

Fighting Fear with Fear:
A Governmental Criminology of Peace Bonds

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ABSTRACT

Peace bonds are a legal tool of governance dating back to 13th c. England. In Canada, a significant change in the application of peace bonds took place in the mid-1990s, shifting their purpose from governing minor disputes between individuals to allowing for persons who have not been charged with a crime to be governed as if they had. Given the legal test for a peace bond has always been the determination of ‘reasonable fear’, the advent of these ‘specialized’ peace bonds suggests that the object of reasonable fear has changed. Despite their lengthy history, peace bonds have limited coverage in academic literature, a weakness compounded by a predominant doctrinal approach based in a liberal framework. The central inquiry of this thesis moves beyond this predominant perspective of ‘peace bonds as crime prevention’ by developing a governmental criminology, which deepens our understanding of the role of specialized peace bond law in contemporary society. Specifically, governmental criminology takes a Foucaultian critical legal studies approach, which acknowledges legal pluralism and sets out the historical context required for analysis. Ultimately, by unearthing underlying social, economic, and political power relations it is possible to critique the accompanying modes of calculation of fear and risk, thus challenging the regimes of practices that make specialized peace bonds possible. Specialized peace bonds merely manage the consequences of a criminal justice system limited by social, political, and economic circumstances, in a broader biopolitical project of integrating risky populations.

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CHAPTER ONE

Introduction

John Haylock (*Haylock v. Sparke*, 1852)

“Donkey Watt, the railway jackass.”
John Haylock, 1852

Written on the pavement of a lane in rural England, the above statement was directed towards Johnson Watt, Station Master of the Ely Railway Station. It was likely the last in a series of offensive messages authored by John Haylock. Fearing the pattern of libel would continue, on April 30th, 1852, Watt brought Haylock before a magistrate who, in an informal proceeding, determined the messages were “calculated” to provoke a breach of the peace. The evidence was provided by oath of Thomas Palmer, a porter for the railway company.

To prevent further messages, the magistrate exercised his discretion and ordered Haylock be committed to a monetary surety to keep the peace. Refusing to comply, that same day Haylock was committed to the House of Correction at Ely for three months or until he could produce the monetary surety.

John Buesnel (*R. v. Buesnel*, 2012, Manitoba, unreported)

“No, sir, I am giving my professional opinion. It is not personal to you. It is about you, but it's not personal to you.”

Psychologist Daryl Lindsey, testifying at the section 810.2 peace bond hearing of John Buesnel, March 16, 2012

Buesnel was mere days from finishing his full seven-year sentence for manslaughter. Instead of being released, however, he was further held on bail until the s. 810.2 peace bond hearing. The hearing involved testimony from a psychologist, his parole officer, and a Winnipeg Police Service officer. Their information drew from a variety of sources,

including interviews, judicial rulings, assessment reports, custody rating reports, criminal records, psychological and psychiatric reports, program performance reports, offender security level decisions, and past parole decisions. Risk assessments declared him a medium to high risk of re-offending violently. However, believing he was innocent, Buesnel had refused to interact with criminal justice officials for the last five years of his sentence, as he considered complying with assessments and programming to be an admission of guilt. His lack of cooperation only increased his risk level, given that it prevented an establishment of ‘trust’, in the words of the probation officer.

The police officer, acting as the informant and in her duties with the major crimes unit, had begun reviewing the available documentation three months prior to Buesnel’s warrant expiry date. She testified that her assessment led to her fear an offence would be “committed against another person in general” if Buesnel were to be released. The judge, viewing the totality of the evidence, agreed “the fear is that wherever you [Buesnel] would be the people would be in danger”. Like the professional opinion of Daryl Lindsey above, it was not about Buesnel personally, it was just *about him*.

To prevent further violent offences the judge issued a section 810.2 peace bond with a number of conditions attached. As per some of the conditions, Buesnel was to meet with a probation officer regularly, abstain from alcohol, not carry weapons, reside at the Salvation Army, abide by a curfew, and attend, participate, and complete any assessments and counselling required by the probation officer. Refusing to comply, that same day Buesnel was committed to a year of custody. When a s. 810 peace bond order expires, new applications may be made indefinitely.

The cases of Haylock and Buesnel illustrate a shift in application of peace bonds. Haylock exemplifies what I will call the *traditional peace bond*, which has existed since the 14th century and continues today (currently in s. 810 of the *Canadian Criminal Code*), whereas Buesnel is the subject of what I call a *specialized peace bond*, which has existed in Canadian criminal law since the mid-1990s. The latter are specialized in the sense that they focus on sexual offences (s. 810.1), dangerous offences (s. 810.2), and criminal organization/terrorist offences (s. 810.01). Traditional and specialized peace bonds maintain a certain similarity, but their object of governance is considerably different. Since their inception, peace bonds have been relied on to govern behaviour that is not definitively criminal, as no offence needs to have taken place. While both types can still be accurately categorized as a *surety to keep the peace*, what exactly it means to ‘keep the peace’ has changed.

Traditional peace bonds originally involved relatively informal hearings to deal with private disputes spurred by a reasonable fear of some specific, but not necessarily criminal action. Specialized peace bonds, as illustrated through Buesnel’s case, involve a formal hearing about a general fear that someone will commit a serious criminal offence against any member of the community. The severity of their respective potential conditions reflects these differences, from the monetary surety for a traditional peace bond to the plethora of general prescribed and proscribed behaviours as was the case for Buesnel. Not only do the conditions of specialized peace bonds resemble the sanctions for a criminal conviction resulting in probation, breaching those conditions or refusing to enter into a peace bond can result in a period of imprisonment.

The fear of one person by another can be thought of as a local problem, as the

problem is confined to the specific people involved. However, specialized peace bonds are based on the general fear that anyone can become a victim and anyone can apply on the community's behalf, which is a much less tangible problem due to the less definable target. Since the threshold to be met for the application of a peace bond has always been a *reasonable fear*, it follows that our understanding of *what it is reasonable to be afraid of* has changed. Indeed, this increasingly generalized notion of fear suggests that the more we try to understand and relieve our 'fear', the less it seems we can specifically know about it – where it is located, what form it takes, or how it is created. This paradox is revealed through the emergence of specialized peace bonds, which, unlike any other law, allow for persons who have not been charged with a crime to be governed as if they had. Specialized peace bonds are, simply put, an attempt to control our expanding fear of the unknowable by turning these same discourses of fear back against themselves.

Given the continued usage of peace bonds since 14th century England, it is surprising to find so little written on peace bonds, and what is available portrays peace bonds as simply a tool of crime prevention. The literature tends to be largely descriptive, either in the context of a legal critique, current responses to sexual or violent offending, or 'traditional' peace bond applications for conflicts between individuals. The legal critiques (Childress, 1994; Hunter, 1978; Neumann, 1994; Poyner, 1997; Rolston, 1972; Strother, 1966) explore issues of constitutionality and legal jurisprudence such as debates about the standard of proof to be met, or legal definitions of 'personal injury' or 'harm'. These sources primarily ask questions 'within' the law. Literature focusing on current responses to sexual or violent offending (Grant, 1998; Lussier & Ratel, 2010; Petrunik, 2002; Petrunik, 2003; Rigakos, 2002; Weinrath & Doerksen, 2011; Wilson, Picheca & Prinzo, 2007) describes the

application and procedure of peace bonds for reducing violent crime, with a focus on effectiveness or efficiency. In these studies peace bonds are often referenced as merely a lesser or secondary focus in relation to dangerous or long-term offender legislation. As such, they ask questions primarily ‘within’ the criminal justice system. The balance of the literature focuses on historical or ‘traditional’ type peace bond applications solely as a means of conflict resolution between individuals (Clayton, 1985; Meredith, 1995; Orr, 2002). What is absent from all existing literature is any recognition of *how* the scope of peace bonds has shifted, thus limiting our understanding of their role in governance and the implications. Any consideration of how the broader sociological context led to the outcome of a new conception of fear, thus making possible specialized peace bonds, is nonexistent.

This thesis seeks to deepen our understanding of peace bonds as a tool of governance by explicating the shift from traditional to specialized application and the ensuing implications. It begins by developing a *governmental criminology* in chapter two, which is rooted in a critical social science framework, specifically critical legal studies (CLS). I then set out the theoretical and methodological framework, which explicates how CLS can address the weaknesses of the legalistic doctrinal approach of existing peace bond literature. By grounding analysis in critical social science, it is shown how CLS approaches law as it is exercised within a broader field of social power relations. In particular, the theories of Foucault provide the intellectual and methodological tools (genealogy and archaeology) for understanding how knowledge, techniques, and discourses form to become “entangled with the practice of power” (Foucault, 1995, p. 23).

Chapters three and four execute the governmental criminology with Foucaultian genealogical and archaeological analyses, respectively. First, the genealogical analysis

explores the social, economic, and political conditions that made possible the construction of risky populations. This reveals the discursive constraints under which the central problematization is revealed: How are the members of these risky populations to be included in society? Next, an archaeological analysis examines how knowledge is organized into the manageable form we now understand to be specialized peace bonds. This is undertaken by examination of the parliamentary debates, which reveals the form of the problematization that saw the creation of specialized peace bonds as the suitable solution for integrating risky populations. The final chapter draws a connection between the genealogical and archaeological analyses, and then offers insight into some of the less apparent consequences of governing through specialized peace bonds.

The cases of Haylock and Buesnel illustrate the significant change in the application of peace bonds. Once a tool of governance for minor disputes between individuals, peace bonds now allow for persons who have not been charged with a crime to be governed as if they had. With reference to the work of critical legal scholars, and by setting the discussion within the context of a critical social science approach, this thesis provides a deeper understanding of the role of peace bond legislation and legal regulation in contemporary society.

CHAPTER TWO

Governmental Criminology: Theory and Method

Introduction

The previous chapter identified a distinct change in the shift from traditional to specialized peace bonds with respect to their treatment of ‘fear’. Once a tool for preventing the fear of minor private disputes from turning into something more serious, peace bonds are now applied in circumstances where there is a general fear that one will commit a serious offence against a non-specific person in the community. Moreover, these new specialized peace bonds carry conditions that allow the bonded person to be governed as if they had committed a criminal offence, and failure to enter into a peace bond may result in up to a year¹ in prison. Since no offence is required for a peace bond, upon their expiration a new application may be brought while the bonded person is still in custody (MacAulay, 2001, p. 60). Despite these changes, what scant literature is available focuses entirely on peace bonds as a method of crime prevention and overlooks the shift from traditional to specialized peace bonds. A critical approach is therefore necessary to deepen our understanding of what it means to govern through peace bonds.

In this chapter I develop the theoretical and methodological approach of governmental criminology specifically for a critical analysis of law. It begins by grounding this research in critical social science, and then elaborates the role of critical legal studies for understanding the interrelationship between law and society. Critical legal studies are then complemented with a Foucaultian approach to power and law, which also supports the need for an historical analysis. I then outline how genealogical analysis reveals the discursive and

¹ Some peace bond breaches may carry a penalty of up to two years in prison if there is a previous conviction for a similar offence.

material limits of the social, economic, and political realms. It is these limits that ultimately create the conditions that make specialized peace bonds possible. Next, archaeological analysis reveals how knowledge is organized into a manageable form, which is then capable of creating a particular type of political subject. The chapter concludes by detailing the sources of data and the method by which they will be analyzed.

Critical Social Science & Critical Legal Studies

This thesis is grounded in a critical social science framework. Critical research can make use of a number of methodologies (Carspecken, 1996; Weiler, 1988; both as cited in McCotter, 2001) and is capable of uncovering knowledge in a way not possible through positivism or phenomenology (Frauley & Pearce, 2007, p. 17). It does this by probing the social world in order to reveal and actively change oppressive conditions for marginalized groups (Esterberg, 2002, pp. 17-18; Neuman, Wiegman & Winterdyk, 2004, p. 77). It must “engage with the material world, its history, its ideologies, its political economy, its institutional arrangements and its structural relation” in order to relieve oppression by providing alternative accounts (Scruton, 2007, pp. 9, 17).

There are two important facets to consider with respect to the concept of oppression. First, the concept of oppression is inextricably linked to the values of both subjects and the researcher, since the definition/construction of ‘oppression’ is relative and therefore debatable (Esterberg, 2002, p. 18; Neuman, Wiegman & Winterdyk, 2004, p. 77). Second, there is a temporal aspect to critical research as oppressive conditions are constructed over an historical period of time (Esterberg, 2002, p. 17). Critical research therefore examines how oppression is constructed over time in order to expose inconsistencies and question

processes of governance (Neuman, Wiegman & Winterdyk, 2004, p. 78).

A critical social science framework, therefore, is an ideal approach for studying law and its oppressive elements. This oppression can be traced over time through legislation and its amendments. For a tool of governance with a history as long as peace bonds (800+ years), it is possible to trace how the purposes have shifted with respect to peace bond legislation in the mid-1990s. The activist orientation of critical research is therefore well suited for understanding not only the underlying mechanisms of peace bonds, but also how to intervene if necessary (Neuman, Wiegman & Winterdyk, 2004, p. 81). The aim of such an inquiry is therefore to critique and transform these structural and material aspects of society in order to facilitate emancipation of a marginalized population (Datta, Frauley & Peace, 2010, pp. 231, 235; Guba & Lincoln, 2003, p. 257).

Critical legal studies provides a critical social science framework to examine the relationship between law and society. It goes beyond the doctrinal legal position that characterizes much of the peace bond literature, as will be demonstrated in chapter three. CLS provides a way to see past doctrine and the ‘professional’ experience (Cotterrell, 1995, p. 45; Unger, 1983, p. 563). This is not to say that CLS scholars renounce doctrine itself, but rather they take doctrine as the starting point of inquiry into the relationship between law and society (Hunt, 1993, p. 36; Sargent, 1991, p. 6). The operation of the law changes its form amongst different structures over history (Tadros, 1998, p. 79), which means the view of liberalism as a historically grounded system can be replaced by a view of liberalism as an historically contingent *intellectual construct* that supports a *particular* view of law (Foucault, 2003, p. 36; Hunt, 1993, p. 144; Unger, 1983, p. 584). Hunt (1997) suggests that looking at law from a sociological perspective threatens the distinction between law and

politics, and therefore the pre-eminence of the legal profession itself (p. 103).

A key element of CLS is legal pluralism, which eschews the view of a unitary totalizing 'Law', and instead examines different forms of law that co-exist over time and social spaces (Hunt, 1993, p. 9; Hunt, 1997, p. 114). It does this by explaining how laws are the outcome of an "attempt to create coherence out of the competing and contradictory social influences and arguments which animate them" (Nelken, 1987, p. 110). This includes laws that are, for example, official or unofficial, state or civil, public or private (each of which may be broken down further), as each type of law coordinates behaviour by authoritative patterns (Cotterrell, 1992, p. 39; Hunt, 1993, p. 224; Unger, 1983, p. 617). The pluralities of law are examined alongside social relations and are viewed as a site for these competing conceptions of social ordering (*e.g.* whether something is public or private)(Hunt, 1993, pp. 11, 224; Sargent, 1991, p. 8). CLS acknowledges a diversity of legal thinking and interpretations (Cotterrell, 1995, p. 10; Sargent, 1991, p. 11), therefore making it possible to account for both the effect laws have on society (*e.g.* their ability to organize) and how social change can in turn affect the law (*e.g.* through technological advances)(Cotterrell, 1992, pp. 44, 49).

Critical legal studies inquiry is diverse in both method and theory (Hunt, 1993, pp. 36, 44, 140). There is general agreement that in order to examine the connection between law and other social processes it is necessary to understand the historical context (Hunt, 1993, pp. 41, 303; Sargent, 1991, p. 2; Unger, 1983, p. 563). Doing so allows empirical analysis to provide insight by way of the social conditions in which legal ideas are formed, including their moral significance, and the power of regulation and control (Cotterrell, 1995, p. 3).

Within CLS, as Alan Hunt (1993) explains, theory does not claim to find the truth but it can provide adequate means to address contemporary concerns (p. 305). Theory is integral to a study of law as a social phenomenon, which cannot be reduced to empirical evidence nor can it be comprehended solely from the actions of individuals or its general structures (Sargent, 1991, p. 8; Turkel, 1990, p. 170). However, all of these aspects can be considered when analyzing law as it is *exercised* within a broader field of social relations (Hunt, 1997, pp. 118-119; Turkel, 1990, p. 170). This approach draws from the theories of Michel Foucault, for whom the exercise of ‘power’ takes a distinctly non-state-centred position (Foucault, 1991; Hunt, 1993, p. 305).

Foucault & Law

With respect to Foucault and law, unfortunately, there is no definitive ‘Foucaultian theory of law’ as it was never a direct object of his inquiry (Golder & Fitzpatrick, 2009, pp. 3-4; Hunt, 1993, p. 269; Hunt, 2002, p. 57; Hunt & Wickham, 1994, p. 39). As a result, some scholars attempt to interpret a Foucaultian position on law based on Foucault’s existing works, while other scholars instead apply Foucaultian concepts and method to law “unencumbered” by Foucault’s ‘supposed’ position on law (Golder & Fitzpatrick, 2009, p. 5). There are two main reasons for the variety of approaches to law in Foucaultian studies.

First, Foucault seemed unwilling to grant significance to law due to his focus on power exercised outside of the law by a wide range of experts or professionals (Foucault, 1980a, p. 144; Hunt, 1993, p. 272; Hunt, 2002, p. 57). In his *Governmentality* lecture he went as far as saying, “law is not what is important” (Foucault, 1991, p. 95), though it was frequently addressed, even if not directly, in his work (Hunt & Wickham, 1994, p. 39).

Second, focusing attention on the shift from state power to non-state power appeared to render any discussion of law outside the scope of inquiry (Hunt, 1993, p. 272). This line of reasoning has directed much governmentality research, notably that of Rose and Miller (1992), which links political power with the governance of economic, social, and individual activity outside of the increasingly decentralized state. The shifts from liberalism to welfarism to neo-liberalism, and the concomitant shifts in moralities, explanations, and vocabularies ultimately result in state governance “at a distance” (Rose & Miller, 1992, pp. 180-181, 184). Power is not imposed to constrain citizens, but instead creates citizens capable of being free, albeit regulated (Rose & Miller, 1992 p. 174). According to Rose and Miller (1992), liberal modes of regulatory government are no longer dependent on political actions such as the imposition of law (p. 280), and therefore it may appear the law is irrelevant.

While Rose and Miller are not wrong in their postulations, Hunt and Wickham (1994) contend the changing status of the law within Foucaultian analysis does not negate its relevance. Approaching from the perspective of *law as governance*, that is, one form of governance among many, ties law with sociology and allows a retrieval of Foucault (Hunt, 2002, pp. 62-63). This perspective is supported in two ways. First, law as governance accounts for the increasing legal regulation of previously informal means of resolution for social disputes, also called the process of *juridification* (Hunt, 1997, p. 105; Hunt, 2002, p. 58). Law also structures the procedures through which decisions may be reached, rather than simply existing as direct rules for a decision (Hunt, 2002, p. 58). Accepting that there is more to the law than these ‘direct rules’ requires a departure from a strict doctrinal position. Moreover, since juridified social disputes can be the result of attempts to

overcome domination or hierarchy (*i.e.* activism), the political nature of law is evident (Hunt, 1993, p. 213). The law is therefore increasingly relevant to modern governance even with political power distanced from the state, but in a way different from that imagined by a doctrinal approach to law.

Second, the outcomes of modern law demonstrate power in new and varied ways. Foucault showed how the function of law is increasingly used to regulate persons based on distributions around the scientific norms about a population (Dean, 2010, p. 140; Foucault, 1980a, pp. 89, 144; Hunt, 2002, p. 67). In his words,

I do not mean to say that law fades into the background or that institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and the juridical institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory. (Foucault, 1980a, p. 144)

Rather than focusing on proscribing conduct, modern law can be viewed as a mechanism to articulate policy prescriptions that form subjects (Dean, 2010, p. 140). Laws can therefore act as “symbolic or legitimizing pronouncements of normative values” (Hunt, 2002, p. 72) that reveal governmental rationales and goals. This is evident when we look beyond how a law fulfils a pragmatic function; the importance associated with the function indicates it must also fulfil a symbolic purpose (Manderson, 1999, p. 180). As such, the failure to acknowledge the symbolic aspect of a problem may result in the law merely reifying the symbol and thereby perpetuating the problem itself (Manderson, 1995). Law can therefore provide insight into the procedures leading to general agreement about what becomes considered a norm (Dean, 2010, p. 141). For example, Smart (1990) shows how the law reproduces “self-evident and natural” women as legal subjects, such as ‘family member’, ‘wife’, ‘divorcee’, ‘mother’, and ‘daughter’ (p. 204). While the law may not be the original

author of these subject-positions, it does play a part in the preservation of norms.

Viewing law as governance has a distinct advantage by allowing for the possibility of incompleteness or failure in attempts to govern (Hunt & Wickham, 1994, p. 79). When a social process is the target of governance, its object may not be (and is unlikely to be) fully knowable (Malpas & Wickham, 1995, pp. 39-40). A prime example is the governance of an environment to keep it clean, even though absolute cleanliness is never possible (Hunt & Wickham, 1994, p. 80). As a more pointed example, the ideals of law (freedom, equality, justice) have persistently underachieved the goals of liberalism, a failure of which “the manifestations [...] have taken varied forms” (Hunt, 1993, p. 46). An inquiry into governance may focus, therefore, on the assemblages of people, organizations, things, and/or actions that result in undesired or imperfect outcomes (Malpas & Wickham, 1995, p. 41).

Tying law with a Foucaultian-inspired critical social science can account for the plurality of relations behind symbolic and material processes of normalization, thus eliminating both the possibility of law being autonomous and any preoccupation with the law being a tool of the state (Hunt, 1993, pp. 304-305). In this thesis, therefore, ‘the law’ is not limited to what is written in the *Criminal Code*, but is rather taken as a number of social relations making up the complete governmental strategy within the project of peace bonds. This examination analyzes the law as a complex social function, a political tactic, and an “epistemologico-juridical formation” (Turkel, 1990, p. 181). In order to understand these aspects of specialized peace bond law we need to have a sense of the power behind the processes which make them possible, and for that we turn once again to Foucault.

Foucault & Power

Central to a Foucaultian understanding of law within society is Foucault's vision of power within governance. In his lecture titled *Governmentality*, Foucault sought to explicate the art of government by questioning how we are governed in modern liberal society (Foucault, 1991, p. 92). He defined government as the right manner for disposing of things so as to lead to a convenient end (Foucault, 1991, pp. 94-95). In contrast to the sovereign rule of the prince over a principality, Foucault initially located a plurality of forms of government in, for example, families, schools, and churches (Foucault, 1991, p. 91). For the governance of the state, the art of government becomes concerned with applying economy to political practice in order to control the wealth and behaviour of its inhabitants (Foucault, 1991, p. 92). Garland (1997) emphasized the use of 'economic' can be not only value-for-money, but also as a broader analytical language of risks, rewards, rationality, and probability (p. 185). The development of this form of economic government was made possible by the emergence of scientific knowledge about the population (Foucault, 1991, p. 99).

Foucault coined the term *governmentality*, which he defined as:

1. The ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principal [*sic*] form of knowledge political economy, and as its essential technical means apparatuses of security.
2. The tendency which, over a long period and throughout the West, has steadily led towards the pre-eminence over all other forms (sovereignty, discipline, etc.) of this type of power which may be termed government, resulting, on the one hand, in the formation of a whole series of specific governmental apparatuses, and, on the other, in the development of a whole complex of *savoirs*.
3. The process, or rather the result of the process, through which the state of justice of the Middle Ages, transformed into the administrative state during the fifteenth and sixteenth centuries, gradually becomes 'governmentalized'.

(Foucault, 1991, pp. 102-103)

We can see that governmentality is thus a concept concerned with not only the pluralistic influences of the workings within governance, but also with the historical processes through which they emerged. Moreover, for specialized peace bonds, this means governmentality includes government beyond simply a state apparatus to a variety of other apparatuses. As a governmental project, specialized peace bonds make up one part of a project to manage a population in an efficient manner.

The concept of governmentality relies on and further builds Foucault's conception of power, which varied over the course of his career yet has common themes throughout. Foucault differentiated from other theorists by claiming power is not given or exchanged or possessed; rather, it is everywhere, comes from everywhere, is held by every individual, and, above all, is *exercised* (Foucault, 1980a, p. 93; Foucault, 1980c, p. 92; Foucault, 2003, pp. 13, 30). It is through this exercise that political power or sovereignty can be established in the first place (Foucault, 1980c, p. 88). In fact, according to Foucault (1980a), power must be understood as

the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization; as the process which, through ceaseless struggles and confrontations, transforms, strengthens, or reverses them; as the support which these force relations find in one another, thus forming a chain or a system, or on the contrary, the disjunctions and contradictions which isolate them from one another; and lastly, as the strategies in which they take effect, whose general design or institutional crystallization is embodied in the state apparatus, in the formulation of the law, in the various social hegemonies. (p. 92)

Foucault's conception of power, therefore, is inextricable from *how* power is exercised in people's everyday encounters and the ensuing outcomes. The law, as Foucault explicitly states, is thoroughly enmeshed with a multitude of other processes and therefore cannot be

examined on its own.

Governmentality is related to specific forms of power identified by Foucault, particularly sovereignty, discipline, and bio-power (Dean, 2010, p. 29). Sovereignty refers to the king or a central authority. According to Foucault, the dominance of the sovereign came to be replaced (though not eradicated) by disciplinary power, which is the power to 'train' a subject (Foucault, 1995, p. 170). The common categorizing of power as 'coercion' or 'violence' fails to account for how individuals come to recognize themselves as subjects in a position to be coerced, which is where disciplinary power succeeds (Foucault, 1993, p. 204; Ransom, 1997, p. 48). The process of creating knowledge begins with collecting information through surveillance, which is a mechanism of observation that coerces (Foucault, 1995, pp. 170-173). Further examination makes it possible for gathered information to be compared to a norm, hierarchized, and ultimately applied in some form of correction (Foucault, 1995, pp. 178-181). The relations of power formed through this process produce a discourse of truth, where the form of panoptic surveillance becomes invisible yet the effects of its silent correction remain embedded in the subject (Foucault, 1995, p. 172; Foucault, 1980c, p. 93).

