language on one hand and the concentrated availability of data in urban centers such as Boston on the other, that urban data gets used to represent much broader areas, including hinterlands that had far fewer schools and, as a result, fewer opportunities for girls in particular.[62] Boston, by comparison, would have been ahead of most curves in New England.

Another challenge to using the mark as indicator of reading literacy, demonstrated for England of the seventeenth century by Spufford (1981) and of the eighteenth century by Nueberg (1971), is that many women who made their mark (or chose to) could, indeed, read—popular fiction at any rate. This raises yet another issue with estimating literacy. As Davidson (1986:59) observes, one

[62] In Boston, for example, private tutors were readily available to teach writing to girls after usual business hours. Such opportunity, Monaghan (409) notes, would have been far less common or absent altogether in the hinterland, where even elevated social class could not have pulled a tutor from a hat.

must understand reading literacy not as something one has or lacks, but as something that can be acquired to many different degrees: being competent enough to read community postings about events, sales and runaways, or even popular fiction, does not mean the average person could read the treatises of John Locke.

Beyond these general problems in estimating literacy are problems specific to populating a new province with migrants from multiple directions. One major source of influx to the region, especially after the American Revolution, were Loyalists from New England, for which previously mentioned estimates, if vague, are at least germane. Another population source, invited in modest droves during the first years of the new province, was areas of Quebec that became Lower Canada. Literacy estimates once again depend heavily on urban data, mainly the use of signatures or marks in marriage registers. From that data, Magnuson (1992) suggests that by 1750, with few exceptions, all professionals, administrators, civil servants and military officers were literate; that artisan classes, for whom literacy was less critical, measured over 50%; and that the lowest classes—"commoners" is his word, which he associates mostly with rural parishes—had almost no ability to read or write. He notes that literacy varied also by gender—a detail that goes unelaborated in his study but is reflected, perhaps, in the singling out of "male" occupations for literacy tests.

Another source of immigration to Upper Canada was Ireland, heavier in the later 1700s, and especially after the 1798 uprising. On one hand, Fallon (2005)

notes an explosion of printing presses and publications in Ireland after 1750, and a concomitant rise in general literacy. Once again, however, literacy was uneven between urban and rural areas and between classes, and the political hardship, food shortages and high rents that many immigrants left behind, as well as the loathsomely poor conditions and oppression they assumed at the other end, suggests that immigrants during this time may have represented the lower end of a general literacy statistic.

Reading literacy between and among waves of immigration to Upper Canada, then, potentially varied to extremes. This adds to the difficulty of attempting hard estimates of literacy in any place, which soon founder on intervening uncertainties, from how to interpret a signature or mark, to questions about how specific waves connected back to educational circumstances and opportunities back home. But the discussion is sufficient nonetheless to grant that literacy, while varied, was both considerable and on the rise, particularly in larger population areas that the *Gazette* would have targeted. It must have been above the province-wide average in the early years in both York and Newark, the early homes of the *Gazette* printing office: not only were these the two main urban centers, but there was a predominance, Hulse (1993:v) notes, of government and military officers and their families to precisely these towns. We have seen that such people were likely literate, no matter where they came from.

Another aspect of reception, noted in passing earlier, distinguishes between readership, narrowly taken to mean those who are literate and read the paper,

and audience, which includes those who read but also those who received contents by word of mouth. A community where illiteracy may still have been common, and which in the early years probably had limited access to printed materials, would have depended significantly on the oral transmission of information.[63] And yet, perhaps Stabile (2002:11) overstates this in her attempt to put early newspapers in perspective:

> Such colonial towns were characterized by a strong oral culture. Information was shared in face-to-face encounters at common meeting places, such as assemblies, the market, the church, and the courts. In such an environment, the newspaper was of marginal importance for the transmission of information.

Perhaps the relationship between orality and early issues of the *Gazette* was more synergistic than this passage portrays. Mandate as government mouthpiece was one aspect of this synergism: the paper existed to reach as wide an audience as possible, and especially in a strongly oral society[64] this would not have been restricted to the literate, but passed along through established networks of information exchange. Indeed, the inaugural proclamation makes explicit use of such networks in commanding

> …that this Proclamation be publickly read in all Courts of Justice, on the first day of every Session to be held in the course of the present year, and

[63] For discussions of oral culture legacies, see Brown (1989) and Stabile (2002). On cognitive shifts entailed in the acquisition of literacy and writing in particular, see Ong (1997), Havelock (1963), Chartier (1989), and Eisenstein (2006).

[64] The underlying assumption is that oral habits do not end with arrival of printed content and a capacity to read it, any more than residential pattern gets fixed by removal to so-called sedentary land. (Will cite Darnell's accordion model—reference in a binder elsewhere this moment.) Aligning with the latter example, I would suggest that apparent emphasis on written forms in our own mainstream society gets dramatically overplayed.

> more especially in such of His Majesty's Courts, as have the Cognizance of Crimes and Offences; recommending the same, to all Christian Ministers of every denomination, to cause the same Proclamation to be read four times in the said year, immediately after Divine Service, in all places of Public Worship… (*Gazette*, April 18, 1793)

Illiteracy was not a bar: illiterate members of every congregation would hear the document read multiple times from the pulpit, as would anyone attending court.

With limited choices for reading material beyond a Bible,[65] a new newspaper was gold to the literate, both for its content (apart from government notices, it became a main source of intelligence about events overseas) and for the sheer pleasure that savoring written words could indulge. As Stabile observes (2002:86;90-91), eagerness for news tended to prompt close reading from the first word of a newspaper to the last. Monaghan (2006:410) echoes this view: "we should not underestimate the pleasure that even a limited reading ability can bring."[66] But the sudden appearance of a first newspaper would not rewrite overnight the social conventions of a time-tried orality; surely, the contents of a first newspaper became topics of everyday conversation too, to an extent not strictly or even closely tied to literacy.

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[65] Chief among these were the hornbook (a flat piece of wood covered with a page showing the alphabet, elementary syllables, and often a prayer, covered in turn by a transparent sheet of protective horn), and a psaltery (book of psalms), which were studied in that order on the way to reading literacy. After the psaltery, one studied the New Testament, and finally the entire Bible. Where this sequence of readings formed the core of reading instruction, one must understand reading as inseparable from religious education: to be a literate reader meant to be versed in Scripture. This inseparability of reading and religion puts the emphasis on Christian virtue in Simcoe's Proclamation into perspective.

[66] She stresses this for colonial women in particular: "reading must have provided one of the very few sources of satisfaction that was not dependent upon others." In most of her roles, Monaghan argues, a woman's role was to look out for the welfare of others.

And that is the main point here: although hard numbers on literacy are speculative to the point of irrelevance, it seems fair to conclude that reading literacy in early Upper Canada was considerable, for men and women, particularly in urban centers such as Newark and York; that it was on the rise; and that contents in the gazette spread well beyond the literate in any case. As a venue for solidifying a unifying, coherent notion of proper conduct at the front lines of diversity and difference, the *Gazette* had the promise of considerable reach into the population.

4.1.2 Overview of the *Gazette*

With only a few gaps in publication, most notably during the War of 1812 when American forces occupied York, the *Gazette* ran from 18 April 1793, when it first came off the press in Newark, until 7 April 1849, when the last printer, Robert Watson, died in a Toronto fire while trying to rescue type from the printing office.[67] Soon-to-be Lieutenant-Governor John Graves Simcoe first stated his plans for the paper in a letter to Henry Dundas of the colonial office, in which he laid out seventeen requirements for his upcoming duties in the new colony. Establishing a king's printer was number ten:

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[67] For a physical description of the newspaper, including size, pages, type face, format, and a general survey of contents by placement in the paper and percentage of space it occupied, see Stabile (2002:82ff). Generally meticulous in her details, Stabile suggests that one quirk in the paper was the location of local news, which she says comes early in the paper, immediately after the second masthead. At the paper's inception and generally for the first few years, local news came near the end immediately following a heading called "Niagara". Occasionally though, it moves earlier in the paper, and this oscillation is never explained by the editor. Placement at the end, as well as the relatively small size allotted to local affairs, may be another hint at the depth of oral practice: in a society that privileged face-to-face, local news would be old by the time it hit print. Appropriately, it was news from further afield, beyond the expedience of talk, that occupied most of the news.

> The Office of Printer seems to be of the utmost importance. It has been suggested to me that by annexing the Office of Post Master to that of Printer a sufficient Salary may be annexed to induce some person to expatriate ... But a printer is indispensably necessary; and tho' many may be found to rush into crowded cities, 1 see no likelihood that any Person will venture into a Wilderness and yet in the Infancy of this Establishment He will be found to be of the utmost Utility.[68]

One of the primary duties of such a printer would be circulation of an official newspaper through which the new administration would publicize laws, notices, proclamations and other government business.[69] But the full original title of the newspaper, the *Upper Canada Gazette, or American Oracle*, reflects a paper that did double duty as a source of non-government news as well, which got printed at the government-supervised discretion of the printer. In a nutshell, other news could be printed if there was room after providing for government needs, and if it was not anti-British. An introduction from Louis Roy, the first of many printers for the newspaper, gives a sense of this scope in a column on the last page of the inaugural issue:

> The Editor of this News Paper, respectfully informs the Public, that the flattering prospect which he has of an extensive sale for his new undertaking, has enabled him to augment the size originally proposed from a Demy Quarto to a Folio.

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[68] Letter from John Graves Simcoe to Henry Dundas, 12 August 1791. In Cruikshank, The Correspondence of Lieut. Governor John Graves Simcoe 1:43, 48.

[69] This official function of the *Upper Canada Gazette* continues today as the Official Notices Publication Act, which authorizes *The Ontario Gazette* as the official and mandatory mouthpiece for "a) all proclamations issued by the Lieutenant Governor; b) all notices, orders, regulations and other documents relating to matters within the authority of the Legislature that requires publication; and c) all advertisements, notices and publications that are required to be given by the Crown or by any ministry of the Government of Ontario, or by any public authority, or by any officer or person. R.S.O 1990, c.0.3, s.2" Cited online 1 August 2010 at: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90o03_e.htm

> The encouragement he has met, will call forth every exertion he is master of, so as to render the paper useful entertaining and instructive, he will be very happy in being favoured with such communications as may contribute to the information of the public, from those who shall be disposed to assist him, and in particular shall be highly flattered in becoming the Vehicle of Intelligence in this growing Province, of whatever may tend to its internal benefit and common advantage. In order to preserve the Veracity of his paper, which will be the first object of his attention, it will be requisite that all transactions of a domestic nature, such as Deaths, Marriages, &c. be communicated under real signatures

This sounds fairly open, but we'll see momentarily what happens when the intelligence this paper flatters itself to report casts the slightest aspersion on anything British.

Before turning to more specific issues of conduct, it is worth a pause to contemplate the movement of news at the time, so tough to imagine from the view of getting impatient when an internet link takes an extra few seconds to load. But then, they were actually used to letters and news taking a month or three to cross the Atlantic, plus extra time to go overland, plus still more time to set a printer and produce copies before spending even more time to deliver them. Just to put that general image into hard numbers, the following list compares the date of publication for an issue of the *Gazette*, and the original date of publication for news borrowed and reprinted from another newspaper.

Gazette publication date	Source publication date
May 2	February 23, Philadelphia February 15, New York March 2, Virginia March 28, Quebec
May 16	December 17, London

	February 7, London November 19, London
June 13	May 20, Philadelphia May 7, Philadelphia March 16, London May 16, Quebec
July 4	June 13, Albany April 1-6, unsourced April 4, letter from "Lisle"

These are typical delays for news from afar: news from south of the border takes a month or more on average, and never much less, while news from overseas adds at least a month. These delays are often compounded, of course, as the paper one borrows from borrowed it in turn from a previous source. One article in the May 16 issue of the *Gazette* credits an extract from a New York paper of April 8, which dates the story in turn back to January 22. The May 2 issue credits a New York paper dated February 15, for a story first put into print on December 15. And so on. The surface-level surprise with timing is local news, which is almost always dated the same day as publication of the current *Gazette*. This seems to be merely conventional, however, and not a measure of how quickly a printer could speed through the laborious process of type-setting.

4.1.3 Matters of conduct

Returning now to the explicit, government-sanctioned purpose of the *Gazette*, a key function of the paper was to provide guidance in Christian morality. Inaugural readers could have no doubt of this, given the "Proclamation for the

Suppression of Vice, Profaneness and Immorality"[70] which covered half of the first page of the first issue (and several issues following). The proclamation, and by extension the paper, intended to set the bar for moral conduct in the province by

> causing all Laws made against Blasphemy, Profaneness, Adultery, Fornication, Polygamy, Incest, Profanation of the Lords Day, Swearing and Drunkeness, to be strictly put in Execution in every part of the Province.

Only by having in mind the *Manual*'s (387) declaration that Christianity is part and parcel of the law of England, and also the interdependence of Christian texts and literacy, does one appreciate the force of this statement. Breaking these laws of the land was also an assault against God, whether one was literate or not. The web of connections between secular acts, religious overtones and English laws would seem to be reinforced by figuring in the religious rigors of acquiring literacy through Christian texts. To the extent that readers would relish every single word, as Stabile suggests, enunciation of these violations may have sounded more like warnings than prescriptions.

Those enforcing these laws, moreover, while not themselves pretenders to divinity, become agents of God when human law acquires both God's endorsement and alignment with God's purpose. This heady combination of God's purpose and God's agents ought to manifest as minimal violations of the law, or failing that, as efficient material and governmental force that violations

[70] See full document in Appendix B.

would mobilize. But in Chapter 3 we saw it manifest as Bartholomew Tench instead, who could hardly have been less effective at imposing anything, or even at communicating across differences of status, official role, religion, and the pesky legacy of English-Irish relations. Apart from status, which enforcement was supposed to enable, not inhibit, none of these elements were scripted to have anything to do with doing one's job as magistrate, which suggests a serious oversight with the script. Basically, it ran into a real world, and that world pushed back. And for all real-world people, from Tench to Joel Skinner to the higher-ups forced into damage control, *this* was frontier morality. On the frontiers between different people—in the traction one might describe, always slightly after the fact, as issues, quarrels, obstinacy, confusion, or even moments of agreement—morality (or other dimensions of conduct) isn't the stable, impervious, safe space of an abstracted system of thought, but its confrontations with people and situations that upset perfection enough for one to notice. Morality is struggle, not complacence. What deflected the struggle between Tench and Skinner the way it unfolded was not merely the bald fact of concreteness, though, but the tenacity with which Tench in particular stuck to his idealized model and overlooked contingency. That is to say, Tench's was also an impossible task, a consequence of sending a real person out to do an ideal person's job. Ideals never account for messiness, the kind of messy, street-level differences Tench ran into. As long as he stuck to that ideal job, he was bound to fail.

