Race and the Criminal Justice System in Canada West: Burglary and Murder in Hamilton, 1852-53

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In the mid-nineteenth century, an influx of immigrants from Europe and the United States brought rapid economic and demographic change to Canada West. At the same time, the criminal justice system was transitioning—unevenly—toward greater professionalization.

The author illustrates how the social and institutional context of the time affected the legal outcomes for a group of companions: four men of African descent, four Irish women, and one white man. The men and two of the women were variously prosecuted for larceny, burglary and murder in the Hamilton assize in the fall of 1852. Convictions were entered against all of the African-descended men, but not the white man. Some of the accused had the benefit of defence counsel; others probably did not. One of the men convicted of burglary, Joseph Butler, who was probably unrepresented, was found guilty on the basis of very tenuous evidence. Less tenuous evidence was deemed insufficient to sustain a conviction against the white man, Thomas Cavill.

The language of race in the trials was elusive. The author argues that prevalent legal norms demanded that the law appear unbiased in the face of societal prejudice. Indications of an emerging "scientific" racism, however, were present. Those found guilty were all associated with a particular place beyond the outskirts of Hamilton that they called "Prince's Island", a place that became constructed before and during the trials as a "den of vice", characterized not only by blackness but also by economic marginality, excessive alcohol consumption and interracial sexual immorality. The author argues that because of Joseph Butler's association with this place, and in the absence of effective defence counsel and a careful judicial treatment of the evidence against each accused, factors that should not legally have been adequate to justify a conviction came to appear sufficient. Thomas Cavill, who had never been to Prince's Island, went free.

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Introduction

In the late summer of 1852, a series of stealthy nighttime break-ins took place in various establishments around Hamilton and Dundas, Canada West, including the houses of two prominent men. Two trials for burglary followed at the sitting of the criminal assizes that started in late October, along with prosecutions for larceny and murder that involved many of the same people. The evidence from the trials, taken together with newspaper reports and the records of the Hamilton jail, permits quite a detailed reconstruction of events. Most of the men involved in these crimes were of African descent, and at least three of the four women were Irish. They were all young, poor and largely homeless. These cases suggest that race, ethnicity and socio-economic position intertwined in a marginal segment of the population's experiences with the criminal justice system.

This paper aims to contribute to scholarship on African-Canadian history and pre-Confederation criminal justice. In the early 1850s policing and lawyering in Canada West were undergoing important transitions; signs of both the localized justice of the earlier period and of the more centralized, professional administration of justice that followed are apparent. The criminal defencework in the cases was uneven—some accused were represented and some likely were not. Although formal equality was probably a goal of criminal justice, racial difference seems to have mattered in at least one of the trials. Blackness, Irishness and habits of vice became linked together and associated with a certain place hidden just outside Hamilton's limits, Prince's Island.

I begin by examining the historical backdrop of mid-nineteenth century Hamilton, and providing a general overview of local perceptions of African-American slavery and race relations in Canada West. Next, I reconstruct the murder and two burglaries in as much detail as records allow. I then describe the arrests and committals of the culprits, the professionalization of policing, the coroner's inquest and the role of the complainants in mobilizing the criminal justice system. I continue by analyzing the significance of race in the criminal trials that followed, paying particular attention to the language used in newspaper reports and the judge's notes. I also describe the roles of the judge, juries, witnesses, Crown and defence counsel in these prosecutions. I conclude by suggesting that race and the stigma of Prince's Island played a determinative role in at least one of the convictions at the 1852 fall assize in Hamilton.

I. Tidings of Disorder: A Burglary Ring?

One midsummer night in 1852, Charles Sadleir, a young Hamilton lawyer, awoke in the night to noises downstairs. When he investigated, the intruder fled. Sadleir found various items missing, including a good deal of silver, some alcohol and an overcoat.[1] Similar break-ins occurred

1. "Burglary", *Hamilton Gazette* (22 July 1852); "*R v Oliver Dawsey*" in a Benchbook of Justice Robert Baldwin Sullivan entitled *Oxford Circuit, Autumn 1852, Common Pleas and Criminal Cases* (Cayuga, Simcoe, Woodstock, Guelph, Hamilton, September–November 1852) at 146–48, Toronto, Archives of Ontario (RG 22-390-5, box 45, file 4) [Sullivan

elsewhere over the next few weeks, with coins, silver and other goods taken from a tin shop, a hardware store and a hotel in nearby Dundas. A newspaper remarked, "[w]e have heard of other similar transactions having lately taken place both in the city and in its suburbs. It is very evident that there is a regular gang of the rascals haunting the city".[2]

A few weeks later, a burglary took place at the Dundas home of William Notman, a lawyer who had recently served in the legislature. Notman ignored his noisy dog. Entrance was made through a window, and two sets of footprints were left on a newly painted windowsill. Again, a good deal of silver was taken. Furniture bore chisel marks.[3]

It is not certain that all of these burglaries, or four others that took place in nearby Wellington Square, were linked, but more than a few may have been.[4] Although Susan Lewthwaite has found violent criminal gangs operating in rural areas in the 1830s and 1840s, John Weaver—in concurrence with John Beattie—observes that the records leave no sign of a criminal subculture existing in the Hamilton area during that

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Benchbook]. The details in this paper come from the judge's benchbooks, which, along with some newspaper reports, are the only records that appear to have survived. This man was likely Charles A Sadleir, a 25-year-old, Irish-born lawyer. See *Census of 1851 (Canada East, Canada West, New Brunswick and Nova Scotia)*, Hamilton, St Mary's, Schedule A at 232, online: Library and Archives Canada <http://www.collectionscanada.gc.ca>; email from Margaret Houghton, Archivist, Hamilton Public Library (2 June 2010) (on file with the author); email from Paul Leatherdale, Archivist, Law Society of Upper Canada (1 September 2010) (on file with the author). The judge identified him as Charles E, the father of Charles A, but I can find no record of the older man's life or death and the circumstances of the younger man's life make him the likelier candidate.

2. "Burglary in Dundas", *The [Hamilton] Weekly Spectator* (5 August 1852); "Robbery", *The [Hamilton] Weekly Spectator* (19 August 1852); "Another Burglary", *The Hamilton Gazette* (23 August 1852).

3. "*R v Oliver Dawsey, Thomas Cavill, Jesse Tillason, and Joseph Butler*" in Sullivan Benchbook, *supra* note 1 at 157–60; Henry J Morgan, *The Canadian Parliamentary Companion: First Year* (Quebec: Desbarats & Derbishire, 1862) at 35; email from Paul Leatherdale, Archivist, Law Society of Upper Canada (5 August 2011) (on file with the author).

4. See "Robbery at Wellington Square", *The [Hamilton] Weekly Spectator* (16 September 1852); "The Assizes", *Hamilton Gazette* (4 November 1852). One of those ultimately convicted noted that Sadleir's was "the first home [Dawsey] took me to". "*Dawsey*", *supra* note 1 at 152.

period.[5] The late summer of 1852, though, gave Hamiltonians cause for concern that a criminal operation had taken root.

II. The Backdrop: Hamilton

By 1852, Hamilton was overtaking Dundas as the more important and prosperous of the two towns. Hamilton's population was less than 11 000 in 1850 but had risen to 25 000 by 1858.[6] Growth brought a measure of disorder to the region, as English, Irish and Scottish wage labourers moved to find work on canals and railways.[7] The local government, backed by provincial legislation, responded with various measures aimed at suppressing vagrancy and vice, including moving toward increasingly rigorous policing.[8] Committals for crimes against the person, property and morals increased in 1850 and 1851. Rootless strangers and the anonymity of cities were understood as threatening.[9] Three murder trials at the fall assize in Hamilton probably contributed to the sense that law and order needed buttressing.[10]

John Weaver and other scholars including Jim Phillips and David Murray have shown that many important aspects of the British North American criminal justice system were in transition during the early 1850s. Paid, professional police constables and magistrates were being appointed. Legal training was becoming a qualification for being a magistrate. The procedure for selecting juries was radically overhauled in 1850. The role of defence lawyers in criminal trials was becoming

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5. Susan Lewthwaite, "Violence, Law, and Community in Rural Upper Canada" in Jim Phillips, Tina Loo & Susan Lewthwaite, eds, *Essays in the History of Canadian Law: Crime and Criminal Justice*, vol 5 (Toronto: Osgoode Society for Canadian Legal History, 1994) 353 at 367; John C Weaver, *Crimes, Constables, and Courts: Order and Transgression in a Canadian City, 1816–1970* (Montreal and Kingston: McGill-Queen's University Press, 1995) at 56–57.

6. Thomas Hutchinson, *Hutchinson's Hamilton Directory, for 1862–63* (Hamilton, Ont: John Eastwood & Co, 1862) at 14.

7. Weaver, *supra* note 5 at 43.

8. *Ibid* at 48–52.

9. *Ibid* at 43–48.

10. "*R v George Foreman and Joseph Butler*" in Sullivan Benchbook *supra* note 1 at 172–82; "*R v John Tipple*" in *ibid* at 180–205; and "*R v Thomas McCabe*" in *ibid* at 208–70.

larger. The events described here illustrate how these changes were affecting the operation of criminal justice in the Hamilton area.

Despite the impressive corpus of scholarship on African-Canadian history,[11] our knowledge of how African-descended people experienced the criminal justice system in the mid-nineteenth century is incomplete. Law and legal institutions were clearly part of the prejudiced reality that they at least at times experienced. By 1852, Hamilton and the Niagara peninsula had well-established black communities. Increasing numbers of African Americans were arriving, following the thousands who had immigrated to Upper Canada since its founding. The American federal *Fugitive Slave Act* of 1850[12] jeopardized the safety that both escaped former slaves and free African Americans found in the northern free states.[13] Many went north.[14] Working out how they experienced either the legal system or other aspects of life in the Niagara Peninsula and Hamilton is complicated because the accounts left to us reflect a variety of political ends. Interpretations of prejudice against people of African

11. By way of introduction to this literature, see Robin W Winks, *The Blacks in Canada: A History* (New Haven: Yale University Press, 1971); James W St G Walker, *"Race," Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Waterloo: The Osgoode Society for Canadian Legal History and Wilfrid Laurier University Press, 1997) [J Walker, *"Race," Rights and the Law*]; Donald George Simpson, *Under the North Star: Black Communities in Upper Canada Before Confederation (1867)*, ed by Paul E Lovejoy (Trenton, NJ: African World Press, 2005).

12. c 60, 9 Stat 462 (1850).

13. For recent work on the 1850 Act and resistance to it, see e.g. Gautham Rao, "The Federal *Posse Comitatus* Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America" (2008) 26 LHR 1.