For Foucault, disciplinary power is made possible through the surveillance and formation of subjects, and then circulates for some political and/or economic advantage or use (Foucault, 1980c, p. 101). Behaviour departing from the norm is punishable, and punishment is normally defined by perceivable natural and observable processes. Punishments can come from the judicial model (*e.g.* fines, jail), but corrective forms are favoured under the disciplinary model (*e.g.* repeated training, exercise)(Foucault, 1995, pp 179-180).

Later in his career Foucault elaborated on the emergence of what he termed *biopower*. In *The History of Sexuality* (1980a), Foucault describes the emergence of biopower as a technology that exerts power over a population based on the ability to give *life*. Biopower allows populations to be managed or governed as a biopolitical group, primarily through knowledge about normality and health, and may focus disciplinary power accordingly (Foucault, 1980a, p. 139). Its focus is on the body as a machine to be both optimized and invested in (Foucault, 1980a, p. 139). For example, knowledge about birth rates or physical development can help determine the locations at which various techniques of subjugation are exercised (Foucault, 1980a, p. 140).

Given what has been outlined about the nature of power, it follows that power cannot be an inherent property of the state. According to Foucault, the state is a regulatory apparatus of governmental reason, born out of a culmination of connections and relations of already existing elements and institutions. How the state is perceived builds on earlier conceptions of, for example, a king, a sovereign, a magistrate, a constituted body, the law, a territory, the inhabitants of a territory, the wealth of a prince or sovereign, and other schema (Foucault, 2007, p. 286). As pertinent to the Canadian focus of this thesis, we are guided in particular by the indebtedness of the state apparatus to the intellectual construction of liberalism, among other discourses. Thus, while the state may appear to be a unitary entity, it is what Foucault called a ‘discursive formation’ made up of – and deriving its perceived power from – a wide range of other discourses, thus revealing its fragmentation. From this fragmentation, the role of the state is to make intelligible and produce “truth” from a set of “given realities” (Foucault, 2007, pp. 273-287).

In relation to biopower and governmentality, the authoritative state can achieve

subjugation of bodies and the control of entire populations through a “carceral net” (Dean, 2010, pp. 118-121; Foucault, 1980a). For example, armed with knowledge that a particular drug produces harm, particular sub-populations are created (*e.g.* addicts, criminals, physicians, parole officers), which makes the problem manageable through various regulatory regimes. This facilitates the creation of policies and laws to regulate or criminalize the drug’s development, sale, medical availability, et cetera, which is then applied to the larger population. The modern exercise of biopower is perhaps best summed up thusly: “Wars are no longer waged in the name of a sovereign who must be defended; they are waged on behalf of the existence of everyone” (Foucault, 1980a, p. 137). The accompanying techniques of power associated with biopower are therefore present at every level of society and applied by a wide array of institutions (Foucault, 1980a, p. 141).

Foucault, Law & Power

Having outlined Foucault’s conception of power, I now return to the question of law within Foucault. Certainly, one could simply apply these concepts of power to the law, or alternatively ‘retrieve’ law within Foucault as outlined earlier (for example, Hunt and Wickham). Contrary to the positions that law has lost importance in modern society, Golder and Fitzpatrick (2009) have furthered a retrieval of Foucault into law by suggesting the possibility of reading two dimensions of law within Foucault, thus ‘refining’ previous approaches (p. 11). The first dimension of law is a “determinate law which expresses a definite content”, or, in other words, a law that is static and may be transgressed (Golder & Fitzpatrick, 2009, p. 71). The second dimension is the law’s ability to extend itself “illimitably in its attempts to encompass and respond to what lies outside its definite

content” (Golder & Fitzpatrick, 2009, p. 71). Together, these dimensions encompass a complex relationship with powers external to the law. To clarify by way of an example, the human sciences are constantly developing knowledge about what is *the norm*, but the human sciences themselves cannot enforce the norm without a law. Therefore, the law must be static in order to facilitate enforcement (read: disciplinary power), yet also dynamically responsive in order to adapt to the future (Golder & Fitzpatrick, 2009, pp. 54-77). The law and disciplinary power are thus reciprocally constituted (*i.e.* they inform each other) and the law is therefore never complete (Golder & Fitzpatrick, 2009, p. 61).

The incompleteness of law, for Golder and Fitzpatrick (2009), is central to understanding the role of law within modernity with respect to forming social bonds (pp. 125-129). However, they do not go into extensive detail about the nature of law’s responsivity, and their focus on law and disciplinary power overshadows their hints at the relationship between law and biopower. Moreover, Golder and Fitzpatrick shy away from the role of the state with respect to the formation of subjects. Thus, for a project taking a law as its central focus (such as this thesis), there must be an account for the limits of responsive law with respect to biopower. For that, I turn to Agamben.

The Limits of Law: Biopower and the Paradox of Law

To many people, paradoxes such as this one appear to be mere pimples or blemishes on the face of the law, which can be removed by simple cosmetic surgery. Similarly, many people who take theology seriously think that paradoxical questions about omnipotence, such as “Can God make a stone so heavy that It cannot lift it?”, are just childish riddles, not serious theological dilemmas, and can be resolved in a definitive and easy way. Throughout history, simplistic or patchwork remedies have been proposed for all kinds of dilemmas created by loops of this sort. But the dreaded loops just won’t go away that easily ... (Hofstadter, 1985, pp. 70-71)

That is a difficult question, but part of the answer is that paradoxes come and go without much notice and are dealt with without much ado. This fact makes the question important as well as difficult. How law copes with paradox sheds light on the nature of legal reasoning and rationality, the nature of legal practicality, and the sense in which law can be reasonable, even 'wise', while being illogical in the technical sense. (Suber, 1990a, p. 53)

To understand how law can be both static and yet responsive requires an inquiry into the limits of law as a program. The purpose of this section is not to inquire into the origins of law, but to highlight the importance of biopower for understanding the formation of knowledge underlying juridical change. As outlined above, Foucault's conception of power departed from classical conceptions by focusing on the formation of subjects and biopolitical techniques of the state. However, as Agamben (1998) observes, Foucault was not clear about how these two expressions of power converge (pp. 5-6), which is fundamental to a Foucaultian understanding of law. Though Agamben was pursuing different ends than this present thesis, the initial arguments of his *homo sacer* paradigm provide a valuable base for this analysis of peace bond law because it explicates the relationship between biopower, law, and material conditions.

At the heart of Agamben's (1998) argument is the relationship between biopower and sovereign power. In *The History of Sexuality* (1980a), Foucault focused on the growing production of biopower as the predominant regime of power beginning in the 17th century, but Agamben's inquiry finds the application of biopower much earlier, indeed as far back as the original actions of sovereign. Agamben (1998) does this by contrasting 'bare life' ('*zoe*') with political life ('*bios*'). Bare life, or in Latin, *homo sacer*, is unpoliticized life – that which can be "killed but not sacrificed" (pp. 1-8). In other words, a body is killed when its life is depleted, but for death to be a sacrifice requires the body to be politicized in some way (p. 81) – the latter form of life, *bios*, is biopolitical power (or biopower) at its

most basic. Agamben (1998) explains the ensuing paradox: Bare life is therefore defined by its exclusion from political life, and at the same time included in the political by its exclusion. If we accept this premise, bare life must be the fundamental referent of the state's mechanisms and calculations of power once it creates a biopolitical body (Agamben, 1998, pp. 6, 122).

For example, at the instant of birth there can already be citizenship and rights in order to ensure 'freedom', which are possible because bare life is politicized as sacred (Agamben, 1998, p. 128). This moment when bare life was first politicized is "the decisive event of modernity and signals a radical transformation of the political-philosophical categories of classical thought" (p. 4). It is the precise moment Foucault was referring to when he claimed, "politics is the continuation of war by other means" (Foucault, 2003, pp. 15-16, 48). This political dimension constitutes the political sphere of sovereignty, as biopower is the foundation upon which modern politics are based (*e.g.* the conceptualizations of right/left, private/public, absolutism/democracy)(Agamben, 1998, p. 4, 83). As Agamben (1998) puts succinctly, "There is politics because man is the living being who, in language, separates and opposes himself to his own bare life and, at the same time, maintains himself in relation to that bare life in an inclusive exclusion" (p. 8).

The inclusion/exclusion paradox of politicized/bare life carries into the essence of sovereignty and, therefore, law. The sovereign, says Agamben, is both inside and outside the juridical order since it "creates and guarantees the situation' that the law needs for its own validity" (1998, pp. 15-18). It defines the exceptions to its own rules by bringing things external to the law within its grasp, the most important instance being the sovereign presupposing its own power to constitute law, an act supported, perpetuated, and reaffirmed

through symbolic and physical violence (Agamben, 1998, pp. 20-41; Benjamin, 1978, p. 286)². As Foucault notes, “the bringing into play of power relations does not exclude the use of violence any more than it does the obtaining of consent; no doubt the exercise of power can never do without one or the other, often both at the same time” (Foucault, 1982, p. 789). Put another way, “War is the ferryman who makes it possible to move from one system of right to another” (Foucault 2003, p.156). The law is therefore an integral part of societal integration. But violence, and therefore law, is the result or instrument of power, not power itself (Leonard, 1990, p. 11). With nothing to point to but itself for its own justification, the law is “in force without significance”, leaving all societies and cultures in a “legitimation crisis of law” (Agamben, 1998, p. 51). Yet despite this ongoing crisis of

² Challenges to the legitimacy of the self-referential nature of law do not exclusively originate outside the law, but the ‘solutions’ do. Consider the following two examples of the law and the sovereign being both external and internal at once:

Peter Suber (1990b) composed a thorough examination into legal mechanisms allowing for their self-amendment within the law itself. For example, if an appeal court must decide on a case properly before it, but a judge cannot accept a case where they are in a conflict of interest, what can be done with a challenge that meets both requirements (such as the constitutionality of the salaries of appeal court judges)? All judges would be simultaneously required to and forbidden from deciding the case. As a solution, there are legal mechanisms that can de-legitimize past legal practices and make new procedures legitimate in the process. Ultimately, Suber offers the explanation for how the self-amending process is considered ‘legitimate’ by linking it to the values of the people who make the law, and then concludes that self-referential self-amendment works (since it does happen), even if its internal logic is impossible.

Rogers and Molzon (1992), examined similar self-referential legal cases. Drawing on Gödel’s *Incompleteness Theorem*, they analogized the legal system with an axiomatic system to examine self-referential laws. They conclude that there is a need to “step out of the system to find the answer” in these cases (p. 1013). Moreover, they claimed that a consistent legal system would necessarily have undecidable rules, or in the alternative accept a system that is incomplete (pp. 1014-1016).

While this thesis is not specifically concerned with self-referential internal challenges to the legitimacy of law, both Suber (1990) and Rogers and Molzon (1992) have demonstrated what Agamben has theorized: the law must step outside its limits to deal with challenges to its legitimacy, and then internalize them. Not only does it happen, but it is common, and in the end such exercises do “nothing other than repeat the ontological structure that we have defined as the paradox of sovereignty” (Agamben, 1998, p. 59).

legitimation, exceptions to the rule eventually *become* the rule, resulting in life being in a permanent state of exception. Constituting power thus becomes a category of ontology, and new problems are approached by the expansion of new articulations of law (Agamben, 1998, p. 44). As biopolitics emerge – particularly from the 17th century on, as noted by Foucault – there is a displacement and expansion beyond the jurist’s relationship to bare life into others, such as the doctor, scientist, expert, or priest (Agamben, 1998, p. 122).

Advances in knowledge influence the emergence of biopower and create discursive gaps. A poignant example given by Agamben (1998) illustrates this idea. In the late 1950s, technology had advanced to the point where a person could be lacking consciousness, mobility, sensibility, and reflexes, yet preserved to a point that they are not definitively *dead*. The ‘discovery’ of this state of *overcoma* identified a *discursive gap* between coma and death, in a place previously unthinkable, and therefore unspeakable. This new gap raised issues by challenging existing political constructs of what legal and medical actions ought to be permissible. The impact was widespread, from how and when death is ‘officially’ declared (both medically and legally), to the organization of how organs are harvested (pp. 160-165). The situation also demonstrates how seemingly concrete constructs, in this case ‘death’, can become less exact than commonly thought. Having no existing legal construct to refer to, new ones were created (again, despite the absence of constituting power). As we will see, these sorts of connections between technology and political-legal constructs are paramount to understanding the importance of scientific actuarial risk assessment with respect to the emergence of specialized peace bonds.

If we accept Agamben’s findings, it becomes evident that biopower is inscribed in all political actions on bare life (in forms such as biology, sexuality, etc):

[T]he river of biopolitics that gave *homo sacer* his life runs its course in a hidden but continuous fashion. It is almost as if, starting from a certain point, every decisive political event were double-sided: the spaces, the liberties, and the rights won by individuals in their conflicts with central powers always simultaneously prepared a tacit but increasing inscription of individuals' lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves. (Agamben, 1998, p 121)

A predominant rationale of law, therefore, is centred around the preservation of bare life, which justifies and requires the (re)arrangement of governmental practices of social integration. The law itself is a program that organizes forms of biopower in a 'thinkable' way, making it possible to diagnose, prescribe, and intervene by dividing populations and ultimately including them through their exclusion. It is this systematic knowledge about the population that provides "normative maps" to guide biopolitical intervention (Lemke, 2011, p. 177).

Thus, central to my genealogical analysis is the ongoing historical relationship between the law and biopower, but keeping in mind that biopower can be expressed in new and competing forms. It is, put succinctly, a *bio-historical* examination of peace bond law. As Foucault (1980a) explains,

If one can apply the term *bio-history* to the pressures through which the movements of life and the processes of history interfere with one another, one would have to speak of *bio-power* to designate what brought life and its mechanisms into the realm of explicit calculations and made knowledge-power an agent of transformation of human life. It is not that life has been totally integrated into techniques that govern and administer it; *it constantly escapes them*. (p. 143, emphasis added)

With all this in mind, we can see the importance of biopower to the analysis of peace bonds. Though traditional peace bonds predate Foucault's claim of the great expansion of biopower in the 17th century, the underlying biopolitical rationale of the preservation of bare life is present much earlier. The state's obligation to protect bare (and therefore also

political) life must include *the prevention* of harm to bare/political life, since this also poses a threat to its legitimacy. The application of a peace bond both fulfils the state's obligation, and also further legitimizes the law itself by maintaining the political construct of subjects. For example, to solve a problem on their own would risk not just their property and/or health, but also their political status (*i.e.* 'citizen', and all the rights that go with it). Property and bare life are connected because a threat to property is a potential threat to the legal order that encompasses political life, which also protects bare life. With a peace bond not only is political status maintained, but also the political-legal order itself. The law thus exhibits a tension between bare and political life, since it defines the former through the qualifications of the latter. In other words, the state can only preserve bare life – that which is outside the political body (*i.e.* knowledge about populations) – by including it in the political body (*e.g.* by facilitating intervention via peace bonds).

Agamben's foray into a Foucaultian account of biopower and law allows us to draw four conclusions, thus bringing this discussion back to critical legal studies. First, it disintegrates the distinction between law and politics, and reveals the 'objectivity' of law to be a contingency of other factors. Second, it reveals a predominant (albeit broad) rationale of law, being the preservation of bare and political life. Third, it further establishes that the form of law is historically contingent. Last, the law maintains legitimacy with respect to governance of bare life by adapting to new articulations of biopower. In other words, as biopower changes (*i.e.* as new knowledges about bodies or populations are created), so must the law. Therefore, to understand the formation of peace bond law requires an historical understanding of its relation to biopower.

Foucault, Power, Law and History

The law is firmly connected to disciplinary power, as demonstrated by Golder and Fitzpatrick, and to biopower, as demonstrated by Agamben. With respect to an inquiry into how these various forms of power are exercised at a given point, Rose and Miller (1992) provide a helpful expression of governmentality by identifying its rationales, programs, and technologies. Rationales "include questions which spur a rearrangement of existing governmental practices, including justifications" (Rose & Miller, 1992, p. 281). The rationale relates to some conception of the nature of the objects governed, and how thinking about them in such a way can make "particular issues, domains, and problems governable" (Dean, 2010, p. 42; Rose & Miller, 1992). Programs are the actual plans crafted to remedy the problem, and are informed by knowledge (Dean, 2010; Rose & Miller, 1992). Programs make the objects of government thinkable in such a way that their ills appear susceptible to diagnosis, prescription, and cure by calculating and normalizing intervention. The law is one such program. Generally speaking, it has the ability to render something legal or illegal through the broad process of juridification; the administration of law can render someone guilty or innocent. Technologies are any means that actualize the programs, generally through the production of knowledge (Dean, 2010). In this sense, peace bonds are a technology since their application requires the production of knowledge about what ought or ought not to be feared, and they facilitate the gathering of knowledge in order for other programs (legal, regulatory, and otherwise) to bring about some future action. After collecting information (knowledge) from a variety of sources (*e.g.* risk assessment, criminal record) and having the legal tests produce a 'truth' about the reasonable fear of a person, the ongoing monitoring further creates knowledge about both the bonded person (*e.g.*

compliance with conditions) and the broader population of bonded people (e.g. breach rates). Of course, there are a plethora of programs and technologies involved – the CLS position on legal pluralism dictates not only that the legal realm itself is fragmented, but also it is just one facet of a broader social environment. Programs and technologies can also form a number of complex relationships in which the subject can, for example, take responsibility to govern their own activity as an autonomous individual (Dean, 2010; Garland, 1997).

However, the approach of Rose and Miller does not explicitly embrace the element of historical processes that preceded the rationales, programs, and technologies making up the relations of power. Foucault (2003) claimed the plurality of relations of power which constitute society are indissociable from discourses of truth, and thus his object of study focused on how ‘true’ discourse must be “produced, accumulated, put into circulation, and set to work” (p. 24). The ‘truth’ of peace bond law as crime prevention is therefore the outcome of historical processes that can be understood by their power relations. Power relations, says Foucault (1982), can be “grasped in the diversity of their logical sequence, their abilities, and their interrelationships” (p. 788). The two methods he devised to achieve this are genealogical and archaeological analysis.

Genealogy and Archaeology

Genealogy is a form of historical research that provides a descriptive and theoretical account of the past (Kraska & Neuman, 2008, p. 425). It is a *history of the present*, yet it is neither a narrative history, nor is it comprehensive (Dean, 1994, p. 20; Garland, 2001, p. 2). Rather, genealogy rejects the present as a “necessary end-point of historical trajectories”

(Dean, 1994, p. 23). It is not a search for origins, nor does it attempt to “capture the exact essence of things”; instead, it is an inquiry into the formation of values, morality, and knowledge (Foucault, 1977, pp. 140-144). It seeks to unearth a history of how things have presently become seen as ‘objective’ or ‘true’ by way of a collection of contingencies (Foucault, 1977, p. 146; Hunt & Wickham, 1994, p. 119; Packer, 2011, pp. 343-344, 366; Ransom, 1997, p. 85). This history reveals fragments of counter-truths that are “traps, questions, [and] challenges” to dominant scientific discourses (Foucault, 2003, p. 12), which make it possible to fracture the view of a unified ‘Law’ by exposing its historical precedents. Within analysis it is important to not ignore the unobservable social processes and relations that make governance possible (Frauley, 2007, p. 268), particularly with respect to an examination of law (Sargent, 1991, p. 8). Foucault rejected the idea there could be a singular object, concept, theme, or style of analysis (Packer, 2011, p. 346), allowing genealogy to remain a flexible analytical tool.

Central to Foucault’s work, genealogy makes it possible to trace the combination of circumstances necessary for the formation of social knowledge and practices (Hunt & Wickham, 1994, p. 6). It seeks to establish how systems of domination have emerged, not as the operation of institutions or moral content of concepts, but as sites of interpretation and contestation. The genealogy distances itself from the institution, morality, or worldview being investigated and instead records the history of the ideas behind this contestation (Ransom, 1997, pp. 80, 86). In light of Foucault’s avoidance of centralized sites of power (Hunt, 1997, p. 114), the necessity of considering unobservable mechanisms, and given the project at hand involves state legislation, it is therefore necessary to consider the epistemic shifts during the formation of the state leading up to legislation. Doing so facilitates an

understanding of how a plurality of sites of power have created the conditions that changed our conception of fear, thus making specialized peace bonds possible.

While genealogical analysis studies the formation of power relations behind objective ‘truths’, archaeological analysis examines the very “games of truth” which organize the plurality of discursive formations revealed in the genealogy (Packer, 2011, pp. 343-346; see also Foucault, 2003). Archaeology describes relations between discourses and non-discursive domains (*i.e.* institutions, economic practices), not to find causality but simply to define how the forms of articulation are governed by rules (Foucault, 1972, p. 162), thus affecting future power formations. Truth is the *effect* of these processes, and therefore asking what a statement *means* is not helpful. Instead, we should ask what a statement *does* or *is* by examining its relationship to other statements and the context in which it is made (Packer, 2011, p. 355). A statement is treated more as a monument than a statement, and statements make up part of a larger discourse, serving a *discursive function* (Gutting, 1989, p. 231). A discourse is made up of the diffusion of other discourses, although the group of statements contributing to a particular discourse is neither constant nor definable (Foucault, 1972, p. 32). As a result, inquiry into discourse is highly contextual. The focus of archaeology, therefore, is on the *form* of a discourse as the *outcome* of other discourses, which is what makes it possible for a statement to appear meaningful (Foucault, 1972, pp. 44-46, 56-57; Packer, 2011, p. 355). In other words, archaeology elucidates the organization of discourses within a particular temporal-spatial coordinate (Dean, 1994, p. 32).

Genealogy and archaeology make up a project of what Foucault called “returns to knowledge” (Foucault, 2003, p. 6). They are tools to reveal the existence of masked blocks

of historical knowledges present in society (Foucault, 2003, pp. 6-9), thus unearthing the invisible political underpinnings based on scientific discourses and practices, and revealing the hidden pluralities behind what is presented as an ‘objective’ singular law. They examine the network of individuals through which power is exercised, and in which individuals both submit and exercise this power (Foucault, 2003, p. 29). Overall, they bring a governmental project to life by orienting “our analysis of power toward material operations, forms of subjugation, and the connections among and the uses made of the local systems of subjugation on the one hand, and apparatuses of knowledge on the other” (Foucault, 2003 p. 34). Combining genealogy and archaeology for the purpose of understanding law – particularly the emergence of specialized peace bonds – is what I will call *governmental criminology*.

Ultimately, a governmental criminology approach allows the consideration of inconvenient facts, clarifying the conditions under which we think and act with respect to law. In short, it makes us not only responsible, but also capable of understanding potentially oppressive actions. As Dean (2010) explains, “by demonstrating the fragility of the ways in which we know ourselves and are asked to know ourselves, and the tissue of connections between how we know ourselves and how we govern and are governed”, we can remove the take-for-granted nature rationales underpinning a regime of practices, revealing both “apparent and not so apparent dangers” (pp. 48, 50).

Governmental criminology makes use of genealogy and archaeology to examine the emergence of specialized peace bonds. In the words of Foucault, “the archaeological dimension of the analysis made it possible to examine the forms themselves; its genealogical dimension enabled me to analyze their formation out of the practices and the modifications

undergone by the latter” (Foucault, 1985, pp. 11-12). The genealogy reveals the constraints limiting the conditions of possibility. Those possibilities are narrowed down in the ‘games of truth’ revealed by the archaeology. Through this method the tenets of critical legal studies are met: by historically accounting for not only the legal pluralities but also the competing social pluralities, the law can be understood by examining its place in social ordering beyond a specific political (*i.e.* liberal) or doctrinal position. This also moves beyond how society has an effect on law or law on society, since the boundaries dividing them have been undermined (Hunt, 1993). The balance of this chapter sets out exactly how these methods will be employed and which sources of data they draw from.

Method

Analysis begins with the genealogical approach, as once the social, economic, and political limits are set out it is possible to draw on those conclusions within the archaeological analysis. In the genealogy there is nothing yet ‘true’ or ‘false’ about specialized peace bonds; the focus is on the epistemic shifts in the preceding social, political, and economic conditions. This genealogy analyzes these conditions leading up to the legislative amendments to peace bonds in the mid-1990s. Social, political, and economic concepts cannot be measured directly because there are no concrete definitions of what constitutes them, largely because they change over time (Blaikie, 2000, pp. 154-155). However, these concepts make up a *sensitising scheme*, which allows exploration into trends and commonalities, and provides suggestions and clues about what to look for (Blaikie, 2000, pp. 136-138).

The genealogical analysis targets the material and discursive conditions preceding

and surrounding the emergence of specialized peace bonds, made possible by examining existing empirical and theoretical secondary sources on peace bonds and the social, political, and economic historical context. These texts were obtained by searching databases of a wide variety of academic journals and books. The genealogy begins with what little literature is available about traditional peace bonds, and then moves into exploring the constructions of the social, economic, and political discourses of the relevant time period. Further to the aforementioned sensitized scheme and the essential peace bond literature, the collection of data was guided by the research question to focus on elements challenging the exercise of peace bonds as merely crime prevention. The challenging questions are, in turn, guided by governmental criminology. They are: How are specialized peace bonds the outcome of the formation of power relations? Since peace bond law is a social process competing among others, what are the other processes and how do they compete (particularly with respect to legal pluralism)? How do social, political, and economic discourses guide the formation of Canadian peace bond law, and which technologies and rationales drive those discourses? These are important sub-questions for coming to a better understanding of the emergence of specialized peace bonds.

In compiling the secondary texts for answering these sub-questions, it was important to remember that genealogy is neither an attempt to “capture the exact essence of things” nor a search for origins (Foucault, 1977, pp. 140-144), but instead a challenge to claims of objectivity. The claim of objectivity, as raised in chapter one, is that of peace bonds being simply a tool for crime prevention. This thesis does not attempt to exhaust the challenges to this claim, but finds relevant any document capable of forwarding an element of peace bonds as being more than, and even possibly contradicting, the objective claim. This ties

CLS with Foucault, as they both call for analysis to include elements of history, power, and social theory in order to separate the ‘objective’ from the political. The political, economic, and social climates – or perhaps, more accurately, the political, economic, and social *problems* reveal the emergence of ‘risky populations’. These populations are excluded from society due to their threat to bare life, but must be included for the sake of political life. From this discovery the central question arises: How are the members of this risky population to be integrated within society?