To take another example of conduct, this one more directly about loyalty to Britain,[71] consider again the introduction by Louis Roy, the first printer at the *Gazette* office, in the inaugural issue. Specifically, he states his hope that the paper may become "the Vehicle of Intelligence in this growing Province, of whatever may tend to its internal benefit and common advantage." Internal benefit and common advantage, read through the government eyes monitoring this paper, meant loyal to Britain or at least in no way disparaging of it. This implicit mandate is evident on one hand in letters from the lieutenant-governor's office to subsequent printers who strayed, and also, when push frequently came to shove, in preferring an untrained printer who was loyal over a trained one whose loyalties were suspect. An example of the former is a letter to *Gazette* printer Gideon Tiffany from E. A. Littlehales, Simcoe's secretary, expressing concern for the paper's political tone. Tiffany is therein advised that "your own good sense and discretion in a variety of intelligence would induce you to prefer that, if it appears to be true, which is most favorable to the British government." In case that hint was missed, Littlehales adds, "You may depend upon it that while you act uprightly and industriously, you will meet with His Excellency's support".[72] Working relations only got worse,[73] and Tiffany received further

[71] Everything overlaps not far below the surfaces of difference, though.
[72] Littlehales to Tiffany, April 1795. In Cruikshank, *Correspondence of Lieut. Governor John Graves* Simcoe, vol.3, p.346.
[73] On December 14, 1796, Tiffany inaugurated the "letter to the editor", where he lamented how travelers through Upper Canada found its roads "the worst in the world". And in the November 9, 1796 issue, while it was not directly anti-British, Tiffany's enthusiasm for American settlement progress, and Upper

reprimands until 1797 when, perhaps serendipitously, he got removed after a court conviction rendered him ineligible for public office. Frustrated with a printer playing too loose with the paper's mandate and its role as a vehicle for Upper Canada, the lieutenant governor hired one Titus Simons, who could claim no experience but whose loyalty could be trusted because he was a trained soldier and the son of a Loyalist. Tobin (1993:9) notes, as a further preventative measure in wake of the Tiffanys, the Executive Council seized more direct control of how government content got presented, notably by moving proclamations and other issuances from the lieutenant-governor's office back to the first page, where it had been in the early issues.

As with the blowup between Tench and Skinner, the way to understand these confrontations between the Tiffanys and the Lieutenant-Governor's office is that loyalty, as anything measurable or perceptible, was the traction of individuals in the midst of argument. It didn't have to be argument, of course, but it was, and it had to be something noticeable. Loyalty is decisiveness, not blandness or the invisibility of someone so consonant with a canon that no one sees. Loyalty, as an issue, had to be made issue of, one way or other. Also as with Tench versus Skinner, what propelled this issue of loyalty along was misperception of one side by the other. In Littlehales' 1796 letter to Gideon Tiffany, reprimanding him for even thinking of starting up a second, monthly paper on his own—for being

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Canada's status as "an infant settlement" by comparison, is just the kind of slant that put hives of bees in the bonnets of British officials.

independent minded—one cannot escape a sense that Tiffany had meant the proposal very differently than Littlehales heard it.

> In reply to your request relative to the publication of a Monthly Magazine, I am to observe it of the greatest importance that the Provincial Statutes should be printed and promulgated; in consequence of which, your whole attention is to be devoted to this most necessary object in conformity to the instructions of the 12th of November delivered to you by Mr. Clark…. His Excellency is much surprised in seeing an advertisement in the late Gazette you published respecting the scarcity of paper in Albany. I am therefore to signify to you, that in future, you must procure paper from Montreal, as you will not be permitted to get it from the United States.[74]

Given that Tiffany thought to write and ask about the project before proceeding, he does not appear secretive or scheming against his bosses, whether one defines them as individuals named Simcoe and Littlehales or the abstract institutions of British colonialism. Neither, judging from his ad in the *Gazette*, was he secretive about where he procured paper. He was apparently being pragmatic at a local level, and creative with his energy, which got understood as some willfulness against the colonial project. This grip between individuals skew to each other, what Sahlins might have called a poorly working misunderstanding, *was* the dynamic that drove matters onward, and eventually, as Tiffany started to dig in, toward his dismissal from the job.

4.2 On female conduct

Discussions have already shown that prescriptions about conduct, such as a proclamation about the suppression of vice and immorality or the feeble

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[74] Littlehales to Tiffany, 15 February, 1796. In Cruikshank, *Correspondence of Lieut. Governor John Graves Simcoe*, vol.4, p.196.

enforcements of a magistrate intent on stopping work on the Sabbath, point to a much wider, messier world than imagined in the tidy ideas of a self-serving elite class. This disparity between neat models and a complex and often unruly world finds no exception in constructions of gender: on one hand, female gender was in the midst of reconfiguration as part of a new delineation of public versus private, and as part of this shift, women also found themselves granted innate moral superiority that must be protected—in no small part by the walls of a dwelling house. On the other hand, a bounty of evidence in the *Gazette*, from notices of elopement to outcry over a widow remarrying too soon to daring jokes about prostitution, make it impossible to imagine a society of well-heeled Sunday-school girls and matrons. The paper's prescriptive wisdom spoke *for* some women and *to* others, some of whom apparently had better things to do than listen.

Morgan (1996:8-11) says much the same in carving out her study of gendered language in Upper Canada. Notions of male and female, she notes, were neither monolithic nor static but actively and unevenly contested. But it should also not be dismissed as merely political. The collected tropes of separate spheres, for all their monolithic hegemony, "were not just intriguing literary devices but were instead strategies whereby relations of power were produced" (10). To assign fault to inherent gender asymmetries in those relations of power would be to ignore "men and women of particular socioeconomic, religious, racial and ethnic backgrounds . . . division of society along the lines of public and private was an

important conceptual framework" (10). For many men and women, in other words, relatively monolithic division of society into public and private made sense, gave a baseline for everyday life.

Using a few examples from the *Gazette*, my point is to note the prominence of that view, and to note that while it was strategic rhetoric of power, it also genuinely informed the lives of many. At the same time, it smacks of wayward presences that gave the push to conformity traction, made it visible and necessary.

On the well-heeled side, the December 14, 1796 issue laments the passing of a true exemplar of conduct, one Mrs. Hamilton who possessed qualities that marked her "a patron to her sex, endeared her as a wife, a mother, daughter, sister, friend; and all to whom she was thus relate, knew well the affection and diligence with which she discharged their several duties." Two weeks earlier, on November 30, a poem targets the younger woman for whom Mrs. Hamilton served as an ideal. Charting a course into the future, the poem compares morality and purity to images of lilies and roses, and their loss to decay, repulsion and debasement. The image comes as a nice supplement to October of that year, where a separate section on "Subjects for the consideration of ladies" stresses delicacy of comportment, and also bashfulness—especially potent when leavened with modesty.

Consistent with the rise during this time of conduct literature devoted to women, and the eclipsing of counterparts aimed at men, the *Gazette* has precious

few entries on male conduct specifically. The following advice, from the April 5, 1797 issue, is characteristic of those that do: "Military skill and prowess have their honor, as well as use, and the laurels, gathered in the field of battle, have been thought to compose the fairest crown that can adorn the head of man." The author goes on to celebrate the true greatness of self-command, calling it

> …a road to glory that lies open to all. For tho' it be not in every one's power to ascent the slippery steep of honor, and reach the summit of a statesman's or a hero's fame; yet all may figure in the less splendid, but more substantial virtues of the Christian, and the man who cannot rule another's spirit, may secure the far nobler attainment of the two, I mean, that of ruling his own

The passage, perhaps having a little cake and eating it too, simultaneously exalts the place of a public statesman and a brave, violent hero through reference to laurels, fairest crowns and slippery steeps, while calling self-mastery the greatest virtue of all. This mastery is not embroidered with fine distinctions like delicacy, bashfulness, modesty, never mind lilies or roses, which perhaps fits the encompassing role of that mastery as head of a household too. It is in another address to women, dated March 24, 1798, that refinements of male character get spelled out:

The Young Lady's Choice

Let the bold youth, who aims to win me, know,
I hate a fool, a clown, a sot, a beau:
I loath a sloven, I despise a cit,
I scorn a coxcomb, and I fear a wit.

Let him be gentle, brave, good-humored, gay;
Let him, in smaller things, with pride obey;

Yet wise enough in great ones to command—
Produce me but the youth, and here's my hand.

She is thus channeled toward her ideal event of marriage by identifying ideals in a man. A gendered difference of implicature is telling: he gets told what to do *if* he wants her hand; it is merely assumed, as the unsaid (and unquestioned) foundation of what does get said, that she is to marry. This difference of voice, the one active, the other passive, is perhaps augmented further given that the author of the poem is male.

Counter examples are striking both as glaring presences when they occur, and for the consistency of their negative image. In notices of elopement, it is difficult to fathom just how the words were read in the day—perhaps it reads too much into a vastly different society to judge both parties as coming off badly. Surely though, given the explicit moral mandate of the newspaper, one does not find a 'patron to her sex' in reading,

> Elopement! Whereas Deborah my wife, eloped from my bed and board, and improperly resides with Charles Wilson, of this town inn-keeper, and refuses to return to the duties of her family; all persons are therefore strictly forbidden harboring or trusting her, as I will pay no debt that she may contract or occasion. *Signed, Daniel Buchner*

These notices—and they abound—occur in the advertising section of the paper, so they are not mandate in the same sense that body text might be. But we observed in the exchanges between Tiffany and Littlehales that the government did monitor content closely, including Tiffany's ad for paper from the wrong source.

These few examples, which can be supplemented by others throughout the early *Gazette*, are sufficient to show the basic tone behind constructions of proper female conduct. They existed, in positive and negative forms, as advice, anecdote and poetry, for the same reason Simcoe's proclamation did: it was needed, not because that is how women consistently were, but in an effort to make them that way.

4.3 Survey as settlement

Inscribing survey lines on the land did not, directly at least, make someone Christian, or moral, or female or male, or define their activity as domestic or public. They did not condemn burglars to the gallows or equate women with the home. But the deeper point of this chapter is that organizing frames intended for one narrow purpose resonate elsewhere, and thus help solidify categories of thought shared among different social activities and spaces. Or as Morgan (1996:11) notes about gender, "Even when . . . concepts of power are not 'literally' about gender, as in the areas of politics, diplomacy, and the military, notions of masculinity and femininity structure perceptions and become 'implicated in the conception and construction of power itself'." Boundary lines delimiting a settlement ghost onto the boundary separating society from wilderness and human from beast. The logic of containment implicit in survey lines, which first delimit and then subdivide, thus facilitate contrasts between

public and private, inner and outer, own lot versus other, home district versus others, and home province and nation versus foreign.

4.3.1 David Smyth

Turning to surveys themselves, the following map was produced in 1799 by David Smyth, the first Surveyor General of Upper Canada.

A Map of the Province of Upper Canada, David Smyth, 1800

Figure 1. Map of the province of Upper Canada, David Smith, 1800

Cited online on 17 April 2011 at: http://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~4040~330018:A-Map-of-the-Province-of-Upper-Cana.

One salient feature of this map is the array of straight lines and ninety-degree angles, two things not found in any natural landscape. By definition, therefore, these lines neither describe nor respond to the physical features a surveyor encounters. As with ink on paper, they impose structure on the blank canvas of geographical space, within which places have yet to be eked out. It is abstraction, not geography on the ground, which has agency. This assignment of agency is even more overt in the written description that accompanied the map, Smyth's *A Short Topographical Description of His Majesty's Province of Upper Canada in North America* (hereafter *Topographical Description*). The work opens with a quote from the Constitution Act of 1791, which set boundaries for the new province of Upper Canada by establishing

> …the following line of division…To commence at a stone boundary on the north bank of the lake St. Francis, at the cove west of Pointe au Bodêt, in the limit between the township of Lancaster and the seigneury of New Longueiul, running along the said limit in the direction of north 34 degrees west, to the westernmost angle of the said seigneury of New Longueiul; then along the north-western boundary of the siegneury of Vaudreïul, running north 25 degrees east, until it strikes the boundary line of Hudson's Bay, including all the territory to the westward and southward of the said line… (Smyth 1799:1-2)

It is the abstract line, not the landscape, which gets the active voice throughout. The line *runs*, and *runs along*, and even more emphatically, *strikes*. Indeed, the thing it strikes—which thus acquires the ontology needed to receive a strike—is another abstract boundary line. This pattern of animating geometrical abstraction continues in Smyth's own words as he describes a new province

> bounded to the eastward by the United States of America; that is, by a line from the 45th degree of north latitude, along the middle of the river Iroquois or Cataraqui, into lake Ontario; through the middle likewise, until it strikes the communication by water between that lake and lake Erie; thence along the middle of the communication into lake Erie; through the middle of that lake, until it arrives at the water communication between it and lake Huron… (1799:2-3)

So the description goes, continuing beyond this quoted passage until the province is fully bounded. In the above quote, the expanse of land and landscape defining the new province is once again passive, bounded *by* a line whose active voice continues through the various lakes and rivers, *striking* and *arriving* as it goes. Where in the previous quotation this line struck another line, here it strikes a communication by water—a laborious phrase for river. In this moment, a specified, located physical feature of landscape gets identified through its subjugation to abstraction, which uses not only a juxtaposition of passive and active voice, but also, again, the force of the word *strike*.

Where these boundary lines do not strike, meet or arrive at lakes, rivers or Hudson's Bay, they extend overland with utter disregard for features on the ground. To the north, for example, the province is bounded by "the 49th parallel of north latitude, extending due west, indefinitely" (3). The category of indefiniteness, no less than the formal purity of a line of latitude, treats landscape as a blank, like a piece of paper. Tellingly, the only spot on this definitive circumnavigation of the province where the surveyor's abstractions do bow to

local overland features is when they run into seigneuries near Pointe au Bodêt. Describing and acquiescing to previous settlement logic, Smyth observes:

> The object of dividing the province of Quebec at a stone boundary, in the cove, west of this point, was apparently in order that the seigniorial grants, under French tenure, should be comprehended in the province of Lower Canada, and that the new seigniories or townships, which were laid out for the loyalists, should be within the province of Upper Canada; the said stone boundary being the limit between the uppermost French seigniory (Mr. De Longueiul's) n the river St. Lawrence, and the lower new seigniory of Lancaster… (1799:6)

Consistent with the logic of settlement and laws of property based on improvement, it is not wilderness, but transformation of landscape through human labor, that produces a capacity for land to push back. Here, it pushes to the point of sending a survey marker out into the cove.

Perhaps one shouldn't make too much of these metaphors, for surely even surveyors, to say nothing of those toiling to carve settlement from a wilderness lot, would bump up against the physical conditions of a landscape. Settlers and administrators may be driven by ideology, but that doesn't mean blind: no one following a line would fail to notice themselves walking into a marsh, or off a cliff and into Hudson's Bay. In this sense the land does push back; indeed, several of these "lines", such as the banks of a lake or edges of a bay, do correspond to the landscape. But these metaphors that animate the abstract do deserve notice. First, this pattern of rendering abstraction active and landscape passive is part of a deployment of resources, including everything from people, money and institutions to writing materials and language, specifically intended

to *make* and administer land as property. If theoretical strains of the last few decades have generally debunked any notion of innocent language, the point is especially clear when patterns of language overtly mimic the logic underlying settlement and property: a basic argument of this dissertation is that ideology gets entrenched as much through harmonics as by institutional formulations and their administration.