14. Both the total number of African Americans who went to British North America and the proportion escaping slavery are uncertain. The 1851–52 census gives the number of "colored" persons in Canada West as "about 8 000" in a note to the table "General Abstract of Origins—Upper Canada", but as 4 669 in the summary of Table III. See the "Upper Canada Personal Census, by Ages": *First Report of the Secretary of the Board of Registration and Statistics on the Census of the Canadas, for 1851–52*, vol 1 (Quebec: John Lovell, 1853) at 36–37, 317. Discrepancies I found between the individual census returns and the published numbers make the 8 000 number seem more plausible to me, but it is unclear how it was ascertained. For a detailed analysis of the origins of those enumerated in the 1861 census, see Michael Wayne, "The Black Population of Canada West on the Eve of the American Civil War: A Reassessment Based on the Manuscript Census of 1861" (1995) 48:56 Histoire Sociale/Social History 465.

descent in Canada have always been deeply embedded in relations with the United States.[15] Some contemporary accounts responded to American southerners' arguments that African-descended people were unsuited to the demands of freedom, making slavery not just necessary but a positive good.[16] Upper Canadian anti-slavery activists therefore emphasized the well-being produced by the liberating or protective mantle of English law; they deemphasized, or interpreted as incidental and temporary, the discrimination and poverty that other local interpreters emphasized. Some perceived class-related nuances around racism. Abolitionist Samuel Ringgold Ward observed that Canada was "an aristocratic country", rather than a republican one, and he argued that African-descended people should acquire the manners and habits necessary for attaining respected social positions.[17] Either genuine religious and moral feeling, or the desire to demonstrate superiority over

15. Anti-slavery commentators tended to link racism to Americans especially. See e.g. letter from Samuel Ringgold Ward to Henry Bibb and James Theodore Holly (October 1852) in C Peter Ripley, ed, *The Black Abolitionist Papers: Canada, 1830–1865* (Chapel Hill: University of North Carolina Press, 1986) vol 2, 225 at 226–28. Afua Cooper observes that the Detroit River came to symbolize the divide between republican oppression and British freedom, with both ex-slaves and others of African descent subscribing to this view. "The Fluid Frontier: Blacks and the Detroit River Region. A Focus on Henry Bibb" (2000) 30:2 Canadian Review of American Studies 129 at 136. Sharon A Roger Hepburn notes considerable racial harmony in Upper Canada and contemporaries' association of prejudice with Americans, "Following the North Star: Canada as a Haven for Nineteenth-Century American Blacks" (1999) 25:2 Michigan Historical Review 91 at 121–24.

16. One primary text oriented in this way is Benjamin Drew, *The Refugee: Or the Narratives of Fugitive Slaves in Canada. Related by Themselves with an Account of the History and Condition of the Colored Population of Upper Canada* (Boston: John P Jewett & Co, 1856). On abolitionists' arguments, see James M McPherson, "A Brief for Equality: The Abolitionist Reply to the Racist Myth, 1860–1865" in Martin Duberman ed, *The Antislavery Vanguard: New Essays on the Abolitionists* (Princeton, NJ: Princeton University Press, 1965) at 156. On British travellers' views of the "experiment in freedom" in Nova Scotia and their unease about abolition, see Jeffrey L McNairn, "British Travellers, Nova Scotia's Black Communities and the Problem of Freedom to 1860" (2008) 19:1 Journal of the Canadian Historical Association 27. See also Barrington Walker, *Race on Trial: Black Defendants in Ontario's Criminal Courts, 1858–1958* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2010) at 24–44 [B Walker, *Race on Trial*].

17. Ward, *supra* note 15 at 226–28.

the thriving republic to the south, could make overt demonstrations of racism distasteful to those claiming respectability.

The Hamilton *Spectator* and *Gazette* were opposed to slavery and probably to the most blatant displays of discrimination, especially in the administration of justice. At the same time, the papers were in favour of black "improvement", guarded about treating people of African descent as social equals, and suspicious that some—like others of the "lower orders"—were particularly predisposed to violence.[18] Contemporary observers of African descent also described racist insults and discrimination in a multitude of contexts in the Canadas at mid-century, particularly around St. Catharines, Hamilton, London and Chatham.[19] Controversies over segregation in public schools arose in Hamilton and St. Catharines, as well as in other parts of the province.[20] Concerns were expressed about the justice system's refusal to address offences against African-descended people in St. Catharines.[21] As early as 1828—before discrimination intensified in the 1830s and 1840s[22]—a man was

18. See e.g. "Emancipation Day", *The [Hamilton] Weekly Spectator* (12 August 1852); Hiram Wilson, "Case of an Escaped Slave", Letter to the Editor, *Hamilton Gazette* (29 July 1852); "Dreadful Murder", *Hamilton Gazette* (30 August 1852); "Uncle Tom's Cabin, or Life Among the Lowly", *Hamilton Gazette* (2 September 1852); "Disgraceful Affray", *Hamilton Gazette* (6 September 1852); "Uncle Tom's Cabin", *Hamilton Gazette* (18 October 1852).

19. See e.g. letter from Peter Gallego to Thomas Rolph (1 November 1841) in Ripley, *supra* note 15 at 87.

20. See Robin W Winks, "Negro School Segregation in Ontario and Nova Scotia" (1969) 50:2 Canadian Historical Review 164 at 171–72, 176; Kristin McLaren, "'We Had No Desire to be Set Apart': Forced Segregation of Black Students in Canada West Public Schools and Myths of British Egalitarianism" in Barrington Walker, ed, *The History of Immigration and Racism in Canada* (Toronto: Canadian Scholars' Press, 2008) 69; James W St G Walker, *A History of Blacks in Canada: A Study Guide for Teachers and Students* (Hull: Canadian Government Publishing Centre, 1980) at 109–15 [J Walker, *A History of Blacks in Canada*]; Simpson, *supra* note 11 at 241–48.

21. *Ibid* at 392–93. The *Provincial Freeman* stated at one point that "colored citizens of St. Catharines cannot hope for protection nor justice in that town". *Ibid* at 392, citing the *Provincial Freeman* (15 September 1855). See also David Murray, *Colonial Justice: Justice, Morality, and Crime in the Niagara District, 1791–1849* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2002) at 169–74.

22. Robin W Winks, "'A Sacred Animosity': Abolitionism in Canada" in Duberman, *supra* note 16 at 303–04; Winks, *Blacks in Canada, supra* note 11 at 142, 148–49.

disqualified from jury service probably because he was black.[23] At common law, certain kinds of licensed public services, specifically inns and common carriers such as stagecoaches, were required to serve all, but there are many accounts of African-descended people being denied service in hotels, in restaurants and on public transportation.[24] According to David Murray, African-descended people were over-represented in the court system in the Niagara district before 1849.[25] Anti-slavery activists and "friends of the fugitive" saw racism as a problem in the Hamilton area and on the Niagara peninsula. Samuel Ringgold Ward remarked that St. Catharines was less prejudiced than he had feared but that "[s]ome foolish actions of our people have given occasion for some prejudice".[26] He may have been responding, at least in part, to the events described in this paper.

III. The Crimes, the Culprits and their Friends

A. The Sadleir Burglary

According to trial testimony, on the night of July 20, 1852, Oliver Dawsey entered the home of Charles Sadleir armed with a revolver. Dawsey was 28 years old and African American by birth. He was generally well-dressed and had plenty of money and a supply of tools and keys.[27] He was accompanied to Sadleir's by Jesse Tillason, another

23. Murray, *supra* note 21 at 170.

24. J Walker, *"Race," Rights and the Law*, *supra* note 11 at 122–81, esp 144. See e.g. *"Walten [?] v Babcock"*, in a Benchbook of Christopher Hagerman, (Gore, September 1845), Toronto, Archives of Ontario (RG 22-390-3, box 40, file 2) at 197–200; Ward, *supra* note 15 at 225; Elevator, "Negrophobia on Canadian Steamboats", *Provincial Freeman* (24 June 1854); Gallego, *supra* note 19 at 89–91; Simpson, *supra* note 11 at 384–85, 392; Jacqueline L Tobin with Hettie Jones, *From Midnight to Dawn: The Last Tracks of the Underground Railroad* (New York: Doubleday, 2007) at 164–65.

25. *Supra* note 21 at 169–70, citing Judith Finguard, "Jailbirds in Mid-Victorian Halifax" in RC Macleod, ed, *Lawful Authority: Readings on the History of Criminal Justice in Canada* (Toronto: Copp Clark Pitman, 1988) 64 at 71.

26. Report by Samuel Ringgold Ward (24 March 1853), in Ripley, *supra* note 15 at 257.

27. *"Dawsey"*, *supra* note 1 at 150–55; *Gore-Hamilton Jail Register* (1850–1857), Toronto, Archives of Ontario (RG 20-72-1).

young man of African descent, who remained outside the house, a short way up the street. About half an hour after entering the house, Dawsey returned with loot tied in a stolen coat. The two jumped a wall into a garden, where Dawsey put his boots on and discarded what he did not want. They drank a bit and fled to a secluded place known as Prince's Island just before daylight.[28]

Dawsey separated the solid silver from the silver plate and gave the plate to Tillason. Dawsey put the solid silver into "aqua fortis" to melt it down.[29] For the remainder of the summer, the two went off together some evenings and made a short trip to St. Catharines. They also spent time on the island with two other young African-American men, George Foreman and Joseph Butler, and four white women: Mary Ashby (or Burns), Ellen Cooper, Jenny Russell and Mary Boyle.[30] Ashby, Cooper and Russell were all Irish-born and had spent much of the previous year in jail for drunkenness and disorderly conduct.[31] Boyle said she had only been in jail a couple of times, also for drinking.[32] Given the company she kept, it seems likely that Boyle was also Irish-born. Tillason gave various items to his girlfriend Ashby, to Cooper (who was paired with Foreman) and to Jenny Russell (who had "got with" Dawsey).[33]

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28. Prince's Island was probably a peninsula, a bit of hard ground in a generally marshy area—Coote's Paradise—perhaps a mile off the Dundas road. It belonged (formally or informally) to Windsor Prince. ("*Foreman and Butler*", *supra* note 10 at 174, 177, 183.)

29. "*Dawsey*", *supra* note 1 at 151, 153.

30. *Ibid* at 148–54.

31. Jenny Russell was committed six times between August 1851 and October 1852, generally for thirty-day stretches. During the same period, Ellen (or Helen) Cooper was committed four times for similar offences and durations. I found neither of them in the 1851–52 census (Russell was in jail when the census was taken, and evidently no household for which the record survives included her). Mary Ashby is harder to identify because she used two or more surnames, but by her August 1852 arrest, she had already been committed seven times. See *Jail Register*, *supra* note 27.

32. "*Foreman and Butler*", *supra* note 10 at 178.

33. *Ibid* at 151.