Having uncovered the discursive and material conditions of this problem (*i.e.* the formation), the archaeological analysis then unveils how legislators problematized risky populations as a target of government, and ultimately how specialized peace bonds were constructed as a solution or strategy (*i.e.* the form) which seeks to regulate risky individuals. The primary data sources are parliamentary debates leading up to the enactment into legislation of specialized peace bonds. They provide insight into how various discourses are acted upon and altered. Recalling that Foucaultian studies of power examine how ‘true’ discourse is “produced, accumulated, put into circulation, and set to work” (Foucault, 2003, p. 24), the debates can be subjected to archaeological analysis to examine the accumulation of various discourses which amount to the ‘truth’ of specialized peace bonds. The dates of the relevant parliamentary debates range from 1993 to 1997, and encompass the amendments of s. 810.1 (Bill C-126), 810.01 (Bill C-55), and 810.2 (Bill C-95) of the *Criminal Code of Canada*. Specifically, it was possible to observe how the discourses form and transform, as multiple knowledges are organized into a single manageable form that can be represented by legislation. There were many persons who spoke at these debates on a wide range of related topics, making it possible to determine how statements were

contextualized and conditioned by their relation to other statements and broader discourses. This archaeological analysis helps to understand what exactly the ‘suitable’ end was for Canadian Parliament and how it constructed the problem.

To understand the formation of a discourse, Foucault (1972) breaks down the elements of discourse to include the formation of objects, enunciative modalities, concepts, and strategies. The formation of objects considers both the “surfaces of emergence”, which are the locations that already exist (*e.g.* family, social group, religious community); the “authorities of delimitation”, who are the authority figures capable to delimiting, naming, designating objects (*i.e.* an expert); and last, the “grids of specification”, which are the systems of categorization that make possible contrast, relation, classification, etc. (pp. 41-43). Enunciative modalities are the rules ‘behind’ a set of statements, which are identified by who is speaking (*e.g.* an expert), from what site are they speaking (*e.g.* an institution), and what is the speaker ‘observing’ with respect to the object of discourse (pp. 50-53). The formation of concepts concerns the organization of a field of statements, particularly the succession of one concept to another and/or their coexistence, as well as the rearrangements through rewriting, transcribing, translating, etc. (pp. 56-59). The formation of objects, concepts, and enunciative modalities makes possible the formation of strategies that are to resolve points of incompatibility. These can be identified, for example, by competing statements in the form of ‘either/or’ (pp. 65-68).

To be clear, I am not intending to show that peace bonds are *not* a tool of crime prevention, but rather that they are a governmental technology built on discursive formations (notably those surrounding ‘reasonable fear’) that have changed over time, thus changing the underlying rationale of peace bonds and their role in governance. It is through genealogy

and archaeology that a deeper understanding of the role of peace bonds is uncovered *beyond* the ‘objective’ crime prevention function it has been perceived as to this point.

Conclusion

To summarize, in this chapter I have developed a governmental criminology to deepen our understanding of specialized peace bond law. Specifically, governmental criminology takes a critical legal studies approach, which acknowledges legal pluralism and sets out the historical context required for analysis. Complementing CLS is a Foucaultian approach to power and law, which facilitates an understanding beyond peace bonds as crime prevention by fragmenting power beyond the state. This is possible by conceiving law as one social relation among many in the project of peace bond governance.

The methodology and method were then outlined, and are employed in the following chapter. Chapter three begins with genealogical analysis focusing on the historical, social, material, and economic context preceding specialized peace bond legislation. In chapter four, the archaeological analysis of parliamentary debates demonstrates the ‘games of truth’ defining the social problem(s) and solution. Together, the genealogical and archaeological analyses challenge the predominant view of peace bonds as crime control, thus affording a deeper understanding of what it means to govern in this way.

CHAPTER THREE

Governmental Analysis of Specialized Peace Bonds: Genealogy

Introduction

In chapter one, the cases of Haylock and Buesnel illustrated a significant change in the application of peace bonds. The original traditional peace bonds were applied in minor disputes between individuals, whereas specialized peace bonds made it possible for persons who have not been charged with a crime to be governed as if they had. Since the legal test has consistently required proving “reasonable fear”, it follows that our understanding of fear has changed. Despite this apparent shift in peace bond application, existing literature essentially takes a doctrinal position and therefore does not contemplate the historical processes of *how* the application of peace bonds has shifted. Our understanding is thus limited with respect to the role of peace bonds as a tool of governance and the implications. This thesis seeks to move beyond that limitation and deepen our understanding of specialized peace bonds.

In chapter two I developed a governmental criminology for the purpose of analyzing law, specifically specialized peace bond law. Within a critical legal studies approach, governmental criminology acknowledges legal pluralism and sets out the historical context required for analysis. To achieve this I drew from a Foucaultian-inspired approach to power and law, which facilitates an understanding of peace bonds beyond that of crime prevention. Genealogical and archaeological analysis make this possible by conceiving law as one social relation among many in the historical project of peace bond governance.

This chapter undertakes the first part of analysis, being the genealogical analysis, which focuses on the historical, social, material, and economic context preceding specialized

peace bond legislation. Tracing these elements uncovers the discursive and material conditions that form a particular problem, of which specialized peace bonds are an outcome. It begins with an analysis of what little literature is available about peace bonds so as to determine their underlying rationale and draw some preliminary conclusions about their application. This is an elaboration of the conclusions drawn in chapter one, but now with the benefit of the theoretical tools developed in chapter two. In doing so it achieves three goals. First, it highlights the weaknesses of the existing literature's predominantly doctrinal 'crime prevention' portrayal. Second, it establishes the importance of legal pluralism for understanding peace bonds. Third, it demonstrates the symbolic function of peace bonds. After having established the weaknesses of the literature, the balance of this chapter analyzes the formation of power relations leading up to the legislation of specialized peace bonds. This includes the economic and political formation of the state, and the rise of discourses of security and risk. Throughout this chapter a link is established between the broader state formation, criminal justice policies, and the everyday lives of individuals.

Ultimately, this chapter reveals the constraints limiting the conditions under which peace bonds became possible. It also enhances the archaeological analysis of the fourth chapter by developing an understanding of the context in which peace bonds were created. Combined, they show how the 'reasonableness' of fear has been constructed in a way that changes the way peace bonds are applied.

I. Peace Bond Literature

Early Peace Bonds

The peace bond, also known as a ‘recognizance to keep the peace’, is a tool of legal governance traceable to 14th century England, and likely even earlier (Childress, 1994, p. 417; Hunter, 1978; Orr, 2002, p. 391). Though it remained largely unchanged for most of its existence, the scope of its application expanded significantly in the 1990s when Canadian legislators adapted the law so applications could be made on behalf of the community instead of solely a specific individual.

The origin of peace bonds can be traced back specifically to the English *Justices of the Peace Act 1361*, a period marked by war, famine, and plague (Childress, 1994, p. 417; Hunter, 1978; Orr, 2002, p. 391; Poyner, 1997; Rolston, 1972, p. 326; Strother, 1966, p. 914); though there is some evidence they existed in common law even earlier (Hunter, 1978). The ensuing period of political upheaval solidified the application of the peace bond as a tool of governance (Clayton, 1985, pp. 133-135). During this period it became established as a technique of crime prevention, which remains its central purpose today in Canada, England, and the United States of America (Childress, 1994, p. 408; Clayton, 1985, p. 137; Grant, 1998, p. 202; Hunter, 1978; Lussier & Ratel, 2010, p. 74; Neumann, 1994, p. 174; Orr, 2002, p. 391; Petrunik, 2002, p. 498; Rolston, 1972, p. 328; Strother, 1966, p. 915).

Peace bonds were originally applied between two individuals in dispute (Clayton, 1985, pp. 134-141). Clayton (1985) reports the five purposes to apply a peace bond in medieval England: (1) to acknowledge a debt; (2) to abide by an arbitration award; (3) to guarantee allegiance to the king; (4) to keep the peace and; (5) to appear before a court,

though the latter two made up the majority of peace bond applications (p. 142). Although it is important that each of these purposes serve to maintain social order, this thesis is specifically concerned with the purpose of ‘keeping the peace’. A ‘reasonable’ fear of personal injury or damage to one’s property serves as the catalyst for such claims (Hunter, 1978). The bonded party would be required to provide a monetary surety that would be forfeited to a representative of the State upon any breach (Clayton, 1985, p. 139). Peace bonds were issued essentially to prevent private disputes from becoming more serious (Clayton, 1985, p. 144), acting as a ‘cure-all’ for a wide range of undesirable or immoral, if not criminal, behaviour (Orr, 2002, p. 391; Rolston, 1972, p. 371). If the surety was not provided, the result was a period of jail/gaol (Hunter, 1978).

Traditional peace bonds were developed under the rationale that ‘peace’ needed to be kept among citizens in order to maintain social order. Disorder between persons with respect to personal safety or property, even when not criminal, infringes upon the ability of the state to maintain peace. The problematization of these sorts of issues is directly related to the potentiality of their becoming legal matters – not just physical violence, but *assault*; not just damaging objects, but damage to *property*. Since these results are within of the realm of the state’s obligations, then so, too, can the actions approaching them. Conceiving of the complainant and respondent as citizens (*bios*) is what allows them to come before the state, thus facilitating their societal inclusion. Having no specific criminal action to present as evidence, fear is the catalyst that makes it possible to calculate where and when the bond should be issued³. It is left to the justice of the peace to diagnose and prescribe the solution

³ As a more recent (but pre-specialized peace bond) example, the judge in *R. v. Patrick* (1990) found a peace bond to be appropriate when Patrick, in the context of his strained relationship with his daughter’s roommate, said “I’ll fix you real bad.” The ambiguity of

based on the ‘reasonableness’ of the fear.

Given the wide range of circumstances and behaviours to which peace bonds can apply, it is not surprising that their exact application varied considerably. Even after the peace bond carried over from England to the United States (Childress, 1994, p. 418) and Canada (Hunter, 1978), there were still a plurality of conflicting legal issues within the program of peace bonds, particularly regarding their civil or criminal nature, and how exactly to calculate the ‘reasonableness’ of fear. Having broadly established the common historical rationale of peace bonds as a tool of crime prevention, the next section explores these conflicts in greater detail in order to begin understanding the deeper rationale.

The Canadian Context & Ensuing Legal Debates

In Canada the peace bond was initially adopted with essentially no modification, first in Ontario in 1792, followed by British Columbia in 1867 (Hunter, 1978), and in Canada’s first *Criminal Code* of 1892 (Part LXV). Since then, little has changed for the traditional application of peace bonds (Orr, 2002, p. 391). However, this account overlooks or at least understates some of the legal ambiguities resulting from their initial inclusion in the *Criminal Code* that have caused much debate. Since the time of codification, the application of peace bonds has demonstrated some legal confusion within Canadian jurisprudence about whether they are civil or criminal in nature, whether the fear should be of physical or psychological harm, and whether fear ought to be considered on an objective or merely subjective basis. These debates show that peace bonds are not determined to be wholly criminal *or* civil, but rather they take on aspects of both. What we learn from this debate,

what is meant by this phrase did not constitute the criminal offence of a threat, but the applicant believed there was reason to fear Patrick.

which I am about to set out, is that the civil/criminal conflict becomes resolved legally, but from a social perspective the two remain in tension, coming to coexist in a complex form of social ordering that is key to the formation of specialized peace bonds. The 'resolution' of civil and criminal traits, in addition to the other debates, set out the both the *legal* limits of peace bonds and also the competing conceptions of *social* ordering.

The first trait suggesting a civil nature is that the issuing of peace bonds does not require the commission of any criminal offence (Grant 1998, p. 235; Neumann, 1994, p. 185). Rather, there only needs to be *fear* someone will cause personal injury to "him or his spouse or child or will damage his property" (s. 810(1), pre-February 1, 1995). Section 810(3) states the evidence must only prove fear based on reasonable grounds. Such grounds are met not only when the applicant is subjectively fearful, but also when a 'reasonable person' in the same position would be fearful (see *R. v. Storrey*, 1990).

Second, entering into a peace bond is in no way a criminal conviction (Neumann, 1994, p. 185). There is no sentence, as the only intention is prevention of a future breaching of the peace, thus providing protection, or "perhaps more accurately some *feeling* of protection" for the applicant (Orr, 2002, p. 394, emphasis added). Breaching the peace can include, but is not limited to, "verbal abuse, harassment and physical violence" (Neumann, 1994, p. 177). The result is an appealing recourse for abused persons who do not wish for criminal charges to be laid, yet want a meaningful message to be sent denouncing some behaviour (Neumann, 1994, p. 175). In this sense, despite not being a strict criminal sanction, the location of peace bonds in the *Criminal Code* nonetheless allows it to perform a symbolic function that provides the applicant with a sense of satisfaction, relief, and/or empowerment (Meredith, 1995, p. 8; Neumann, 1994, pp. 175, 189). The criminal justice

system, through the application of peace bonds, therefore takes an *active* role in creating, recreating, and extending shared “values, conceptions, sensibilities, and other social meanings” about what is reasonable to be feared and what ought to be done about it (Garland, 1990, pp. 250-251). Behaviour that causes reasonable fear in another person is denounced.

While the burden of proof unquestionably falls to the applicant, the ambiguous nature of peace bonds instigated longstanding debate in both Canada and the United States over whether the standard of proof of “reasonable fear” should be based on a civil or criminal standard (Childress, 1994, p. 414; Neumann, 1994, p. 189-193). The former is “a balance of probabilities” while the latter is the higher “beyond a reasonable doubt” (Department of Justice, 2009). Reasons for each are as follows.

Arguments for a *civil standard* are based on the lack of any actual charge, offence, or conviction, plus the fact that the procedure is a hearing and not a trial (Hunter, 1996; Neumann, 1994, p. 186). For these reasons, some courts did, in fact, base their judgments on a balance of probabilities (see *Miller v. Miller*, 1991, note 54 at 255; *Stevenson v. Saskatchewan*, 1987). The reasoning was based on the peace bond’s common law origins, which were civil in nature (Hunter, 1996).

Contrarily, peace bonds have traits evoking the application of a *criminal standard* of proof. Most obviously, they are located in the *Criminal Code*. Moreover, the conditions outlined therein are similar to s. 515, referencing judicial interim release (see *R. v. Soungie*, 2003), and are commonly enforced by probation officers (Tutty, Koshan, Jesso, Ogden & Warrell, 2011, p. 166). Essentially, the bonded person is treated equivalently to a criminal on probation. For this reason, some judges have opted to apply the criminal standard of

proof (Colin, 1995, p. 16; Neumann, 1994, p. 190; see also *R. v. Charles English*, 1984; *R. v. Kirkham*, 1993, para. 3; *R. v. Wakelin*, 1992). In the United States, some judges have opted to classify peace bonds as *quasi-criminal*, and still other judges have explicitly refused to classify them at all (Childress, 1994, p. 414). Nonetheless, as per the leading authority of *R. v. Budreo* (2000), current Canadian precedent has decided in favour of the civil standard of a balance of probabilities.

Further compounding the civil/criminal debate is the ambiguity of both how to legally interpret ‘personal injury’ and whether the fear need be objective (*i.e.* something a ‘reasonable person’ would fear) or merely subjective (*i.e.* the applicant’s fear alone is sufficient). While some judges have held the traditional position that personal injury relates to physical harm (personal injury or property), there have been interpretations that also allow for psychological harm. The Supreme Court of Canada decision in *Lavalee v. R.* (1990), as well as *R. v. Nelitz* (1993) have allowed for subjective and psychological harm to be considered (Neumann, 1994, pp. 193-195). In *R. v. Budreo* (2000) it was decided that both objective and subjective elements must be met to prove ‘reasonable fear’. Aside from the obvious procedural impact, this decision also impacts upon the symbolic function of peace bonds: with only *subjective* harm required, the communicated message is not to make a specific person afraid, thus encouraging ‘interpersonal peace’. Requiring additional *objective* fear externalizes how ‘fear’ itself is constructed, thus signifying that both the applicant and society-at-large disapprove of such behaviour towards the applicant, thus communicating a normative message with respect to physical- and psychological-impacting behaviour in relation to ‘community peace’.

An explanation for how these legal issues remained unsettled for so long is absent

from the literature. Perhaps, because the overall intrusiveness of a peace bond between two people is limited, judges were content to apply whichever combination of civil/criminal burden, subjective/objective fear, and/or physical/psychological harm was best for a particular *social* circumstance. One opinion offered by Neumann (1994) is that a dispute between two individuals is fairly personal and so it is reasonable that the lack of absolute resolution continued in order to avoid being overly restrictive. Regardless of the reason(s), these contradictions are a prime example of different forms of law co-existing and competing, thus demonstrating legal pluralism. Because of the overlap between civil and criminal realms, the peace bonds can make use of criminal-type sanctions while maintaining civil-type proceedings. Likewise, the overlap of subjective and objective fear doubles the symbolic function of peace bonds.

The aforementioned legal limits to peace bonds carried over to specialized peace bonds, which were amended to the *Criminal Code* beginning in the mid-1990s. There have been three such amendments. In response to perceived public dissatisfaction with the leniency of the criminal justice system, combined with an increasingly acceptable exclusionary approach to pedophiles under a rationale of community protection, on August 1st, 1993, *Bill C-126* saw the amendment s. 810.1 (Grant, 1998, pp. 183-185; Kleinhans, 2002, p. 234; Lussier & Ratel, 2010, p. 72; Petrunik, 2002, pp. 483-484; Petrunik, 2003, pp. 51-57; Wilson, Picheca & Prinzo, 2007, p. 290). This first amendment targeted "fear of a sexual offence", which called for restrictions on the movement and behaviour of persons when there is reasonable fear they will commit a sexual offence against someone under the age of 14 (now 16)(MacAulay, 2001, p. 43). Typical conditions include prohibition from having contact with persons under the age of 14 or attending public areas (e.g. parks,

swimming pools) where they are reasonably expected to be found.

In 1997, four years after the creation of s. 810.1, *Bill C-55* appended the second specialized peace bond under s. 810.2, applicable where there is "fear of a serious personal injury offence" (Poyner, 1997). Being of a more general nature in that it applies to a broader range of offences and victims, s. 810.2 increases the power and scope of the law (Grant, 1998, p. 235). Conditions may include weapons and firearms prohibitions, along with other reasonable conditions perceived necessary to secure good conduct (Grant, 1998, pp. 234-235). A notable subject of s. 810.2 is Karla Teale, also known as Karla Homolka, accomplice of serial killer Paul Bernardo (see *Teale v. Noble*, 2005).

Section 810.01, the third specialized peace bond, concerns "fear of certain offences" and was created under *Bill C-95* and assented to on April 25th, 1997. The 'certain offences' currently listed are criminal and terrorist organizations offences. Records of the application of s. 810.01 are scant, though there is some evidence of their use for persons loosely affiliated with gangs, for example, in order to prevent contact with each other (see *Campana Uribe v. Canada (Public Safety and Emergency Preparedness)*, 2010).

The most common procedure for specialized peace bonds is by way of private information, and is usually (but not necessarily) initiated by the police or the Crown. Although any person can be the subject of a peace bond, the majority of cases are offenders held to their warrant expiry date. In such cases, the policy of the Correctional Service of Canada is to provide information to the applicant in advance of the offender's release. This is especially common for untreated or persistent sexual offenders who are assessed as "continuing to pose a risk to the community" (MacAulay, 2001, p. 64).

Defendants can "often be persuaded to 'buy-into' the process, providing it is

reasonable, so that there will be no surprises once they leave prison" (MacAulay, 2001, p. 60). Otherwise, a hearing may be ordered. The preparation for trial requires the cooperation of a number of experts, professionals, and laypersons, each contributing towards a determination of the risk and/or dangerousness of the defendant (MacAulay, 2001). Further information is obtained from a variety of potential sources: the National Parole Board, Correctional Service of Canada, available records from other relevant institutions, psychological and psychiatric reports, interviews with the defendant or their family, and/or victim impact statements (MacAulay, 2001). Together, the various sources of information make it possible for a judge to declare, and therefore create, the risky person.

The judge or justice of the peace then determines if there is reasonable fear, and following a positive finding, assigns conditions set out in the *Criminal Code*. Conditions are similar to those of probation or judicial interim release, which can include, for example, avoiding particular geographical locations, non-communication with specific populations, abstention, and curfews (MacAulay, 2001, p. 58). Such conditions are in place to prevent the actual feared event from occurring. The *Criminal Code* also grants authority to devise other reasonable conditions. For example, one judge restricted the type of romantic relationships permissible without court consent (Blatchford, 2000). This condition is not specifically articulated in the *Criminal Code*, yet the judge felt it necessary to limit the perceived risk created in those circumstances. Another condition can be the participation in a treatment program. Treatment programs are often non-state entities such as the 'Circles of Support and Accountability' (COSA), which has been used for those on specialized peace bonds (Wilson, Picheca, & Prinzo, 2007, p. 290; see also *R. v. Budreo*, 2000). The peace bond application thus responsabilizes the risky person to

accept and acknowledge what is considered to be an inherent risk, or else face prison until they accede to the peace bond. Once they accept the peace bond conditions (which is not necessarily an acceptance of risk, but may be perceived as such), the conditions are set up so the bonded person can *prove* they can manage their risk in a way that keeps the peace.

Since the three specialized peace bonds are not considered punitive in nature, there is no requirement that the ‘offender’ have a previous criminal record or charges to qualify for an order (MacAulay, 2001, p. 43-44), nor is it required to name the specific victim of the feared offence (Grant, 1998). The symbolic function is therefore changed: instead of the applicant and society disapproving of specific behaviour towards the applicant, the message communicated is that society at large disapproves of fear-causing ‘behaviour’⁴ towards anyone at all. The normalizing effect is thus much broader. The scope of peace bond application has thus expanded drastically, beyond the authority of the court to a variety of experts. It also demands a new catalyst for their trigger; since there is no specific applicant, the responsibility of applying for a peace bond is shifted to someone, or *anyone*. With traditional peace bonds the court *facilitates* the resolution of private disputes brought by an individual by regulating the relationship between the two parties, whereas with specialized peace bonds the court *creates* a juridical relationship between the respondent and the state, which regulates that same respondent’s relationship with all of society (including other legal subjects). Because of the lack of a specific complainant (a person with fear), the nature of the ‘dispute’ becomes much more ambiguous.

⁴ *Behaviour* is in quotations because, as demonstrated by the Buesnel case in chapter one, specialized peace bonds may entail calculating fear based on an *absence* of a particular kind of behaviour.

Conclusions From and Shortcomings of the Literature's Doctrinal Approach

To this point we have analyzed peace bond literature and drawn some conclusions about their shifting pragmatic and symbolic function. The legal limits of modern peace bond application have been set out as requiring reasonable subjective and objective fear of physical or psychological harm, adjudicated on a civil standard. Yet it is clear there is a discernable and substantial difference between what I have called traditional and specialized peace bonds. Certainly, the two have maintained certain traits throughout history: they have always been intended to prevent undesirable situations from becoming more serious or criminal, they do not constitute a criminal offence sanction, and they possess the potential penalty of jail upon refusal or breach. Moreover, they share the symbolic and normalising functions of reinforcing values, conceptions, sensibilities, and other social meanings by governing behaviour approaching, but not constituting, criminality.

Yet the specialized peace bonds of today are a marked departure from the hundreds of years of traditional peace bonds: instead of one individual applying against another, peace bonds are sought to protect the community at large from a broad range of offences including terrorism; where monetary sureties were sufficient, now there is a wide range of conditions available to judges which are strikingly similar to criminal sanctions (*i.e.* probation, judicial interim release); where the applicant used to present their case before a magistrate, now a plethora of state agents and experts are networked to organize information to determine 'fear'; where physical harm was paramount, now psychological harm is also considered; and, perhaps most significantly, what was once reserved for private disputes between individuals has now drifted into 'disputes' between an individual and society at large. Despite these differences, research on modern peace bonds has conflated traditional peace

bond (s. 810) with specialized peace bonds (ss. 810.1, 810.01, 810.2), which further masks the significance of the distinctions made above (see Day, 1996; Meredith, 1995; Nova Scotia Department of Justice, 2006; Rigakos, 2002; Weinrath & Doerksen, 2011). Moreover, while it has been possible to determine the symbolic function of peace bond laws in society, there is no literature examining how peace bonds came to embody these new symbolic functions.

I suggest that these weaknesses of peace bond literature are the result of a predominant doctrinal approach based on a liberal framework. By doctrine, I mean the established rules, regulations, procedures, guiding principles, and normative concepts organized by modes of reasoning defined by the legal institution in which they exist (Cotterrell, 1995, p. 4). Working from institutionally defined materials results in self-validating illusions of apolitical objectivity, neutrality, and rationality (Hunt, 1993, p. 141; Hunt, 1997, p. 103; Unger, 1983, p. 565), as legal doctrine and legal discourse “mutually and endlessly guarantee each other” (Sargent, 1991, p. 3). As Foucault (1971) puts it, “Doctrine links individuals to certain types of utterance while consequently barring them from all others” (p. 19). A doctrinal view misleadingly presents the law as separate from other forms of social control, a hermetic institution capable of making claims of determinant and predictable results in the application of the law (Hunt, 1993, p. 141). Since interpretations and applications of law are only thought of ‘within’ the legal realm, any political and moral origins are ignored (Cotterrell, 1995, p. 9; Unger, 1983, p. 570). Because doctrine fails to consider positions external to legal texts, it lacks both “theoretical sophistication and methodological rigour” (Sargent, 1991, p. 2). In fact, the concept of power is essentially ignored by liberal jurisprudence (Hunt, 1993, p. 223), a problem reflected in peace bond literature. To understand peace bond law it is thus helpful to look

beyond doctrine to the sociological approach of critical legal studies (Sargent, 1991, p. 8).

The suitability of CLS for analyzing peace bonds is apparent: for example, the question of civil law versus criminal law is revealed as a false polarity in the sociological context of legal pluralism, since there is no sociological difficulty with it having elements of both. Moreover, that there was even a question of ‘civil’ or ‘criminal’ acknowledges the inherent political nature of the question itself, highlighting a possibility for CLS to challenge legal orthodoxy (Hunt, 1993, pp. 212-213). CLS allows us to move beyond the peace bond’s ‘taken for granted’ nature, a characteristic borne out in the undercurrents of peace bond literature to this day. It is perhaps due to their lengthy, yet modest history that little attention has been paid to the jump from traditional to specialized peace bonds; they are portrayed as simply a crime prevention tool. Such a limited view leaves many questions unanswered. To begin, how did this jump occur? And why, after hundreds of years of remaining essentially the same, did the jump begin in the mid-1990s?