Another aspect of this description and the acts of surveying and settling it implicates is its stress on containment. The new province was constructed, literally, from the outside in. The Constitution Act of 1791 begins by setting the boundaries of Upper Canada before addressing internal divisions. Further divisions, such as the renaming of districts and creation of counties in 1792, were later developments. Smyth's topographical description, as we saw, mirrors this chronology by setting the frame first and then moving to internal features. In volume 1 of his *Statistical Account of Upper Canada*, Gourlay presumes the same frame by insisting: "In sketching the Geography of the province, the first object is to ascertain its Boundaries" (1822:17). Natural as may seem this idea of establishing a perimeter (of a place, of a discussion, of an artistic canvas) before getting into details, it is certainly not the only way to imagine or encounter land, or to manage coexistence among different societies. Native groups had done without these abstract divisions for centuries, and even today, land negotiations between Native groups and the mainstream government often run aground on precisely this issue of how land is framed: as a blank sheet to be overlain with a

conceptual grid imported from somewhere else, and then transformed into something useful and valuable; or as something where decisions about land use derive from accumulated experience in and stories about that (rather than any other) place. A corollary, appropriate to the present discussion about early surveys in Upper Canada, is that even land that is imagined and constructed as empty, or as wilderness whose value resides in transforming it, is first of all made, and made in place. Although vitally connected to a legacy of experience overseas and in other colonies, Emptiness, and the abstractions—survey lines, lines of latitude, ninety-degree angles, rectangles, arpents, feet, lots, townships, districts—used to define, bound, and then fill a blank sheet is not a contrast to place but a specific practice *of* place. It is the concrete engagements of and in land that activate, make manifest, and to a degree reproduce the prior experience of land for the newcomers.

4.4 Preliminary sense of domestic

As a segue into the next chapter, it will help to gain a basic sense of what domesticity means. Despite careful parsing of a dwelling house in the *Manual*'s definition of burglary, which we visit in the next chapter, that source offers only a fuzzy notion of "domestic", and it must be inferred rather than read more directly. But the resulting approximation of physical and social space is a place to start: it provides something to expand later through a look at conduct literature.

In defining a dwelling house for the crime of burglary, the *Manual* uses the word "domestic" (the only variation of the word) just once, stating that "…though a person actually sleep in the house for the purpose of protecting it, if such person forms no part of the domestic family of the owner" (1835:85), then it is not a dwelling house. We saw last chapter that sleeping in a house or room had the capacity to transform it from a space that is merely owned or rented into a dwelling house. But this passage says that only family members (not defined) have this transformative capacity. This clarification in the *Manual* is part of a scenario where the owner of a house has moved in furniture with the intention of residing there, and has even taken meals and conducted "all the purposes of his business" there. It remains just a house, however, and not a dwelling house, as long as "neither he nor any of his family ever sleep there" (85). Domestic is thus aligned squarely with family, at least the sense of family relevant to the space of a dwelling house. The strictures about sleeping and family also apply to rented spaces. A rented shop, not connected internally to the owner's dwelling space, does not become the dwelling house of the tenant "when neither he nor any of his family sleep there."

A striking aspect of this domestic family space of dwelling, just observed in repeated stress on the absence of internal communication, is how completely the *Manual* severs it from surrounding spaces. The crime of burglary, crucial here because its careful description of dwelling is what defines the crime, does not apply to a rented shop that is attached to the owner's dwelling house as long as

"there is any internal communication" between the two, "though there may be a separate entrance from without to the part let off; as where the communication was formed by means of a trap-door and a ladder, which were seldom used, but the trap door was never fastened." And when the owner of a house rents out rooms in a house but "continues to sleep in it, no part of it then can be so severed by being let off to a tenant or a lodger, as to become a separate mansion-house.[75] But tenants do get to claim a dwelling house when "that which was one house originally comes to be divided completely into two separate tenements, and there is a distinct outer door to each, without any internal communication" (84).

This isolation of dwelling and domesticity from surrounding spaces recalls Blackstone's distinction between relative and absolute duties, which consigns the latter to the realm of individual (internal) governance because they are beyond the observation by anyone else. "Let a man be ever so abandoned in his principles", he wrote, "or vitious in his practice, provided he keep his wickedness to himself" (I, I, 120). This limiting of law to what is publicly observable simultaneously removes private spaces—individual conscience and private dwellings alike—from direct legal scrutiny and adjudication. In Chapter 2 I also suggested, extrapolating from Blackstone's distinction between individual rights and duties, that the purpose of a legal system that does not see beyond the social, but nonetheless depends conceptually on the existence of

[75] This is a synonym for dwelling house. Except in some uses where mansion seems to allude to the considerable size of a house (not the case in this passage from the MM), the two terms are completely interchangeable.

independent human nature, is to safeguard that essential but invisible nature of the human being through acute attention to what can be observed—public conduct, in other words.

A powerful symmetry emerges when this invisibility of private space, its coincidence with domestic space, invisibility of intention and conscience (these can only be inferred), and invisible human nature converge on a dwelling house. Symmetry only grows by adding notions of female to this mix, for in addition to a widely reproduced social alignment between gender, domestic space and a canon of domestic duties specific to women, there lurked a perceived natural alignment too. On one hand, a view of female "sensibility" that was promoted in philosophy and also through medical science's theory of nerves, held that women were more fragile, excitable, and susceptible to deflection, and thus unfit for public offices. At the same time, women were believed to possess elevated morality that made them ideal guides in the raising of children. Ignoring the contradiction of a mind at once pure and overly susceptible to wayward impulse, this twin view of women as unfit for public roles and as naturals in child raising lodges them rhetorically in domestic space both through stated roles, and also because these roles were supposedly "natural". Women thus endured a double naturalization as domestic beings: domestic space mirrored the invisibility of human nature, as protected through an emphasis on visible conduct; and women, as marked beings, were naturally suited for domestic space and duty in ways men were not.

Chapter 5
Of Beasts and Burglars

In 1792, a black slave in Detroit was convicted and executed for burglary. By various eyewitness accounts and his own admission, Josiah Cutan had broken into a private dwelling during the night and tried to make off with some smoked skins, rum and pelts. As noted previously, British law governed criminal cases in Upper Canada, and by its terms burglary carried the death penalty without the benefit of clergy.[76] To the extent that necessary facts were evident and that Cutan confessed to the crime before justices of the peace, the case was open and shut.

This chapter explores the outcome of the Cutan trial and specific words used to express its verdict, and more fundamentally, the conceptual framing required to understand them. In doing so, it revives overtones sounded in previous chapters, especially those related to prescriptive practices in the *Gazette*, to land surveys, to literature on conduct, and to ambiguous overlap between domesticity as family, as nation, and as woman. This resonance with other practices in other social arenas adds social depth to a charge of burglary, and in particular to words uttered during sentencing that did more than just end a life.

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[76] Benefit of clergy was originally a privilege by which clergymen, insisting that secular courts had no jurisdiction, could be tried for certain crimes by the more lenient ecclesiastical courts instead. Over time this benefit transformed into more general leniency for certain first-time offences. Especially heinous crimes, including burglary, never enjoyed this benefit: clergy were not granted exemption from secular courts, and the later sense of leniency for first offenders did not apply. For a general history of the benefit of clergy, see Baker (2002) and Briggs (1996).

If a guilty verdict on any high crime might be unusually visible against the humdrum of everyday legal process, two (probably related) features make this trial particularly apt as an exemplar. Cutan's conviction produced the first execution in newly minted Upper Canada; and where most cases are hard to extract as anything but brief summaries that name the accused, the charge, whether it was returned guilty or not and if so, the sentence, this one is readily available in full transcript form today, which suggests that its potential significance was both understood at the time and maintained since.

This case thus offers an extraordinary window on the inscription of proper conduct in and by legal institutions in the new province. The trial inscribed conduct "in" legal institutions by entering the case as precedent, as something that helped comprise the larger text of legal procedure where it could then be accessed, reviewed and applied in subsequent cases. It was an inscription "by" legal institutions in two senses. First is the straightforward sense that legal understandings of crimes and culpability, what counted as evidence, what got heard or not, and how a trial proceeded from its opening before a judge through to conviction, sentencing and execution, had real force as expressed in grounded social life. In the language of a previous chapter, this response to a specific crime by means of a trial, and its culmination in the pronouncement and execution of a death sentence, revealed a world that pushes back. This pushing also exposes some of the stark asymmetries upon which social order was predicated. If asymmetry is generally presumed as an engine of both inertia and

transformation in practice theory, the asymmetry between the compelling force of law and those being compelled to the gallows is extreme by any measure. A second, more elusive sense of law's "agency" emerges during the verdict and sentencing. The event becomes precedent for the future, but it is also an act of interpreting backward, of retroactively condoning a specific interpretation of everything that led up to that moment. In that condoning, previous trouble spots—inconsistencies, unanswered questions, alternative interpretations, doubts about particular bits of evidence—are brought into line with the fateful narrative, not by resolving them, but by overruling them.

5.1 The transcript

Before jumping into the case itself, it is worth pondering for a moment what may get lost across distances of time and context, and through elisions or inaccuracies between the full detail of a trial and what ends up in a court transcript we read today, even a full one.

One filter in transcripts from the court of Oyer and Terminer (hereafter O&T), where Cutan was tried, is pervasive use of the third person. There is no first person pronoun, even in the reported speech of witnesses. To take just one example, the witness Ralph Pilon, after being sworn in, conveyed "That about the eighteenth day of October last he resided at Mr. Robert McDougall's", and that after being called upon to assist in catching a thief, "he went up into the garret of M. Joseph Campeau's store", and that "on his way to the said house he

observed a bag lying on the road." (Cited in Riddell (1926:350-351). If it weren't already clear that Robert's "I"s are being transformed into "he" and "his", the "said house" would confirm that even a complete transcript does not mean verbatim quotation: all original words, including points of reference, have experienced the purifying, objectifying rigors of court language. The second person (you) occurs in three spaces: when the court asks a witness what "you" saw, heard, etc.; when the judge, charging the jury to go and deliberate, reminds them that the conditions of burglary "have been proved to you"; and at the very end, when the judge tells Cutan, "you have been found guilty by the Verdict of twelve impartial men". The complete absence of "I"—even in the judge's sentence, which gives all agency to "the Court" and "the Law"—evokes the instrumentality of the court system, and the role of individuals, however notable in name, as place holders in that system.

Looking beyond this transcript and case to other charges and verdicts in the O&T court, correlations between a given crime and its sentence are flexible to the point of seeming haphazard. Crimes also attach to various, sometimes competing descriptions, as when petit larceny is the charge even though the amount stolen exceeds the threshold of grand larceny, or vice versa. Perhaps sloppy record keeping is a culprit here, which Holloway (2009:PC) suggests was common in the early days. Or it may be, as Philips (1992:258) notes for evidenciary standards in a modern courtroom, that sometimes "fact finders do arrive at rather different decisions regarding guilt from those reached by others who have access to

different information and who are unconstrained by the interpretive principles imposed on the jury."[77] In any case, a problem for modern interpretation is that reasons for all this variance in O&T transcripts tend to go unstated. And when real detail comes along, as it does in Cutan's trial, it entices partly because lack of comparative cases make it provocatively hard to see in context. And perhaps, as Stoler (2009:1) shows for other archives, hazy associations also suggest that tight order and coherence were something of a conceit anyway. It would be a conceit on the part of early Upper Canadians whose faith in the social order they arrived with blinded them to local difference and a need to adapt; and perhaps a conceit on the part of someone looking back on the early province without an appreciation for the extent to which the administration did adapt, or try to, even if those efforts sometimes backfired. Without access to greater detail, there is little way to distinguish among these possibilities.[78]

What I hope to suggest is that while consistency in sentencing remains elusive, and so too an algorithm for the legal implementation of proper conduct, Cutan's

[77] A myth of the legal system, in other words, seems to be that having access to the same information ought to produce a consistent verdict. In this trial, before sending them off to deliberate, William Roe reminds the jury of all the facts in the case, and stresses that they are both unambiguous and sufficient for a guilty verdict. Thus instructed, he tells them to "consider of the evidence under this view of the Offence, and discharge your consciences". This myth of facts speaking only one way, of course, ignores any sense in which facts are made rather than found, and can be made differently given different social, cultural, historical, personal backgrounds.

[78] For further description of such adjustments to the laws of England, see various acts in the Upper Canada Statutes, including: Fourth Session of the Second Provincial Parliament, Chapter I, p.86ff: *An Act for the further introduction of the Criminal Law of England into this Province, and for the more effectual Punishment of certain offenders*; and First Session of the Third Provincial Parliament, Chapter IX, p.95: *An Act the better to adapt the establishment of the Court of King's Bench to the present situation of this Province*. This fine-tuning of criminal procedure to suit Upper Canada, of course, reflected the more general purpose of statutes in Upper Canada, which reacted to what worked and what didn't, and adjusted to perceived trajectories of change. On the emergence of separate identity in Upper Canada relative to British colonies more generally, see Esten (1836). On the specific adaptation of Blackstone's Commentaries to the situation in Upper Canada, see Leith (1864).

trial and especially sentencing nonetheless give an indelible sense of society's edges and also its core, an image that remains consistent even when—perhaps especially when—people sometimes get away with murder.

5.2 The case

The basic facts of the case were not much disputed. Court Clerk William Roe, who administered this trial,[79] sums them up in sending the jury off to reach its verdict:

> It is proved… that on the night of the 18th of October last the Prisoner about midnight was found in the road near Mr. Campeau's house. That upon alarm of noise several persons assembled and found the Store of Mr. Jos. Campeau broke open. They found a Carpenter's adze near it, the supposed instrument of the violence, and merchandise and liquors were found near the store, but not proved to have been the property of Mr. Campeau—but the Prisoner's voluntary confession on examination before two Justices proved in evidence to you, shows beyond a doubt that he was guilty of the Burglary, that he forced the door with the adze, and took away the articles described. (Riddell 1926:352)

Trial minutes report that Cutan attempted brief resistance but was quickly overcome, and cooperated thereafter, even giving his voluntary confession to two justices of the peace.

A few matters of procedure in the trial do raise questions. We have Cutan's confession, but it seems slightly odd that the stolen items were not otherwise proved to have been the property of the store owner, who helped with the arrest

[79] Until legislation in 1797 regulated the practice of law in Upper Canada, most advocates and judges in the court system were not trained lawyers but received their legal appointments based on social standing. At the time of Cutan's trial there were but two trained lawyers in the entire Western District: William Dummer Powell, who officially presided in this court, and Walter Roe, who administered Cutan's trial.

and was presumably available to identify his own goods. Cutan also did not speak French. Called upon to speak in his own defense in the courtroom, the trial minutes record Cutan's response: "That true it is, Mr. Campeau took him prisoner; that he does not understand French, but that in answer to any questions he proposed to him, he may have said yes" (Riddell 1926:351-352).[80] If he didn't speak French, did he have a sure grasp of what he was saying yes to? What does it mean, in a court that seeks hard facts, that he "may" have said yes? Is it possible that a lone man, captured by foes, and also a black slave in the custody of angry white men, might say whatever was necessary to appear conciliatory in the moment? These questions are not even raised; indeed, there is no mention of what exact questions Cutan was asked by these speakers of French. Surely these are critical, commonsense things to be sure of, especially in light of Blackstone's stress on the extreme care and caution required in assigning a death sentence.