B. The Notman Burglary

Between late July and late August, other burglaries took place. As well, Dawsey moved into the Hamilton house of Thomas Cavill, who was white and English by birth.[34] Dawsey continued to frequent Prince's Island, though, and late in the evening on Thursday, August 19, he left Prince's Island with Jesse Tillason and Joseph Butler. They spoke of making "a raise" in Dundas. In the early hours, William Notman's house was broken into and quantities of silver were taken. Dawsey, Tillason and Butler returned to Prince's Island early the next morning. Tillason came first, carrying a coat (probably Sadleir's) and speaking of winning it in a raffle. Butler followed—and no one said he carried anything. Dawsey came last, carrying a carpet bag, which he forbade anyone to touch. He got a fire going in a stump to melt the silver, and he and Tillason told Jenny Russell and Mary Ashby to stay away. Tillason thought they had had done well for one night, but Dawsey commented that "if it had not been for a damned dog they would have had a better raise".[35] One witness heard mention of a fourth person who had run away when a dog barked. Tillason left on the Saturday for Burford.[36]

On the Monday after the Notman burglary, August 23, Dawsey and Cavill, the white man, left Hamilton for St. Catharines to unload the silver some distance from where they acquired it.[37] A local constable became suspicious of the pair and followed them for the next two days. A St. Catharines innkeeper remarked that they "seemed intimate together", but in public they kept their distance, tending to walk and stand apart. They pretended not to know one another while playing cards with an acquaintance of Cavill's. Dawsey asked where he could sell

34. "*Dawsey et al*", *supra* note 3 at 162; *Jail Register*, *supra* note 27. Cavill probably rented, since his name does not appear on Marcus Smith's contemporary map of Hamilton, which seems to mainly identify owners. *Map of the City of Hamilton in the County of Wentworth Canada West, 1850–51* 2d ed (New York: Ferd Mayer's Lithography). He also does not appear on the individual census returns for Hamilton (*Census of 1851*, *supra* note 1), most of which have survived.

35. "*Dawsey et al*", *supra* note 3 at 162–65.

36. *Ibid.*

37. Hamilton had nine jewelers. See *Census of the Canadas*, *supra* note 14 at 514.

some silver he had got in California, and was referred to three jewellers or watchmakers. While Cavill stood watch outside, Dawsey sought them out, telling one of the jewellers he had got the silver in the form of trinkets from "some Indians near Montreal".[38] The jeweller thought the person who had melted the silver did not properly understand the process. Ultimately, it seems, Dawsey succeeded in selling the silver, for around twenty dollars.[39]

C. Murder on Prince's Island

Meanwhile, a murder took place on Prince's Island. On the day Dawsey and Cavill left for St. Catharines, two young white brickmakers, Hugh Kenny and William Edgar, arrived at Prince's Island, probably at least somewhat inebriated.[40] They may have been looking for more alcohol, female companionship or the revival of an earlier quarrel. Things went badly wrong, especially for Edgar.

With legal questions around premeditation and "the heat of the moment" central to the murder trial that resulted, it should not be surprising that the evidence about earlier quarrels, racist epithets, intoxication and the timing of events was contested. Jenny Russell said

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38. "*Dawsey et al*", *supra* note 3 at 162, 165–69.

39. *Ibid.*

40. "*Foreman and Butler*", *supra* note 10 at 173, 179. "The Queen vs. George Foreman and Joseph Butler – Murder" in "The Assizes", *The [Hamilton] Weekly Spectator* (4 November 1852). They started the day at Simeon Cline's Globe Cottage Inn: see Smith, *supra* note 34; Loreen Jerome, "The Way We Were: Paddy's Tavern", online: Ainslie Wood/Westdale Community Association of Resident Homeowners <http://media.awwca.ca/site_media/uploads/essays/Paddys_Tavern.pdf>. The dying William Edgar was taken to the home of William Kirkendall, where Edgar boarded. The census, taken only eight months earlier, reveals a William Kirkendall with a brickmaking business (*Census of 1851*, *supra* note 1, Hamilton, St George's, Schedule A at 109). Likely, Edgar and Kenny worked for Kirkendall. The census, though, provides no record for Kenny or Edgar, so they may have been transient. In reporting the murder, the Hamilton newspapers noted no respectable associations for either. See "Dreadful Murder", *supra* note 18; "Murder", *The [Hamilton] Weekly Spectator* (2 September 1852). However, one HL Kenny and his wife Jane had a fifteen-year-old Irish-Catholic "housemaid" named Mary Burns, who might have been the Mary Burns/Ashby who was involved in the trial, although the jailer said she was twenty. See *Census of 1851*, *supra* note 1, Hamilton, St Mary's, Schedule A at 198; *Jail Register*, *supra* note 27.

that Foreman and Butler were keen to get revenge against Edgar and Kenny for a black eye Foreman had received about two weeks earlier. Russell indicated that she had seen Kenny twice before at the island but said nothing about Edgar. The accounts of Mary Boyle and Windsor Prince—an African-descended man who had lived on Prince's Island for perhaps ten years, and had what two witnesses had called a "shanty" there—accorded with Russell's. Kenny, however, denied having previously visited Prince's Island.[41]

Ellen Cooper testified for the defence. She said that after Edgar and Kenny arrived, Butler and Foreman went for whiskey and water. Edgar and Kenny were already "pretty tipsy".[42] When Butler and Foreman returned, Kenny and Edgar began cursing and swearing "and called the others niggers for not getting more liquor to drink and they said they would kick the women & pull down Prince's Shanty".[43] Cooper denied there was quarrelling but said she heard Edgar tell someone, "if you do not leave these white girls alone I will pull your black heart out and pull down Prince's Shanty".[44] She claimed she then entered the house and saw no blows struck.[45]

Windsor Prince, in testimony for the Crown, said he was absent when Kenny and Edgar arrived but that as he returned, he saw Edgar and Butler shoving each other. Edgar appeared intoxicated. Prince said

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41. "*Foreman and Butler*", *supra* note 10 at 173–75, 177, 180. Mary Boyle probably lived in Hamilton most of the time. She said she visited Prince's Island only occasionally (*ibid* at 178). I found five potential Mary Boyles in the individual returns for the census taken in January 1852. The first of the two likeliest candidates was widowed, 28, and living in the "House of Industry" in St Patrick's ward: *Census of 1851*, *supra* note 1, Hamilton, St Patrick's, Schedule A at 343. The second was 23 and employed in a household on Barton Street. *Ibid*, Hamilton, St Andrew's, Schedule A at 334. The other three seem less likely: a Scottish Episcopalian daughter sharing her name with her mother, who lived with her parents, and an Irish "Kirk" member living with what were probably her older brother and sister-in-law and their family.

42. "*Foreman and Butler*", *supra* note 10 at 182–83. See also "The Queen vs. George Foreman and Joseph Butler - Murder", *supra* note 40.

43. "*Foreman and Butler*", *supra* note 10 at 182-83.

44. *Ibid* at 183.

45. *Ibid.*

he saw Kenny trying to "subdue the other man Edgar to make him behave himself".[46]

Hugh Kenny, another Crown witness, admitted to seeing Edgar argue with Foreman and Butler but asserted that there was no (physical) "quarrelling".[47] He assured defence counsel that neither he nor Edgar used harshly racist language or objected to the presence of white women with black men. He suggested the others had all been drinking.[48] Mary Boyle affirmed Kenny's testimony and denied that there was quarrelling or angry words of any kind.[49]

Some sort of exchange of words took place perhaps an hour or two after Kenny and Edgar arrived on Prince's Island. Foreman and Butler disappeared behind the building. Edgar and Kenny remained on the other side with their backs to the other two.[50] Foreman and Butler then reappeared and rushed at Edgar and Kenny. Foreman hit Edgar, a "little man", with the metal blade of a shovel. Butler hit Kenny with a stone about the size of a baseball inside a bag.[51] Edgar and Kenny fell. The defence's version of events, put forward by Ellen Cooper and Mary Ashby, attempted unavailingly to pin final responsibility for Edgar's death on Jenny Russell. Whereas Mary Boyle had testified that Cooper conferred with Foreman and Butler behind the house, Cooper, who instead claimed to have been indoors when the blows were struck, said she saw Russell leave and return holding a flatiron.[52] Ashby testified that Jenny Russell swore "that she would kill any white man with a flat iron, and she hit Edgar on the small of the back" as he lay on the ground. Ashby also testified that Foreman called to Butler in an effort to dissuade him from striking Kenny a second time.[53]

Mary Boyle went to Edgar with a pail of water and got Kenny to a bed. When Boyle proposed to go to the nearby toll gate or tavern to

46. *Ibid* at 175.

47. *Ibid* at 172, 174.

48. *Ibid* at 173-74.

49. *Ibid* at 177.

50. *Ibid* at 172, 175, 177.

51. One witness said Butler hit Kenny with a hoe, but the majority described it as something wrapped in cloth or inside a bag. *Ibid* at 172, 175, 177, 179-80.

52. *Ibid* at 182-83.

53. *Ibid* at 183.

"make an alarm", Butler suggested to her a story about "railway men" attacking Edgar and Kenny. When Boyle told him she knew who had done it, he threw a bucket of water on her. When she tried to leave for the tavern, Butler, Foreman and Cooper stopped her. All four stayed in the trees.[54]

Eventually Boyle was permitted to go to Prince's shanty for her bonnet, just as a neighbour's wagon came along, its driver in search of a load of wood. George Foreman then took off into the bush with Cooper and Ashby.[55] It seems that in the course of their escape, they stole some clothes.[56] When Butler made to leave too, Jenny Russell called him to come back or she would call the constables. He put a hand to her throat, and insisted, "it was the rail road fellows who came and did it".[57] With the help of Prince and Russell, the wagon's driver took Edgar and Kenny to the home of the toll gate keeper.[58] The keeper kept Kenny but sent Edgar to a house in Hamilton's west end, where he was boarding and was likely employed. Kenny recovered; Edgar was dead by the morning of Wednesday, August 25.[59]

IV. Policing and Pre-Trial Proceedings

The events that followed shed light on the operation of the changing criminal justice system in Canada West. John Weaver has indicated that Hamilton's efforts to professionalize its policing came in fits and starts, as economics seemed to permit, in the 1840s and 1850s. To suppress demonstrations by striking railway labourers in Dundas in 1851, Hamilton and Dundas cooperated with the railway company to

54. *Ibid* at 178.

55. *Ibid* at 178-80.

56. *Ibid* at 176, 178–80; "*R v Ellen Cooper and Mary Ashby*" in Sullivan Benchbook, *supra* note 1 at 89–90.

57. "*Foreman and Butler*", *supra* note 10 at 179–80.

58. *Ibid* at 176, 179–80.

59. *Ibid* (The man at whose house Edgar died said he died Wednesday "about 9 or 10 o'clock" at 180). The newspapers gave the date of death as Tuesday evening, with the inquest beginning on Wednesday. See "Dreadful Murder", *supra* note 18; "Murder", *supra* note 40.

establish a local police force. By 1853, Weaver writes, Hamilton's force seemed to be established on a "fairly secure basis".[60] The arrests and committals for the Sadleir and Notman burglaries and the Edgar murder appear to have been coordinated between Dundas and Hamilton, and they suggest the operation of a locally rooted, professionalizing form of policing, consistent with Weaver's observations. They also, though, seem to indicate that the prominent men whose houses had been broken into were a force behind the police work.