The central inquiry of this thesis moves beyond the perspective of ‘peace bonds as crime prevention’. The next section of this chapter sets out to achieve this by continuing with a governmental criminology that focuses on the socio-historical elements of peace bond history absent from the literature. It does this by exploring how specialized peace bond laws are the outcome of an “attempt to create coherence out of the competing and contradictory social influences and arguments which animate them” (Nelken, 1987, p. 110). Having established the legal limits of peace bonds, the balance of this section explores the limits and social, political, and economic conditions central to the formation of specialized peace bonds as a tool of governance.

II. Socio-Legal Context

The first part of this chapter summarized and drew some preliminary conclusions from the existing peace bond literature, ultimately revealing the limited nature of its doctrinal approach. The doctrinal separation of social and legal realms ignores the political and moral underpinnings of peace bond development. The present inquiry intends to temporally broaden analysis by considering the interplay between social, political, and economic “processes of history” and peace bond law formation. The genealogical analysis of this formation must concern both what is outside and inside the control of the limits of peace bond discourse (Foucault, 1971, p. 26). Therefore, having set the legal limits of peace bonds, I now set out to examine the social limits.

The balance of this section follows the threads of biopower and external challenges through the socio-political-historical context preceding the amendment of specialized peace bonds. The genealogical analysis is loosely organized by intertwining legal, economical/political, and security discourses. In short, this section is “concerned with the body politic, as a set of material elements and techniques that serve as weapons, relays communication routes and supports for the power and knowledge relations that invest human bodies and subjugate them by turning them into objects of knowledge” (Foucault, 1995, p. 28).

I take as a starting point the historical circumstances in which John Haylock (from chapter one) found himself subjected to a peace bond in the mid-19th century. At this point in the formation of the English state, the bio-political nature of law takes on a particular role in governing society as liberalism. Liberalism is a version of biopolitics that applies knowledge of the population so as to govern through the pursuit of individual self-interest

and market exchanges (Dean, 2010, p. 133-135). As outlined in chapter two, Foucault identified how this is achieved through economic calculations and creating the conditions under which individuals have enough freedom to exercise their rights and liberties (Dean, 2010, p. 137; Foucault, 1991). The balance of this section examines the advancement of peace bond law through the promulgation of particular forms of biopower and the discourses related to it in order to understand how a particular problematization lead to specialized peace bonds. It achieves this by examining the historical contingency upon which specialized peace bonds were developed through the biopowered foundation of law, while examining the political, social, and economic conditions and disciplinary apparatuses making up the polyvalent mechanisms of governance surrounding specialized peace bonds.

Formation of the State

As established in chapter two, Foucault sought to explicate the art of modern governance through an understanding of the complex governmental apparatuses that arise out of knowledge of political economy. This section explores the shifting economic, social, and political discourses leading up to the formation of specialized peace bond legislation in the 1990s. Connecting these processes historically helps us to better understand crime policies leading up to the emergence of specialized peace bonds. Specifically, it shows how the development of welfarism and ensuing shift to neo-liberalism transformed discourses of security and risk, which drove criminal justice policies and practices. As society became more dependent on the idea of risk and dangerousness, neo-liberal strategies increasingly pervaded the rationales underlying governmental problematizations. The problem is revealed: How are risky people to be included in society?

The Rise and Fall of Welfare

The 19th century was a period of great political change in England, during which the state was increasingly relied on to regulate social relations. Robert Castel (2003) demonstrates that within England and France, this reliance is directly related to the development of labour as the primary means of societal integration. He traces back to the medieval era a social question concerning those who did not work, a group which came to represent a vulnerability that “feeds the tremors that shake inherited conditions and affront guaranteed statuses” (Castel, 2003, pp. xvii-xviii). With words resembling the inclusion/exclusion paradigm of Agamben, he identifies the vagabond as one who “could not appear except in a structured world from which he has been disconnected” (Castel, 2003, p. 15). Most importantly, the threats posed evolved alongside the social construction of the vagabond were perceived as a risk to be mitigated through state intervention (Castel, 2003, p. 11).

Between medieval times and the 19th century the regulation of vagabonds varied by material circumstances and accumulated knowledge about the nature of vagabondage. The onus of intervention shifted away from the community, church, and private charity towards the state, as the tides of overpopulation, unemployment, and plague displaced persons from their primary social relationships (Castel, 2003, pp. 87-124). Whereas justices of the peace had been designated since the 13th century to ensure their own shire was peaceful (such as through arrests, jail, or sureties to keep the peace), social regulation became more uniform across the country via new legislations (Corrigan & Sayer, 1985, p. 39). Moreover, Christian influence created new categorizations of vagabondage that appeared in the ‘discursive gaps’, thereby dividing the ‘good poor’ (*e.g.* elderly, disabled, or those who

chose poverty) and the immoral ‘bad poor’ (e.g. vagabonds, paupers), a distinctly moral differentiation that would play into the formation of the state (Castel, 2003, p. 24, 199, Corrigan & Sayer, 1985, p. 4). During this period, the state intervened through a number of methods in attempts to encourage some ways of social life while “suppressing, marginalizing, eroding, undermining” others (Corrigan & Sayer, 1985, p. 4). The form of state intervention varied, including punishment by work camps, jail, capital punishment, hospitals, orphanages, and early forms of social assistance (Castel, 2003, pp. 16, 27, 48, 66; Corrigan & Sayer, 1985; Mendelsohn, 1954, p. 26; Young & Ashton, 1956, pp. 21-46). A thorough overview with respect to the development of the state during this era cannot be offered here due to space limitations, but it has been well-done elsewhere (notably Castel, 2003, and Foucault, 2008). In light of this, the point I want to make here is simply that between roughly the 13th and 19th centuries there is the development of a governmental rationality – a *raison d’État* – where the state adopts economic self-interests that it must defend, which is distinct from previous affiliations with “divine command” (Foucault, 2008, p. 6; Garland, 1997, p. 176).

By the time Haylock was issued his peace bond for the ‘Donkey Watt’ incident of 1852, the state was already established as an important part of the ‘solution’ for developing economic, moral, and cultural responses to fears of social dissociation (Castel, 2003, p. 211; Corrigan & Sayer, 1985, p. 4; Young & Ashton, 1956). Near the end of the industrial revolution wage labour became the source of wealth, and it was conceived of in terms of models of liberty and contract (Castel, 2003, p. 121; Corrigan & Sayer, 1985, p. 88). Therefore, in order to be considered socially useful one had to work (Castel, 2003, p. 141). Influenced by economists such as Adam Smith, the state would come to facilitate liberalism

by promoting competition and industry through the free market (Castel, 2003, pp. 153-154). In particular, the rise of insurance practices (*e.g.* unemployment, property, life) facilitates not only a social safety net for the poor of society, it also promotes a sense of social belonging to everyone who participates (Castel, 2003, pp. 265-272). In addition to removing obstacles to the free market, the state also takes on the role of legislator, educator, and moralizer of the public in order to ensure the “social discipline” required for the functioning of a ‘free’ society (Corrigan & Sayer, 1985, pp. 95, 107).

For example, as a result of these developments the non-worker was no longer to be punished by the state for a lack of employment, but rather helped to become employable (Castel, 2003, pp. 162-166). Thus, we see the beginnings of the *welfare state*. The welfare state is not a concrete concept, but is abstractly defined by the period marked by macroeconomic Keynesian social policies and state intervention for the purposes of societal reproduction (Jessop, 1993, p. 7; Sears, 1999, p. 92; Teeple, 2000, pp. 15-17; Walters, 1997, p. 227). The problems caused by industrialization in Britain appeared in Canada, albeit somewhat later, and “by and large the same methods [were] adopted” (Mendelsohn, 1956, p. 67). In Canada, the welfare state emerged between confederation and about 1890, at which point the state began to take a more active role in regulating the economy through welfare institutions and practices (Moscovitch & Drover, 1987, pp. 15-17). As workplace (often factory-related) injuries mounted, workers demanded work security and workman’s compensation and unemployment insurance programs were developed (Moscovitch & Drover, 1987, pp. 22-27). With Canada’s economy largely linked to agriculture, the great depression and certain years of bad crops caused further unemployment and a demand for state assistance (Chappell, 2001, pp. 29, 36; Mendelsohn, 1956, p. 67). A major boost to

social welfare was the Marsh Report of 1943, influenced by the Beveridge Report in the United Kingdom, called for a comprehensive program for social insurance and social expenditure by the government (Chappell, 2001; Mendelsohn, 1956, pp. 21, 45; Moscovitch & Drover, 1987, p. 28). The welfare state became particularly economically and politically necessary after World War II for rebuilding infrastructure and countering socialism (Teeple, 2000, p. 16).

During this time, the state increasingly sought to directly intervene in the wellbeing of citizens through economic calculations. Gary Teeple (2000) identifies four programs of state intervention on society under welfare state rationales: preparing the working class for the labour market (through health care, education, social benefits, etc.), regulating the labour market (through minimum wage, immigration, injury insurance, etc.), bargaining for workers' rights at the point of production, and providing income assurance for the unproductive or after-productive (retired)(p. 15). Political calculation was decidedly directed at a societal level (Walters, 1997, p. 222), made possible by knowledge about the population. For example, a shortage in a particular field of work can be addressed by providing the unemployed with training to meet those needs. These sorts of political calculations were integral to maintaining the capitalist system in its national form (Jessop, 1993, p. 8; Teeple, 2000, p. 18).

As the economy improved, so did the optimism of the criminal justice system. David Garland (2001) explains that until about the 1960s, criminal justice policies were at a "height of modernism", when experts claimed the ability of positively rehabilitating offenders through scientific research and treatment. For example, the influence of penal experts increased to the point reaching new policies, as discretion was shifted away from

judicial authorities towards penal experts. The rationale was criminals were curable through social reforms, and therefore the state would take responsibility for the *care* of offenders in addition to punishment and control. As knowledge about what makes a person commit a crime increased, it was believed that crime rates could be decreased.

The eventual demise of the welfare state is linked to a global profitability squeeze in the 1970s (Sears, 1999, p. 94). The working class underwent a restructuring in response to new computerized technology, which reduced the number of jobs and existing employment positions became increasingly efficient and hyper-competitive (Jessop, 1993, p. 12; Teeple, 2000, pp. 29, 65). By the 1980s, rising unemployment in Western nations reflected the growing class inequality of their political and economic system (Teeple, 2000, p. 41). In order to maintain economic growth, which would ultimately benefit the interests of the state, the economy was opened to a worldwide market (Teeple, 2000, p. 56). With transnational corporations employing a workforce in non-Western countries, combined with the surplus workforce growing due to women and illegal immigrants looking for employment, the national working class of the West was no longer needed (Teeple, 2000, pp. 71-73, 76). Since social reforms could not push individuals towards opportunities that simply no longer existed, the logistics of the state's welfare-based intervention became impossible and Keynesianism was largely abandoned.

Contemporaneous to the Western economic downturn was the general decline of faith in welfarist criminal justice policies, which marked a distinct change in both political discourse and crime control strategies during the late twentieth century. Rehabilitation efforts were unable to curb recidivism rates, leading to Martinson's famous conclusion that "nothing works" (Garland, 2001, p. 58). Eventually, the ever-increasing crime rates

irrefutably contradicted modern discourse and crime became recognized as "a normal social fact" pervading public consciousness (Garland, 1996, p. 446; Garland, 2001, pp. 106-109). Given the dour economic outlook and the perceived failure of the criminal justice system, the conceptions of political and criminal justice thought had to be re-problematized with respect to the constitution of the population.

Neoliberalism

While Keynesianism was necessary during the expansion of capital, it was a change in circumstances and not a 'Keynesian failure' that guided in a new era (Jessop, 1993, pp. 8-9). The effects can be seen at the nation-state, individual, and social levels, and are generally encompassed under the term *neoliberalism* (Jessop, 1993, p. 29; Sears, 1999, p. 107; Walters, 1997, p. 224). This term is somewhat ambiguous, as it has different, yet interrelated meanings when referred to in the context of policy or ideology, or as part of governmentality (Larner, 2000, p. 5). Moreover, its features are still emerging and contestable, which only furthers the abstraction (Picciotto, 2010, p. 87). Neoliberalism is perhaps better understood as more of a process than a definable object. For this reason, it is better to examine the pertinent effects and outcomes of this apparent shift.

The effects of the shift towards neo-liberalism have been variously described in theories such as the Schumpeterian workfare state (Jessop, 1993), post-Fordism (Jessop, 1993, p. 25; Sears, 1999, p. 95), the lean state (Sears, 1999), and the active society (Walters, 1997). Essentially, as a crisis of profitability and growing unemployment antagonized concerns about how the state can increase productivity and save costs, social welfare programs were cut and more reliance was placed on privatization (Jessop 1993, p. 18; Rice

& Prince, 2000, p. 83; Sears, 1999, p. 96; Teeple, 2001, pp. 109-111). This process materialized in Canada, albeit to a lesser degree than many western nations, where the financial pinch became particularly acute circa 1974 to 1978 (McBride, 2005, p. 35; Moscovitch & Drover, 1987, p. 36; Sears, 1999, p. 95). The economic policies of Western nation-states were increasingly influenced by Chicago school-type economics, which claimed that reliance on the free market could produce efficient allocation of resources and maximize profits while promoting liberty and freedom of choice (Pearce & Snider, 1995, p. 20). In this way, a population is not a society that can be acted on, but a collection of individuals who act in their own self-interests, predominantly as consumers. Despite this conception of people as ‘individuals making choices’, their interests still require “particular institutional, cultural or economic conditions” which are made possible through manipulation of their environment (Dean, 2010, pp. 185-186). The state still maintained the function of being the central executive authority and was responsible for maintaining that function, even though it was limited by the displacement of its economic power (Jessop, 1993, p. 22). As succinctly put by Dean (2010), the state operates under the promise to “assist you to practise your freedom, as long as you practise it our way” (p. 188).

At the level of individuals, the problem centred generally on the problem of inactivity (Walters, 1997, p. 224). Many Canadians viewed the social agenda as a failure: the political left said welfare simply does not redistribute wealth effectively, and ends up blaming the poor; the political right raised claims of infringements on personal liberty, and fears of dependency; interest groups were concerned about their marginalization by social policies which treated groups unequally (*i.e.* racism, sexism, homophobia) (Chappell, 2001, p. 48; Pearce & Snider, 1995, p. 19; Rice & Prince, 2000, pp. 83-103). During the welfare

era, social programming thus established an insider/outsider dichotomy of workers, with the latter coming to be viewed as an underclass (Walters, 1997, p. 227). Policies reflected this sentiment. Instead of support from social security programs, the unemployed and other marginalized groups were to be provided access to paid employment through training, usually provided by the private sector (Walters, 1997, pp. 225, 228-229). This shifted the onus of unemployment to the individual and promoted a morality of self-maintenance and abstinence from “sloth and self-indulgence” (Sears, 1999, pp. 99, 102; see also Moscovitch & Drover, 1987, p. 14; O'Malley, 1996a, p. 28). Individuals who failed to take responsibility for their choices were perceived as corrupt, further underlining the position that they need to take responsibility (Dean, 2010, p. 190). The rationale underlying this ‘solution’ was pervasive, even though it failed to consider those who, for example, were unable to work, nor was it capable of alleviating structural constraints (e.g. minimum wage)(Walters, 1997, p. 230).

Due to increased reliance on privatization and the free market, some scholars have claimed the power of the state became “hollowed out” (Jessop, 1993, p. 10; Rose & Miller 2010, pp. 297-298), though others have countered that the nation-state is not helpless but rather has been transformed (McBride, 2005, p. 23; Pearce & Snider, 1995, p. 42; Pearce & Tombs, 1998, pp. 65-68; Picciotto, 2010, p. 93). Many politicians and academics claimed neo-liberal responses to the effects of globalization were inevitable. However, it is possible that politicians were too eager to blame globalization for their economic woes, when it may be their policies that at least partially further globalization itself (McBride, 2005, pp. 29, 82). Nonetheless, while Canadian parliament *could* pass legislation to dispense with neo-liberal policies (such as trade agreements) and reverse the process, the public generally supports

neo-liberal policies to reduce deficits and large government while also demanding protection from economic uncertainty (McBride, 2005, pp. 43, 82, 133; Pearce & Snider, 1995, p. 42; Rice & Prince, 2000, p. 3).

As a result, the Canadian government abandoned many welfare policies and programs by constructing programs and policies rewarding and encouraging a mentality of individual responsibility. As Pearce and Tombs (1998) explain,

the functioning of the different markets involving such legal persons as shareholders, employees and customers, and the corporate entity in combination with the right of such persons to challenge violations of their rights in the civil courts will constitute an adequate and socially efficient mechanism for producing self-interested but socially responsible behaviour. (p. 13)

In Canada, more so than other western nations, citizens still supported their government's role in some socio-political and cultural areas (*e.g.* Canadian Pension Plan, Aboriginal identity), but the dominant discourse of fiscal policy had eroded the legitimacy of social welfare. The attention of government, public, and media was thus shifted to the allocation of resources based on costs rather than social need (Rice & Prince, 2000, pp. 126, 139, 144-146).

Discourses of individual responsibility became increasingly prominent as they came to apply to criminals. The criminal justice policies of the welfare state were also perceived as a failure as crime rates rose in all western industrial nations, defying the 'experts' (Garland, 2001, p. 90). In response, state welfarism and government overextension were addressed by a number of neo-liberal strategies fostering entrepreneurial and economic-minded conduct within criminal justice policy, thus minimizing state intervention (Bittle, 2002; Larner, 2000, p. 7). As Rose and Miller (1992) note, at its base

[n]eo-liberalism re-codes the locus on the state in the discourse of politics. The state must be strong to defend the interests of the nation in the international sphere, and must ensure order by providing a legal framework for social and economic life. But within this framework autonomous actors – commercial concerns, families, individuals – are to go freely about their business, making their own decisions and controlling their own destinies. (p. 296)

The change of rationality is therefore not located exclusively in the state's strategies but in the depths of the entire social structure, particularly within the expectations of the public with respect to their own entitlement as citizens (Foucault, 1995, p. 27; Larner, 2000, pp. 9-10). This is fundamental to understanding crime policy shifts from welfarism to neoliberalism, since neither the state nor its institutions are a unitary consistent institution but rather a plethora of competing governmental projects made up of discourses that may be only partially understood by individual actors (Peace & Tombs, 1998, pp. 37-38). There are conflicts between the actors, the various levels of organizations, and in the way the problems themselves are framed, yet they are all within the same challenging material circumstances. The broader societal shift began from a number of directions, not through an imposition of 'The State' on its citizens.

The public perception of crime as normal and the shift towards neo-liberal politics had profound effects on crime control rationales and programs. Since further punitivity would only compound existing problems of over-incarceration, new strategies were needed to shift the target of intervention away from the *causes* of crime to its *effects* (Garland, 2001). The state is thus confronted with a question: what sort of policies and strategies could address such premises? The two options identified by Garland (1996) are strategies of denial and adaptive strategies. Strategies of denial are defined by a "law and order" stance that demands increased punitivity, thus giving the impression that "something is being done"

(Garland, 1996, pp. 459-460). Adaptive strategies, conversely, involve redefining the problem in such a way that crime can be managed, if not stopped (Garland, 1996, pp. 450-459). Adaptive solutions involve a multi-faceted approach engaging a number of interrelated responsabilization strategies, including activating communities, prudentialism, partnerships, and risk reduction (Bittle, 2002).

Activating communities invokes 'responsibilization' to shift the onus of crime control away from the state. A new palette with which to paint the art of government, this strategy infuses responsibility to "the organizations, institutions, and individuals of civil society" (Garland, 1996, p. 451; Muncie & Hughes, 2002). Members of these groups make up a "technology of citizenship" (Dean, 2010, p. 180) and take it upon themselves to avoid and prevent crime, while the state (hopefully) avoids the cost of a perpetually expanding scope of social control. They must *change the way they think* about their roles and actions, and respond by applying responsabilization strategies. To do this means freeing the conduct of individuals as neo-liberal subjects to follow their own economic interests (Dean, 2010).

Prudentialism follows the same principles of responsabilization except applied in a narrower, more specific method of 'self-help'. In the context of neo-liberal strategies, prudentialism is exercised when an individual takes responsibility for managing their own risk level (Bittle, 2002). In other words, instead of working upon 'the social', the target of government becomes the family, market, individuals, and voluntary associations (*e.g.* a community)(O'Malley, 1996a, p. 28). For example, Bittle (2002) explains this concept in the context of youth prostitution, claiming it is possible to be simultaneously a victim and accountable for any consequences of their actions. The ability to judge one's own behaviour enables these 'responsible victims' to "help them help themselves" (Bittle, 2002, p. 336) by

monitoring their “risks of physical and mental ill-health” (Dean, 2010, p. 194), among other things. The same rationale applies to offenders, who are individually responsible for their actions and circumstances (Garland, 1997, p. 188; O'Malley, 1996a, pp. 31-32).

Risk reduction, the counterpart to prudentialism, is how social spaces are governed to prevent situations where crime can occur (Bittle, 2002; Garland, 1996). The target is not the offender but rather the criminogenic circumstances in which offenders are able to operate. By taking control of situations entire populations can be controlled, thus reducing the chances of an offence or accident taking place (Garland, 1997). For example, employing any technology of security (*i.e.* security systems, locks) reduces the ability for criminals to act at all.

The growing prominence of rationales supporting activating communities, prudentialism, and risk reduction did not obviate the traditional role of the state, but rather they opened up possibilities for new forms of state intervention. Indeed, the economic conditions and social dissatisfaction with the state did “erode the notion of the state as the public's representative and primary protector”, but this only marked the beginning of a strategy to govern “at a distance” (Garland, 1996, p. 454; Muncie & Hughes, 2002; Rose & Miller, 1992). This distance involves the creation and employment of increasingly numerous ‘preventative partnerships’. Partnering with non-state entities allows the state to “coordinate their practices in order to enhance community safety through the reduction of criminal opportunities and the extension of crime-consciousness” (Garland, 2000, p. 349; Jessop, 1993, p. 19). The apparatus of government becomes less definite, made up of an ever-changing multiplicity of force relations. This further increases the complex plurality of law, as public/private distinctions become obfuscated. According to Dean (2010),

partnering is a key aspect of the new technique of governance, leading to an increase in the “multiplicity of authorities and agencies, employing a variety of techniques and forms of knowledge, that seeks to shape conduct by working through the desires, aspirations, interests, and beliefs of various actors” (p. 18; see also Garland, 1996).

The state, however, is not wont to relinquish its role in the security and protection of its citizens (Pratt, 1999). Indeed, the state is "not good at acting at a distance," and tends to combine responsabilization measures with its own exertion of powers in order to ensure its own goals are achieved, as an excessive withdrawal would be a political disaster (Garland, 1996, p. 463; Garland, 2001, p. 110). As Zedner (2007) claims, "[t]he State retains a vital role in developing and sustaining norms, policies, and institutions essential to protection" (p. 273). The neo-liberal state is therefore in a precarious position, since it “governs already too much, and has to continue governing in order not to govern too much” (Opitz, 2011, p. 100, see also Foucault, 2008, pp. 13, 17). This conundrum raises a question of what to do when promotion of market-based governance fails.

The question of failure always exists, regardless of the political climate in any governmental epoch. In the context of neoliberalism, what if the market or governmental strategies are unable to reach the desired ends of governance? This question is especially critical during this period since the exercise of biopower (*i.e.* knowledge of birth rates, illness, accidents) within liberal rationales prevents the state from negatively affecting seemingly natural processes or the market (Opitz, 2011, p. 98).

With respect to a shift towards illiberal practices, Ratner and McMullan (1983) claim the effects of the aforementioned economic developments (profit decline, unemployment) were exacerbated by increased energy costs (p. 31). When this unique set of simultaneous

conditions painted the welfare state as a failure it made possible the emergence of a new ideology of punitivity (p. 32). The most pertinent outcome of this shift was the consensual increase of repressive/coercive policies of the state (albeit less pronounced in Canada than in Britain or the U.S.), a key characteristic of what they describe as the *exceptional state* (pp. 31-34). This suggests the state is moving past liberalism and approaching authoritarianism, or perhaps even “friendly fascism” (Ratner & McMullan, 1983, p. 41; see also Dean, 2010, p. 171; Pratt, 2000, p. 47).

Even when it does not encroach on fascist tendencies, a liberal democracy necessarily involves some degree of illiberality because the creation of a proper liberal subject requires education and training in order to develop ethical or moral faculties, which is mandated by the state (Dean, 2010, p. 162; Valverde, 1996, pp. 361-362). This embeds in the subject a common sense to exercise the right or responsible decision when given the opportunity, or else face further despotic intervention (Dean, 2010, p. 159; Valverde, 1996, p. 364-365). What is ‘right’ according to the state is closely related to capitalism and the social relations of production. This relationship is influential on what society has come to define as deviant, and thereafter subjected to intervention through normalization, conversion, or containment (Spitzer, 1975, pp. 642-643, 648).

The concept of illiberalism is inherently linked with the development of policing of comfort, public health, commodity production, regulation, et cetera (Neocleous, 2008, pp. 19-21). The state must employ policing programs in order to quell rebellion through processes organized around discourses of security (Neocleous, 2008, pp. 24-26, 38). One of the predominant rationales distancing governmental problems from the state, yet at the same time demanding state intervention, is the promotion of security through discourses of risk.

Risk is the proverbial glue that binds neoliberalism and illiberalism, making their co-existence possible. By locating the point where liberal regulations become illiberal to find securitization, we can identify the threshold returning classical sovereign power within governmentality (Opitz, 2011, p. 103).

The Reflexive Coordination of Governance Through Discourses of Security and Risk

In addition to the aforementioned changes in structure and practice of the state, the political shift from welfarism to neo-liberalism coincided with an important change in approach to individual and national security. Security is a difficult concept not only for the state but also for researchers, since by its very nature it is defined by what *does not* happen; or in other words, one is secure when there is an absence of foreseeable and unforeseeable future events – which is never (Spitzer, 1987, pp. 46-47). This is also what makes it so appealing for consumers, both product-wise (*e.g.* alarms, guard dogs, air bags), and also discursively, as there are no limits to what may bring insecurity. It is therefore necessary to calculate the risk of an uncertain future event, even when the future is unpredictable (Miller, 2009, p. 159, O'Malley, 2000, p. 461). Discourses of risk tackle questions of how to be able to predict where and what is dangerous (Pratt, 2000, p. 42). This is amplified by neo-liberal rationales, which encourage risk taking in the marketplace, which reinforces a psychological and cultural symbiosis with danger (Foucault, 2008, p. 67). The salient feature of modern risk discourse is that it is preoccupied with *how* to provide security and ignores the question of whether it ought to be applied at all (Opitz, 2011, p. 97).