The important thing, though, is not whether such matters, pressing as they may seem from the hindsight of today, were overlooked two hundred years ago, but whether the trial seemed fair in its day. Certainly the weight of evidence was against him. The stories of multiple witnesses who helped apprehend Cutan match well in their details. Most importantly, Cutan confessed, and in the judge's summary of the trial that confession evidently trumped the curious lack of confirmation from the owner of the stolen objects that they belonged to him. The

[80] This use of the third person to render what otherwise appear to be direct quotes is consistent throughout the transcript. Whether a conscious strategy or merely conventional, this practice helps evoke a realm of objectivity, and of law's objectivity in particular.

objects were "not proved to have been the property of Mr. Campeau—but the Prisoner's voluntary confession on examination before two Justices proved in evidence to you, shows beyond a doubt that he was guilty of the Burglary". Perhaps this confession seemed even more secure given that one of the justices of the peace who obtained it was John Askin, a man widely known for his fairness and unimpeachable character. Askin declared under oath that the confession was "voluntarily taken before him, without any threats or menace being used to obtain the same" (cited in Riddell 1926:351). One can understand how a jury of the time supposed this evidence to be sound, especially when corralled toward a guilty verdict by the judge's preamble. From that view, a different outcome becomes hard to imagine.

As for the charge, Roe reminds the jury that burglary was "a breaking of a dwelling house by night with intent to commit a felony." This definition is echoed in the June 11, 1803 edition of the British American Register, in section XVI, which defines crimes against habitation (the other being arson). Burglary, it adds, is a felony without clergy: it permitted no leniency even in the case of a first-time offender. Roe goes on to clarify what is meant by a dwelling house: "…to give to every house the character of a dwelling house, it is enough that the owner or someone having charge of it, sleeps in the house usually, although he may board elsewhere" (cited in Riddell 1926:352). Campeau's house, which was also his shop, clearly qualifies since he slept there usually. Given the hour of the deed, burglary it was. That leaves only the sentence, and in British law at the

time, conviction usually carried a death penalty, mitigating circumstances notwithstanding. There is also no sense in early O&T court records that slaves or other disenfranchised groups got slapped with more severe sentences, or that acquittals were less likely for them.[81] Winks (1971:50-51) concurs, noting that three years later, in Powell's court, a Negro slave was again convicted of burglary and sentenced to death, but that Powell then appealed to the Lieutenant-Governor for a reduced sentence owing to the slave's tender age. Winks names further examples—two slaves of William Jarvis, the provincial secretary of Upper Canada, who stole gold and silver from his desk; a black woman who killed her husband by stabbing him in the temple with a fork—where the consequence was not summary punishment but the process of a full and fair trial.

I do not, then, seek to explain why the trial went the direction in did in Cutan's case: it apparently did so because in the eyes of the time, evidence took it there, and the conviction got a death sentence because burglary usually did.[82] Rather, I

[81] It is worth suggesting, of course, that social disenfranchisement may predispose an individual against the law to begin with in ways that social entitlement would not. Existing court transcripts from O&T, unfortunately, do not usually indicate the social station of the accused. Riddell (1923:252) points out that while the laws of England did not dictate lesser legal rights to the slave, the deeper problem is that English law at that time didn't recognize the slave at all; there was no relevant category of person, which meant that even basic rights did not apply: right to marry, rights as a parent, rights to property, even the right to security and life. And yet, the fact of a trial by jury in Cutan's and other cases and apparent even-handedness in the judge's interpretation of evidence suggests that whatever rights, or lack of them, may have been practiced off the legal stage, slaves—as humans if not slaves—were legal persons in the eyes of the law.

[82] Justice Powell's appeals for leniency on a sentence, when they occurred, tended to come after the fact, in letters to the Lieutenant-Governor. Viewed in light of character sketches by Riddell (1924) and Mealing (2000), one understands Powell's respect for his role as judge, which was not to sway the sympathies of a jury but to preside over a fair hearing. This did not preclude his own intercession afterward, however, where he believed he had access to information that warranted special consideration. By keeping these

want to look at the burglary and trial from the standpoint of the conviction and sentence as Roe handed them down. From a pragmatic point of view, this was the moment that retroactively defined what had gone on before, and the moment when Cutan, as exemplar, served social order and set legal precedent.

5.3 The sentence

At the end of the trial, a guilty verdict now in hand, Roe asked Josiah Cutan if he knew any reason why the court's sentence should not be carried out. Cutan said no, so Roe continued:

> Josiah Cutan, you have been found guilty by the verdict of twelve good and impartial men upon the plain evidence of your own voluntary confession in addition to other proof, of having committed on the eighteenth of October last a burglary in the house of Jos. Campeau. This crime is so much more atrocious and alarming to society as it is committed by night, when the world is at repose and that it cannot be guarded against without the same precautions which are used against the wild beasts of the forest who, like you, go prowling about by night for their prey. A member so hurtful to the peace of society, no good laws will permit to continue in it, and the Court in obedience to the law, has imposed upon it the painful duty of pronouncing its sentence, which is that you be taken from hence to the gaol, from whence you came, and from thence to the place of execution, where you are to be hanged by the neck until you are dead. And the Lord have mercy upon your soul. (Cited in Riddell 1926:354-355.)

On the surface, this verdict assigns a sentence of death, according to law, and thus brings an end to Cutan's life. But Cutan is not merely sentenced to death here. This summation of issues at stake in the trial could not be starker in its

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actions separate from the trial, his intercession concerned the sentence, not the evidence in trial, which thus remained intact and unquestioned. This clarity supports Mealing's suggestion that "Powell's primary loyalty was always to English common law, not to the provincial administration of Upper Canada." (Cited online on 4 March 2011 at http://www.biographi.ca/009004-119.01-e.php?BioId=37202.

construction of a boundary between society and wilderness, and its distinction of inhabitants on either side. By conflating the nighttime hour of the deed and a moral/geographic space antithetical to society, and through liberal use of feral imagery, Cutan is banished to a savage world outside society where wild animals and burglars at night ranked the same. On the civilized side of the boundary is a particular sense of order, embodied in the productive trades of the jurors (armourer, trader, shoemaker, schoolmaster, innkeeper, tailor, cooper, joiner and blacksmith). Order also resided in the sense of fair procedure available to everyone including criminals, and the institutions of law and government that serve the interests of settlement.

This condemnation of Cutan appears in greater relief when compared to a second verdict in the early court. Jack York, another black slave, convicted in 1800 of a burglary in the court of William Powell, also landed a death sentence, but the crimes of which he was convicted suggest a whole different level of threat, for in addition to forcible entry by night, the conviction included assault and rape of the home owner's wife, itself a capital offense. The violence of York, in other words, far exceeded that of Cutan, who stole but attacked no one as part of the felony defining his actions as a burglary, and he cooperated fully leading up to and during the trial. He also did not "fly for it", or flee, which Riddell (1926:457) notes carried formal punishment of its own: even if the accused is proved innocent and acquitted, having fled would mean he loses all his possessions. As a slave, of course, Cutan had no possessions anyway, but this

definition of flight and its consequences state formally that he did nothing to aggravate his situation in the eyes of the court. In one sense, a death sentence on both cases erases what seem like important differences about willingness to threaten someone's life. Given English law's basic protection of a person's right to security, as explained by Blackstone, it is not surprising that the defining element of another capital crime, robbery, is fear, threat against a person's sense of security. On the amount taken in a robbery, the *Manual* (401) notes that "The gist of the offense being the force and terror used by the offender, the value of the property stolen is quite immaterial." Clarifying this relationship between fear and violence, the *Manual* goes on to explain:

> The principle of robbery being violence, some degree of force is therefore necessary to constitute the offence. But there may be a constructive, as well as an actual force, for where such terror is impressed on the mind as not to leave the party a free agent, and in order to get rid of that terror he delivers his money, this is a sufficient force in law. And where actual violence is used, there need not be actual fear, for the law will presume it. (402)

Just this element of force, fear and duress, it turns out, define the crime of rape, of which Jack York was convicted. Defining rape as "carnal knowledge of a woman, forcibly and against her will, and above the age of ten years", the *Manual* (374) stresses: "The offence of rape is in no way mitigated by shewing that the woman at last yielded to the violence, if such her consent was forced, by fear of death or of duress."[83] In a system where fear and terror have such

[83] Rape of a girl under age ten bypasses the issue of consent since, "by reason of her tender years, she is incapable of judgment and discretion" (374). Issues of consent aside, the *Manual* adds that rape could be difficult to prosecute because "it is an accusation easily to be made, and hard to be proved, and harder to be

capacity to raise the punishable stakes of violence, it seems odd to punish Cutan and York equally. If one of these two sets of actions deserves condemnation as beastly, the perpetrator removed from society as an irredeemable menace, it would have to be Jack York. On the other hand, given a death sentence already in place for Cutan, there's no way to kill Jack York more. The real question becomes, what was it about Cutan's actions that required a death sentence? In what way does Roe's extreme recasting of the event make sense?

Two threads of British tradition can help illuminate the specific feral metaphors Roe uses: the practice of dueling, represented in the early court of O&T by four cases, and the practice of game hunting. Both practices had deep histories overseas, and in certain important circles at least, were at least tolerated both socially and legally.

5.4 Murder and other honorable pursuits

In early Upper Canada, killing someone deliberately without formal warrant (such as the execution of official duty) was murder. And killing doesn't get more deliberate than in the practice of dueling where a challenge is planned, sent out, received, and responded to according to a strict set of protocols. In the eyes of the law, killing by a well-planned duel was therefore murder, plain and simple. The telling thing is how often the law had to make this point, which starts to sound

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defended by the party accused" (375), even though the manual also calls rape "a most detestable crime", one that "ought severely and impartially to be punished with death." Even though these difficulties may have made some rapists more bold, the present point is not about success in prosecuting rape, but understanding the crime and its severity in principle.

very much like a twist on Schneider's sign: "No Murdering". One finds the sign sprinkled through court transcripts and repeated throughout the *Manual*, apparently necessary because this murdering was such a problem. And it was a problem, in part, because the law kept excusing it.

There is no mistaking the official letter of law on dueling. Under the category of murder, the *Manual* says,

> And the law so far abhors all dueling in cold blood, that not only the principal, who actually kills the other, but also his seconds, are guilty of murder, whether they fought or not; and the seconds of the party slain are likewise guilty, as accessories (224).

Indeed, even to initiate a challenge to a duel was an indictable offense, and as the *Manual* makes clear, "it is no excuse that the challenge is given under provocation, for if one person were to kill another in a deliberate duel, though under provocation, it would be murder in him and his second" (99). Deliberateness is key in both cases, suggested in the first by use of the term "in cold blood". For as the manual also states,

> If two fall out upon a sudden occasion, and agree to fight in such a field, and each of them go and fetch his weapon, and the one killeth the other—this is no *malice prepensed*; for the fetching of the weapon and going out into the field, is but a continuance of the sudden falling out, and the blood was never cooled; but if there were deliberation—as, where they meet the *next* day,—nay, though it were the same day, if there were such a competent distance of time, that in common presumption, they had time to deliberate—then it is murder.

We thus see, on one hand, the extreme care taken to delineate capital offenses, given what is at stake in the issue of human rights; and on the other, the

unambiguous legal stress on deliberate duels as a high crime. This position also finds support in Blackstone, who says

> …where both parties meet avowedly with an intent to murder, thinking it their duty as gentlemen, and claiming as their right to wanton with their own lives and those of their fellow creatures, without any warrant or authority from any power either divine or human, but in direct contradiction to the laws of God and man…the law has justly fixed the crime and punishment of murder on them and on their seconds also. (Commentaries vol. 4, p.199)

This stance appears again in courtroom transcripts where the presiding judge advises the jury not to misunderstand the legal status of duels as murder. In the high-profile trial in 1817 of Samuel Peter Jarvis, who had killed John Ridout in a duel after Ridout issued a challenge, Chief Justice William Dummer Powell repeats the legal status of dueling as murder, and adds that the charge "was anything but indulgent to the prisoner and was so considered by most of the persons in Court" (Powell, cited in Riddell 1915:170). In another high profile trial of August 9, 1833, where John Wilson stood accused of killing Robert Lyon in a duel, Chief Justice Beverly Robinson again stresses the legal terms of the offense and the criminality of dueling.

At the same time, actual exercise of the law, where murder by duel is almost always acquitted, tells a different story, one not just apparently contrary to the letter of law but also, measured as outcomes, above it. As Chief Justice Robinson goes on to say, "The practice of private combat has its immediate origin in high example, even of Kings. Juries have not been known to convict when all was fair,

yielding to the practices of Society" (Robinson in Riddell 1915:175). One could hardly find bolder or more official encouragement to read between the lines of law. As with most cases of duel, returning an acquittal took only minutes.

This stress on fairness echoes another passage in the *Manual*, which warns that

> No breach of a man's word or promise, no trespass either to lands or goods, no affront by bare words or gestures, however false or malicious or aggravating, will excuse him from being guilty of murder, who is so far transported thereby, as immediately to attack the person who offends him, in such a manner as manifestly endangers his life, *without giving him time to put himself upon his guard*, if he kills him in pursuance of such an assault, whether the person slain did at all fight in his defense or not (224, my emphasis).

Read against both the preceding passage about a hot-blooded duel and the actual practice of acquitting cases of murder by duel, even those where the blood had time to cool, the above passage says two things: first, that despite the law's letter, breaches of word or promise, trespasses on lands or goods, affronts by word or gesture, especially when false, malicious or aggravating, can fairly (if illegally) be responded to with violence as long as it is pursued correctly; and second, none of the unofficial legal exemptions about responding to an offense apply if you catch the opponent with his guard down. This core issue of honor and fairness continued centuries-long traditions and published codes of conduct relevant to dueling.[84] From that perspective, the astonishing outcome would have been conviction. But what was it, exactly, that made this killing outside the law

[84] See, for example, the 25 rules of the *Code Duello*, drawn up in Ireland in 1777 to govern the practice of dueling there. This code was adopted, with some variation, in England and continental Europe, and with greater variation in America. Also see *The British Code of Duel: a reference to the laws of honor and the character of gentlemen*, Knight and Lacey, 1824.

acceptable, while stealing some rum and a few furs nets a death penalty, even if it was at night? Any logic motivating the duel only looks more forceful to the extent that public resentment over duels was starting to smolder even in the earliest years of Upper Canada, and could only have made rationalizing exceptions to law increasingly difficult.[85]

Halliday (1999) explains this tendency in terms of class exceptionalism: the duel reproduced ideals of conduct among the aristocracy where it originated, and to protect the duel through legal attitudes and precedent meant to protect the class. Supporting that view, Halliday notes a conspicuous representation of both duelists and social elite among the judiciary where the matters related to dueling reached their legal outcomes. Perhaps it is not surprising that juries on

[85] The Niagara *Constitution*, dated January 11, 1800, published unveiled disgust for a deadly duel that had occurred just eight days previous, in which John Small, Upper Canada's first Attorney General, shot and killed John White, Clerk of the Executive Council. It could be, as Halliday (1999:47) observes, that Small's subsequent failure to win two elective offices, and his wife's isolation by the upper crust (it was she who charged John to defend her honor), went beyond coincidence. It may be, though, that at least some of the growing antipathy to dueling expressed a sense that its honor code—its *sine qua non*—was eroding and in some cases missing altogether, transforming the dueling field from a place of honor into a place for hotheads to blow off steam. What seems to have stoked public ire over the Small/White duel was, above all, a trivial Mrs. Small's role in starting the feud by insulting Mrs. White at a public gathering in 1799, and then insisting her husband defend her honor when she received insults in return from John White. Even if duels of the day still proceeded according to a code, and had honor at their core, the genesis of this one in a pointless cheap shot may have made the whole affair appear base. Chamberlain (2009) suggests a broader foundation for this interpretation of the Small/White duel in looking at the entry of middle classes into a practice that had been reserved for gentry, and the shift from a practice of honor to one whose "honor" aligned with party politics and journalism. From the standpoint of the honor code, whether one really supported dueling or not, a rising generation of climbers, pretenders, opportunists and hotheads must have looked particularly vile. The problem with such pretenders, from a gentry point of view, is that they have the class-defining relationship between deed and character exactly backward. The presumption is that just as a gentlemanly character is inclined toward gentlemanly deeds, so gentlemanly deeds point to a gentlemanly character. From the perspective of higher status, the difference of where deed points in each case is between a character that *is* of a gentleman, and one that *is* of someone who would pretend. Gentleman status, although evidenced through actions, is fundamentally essentialist in its basis in heredity, or the "common law of GOOD BREEDING" as the *Code of Duel* (8) calls it. (Capitals in original.) One might speculate that this insistence on visible trappings of character that are independent of deeds, such as details of lineage summed up in "good breeding", took aim at precisely this capacity of innate character to hide from view, and even to masquerade.

such trials were reasonably well stocked, though not exactly stacked, with social notables, at least judging from the honorific suffix "Esq." on the jury list. Serving on a jury was a public duty, after all, one that included but was not actually about trials related to dueling.[86] It is much less clear which, among that elite, actively supported the idea of duels in a climate of growing grassroots antipathy for the practice.[87] A charge of protectionism by certain of the jury's elite, while plausible, remains speculative without a record of who was inclined to vote which way, and how efforts at persuading dissenters on the road to a verdict might have played out. Without that evidence, it is too easy for suspicions of protectionism to transmogrify into implausibility of them being anything other, and thus to homogenize a class. Being elite doesn't mean homogeneous: in Chapter three we noted significant dissentions among the governing elite over when to impose, adapt or abandon administrative and social practices imported from England.