A. Foreman, Cooper and Ashby Arrested and Committed

The arrests of the burglary and murder culprits began the day after the attack, on August 24. A constable arrested Foreman, Ashby and Cooper in the woods about a quarter-mile north of Dundas. Dawsey and Cavill were still hawking silver in St. Catharines at that time.[61] Foreman, Cooper and Ashby were committed to the Hamilton jail for larceny by a Dundas magistrate, who would have interviewed the prisoners, assessed the Crown's case and sent the documents on to the grand jury. Although Canada West was by this time moving toward appointing lawyers as magistrates, the magistrates involved in these cases were not lawyers but would have been men of connections and substantial property.[62] Foreman had been committed once before, and Ashby and Cooper seven and eight times respectively. The jailer described all three as intemperate.[63]

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60. *Supra* note 5 at 52–53.

61. I did not find the constables in the Hamilton records, and the evidence links them to Dundas (the census records for Dundas have not survived).

62. Murray, *supra* note 21 at 29–33. John Patterson, Thomas McKenzie and George Armstrong, the three magistrates involved with the burglaries and murder, do not appear in the rolls of the law society and therefore must not have been lawyers: email from Paul Leatherdale, Archivist, LSUC (3 August 2011) (on file with the author) [Leatherdale, 3 August]. McKenzie lost to Notman in the election that sent the latter to the legislature in 1848. See Morgan, *supra* note 3 at 35. On Armstrong, see text accompanying note 71.

63. *Jail Register*, *supra* note 27.

B. Tillason Arrested and Committed

Charles Sadleir contacted a constable to investigate the burglary at his house.[64] William Notman, too, gathered information, probably from those involved in investigating the Sadleir burglary, and arresting and committing Foreman, Cooper and Ashby. On Wednesday, August 25, having "procured a search", Notman went to Tillason's mother's house in Burford, along with two Dundas constables and a man who presumably could identify Tillason.[65] Seeing them, Tillason took to the woods but was caught. He initially maintained his innocence, but when his mother "began to upbraid him with his conduct", he relented and said "give up mother and in God's name let the men have the things".[66] She then went to a cupboard and took out a quantity of silver-plated spoons, forks and ladles, none of which were Notman's. Tillason returned with Notman to Dundas and told him on the way that Dawsey had given him the silverware. Notman testified that he then "procured Dawsey and Cavill to be arrested",[67] presumably by applying to one of the magistrates for a warrant. How Notman knew of Cavill is unclear; I infer that Tillason probably mentioned him, since any suspicions Dawsey and Cavill aroused in St. Catharines could hardly have reached Dundas so soon. Exactly what Tillason said about Dawsey and Cavill, however, is unknown. Notman went to St. Catharines in search of his silver. He did not find any "in an unmelted state".[68]

Tillason was not committed to jail until three days later—August 28—when he was examined by a Hamilton police magistrate. Likely in the interim Charles Sadleir had heard about Tillason's arrest (and possibly Dawsey's and Cavill's) from a constable or magistrate and had claimed the coat Tillason was wearing, along with some other items

64. Sadleir said that he sought out the chief constable immediately after discovering the burglary. He appears to have been involved in an investigation of another suspect as well. See "*R v Collins*" in Sullivan Benchbook, *supra* note 1 at 113–20. Other than identifying his own stolen coat, though, the nature of his involvement in the subsequent investigation, arrest and committal of Dawsey and Tillason is unknown.

65. "*Dawsey et al*", *supra* note 3 at 158–59.

66. *Ibid.*

67. *Ibid* at 159.

68. *Ibid.*

including four forks that were recovered from "the girls".[69] Tillason had previously been committed to jail five times, including once for "stealing".[70]

C. Dawsey and Butler Arrested and Committed

Joseph Butler and Oliver Dawsey were arrested, separately, probably on August 25, by the constable Sadleir had contacted upon discovering he had been robbed. Like Tillason, the two were committed to jail by Hamilton's first police magistrate, George H. Armstrong, who was the last person without legal training to hold this office.[71] Butler was arrested on the road between Hamilton and Dundas. Where Dawsey was arrested is unclear; he had a loaded revolver in his carpet bag. Neither had any previous committals.[72]

D. The Coroner's Inquest

Also on August 25, a coroner's inquest was convened.[73] An article published serially during the first year of publication of the *Upper Canada Law Journal* in 1855 set out the duties of the coroner and the nature of proceedings before him.[74] A coroner's inquest was a pre-trial judicial proceeding whose purpose was to examine and reach a verdict on the causes and circumstances of a suspicious death, if a body was available and in a condition to be examined. Inquests were to take place

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69. *Ibid* at 152.

70. *Jail Register*, *supra* note 27.

71. Weaver, *supra* note 5 at 42–43.

72. *Jail Register*, *supra* note 27.

73. "Dreadful Murder", *supra* note 18; "Murder", *supra* note 40. Bray was 31, Anglican, English by birth and married with a substantial household. See *Census of 1851*, *supra* note 1, Hamilton, St George's, Schedule A at 239.

74. A Barrister-at-Law, "On the Duties of Coroners" (1855) 1 UCLJ (os) 45. According to the author, the coroner's inquest was founded in statutes dating back as far as Edward I, which had been modified by the omnibus criminal justice system reform statute of 1841 (*An Act for Improving the Administration of Criminal Justice in this Province*, S Prov C 1841 (4&5 Vict), c 24 [*Criminal Justice Act*]) and, most recently, by *An Act to Amend the Law Respecting the Office of Coroner*, S Prov C 1850 (13 & 14 Vict), c 56. See also Weaver, *supra* note 5 at 27–28.

before a jury of at least twelve members and not more than twenty-four. The coroner himself was not necessarily a "medical man".[75]

Once a jury was duly sworn and a foreman appointed, the jury and the coroner viewed the body. They then (usually in a different room) heard sworn evidence from medical witnesses and others, whose testimony might favour the Crown or a suspect. This testimony was carefully written down and read back to the witnesses; it became part of the documentary record of the inquest. Once the witnesses had been heard, the jury produced a "finding" or "verdict" on the circumstances of the death. A coroner could take recognizances to require witnesses to appear before the grand jury.[76] There is no indication that suspects were examined during an inquest.[77] Warrants for arrest and committal, however, could be issued against a suspect not already in custody. The coroner could also release a prisoner on bail. At the end of the inquest, a package of documents would be delivered to the clerk of the peace, including the information, the evidence from the inquest, the inquisition (i.e. verdict) and the warrant of commitment. The clerk of the peace would then pass these documents to the Crown prosecutor at the beginning of the assizes, to be put before the grand jury.

The question of who served on the coroner's jury about Edgar's murder must remain unanswered for lack of records. The speed with which the jurors were assembled (the two-day inquest began within 24 hours of Edgar's death) suggests that they may have been regulars, called upon at need. The inquest returned a verdict of wilful murder against Foreman and Butler, based on dramatic evidence of the state of Edgar's skull: fractured, with pieces of bone and a great deal of pooled blood between his skull and brain.[78] On Thursday, August 26, the committals

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75. "Some Remarks on Medical Testimony, &c., at Coroners' Inquests" (1855) 1 UCLJ (os) 85. A sample list of new appointees in 1855 shows only some with "M.D." by their names. See e.g. "Appointments to Office, &c" (1855) 1 UCLJ (os) 80.

76. Barrister-at-Law, *supra* note 74.

77. If this had been the practice, I would have expected it to be mentioned in the *Upper Canada Law Journal* article, by analogy to the situation when witnesses and prisoners were examined before justices of the peace: witnesses were sworn but prisoners were not.

78. "Dreadful Murder", *supra* note 18; "Murder", *supra* note 40. The records of the coroner's inquest do not appear to have survived, but two doctors who appeared before the coroner testified at the murder trial about what they found upon examining Edgar

for larceny and assault against Foreman and Butler respectively were replaced by committals for murder, on the coroner's order.[79]

E. Cavill Committed, Finally

It was not until September 9 that Thomas Cavill, the white man, was arrested. William Notman and one of the Dundas constables who had arrested Tillason found Cavill in bed at his Hamilton home. It seems likely that Tillason, travelling with Notman from Burford to Dundas, gave him Cavill's name, though perhaps Tillason did not say enough to warrant charging Cavill immediately. The Hamilton police seem not to have been involved in the arrest.

Notman confronted Cavill about the burglary of his home. In response, Cavill "swore a great oath and said he did not know and if he did know he would not tell".[80] Notman and the constable, however, noticed a bad, festering wound on Cavill's leg, which Cavill attributed to a dog that belonged to someone in Hamilton. Notman, however, testified that he owned a fierce bulldog, which had been highly excited the night of the burglary, and that a neighbour's dog had been stabbed that night. The constable later took Cavill's shoes to Notman's house and matched them to a set of footprints on the window sill. Notman was not sure they matched, but the constable had no doubt.[81]

Despite the suspicious circumstances, Cavill was released and remained at large until September 16, during which time a burglary took place in nearby Wellington Square. It is unclear whether Cavill was involved in this crime.[82] After a process that may have reflected the

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before he died and afterward. One testified that no treatment would have prevented Edgar's death. Pieces of skull lay loose on Edgar's brain, and there was a large pool of blood between the brain and skull. One doctor testified that the fracture was five inches long "and extended from front to ear & downwards to the base of the skull". They agreed that the wound could have been given with an instrument such as the blade of a shovel, if given with great determination. See "*Foreman and Butler*", *supra* note 10 at 181–82.

79. *Jail Register*, *supra* note 27.

80. "*Dawsey et al*", *supra* note 3 at 159–60, 162–63.

81. *Ibid* at 160, 163.

82. According to a letter published in the *Spectator*, dated September 10, this other burglary took place late on September 9 or early on September 10 and was similarly executed, although it involved gold rather than silver. "Robbery at Wellington Square",

thinness of the evidence, he was finally committed by at least two magistrates.[83] The jailer observed that Cavill was 31 years old, read and wrote imperfectly, had never before been committed to jail and was married.[84] No other mention was ever made of a wife.

F. On Pre-Trial Processes

The policing and pre-trial processes in these cases capture a moment in the transition to professionalization that took place between about 1840 and 1870. Susan Lewthwaite has noted that in Burford in the late 1830s, people involved in disputes frequently took the least severe measures that the justice system provided—seeking recognizances to keep the peace, for example, rather than prosecuting for assault, or opting to lay minor charges when more major ones were a possibility.[85] David Murray, too, has remarked that "many criminal offences were never prosecuted" in the Niagara region between 1791 and 1849.[86] The discretion underlying these practices is evident in the cases discussed here. No undercharging took place regarding the clothes Ellen Cooper and Mary Ashby took as they fled. On the other hand, there is no indication that the other burglaries of the late summer of 1852 attracted prosecution.[87] Both burglary complainants seem to have been reasonably affluent lawyers. Notman had recently been a member of the legislature. There is no reason to think that the magistrates or constables considered

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supra note 4. If the dates are correct and Cavill was the culprit, he must have coolly embarked upon another robbery within hours of being examined in connection with Notman's.