The effects of various risk discourses are evident throughout all levels of social experience. The security of the state is traditionally assumed to further protect the state's

population (Busumtwi-Sam, 2008, pp. 18-19; Pratt, 2000, p. 41), however, the process of making the state secure (*securitization*) opens political space for illiberal state practices, and can erode the boundaries between what is perceived as civil and military, legal and illegal, public and private, and internal and external security (Opitz, 2011, pp. 96, 105).

John Pratt (1997, 2000) has noted the changing discourses surrounding who is 'dangerous' can be split into two historical periods. In the first half of the nineteenth century, groups who threatened "the very foundation stones of modern society itself" were classes of people, such as trade unionists, political agitators, and criminals (Pratt, 2000, p. 36). At some point the threat became less definitive, as 'dangerousness' was used more to classify particular sub-groups of criminals, particularly those who refused to conform to laws or normative expectations (Pratt, 2000, pp. 37-38). Patterns of habitual offending were equal to the "'unknowable' identities" with respect to what was considered dangerous (Pratt, 2000, p. 39). It is the technology of risk assessment that makes dangerousness 'knowable', in the sense that it gives a particular language with which to organize risk into different levels of severity for the purpose of determining a course of intervention.

The appeal of risk assessment is bolstered by support from the community, particularly when used to govern offenders perceived as a danger to the values of society (McAlinden, 2006, p. 197; Petrunik, 2003, p. 47). Risk discourses have existed for a long time, but how risk is capable of being *thought of* has changed based on social circumstances. For example, Pratt (2000) notes that discourses surrounding a population decline around the 1930s led to an increased importance to be placed on the protection of youth, who were in need of greater protection due to their vulnerability (p. 44). Likewise, in the 1970s, a sense of uncertainty and insecurity developed surrounding sexual/violent

attacks on women who were entering the workforce (pp. 44-45). After the events in the United States of America on September 11, 2001, discourses of ‘the war on terror’ greatly influenced new types of knowledge necessary to reduce risk, such as profiling populations, surveillance, and intelligence gathering (Aradau & Van Munster, 2007). This last example is particularly important to the development of s. 810.01 peace bonds, as defining what constitutes ‘terrorism’ is impossible since imagination and technology continually reinvent what can be terrorism (Cooper, 2001). Despite being able to definitely know what exactly is terrorism, or even what is dangerousness, when citizens feel threatened they are responsabilized and more amenable to having their civil liberties restricted (Gaszo & Haggerty, 2009; Opitz, 2011, p. 101). The commonality across all eras with respect to what is dangerous or risky is the perception of some incalculable and irreparable harm (Pratt, 2000, p. 46).

Perceptions of risk are derived from a wide range of discourses, events, and material conditions. For example, media representation of sexual offences furthers discourse surrounding dangerousness and risk, especially following high profile cases such as Clifford Olson or Paul Bernardo (Petrunik, 2003, p. 51; McAlinden, 2006, p. 199). Sex offender policies are even named after child victims, whose deaths caused tremendous public anger (Petrunik, 2002, p. 485). Ultimately, the risk posed is considered by society to be unacceptable, and they eschew rehabilitation while demanding safety, quality of life, and freedom from fear (Petrunik, 2002, p. 485, 502).

Outside of media representation, Ulrich Beck (1992) links the relationship of modern social and natural circumstances to a heightening the general public’s sense of impending risk. These processes are accelerated by the impact of modernization processes. For

example, technology brings about the increased chance of ecological problems, such as pollution of the environment or nuclear disasters (meltdowns, bombs), and their effects are felt across the globe. The result, says Beck, is that instead of distributing goods as in the past, people now govern by distributing, managing, and avoiding risks (pp. 19-20). This is necessarily irrational, but appears rational through the development of scientific knowledge and calculation (p. 29). Thus, science determines risk, while the population merely perceives it, with the entire process underlined by an indefinable “acceptable” level of risk (pp. 57, 64). While I tend to agree with O'Malley (1999, 2001) that Beck's claims are too deterministic and overstated, Beck does raise a valid point about how material conditions and technological advances are shaping the way we govern ourselves to manage pervasive risks. Risk is real in its interactions with the mechanisms of calculation and control (Dean, 2010, p. 211), and there are certain types of risks (*e.g.* an exploding volcano) existing outside of perception that have real consequences (Rigakos & Law, 2009, p. 80).

Risk has become an overriding concern in many areas of social life, but in particular that of the criminal justice system, which requires risk to identify security threats. Some threats to public safety can be dealt with by limiting mobility in order to maintain security (Zedner, 2007, p. 380). Judges have come to rely on mental health professionals assess the risk of violent offenders (Grant, 1998, p. 186). At first these professionals were criticized for not being able to accurately predict *dangerousness*, but it has become accepted they can predict the *risk* presented by an individual in some contexts (Castel, 1991, pp. 282-283; Grant, 1998, pp. 186-187). Instead of relying on clinical assessment, a calculation of risk makes use of actuarial factors (Castel, 1991, p. 288; Grant, 1998, p. 187; Petrunik, 2002, p. 491). The resulting claim is not a prediction but rather a probability, thus making it

unfalsifiable (Grant, 1998, pp. 188-189).

It is now common sense to combine risk with dangerousness in decision-making. For example, a person at high risk of shoplifting is not dangerous, but a person at lower risk of committing sexual assault may be considered more dangerous (Petrunik, 2003, p. 45). Prisons increasingly focus on the incapacitation of offenders, reflecting a cultural shift in punitivity for persons who are irredeemable (Garland, 1996, pp. 458-460). Having been unable to take responsibility for their choices, criminals are perceived as undeserving and beyond help (Garland, 2001, pp. 135-136). Congruent with neo-liberal governance, the calculation of risk made it possible for the criminal justice system to go beyond the reduction of crime by also targeting the reduction of *fear of crime* through the promotion of a culture of security consciousness and public safety (Garland, 1997, p. 188).

It is difficult to pinpoint how, where, or in whom 'fear of crime' is manifested. One way risk discourses can perpetuate fear is by emphasizing defective individual characteristics (Schehr, 2005, p. 53). Fear may be also perpetuated through media coverage of global events, such as terrorist attacks or the SARS virus, though it is unclear exactly how that fear manifests itself among individuals (Pain, 2009, pp. 469, 481-482; Van Swaaningen, 2005, p. 293). Even though crime policies are set at a national level, sentiments about which groups are targets of insecurity take place at a local level (Van Swaaningen, 2005, p. 290). This is exacerbated in communities with weak informal ties and/or signs of disorder, which have been shown to have higher levels of fear (Ross & Jang, 2000, p. 416). Fear has been conceptually linked to a variety of social conditions. For example, loitering has been identified as a prominent symbol of disorder which can lead to high levels of fear and anxiety (Fisher, 2009, p. 314; Jim, Mitchell & Kent, 2006, p. 147; Ross & Mirowski, 1999,

p. 426), particularly with respect to crimes such as stalking (Jagessar & Sheridan, 2004, p. 97-98) and drug dealing (Bird, Masoud, Papanikolopoulos & Isaacs, 2005, p. 167). A study by Kohm (2009) found signs of disorder were more influential in residents' fear of crime than actual high-profile local homicides (p. 19).

Further complexities arise when trying to define fear as a consistent, unitary object. Walklate (1998) identifies five ways of conceptualizing fear of crime: First, there is a fear of the other, which was initially exhibited in racial crimes and then later adopted by the feminist movement; second, fear can be rational or irrational, which is often tied to risk; third, fear can be learned through experiences; fourth, anxiety as a form of fear is born out of a connection between risk and rationality; fifth, fear is inversely related to trust and a feeling of security (pp. 404-415; see also Garland, 1996, pp. 461-463). Regardless of the particular conceptualization of fear, it can be manifest in coherent ways. For example, in situations such as moral panics, the actions taken by those who are afraid (by any conceptualization) can appear to be rational and proportionate when viewed within a discourse of risk management (Hier, 2008, pp. 186-187). The combination of risk with a 'rational' fear, therefore, can take on a seemingly unlimited number of social manifestations. Being able to govern fear within the criminal justice system would thus make it possible to govern a wide variety of behaviours and circumstances.

The discourse of risk now embedded within modern criminal justice is not a new phenomenon, though it does seem to be increasingly pervasive. Prior to the 1930s, assessments of risk in criminal justice were largely based on discussions with neighbours or family (Pratt, 2000, p. 45). However, as perceptions of risk became more abstract, so, too, did the sources of information upon which it is based (Pratt, 2000, p. 45). This is evident in

the rise of actuarial calculations of risk. Many authorities that apply risk assessment, including the Correctional Service of Canada (CSC), base their calculations in actuarialism. Actuarial risk calculation can be traced back to at least the mid-17th century insurance schemes, designed to protect or police capital investments (Rigakos & Hadden, 2001, pp. 65-66). Even the practice of demanding a legal surety was a form of risk management (p. 67). Instead of displacing other governmental techniques, actuarialism varies in nature and articulation depending on the political climate in which it exists (O'Malley, 1996b, p. 190), and receives much of its support because of its objective appearance (Hannah-Moffat, 2005). However, the claim of actuarial practices being amoral and apolitical is contradicted by inherent race, gender, and class bias. This is revealed by the risk factors related to socioeconomic status, ethnicity, gender, and age (Rigakos, 1999, p. 145).

Grounding risk calculation in actuarialism makes the process seem objective, but there are counter-discourses criticizing actuarialism for masking the subjectivity of professionals' discretion (Dean, 2010, p. 219; Hannah-Moffat, 2005, p. 36). When used in court, the disguised underlying subjectivity of a risk assessment informs judges "who and when they might send to prison and who they might not" (Pratt, 1999, p. 147). Risk is thus operationalized as a mode of regulation through which states can discipline and govern (Mythen & Walklate, 2006, p. 385). When applied as a neo-liberal strategy, actuarial risk assessment is intended to responsabilize offenders to act morally (Dean, 2010, p. 214; Mythen & Walklate, 2006, p. 385; O'Malley, 1996b, p. 199; O'Malley, 2001, p. 90).

As has been demonstrated, discourses of risk have always created an interesting challenge to the legitimacy of the state, from the risk posed by vagabonds in the 13th century to the risks of terrorism today. With respect to peace bonds, once it became possible to

calculate and therefore ‘know’ the risk of a body it became possible to expand neo-liberal techniques for crime prevention. Knowledge of the existence of risky people means they can be identified for interventional governance, and, therefore they *must* be governed to account for their risk to personal and national security. These risky populations are a threat to the legitimacy of the state and law, and therefore the law must be adapted. Here the overarching question emerges: How are risky people to be included in society?

This question highlights the relationship between law and biopower that Agamben detailed. However, now bare life is contrasted with a complex political life, which limits the possible outcomes. Liberalism stresses reduced state intervention, further constrained by neo-liberal discourses of individual responsibility and self-governance. But at the same time the state is obliged to intervene when risk threatens any sense of security at the individual, local, or national levels. This obligation of the state is also limited economically, as the effects of what is understood as ‘globalization’ weaken its financial and political capabilities. Furthermore, risk can be thought of in new ways, which spurs a new economy of the power to govern, rearranging all levels of society from the individuals to institutions. And while all of these discourses (the state, neoliberalism, risk, security, globalization, economy) are ill-defined polymorphous constructs replete with contradictions and counter-discourses, none of them can deny that a new knowledge of risky bodies – a new expression of biopower – poses a threat to bare life, and must be governed. Given the political climate, to step outside of or deny these limits would seem irrational.

Conclusion

The social, economic, and political precedents come together to make a certain kind

of ‘truth’ about the perception of risk and fear leading up to the mid-1990s (though elements of the fear have been traced back to the 13th century). As far back as the medieval times and continuing to the present, fears of social dissociation sparked questions of how to integrate excluded populations into society. The broader historical discourses limit the possible discourses and problematizations at a given point in time, and specialized peace bonds are an outcome of these processes. The next chapter continues analysis with an archaeology of the developing problematization of fear at three points in time, those points being the parliamentary debates leading to each specialized peace bond amendment. It is during these debates that the forming power relations of the genealogical analysis are transformed and crystallized, providing insight into how the application of peace bonds represent a shift in our conception of fear.

CHAPTER FOUR

Governmental Analysis of Specialized Peace Bonds: Archaeology

Introduction

The previous chapter consisted of a genealogical analysis setting out the social, political, and economic conditions out of which risky populations emerged. It was shown how discursive and material conditions enable the state to govern the health and safety of the population at large in order to maintain political stability. Within these conditions a question arose: How are risky people to be included in society? The solution is necessarily limited by the liberal framework and discourses of security and risk from which it emerged.

This chapter undertakes an archaeological analysis of the three parliamentary debates leading to the legislation of specialized peace bond sections 810.1, 810.2, and 810.01 in order to demonstrate the form of the solution. The first debate concerns Bill C-126, *An Act to Amend the Criminal Code and the Young Offenders Act*, taking place from May 6 to June 23 of 1993. The second debate concerns Bill C-55, *An Act to Amend the Criminal Code (High Risk Offenders), the Corrections and Conditional Release Act, The Criminal Records Act, the Prisons and Reformatories Act and the Department of the Solicitor General Act*, taking place from September 17, 1996, to April 25, 1997. The third debate concerns Bill C-95, *An Act to Amend the Criminal Code (Criminal Organizations) and to Amend Other Acts in Consequence*, taking place from April 17, 1997, to April 25, 1997.

The archaeological analysis of the debates examines how knowledge is organized into a manageable form, or what appears as a totality or uniform unit, called a discursive formation (in this case a law). The statements of the Members of Parliament in the peace bond debates construct a discourse by way of merging other historical discourses on law,

risk, dangerousness, fear, the economy and markets, et cetera. From this apparent unity of statements a particular object takes shape that pre-exists the discursive formation, but according to Foucault this object is an outcome of these statements and intuitional practices. Within this context, objects of governance are formed, and from this same discursive context strategies are formulated as viable and legitimate solutions. Thus, ‘breach of the peace’ as a governmental problem can be remedied effectively through the application of a peace bond, and where ‘breaches’ may acquire different characteristics or expand in scope, new strategies of governance (such as the specialised peace bond) emerge within this context to meet new needs. The discursive formation is in reality an artificial unity that looks uniform and stable through the exclusion of competing truths or knowledge claims. Thus, the idea that those who *may* breach the peace *are* risky is one such truth-claim that emerges from within this discursive context to legitimate the use of specialised peace bonds. Therefore, the focus of this analysis is placed on what the statement *does*, or in other words, what the statement makes possible. Analysis of discursive formations, as discussed in chapter two, includes analysis of the formation of objects (*e.g.* fear, gendered fear, organized crime), enunciative modalities (*e.g.* women, judges, health care professionals), concepts (*e.g.* nationalism, liberalism, risk, dangerousness), and strategies (*i.e.* specialized peace bonds).

While these will be made apparent during analysis of each debate, it is possible to draw some preliminary conclusions with respect to enunciative modalities. First, given the debates are partaken by politicians at the site of Parliament, the speakers are already embedded with a sense of competence and knowledge – certainly with respect to the rules, procedures, and purposes of parliamentary debates, if not the subject of the debate itself. By this I mean that as part of a liberal democratic regime of truth, the Members of Parliament,

having been elected, are in a position to produce certain kinds of legal and political ‘truths’ that individual citizens cannot. This enunciative modality is obviously central to the entirety of this analysis. Second, given the format of debates, there is an inherent formation of a strategy that will result from competing sides.

The results are loosely organized from a specific to a broader discourse as the problem is constructed, and then narrowed again to a particular ‘solution’. They each begin with local examples or anecdotes about a problem and its immediate consequences, and then move into generalizations about the problem, or in other words, what *tends to happen* in similar circumstances. The scope of the generalizations is then expanded to the entire country, thus making possible justifications of further state intervention. This includes developing an understanding of how state intervention to this point has been inadequate and/or inefficient. This makes possible a discussion on new forms of governance, which requires constructing new ways of thinking about fear. While there are other new laws that are outcomes of these debates, focus is placed on the particular specialized peace bond.

With respect to the formation of concepts, it is important to note that the order the results are presented is not meant to suggest that one set of discourses *causes* the other set, nor that the analysis of each debate is suggestive of any sort of chronological order. For example, in a debate a speaker may offer an anecdote, following which a second member makes a generalized statement, which prompts a third member to make a claim about the state of the Canadian criminal justice system. At the same time, that second member’s generalized statement may invite a fourth to articulate another anecdote, or another generalized statement, and so on. Not only can any given statement make possible another statement at a different level, the discourses upon which these statements are made are

influenced by what was said in a committee hearing, in a newspaper article, a personal experience, or by any number of other sources outside the debate itself. In other words, the development of the discourse itself does not depend on the order of the speakers at the debate.

Thus, the discourses are all intermingled, though they do lead to a particular outcome of which specialized peace bonds are a part. What are important are the connections between the discursive and non-discursive domains as they exist at the time of the debate. The three debates are analyzed in the order that they occurred, making it possible to further trace a transformation of fear over this time period by asking: with each new peace bond law, what is a reasonable person now entitled to be afraid of?

Part I: Bill C-126, *An Act to Amend the Criminal Code and the Young Offenders Act*

810.1: Fear of a Sexual Offence

May 6, 1993 - June 23, 1993

The debates of Bill C-126 surround the victimization of women and children, and, perhaps more importantly, the fear of their future victimization. Though not presented in a chronological narrative, the overarching problematization develops from specific local, and often anecdotal, events that are tied to macroscopic national problems. Combined, they form a particular regime of truth about the object of fear. The justifications that substantiate the problem are then tied to the proposed governmental project, of which s. 810.1 is one of the outcomes. The newly developed peace bond proposal is only part of the bill, which also includes criminal harassment/stalking laws, restricting bail conditions to prevent re-offending, preventing the abduction of children by a father or mother, and changing rules about children testifying in court. Interestingly, most of the debate centres on women and the proposed harassment laws, but the victimization of children is connected to the same root problems of fear and risk. This is despite the fact that, as Ms. Mary Clancy notes, tying together these elements is “distressing” (June 10, 1993, p. 20672).

The problematization begins with personal or local anecdotes put forth by the Members of Parliament that establish particular experiences of women. Thus, immediately the discourse is developed based on the ‘surface of emergence’ of women, who become the authorities to delimit a particular conception of fear. For example, Mr. Ian Waddell recounts a story from his riding where a woman who worked at a medical office was harassed by her ex-husband. Her complaints went unanswered, and the ex-husband later killed her (May 6, 1993, p. 19062). Ms. Dawn Black gives another example of a woman stalked for eight years, being “watched, followed, assaulted, vandalized, robbed, threatened with your life,

harassed at school and at work” to the point that she went into hiding, as police and judges were often unwilling to help and too lenient even when they did (June 10, 1993, p. 20695).

A third example portrays a woman who attempted to go to court only to find the process revictimized her. She is quoted as saying:

I feel the court system and the officers of the court did not treat this case with the degree of seriousness I feel as a victim. I felt revictimized every time I had to appear in court. I hated being treated like I didn't count or exist. I found the hearings to be confusing, humiliating and overwhelming. I felt I was given the run around. (March 6, 1993, p. 19040)

These three examples, among others, represent the problematization at its most pointed.

These victims' specific experiences demonstrated a concern for the legal outlets available to them when they felt threatened and afraid.

The specific examples make way for more generalized comments about what *tends* to happen to women who are harassed. This is the succession of one concept to another and explores how the two can coexist at different social levels. These broader examples increase the scope of the problem and begin to suggest reasons. Some claim that there has been “a lot of urging from individuals, victims, women's groups and organizations that have raised concerns about stalking for *a long time*” (May 6, 1993, p. 19067, emphasis added). Ms. Black claims that “probably the most common” stalking case is women terrorized by their estranged husband or boyfriend (May 6, 1993, p. 19025). In comparison to sexually abused women, the sexual abuse of children is also considered. Women and children are related, as their abusers are “physically and economically stronger”, thus making them particularly vulnerable (May 6, 1993, p. 19015). Moreover, sexual assaults by strangers are even more embedded with risk, as it is noted to carry the potential for the transmission of “some horrible disease” (May 6, 1993, p. 19072).

The formation of the concept of women's fear continues, as the consequences of what tends to happen are then connected to the entire country. The Minister of Justice, Hon.

Pierre Blais, states:

The disturbing fact is that victims of family violence and sexual abuse may never come to terms with what happened to them. The physical effects may disappear but the psychological damage remains. These victims may never again be able to trust others as readily as they did before. They may feel insecure for the rest of their lives. The victim is not the only loser. Society is deprived of what would otherwise have been the promising future of this victim as a productive member of the community. That is why society must take appropriate steps to provide protection against family violence, child sexual abuse and violence against women in general. (May 6, 1993, p. 19015)

The problematization of the fear of victimization is thus extended to everyone, with pain that is continuous into the future (June 10, 1993, p. 20676). Ms. Albina Guarnieri expressed her concern for the "hundreds and thousands of women [who] are being harassed day after day after day. Their lives are being made intolerable" (May 6, 1993, p. 19068). As succinctly put by Mr. MacLellan, "Everyone in Canada is concerned about the increase in crime and violence in our communities" (May 6, 1993, p. 19022). The problems of family and child abuse occur at "all levels of our society, irrespective of class or income" (May 6, 1993, p. 19015). "There have been deaths in almost every province and region in this country", claims Ms. Clancy (June 10, 1993, 20671). Ms. Joy Langan combines her own general experiences with Canadian sentiment:

As a woman in Canadian society I resent being afraid. I resent having to change my activities. As a woman in public life I resent having to be even more concerned about ensuring that I take precautions to walk, move and live in this country in a safe way. I resent the fact that I, or any woman in this country should be in a position where we often feel fearful, look over our shoulders and wonder just what is going on in terms of whether someone is unduly watching, following or stalking, under the definition of this bill. (June 10, 1993, p. 20661)

The problem of violence against women is further compounded by the current onus on the women themselves to do something about it, thus opening the discussion up to shift the onus to the state. A strategy is thus forming, where the onus will *either* continue to be placed on women *or* be shifted to the state. Ms. Black opines that potential victims ought not be required to hire private security guards, and further decries that it is the victim who has to apply for a restraining order, pay for lawyers, and wait while their “life may be at risk” (May 6, 1993, p. 19026). Mr. MacLellan asks:

Why can this not be done? Why can justices of the peace not be hired to do this? Why do women and children have to live in fear because our legal system is not prepared to give them the protection they deserve? Why is this happening? Why? (May 6, 1993, p. 19023)

The fear of victimization is constructed like an illness within the population that demands state intervention. The appropriateness of state intervention is further justified by the *Constitution Act* (1867) requiring “peace, order and good government”, which is referenced by Ms. Mary Clancy. She goes on to say:

When I first heard that clause in a civics class in junior high school I remember it had a ring to it and that ring has stayed with me all these many years. It is a peculiarly Canadian phrase. The desire for peace, order and good government is one of the things that makes us, as Canadians, Anglophone, Francophone or allophone, part of our national fabric and different from other people’s national fabric. (May 6, 1993, p. 19034)

Ms. Clancy’s comment is part of a formation of the concept the of the Constitution, as it results in a coexistence wherein these discourses reaffirm each other. By this I mean that her statements about state intervention, as she has raised them, are supported by the Constitution, and therefore the validity (*i.e.* truthiness) of the Constitution is also supported by her reliance on it. The debate surrounding Bill C-126 thus appears especially meaningful since the problem of fear of victimization encapsulates every Canadian not only physically

and emotionally, but also by their sense of what it means to be Canadian at all. For this reason, it is stressed that the courts must do something about this, and not leave it to “the Oprah show” to solve problems of human relationships (June 10, 1993, p. 20677).

Intertwined in all this are the currents of biopower making it possible to know who is or ought to be afraid of what. Studies and experts are enunciative modalities that are cited and relied upon to understand the nature and scope of the problem from a particular position. For example, a study funded by the Ontario Women’s Directorate determined that over three-quarters of murdered Ontario women were stalked by the former partner who killed them. Both Mr. MacLellan and Mr. Mac Harb cite this study as a basis that fears of victimization are well-grounded (May 6, 1993, pp. 19022, 19039). This is compounded by other regional statistics, such as a recent rise in sexual assaults, sexual offences, and general assaults in the City of Ottawa (May 6, 1993, p. 19039). A former worker in the family courts also draws on her professional experience to provide information about the need for women to move to a different city due to harassment (June 10, 1993, 20696). Moreover, experts and clinicians are cited for their positions on the ‘incurability’ of those who sexually offend children, concluding that intervention can only minimize the risk of reoffending (May 6, 1993, p. 19016). These scientific and professional discourses are organized and combined together, thus providing depth to the ‘truth’ of the anecdotal and general aspects of the conceptual formation of fear.

Having established that fear of victimization is an appropriate target of state intervention, a strategy emerges from competing ideas and discourses of what the criminal justice can or should do. This process begins with the categorization of which current strategies are adequate and inadequate. The main charge against the criminal justice system

is its leniency on criminals. First, as already mentioned, the process of victims applying to the court for restraining orders revictimizes the applicant, while providing the accused is “given free legal advice” (May 6, 1993, p. 19040). Second, even when the Crown or police agree that the offender’s behaviour is threatening, they do not have the tools to deal with it due to a weakness of the Criminal Code (May 6, 1993, pp. 19025, 19038, 19067). Not enough can be done about restraining orders, and they are “not worth the paper it is printed on” (June 10, 1993, pp. 20676, 20696). Third, short jail terms and light penalties are not seen as enough of a deterrent to “obsessed” offenders (May 6, 1993, p. 19026; June 10, 1993, p. 20677).