In broad brush, though, there is undoubtedly correlation between dueling and class, even if imputation of motives to individuals in a courtroom remains hard. The British Code of Duel (hereafter *Code of Duel*), a formal codification of British-derived dueling practices as of its publication in 1824, locates dueling in "the higher orders of society, including legislators", among whom "it is indirectly

[86] If specific appointments to a jury for cases of duel were intended to produce sympathy and an acquittal, that correlation is not revealed in O&T court records directly.

[87] William Dummer Powell, a steadfast opponent of dueling and the practice of excusing it, was notably absent from the trials of John Small and David Sutherland. Duty at the time may simply have fallen on a different judge for these trials, but it seems possible that protectionism, if it occurred, also extended to arranging for a more sympathetic judge. Regarding antipathy for dueling, see also footnote 10.

proclaimed contrary to law" (*Code of Duel*:4). It also observes that rules prohibit dueling across classes: "…if a gentleman (by blood, or coat armour) detracted from another *the combat should be allowed*; but if a clown, he was to take the remedy of legal action… a clown might not challenge a gentleman to combat because of the inequality of their condition" (1824:14). Chamberlain (2009:17) backs this up with mention of cases where a duel was refused because the challenger was not of the appropriate class.

The larger problem with an explanation of protectionism, though, is that it misses a deeper point about what kind of conduct dueling represented. Whatever kind of class collusion may have helped protect an unlawful practice after the fact of a duel, and no matter the class habits and expectations that may have helped stoke temper and indignation toward a duel, reducing it to the act of solidifying class ignores everything individual that made heads hot enough to fight and to risk being killed. By looking inward to the courage and stakes of individuals rather than outward to collective maintenance of class, one observes ideals that ramify well beyond the narrow circles of duelists or even aspiring duelists. Indeed, they help bring Cutan's crime of burglary into sharper focus.

The *Code of Duel* (43) notes that in a previous age in England, swords were the weapon of choice among duelists. This detail receives mention "only to mark its evils" in a new age that boasted dueling pistols instead. Two of these evils—the severity of wounds from a sword cut and the absence of any natural pause in the action that might open a chance for reconciliation—clarify that dueling by the

British code, while a form of combat, was not *about* fighting. At core, it provided an unambiguous, socially meaningful and loaded means of recovering from an insult or engaging a challenge: through the process of duel, the society of peers[88] who counted the duelists among its members deemed a grievance settled. We see this pragmatic dimension of dueling again in the *Code of Duel*'s description of shots to be fired: "Three fires should be the ultimatum in any case; any further reduces duel to a conflict for blood, or must subject it to the ridicule of incapacity in arms" (50).

A third evil of swords, though, and the first mentioned in the *Code of Duel*, is perhaps the most telling: swordplay easily exposes and exploits differences of skill level, whereas the code of duel does just the opposite. Dueling pistols were notoriously inaccurate to begin with, a great equalizer in itself. Acknowledging that some pistols are nonetheless superior to others, dueling weapons were to be inspected to ensure that "the same degree of excellence…be used by both parties" (45). The ritual of duel progresses through a series of further equalizers, carried out by the seconds. Pistols are examined for condition to preclude misfire of one, and each pistol is then loaded in the presence of both parties. The ground for combat is inspected to ensure no advantages on one side, like obstacles, line of sight, or location of the sun. Distance along that ground is then measured by pace, to a distance not less than ten paces but otherwise at the discretion of

[88] This sense of a society of peers has no relation to today's notion of a jury of peers, where peerage presumes common ground among people that class systems try to keep stratified. Juries at the time of Cutan's trial, though, were not described as peers, but as "honest and impartial men", which at that time entailed at least modest class standing.

seconds. Parties then agree to a firing signal, commonly the movement of a handkerchief. By its suddenness, the signal "prevents that decisive aim, which might give one party the advantage over another, and is always to be avoided" (48).[89]

From this perspective of meticulously orchestrated equivalence, the dueling code brings to mind Geertz's observation of the Balinese cockfight: the closer and more equivalent the match, the deeper the play—or here, the more honorable the contest and courageous its participants, and the purer, therefore, its restorative alchemy. This heady brew of fair play and ultimate risk deserve emphasis, on one hand for drawing attention to the poignant, irreducibly personal dimension of dueling that gets elided from arguments about reproducing class in the courtroom. The weight of insult, progress through failed attempts at reconciliation, and finally, the intense fortitude to look death in the eye at just a few paces, have no surrogates outside an agitated individual psyche: not in a social class of peers or in the machinery of law. On the other hand, it was precisely the urgency of proper standing in the eyes of others that drove men to duel in the first place. This sense of standing, Fischer (1989:396-7) suggests,

[89] In the duel between John Ridout and Samuel Peter Jarvis, Ridout acted out of turn and tried to get a shot off first, but missed his mark. He was then ordered to give Jarvis a free shot, which mortally wounded him. Based on the wound, the coroner inferred that death was instant, but a rumor spread that Ridout stayed on his feet just long enough to shake Jarvis's hand, thus ending the quarrel before he collapsed (Halliday 1999:56). Whether true or not, but perhaps especially if it isn't, the case illustrates the restorative potential of a duel to those who fight them, but only as long as rules are strictly followed. Just as Ridout's earlier misconduct by acting out of turn had damaged his reputation, his apocryphal swansong restored it by conforming to the code: in the case of a mortal wound, the *Code of Duel* (50) states, parties should not separate without mutual forgiveness. The "rightness" of this moment, even if fictional, would not have been lost on any jurors who valued the honor codes embedded in the duel, no matter what they may have thought of dueling more narrowly.

meant social death if lost. Perhaps that overplays things slightly, given the potential for recovering from a fall from grace, but an appropriate notion of standing certainly went beyond superficialities like vanity or pretense; excepting fools, those would be the wrong words to describe someone whose principles stood tall while facing down a pistol. As the *Code of Duel* puts it,

> While honour and dignity are the reward of virtue, any lapse of it that may tend to affect the character of Gentleman, is punishable by formal degradation, expulsion from peculiar association, and, ultimately, with loss of privileges, from society in general. A Dignitary is bound by the most solemn oaths, the perpetuity of which is supposed to render that test unnecessary to Peers, where required in inferior orders. These declare only upon *honour*… (9-10)

This threat of lapsed virtue, combined with the sheer mass of worth and expectation loaded onto words—meaning and keeping to what one says—suggests an extreme need for vigilance about action and reaction, about rendering virtue as deed. Or to take it a bit further, honor depends crucially on deeds to make it visible to peers, and remains unproven, hypothetical and possibly even pretentious without them. Honor, in other words, is extremely fragile and must be guarded as such.

Pretenders and pretensions notwithstanding, this code of honor, crystallized in deeds that accept mortal individual risk rather than insult, has strong overtones in the broader notion of virtue outlined by Blackstone (see Chapter 2) as being foundational to English law. To this degree, anyone with respect for common law notions of human rights and duties, and especially the law's coding of what

it meant to act properly in the eyes of others (recall that being vicious and drunk out of sight was not a legal sin), would find something to admire in the principles governing duel, even if that admiration be tempered by loathing for the practice more narrowly. Given the deep history and inertia of the dueling code in a politically influential stratum of English society, and its importation into Upper Canada's upper administrative echelons as English gentlemen took up positions of authority (Riddell 1916:165), it is not surprising that the code maintained influence in the new province. Judging by the ubiquity of acquittals and their overt contrariness to the letter of law, the laws of honor were held by the consensus of juries to be above the laws of England. Indeed, the *Code of Duel* makes this very point:

> …it is evident, that propelled on one hand by opinion, and but negatively repelled on the other by legal power, the principle of duel retains its full force, and while holden to be without the pale of law, possesses the most positive laws (5).

Beyond providing a sense of what the code of duel looked like "from the inside", so to speak, two takeaway points in this discussion are, first, that the code held considerable sway at the legal level. From a practice perspective, the collusion of juries in producing acquittals (or negligible fines) for what the law calls murder does not suggest contrariness to and defeat of law, but the capacity of law, when implemented by living bodies rather than placeholders, to help constitute the place of duel and its embedded code of honor. In this sense, law did not, contrary to the *Code of Duel*, "negatively repel" the practice of duel.

Rather, by providing on one hand an official legal stance on a "crime" and set of legal rituals through its letter, and on the other hand, the fact of a jury whose power to deliberate in closed session and produce a verdict potentially at odds with that letter, introduced flexibility that enabled the exceptionalism regarding duels. This enabling was according to the scripts of all concerned, from juries to judges, with the possible notable exception of William Dummer Powell, whose opposition to the duel seemed more fervent and genuine than most.

The second takeaway point is that, while the practices of honor described in the *Code of Duel* relate to duel and duelists specifically, they have ringing overtones in notions of virtue and integrity that extend to society generally. And this brings us back to the sentencing of Josiah Cutan for a crime "so much more atrocious and alarming to society as it is committed by night, when the world is at repose." The world does not repose: people do. This simple switch of referent reframes a crime against a person as a crime against civilization; or perhaps, limits the view of civilization so that violence against a person means everything. In the codes of duel and legal attitudes to it, we've just seen that attacking the person fairly lets you get away with murder, so it's hardly surprising that attacking where and when they should be horizontal in bed with eyes closed won't help the attacker in court. As in the duel, honor comes down to deeds.

The violence of intrusion by night emerges even more clearly in William Roe's descriptions of a dwelling house as he sent the jury off to reach a verdict:

> It remains only for the court to inform you that by a dwelling house alone being the subject of the aggravated offence of burglary, the law meant to secure to the subject the peaceable indulgence of rest by night, and that to give to every house the character of a dwelling house, it is enough that the owner or someone having charge of it, sleeps in the house usually, although he may board elsewhere. The being absent from the house on the night of the burglary does not diminish the offence, if you shall be satisfied that it was not abandoned…. You will consider the evidence under this view of the offence and discharge your consciences. (Cited in Riddell 1926:352-353)

A dwelling house is thus more than just a place, a private residence. In the context of burglary, it is a constellation of place, ownership, and time of day, which together represent the circumstances of greatest vulnerability. To attack that would be to violate both deeply ingrained sensibilities about fair conduct, and the most basic conditions of a successful and safe society, both of which a proper duel upholds.

5.5 Hunting and prowling

This fatal breach of honor is then linked to a wild beast of the forest prowling for prey, and each of these words suggest clear contrasts to the idea of a hunt, another strictly codified and honorable mode of killing. In British tradition[90], from deer and boar hunting and then fox hunting after that, each possible object, subject and action are precisely defined and given its own special term. In the example of fox hunting, by this time replacing deer hunting abroad and also on the rise in North America, the action of "hunting" itself gets broken down:

[90] Comparison to British hunting tradition is most directly relevant since we're talking about British justice, but highly codified traditions of hunt had long histories through much of Europe by this time.

hunters “cast”, “draw” and “head” as their “hounds” (never “dogs”) “feather”, then finally “open” to give “tongue” to a “line”, trying not to “blank”, “heel” or “riot” meanwhile.[91] On the receiving end of all this code and ritual is the fox, who is not prey, but “quarry”. Unless this quarry has luck, it will be driven to “covert” and ultimately “accounted for”, a privilege-driven euphemism for ripped apart by dogs. In the trial, the words “beast”, “prowl” and “prey” are merely used as quoted, not explained, so perhaps one shouldn’t overplay this comparison to a hunt. But three particular differences between the two deserve mention. First, precise terminology specific to a highly codified activity like the hunt creates its own conceptual territory that rules out substitute words: the “quarry” in a hunt is never “prey”, and the rich vocabulary of ways a huntsman can hunt do not include “prowl”. Given the previous discussion of honor, call the huntsman a “beast” and you have a duel on your hands.

Second, the relation between “wild”, “beast”, “forest”, “prowl” and “prey” on one hand, and membership in society on the other, is both mutually exclusive and starkly hierarchical. The very existence of the court, never mind Cutan’s death sentence, demonstrated that society stood in control and judgment of the beast. The two sides are also asymmetrical, with one side richly described through various trades among jurors, a complex court system, classes of building, multiple languages, unique personalities with their own names and so

[91] See Ridley (1990), and Cannon (2002). For an anthropological view of fox hunting as ritual in England, see Howe (1981). For parallel terms used for hunting other kinds of game, see Cox (1928).

on. The other side is singular, "the wild beasts of the forest". The plural on "beasts" only makes them generic when preceded by the article, "the", which stresses that they're all the same, that they must all be "guarded against" with the same set of precautions. This opposition, of course, resonates with a notion of progress that motivated the overseas journey and then settlement, with all its prejudices about what civilization entailed, what had to be done or changed to achieve it, and what the vision excluded. Settlement brought order and law to wildness, created contingently safe, productive space out of forests, and tamed the beast. Conversely, any member of society convicted of turning into beast got his membership revoked.[92]

Third, just as the duel was a practice of privileged classes, so the vocabulary of a proper hunt would reproduce a sense of class since the hunt was historically a class based activity. If that vocabulary was not itself used in the trial, I have suggested that awareness of it would have helped give the feral metaphors leveled at Cutan the oppositional force they had. It would be simplistic to say that even an implied opposition to hunting was about class protectionism, that it reproduced a ruling class in any simple sense. The noble classes among which the hunt first emerged as a distinguishing sport are not the same classes one

[92] It is tempting to imagine this implied boundary between society's inside and outside as a kind of markedness relation, specifically in a semiotic sense that Waugh (1982) distinguishes from the phonological approach first proposed by Trubetskoy and Jakobson. As with markedness relations, the term defined as "other" (in our case the beast) becomes internally undifferentiated: there is only one kind of beast, but many kinds of membership in society. Markedness relations are also hierarchical, and as Waugh points out, linguistic markedness does not exist in a social, political or conceptual vacuum, but in a world where all these elements resonate with and reinforce each other. For a general discussion of markedness in linguistics, see Battistella (1990). On semiotic and social ramifications of linguistic markedness, see Waugh (1982).

finds centuries later in a different country, where both the structure of rule and the emerging exigencies that needed ruling were different. Even in Britain, hunting eventually came to include many rungs below the royalty and aristocracy where it began, so dynamism of the acting subject would have to be accounted for in any case. On the other hand, if the specific identity of class structure and how it got shaped by new exigencies and players makes the reproduction of a specific class a complicated matter on the frontier of Upper Canada, perhaps the hunt and the duel resonate with a sense of class more abstractly. As Howe (1981:296) argues for the case of fox hunting in Britain, support for the sport among various classes, even those who could not directly participate but who could at least "agree" to have the chase run over their land, suggests at least a grudging consensus about class itself, much the way people across the social hierarchy might be persuaded to believe in a monarchy. In this view, what got reproduced in Roe's words, as also in acquittals for the duel, was at the very least a sense that not all people, as measured by their current situations, are actually equal.