83. The jailor's note appears to bear three names, one of which is Thomas McKenzie, before whom Cavill was examined. See *"Dawsey et al"*, *supra* note 3 at 160; *Jail Register*, *supra* note 27. The word "Hamilton" also appears, so perhaps a Hamilton magistrate was present too. The 1841 *Criminal Justice Act* required that if a single justice did not think the evidence raised a strong presumption of guilt, the prisoner was to be taken before two justices of the peace for their determination. See *supra* note 74, s 1.

84. *Jail Register*, *supra* note 27.

85. *Supra* note 5 at 365.

86. *Supra* note 21 at 131.

87. Sullivan's benchbook does not note any other burglary case from the late summer, and no one else was committed to jail for burglary around that time. See *Jail Register*, *supra* note 27.

the hardware store, tin shop or hotel undeserving of redress for their losses. Perhaps some of their stolen goods were found and returned, since some of the goods would have been traceable and unaccounted-for silver was recovered. However, Notman and Sadleir may have been particularly enthusiastic about using legal processes. Certainly Notman was energetic in pursuing Tillason and Cavill and in searching for his silver. Sadleir similarly appears to have spurred the local constables into action.[88] Initiative and connections may have been useful if one wished to mobilize the criminal justice system—at least in burglary cases, where stolen goods would need to be identified.

Perhaps assisted by the clerk of the peace, the magistrates involved in these cases would have prepared most of the burglary and larceny cases, including drafting the indictments.[89] The trial testimony leaves no hint that lawyers were involved before trial, which makes sense, as the office of the County Crown Attorney did not exist until 1857.[90] Certainly there are no obvious signs of defence lawyers engaging in any kind of deal-making. It may be that charges were contemplated against Tillason in the Sadleir burglary but that he managed to avoid them by agreeing to testify against Dawsey, who was convicted.[91] Without Tillason's testimony, little evidence linked Dawsey to Sadleir's home. The examining magistrate would have had to choose either to prepare the case against both men, recognizing that convictions would be difficult to obtain, or to aim to convict the ringleader, Dawsey, while letting Tillason off for that burglary. Butler though, against whom the evidence in the Notman burglary case was weak but whose testimony was not

88. Sadleir not only summoned the constable but appears to have assisted the magistrates in investigating another, earlier suspect regarding the burglary at his home. See "*R v Collins*", *supra* note 64.

89. Paul Romney, "Upper Canada (Ontario): The Administration of Justice, 1784–1850" in DeLloyd J Guth & W Wesley Pue, eds, *Canada's Legal Inheritances* (Winnipeg: Canada Legal History Project, Faculty of Law, The University of Manitoba, 2001) 183 at 197; Weaver, *supra* note 5 at 34.

90. *Ibid* at 82.

91. Jim Phillips notes that this practice was common in late-eighteenth- and early-nineteenth-century Nova Scotia. "The Criminal Trial in Nova Scotia, 1749–1815", in G Blaine Baker & Jim Phillips, eds, *Essays in the History of Canadian Law in Honour of RCB Risk*, vol 8 (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1999) 469 at 487.

needed to convict Dawsey, was not well-positioned to strike a deal. He would stand trial.[92]

V. Race in the Criminal Courtroom

The records of these burglary and murder cases suggest that the witnesses, lawyers and judge all intended not to let prejudice affect the dispassionate gaze of the law. The results of the cases suggest that it did anyway. The only evidence of Butler's involvement in the Notman burglary was that he left the island at night with Dawsey and Tillason and returned with them in the morning. That is all. The evidence against Cavill was more substantial. Dawsey was living in Cavill's house in Hamilton. Notman's silver tray was found in the lane nearby. Cavill kept watch in St. Catharines while Dawsey attempted to sell the silver. Cavill had a suspicious dog bite on his leg, which Notman believed his dog or his neighbour's had inflicted. One constable thought Cavill's shoe fitted a print on Notman's freshly painted window sill, although Notman disagreed. In the end, although the case against Cavill was stronger, only Butler was convicted for the Notman burglary.[93]

Less contentious are Dawsey's conviction for the Sadleir burglary and his guilty plea to the Notman one. It is also unsurprising that Tillason, against whom there was evidence, was convicted alongside Butler for the Notman burglary. Butler's murder conviction may at first be surprising, since he clearly did not attack Edgar. However, Butler was charged and convicted as a "principal in the second degree", which meant he was "present aiding and abetting at the commission of the fact".[94] A person could be a principal in the second degree if she or he

92. On the rise of plea bargaining in middle-tier courts in nineteenth-century Massachusetts, see George Fisher, "Plea Bargaining's Triumph" (2000) 109:5 Yale LJ 857.

93. The charges in the burglary cases were burglary and receiving stolen goods, according to the judge's notes.

94. John Jervis, *Archbold's Summary of the Law Relative to Pleading and Evidence in Criminal Cases*, 9th ed (London: S Sweet, V & R Stevens & GS Norton, 1843) at 4. Sullivan's notes for his charge to the jury state, "[b]ut if there were no assault to mitigate Foreman's act and if the prisoner Butler returned with him, and both came around to commit an assault upon the deceased and his companion, and the deceased were killed by one, the other would be guilty of murder in the second degree". See "*Foreman and*

was intentionally near enough to assist the person who was actually committing the homicide. As an 1843 evidence law text notes:

> So, likewise, if several persons combine for an unlawful purpose, or for a purpose to be carried into effect by unlawful means . . . particularly if it be to be carried into effect notwithstanding any opposition that may be offered against it . . . and one of them, in the prosecution of it, kill a man, it is murder in all who are present, whether they actually aid or abet or not . . . provided the death were [*sic*] caused by the act of some one of the party in the course of his endeavours to effect the common object of the assembly.[95]

The Crown, in effect, argued that if Butler and Foreman were intent on assaulting Kenny and Edgar, and Foreman killed Edgar, then Butler would be guilty of murder too.

It seems that race probably played a role in the outcomes of both trials, possibly more so with respect to the Notman burglary than the murder. But the question is how, especially if the judge did not believe it should. In this part, I begin by describing the roles of judge, juries and counsel in these prosecutions. I then explore the relationships among the prisoners and witnesses, as manifested at trial. I move on to argue that a number of factors determined how race worked in the court. Certain language used—though infrequently—hints that a new "scientific" racism had seeped into contemporary understandings of the meaning of blackness. Also, during the trials and in the newspaper reporting that led up to it, Prince's Island became constructed as a "den of vice", which tainted everyone who frequented it. Furthermore, the practices of the judge and lawyers contributed to the first two factors or at least failed to offset them, especially given what we can infer about the jury.

Butler", *supra* note 10 at 85. An 1865 Upper Canadian magistrates' manual stated the law similarly. See John McNab, *The Magistrates' Manual: Being a Compilation of the Law Relating to the Duties of Justices of the Peace in Upper Canada with a Complete Set of Forms and a Copious Index* (Toronto: WC Chewett & Co, 1865) at 387.

95. Jervis, *supra* note 94 at 5–6. Interestingly, Scottish criminal law seems to have acknowledged that participants could have had different, non-murderous intentions. See John Burnett, *A Treatise on Various Branches of the Criminal Law of Scotland* (Edinburgh: printed for George Ramsay and Company for Archibald Constable and Company, 1811) at 277–80.

A. The Judge

The criminal assize began around October 21 before Mr. Justice Robert Baldwin Sullivan of the Court of Queen's Bench.[96] Sullivan lived in Toronto. He was an able administrator and capable politician whose principles with respect to race and its relationship to law are hard to guess at from his biography.[97] Sullivan was also a cousin of Robert Baldwin, who had just over a year earlier stepped down from the government he led with Louis-Hippolyte La Fontaine.

Justice Sullivan's trial notes are circumspect, although race did figure in them. In his benchbook, no racial or ethnic ascriptions appear in the cases against Dawsey alone or against Ellen Cooper and Mary Ashby. However, perpendicular to the style of cause in his notes on the Notman case, Sullivan wrote "colored" and "white" in small print. It may be that, as the case began, he looked down at the three accused and entered these descriptions in his notes to help him remember who was who. He made no such notes about the two witnesses who were definitely of African-descent, perhaps because he forgot or considered it irrelevant. He may have known he would remember that the African-descended witnesses testified last.[98] His use and non-use of racial classifications in the burglary cases are hard to interpret. In the murder case, though, beneath the style of cause, Sullivan wrote, "The Prisoners are both colored men". Did he anticipate some future use being made of this information, such as in sentencing, commutation or pardoning? Race was hidden in Sullivan's notes of the Sadleir burglary case, evident but unclear in its meaning in the notes on the Notman case and worth stating clearly to himself in the murder case.

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96. "Assize Intelligence", *The [Hamilton] Weekly Spectator* (21 October 1852).

97. See Victor Loring Russell, Robert Lochiel Fraser & Michael S Cross, "Sullivan, Robert Baldwin", online: Dictionary of Canadian Biography <http://www.biographi.ca>.

98. "*Dawsey et al*", *supra* note 3 at 157. Only one witness appeared after the two African-descended witnesses: Lewis Cook, who lived next door to Dawsey and Cavill. He does not turn up in the census, so I know nothing about him. I also do not know whether any of the St Catharines witnesses were of African descent, since the census of that town has not survived. Windsor Prince did not testify last in the Foreman and Butler case.

In any case, Justice Sullivan said nothing during the trial to suggest that he saw it as appropriate to treat African-descended people differently from anyone else. He charged the grand jury in detail on the elements of murder and burglary, but he did not suggest that crime in the cities was attributable to anything other than the density of the population—not immigration, not race.[99]

In the early 1850s, Upper Canadian law drew almost no formal black-white distinctions.[100] The northern United States, however, did.[101] It is unclear how much the Upper Canadian situation arose from, or was maintained because of, a principled commitment to formal equality for African-descended people and how much it was an accident of history. Bradley Miller has described Upper Canadian judges in the 1830s and 1840s scrupulously—and ironically—refusing to consider the implications of race in extradition decisions involving escaped slaves alleged to have committed crimes.[102] Egerton Ryerson, as superintendent of schools in Canada West, disliked the idea of allowing communities to establish separate schools for black children; in 1847, he wrote to the attorney general in dismay at the possibility that "invidious" distinctions

99. "Assize Intelligence", *supra* note 96 at 6–7.