Many of these problems are attributed to the inefficiencies of the criminal justice system. Peace bonds (that is, traditional peace bonds) need to be issued quicker, and violations of conditions enforced as soon as possible (May 6, 1993, p. 19023). Financial constraints further complicate the matter. On one hand, women’s shelters have faced decreasing budgets (May 6, 1993, p. 19067; June 10, 1993, p. 20677), and it is “horrendously expensive to keep sex offenders behind bars” (May 6, 1993, p. 19066) as it costs approximately \$98 million a year (June 10, 1993, p. 20703). On the other hand, as Mr. MacLellan explains, “We cannot say that because we do not have the finances it is somebody else’s jurisdiction. We cannot continue to say that this cannot be done. It has to be done. It has to be done soon. The longer we take, the more women are going to be murdered ...” (May 6, 1993, p. 19024). A US study is cited to show that every dollar spent on crime prevention brings a \$4.75 return, which could reduce the \$12-14 billion cost of crime in Canada the year previous (May 6, 1993, p. 19061). For these reasons, the problem is defined by its inability to create an efficient or economic strategy of prevention.

The discourses of preventing crime and efficiency culminate into the necessity of governing risk through the fear their potential commission instils in others. Therefore, the most important topic of debate and biggest issue for Parliament is how to construct fear in a way that it can be governed. The proposed legal threshold for the new harassment and peace bond laws is the proof of “reasonable fear”, and to this point the test of reasonableness had been the ‘reasonable man’ test. Several of the legislators took exception to this test claiming it may be part of the problem. Ms. Clancy sums up the problem:

[...] on my first or second day in law school a professor spoke about the reasonable man test. When the heads of the 20 women in the class all snapped up he immediately amended it, being a lawyer and knowing which way the wind was blowing, to the reasonable person test. In too many of our courts the reasonable person is still the reasonable man. That is a bona fide fear on the part of women who will have to go before the courts in this country. (June 10, 1993, p. 20674)

Here there is a concomitant fear by women that they will not be understood, thus further shaping and developing the gendered conception of fear. Mrs. Beryl Gaffney supports this position that substantiating the reasonableness of fear requires recognition that women’s experiences and perceptions are different than those of men (June 10, 1993, 20702).

However, the problem is not constructed simply as ‘women experience fear differently’; the female gender is also constructed as being in need of help from men. For example, Mr. MacLellan first agrees, “What is reasonable to cause a woman to be afraid [...] This may be much different from what is reasonable to cause a man fear.[...] We have to look at what is genuinely reasonable to cause fear to a woman who is being stalked” (May 6, 1993, pp. 19021-22). MacLellan then goes on to say that

It is time for men to come forward and demand changes to the law with respect to violence against women and children, to demand and promote a change in the mind-set of people in this country. As men we must do something. We have seen that women cannot do this alone and if they have

to do it alone it is going to take much longer than should be in the case (May 6, 1993, p. 19022).

The opinion that ‘men need to change’ is backed up by scientific studies. One study found that 49 percent of people believed women provoke sexual assault with their clothing or behaviour (May 6, 1993, p. 19024). Statements such as this construct the problem as a need to better understand women’s experiences so that men can help them.

The problem becomes how to construct a reasonable person test that accounts for the experiences of women and can be understood by men. Once again, the discourse of women’s fear is built upon anecdotal, general, and expert discourses. The reasonable fear has to be that of the woman’s “because it is of her own experience, her own view” (May 6, 1993, p. 19032). The legal test must be able to account for, as an example, something that may seem benign like sending flowers. Any action must be looked at “on its own merit” because “if one was sending flowers in a way and as a result of a history that would lead the woman to fear for her safety then that could be conduct which could be included as criminal harassment” (May 6, 1993 p. 19032). While flowers are usually a “symbol of romance, affection”, in different circumstances they become a “symbol of horror, fear, domination and threat” (June 10, 1993, p. 20675). As such, the bill was amended to take into account “all of the circumstances” (June 10, 1993, p. 20697).

Now that the differentiated fear of women has been established and accounted for, the next facet of the problematization is determining how the men of the criminal justice system will understand the position of women. This is essentially a question of procedural intervention, as the discourse of women needs to be translated into something men can understand. Ms. Clancy explains,

The problem that worries me [...] is whether there is a difference in interpretation as to what the reasonable man would think in the circumstances and what the reasonable woman would thinking the circumstances, and whether that particular gender differentiation makes a difference in Crown prosecutors' offices when the time comes to lay an information against an alleged perpetrator. That is my worry. (May 6, 1993, p. 19036)

The test of reasonableness will ultimately depend on the judges and their interpretations (June 10, 1993, p. 20675). Even if they can distinguish the fears by gender, discourses of sexism may interfere:

There are judges who will not convict, who have the lowest conviction rates in matters that relate to those which require gender sensitivity. There are judges who will not convict in sexual assault cases unless the evidence is so far beyond the question of reasonable doubt that they would be knocked off the bench if they did not convict. There are some who do not convict even in those cases. There are judges who when faced with the inevitability of conviction will then sentence inappropriately. We all know this and we have all seen it. (May 6, 1993, p. 19035)

The response to these is a strategy of education to correct the 'false' position. It begins with the police, who must be "sensitized" through "proper training" (May 6, 1993, p. 19023). Connections are made to qualify other enunciative modalities, as exhibited when another speaker calls for "mandatory, in-depth education" that "must come hand in hand with the changes in laws so that police forces, Crown prosecutors and judges understand the reality of this kind of behaviour, and the social and economic power differences between men and women in our society" (May 6, 1993, p. 19029). Yet another member admonishes judges for the "outrageous statements made by judges in virtually every jurisdiction in this country about women's reality", demanding they be educated about gender sensitivity (May 6, 1993, p. 19033).

What is being exhibited by these competing discourses is the exercise of biopower, driven by knowledge about a population of women with fears. This expression of biopower

is what makes it possible to instantiate disciplinary power over those who are not sensitive to the plight of afraid women, which further makes possible the correction and training of the opposition's behaviour accordingly. All of this development of power and knowledge is necessary, spread past the supposed boundaries of the criminal justice system, even before the solution to the purported primary problem can be proposed. Having drawn from a combination of disparate individual discourses, general anecdotes, experts, clinicians, scientific studies, and legal rules, which have altered and reinforced discourses of gender, family, women, children, wives, judges, police, men, and Canada, what arises is a new construction of what constitutes 'reasonable fear.'

Forming 'fear' into a knowable discursive object ('reasonable fear') is what makes possible a solution to the problem of governing that same fear. It allows Canadian criminal law to move into areas of "conduct, behaviour and pathology never entered before" (June 10, 1993, p. 20667). With 'reasonable fear' the law is directed forward in time, towards what risks the loss of women's lives (May 6, 1993, p. 19018), the sexual abuse of children (May 6, 1993, p. 19024), and the loss of future economic production of members of society (May 6, 1993, p. 19015). From this perspective, the actual law and physical strategies and technologies are only possible due to the discourses driving them.

The resulting changes in legal procedure targeting crime prevention include preventing offenders from going to certain places (parks, school yards, playgrounds, etc.) and preventing communication with a particular witness/victim (May 6, 1993, p. 19016) through laws covering harassment/stalking, bail provisions, children testifying in court, and the new s. 810.1 peace bond. What is interesting is that the actual proposal of a new peace bond is not debated at any great length but is instead combined with the 'strict' criminal

offence of harassment/stalking law, which may suggest an inclination toward the criminal side of the peace bond's longstanding criminal/civil ambiguity. This is likely partly due to the time limitations as a result of the debate occurring immediately before an election, leaving only approximately six weeks from the first debate to royal assent⁵. Ultimately, however, it is the further construction of 'reasonable fear' and a pressure for preventative forward-looking criminal harassment laws (themselves the outcome of historical processes outlined in chapter three) that made possible s. 810.1 peace bonds, regardless of the actual debates main focus.

The debates of Bill C-126 are centred on the potential victimization of women and children. What is a reasonable person now entitled to be afraid of? The answer involves a change both in what the reasonable person is, and in what they can be afraid of. Once the 'reasonable man' test, the 'reasonable person' test now extends to include the experiences and perceptions of victims distinct from those of the 'reasonable man'. In something of a contradiction, men cannot fully appreciate the fear women feel, but education is expected to have male criminal justice workers sensitized to the gendered construction of fear so that they can perform their protective duties.

A discourse of specialized peace bonds is based on the formation of fear as an object of governance, which takes existing subjects (*e.g.* men, women, judges) and forms them into new enunciative modalities. As a result, the fears of women are conceived as being driven by the risk of being victimized. Not only should women be afraid for their health and lives,

⁵ This is another less prominent discourse affecting the direction of the debate. A number of members raised concerns that this legislation was introduced right before an election so as to influence the national opinion of the government taking credit for doing something about an important issue (see May 6, 1993, pp. 19022, 19065; June 10, 1993, pp. 20669, 20697, 20698).

men should also be afraid on the behalf of women because society could lose a productive member. Knowledge of victimization rates of women and children lends credence to the law's rationale, as risky offenders may be incurable.

Moreover, the peace bond solution is economic and efficient, since imprisonment is expensive, as is the costs associated with harm to victims and (re)processing offenders in the court system. Together, this multiplicity of discourses forms a pattern from which the specialized peace bonds for the fear of a sexual offence emerges as a governmental strategy. It also justifies the new usage of peace bonds in a way that will be developed further in the next two debates.

Part II: Bill C-55, *An Act to Amend the Criminal Code (High Risk Offenders, the Corrections and Conditional Release Act, The Criminal Records Act, the Prisons and Reformatories Act and the Department of the Solicitor General Act*

810.2: Fear of a Serious Personal Injury Offence
September 17, 1996 - April 25, 1997

A little more than three years after s. 810.1 was enacted, Bill C-55 proposed amending s. 810.2 for a peace bond where there is fear of a serious personal injury offence. At its simplest, this debate centres on dangerous people in society, which is part of the ongoing formation of the concept of fear. Again, this new fear arises out of specific examples presented at the debate. The two most predominant examples were that of Fernand Auger and Bobby Oatway. Auger killed Melanie Carpenter while he was on statutory release, despite officials' concerns that he was a high risk to reoffend (October 4, 1996, pp. 5119, 5121). Bobby Oatway is described as a "serious sexual offender", whose release from prison endangered the community (October 3, 1996, p. 5069). Oatway's story becomes remarkable, both within and outside of the context of the debate, when "the general public got involved in drawing the attention of the authorities to the fact that they did not want this individual loose in their community", and the resulting pressure made Oatway decide to voluntarily return to jail (October 4, 1996, p. 5121). Oatway did not reoffend while out of prison. This story's recurring presence in the debate is remarkable because it suggests there is a concern going beyond simply preventing offences into governing fear of the presence of a 'dangerous' person.

There are numerous other examples: "Career criminal" Paul Butler kills while on day parole (October 3, 1996, p. 5081); a husband murders a woman while out on bail for charges of throwing someone out of a tenth storey window (October 4, 1996, p. 5097); Allan Walsh, who had committed over 60 serious offences, commits multiple sexual assaults while out on

parole (October 4, 1996 p. 5118); Rod Martineau, convicted of murders for which he demonstrated no remorse and accepted no rehabilitation, is being let out on statutory release (April 15, 1997, p. 9712). These examples, and a dozen others like them, are presented as demonstrations that there are dangerous people in society and the specific consequences thereof.

The specific events reflect and are reflected by generalizations about what tends to happen, thus broadening the formation of fear. There is concern that “the fact that dangerous offenders present a very high level of risk to the public and that risk is not likely to soon abate” (October 3, 1996, p. 5039), and that “there is absolutely no justification for allowing these high risk individuals to roam our streets” (October 3, 1996, p. 5073). The concern, as summed up by Mr. Art Hanger, is that

a pedophile, a sexual offender, is sentenced to a definite term. Because that person refused treatment, refused to follow through on the criteria set before them as far as rehabilitation in the Liberal sense, because the law is the law when the warrant expiry comes up, the offender is released into the community in spite of statements by psychiatrists, psychologists, those who in the know, prison officials, that clearly point to the fact that this individual is high risk, that this individual will reoffend. (October 3, 1996, p. 5052)

The conclusion is dangerous offenders are everywhere, at all times, and the criminal justice system can only slow down their offending. There is a distinct categorization of the dangerous offender separate from a ‘normal’ person. One member asks, “Can we imagine a woman, a man, a child or a teenager being subjected to these offences? Can we imagine the people who committed the offences being free to go wherever they wish?” (April 15, 1997, p. 9714). Another adds, “watching a repeat child molester walk out of a prison, unrepentant and unreformed, understandably drives people crazy with anger and betrayal (p. 5082). This is supported by Mr. John Williams, who recalls a town hall meeting:

An elderly couple stood up and said: ‘Do you know what we want? We want to be able to leave this meeting, walk down the street to our car and drive home, park our car and walk into our house which is currently in darkness and feel safe. Safe as we walk down the street, safe as we drive home, safe as we park our car, safe as we unlock the door in a dark house and walk in and safe as we live there at night. But we do not have that’. That is what every Canadian wants and that is what this government is failing to deliver. People want to be assured that the streets of this country are safe. (October 7, 1996, p. 5179)

The discourse is transformed, drawing from specific events to something that is concerned as much with the fear of violent or sexual offences as the offences themselves. It is a problem that is everywhere and affects everyone, as evidenced by the further categorization of victims:

There are two kinds of victims. I talked about the first set of victims, the ones against whom rape is committed and against whom all kinds of influences are brought to bear. Those are the direct victims. There are indirect victims as well. These indirect victims are the families, associates and friends of the victims who suffered directly. (April 15, 1997, p. 9718)

Due to the problem’s connection with (the lack of) legal recourse, the discourse of fear is immediately elevated to a national level. It is a nationwide concern to have “a lot of inherently evil people presently incarcerated who are coming up for either parole or the end of their terms in jail. They will be released into society” (October 3, 1996, p. 5072). The severity of the problem is supported by statistics about “more and more” individuals being declared dangerous offenders (October 3, 1996, p. 5065). For example, Correctional Services Canada research is cited: about 4,960 persons convicted of “lesser violent offence such as child molestation, manslaughter, rape or attempted murder repeated their crimes while on conditional release” (October 4, 1996, p. 5118).

There was, however, some argument about the use of specific statistics for qualifying the extent of the problem, particularly with respect to the crime rate. Some cited a Statistics

Canada study showing 400 percent increase in crime since 1962 (October 3, 1996, p. 5032). Furthermore, of the 46 first-degree murderers who applied for release up to mid-1995, 11 killed women and eight killed police officers (April 15, 1997, p. 9762). Yet others cite a decrease in violent crime of 13 percent of the past five years (October 3, 1996, p. 5066), plus the lowest homicide rate since 1969 (October 3, 1996, p. 5077). According to conversations with police officers, chiefs of police and other law enforcement experts “the reality is” there is no “massive increase” in violent crime (October 3, 1996, p. 5048). Regardless of the statistical trends, a possible conclusion suggested is that “there is a rise in certain types of crimes we have not had to deal with in the past” (October 3, 1996, p. 5041). Indeed, these conflicting scientific and anecdotal accounts of the population are reconciled to a degree, and actually facilitate a new understanding of a need “to deal with a *new reality*, with a new approach towards criminals and with changes to the criminals’ behaviour, because the traditional notion of what constitutes a crime has evolved during the last few years and the last few decades in Canada” (April 15, 1997, p. 9757, emphasis added). We can see that even in the absence of a consistent statistical ‘truth’, a new expression of biopower emerges out of the conflict making possible the formation of a new risky population.

Despite what the crime statistics say, this ‘new reality’ is supported by claims of a variety of experts from different enunciative modalities decrying the nature of dangerous people. Concerning dangerous offenders, it is psychiatrists, psychologists, and prison officials who know that “All the reports clearly point to the fact that they are going to reoffend (October 3, 1996, p. 5052; April 15, 1997, p. 9703). An expert report claims “15 to 20 per cent high risk offenders [...] do not respond to treatment [and] are not likely to be able to go back into society and lead meaningful lives” (April 15, 1997, p. 9707). The fear

is thus based on a psychological risk, of which medical experts are the only ones capable of understanding and speaking about. Society is only protected as long as the risky person is incarcerated, and there is “no way to guarantee that he will not reoffend” (October 3, 1996, p. 5041). Another bluntly claims there is “no known cure for pedophilia” (April 15, 1997, p. 9703).

The problems of this ‘new reality’ are discursively linked to a failure of the state to incapacitate the risky population. The failure of the state is constructed on four fronts, from different enunciative modalities. First, debaters reference the most recent speech from the throne, wherein the government pledged to “focus resources on high risk offenders while developing innovative alternatives for low risk offenders” (October 3, 1996, pp. 5037, 5069). Moreover, according to the Minister of Justice, the victims groups, police groups, and crime prevention committees he has spoken with have said that

Canadians want the justice system to be more focused as far as violent crime is concerned. They want to see tough measures applied to high risk offenders but the more he consults, the more he hears that people do not want simplistic solutions. Whether talking about crime prevention, policing, sentencing or parole, Canadians expect governments to devise well crafted well focused laws that really home in on the categories or sub-categories of offenders who commit serious crimes of personal violence. (October 3, 1996, p. 5037)

However, “what every Canadian wants [...] is what this government is failing to deliver. People want to be assured that the streets of this country are safe” (October 7, 1996, p. 5179). There is therefore an explicit discourse originating with state officials setting out its authority and prerogative to govern this area problem, of which the general population supports. It is a discourse of the state “improving the law, about protecting society” (October 3, 1996, p. 5041).

Second, as has been alluded to, the current governmental interventions of the state

are inadequate and inefficient. Inmates may not take programming while incarcerated (October 4, 1996, p. 5123), and incarceration itself “does not cure pedophilia. Pedophiles are sexually attracted to children. Keeping a pedophile behind bars for five, six or seven years will not cure him. Society will be protected, but once the sentence has been served and the person released, he remains a high-risk offender” (October 3, 1996, p. 5041). A university professor, speaking from a position of expertise, is cited for his expertise on violent offenders, claiming “The evidence was very strong that the psychopathic offenders in fact did not follow the pre-release plans. They did not follow the rules and regulations of the program. They were violating them all the time” (April 15, 1997, p. 9707). The ineffectiveness of this strategy has left “Canadians feeling wary and cynical” (October 3, 1996, p. 5050). The criminal justice system is characterized as a “soft on crime approach” that “isn’t working” (October 4, 1996, p. 5119) and needs to be “toughened up” (October 4, 1996, p. 5099).

Third, the current system of risky population management is economically damaging. Prisons are already overcrowded (October 3, 1996, p. 5073), and it is “an injustice, because many times when prisoners are released back into society, they immediately reoffend and are put back into the system. That is at a great cost to the taxpayer” (April 15, 1997, p. 9703). Mr. Keith Martin recounts an experience: “I spoke to the head of the jail. In my naivety I asked how an individual who both he and I knew would hurt somebody else could be released. His response was that it was the law and he could do nothing about it” (April 15, 1997, p. 9714).

Fourth, there is a debate centring on upholding the rights of the citizens. This debate is particularly important for understanding the construction of ‘reasonable fear’ within a

liberal framework. The general proposal is that peace bonds can exert a measure of control through the supervision of released offenders, which could be “reasonable in a free and democratic society, where a happy medium must be found between individual rights and the right of the community to protection” (October 3, 1996, pp. 5041, 5052; October 4, 1996, p. 5097). The ‘happy medium’, however, is a point of contention between competing discourses of victims’ rights and discourses of civil rights.

One side of the argument is in favour of the rights of victims, based on a concern that criminals have more rights than law-abiding citizens (October 3, 1996, p. 5044; April 15, 1997, p. 9719). One Member of Parliament sums up the foundation of their position:

The government is failing in what is a major responsibility to our people, that of protecting the life and property of law-abiding citizens. Should these citizens ever become victims they discover to their horror that they are failed again. They discover the difference between their rights and the victim’s rights. (April 15, 1997, p. 9708)

A member of the Reform party furthers this argument, rebuking Parliament’s Liberal majority:

For 3.5 years members of my party have continually fought for the rights of Canadians to live in peace, free from being abused by criminals and free of criminal acts. The government has repeatedly watered down any solutions put forward. In the view of many Canadians and many members of the House it has not done the job it should have done in trying to protect Canadians. It should have made the protection of innocent civilians the number one priority of the justice department. The government continually pursues the theory that the most important aspect is the protection of the rights of criminals instead of the rights of innocent civilians. (April 15, 1997, p. 9713)

It is a matter of “ensuring Canadian communities enjoy safety and protection from violent criminals”, as it is their right (October 3, 1996, p. 5071). Economically, having “these bad guys” locked up would save the cost of damages, as well as the lives and health of victims (October 4, 1996, p. 5126). From this perspective, it is proffered that “Canadians believe

they should have the final determination, not ivory tower, soft on crime Liberal lawyers, in choosing a fair and just punishment for monsters such as Clifford Olson and Paul Bernardo” (October 3, 1996, p. 5044). Those who oppose, such as the Justice Minister, are “missing the boat” (October 4, 1996, p. 5099) and “a friend of the criminal” (October 4, 1996, p. 5121). In sum, the position is that “We must balance the rights of the accused with the rights of the victims and the entitlement of society to an effective, fair justice system” (October 3, 1996, p. 5052).

Predictably, the contrary position is that the proposed peace bond legislation is an excessive infringement of civil rights. The first concern is “when a society starts to suspend such basic rights as the presumption of innocence on a case-by-case basis, it is treading close to the line of intolerance and is at risk of falling over that line into unjustified excesses” (October 3, 1996, p. 5066). This problem is particularly acute when peace bonds may be applied to someone who has not been convicted of an offence but there is still reasonable fear (October 3, 1996, p. 5042). In these situations, “it is one thing to punish a person who has been found guilty, but it is quite another thing to take away the freedom or fundamental rights of a person who is presumed innocent, or worse yet who has been found innocent of the crime of which he was accused” (October 3, 1996, p. 5043).

Most of the concerns about peace bonds were centred on the condition of electronic monitoring. This was viewed as “a very serious violation of recognized legal principles” and the Charter of Rights (October 3, 1996, p. 5065). It makes potential abuse by authorities who order compliance based on rumour, misinformation, or malice (October 3, 1996, p. 5079). One Member of Parliament even spoke for ten minutes comparing it to George Orwell’s dystopian novel *1984* (October 4, 1996, pp. 5101-2). Likely due to these concerns,

an amended version of the bill deleted all explicit references to electronic monitoring (April 15, 1997, p. 9761). Curiously, after the amendment the concern about the presumption of innocence was not raised again, as if conceding electronic monitoring conceded the competing discourses in favour of the rights of victims.

Having established the failure of the government's obligation to protect against risky persons, the ineffectiveness of the prison system to rehabilitate them, the damaging economic consequences of repeat offending, and the perceived infringement upon civil rights, it follows that the state must govern risky populations in a new way. The debate is directed towards developing a strategy of what the state *can* do to achieve the "important objectives" of protecting Canadians by making streets and communities safer (October 3, 1996, p. 5076). The discourse is shifted to restricting "high risk, violent offenders" (October 3, 1996, p. 5082).

The primary goal of Bill C-55 is to identify high-risk offenders, an object which is formed by categorization with other types of offenders: "If there is a high risk that a criminal or offender, if released back into society, will harm or violently reoffend," says one Member of Parliament, "then this bill is supposed to protect society from that person by ensuring that he or she is not released back into society until no longer a high risk offender" (April 15, 1997, p. 9711). The proposed legislation addresses both protection from physical damage and the "legitimate fears among Canadians over the ability of the justice system to deal with repeat sex offenders and specifically high risk offenders" (October 3, 1996, p. 5050). The key to governing dangerous offenders becomes "the prediction and management of risk. The punishment must match the crime. The overall sentence must match the risk" (October 3, 1996, p. 5040). This statement exudes the familiar principle of the criminal justice system

of commensurability, but it expands its rationale to the forming risk discourse.

The specific amendments to law are based on the recommendations from a federal-provincial-territorial task force on high-risk violent offenders set up by the Conservatives and maintained by the Liberals. The report advised “that dangerous offender provisions and civil incarceration procedures be used more often in the case of dangerous offenders suffering from mental illness who had almost completed their sentences” (October 3, 1996, p. 5040). Despite the many demands to be tough on crime, a counter-discourse of nationalism urges against simply incarcerating as much as possible, in favour of a combination of jail and “managed reintegration” (October 3, 1996, p. 5038). The position is supported by referencing the United States of America “bandwagon”, whose “ineffective” crime policies based on incarcerating “an incredible percentage of its population” and is far less safe than Canada (October 3, 1996, p. 5049). The United States is “too simplistic, too expensive and it simply does not work” (October 3, 1996, p. 5040), and Canadians “do not want simplistic solutions” (October 3, 1996, p. 5037). “Strategic” imprisonment, and community sanctions when possible (October 3, 1996, p. 5040), is thus constructed as an appropriate ‘Canadian’ response to risk.

The amendments of Bill C-55, driven by the above discourses, are for “protecting people’s basic freedoms and allowing Canadians to experience greater freedom from fear”, even if some of the debaters feel it goes too far, or not far enough (October 7, 1996, p. 5176). Increased ability to incapacitate risky persons is to be made possible through a new sentencing regime aimed at “strengthening and tightening the supervision of high risk offenders and at keeping them in prison for a longer period” (October 3, 1996, p. 5064). However, due to the fact that Bill C-55 cannot retroactively apply to dangerous offenders

(October 4, 1996, p. 5121), plus the economic and nationalistic push for community sanctions, s. 810.2 peace bonds are added as a preventive measure which is “much needed and has great potential for monitoring and controlling the movement of individuals who pose a risk of committing a serious personal injury offence”, without the need for the commission of a criminal offence (October 3, 1996, p. 5051).

The debates of Bill C-55 are centred on the potential victimization of anyone in society by high-risk persons. What is a reasonable person now entitled to be afraid of? The expanding concept of risk, driven by expert opinion on dangerous offenders and statistics about reoffences, has increased the scope of what is causing fear. This is the ‘new reality’ that must be dealt with by the government. When risky persons are released from prison they are not controlled and can offend at any time. With respect to enunciative modalities, much reliance is placed on medical professionals for their unique position to comment on the incurability – and therefore categorization – of certain kinds of offenders.

Highlighting the underlying liberal framework, the second form of specialized peace bond emerges out of a competition between rights discourses, with victims’ rights triumphing over civil rights. Section 810.2 peace bonds are intended to govern through the freedom allowed to each group, thus managing the risk. Freedom from the fear of high-risk offenders is perceived as a Canadian right. By creating partnerships between clinicians, psychologists, prison officials, police, the courts, and others, an economic solution is reached through strategies made possible by risk assessment.