5.6 Order and good government

Two underlying patterns of thinking further raised the stakes of assaulting the dwelling house. One, alluded to earlier, was a Lockean ideal of progress such that rights and ownership of property—indeed its emergence *as* property—connected to the work of transforming wildness and savagery into civilization

and settlement, and thus chaos into order. This ideal, which motivated both a journey overseas to a new continent and a pervasive push westward, was also epitomized in the dwelling house, the safe and hard-won retreat from all the dangers that civilizing effort and property making entailed. Just as the beast lies outside society, so the dwelling house, as safe haven, was a symbol par excellence of social order. To attack it meant to attack society's raison d-etre.

Another force that repelled and would have been repulsed by the chaos of a nighttime home invasion was the superimposition of religion and state. In Upper Canada, in contrast to emerging republican democracy in America, recognition of divine order in the universe and submission to laws and government were ultimately one and the same. As the *Manual* (387) says, "The Christian religion, according to high authority, is part and parcel of the law of England." An attack on social order was thus an attack on God.[93] The honor code embedded in dueling made a similar claim, as one might assume given any genuine commitment to Christianity among the social elite. Addressing the possibility of "Deity" taking offense at a duel, the *Code of Duel* (50) says, "…parties may be reminded that humanity is identified with honour, and that the qualities of a true Christian, are the same as those essential to form the character of a gentleman."

[93] Clark (2001:54) suggests that many people took the identity of church and state to the point of seeing Upper Canadians as a chosen people.

5.7 Beastly metaphors

Josiah Cutan's death sentence should now appear in a deeper light. Gone, one hopes, is any question of why the theft of mere goods, even when measurable at the level of grand larceny, should translate into such an extreme punishment and condemnation from the judge. We have seen, for one thing, that burglary is not about theft even if it occurs: it is about intention to commit a felony, which can be larceny or any other felonious crime. And crucially, it is about when the assault occurs, and that the assault is against a dwelling house, a place ultimately sanctified through this specific, extreme punishment against its aggressors. Even stealing from a church ranked lower than stealing from a dwelling house at night. Defining "sacrilege" as theft of items from and belonging to a church, *Manual* (404) notes that while the crime used to be punishable by death without benefit of clergy, a tightening of cases for which death sentences should apply (in accordance with Blackstone) rendered sacrilege—unlike burglary—no longer capital. More to the point, the clamor of overtones as burglary ramifies through all of society shows how deep a burglary strikes. The fact of rum and furs, never mind calculation of their measure, completely misses this, the real measure of the crime.

Gone, too, is suspicion of inconsistency in laws on the books, where murdering by duel is excused even though technically murder, while thieves in the night suffer death as well as demotion from the human race. Not only does sense of

honor serve as common denominator in both cases, but as practice, the letters of law that define duels as murder and require their punishment as such, actually provide a place for exceptionalism, which is what class is about. The "ism" here is attested to by the ubiquity of acquittals in cases of duel. Noting this reproduction of class, however, is not to reduce dueling itself to this reproduction. Indeed, it is the particularity and inward intensity of the stakes raised in duel that underwrite all of the honor in the code: the understanding of code, its definition and exposure in moments of insult, the progress from seeking reconciliation by other means to ultimate showdown in a duel, and the refusal to flinch even when staring down a loaded barrel, locate individual psyches or they locate nothing.

Given resonance between burglars and beasts in resolving the boundaries of society, and resonance also between violating formal codes of honor and attacking a person/place in their state of greatest vulnerability, Cutan's sentence was about the very emergence of society on the frontier of western expansion, which was simultaneously a frontier between civilization and wildness, order and chaos, light and dark, right and wrong, and in a world where government and Christianity were one, between good and evil. This doesn't mean that the trial couldn't have gone Cutan's way, or that we must blink with non-comprehension when another burglar gets sentenced more mildly. A good deal about the local implantation of legal procedure remains veiled by sketchy records, which otherwise might help explain the wide and unexplained latitude

in naming, describing and sentencing crimes. It does mean, though, that no milder sentence would use the metaphors applied to Cutan, which *make* sense of nothing less than execution, and do so by linking Cutan's act to social values in specific ways. The dwelling house is linked to society's core by opposing it to darkness, beastliness, chaos, wildness and mortal danger to all. The actions of a prowling beast also suggest clear contrasts to honorable modes of hunting animals for sport which, like the duel, had the interpretive momentum both of a deep history and entrenchment in privileged, politically influential classes in particular.

Through this linking to the feral world, Cutan didn't attack a house but the heart of civilization and the very notion of progress—a heinous crime indeed, viewed that way and at that time. And it's all in the viewing; links don't reflect standpoint: they create it, *are* it. If this case and its deployment of damning metaphors confirms anything, it is that standpoint does not exist apart from its emergence in particulars, which are viewed by specific people and spoken about in certain ways. Standpoint is not ontologically prior, somehow apart from or above concreteness: concreteness is the very scene where it gets produced at all and the groundwork for its posterity laid.

To that end, crucial metaphors, the heavy artillery of the sentence, were leveled against Cutan, not so that people looking would recognize who he was, but to make him that person. Without these metaphors and their overtones with social order, and looking only at his actions including his cooperation, a different

sleight of hand might have been required for posterity to find him beyond redemption. Finding him beyond redemption and ranking him among the beasts were not, of course, done for Cutan's sake, even though the sentence is spoken to him. Now a short walk to the hangman's noose, nothing in society is for his sake any longer. To have any pragmatic value, the words must thread back into society, not out of it. They did so in two directions. As a revisionist summation of the trial, Roe's words acted backward on the proceedings to reframe them: however those attending the trial may have construed events during the questioning of witnesses and unfolding of evidence, or harbored unresolved questions based on that evidence, the final word was now in; there was but one way to understand what had transpired. As the moment when legal precedent gets set and words are recorded for posterity, Roe's words also acted forward in time. Precedent, of course, constrains the interpretation of similar cases in the future. But the extreme feral metaphors were not part of that precedent in any formal sense, because being a beast was not a formal legal charge, or even a possible one. What gets reproduced in that moment, superimposed on the sentence, is a reminder of what society was and was about, where its edges lay, and what it meant to be on either side of that edge.

Chapter 6
Conclusions

Check the back page of any issue of the *Gazette*, or most other newspapers of the time, and chances are you'll find ads listing dwelling houses for sale. Unremarkable in their ubiquity, mundane and routine in their associations, there is little surface hint of the moral gravity that anchors this unassuming space to the social firmament of early Upper Canadian society. Contrary to this easy impression, this study has found that the dwelling house was not merely important beyond casual impressions, but figured as no less than the moral core of society. Understood in the context of human rights, codes of honor, visions of social progress and ideas of property, each of which ramified widely in society, one grasps why the dwelling house was protected even more fiercely than a house of god.

The measure of that protection, the subject of Chapter 5, was the crime of burglary, among the most heinous of crimes and specific to the dwelling house. Indeed, it is through a definition of that crime that the dwelling house gets rendered as a precise idea. But legal definition alone does not account for the extreme metaphors leveled at Josiah Cutan during his sentencing, which did more than simply condemn him to death: they first stripped him of membership in human society, and drew their power for this from the deep toll of a resonant

social fabric beyond the realms of burglary, crime, and law. In making an example of Cutan, this resonance with other realms, which included gendered understandings of conduct and space, geographical surveying, fighting duels, hunting game, and managing political loyalty, was deeply constitutive. In that sense, resonance is itself the exemplary thing, that which renders a symbol or idea indelible to all. To isolate a discrete moment of dazzle is to miss what energizes it. This study has tried to give voice to some of the resonances that energized a burglary sentence.

The baseline resonance in the case of burglary was a peculiar notion of honor, so deeply entrenched that the legal system routinely forgave honorable murder, contrary to the explicit letter of law and its repetition to juries about to deliberate on such cases. In Chapter 5, however, I suggested that this opposition was really a kind of collusion, whether quite intended or not, at least in the early years of the province (and genuine opponents to the honor law nothwithstanding). On the one hand, murder by duel was not exempt from the legal system itself; at the level of forcing such events to trial and submitting evidence to a jury, the system did what it was there for: to subordinate evident transgressions to the rigors of legal procedure and judgment. In this sense, none of the actions heard and judged by a court system were outside the law. Indeed, by forcing proper procedure, the system in effect created the legal space for everything it judged according to protocol. A key part of that machinery was the distinction between the law's letter, and the relevance and power of a jury, which produced dramatic

potential for flexibility of outcome—the one a judgment of law on the books, the other a judgment of peers, both equally constitutive of the legal system. Thus, when a jury returns a verdict that excuses duelists of murder, either acquitting or assigning a token fine, the judgment is legal in every sense. So it was that space for dueling was protected by the very law that presented itself as threatening it with a death sentence.

Although usually reckoned as a deterrent to crime, especially extreme kinds such as burglary, law as just described is also what made burglary literally possible, the difference being that with burglary, jury and laws on the books usually aligned well. Socially harmful breakings, enterings and robberies by night did not, of course, depend on law to happen, nor did the social opprobrium that attached to them. But the thing called burglary, its definition as precise as its overtones were rich, depended on a specific legal code because that code was what it expressed. In the tendency of its verdicts and its overtones with a view of honor, burglary stood at the opposite pole from a duel: an attack against someone who was not merely down and asleep, but in the space above all designed to protect a person (and society) in that state. Attack against that space amounted to an attack against the ordained order of things.

Crucially, honor did not itself help define dwelling or a dwelling house. Indeed, honor per se was not directly regulated by law. What got regulated, going back to Blackstone, were measurable acts from which intentions would be inferred. Honor, once further removed, was a specific judgment about those

intentions. John Ridout's pre-emptive shot at Samuel Peter Jarvis got read as intention to win the duel at any cost, and thus as willingness to put survival above honor, which led to the remedial, restorative decision among the parties regulating protocols of honor to give Jarvis a free shot. This, in turn, ended up killing Ridout. Such preoccupation with honor informed burglary no less than the duel. But it got its force in law from implication rather than definition, and instrumentally, in the Cutan case, from allusions of metaphor that extended relevance the other realms of society where a prowling beast on the loose would entail a threat. This, of course, meant all of society, whose essence as improvement from a wild state pitted civilization against the uncivilized wilderness and human against beast. Such oppositions would have been even starker in a society built on a marriage of god and law, where industriousness addressed obligations not just to society but also to god; industry was a form of piety. Informed by faith, the axes along which work got measured, with society/civilization at one pole and nature/wildness at the other, acquired the further, austere judgmentalism of light vs. dark and good vs. evil. These overlapping contrasts mapped densely onto the dwelling house as a legal and social entity.

The deeper point in all this is that legal definitions, however explicit and detailed and however solemnized by the prospect of a death sentence for transgressors, demonstrate but do not themselves account for the importance of dwelling as a practice or the dwelling house as a place. To grasp that importance,

one must appreciate overlap among ideas and social spaces, understand notions of dwelling as surfaces on which multiple ideals coalesce, which gives dwelling a rich dimensionality not explained by any surface in isolation. This capacity for occurrences in one realm to sound overtones in/of another illustrates what Chapter 2 calls the integrationist aspect of practice theory. We noted there that a core element of practice is the use of special terms (most famously *habitus*) or combinations of ordinary words that evoke the emergent simultaneity and inseparability of "things" that analysis separates in order to see, things like structure, action, agent, predisposition, and so on. Even *habitus*, and "practice" for that matter, derive their specific meanings from a sense that conservative predisposing structures, accumulated individual experiences, deflections of the moment, and the choices these inform, have mutual constitution as their dynamic. As practice, the multiple overtones of a settlement plan, a notion of wilderness and wildness, gendered space, honor codes and the implications of burglary are separable only as analysis, and then only given a clear sense that what one tries to see are consequences of inseparability. With the right categories and analytic machinery one can identify distinct overtones in a given note, but the mistake would be to forget that if isolated from the note and moment of its sounding, they no longer exist.

Another integrating aspect of exemplars, also noted in the discussion of practice in Chapter 2, is their acute stress on first-person interaction. This is not the generic first person of merely named individuals who, for all their

distinctions of detail, nonetheless depend on a generic "being" that is presumed, brought *to* a place, in*to* engagement with other named individuals, who then push and pull each other in ways that leave traces in archives and historical narratives. Such individuals are generic in being kinetic rather than truly emergent and mutually constituting. One can think of them as third-person "I"s. The individual of practice, in contrast, exists (if one wishes to keep the word) *in terms of* her traction with others, who simultaneously exist as traction that pushes, pulls, compels and otherwise engages her. In a moment considered in Chapter 3, magistrate Bartholomew Tench *was* his contentious engagement with Joel Skinner, which crystallized Tench's sense of duty as a magistrate, his resolve in spite of what he no doubt foresaw as a hard sell of his authority, perhaps his sense of class difference, and quite likely, his sense of self as Irish Catholic in the company of an English Protestant. He was not, as the generic sense of individual would make him, a vessel in whom these things were brought to Skinner, who in turn brought his own predispositions and experiences. He was no mere vessel, named or not, in whom government authority traveled to Skinner by way of Tench's prior experiences and connections to certain institutions: Tench's humiliation revealed as a brittle fiction the idea that tokens of authority pointed to some mystically presiding force of order. The only sense of institution relevant to that moment was humiliating mismatch between the formality of vested authority and the expectations that come with it, and utter disregard for these, plus all the angst, bewilderment, anger and resolve this mismatch generated.

Perhaps the courts had some inkling of this when, rather than pursuing the grievance against Skinner, they merely imposed a fine to keep the peace between them for a year. As if to say, "You'll get your money back if you stop making waves and just go away."

The point, of course, is not that system apparently failed in this case, but that its failure or success is always irreducibly concrete, which is what gives "I" and individual their meaning. System also doesn't shade into independence and self-sufficiency as an outcome adheres more closely to pattern. In Cutan's trial, the force of presented evidence, its career toward a guilty verdict, and the awful metaphors that removed Cutan's humanity on the way to the gallows, emerged through multiple, livewire "I"s whose potency resided in their simultaneous presence *to* each other. One is tempted to see system at work through the agency of third-person "I"s, given that a conviction led where it usually did for burglary, especially when viewed through the . But it makes no more sense to understand the usualness of a burglary sentence as the unfolding of a system run by third-person "I"s than it does to disembody the participation of unique identities that helped achieve Jack York's escape.