100. Hepburn, *supra* note 15 at 114–21; B Walker, *Race on Trial*, *supra* note 16 at 33–37; Lyndsay Campbell, "The Northern Borderlands: Canada West" in Tony Freyer & Lyndsay Campbell, eds, *Freedom's Conditions in the U.S.-Canada Borderlands in the Age of Emancipation* (Durham, NC: Carolina Academic Press, 2011) at 195. The treatment of indigenous people deserves separate consideration, since racial understandings intersected with conceptions of nationhood, religion, and rights deriving from historical relationships. School acts passed starting in the late 1840s began to make provision for a "local option" over the establishment of separate schools for black children. See generally *supra* note 20.

101. See Hepburn, *supra* note 15 at 95–101; Stephen Middleton, "The Judicial Construction of Whiteness in the Borderlands of the Northwest Territory, 1803–1860", in Freyer & Campbell, *supra* note 100; Michael A Elliott, "Telling the Difference: Nineteenth-Century Legal Narratives of Racial Taxonomy" (1999) 24:3 Law & Soc Inquiry 611; Blair LM Murphy, *Right to Ride: Streetcar Boycotts and African American Citizenship in the Era of Plessy v. Ferguson* (Chapel Hill: University of North Carolina Press, 2010) at 16–32.

102. "British Rights and Liberal Law in Canada's Fugitive Slave Debate, 1833–1843" in Freyer & Campbell, *supra* note 100 at 141.

drawn on the basis of race would be introduced into the statute book.[103] I have hypothesized that a formal preference for neutrality or silence on racial difference (or at least on "blackness") may have been a commitment of an earlier Upper Canadian constitutionalism that was understood as a mark of difference from Americans in the pre-Confederation period but dissipated in the decades thereafter.[104]

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103. Simpson, *supra* note 11 at 244. Ryerson suggested, in the same letter, that a law accommodating Upper Canadians' racism would be "a disgrace to our Legislature". See K McLaren, *supra* note 20 at 73.

104. Campbell, *supra* note 100 at 201–02. I have at times referred to this commitment as "colour-blindness". The word "blindness" signals the insensitivity to the realities of prejudice that I think accompanied the ideological commitment. The provenance of this commitment is unclear. A discomfort with legal distinctions drawn on the basis of race or religion would certainly be consistent with the Irish inflection of British constitutionalism. See John McLaren, "The Rule of Law and Irish Whig Constitutionalism in Upper Canada: William Warren Baldwin, the 'Irish Opposition,' and the Volunteer Connection" in Jim Phillips, R Roy McMurray & John T Saywell, eds, *Essays in the History of Canadian Law: A Tribute to Peter N Oliver*, vol 10 (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2008) 320; John McLaren, "The King, the People, the Law . . . and the Constitution: Justice Robert Thorpe and the Roots of Irish Whig Ideology in Early Upper Canada" in Jonathan Swainger & Constance Backhouse, eds, *People and Place: Historical Influences on Legal Culture* (Vancouver: UBC Press, 2003) 11 at 11–12, 20–21. The Irish connection is complicated, though; in the United States, as Noel Ignatiev has shown, Irish immigrants' response to the oppression they faced, on the basis of race and religion, was often to differentiate themselves from African Americans and promote the oppression of the latter. *How the Irish Became White* (New York: Routledge, 1995). Janet Azjenstat's interpretation of Lord Durham's "liberal" approach to English-French inequalities in the late-1830s resonates too. According to Azjenstat, Durham thought the legal system had to treat all the same way to prevent exploitation. *The Political Thought of Lord Durham* (Montreal: McGill-Queen's University Press, 1988) at 7–10. It seems likely that colour-blindness—at least with respect to African-descended people—in Upper Canada found support in a combination of constitutional principles and the tense nineteenth-century Anglo-American politics around abolitionism, in which the British, taking the moral high ground after abolishing slavery in the empire in 1834, determined to keep the pressure on Americans. See Van Gosse, "'As a Nation, the English Are Our Friends': The Emergence of African American Politics in the British Atlantic World, 1772–1861" (2008) 113:4 Am Hist Rev 1003.

Contemporary African-descended commentators certainly understood "British justice" to be officially colour-blind.[105]

B. The Juries

Blake Brown has described the process of jury selection under the new 1850 *Jury Act* and the political pressures that led to that legislation.[106] Under the *Act*, eligible jurors were drawn from the top three-quarters of the assessed residents on the tax assessment roles for the town, city, village or township. Eligible jurors were identified by a committee of selectors, elected township officials who considered "the integrity of their characters, the soundness of their judgments, and the extent of their information".[107] A wide range of people were exempt, including those over sixty years of age, priests, physicians, constables, teachers, fire fighters, millers, judges, lawyers and active seamen. Two-thirds of the top three-quarters of the assessed residents were selected, and they were allocated to grand and trial jury pools for the superior and inferior courts. A ballot process was used to identify the actual men to empanel.[108]

The names of the sixteen grand jurors who indicted Dawsey and the rest appeared in a newspaper.[109] The grand jury for this assize seems to have been composed mainly of at least reasonably prosperous farmers and merchants—the sort of group that the Legislative Council of Upper

105. See e.g. JE Ambrose, "Colored People in Canada—Grants of Land to Them—Settlements—Difficulties—Advantages &c", *Voice of the Fugitive* (12 March 1851) and "Law Respecting Colored People in Canada", *Voice of the Fugitive* (1 January 1852).

106. R Blake Brown, *A Trying Question: The Jury in Nineteenth-Century Canada* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2009) at ch 6.

107. *On an Act for the Consolidation and Amendment of the Laws Relative to Jurors, Juries and Inquests in that Part of this Province called Upper Canada*, S Prov C 1850 (13 & 14 Vic), c 55, s 10 [*Jury Act*].

108. Brown, *supra* note 106 at 136–37 ("Township committees included the mayor or townreeve, the village, town, city or township clerk, and the local assessor or assessors" at 136).

109. There were supposed to be 22 plus a foreman, but seven were absent. See "Assize Intelligence", *supra* note 96.

Canada in the mid-1830s thought should supply jurors.[110] It seems to have had few men with Irish backgrounds and probably no one who was African-descended either, although I cannot say absolutely. As far as I can determine, five of the jurors were Protestant and married, and they possessed the sort of affluence signalled by residence in stone houses, the retention of servants or employees, or the ownership of more land than usual.[111] One juror could have been of African descent, but his name,

110. Murray, *supra* note 21 at 53, citing Upper Canada, Legislative Council, *Proceedings of the Legislative Council of Upper Canada on the Bill sent up from the House of Assembly, entitled "An Act to Amend the Jury Laws of this Province"* (Toronto, 1836).

111. Assuming (based on an email from Blake Brown dated 6 October 2011 (on file with the author)) that the eligible jurors must have lived in the United Counties of Wentworth and Halton, those I believe I can conclusively identify are Jacob Terryberry, a 45-year-old American-born Methodist farmer from Barton whose highly productive farm was among the largest landholdings in the vicinity. See *Census of 1851*, *supra* note 1, Wentworth, Barton, Schedule A at 5, Schedule B at 79; James Colville from nearby Binbrook who appears to have been one of the more prosperous farmers in the area (*ibid*, Wentworth, Binbrook, Schedule B at 5); HW Ireland, an English-born Anglican merchant of 34, who lived in a stone house on King Street (*ibid*, Hamilton, St Patrick's, Schedule A at 37); Duncan Bell, a 33-year-old Baptist, Scottish-born merchant, who lived in a two-story stone house on John Street (*ibid*, Hamilton, St Patrick's, Schedule A at 377); and Thomas Morris, a Wesleyan Methodist wheelwright, born in Ireland, who lived in West Flamboro and owned three shops (*ibid*, Wentworth, Flamboro West, Schedule A at 85). The majority of these men were married with children and had others in their households who were generally employees.

One other juror was named Robert Hall, for whom the census indicates two possibilities. The likelier one is a 39-year-old Irish-born Methodist carpenter, who lived in St Mary's ward (*ibid*, Hamilton, St Mary's, Schedule A at 189). The other is a 22-year-old English-born tin smith (*ibid*, Hamilton, St Mary's, Schedule A at 14). He seems substantially younger and less affluent than the other jurors and therefore less likely to have been the grand juror. There are also two possibilities for a juror named James Harvey: a farmer from Barton with middling land holdings and productivity (*ibid*, Wentworth, Barton, Schedule B at 77); and a 26-year-old English-born Anglican mariner, who lived on James Street in St Andrew's ward (*ibid*, Hamilton, St Andrew's, Schedule A at 216). An eighth juror, Joseph Clement, may have been a 32-year-old Wesleyan Methodist, born in Upper Canada, who lived in St Patrick's ward and owned a carriage "for pleasure" and two-thirds of an acre of land, which was a larger property than most in that part of Hamilton (*ibid*, Hamilton, St Patrick's, Schedule A at 158); Smith, *supra* note 34. There was also a Brantford postmaster named Clement. He espoused no religion, but the rest of his family was Methodist. He and his family were born in Canada West. See *Census of 1851*, *supra* note 1, Brant, Brantford, Schedule A at 69. In 1852 (but not 1851 or

John Willson, was a common one. He could have been a 45-year-old cook, born in Maryland, who lived with his family in a frame house in St. Lawrence ward; four of the five family members were identified as "colored". More likely, he was a white, 34-year-old Methodist merchant who lived in St. Mary's ward with his wife and family in a three-story brick house.[112] It is impossible to say with certainty that an African-descended man sat on the grand jury—the economic position of John Willson the cook makes it doubtful.

Probably few African-descended people were eligible for jury duty in Hamilton or nearby Barton, in Wentworth county. A total of 221 people were identified as "colored" in the Hamilton census, although there are a few households for which these designations are unclear.[113] Hamiltonians filled out their own census forms, whereas enumerators compiled census returns outside of urban areas. In Hamilton, only 69 men identified as "colored" were between 21 and 60 years of age. At least 64 of these were born in the United States. One other was born in St. Catharines, one in Ireland, and the last was not specified. At least one man—Benjamin Harris—was naturalized, as the *Jury Act* required, but he was a Crown witness.[114] Seventeen of the 69 lived in the

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1853) Brant was a Unified County, with Wentworth and Halton. A number of cases from Brantford appeared in Sullivan's benchbook. I suppose that its residents might have been potential jurors for the fall 1852 Hamilton assize.

112. *Ibid*, Hamilton, St Lawrence, Schedule A at 9; (*ibid*, Hamilton, St Mary's, Schedule A at 444).

113. The published census records note that there were 51 "colored" males and 47 "colored" females. See *Census of the Canadas, supra* note 14 at 307. However, even though some individual returns have not survived, I found 221 people identified as "colored". *Census of 1851, supra* note 1, Hamilton. Benjamin Drew placed the number at 274 in 1854. *Supra* note 16 at 118.