Bill C-55 builds on the formation of risk developed in Bill C-126. In the latter, the limit of fear was found between risky people and vulnerable people (*i.e.* women and children). Bill C-55 expands the vulnerable group to include anyone in society. This is not

due to a change in the conception of the vulnerable group, but rather a change in the conception of risky people. Moreover, the authority to designate the nature of the risk shifted away from the vulnerable group towards medical experts. Where before the potential victims were the authorities of their own fear, now it is expanded to medical experts declaring who should be feared. This shift to 'external fear experts' is further developed in the third debate.

Part III: Bill C-95, *An Act to Amend the Criminal Code (High Risk Offenders), the Corrections and Conditional Release Act, The Criminal Records Act, the Prisons and Reformatories Act and the Department of the Solicitor General Act*

810.01, Fear of certain offences
September 17, 1996 - April 25, 1997

The content of the third debate is much like the second. Approximately two years before the debates of Bill C-95 a little boy was killed as a result of what is presented as “organized criminal activity” (April 17, 1997, p. 9905). It “all started as an incident, as we all know” involving gangs threatening innocent bystanders in Quebec City (April 18, 1997, p. 9955). Daniel Desrochers, an 11-year-old boy, was on an errand for his mother when an explosion sent shrapnel across the street and killed him. Police believed that the explosive was set as part of an inter-gang war (April 21, 1997, pp. 9978, 10001). There have apparently been 50 deaths over the past couple of years as part of this gang war, but it is only recently that bystanders had been victimized. One member notes, “As long as this war was strictly between members of the gangs, it did not really matter, but when the quality of life and the very lives of citizens are at stake, public perception changes” (April 17, 1997, p. 9904). Previous to Daniel’s death, there had been hints of organized crime: dynamite was found “across Quebec”, including Longueuil, a Molotov cocktail was thrown into a Quebec City restaurant, and a shooting in Saint-Nicolas are all raised (April 21, 1997, p. 10022), though the connections of these events to organized crime are not elaborated on.

While not much is presented about the specific role of any organized crime members, a number of conclusions are nonetheless drawn from the Desrocher case. As the specific cases begin to form a pattern and are succeeded by generalizations about the nature of the problem. An assumption is drawn that it was not the leaders of the gang who detonated the bomb, but rather their subordinates (April 21, 1997, p. 10001). As one

Member of Parliament elaborates, “It is not the leaders who went out and put the bomb under the vehicle that exploded. The leader simply told one of his henchmen: ‘Mr. X is starting to get on my nerves. I want him out of the picture. Do what you have to do’. The leader gives the order to his henchmen who then go out and set off the bomb” (April 21, 1997, p. 10003). It is then suggested that organized crime has changed the way it operates, and that they are “intelligent, well organized, and they have many means at their disposal to carry out their activities” (April 21, 1997, p. 10116).

These general comments about the leadership and operation are contextualized by a definition of organized crime and why organized crime has increased in the recent past:

I would like to propose a definition that is commonly used by police forces and to remind viewers that whenever we speak about organized crime, we are referring mainly to four elements. First, there are the proceeds of crime. Naturally, the purpose of organized crime is to make money. The second element is power, control over a specific territory. Then come fear and intimidation. The fourth and final element is corruption. You could say that organized crime does not exist in every society and you would be right. Some specific, precise conditions are required for organized crime to thrive in a society.

There are at least four conditions which make cities like Montreal, Toronto, Calgary and Winnipeg, and the maritimes, good locations for organized crime. For organized crime to thrive, it needs a wealthy community where it can make money. That is why we talk about corruption in the third world, but in those countries, organized crime is quite different from its usual manifestations in urban environments. In order for organized crime to take root somewhere, it needs convenient access to major routes. Since it is an import-export trade, organized crime in Canada is concentrated in major centres across the country. For organized crime to prosper, it needs a free society, a society without dictatorial powers and oppression. Fourth, and probably the most important, is that, to prosper, organized crime needs a society where there are rights, charters and bureaucracy. We know full well—that is what police officers told me, and probably told the Minister of Justice also—that the greatest ally of organized crime is the charter of rights and freedoms, which has given it some immunity. It has been a powerful tool for organized crime. Once these conditions are met, organized crime proceeds in phases. Operations of organized crime and its representatives have three different phases. The first one is control of a territory. Control of a

territory is gained by intimidation, by generating fear. Such a territory becomes the exclusive turf of a particular group. After you control a territory, you get into money laundering. I will come back to the importance of money laundering for organized crime. I should mention that money laundering in Canada accounts for about \$20 billion, invested in legal or illegal activities. Once money has been laundered, it can be invested in legal enterprises. In Montreal, to give you an example that I know very well, organized crime has invested mostly in restaurants, bars and the like, although I do not think this is unique to Montreal. I know it is the same in other communities. (April 12, 1997, pp. 10015-10016)

Discourse of organized crime is thus immediately connected to a larger context based on its perceived operation. More importantly, there are connections formed between discourses of economics, crime, and fear. The risk of organized crime is contrastable to the risk of dangerous offenders. Where dangerous offenders are risky due to their incurable psychological essence, the risk of organized crime is rooted in the economic realm. The strategies of intimidation and generating fear are secondary to the financial pursuits of the organization, and while the risk they post may not be as pervasive as dangerous offenders it is a concern for major centres across the country. Given the importance of economic discourse to the formation of this new kind of fear, it follows that the authorities are the ones investigating their crimes. This is supported by the enunciative modalities of various policing institutions across Canada.

For example, even though the specific anecdotes were Quebec centric, expert information is sourced from the Royal Canadian Mounted Police (RCMP), who claim biker gangs are “active everywhere in Canada” (April 21, 1997, p. 10014). This is supported by information from “attorneys general in Manitoba and Ontario, to the chiefs of police in Halifax, Toronto and Ottawa who have all told me the same thing. This is not just a Quebec issue [...] we are dealing with a pan-Canadian issue” (April 21, 1997, p. 9974). Moreover, the essence of organized crime takes on various forms. According to the Criminal

Intelligence Service Canada, the RCMP, and the organized crime committee of the chiefs of police, organized crime “in Atlantic Canada, in Ontario, on the prairies or on the west coast [...] It is remarkable the number of forms in which corruption, intimidation and violence can be found, all in a ruthless effort to squeeze profit out of innocent people and to victimize others” (April 21, 1997, p. 10005).

Due to the multiple forms of organized crime and its nationwide scope, the onus is placed on the state to intervene, specifically the police: “When you have a medical problem you go to a doctor. When you have a legal problem you go to a lawyer. When you want to know what will help the police in what they are doing to combat crime on the streets you go to the police” (April 21, 1997, p. 10008). The police, however, have been unable to deal with the problem effectively because of the nature of the perceived problem. As organized crime becomes an increasing threat, the police need “improved tools and a mechanism to better co-ordinate and integrate their efforts to get the job done” (April 17, 1997, p. 9903). The police and the government are “supposed to stand on guard for this country” (April 21, 1997, p. 10020) and uphold the rights of Canadians and victims (April 18, 1997, p. 9959; April 21, 1997, p. 10001). The problem facing the police is the tools currently available are inadequate, thus forming a categorization of what is or is not possible. The two main police techniques are uncover infiltration attempts, which are thwarted by initiation procedures involving committing serious crimes, or finding an informer, which is difficult because the informer may face serious repercussions for their own participation (April 21, 1997, p. 9975). This makes it difficult to “go after the leaders” because they are insulated from those who actually “do the job for them” (April 21, 1997, p. 10003).

The difficulty of the police to build criminal cases against gang leaders is linked to

the rights of criminals outweighing the rights of everyone else:

Our criminal justice system has allowed that to happen. If it did not happen, we would not be asking for this kind of a bill. We should have had these tools in the hands of the police years ago. We brought in a charter of rights and freedoms that now can be used as a shield by many of these people in this illicit trafficking that is destroying the lives of our children, destroying the undergirdings of society. Therefore we have asked the justice minister and we have asked this government to protect the rights of victims, to protect the lives of our children by bringing in reasonable, common sense laws, by giving back to the police the powers and the discretion to use those powers in a manner they think is in the best interests of society. (April 21, 1997, p. 10020)

The current method of including particular kinds of criminals in society is thus brought into question. The law is portrayed as too soft, which makes the economic appeal of gang activity more lucrative (April 21, 1997, p. 10019), effectively tying discourses of safety and economy together. Organized crime is reported to cost \$20 billion a year, which is then invested into both illegal and legal enterprises (April 21, 1997, pp. 10016, 10018). Through these economic and legal discourses the criminal justice system is made to look inefficient and ineffective.

The failings of the criminal justice system and the rights on which it is based, as supported by the specific and general examples of organized crime, makes it possible to form the object of 'criminal organization' so that a strategy can be developed. It is clear that the 'fear' of criminal organizations is rooted in the instrumentalities of their crime committing ability (April 21, 1997, p. 9983), but current laws and rights (liberal discourses) prevent the government from criminalizing mere membership (April 17, 1997, p. 9903). The target of governance can, however, be the *participation* in a criminal organization where the primary purpose is the commission of a criminal offence (April 17, 1997, p. 9903-4). There is much debate about the finer points of the definition, such as how many people

are considered a group or what it means to “participate” (April 18, 1997, p. 9957), as well as whether it applies to youth (April 17, 1997, p. 9905; April 21, 1997, pp. 9981, 10006). The key aspect of organized crime is revealed in knowledge of “the fruits and instrumentalities” of crime, which makes it possible to develop the actual laws of this bill, thus establishing a formal framework that provides police access to new tools (April 21, 1997, pp. 9971, 10003). For example, participation in a criminal organization means the police can have easier access to wiretapping, search warrants, and tax information, and the courts can impose harsher sentence, reverse the burden of proof for bail, and issue a new type of peace bond (April 21, 1997, p. 10003).

The formation of these new legal discourses was justified through a number of enunciative modalities. First, the proposals were developed not only through “extensive consultations with police” (April 17, 1997, p. 9903; April 21, 1997, p. 9973), but also through a national forum attended by defence counsels, Crown prosecutors, criminologists, business people, experts from the RCMP, civil libertarians as well as representatives from other countries (April 21, 1997, p. 9972). Moreover, despite their differences, the new peace bond provision is presented as “an elaboration of an existing peace bond provision [which has] been tested for some time”, thus justifying its practical and legal form. It does not create a new method of investigation, but it will merely “augment and improve the methods of investigation used by police forces against leaders and members of gangs and of criminal organizations” (April 21, 1997, p. 10002). The new peace bond in particular is presented as “a good idea [that] could have been brought in years ago as well. It could have been brought in to deal with organized crime for the very purpose for which it is being brought in now. It was not brought in. Why? I do not know” (April 21, 1997, p. 10020).

This statement and others like it establish new peace bonds by presenting them as something with historical validity due to their surface similarities to other peace bonds.

The justifications of these new laws allow peace bonds to be applied in new ways with new practices. While the other provisions of Bill C-95 focus more on the enhanced response to criminal organization offences, the new peace bond is meant to be an enhanced *prevention* of crime by targeting gang leadership and making it difficult for criminal organizations to carry out their activities (April 17, 1997, p. 9903). The police can bring the suspected criminal organization member before a judge with reasonable grounds to fear the person will commit a criminal organization offence. The judge will decide based on the person's associates, what he has done in the past, information gleaned through wiretaps, what he has said in public or private, and other circumstances (April 21, 1997, p. 9977). The criminal organization member can then be "forced into a peace bond", prohibiting them from communicating or associating with other members, or leaving the country, thus undermining the ability of the criminal organization to carry on business (April 17, 1997, p. 9904; April 21, 1997, pp. 9977, 10017). Breaches of the conditions can result in fines or imprisonment (April 21, 1997, p. 10017).

The criminal organization peace bond demonstrates the perpetual failure of risk governance. Any given member of a criminal organization is not *inherently* risky, but the risk lies in the instrumentalities of their organization. For example, the fear of an actual violent offence carried out by a gang member would constitute a risky person governable through a section 810.2 serious personal injury peace bond. However, the calculated nature of organized crime means s. 810.2 fails to account for the leaders of the organizations. Where s. 810.2 fails, s. 810.01 attempts to succeed by essentially governing the *risk* that

enables a person to become risky. In other words, targeting the instrumentalities of organized crime is an attempt to prevent someone from becoming a risk. They are *at risk of riskiness*. This third debate thus demonstrates a further succession in the formation of fear, as the fear of risk folds back on itself in an attempt to cover its own governance shortcoming.

The debates of Bill C-95 are centred on the risk presented by criminal organizations. What is a reasonable person now entitled to be afraid of? The predominant discourses present criminal organizations as a unique threat because they are intelligent, organized, and well-equipped in their criminal endeavours. The specific form of organized crime varies by region as well as the economic opportunities presented, meaning that the actual risk may be difficult to identify. Because of the nature of organized crime as it is presented, the police are the ones who have the authority to determine what organized crime is, why it is 'risky', and what strategy to adopt. Either organized crime continues, along with the continued effects portrayed in the anecdotes, or else the police can be granted a number of new investigative tools, including s. 810.01 peace bonds. The discourse of fear has therefore been effectively constructed from individual vulnerable groups, then expanded by medical experts, and now includes criminal justice authorities. Each has led to the formation of a strategy that includes new forms of specialized peace bonds.

Conclusion

The debates of Bills C-126, C-55, and C-95 resulted in three new types of specialized peace bond for fears of sexual offences, serious personal injury offences, and criminal organization offences. Each drew from similar types of discourses, including specific local examples or anecdotes, generalizations about what tends to happen, expansion of the scope to the entire country, the onus on the state for intervention, and the inadequacies and inefficiencies of current state intervention. These made it possible to create new categories and definitions that resulted in new formations of the fear of risk, which ultimately lead to strategies including specialized peace bonds.

Each specialized peace bond is the outcome of a particular formation of the fear of risk. These formations are made possible by existing surfaces of emergence (specifically: women, children, medical experts, police), which were transformed as enunciative modalities with the authority to delimit the emergence of fear. Underlying these transformations are new currents of biopower that support the formation of conceptualizations of risky persons and organized crime. Bill C-126 dealt with the formation of dangerous and 'vulnerable' people (*i.e.* women and children). It was demonstrated that vulnerable populations experience fear differently based on their own experiences and perceptions, which presents individuals as experts of their own fear. Risk was directly connected to the currents of biopower within discourses of women's victimization, including statistics and studies about offence rates and criminal justice system obstruction. Bill C-55 extended this conception of fear to anyone in society. The authorities of this type of risk are the medical experts (clinicians, psychiatrists, psychologists) who substantiate claims of risky dangerous offenders that are released into society, uncontrolled.

More so than the other two debates, Bill C-55 connected fear with the concept of rights within a liberal framework, and the need to govern through the freedom and rights of offenders versus those of victims. Bill C-95 again extends the formation of fear to include the instruments of crime and dangerous people. Here an undeniable connection is made between discourses of fear and economics. The police and criminal justice officials, being in a position to know the potential economic fallout, are positioned as the experts on how crime is organized, thus substantiating the fear of organized crime. The perpetual failure to govern all risk is evident, as this peace bond is concerned with the risk that something will become risky. The inherent risk of the risky person found described in Bills C-126 and C-55 is absent until there are certain circumstances which enable it. The target of this peace bond is the perceived risky circumstances that enable organized crime members to become risky.

Over the period of these three debates we can see that reasonable fear is reformulated and reinvented as attempts to govern a form of risk continue to fail to account for emerging formations risk. Fear from vulnerable groups of the risk presented dangerous offenders, to fear from all people of the risk presented by dangerous offenders, to fear of the risk of circumstances enabling dangerous offenders to become risky – each new formation makes possible new strategies. During this process, new and old populations and subjects are created and reinforced: pedophiles, dangerous offenders, psychologists, psychiatrists, criminals, victims, adults, family, women, children, wives, judges, police, men, Canadians, and others. Also reinforced is the liberal framework, including state's obligation to protect society, as any other solution would undermine both its authority and every citizen's claims to rights.

Ultimately, it is clear that what it is reasonable to be afraid of has thus changed based

on emerging knowledge about the population, which is driven by a variety of social, economic, and political discourses accumulated within the parliamentary debates. As the conception of risk continues to form, so, too, does the reasonableness of fear.

CHAPTER FIVE

Discussion and Conclusion

My view is not that state discourses and programmes disguise their true meaning and have to be read obliquely or contextually to uncover their concealed purposes and objectives. [...] Most of the time one can take at face value the claim that the authorities would like to reduce crime, protect citizens, do justice, uphold the rule of law and so on. [...] But because programmers are usually candid in their concerns doesn't mean that they are correct in their analysis. It is precisely because the authorities' analysis can be incorrect – based on false assumptions about how the world works, how 'the crime problem' is created, how punishments have their effects, etc. – that one wants to generate alternative accounts. [This is...] crucial if one wants to explain not just the nature of the programmes but also the impact that they have in the fields that they govern. A history of the present should [...] seek to explain the pattern of their effects, including their failures and unanticipated consequences. (Garland, 1997, p. 201)

Discussion

What, then, is to be made of the role of peace bonds in contemporary society? This final chapter summarizes the previous chapters and connects the findings of the genealogical and archaeological analyses. In doing so, it further develops a deeper understanding of specialized peace bonds, particularly their role in mobilizing discourses of fear and risk, thus facilitating the integration of risky populations into society. Next, consideration is given to the contradictions of attempting to govern the fear of risk in such a manner. Finally, I offer some suggestions for further research and concluding remarks.

The shift from traditional to specialized peace bonds reveals a drastic change in their governmental role that goes far beyond crime prevention. The differences between the cases of *Haylock v. Sparke* and *R. v. Buesnel*, as illustrated in chapter one, were borne out in the governmental criminological analysis. Even the way the titles of these two cases are recorded identifies a significant change in peace bond application, that being the shift from the facilitation of a private dispute between two individuals to the state creating a juridical

relationship between an individual and all of society. Perhaps even more significant, the conditions of a peace bond have been expanded such that persons who have not been charged with an offence can now be governed as if they have been convicted of a crime, including up to two years of imprisonment. Given the legal test for a peace bond has always been the determination of ‘reasonable fear’, the advent of specialized peace bonds suggests that the object of reasonable fear has changed. Once used for minor private disputes, peace bonds now exhibit a rationale of protecting society by preventing offences such as organized crime and terrorism, and this is revealed to be part of a biopolitical strategy of governance.

Despite a history dating back hundreds of years, peace bonds have limited coverage in academic literature, which has focused only on legal critiques, current responses to sexual or violent offending, and the traditional application of peace bonds for conflicts between individuals. These positions overlook the political and social aspects of law since they approach peace bonds from a predominantly doctrinal position. Moreover, the lengthy history of peace bonds was relied upon as an indication of legitimacy in their parliamentary debates. Taken together, the literature and the debates thus stress a certain continuity in the application of peace bonds that ignores the discontinuities set out above. There has been no recognition of how the scope of peace bonds shifted historically, limiting our understanding of their role in governance and the consequences.

To remedy these deficiencies of peace bond literature, I developed a governmental criminology based in critical legal studies that acknowledges legal pluralism and sets out the necessity for historical context in analysis. Central to governmental criminology is a Foucaultian approach to power and law that facilitates an understanding beyond peace bonds as crime prevention by fragmenting power beyond the state. This is possible by conceiving

legal relations amongst other social relations in the project of peace bond governance, driven by currents of biopower and disciplinary power.

The genealogical and archaeological analyses inquired into the discursive formation and the discursive form of peace bonds, respectively. Though they focused on different time periods – the genealogy ran from roughly the 13th century to the 1990s, and the archaeology dealt with three specific debates in the mid-1990s – the two are inextricable in several ways. *First*, the economic and social conditions in Canada at the time of the legislation of specialized peace bonds were such that an expensive solution was not possible. As referenced in the debates, the combination of a national crisis of profitability, increasing incarceration rates, and liberal rights discourses precluded the state from simply locking all risky people in prison.

Second, and adding more depth to the first point, the formation of the state is tied to biopolitical struggle wherein the legitimacy of the state is in constant crisis due to external threats that must be internalized. During the formation of the liberal state, the form of this biopolitical struggle was linked to the fear of social dissociation, as raised by the question of how to include vagabonds into the socio-economic order. The outcome of this struggle eventually resulted in the state's onus of developing the economic, moral, and social conditions in which citizens are free to pursue labour (notably the rise of 'rights' discourse). Of course, "the other side of liberty is 'social discipline'" (Corrigan & Sayer, 1985, p. 95), and therefore illiberal responses to those who continued outside the social order developed alongside the biopolitical conditions. For example, workhouses could motivate the degenerate, then medical science could 'cure' offenders via rehabilitation, and then neoliberal policies could responsabilize individuals; and if those failed, it was always

possible to incarcerate. These shifts were not initiated at the behest of the state, but rather they were the outcome of the economic, political, and social conditions making them possible.

The development of the state's obligations is as evident in the three peace bond debates as it is in 17th century British social policies. The first debate raises issues about how women need to change their activities, put their lives on hold, and the effect it has on their ability to work; the second, about how fear reduces a citizen's mobility, threatens what it means to be Canadian, and infringes on the right to freedom; the third, about how organized crime is caused by and threatens the economic and social order. Not once is it raised that there could be another solution; it is merely that the state should do more, do better, do *something*. Given the pervasive myth of the sovereign state's role of ensuring the safety and rights of its citizens (see chapter three; Garland, 1996, 2001; Pratt, 1999), that the parliamentary debates centre on the role of the state in a solution is, of course, not the least bit surprising. But it is *how* the strategy is formed that results in unavoidable failure and unanticipated consequences, which is revealed by the *third* link between the genealogical and archaeological analyses: discourses of risk.

Discourses of risk appear in what I have identified as *discursive gaps*. Discursive gaps are created when new forms of knowledge challenge the limits of existing discursive objects. Just as Agamben (see chapter 2) explained how medical advances created a state of overcoma, a gap between coma and death; and Castel (see chapter 3) explained how Christian morality created a state of 'good poor', a gap between 'bad poor' and 'the employed'; and Pratt (see chapter 3) explained how dangerousness created a gap between what was and was not known about the population; this thesis demonstrates how the

emergence of ‘calculable’ risk profoundly affected criminal justice policy by forming a population between offenders (*i.e.* the dangerous) and law-abiders: the risky person. The formation of the risky person is not actually based on an inherent risk; rather, the risky person is created due its externality from the ‘non-risky’ population. In other words, since risk lies in the unknowable (Pratt, 2000), it is not that we can actually *know* risk, but rather that *we cannot know who is not risky*. Since the emergence of new expressions of biopower threatens the legitimacy of law (as per Agamben), risky populations excluded from political life *must at the same time be included* in political life. As the object of risk becomes knowable, it also transforms – and becomes – that which is reasonable to fear. The object in need of governance becomes the *fear of risk*.

A world without risk discourses would have a well-defined boundary between offenders and law-abiders, but the debates demonstrate this is not the case. Once the target of criminal justice policy shifted the point of intervention away from the causes of crime towards its effects, calculations of risk became more prominent in discourses surrounding how to know and govern these gaps. The first debate exhibits the formation of a risk-gap consisting of the risk of vulnerability of women and children, which is expanded in the second debate to the risk of vulnerability of all society. In the third debate, another risk-gap appears between the risk of vulnerable groups and law-abiders, which is those who are at risk of becoming risky by possessing the instruments of crime. Each of the three debates implicitly refers back to the sacredness of *bare life*, though each debate explicitly politicizes it in the context of a new emerging risk-discourse. In other words, while the life (*zoe*) of a woman or child is sacred, it is politicized (*bios*) because it is a woman, or child, or citizen, or vulnerable group, and so on.

The difficulty for parliamentarians was in politicizing the risky population in a way that led to societal integration while having regard for the discursive and material conditions detailed in chapter three. Discourses of rights clashed between victims' rights and civil rights, as risky populations cannot be included in society like criminals (via prison, probation, etc.), but are excluded due to their perceived dangerousness (as expressed in terms of risk and fear). By connecting discourses of fear and risk, the strategy of specialized peace bonds makes possible the transformation of biopower into disciplinary power, thus creating a population of risky people that can be governed. Persons subjected to specialized peace bonds face a number of disciplinary techniques through which the bonded person is trained in two respects. First, they must accept themselves as risky, or face potential prison until they do. Second, they are disciplined through the conditions assigned by the judge, and in particular any counselling condition. The bonded person is thus governed through their freedom as they are still free to choose whether or not to abide by their conditions, and can practise 'working on themselves' to reduce their riskiness. Furthermore, it is the conditions that make the fear of risk manageable, as they provide a concrete mechanism to facilitate surveillance of the subject and determine the ensuing practices of integration (*e.g.* continuing peace bond, imprisonment upon a breach).

Specialized peace bonds also reflect broader practices of governance affecting the population as a whole by performing a symbolic function. By intervening in cases of risky persons a symbolic message is sent to the public that being risky causes fear, and therefore any actions (or inactions) construed as risky are not normal and to be avoided. This also encourages non-state entities to govern themselves by exercising their freedom to govern the fear of risk, particularly by applying for a peace bond on the behalf of others. Moreover,

non-state entities are relied on to fulfil counselling or monitoring conditions. The exercise of specialized peace bonds thus performs a normalizing function on the bonded person and society at large, but it also makes political constructions appear natural. By this I mean that peace bonds make fear and risk into ‘truths’ whilst simultaneously reproducing the meaning of – and legal relationship between – other political constructions such as women, men, children, family, judges, police, Canada, and so on, as part of a grander regime of truth. However, the discursive connection between fear and risk has some unintended consequences.

Mitchell Dean (2010) warns, “the significance of risk lies not with risk *itself* but with what risk gets attached to” (p. 206, emphasis original). The risk of violent offenders or organized crime is treated as an ontological category only because it has been rendered thinkable by forms of knowledge. Speaking in ‘risks’ masks the state’s marginalizing actions as a technical calculation. It allows John Buesnel to be imprisoned because he refused to ‘prove’ he was not risky and therefore not to be feared. It reduces the complex situation of a recently released prisoner, with unique experiences and circumstances, to a simple probability. It is what allows psychologist Darryl Lindsay to say that the peace bond is “about you”, but “not personal to you”, thus transforming the atypical into the stereotypical.