But then, what is historical narrative if not reduction to third-person "I"s? The "I" of practice is a shifter whose identity gets fixed only in being inhabited, invested with the full power of irreducible concreteness and traction. That inhabiting never survives the trip into abstraction. But just as the gist of practice is evocative rather than definitive, so one might construe or combine elements of

narrative in a way that stokes imagination and, to a small degree at least, transcends the tight, persistent limitations of vocabulary. One hopes it does something to suggest that as practice, it is never individuals, but their trace fossils, that get linked to narrative. The practice individual is always steps ahead of any analysis, always over an event horizon separating emergent, traction-driven moment and its recognition and interpretation. This radical embodiment, always beyond the reach of the named and therefore dead bodies of analysis, is surely a culprit in conjuring, despite best efforts and cunning circumlocutions, the kinetics of presumed ideas, bodies, habits and other "things" brought in*to* engagement.

7.1 Frontiers of fieldwork

Recalling the adventure of beginning research for his dissertation, Dirks (2002:50) says he "walked into the archive for the first time with all the excitement that my fellow anthropology students reserved for the moment they arrived in a 'field of their own'". He goes on to describe how excitement soon merged with terror at not knowing how to face such vast archival excess, a sentiment echoed elsewhere where he calls this a moment of panic. This recollection of panic and terror may seem familiar to anthropologists with their own fieldwork stories to tell. Anthropologists will also appreciate his ensuing deconstructions of historiography, and likewise his focus on small voices and contradictory ruptures—part of his strategy for relating insights from the

disciplines of history and anthropology. At the level of description, however—and Dirks chooses his words carefully—there seems an important difference between Dirks' experience and the core of conventional anthropological fieldwork. If historians and anthropologists alike will find an archive "pushing us by its recalcitrance, limiting us by its aggravating absences, fascinating us by its own patterns of intertextuality, and seducing us by its appearance of the real" (60)—or in the language of previous chapters, demonstrating a capacity to push back on researchers who push them—historians and anthropologists will experience pushing, limitation, fascination and seduction is some different ways. I want to suggest that this difference is more about the respective disciplines than the fields they typically operate within—that one can do primary anthropology in the archives and history in a small community, and vice versa.

Locating this difference between conventional anthropological fieldwork and archival research depends on being clear about characteristics of both. Taking them in order, it seems ironic, given its iconic status within the discipline, that conventional fieldwork is rarely systematically identified or discussed prior to the inaugural moment when the neophyte leaves home. In part, of course, this is because fieldwork tends to be unsystematic in the same sense that "deep hanging out" is a recommended long-term strategy. Plans are made and formally approved, but anthropology is perhaps unique among disciplines for the degree to which initial preparations are susceptible to revision and abandonment in the course of fieldwork encounters. Whatever the reason, the core of anthropological

fieldwork—the thing that makes it essential to admission to the profession—is rarely spelled out, yet for many it remains, as if by unspoken consensus, a necessary rite of passage for new candidates of the discipline.

So what is this thing that is so rarely spelled out? Although typically described in terms of time spent in the field, being among the locals, living in some sense as they do without easy recourse to home, such descriptions of conventional fieldwork gloss over what is perhaps the core of the enterprise: psychological shake-up that arises when routine social practices and expectations get revealed as wrongheaded, in a context that forces you to stay and deal with it. It is the absence of an easy retreat into the comforts of home when this happens—the ability to close a book and go for coffee, to fall back on myriad habits and routines that rejuvenate peace of mind and sense of place. If, as Guemple (PC) put it, being sane is a process of having bedrock social assumptions affirmed by those around you, then the conventional fieldwork moment is a kind of insanity, a moment where basic affirmation fails and there is no convenient exit from the situation. This insanity has unique potential to teach things, expose things, or simply drive one home again.

The rite of passage is more than this, of course. It is a rigorous and sometimes painful elaboration on moments of shake-up which leads, in the form of a dissertation, to a realignment with the discipline. This signature product supposedly owes its worth to the fieldwork moment, which provides a unique kind of impulse to think outside prior experience and expectations, just as it

constitutes fieldwork's test of sheer resolve and mental toughness that not everyone will pass. This fieldwork moment, the spine of all fieldwork products including time spent in the field, resolves in two basic ways: perseverance and eventual success in producing an institutionally recognizable final product, or failure, retreat into existing comfort zones and (not uncommonly, perhaps) abandonment of the discipline, at least in a formal sense. Once completed, this rite of passage becomes a key basis of integrity and authority when talking about or within the discipline. And because this view seems to be a consensus, especially a somewhat unreflective one, it is very hard to defend any plan that appears to omit it.

It is hard to make similar claims about archival "moments". Archival research has its epiphanies, of course, and failures, senses of loss, sinking feelings of having gotten it all wrong, senses of having perceived a new and larger world. But these generally happen (and certainly did in the present case) in the context of known and familiar worlds where safe retreat is around every corner—libraries, archives, universities, and churches. Even institutions I'd never heard of, like the Sisters of the Holy Order of Mary and Joseph in Windsor, offered no obvious surprises at the institutional or social level; I explored their recesses from the comfort of habitual social space. The world *in* which I did research still operated in the same basic ways I expected. Other archives, like the Burton Collection in Detroit, hid surprises behind the sheer complexity of its filing system, but again one can blow off steam under a familiar blue sky, venti

Starbucks in hand. Archives, moreover, in lacking the kind of social interaction that puts your deep conventions actually at stake, also lacks conventional fieldwork's source of insanity.[94]

Although archival research is by no means identical with this sense of conventional fieldwork, it does entail confrontations and transformations of its own that are easily overlooked in adhering to a fieldwork "tradition". Psychological characteristics aside, one basic feature of conventional fieldwork is degree of openness and submission both to raw material that becomes analytical data, and to how one perceives/locates raw material to begin with. The underlying idea is that engagement of material in the field acts as a catalyst that propels effort and discovery in unpredictable new directions. Anthropology, to a degree not characteristic of most other disciplines, reverses cart and horse as they get proposed in the form of research plans. If all good social science discovers things not known beforehand, anthropology is perhaps most radical in the degree to which it makes research design itself subject to outcomes as they unfold in the field. This feature is no less evident in archival research than in conventional fieldwork, and indeed is the first and most basic thing the budding anthropologist must learn and grapple with when thrust into the archives for dissertation work. Nothing about my initial proposal even hinted at the importance of a burglary trial until I encountered it by accident. Even then, real

[94] Peirce's notion of firstness, secondness and thirdness, especially with its many subdivisions, offers a meticulous framework for talking about the conventional fieldwork moment and its aftermath.

questions only started to form after subsequently bumping into a court transcript about duels. Only then did the seeming paradox emerge: what consistent mode of thinking hangs someone for stealing a little rum and a few furs, yet acquits people for killing someone apparently outside the law, despite express and repeated legal emphasis that duels were murder? Going in, I hadn't the slightest clue about the central moral importance of a dwelling house. I also had no thought of complicating everything with gender questions, or more fundamentally, with a plan to listen for something as diffuse as resonance. These new horizons deflected into utterly unpredictable areas and opportunities for insight.

If conventional anthropology is about expanding habitual horizons and finding new boxes to think inside, this is no less true of archival work. But it is much harder to achieve in the archives, which lacks the flashing neon of surprised or irate individuals, weird and sticky relationships, personal embarrassments or other faux pas that help point the way. By the same token that archives allow you to close the books and go for coffee when the going gets tough, they also demand keen and patient attention to unpack their interior worlds, those other boxes that let researchers get outside their previous selves. These new boxes are equally abundant in each case. But what often arrives with the force of a highway accident in the one case, can only come by quiet focus, reflection and

discipline in the other.[95] New boxes also come by a different route in the archives, one that must account for how archival collections are assembled, by whom, for what purpose, what they systematically include and exclude. This kind of question is familiar in conventional fieldwork too but is directed there at different institutions. Other questions, which do not straightforwardly privilege one kind of fieldwork over the other, nonetheless distinguish them. What does it matter, for example, that texts can collect dust in ways spoken words and people do not?

To say that conventional fieldwork is based in social interaction easily suggests a wrongheaded contrast to archival work. It is certainly true that archives don't get to "talk back" in the same sense that living people do, and that its physical space and contents didn't emerge in interaction with the researcher the way conversation or living with people does. Bakhtin's idea of co-presence, a basis of his model of dialogue, starts to seem either trivial or silly if we imagine researchers being present *to* the archives. Archives are also silent in the literal sense (sound archives notwithstanding) that they don't take the form of audible vibrations to our ears. But to deduce wholesale silence and non-interactivity does not follow. If recent anthropology has accomplished anything, it is the end of social innocence for things in the world. In order for a box of archival papers to

[95] Compounding this problem in the case of archives, it is difficult to use that discipline while simultaneously putting its underlying disciplinary force (in the corrective sense) up for scrutiny, something that happens more automatically in conventional fieldwork when routine interpretations fail *despite* the fieldworker's tendency to cling to them.

rise above the role of a doorstop or paperweight, it requires the interactive positioning of a critical mind.

The usual buzzwords for fieldwork in anthropology, including participant observation and deep hanging out, attempt to capture a sense of the field's dynamism, its capacity to shape projects rather than just give them a place to happen. They describe a sense of context's agency. If all projects in all disciplines are somehow dynamic and engaged in place, anthropology perhaps commits to this more radically than most by viewing that agency as programmatic for the work to be done. For all their intended openness and flexibility, these buzzwords nonetheless evoke a sense of established routine as well, a basic sense of method, of knowing how we, as anthropologists, intend to orient ourselves toward the idea of being and learning in the field. They do this in part simply because the terms themselves are established in the literature, and thus reproduce a shared sense that there are real terms for what we do. Specialized vocabulary, whether invented by or simply appropriated by a discipline, seduces us further into imagining our methods with a precision deserving of the terms; saying "we go and do stuff we didn't know we were going to do, pull our hair out, go crazy, and finally learn something unrelated to our initial project if we don't give up first", while probably more accurate, is harder act dignified about.

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Appendix A: Definition of Burglary

The following definition comes verbatim from Keele's *Magistrate's Manual*. The full title of this work, including subtitles, gives a fair sense of overall contents and purpose: "The provincial justice, or magistrate's manual, being a complete digest of the criminal law, and a compendious and general view of the provincial law; with practical forms, for the use of the magistracy of Upper Canada." In reproducing this definition, I keep faithful to the use of spellings, italics, punctuation, and line breaks, but not to font (guesswork to reproduce anyway), or to line or page endings, which reflect nothing beyond the physical dimensions of Keele's book. For ease of reference to passages, I also add line numbering; note that it does not relate in any way to lines in the MM.

BURGLARY

BURGLARY is a felony at common law, in breaking and entering the mansion-house of another in the *night*, with intent to commit some felony within the same, whether the felonious intent be executed or not.

By Stat. 12 *An.* c. 7. if any person shall enter into the mansion-house of another by day or by night, without breaking the same, with an intent to commit a felony, or being in such house shall commit any felony, and shall in the *night time* break the said house to get out, he shall be guilty of burglary.

Every entrance is not a breaking;—as, if the door stand open, and the thief enter—this is no breaking. So if the window be open, and the thief draw out some of the goods—this is not burglary, because there is no actual breaking. But if the thief break the glass of the window, and draw out the goods—this is burglary. 3 *Inst.* 64. And lord Hale says, these acts amount to an actual breaking:—opening the casement, or breaking the glass window; picking open the lock of the door, or putting back the lock; or the leaf of a window; or unlatching the door that is only latched. 1 *H. H.* 552. And so does the pushing open of folding doors. *Rex. v. Brown.* 2 *East. P. C.* 487. 2 *Russ.* 902. Pulling down the upper sash of a window. *Rex. v. Haines. Russ. & Ry.* 451. *S. C. nom. Rex. v. Harrison.* 1 *Chetw. Brom.* 497. Creeping down a chimney. *Cromp.* 32. *Dalt.* 253. 1 *Haw. c.* 38. § 6.

The breaking is not confined to the outer door, or external parts of a house; for if A. enters the house of B. the outward door being open, or by an open window, and when within the house, turn the key of a chamber door, or unlatch it, with intent to steal—this will be burglary. *Johnson's case,* 2 *East. P. C.* 488. And the like if any lodger in a house, or guest in a public inn, open and enter another persons chamber door, with intent to commit a felony. 1 *Hale.* 553. 554. 4 *Bl. Com.* 227. *Rex. v. Bington*, 2 *East. P. C.* 488. But if an inn-keeper break the chamber of his lodger or guest, at night, to rob, this would not be burglary; for a man cannot commit a burglary by breaking his own house. 2 *East. P. C.* 502. *Kel.* 84.

Constructive breaking, is where, in consequence of *violence* commenced or threatened, the owner of the house, (through fear, or in order to repel the violence) opens the door, and the thief then enters,—this amounts to burglary; for the opening of the door in this

case, is as much imputable to the thief as if it had been done by his own hands. *Crompt.* 32 *(a.)* 1 *Hale.* 553. 2 *East. P. C.* 486. And so, if in consequence of any *fraud* or *deceit*, the owner is induced to open his door to the thieves—this will amount to breaking.—As where thieves came with a pretended hue and cry, and required a constable to go with them to go with them to apprehend the owner and search his house; and the owner, at the command of the constable, open the door, when the thieves bound the constable and rob the house;—this was held to be burglary. 1 *Hale.* 553. 3 *Inst.* 64. *Cromp.* 32 *(b.)* 4 *Bl. Com.* 226. And the like if a man go to a house under pretence of being authorized to make a distress, and by this means obtain admittance. *Gascoigne's case*, 1 *Leach*, 284. For in all these cases, the law will not endure to have its justice defrauded by such evasions. 1 *Haw. c.* 38. § 5. 4 *Bl. Com.* 227.

What is an Entering.

It is deemed an entry when the thief breaketh the house, and his body, or any part thereof—as his foot, or arm, is within any part of the house; or when he putteth a gun into a window which he hath broken; or into a hole of the house which he hath made, with intent to kill or murder. 3 *Inst.* 64. Or where the thief merely puts his fingers within the window. *Rex. v. Davis, Russ & Ry.* 499. But if he shoots *without* the window, and the bullet only comes in, the point is doubtful. 1 *Hale,* 555. Yet Hawkins says, this is a sufficient entry. 1 *Haw. c.* 38. § 11. Where a glass window, which had shutters inside, was broken, and the window was opened with the hand, but the shutters were not broken or opened—this was ruled to be a burglary. *Rex. v. Roberts, alias Chambers,* 1 *East. P. C.* 487. But as in this case, *Holt. C. J.* and *Powell, J.* doubted, and inclined to another opinion, no judgment was given. But in a recent case, the same point was before the judges, who were of opinion (three being absent) that the entry was sufficient. *Rex. v. Baily, Russ. & Ry.* 341.

If divers come in the night to do a burglary, and one of them break and enter, the rest of them standing to watch at a distance—this is burglary in all. 3 *Inst.* 64.

What is a Mansion or Dwelling-house.

Where the whole of the house is let out into lodgings, and the owner does not inhabit any part of it, though there is only one outer door common to all its inmates, yet every separate apartment is the distinct mansion-house of its possessor. *Rex. v. Trapshaw,* 1 *Leach,* 427. So where a loft over a coach-house and stables was converted into lodging rooms. *R. v. Turner,* 1 *Leach,* 305.