114. *Jury Act, supra* note 107, s 9. I assume that the selectors were careful about applying this qualification, as with all others. Determining conclusively who had not been naturalized before 1852 is probably impossible owing to the limitations of record-keeping, but I ran the names of the 69 through the database of Library and Archives Canada, which contains 3 344 names, naturalized from 1828 to 1850. The only one of the 69 who can be decisively identified as naturalized is Benjamin Harris, a Hamilton gunsmith who testified in the Notman case. See *Upper Canada and Canada West Naturalization Records* (1828–1850), Ottawa, Library and Archives Canada (RG 5 B 47, vol 7, file 3). Perhaps another four may have been naturalized (one of these from Barton), but the commonness of their names makes certainty impossible.

households of other people and therefore were probably not assessed.[115] There were two ministers, so they were ineligible. Twenty of the 69 were labourers. Seven were cooks, butlers or waiters. Many others had skilled trades (six were shoemakers) and may have had their own shops, but they seem unlikely to have had much wealth. The data for the 19 black men between 21 and 60 in two other Wentworth townships, Ancaster and Barton, is similar: mainly they were labourers. Seventeen were identified as the heads of their households. Only one was born in Canada West, and the rest in the United States.[116] Taking all of these factors together, it appears that very few African-descended men were eligible to sit on juries at this assize.

No record of the trial jurors seems to have survived, so it is not possible to say whether the trial jury's composition was similar to that of the grand jury or whether the selectors tended to place more prosperous or prominent (or white or Protestant) men on grand juries.[117] According to the *Jury Act*, the selectors would have compiled jury pools for the fall assize in September, shortly after the coroner's inquest had sent Butler and Foreman to trial for a well-publicized murder.[118] Knowledge of these events could have affected the distribution of names among the different jury pools. Although we know who was ineligible for jury service and what the jurors' relative economic status was, ultimately it is not possible to be sure who the jurors were or where they came from.

115. Mary Stokes explains that while tenants were assessed on the value of their leases, boarders, who probably would not have had leases, would therefore normally not have been assessed, unless they had businesses or wealthy wives or some other unlikely situation. Email from Mary Stokes, candidate for degree of Doctor of Philosophy in Law, Osgoode Hall (23 October 2011) (on file with the author).

116. *Census of 1851*, *supra* note 1, Wentworth, Ancaster and Wentworth, Barton.

117. This was certainly done in eighteenth-century Halifax. See Jim Phillips, "Halifax Juries in the Eighteenth Century" in Greg T Smith, Allison N May & Simon Devereaux, eds, *Criminal Justice in the Old World and the New: Essays in Honour of JM Beattie* (Toronto: Centre of Criminology, University of Toronto, 1998) 135 at 147–56.

118. *Jury Act*, *supra* note 107, s 11.

C. *The Role of Counsel and the Form of the Trial*

One newspaper report on the murder trial implies that it took place in a single day.[119] If the length of the judge's notes is an indication, it took about the same length of time as the trial for the Notman burglary and about one-third longer than Dawsey's trial for the Sadleir burglary. Jim Phillips has suggested that defence counsel in Nova Scotia in the late-eighteenth and early-nineteenth centuries generally did not lead witnesses through their testimony.[120] In these cases, Justice Sullivan did not explicitly note counsel's questions, but a certain amount of jumping around in the testimony and an almost total lack of hearsay would seem to indicate that counsel on both sides did guide the witnesses and ask clarifying questions. Some witnesses were asked to respond to the evidence of others. Cross-examination was mainly for clarification.

The lawyer for the Crown that term was Samuel Black Freeman, from Barton.[121] He was called to the bar in 1840 and was made a bencher of the Law Society of Upper Canada in 1850. He was a founding member of the Anti-Slavery Society of Canada in 1851, and within two years he was representing John Anderson, a former slave whose extradition case was one of the most controversial of the period.[122] Paul Romney has remarked that Crown counsel, who were often ad hoc appointees, would arrive in court ignorant of the case facing them and therefore reliant on the preparatory work done locally.[123] Freeman's affiliations suggest that he must have been concerned about anti-black prejudice. How he happened to be serving as Crown counsel at this

119. "Assizes", *Gazette* (1 November 1852).

120. Phillips, "Criminal Trial", *supra* note 91 at 485.

121. See also "The Queen vs. William McCabe - Murder" in "The Assizes", *supra* note 40; "The Queen vs. John Tipple - Murder", in *ibid.*

122. *Census of 1851*, *supra* note 1, Wentworth, Barton, Schedule A at 67; "The Queen vs. George Foreman and Joseph Butler - Murder", *supra* note 40; Leatherdale, 3 August, *supra* note 62; Paul Finkelman, "International Extradition and Fugitive Slaves: The John Anderson Case" (1992) 18:3 Brook J Int L 765 at 767; Robert C Reinders, "Anderson, John", online: Dictionary of Canadian Biography <http://www.biographi.ca>. The Anti-Slavery Society of Canada, founded in 1851, was "the last of several short-lived anti-slavery societies in Canada". "The Anti-Slavery Movement in Canada", online: Library and Archives Canada <http://www.collectionscanada.gc.ca>.

123. *Supra* note 89 at 201; see also Weaver, *supra* note 5 at 82–83.

particular assize is unclear, but he was an apt choice to counter any appearance of racial prejudice in the proceedings.

Those tried for felonies, as well as for summary conviction offences, had a right to counsel in Upper Canada by 1841.[124] It is not safe to assume, however, that those accused of felonies were in fact represented by counsel.[125] In the murder case, Foreman was represented by D.B. Read, a Toronto-based lawyer who had been called to the bar in 1845. How he became involved in this case is unknown, but he also defended another prisoner accused of murder at the same assize.[126] "M. Martin", who defended Butler in the murder case, does not seem to have been an Upper Canada lawyer.[127]

One witness in the Notman case mentioned offering to procure a lawyer for Dawsey, and a couple of fairly substantial cross-examinations during the Sadleir trial signal that Dawsey probably did in fact have one. A Dundas innkeeper prosecuted at the same assize for assaulting a constable also had counsel.[128] In contrast, it is doubtful that any defence counsel was present at the Notman burglary trial, in which Dawsey pleaded guilty. There was only one, remarkably ineffective cross-examination in that case.[129] There is no indication in the judge's records of the larceny prosecution that Ellen Cooper or Mary Ashby had legal representation. On the whole, these trials appear to have been partly professionalized, with Crown counsel dominating the proceedings and probably bringing more local knowledge to the cases than did the defence. Very few witnesses were called for the defence: one in the prosecution of Dawsey for the Sadleir burglary and two for Foreman and Butler. No one testified for the defence in the Notman case or in the

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124. See *Criminal Justice Act*, *supra* note 74, ss 9–10.

125. Speaking generally of England and Nova Scotia, Jim Phillips has suggested that counsel took part in by no means all criminal trials in the mid-nineteenth century. "Criminal Trial", *supra* note 91 at 469.

126. "The Queen vs. John Tipple - Murder", *supra* note 121.

127. "The Queen vs. George Foreman and Joseph Butler - Murder", *supra* note 40. Martin does not appear in the rolls of the law society: Leatherdale, 3 August, *supra* note 62.

128. "*R v Collins*", *supra* note 64.

129. When the examining magistrate was asked if he was sure that Cavill's statement was in his own words he said it was. See "*Dawsey et al*", *supra* note 3 at 160.

larceny prosecutions of Ashby and Cooper. The absence of defence witnesses probably went hand-in-hand with the absence of defence counsel.

In none of these cases is there any sign that the accused addressed the jury.[130] As well, none of the cases bore any sign of character evidence brought in favour of the accused.[131] Without effective counsel, the accused stood mute, entirely dependent on the fairness of the judge and prosecutor.

D. The Witnesses

Witness testimony reflected ties of romance and friendship within the Prince's Island community that transcended race and ethnicity. The burglaries, and especially the murder, divided that community. Dawsey was the outsider; Cooper, Foreman and Ashby stood together; and the others made their own way through the testimonial thicket. In the Sadleir burglary trial, Tillason, Cooper and Ashby testified against Dawsey, and Butler testified in his defence. Jenny Russell, who had earlier "got with him", did not testify. Dawsey otherwise stood alone, depicted as the director of operations (as he probably was).

In the Notman case, Foreman testified against Tillason; Mary Ashby, who had been romantically involved with him, did not. Jenny Russell testified against both Tillason and Butler. Foreman and the women did not know Cavill and said nothing that pertained to him, aside from Foreman's references to overhearing Dawsey and Tillason mention that someone ran away when a dog barked.

In the murder trial, Jenny Russell and Mary Boyle presented themselves as horrified by the assault on Edgar and Kenny and as having sought to raise the alarm and care for the injured, although neither knew Edgar. Ellen Cooper and Mary Ashby, testifying for the defence, attempted to pin the murder on Jenny Russell, suggesting that she

130. According to Jim Phillips, in late-eighteenth and early-nineteenth-century Nova Scotia, prisoners themselves tended to address the jury at the end of the trial, as indicated by words such as "the prisoner put on his defence", which frequently appeared in one judge's surviving benchbooks. See "Criminal Trial", *supra* note 91 at 493–94, 510 n 122.

131. This situation also represents a change from what Phillips has described. *Ibid* at 496–97.

delivered the terminal blow to Edgar with a flatiron. Russell and Boyle denied this, placing Cooper behind the house conspiring with Butler and Foreman. In any case, the state of Edgar's skull was so appalling that the flatiron theory was unpersuasive.

At least two African-descended Hamilton residents testified in the Notman burglary trial, both for the Crown. Peter Price, a cab driver in his mid-thirties who lived with his family in St. Andrew's ward, denied knowing the prisoners. He thought he had seen Cavill in August "pretending to be in a great hurry to get on the boat". Price drove Cavill and Dawsey to the boat that took them to St. Catharines.[132] The second witness of African descent was Benjamin Harris, an older, Kentucky-born Hamilton gunsmith and community leader.[133] He knew Dawsey and Tillason and recognized Cavill. Cavill's house was probably near Harris's shop. Harris testified that he visited Dawsey in jail and offered to get him a lawyer. Dawsey told Harris where to find a certain silver tray belonging to William Notman. Harris took it to George Notman, presumably a relative of William's. Harris's intentions are unclear; perhaps he wanted to ensure that justice was done—that the evidence was adduced and that Dawsey had legal assistance.[134]

E. The Language of Race in the Courtroom

The *Spectator* reported that Samuel Freeman opened the murder prosecution by remarking "that he had no desire to say a word which would create a feeling of prejudice against the prisoners". He made a similar statement in another case and may therefore simply have been admonishing the jury not to pre-judge the case for any reason.[135]

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132. "*Dawsey et al*", *supra* note 3 at 169. Peter Price, his family and employees lived on Hughson Street. Price ran what the census enumerator called "a house of entertainment". See *Census of 1851*, *supra* note 1, Hamilton, St Andrew's Schedule A at 516.