The troubling aspect of governing through risk is that its limits are unclear. According to the debaters, risky people are ‘real’ insofar as we know that, for example, some violent offenders released from prison will reoffend. The debates also construct this form of risk as inextricable from security and dangerousness, lending further weight to the ‘new reality’. However, as identified in the genealogical analysis, risk, even when

calculated through actuarial assessments, is only a probability – *not* a prediction – and is therefore unfalsifiable. The risk-gap, therefore, is delimited only where it *probably* separates dangerous and the law-abiders. This discursive ambiguity provides great flexibility in the possible outcomes and effects of specialized peace bonds, as persons subjectified by peace bonds may find themselves amidst contradictory governmental strategies. I will suggest two of these contradictions, which are related.

The first set of contradictions appears with respect to how the state simultaneously applies a strategy of denial and an adaptive strategy (see Garland (1996) and my discussion in Chapter 3). Specialized peace bonds are adaptive by redefining the problem in order to facilitate management of the problem. For example, they activate communities by appealing to responsabilized groups to collect information for the determination of objective fear. This could be neighbours, family members, mental health experts, and so on. Moreover, if a peace bond imposes a condition to attend counselling, this may be fulfilled by a non-state program (such as Circles of Support and Accountability) responsabilized to mitigate the subject's risk. This also facilitates surveillance by allowing more information to be collected about the subject. Specialized peace bonds are also an adaptive strategy both by creating prudential citizens to apply for peace bonds when they are afraid, and by fostering prudential bonded persons to take responsibility for their own riskiness. In the latter case, this may include abstaining from alcohol, not carrying weapons, abiding by a curfew, and taking counselling. Certain conditions, such as not attending a school ground, also engages in risk reduction by governing spaces to prevent crime. In this case, the peace bond theoretically acts like a security camera by symbolically admonishing proscribed behaviour in a geographical location. Yet peace bonds are also a strategy of denial in that they contain

a punitive response. The debates make it clear that peace bonds are part of a ‘tough on crime’ discourse, particularly with respect to dangerous offenders being released from prison. Even though their incarceration has evidently not lowered their risk, a peace bond (or the refusal to enter a peace bond) may send them back to the very place that did not lower their risk, thus giving the impression that the state is doing *something* while denying that prison is either part of the problem or at least not part of the solution.

The simultaneous adapting/denial strategies are, I suggest, merely a transformation of the earlier legal debate concerning whether peace bonds are a civil or criminal remedy. The adaptive strategies are reminiscent of the argument for a civil standard, where the lack of charge, offence, and conviction is reflected in a peace bond as a contract with conditions to avoid contact with the complainant. With specialized peace bonds this has simply been expanded to avoiding contact with certain types of individuals, areas, or activities. And, of course, the strategy of denial involves reasserting the state’s ability to exercise of power via the possibility of incarceration, thus evoking a criminal standard. Therefore, despite its legal resolution, a new form of the civil/criminal debate continues within this contradiction as the state is both distanced from and drawn to the point of intervention.

The second set of contradictions resulting from the ill-defined risk category is that programs resulting from risk discourses can simultaneously be a complete failure and a complete success. When the state applies a peace bond it is effectively demanding a risky person to take responsibility for their own risk. However, while the state monitors the bonded person to ensure compliance with conditions (*e.g.* through intensive supervision parole programs, such as COHROU; see Weinrath & Doerksen, 2011), it has no way of determining whether the peace bond has actually trained the bonded person to be responsible

or has merely trained them to comply with conditions while under surveillance. In other words, once the peace bond expires there may be no less reason to fear the risky person than there was before the peace bond⁶. Peace bonds are a complete failure because they cannot quell emerging fears and risks, meaning they are incapable of keeping the peace. And yet, at the same time peace bonds are a complete success because discourses of risk allow self-affirmation. If a risky person reoffends or breaches conditions while the subject of a peace bond, there is justification that they are indeed ‘risky’. Likewise, if that person does not reoffend or breach conditions while on a peace bond, then the peace bond is justified because it appears to have reduced the subject’s perceived riskiness. Peace bonds are thus a complete success, but only insofar as they make it possible to turn risk back against itself. The symbolic message is clear: If you cause fear, you are a risk, and therefore you will be governed by the nearly illimitable conditions of a peace bond – so do not cause fear. Specialized peace bonds perform a normalizing function not just for those who are subjected to conditions but to *all of society*, as the broad ‘cause no fear’ message is open to a judge’s interpretation, albeit limited by political, economic, and social discourses. Moreover, this contradiction exhibits an ironic twist: as individuals are increasingly expected to be responsible (via peace bond conditions), it creates more opportunities for them to shirk that responsibility and thus require illiberal state intervention. In other words, the more the state tries to distance itself, the more it increases the potential outcomes where intervention is necessary.

⁶ Of course, since specialized peace bonds govern *the fear of risk*, so long as those who were fearful believe the peace bond has neutralized the risk, then it *may* be a success. However, I am suggesting that since it is not possible to determine if peace bonds have actually addressed risk, there is no reason to assume they should reduce fear of that risk.

Conclusion

When trying to gain a deeper understanding of the role of peace bonds in contemporary society, looking at the calculations of risk as a sort of ‘end game’ is futile: It is possible to govern *through* risk, but it is impossible to govern risk itself. This is proven by repeated recidivists and the ever-increasing variables for calculating risk. Therefore, the parliamentary debates are crucial to understanding peace bonds, not just because they are the site of legislation, but because of how polyvalent discourses of risk, driven by biopolitical knowledge about recidivism rates, were mobilized by the everyday discourses of fear. The discovery of a population that is a risk to violently offend, and its necessary counterpart (a population at risk of being offended), upsets the social equilibrium. Risk is difficult to govern, but fear is already governable – through peace bonds. It is therefore a rational outcome to govern the fear of risk by expanding the scope of peace bonds beyond their traditional application to what I have called ‘specialized peace bonds’. They enable discourses of fear to be turned back upon themselves in a strategy of biopolitical governance – in essence, fighting fear with fear. Where traditional peace bonds are essentially a test to see if a dispute between two people can be resolved via a contract, specialized peace bonds have become a *test of rationality* to see how the respondent will be included in society at large.

In this thesis I have begun to unearth the social, economic, and political power relations in the formation of specialized peace bonds, critiqued the accompanying modes of calculation of fear and risk, and challenged the regimes of practices that make specialized peace bonds possible. There is much room for further research, particularly with respect to understanding the “‘view from below’, ensuring the voices and experiences of those

marginalised by institutionalised state practices are heard and represented” (Scraton, 2007, p. 10). Given the wide variety of circumstances that can result in a peace bond, there are surely an equal variety of voices that can provide an understanding of the function of peace bonds going beyond risk categorizations. This thesis has outlined the governmental outcomes of peace bonds, but there are many other outcomes that need to be considered.

In conclusion, specialized peace bonds, driven by biopolitical currents and discourses of risk and fear, appear to be a tool of crime prevention, enhancing the security and liberty of Canadian citizens. This is undoubtedly true in some cases. For example, it would not be surprising to hear that a peace bond requiring counselling has resulted in a person learning to cope with their anger in a non-violent manner. From an alternative perspective, however, peace bonds merely manage the consequences of a criminal justice system limited by social, political, and economic circumstances, in a broader project of integrating risky populations. Prisoners cannot be held in penitentiaries forever; some of them will reoffend upon release, and discourses of risk and fear form a regime of truth that makes it possible to govern those who have not been charged with a crime as if they had. The full consequences of this are perhaps yet to be seen. The words of Dean seem appropriate:

“[The liberal art of government’s] emphasis on governing through freedom means that it always contains a division between those who are capable of bearing the responsibilities and freedoms of mature citizenship and those who are not. [...] Under certain conditions, however, frustrations with such programmes of improvement may lead to forms of knowledge and political rationality that will identify certain groups as without value and beyond improvement. Liberal regimes of government can thus slide away from the ‘good despot’, from the improvable towards sovereign interventions to confine, to contain, to coerce and to eliminate, *if only by prevention*, those deemed without value. [...] This should offer no reason for complacency even for those who find themselves marked as mature subjects within the boundaries contained by liberal-democratic constitutionalism, let alone those

who currently remain in need of a 'good despot' within and outside the boundaries. It also offers even less room for complacency for those who find themselves occupying the position of the 'good despot'." (Dean, 2010, p. 171, emphasis added)

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Appendix A
Canadian Criminal Code ss. 810.01, 810.1, 810.2, 811, as at March 13, 2012

Sureties to Keep the Peace

Fear of certain offences

810.01 (1) A person who fears on reasonable grounds that another person will commit an offence under section 423.1, a criminal organization offence or a terrorism offence may, with the consent of the Attorney General, lay an information before a provincial court judge.

Appearances

(2) A provincial court judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge.

Adjudication

(3) If the provincial court judge before whom the parties appear is satisfied by the evidence adduced that the informant has reasonable grounds for the fear, the judge may order that the defendant enter into a recognizance to keep the peace and be of good behaviour for a period of not more than 12 months.

Duration extended

(3.1) However, if the provincial court judge is also satisfied that the defendant was convicted previously of an offence referred to in subsection (1), the judge may order that the defendant enter into the recognizance for a period of not more than two years.

Refusal to enter into recognizance

(4) The provincial court judge may commit the defendant to prison for a term not exceeding twelve months if the defendant fails or refuses to enter into the recognizance.

Conditions in recognizance

(4.1) The provincial court judge may add any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant, including conditions that require the defendant

- (a) to participate in a treatment program;
- (b) to wear an electronic monitoring device, if the Attorney General makes the request;
- (c) to remain within a specified geographic area unless written permission to leave that area is obtained from the judge;
- (d) to return to and remain at their place of residence at specified times; or
- (e) to abstain from the consumption of drugs, except in accordance with a medical prescription, of alcohol or of any other intoxicating substance.

Conditions — firearms

(5) The provincial court judge shall consider whether it is desirable, in the interests of the defendant's safety or that of any other person, to prohibit the defendant from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition,

prohibited ammunition or explosive substance, or all of those things. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance and specify the period during which the condition applies.

Surrender, etc.

(5.1) If the provincial court judge adds a condition described in subsection (5) to a recognizance, the judge shall specify in the recognizance how the things referred to in that subsection that are in the defendant's possession shall be surrendered, disposed of, detained, stored or dealt with and how the authorizations, licences and registration certificates that are held by the defendant shall be surrendered.

Reasons

(5.2) If the provincial court judge does not add a condition described in subsection (5) to a recognizance, the judge shall include in the record a statement of the reasons for not adding the condition.

Variance of conditions

(6) A provincial court judge may, on application of the informant, the Attorney General or the defendant, vary the conditions fixed in the recognizance.

Other provisions to apply

(7) Subsections 810(4) and (5) apply, with any modifications that the circumstances require, to recognizances made under this section.

1997, c. 23, ss. 19, 26;
2001, c. 32, s. 46, c. 41, ss. 22, 133;
2002, c. 13, s. 80;
2009, c. 22, s. 19.

Where fear of sexual offence

810.1 (1) Any person who fears on reasonable grounds that another person will commit an offence under section 151, 152, 155 or 159, subsection 160(2) or (3), section 163.1, 170, 171 or 172.1, subsection 173(2) or section 271, 272, or 273, in respect of one or more persons who are under the age of 16 years, may lay an information before a provincial court judge, whether or not the person or persons in respect of whom it is feared that the offence will be committed are named.

Appearances

(2) A provincial court judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge.

Adjudication

(3) If the provincial court judge before whom the parties appear is satisfied by the evidence adduced that the informant has reasonable grounds for the fear, the judge may order that the defendant enter into a recognizance to keep the peace and be of good behaviour for a period that does not exceed 12 months.

Duration extended

(3.01) However, if the provincial court judge is also satisfied that the defendant was convicted previously of a sexual offence in respect of a person who is under the age of 16 years, the judge may order that the defendant enter into the recognizance for a period that does not exceed two years.

Conditions in recognizance

(3.02) The provincial court judge may add any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant, including conditions that

- (a) prohibit the defendant from engaging in any activity that involves contact with persons under the age of 16 years, including using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under that age;
- (b) prohibit the defendant from attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground or playground;
- (c) require the defendant to participate in a treatment program;
- (d) require the defendant to wear an electronic monitoring device, if the Attorney General makes the request;
- (e) require the defendant to remain within a specified geographic area unless written permission to leave that area is obtained from the provincial court judge;
- (f) require the defendant to return to and remain at his or her place of residence at specified times; or
- (g) require the defendant to abstain from the consumption of drugs except in accordance with a medical prescription, of alcohol or of any other intoxicating substance.

Conditions — firearms

(3.03) The provincial court judge shall consider whether it is desirable, in the interests of the defendant's safety or that of any other person, to prohibit the defendant from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all of those things. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance and specify the period during which the condition applies.

Surrender, etc.

(3.04) If the provincial court judge adds a condition described in subsection (3.03) to a recognizance, the judge shall specify in the recognizance how the things referred to in that subsection that are in the defendant's possession should be surrendered, disposed of, detained, stored or dealt with and how the authorizations, licences and registration certificates that are held by the defendant should be surrendered.

Condition — reporting

(3.05) The provincial court judge shall consider whether it is desirable to require the defendant to report to the correctional authority of a province or to an appropriate police

authority. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance.

Refusal to enter into recognizance

(3.1) The provincial court judge may commit the defendant to prison for a term not exceeding twelve months if the defendant fails or refuses to enter into the recognizance.

Judge may vary recognizance

(4) A provincial court judge may, on application of the informant or the defendant, vary the conditions fixed in the recognizance.

Other provisions to apply

(5) Subsections 810(4) and (5) apply, with such modifications as the circumstances require, to recognizances made under this section.

1993, c. 45, s. 11;

1997, c. 18, s. 113;

2002, c. 13, s. 81;

2008, c. 6, ss. 52, 54, 62.

Where fear of serious personal injury offence

810.2 (1) Any person who fears on reasonable grounds that another person will commit a serious personal injury offence, as that expression is defined in section 752, may, with the consent of the Attorney General, lay an information before a provincial court judge, whether or not the person or persons in respect of whom it is feared that the offence will be committed are named.

Appearances

(2) A provincial court judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge.

Adjudication

(3) If the provincial court judge before whom the parties appear is satisfied by the evidence adduced that the informant has reasonable grounds for the fear, the judge may order that the defendant enter into a recognizance to keep the peace and be of good behaviour for a period that does not exceed 12 months.

Duration extended

(3.1) However, if the provincial court judge is also satisfied that the defendant was convicted previously of an offence referred to in subsection (1), the judge may order that the defendant enter into the recognizance for a period that does not exceed two years.

Refusal to enter into recognizance

(4) The provincial court judge may commit the defendant to prison for a term not exceeding twelve months if the defendant fails or refuses to enter into the recognizance.

Conditions in recognizance

(4.1) The provincial court judge may add any reasonable conditions to the recognizance that the judge considers desirable to secure the good conduct of the defendant, including conditions that require the defendant

- (a) to participate in a treatment program;
- (b) to wear an electronic monitoring device, if the Attorney General makes the request;
- (c) to remain within a specified geographic area unless written permission to leave that area is obtained from the provincial court judge;
- (d) to return to and remain at his or her place of residence at specified times; or
- (e) to abstain from the consumption of drugs except in accordance with a medical prescription, of alcohol or of any other intoxicating substance.

Conditions — firearms

(5) The provincial court judge shall consider whether it is desirable, in the interests of the defendant's safety or that of any other person, to prohibit the defendant from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all of those things. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance and specify the period during which the condition applies.

Surrender, etc.

(5.1) If the provincial court judge adds a condition described in subsection (5) to a recognizance, the judge shall specify in the recognizance how the things referred to in that subsection that are in the defendant's possession should be surrendered, disposed of, detained, stored or dealt with and how the authorizations, licences and registration certificates that are held by the defendant should be surrendered.

Reasons

(5.2) If the provincial court judge does not add a condition described in subsection (5) to a recognizance, the judge shall include in the record a statement of the reasons for not adding the condition.

Condition — reporting

(6) The provincial court judge shall consider whether it is desirable to require the defendant to report to the correctional authority of a province or to an appropriate police authority. If the judge decides that it is desirable to do so, the judge shall add that condition to the recognizance.

Variance of conditions

(7) A provincial court judge may, on application of the informant, of the Attorney General or of the defendant, vary the conditions fixed in the recognizance.

Other provisions to apply

(8) Subsections 810(4) and (5) apply, with such modifications as the circumstances require, to recognizances made under this section.

1997, c. 17, s. 9;

2002, c. 13, s. 82;
2008, c. 6, s. 53.

Breach of recognizance

811. A person bound by a recognizance under section 83.3, 810, 810.01, 810.1 or 810.2 who commits a breach of the recognizance is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 811;
1993, c. 45, s. 11;
1994, c. 44, s. 82;
1997, c. 17, s. 10, c. 23, ss. 20, 27;
2001, c. 41, s. 23.

Appendix B
All Legislative Amendments to ss. 810.01, 810.1, 810.2

s. 810.01, added, 1997, c. 23, ss. 19 and 26; Bill C-95

2001, c. 32, s. 46 (s. 46(2) repealed by 2001, c. 41, s. 133(21), c. 41, s. 22 and s. 133(19));
Bill C-24
Modifies the definition of criminal organization

2002, c. 13, s. 80; Bill C-15A
Adds the fear of child pornography, Internet child-luring offences; adds to the list of activities which may be proscribed by such orders the use of a computer system (i.e., the Internet) for the purpose of communicating with a person under the age of 14.

2009, c. 22, s. 19; Bill C-14
Extends the maximum period to two years where the defendant was convicted previously of a similar offence.

2011, c. 7, s. 8; Bill C-30
Creates new enforcement conditions, notice requirements, regulation-making powers, misuse offences, and evidentiary provisions in the context of “peace bonds,” which are intended to prevent future harm and may be imposed in certain circumstances even if the “defendant” has not been charged with or convicted of an offence

s. 810.1, added, 1993, c. 45, s. 11; Bill C-126

1997, c. 18, s. 113; Bill C-17
Modifies the language of the French version of s. 810.1(3); Provincial court judge may commit defendant to a term not exceed 12 months for failure or refusal to enter into the recognizance

2002, c. 13, s. 81; Bill C-15A
See 810.01 above

2008, c. 6, ss. 52, 53(j), 62(2); Bill C-2
Raises the age of consent from 14 years of age to 16

2011, c. 7, s. 9; Bill C-30
See 810.01 above

s. 810.2, added, 1997, c. 17, s. 9; Bill C-55

2002, c. 13, s. 82; Bill C-15A

See 810.01 above

2008, c. 6, s. 53; Bill C-2

See 810.1 above

2011, c. 7, s. 10; Bill C-30

See 810.01 above

Appendix C
Speakers of Analyzed Debates

Bill C-126, *An Act to Amend the Criminal Code and the Young Offenders Act*
May 6, 1993 - June 23, 1993

Ms. Dawn Black (*New Westminster – Burnaby, NDP*)
Mr. Bill Blaikie (*Winnipeg Transcona, NDP*)
Hon. Pierre Blais (*Minister of Justice, Attorney General of Canada and Minister of State (Agriculture), PC*)
Ms. Mary Clancy (*Halifax, Lib.*)
Hon. Mary Collins (*Minister of Western Economic Diversification and Minister of State (Environment) and Minister Responsible for the Status of Women, PC*)
Mr. Ronald J. Duhamel (*St. Boniface, Lib.*)
Mr. Jesse Flis (*Parkdale – High Park, Lib.*)
Mrs. Beryl Gaffney (*Nepean, Lib.*)
Ms. Albina Guarnieri (*Mississauga East, Lib.*)
Mr. Mac Harb (*Ottawa Centre, Ind.*)
Mr. Ross Harvey (*Edmonton East, NDP*)
Mr. Dan Heap (*Trinity – Spadina, NDP*)
Mr. Jim Karpoff (*Surrey North, NDP*)
Mr. David Kilgour (*Edmonton Southeast, Lib.*)
Hon. Doug Lewis (*Solicitor General of Canada, PC*)
Mr. Russell MacLellan (*Capte Breton – The Sydneys, Lib.*)
Mr. Fred J. Mifflin (*Bonavista – Trinity – Conception, Lib.*)
Mr. Rob Nicholson (*Parliamentary Secretary to Minister of Justice and Attorney General of Canada and Minister of State (Agriculture), PC*)
Mr. Pat Nowlan (*Annapolis Valley – Hants, PC*)
Hon. Alan Redway (*Don Valley East, PC*)
Mr. Nelson A. Riis (*Kamloops, NDP*)
Mr. Ian Waddell (*Port Moody – Coquitlam, NDP*)

Bill C-55, *An Act to Amend the Criminal Code (High Risk Offenders, the Corrections and Conditional Release Act, The Criminal Records Act, the Prisons and Reformatories Act and the Department of the Solicitor General Act*
September 17, 1996 - April 25, 1997

Mrs. Diane Ablonczy (*Calgary North, Ref.*)
Ms. Colleen Beaumier (*Brampton, Lib.*)
Mr. Michel Bellehumeur (*Berthier—Montcalm, BQ*)
Mr. Maurizio Bevilacqua (*York North, Lib.*)
Mr. Garry Breitkreuz (*Yorkton—Melville, Ref.*)
Mr. John Bryden (*Hamilton—Wentworth, Lib.*)
Mr. Nick Discepola (*Parliamentary Secretary to Solicitor General of Canada, Lib.*)

Mr. John Duncan (*North Island—Powell River, Ref.*)
 Mr. Jesse Flis (*Parkdale—High Park, Lib.*)
 Mr. Bill Gilmour (*Comox—Alberni, Ref.*)
 Mr. Art Hanger (*Calgary Northeast, Ref.*)
 Mr. Ed Harper (*Simcoe Centre, Ref.*)
 Mr. Grant Hill (*Macleod, Ref.*)
 Mr. Jay Hill (*Prince George—Peace River, Ref.*)
 Mr. Gordon Kirkby (*Parliamentary Secretary to Minister of Justice and Attorney General of Canada, Lib.*)
 Mr. François Langlois (*Bellechasse, BQ*)
 Hon. Lawrence MacAulay (*for the Minister of Justice, Lib.*)
 Mr. John Maloney (*Erie, Lib.*)
 Mr. Keith Martin (*Esquimalt—Juan de Fuca, Ref.*)
 Mr. Philip Mayfield (*Cariboo—Chilcotin, Ref.*)
 Ms. Val Meredith (*Surrey—White Rock—South Langley, Ref.*)
 Ms. Maria Minna (*Parliamentary Secretary to Minister of Citizenship and Immigration Lib.*)
 Mr. Andy Mitchell (*Parry Sound—Muskoka, Lib.*)
 Mr. Lee Morrison (*Swift Current—Maple Creek—Assiniboia, Ref.*)
 Mr. John Murphy (*Annapolis Valley—Hants, Lib.*)
 Mr. Pat O'Brien (*London—Middlesex, Lib.*)
 Mr. Rey D. Pagtakhan (*Parliamentary Secretary to Prime Minister, Lib.*)
 Mr. Charlie Penson (*Peace River, Ref.*)
 Mr. Jack Ramsay (*Crowfoot, Ref.*)
 Mr. Bob Ringma (*Nanaimo—Cowichan, Ref.*)
 Mr. Werner Schmidt (*Okanagan Centre, Ref.*)
 Mr. Jim Silye (*Calgary Centre, Ref.*)
 Mr. Bob Speller (*Haldimand—Norfolk, Lib.*)
 Mr. Chuck Strahl (*Fraser Valley East, Ref.*)
 Mr. Myron Thompson (*Wild Rose, Ref.*)
 Mr. Randy White (*Fraser Valley West, Ref.*)
 Mr. Ted White (*North Vancouver, Ref.*)
 Mr. John Williams (*St. Albert, Ref.*)

Bill C-95, *An Act to Amend the Criminal Code (High Risk Offenders), the Corrections and Conditional Release Act, The Criminal Records Act, the Prisons and Reformatories Act and the Department of the Solicitor General Act*

September 17, 1996 - April 25, 1997

Mr. Antoine Dubé (*Lévis, BQ*)
 Mr. Michel Bellehumeur (*Berthier—Montcalm, BQ*)
 Hon. Herb Gray (*for the Minister of Justice, Lib.*)
 Mr. Jay Hill (*Prince George—Peace River, Ref.*)
 Mr. Dale Johnston (*Wetaskiwin, Ref.*)
 Mr. Réal Ménard (*Hochelaga—Maisonnette, BQ*)

Mr. Jack Ramsay (*Crowfoot, Ref.*)
Hon. Allan Rock (*Minister of Justice and Attorney General of Canada, Lib.*)
Mr. Jim Silye (*Calgary Centre, Ref.*)
Mr. Chuck Strahl (*Fraser Valley East, Ref.*)

Legend:

BQ – Bloc Québécois
Lib. – Liberal Party
NDP – New Democratic Party
PC – Progressive Conservative Party
Ref. – Reform Party

Appendix D Glossary of Terms

Biopower A form of power operating through social relations concerning the ability to give life

Burden of Proof The threshold upon which a determination is to be made by a trier of fact. The threshold for a civil standard is *a balance of probabilities*, and for the criminal standard it is *beyond a reasonable doubt*.

Dangerousness A socially constructed classification referring to persons or populations that threaten the established socio-political order

Disciplinary Power The power to train or correct a body, which is made possible by surveillance and the formation of subjects

Fear A feeling of concern or anxiety born out of either unique personal circumstances or general risk factors

Government The right manner for disposing of things so as to lead to a convenient end

Governmentality A way of thinking about governing populations through a plurality of forms of government (*e.g.* families, schools, churches)

Legal Pluralism The co-existence of multiple forms of law over both time and social spaces resulting from competing and contradictory social influences

Liberalism The critique of excessive government; a rationale of governing through freedom via the rights and liberties of citizens

Neoliberalism A particular form of liberalism derived from critiques of state welfarism

Normalization The correction of a subject driven by a rationale of statistical conformity

Problematization A form of rationality in which something becomes a problem, from which new forms of government are formed

Reasonable Person Test A legal test examining whether another person in the same circumstances would come to similar conclusions. For example, the reasonable person test with respect to 'reasonable fear' asks if another person in the same circumstances would also be afraid, thus lending an air of objectivity.

Risk Exposure to the possibility of harm

Risk Assessment An actuarial and predominantly quantitative instrument grounded in aggregate data about a population's past behaviour for the purpose of determining the probability of an individual's future behaviour

Security The absence of harmful foreseeable and unforeseeable future events

The State A regulatory apparatus of government reason; an apparatus born out of a culmination of connections and relations of already existing elements and institutions