But where the owner of a dwelling-house lets off the shop to a tenant, who occupies it by means of a *different entrance* from that belonging to the dwelling-house, and carries on his business in it, but never sleeps there, it then becomes so severed from the rest of the house, as no longer to be a place where burglary can be committed; for it ceases to form parcel of the dwelling-house of the owner, being thus severed by lease as well as by the distinct mode of ingress and egress to it; and it does not become the dwelling-house of the tenant, when neither he nor any of his family sleep there. 1 *Hale,* 557. *Kel.* 83. 4 *Bl. Com.* 225. 2 *East. P. C.* 507. But if the tenant, or his servant, should usually, or often, sleep in the shop at night, it would then become the dwelling-house of the tenant. 1 *Hale,* 558.

There is no severance, however, where there is *any internal communication*, though there may be a separate entrance from without to the part let off; as where the communication was formed by means of a trap-door and a ladder, which were seldom used, but the trap-door was never fastened. Lord Ellenborough said it could make no difference whether the communication was through a trap-door, or by a common staircase. *Rex. v. Stockton,* 2 *Taunton,* 339. 2 *Leach,* 1015. And when the owner of the house continues to sleep in it, no part of it then can be so severed, by being let off to a tenant or a lodger, as to become a separate mansion-house. *Rex. v. Rogers,* 1 *Leach,* 89. 2 *East. P. C.* 507. Unless, indeed, that which was one house originally comes to be divided completely into two separate tenements, and there is a distinct outer door to each, without any internal communication; in which case, they will then become separate houses. *Per Ld. M. Cowp.* 8. But if the owner of a house neither *inhabits* it himself, nor any of his family, it will not then become *his* dwelling-house, as applicable to the offence of burglary. Therefore, when a man purchases or rents a house with intention to reside in it, and moves some of his furniture into it, but neither he nor any of his family ever sleep there, and it is broken open in the night time,—the judges have determined that a breaking into a house of this description does not amount to burglary. *R. v. Lyons,* 1 *Leach,* 185. 2 *East. P. C.* 496. *R. v. Hallard,* 2 *East.* 498. 2 *Leach,* 701. *(note a.) R. v. Thompson,* 2 *Leach,* 771. 2 *East.* 498. *Contra* 1 *Haw. c.* 38. § 18. 1 *Kel.* 46. And this—even though the owner of the house has used it for his meals, and for all the purposes of his business. *Rex. v. Martin, Russ. & Ry.* 108. Or, though a person actually sleep in the house for the purpose of protecting it, if such person forms no part of the domestic family of the owner,—as where the owner puts in a workman or other person, who is in no situation of servitude to him, for the purpose of taking care of his goods. *Rex. v. Fuller,* 2 *East. P. C.* 498. 1 *Leach,* 186. *(note b.) Rex. v. Harris,* 2 *Leach,* 701. 2 *East. P. C.* 498.

So if a servant it put into a ware-house to watch goods, this does not make it a dwelling-house. *Rex. v. Smith,* 2 *East. P. C.* 497.

But where the owner of the house has once inhabited it, it will not cease to be his dwelling-house on account of any occasional or temporary absence, provided he has the *animus revertendi*—the intention of returning to it;—in such cases, the premises may be the subject of burglary. *Rex. v. Murray & Harris,* 2 *East. P. C.* 496. *cit. Fost.* 77. But where a person had a country house at which he lived only a part of the year, and then quitted, with a considerable part of his furniture, with no intention of immediately returning, and during his absence his house was broken open and rifled—this was held not to be burglary. *Fost.* 76. 77.

And now, by stat. 3 *W.* 4. *c.* 4. § 10. it is enacted, that no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house, for the purpose of burglary, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other. And by § 12. accessories before the fact shall be punishable as principals.

Of the time of committing the Offence.

It must be *in the night*, and, generally speaking, in the darkness of the night; for though the day was formerly accounted to begin only at sun-rise, and to end immediately upon sun-set, yet it is now settled that if there be daylight or twilight enough to discern a

man's face, there can be no burglary. 3 *Inst.* 63. 1 *Hale,* 550. 1 *Haw. c.* 38. § 2. 4 *Bl. Com.* 224. 2 *East. P. C.* 509. But this does not extend to moonlight, for then many midnight burglaries would go unpunished; and the malignity of the offence, as Blackstone observes, does not indeed so properly arise from its being done in the dark, as at the dead of night, when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless. 4 *Bl. Com.* 224.

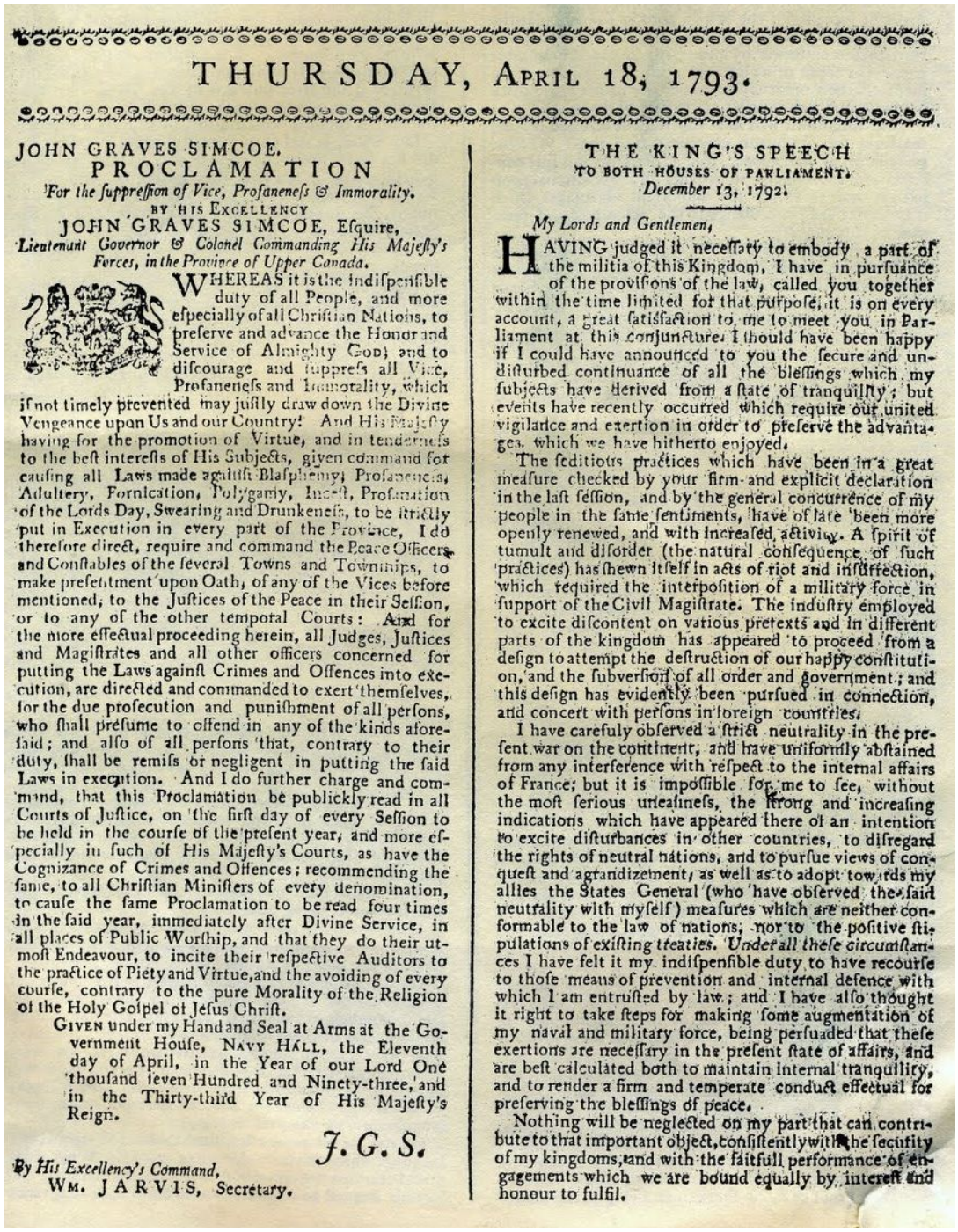
The breaking and entering need not be the *same night*; for if thieves break a hole in the house one night, with the intent to enter another night and commit a felony, and they accordingly do so, through the hole they made the night before—this seems to be burglary. 1 *Hale,* 551. 4 *Bl. Com.* 226.

Of the Intent.

The intent of the breaking and entering must be to commit a *felony.* Therefore, if the intention was only to commit a *trespass*, the offence will not be a burglary. Thus, an intention to *beat* a man in the house, will not be sufficient; for though killing or murder may be the consequence of beating, yet if the primary intention were not to kill, a breaking and entering for the purpose of beating, will not amount to burglary. 1 *Hale,* 561. 2 *East. P. C.* 509. And where a man broke into a house with intent to commit a rape—this was held to be burglary. *Rex. v. Gray,* 1 *Str.* 481.

By stat. 23 *G.* 3. *c.* 88. it is enacted, that if any person shall be apprehended having upon him any picklock, key, crow, jackbit, or other implement, with an intent feloniously to break and enter into any dwelling-house, out-house, &c.; or shall have upon him any pistol, hanger, cutlass, bludgeon, or other offensive weapon, with intent feloniously to assault any person; or shall be found in or upon any dwelling-house, ware-house, coach-house, stable or out-house, or in any inclosed yard or garden, or area, belonging to any house, with an intent to steal, he shall be deemed a rogue and vagabond within the intent and meaning of the 17 *G.* 2. *c.* 5.

Appendix B: Proclamation for the Suppression of Vice, Profaneness & Immorality



THURSDAY, APRIL 18, 1793.

JOHN GRAVES SIMCOE.

PROCLAMATION

For the ſuppreſſion of Vice, Profaneneſs & Immorality.

BY HIS EXCELLENCY

JOHN GRAVES SIMCOE, Eſquire,

Lieutenant Governor & Colonel Commanding His Majeſty's Forces, in the Province of Upper Canada.

WHEREAS it is the indiſpenſible duty of all People, and more eſpecially of all Chriſtian Nations, to preſerve and advance the Honor and Service of Almighty GOD; and to diſcourage and ſuppreſs all Vice, Profaneneſs and Immorality, which if not timely prevented may juſtly draw down the Divine Vengeance upon Us and our Country! And His Majeſty having for the promotion of Virtue, and in tenderneſs to the beſt intereſts of His Subjects, given command for cauſing all Laws made againſt Blaſphemy, Profaneneſs, Adultery, Fornication, Polygamy, Inceſt, Profanation of the Lords Day, Swearing and Drunkeneſs, to be ſtrictly put in Execution in every part of the Province, I do therefore direct, require and command the Peace Officers and Conſtables of the ſeveral Towns and Townſhips, to make preſentment upon Oath, of any of the Vices before mentioned, to the Juſtices of the Peace in their Seſſion, or to any of the other temporal Courts: And for the more effectual proceeding herein, all Judges, Juſtices and Magiſtrates and all other officers concerned for putting the Laws againſt Crimes and Offences into execution, are directed and commanded to exert themſelves, for the due proſecution and puniſhment of all perſons, who ſhall preſume to offend in any of the kinds aforeſaid; and alſo of all perſons that, contrary to their duty, ſhall be remiſs or negligent in putting the ſaid Laws in execution. And I do further charge and command, that this Proclamation be publickly read in all Courts of Juſtice, on the firſt day of every Seſſion to be held in the courſe of the preſent year, and more eſpecially in ſuch of His Majeſty's Courts, as have the Cognizance of Crimes and Offences; recommending the ſame, to all Chriſtian Miniſters of every denomination, to cauſe the ſame Proclamation to be read four times in the ſaid year, immediately after Divine Service, in all places of Public Worſhip, and that they do their utmoſt Endeavour, to incite their reſpective Auditors to the practice of Piety and Virtue, and the avoiding of every courſe, contrary to the pure Morality of the Religion of the Holy Goſpel of Jeſus Chriſt.

GIVEN under my Hand and Seal at Arms at the Government Houſe, NAVY HALL, the Eleventh day of April, in the Year of our Lord One thouſand ſeven Hundred and Ninety-three, and in the Thirty-third Year of His Majeſty's Reign.

J. G. S.

By His Excellency's Command,
WM. JARVIS, Secretary.

THE KING'S SPEECH

TO BOTH HOUSES OF PARLIAMENT.

December 13, 1792.

My Lords and Gentlemen,

HAVING judged it neceſſary to embody a part of the militia of this Kingdom, I have in purſuance of the proviſions of the law, called you together within the time limited for that purpoſe; it is on every account, a great ſatisfaction to me to meet you in Parliament at this conjuncture. I ſhould have been happy if I could have announced to you the ſecure and undiſturbed continuance of all the bleſſings which my ſubjects have derived from a ſtate of tranquillity; but events have recently occurred which require our united vigilance and exertion in order to preſerve the advantages which we have hitherto enjoyed.

The ſeditious practices which have been in a great meaſure checked by your firm and explicit declaration in the laſt ſeſſion, and by the general concurrence of my people in the ſame ſentiments, have of late been more openly renewed, and with increaſed activity. A ſpirit of tumult and diſorder (the natural conſequence of ſuch practices) has ſhewn itſelf in acts of riot and inſurrection, which required the interpoſition of a military force in ſupport of the Civil Magiſtrate. The induſtry employed to excite diſcontent on various pretexts and in different parts of the kingdom has appeared to proceed from a deſign to attempt the deſtruction of our happy conſtitution, and the ſubverſion of all order and government; and this deſign has evidently been purſued in connection, and concert with perſons in foreign countries.

I have carefuly obſerved a ſtrict neutrality in the preſent war on the continent, and have uniformly abſtained from any interference with reſpect to the internal affairs of France; but it is impoſſible for me to ſee, without the moſt ſerious uneaſineſs, the ſtrong and increaſing indications which have appeared there of an intention to excite diſturbances in other countries, to diſregard the rights of neutral nations, and to purſue views of conqueſt and agrandizement, as well as to adopt towards my allies the States General (who have obſerved their ſaid neutrality with myſelf) meaſures which are neither conformable to the law of nations, nor to the poſitive ſtipulations of exiſting treaties. *Under all theſe circumſtances* I have felt it my indiſpenſible duty to have recourſe to thoſe means of prevention and internal defence with which I am entruſted by law; and I have alſo thought it right to take ſteps for making ſome augmentation of my naval and military force, being perſuaded that theſe exertions are neceſſary in the preſent ſtate of affairs, and are beſt calculated both to maintain internal tranquility, and to render a firm and temperate conduct effectual for preſerving the bleſſings of peace.

Nothing will be neglected on my part that can contribute to that important object, conſiſtently with the ſecurity of my kingdoms, and with the faithfull performance of engagements which we are bound equally by intereſt and honour to fulfil.

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Curriculum Vitae

Education

Ph.D. Anthropology, University of Western Ontario, 2011

Western Certificate in University Teaching and Learning, University of Western Ontario, 2010

Certificate in Museum Studies, Harvard University, 2004

Masters Anthropology, University of Western Ontario, 1996

Bachelor of Arts, University of Saskatchewan, 1993

Grants

Western Graduate Research Scholarship, University of Western Ontario, 2003-04 through 2006-07

Phillips Grant for Native American Research, American Philosophical Society, one-year grants given in 2002, 2005 and 2007.

Experience

Graduate Teaching Assistant, University of Western Ontario, 2003-04 through 2006-07