133. *Ibid*, Hamilton, St George's, Schedule A at 122; Adrienne Shadd, *The Journey from Tollgate to Parkway: African Canadians in Hamilton* (Toronto: Natural Heritage Books, 2010) at 99–100, 104, 131–32; *Naturalization Records*, *supra* note 114.

134. "*Dawsey et al*", *supra* note 3 at 169.

135. "The Queen vs. George Foreman and Joseph Butler – Murder", *supra* note 40; *c.f.* "The Queen vs. John Tipple – Murder", *supra* note 121.

However, given his background and interests, it is likely that he was concerned about racial prejudice.

Language used in other newspaper reports gives further indications of how race was understood in the courtroom. The fighting epithet "nigger" appears in the testimony as a term that, if spoken by Edgar or Kenny, might have provoked Butler and Foreman to murderous rage. Kenny denied uttering it. The *Spectator* put it in quotation marks: a loaded word, one to be printed with care.[136] The *Gazette* did not print it. The terms "black" and "white" were also used by witnesses, often when they did not know the people they had seen.

Eve Darian-Smith has said that the term "negro" was associated with the emerging "scientific racism" of the mid-century, which justified racially-based oppression and discrimination on the basis of purported biological difference, and she has noted that the word came to connote troubling moral characteristics.[137] Justice Sullivan wrote the word only once, identifying Windsor Prince parenthetically as "a negro".[138] In recounting Kenny's testimony, the *Spectator* wrote that "none of the white men took hold of the negroes".[139] In what appears closer to verbatim notes, Justice Sullivan did not use this term.[140] I suspect the newspaper's reporter inserted the word in summarizing the testimony. The term was an old one, but it is possible that the term's newer, pseudo-scientific associations may have been in the air.

"Colored" was the most commonly used term. Its use intimated an awareness of possible racial prejudice. The *Spectator* used it to signal

136. "The Queen vs. George Foreman and Joseph Butler - Murder", *supra* note 40; "*Foreman and Butler*", *supra* note 10 at 174.

137. Darian-Smith cites historian Catherine Hall as arguing that the 1849 essay "Occasional Discourse on the Negro Question", by the Scottish intellectual Thomas Carlyle, "marked the moment when it became legitimate for public men to profess a belief in the essential inferiority of black people". Eve Darian-Smith, *Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law* (Oxford: Hart Publishing, 2010) at 133. Jamaica's Governor Edward John Eyre is quoted as saying in 1865 that the "negro" was irrational and impulsive, easily stirred to become a "perfect fiend". *Ibid* at 142. Jeffrey McNairn notes a "generalized hardening of racial attitudes" after Carlyle's essay appeared. *Supra* note 16 at 52.

138. "*Foreman and Butler*", *supra* note 10 at 174.

139. "The Queen vs. George Foreman and Joseph Butler - Murder", *supra* note 40.

140. "*Foreman and Butler*", *supra* note 10 at 172-83.

racial neutrality.[141] The *Gazette* used it too, both in the context of the trials and generally.[142] Sullivan wrote it below the style of cause in his notes of the murder trial. Mary Boyle and another witness used it.[143] A year later, when Dawsey made the news again, an admiring account used the term "colored"; a disapproving account called him "a negro convict".[144]

Pejorative language and references to Irishness were notably absent from the prosecution of the women for larceny. Exactly how their Irishness affected the trial is difficult to assess, since their lifestyle, activities and associations were otherwise so disreputable. John Weaver's work indicates that the Irish of Hamilton were understood to be trouble; "they were singled out for . . . moral order charges to a far greater extent than any other nationality".[145] Irish women made up about sixty per cent of the women arrested from 1832 and 1851, three-quarters of the women committed for drunk and disorderly conduct, and four-fifths of the women arrested for vagrancy. They tended to be more likely than other women to be committed more than once. As Weaver aptly remarks, "[y]oung and poor, these women lacked subtlety in their relationship with community values".[146] Of course, many people associated with the trial—such as Sadleir and Sullivan—had, or likely had, Irish roots. The grand jurors tended not to be Irish. It is unclear whether the women were Catholic. Given their ages, they may have been Irish famine refugees. These women's Irishness was a marker that may have attracted suspicions of moral turpitude.[147]

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141. See e.g. "Emancipation Day", *supra* note 18; "Murder", *supra* note 40.

142. See e.g. "Dreadful Murder", *supra* note 18.

143. "*Foreman and Butler*", *supra* note 10 at 177; "*Dawsey et al*", *supra* note 3 at 167.

144. "Extraordinary Industry!", *Dundas Warder* (11 November 1853); "One Hundred Dollars Reward" (*ibid*). The 1851-52 city census forms used simply "colored", but the ones used elsewhere specified "Colored Persons - Negroes".

145. *Supra* note 5 at 53.

146. *Ibid* at 54.

147. On the divisions among Irish groups, see Elizabeth Jane Errington, "British Migration and British America, 1783–1867" in Philip Buckner, ed, *Canada and the British Empire* (New York: Oxford University Press, 2008) 140 at 155–57. In Canada West, both tension and co-operation between Irish immigrants and people of African descent have been noted by contemporary commentators and scholars since. See e.g. Scoble, "Refugee Slaves in Canada", *Voice of the Fugitive* (20 May 1852); letter from Samuel Ringgold Ward

On the whole, there is little sign of the language of race in the trial records. Nowhere was race explicitly blamed for a propensity to vice or violence. A commitment to formal racial neutrality that was both principled and consciously maintained seems to have characterized the trials.

F. The Taint of Prince's Island

I strongly suspect that a critical factor leading to Butler's conviction and Cavill's acquittal was the characterization of Prince's Island as it emerged before and during the trial, through newspapers and testimony. Barrington Walker has observed that "[g]eographical space is yet another mark of difference through which groups experience the historical social process of racialization".[148] He urges that "we must think about space as something that is socially produced, both in a material sense (lower-class people live in slums as a result of class bias) and a symbolic sense (certain spaces come to represent people who are diseased, poor, filthy, dangerous, or prone to vice)".[149] Prince's Island lay outside the boundaries of Hamilton, far from the neighbourhoods where people like Peter Price and Benjamin Harris lived and worked. The characterization of Prince's Island as a hellish "den of vice" began with the newspapers' reports on the coroner's inquest. The "diabolical" murder took place in a "misnomered place", where "an aged colored man named Prince" resided, "whose shanty is a den of infamy, where the most wretched and abandoned creatures of both sexes are wont to assemble". The two "white men" came, some "jostling took place" with the "two colored men", who retired and then returned "to gratify their fiendish desires".[150] The *Spectator*'s account was similar. Prince, a "decrepid [*sic*] colored man", lived "in a log house, on the further side of the Marsh, about a mile west of the city, where the most abandoned of

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to Benjamin Coates (October 1852) in Ripley, *supra* note 15 at 240; Bruce S Elliott, *Irish Migrants in the Canadas: A New Approach* (Montreal: McGill-Queen's University Press, 1988) at 137; J Walker, *A History of Blacks in Canada, supra* note 20 at 101–02; Winks, *Blacks in Canada, supra* note 11 at 144–45; Simpson, *supra* note 11 at 259.

148. B Walker, *Race on Trial, supra* note 16 at 67.

149. *Ibid.*

150. "Dreadful Murder", *supra* note 18.

both sexes are in the habit of congregating".[151] The women were "white" and "abandoned", but their Irishness was not mentioned.[152] The reader might have wondered why two white bricklayers would visit the island. Though Kenny and Edgar were not blameless (having associated with Butler and Foreman before) the newspapers implied that they did not deserve a "fiendish" attack while their backs were turned.

In oral testimony, Prince's Island emerged bit by bit as a place of resort for the disreputable: young women of "bad character", who drank whiskey, slept in the bush during the day, and consorted with young black men, who broke into houses at night and melted stolen silver in tree stumps in the afternoon. Idleness and thievery would have been particularly disturbing in black men.[153] Whiskey clearly signalled disorderliness.

The cross-racial relationships apparent in the testimony were certainly anomalous. According to Hamilton census returns, only 25 of the 2 333 households for which records survive were racially mixed. Few white people had black employees, and cross-racial marriages were scarce.[154] The relationships between Dawsey and Russell, Tillason and Ashby, and Foreman and Cooper would surely have struck contemporary observers as unusual. Their extramarital nature would have compounded the anomaly, making them entirely disreputable. Prince's Island emerged as a site of depravity, but not simply because the "colored" went there: blackness was part of the bundle of factors that

151. "Murder", *supra* note 40.

152. *Ibid*; "Dreadful Murder", *supra* note 18.

153. On British travel writers' contributions to the discussions of whether or not those freed from slavery would voluntarily engage in free labour, see McNairn, *supra* note 16. On race, gender, idleness and work in the post-bellum United States, see Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage and the Market in the Age of Slave Emancipation* (New York: Cambridge University Press, 1998).

154. Irish Protestants occasionally shared quarters with African-descended people, but Irish-Catholic adults usually did not: two Irish Protestants were among the approximately ten white women who were married to "colored" men or who were widowed mothers of "colored" children. All of the white men whose households contained the thirteen "colored" adults were Protestant, and at least three came from Ireland. Eight people not marked as "colored" lived in households headed by "colored" people, including three female Irish-Catholic teenagers. See *Census of 1851*, *supra* note 1, Hamilton.

gave Prince's Island its meaning. Race and the crossing of racial boundaries became intertwined with the disreputability of the activities associated with this place.

The circumstantial evidence against Cavill was admittedly weak. All that placed him at Notman's house was a footprint (which may or may not have matched) and a suspicious dog bite. The only other evidence against him was that he helped Dawsey fence the silver. A jury of upstanding male citizens would surely not have hesitated to convict and jail a white man who had broken into the houses of prominent men, stolen their family silver, melted it down and hawked the lumps. But the evidence was not strong enough to convict Cavill, and he did not bear the taint of Prince's Island. Butler, on the other hand, who did socialize there, was found guilty of the Notman burglary solely on the basis that he left with Dawsey at night and returned with him in the morning. In his case, that was enough.

G. Lawyering

The testimony in the trials resulting from the Notman burglary and the murder was extensive and must have been confusing. What exactly Justice Sullivan told the jury in these cases is somewhat unclear; he may have said more than his notes suggest. The notes, though, indicate that he spoke carefully. In the Notman burglary trial, he cautioned the jury "not to allow the confession of Dawsey to weigh against the other prisoners".[155] At the close of the Crown's case in the murder trial, D.B. Read moved to enter an acquittal, arguing that the blows Edgar had received while on the ground confused the issue of causation. Read also emphasized that Butler was charged only with assisting in the murder, of which there was no evidence. Sullivan noted without explanation, "I overrule these objections".[156] Presumably he found the evidence of Butler's involvement to be consistent with guilt as a principal in the second degree.

A newspaper report said Sullivan then "addressed the jury at great length, pointing out clearly the difference in the offences of Murder and

155. "*Dawsey et al*", *supra* note 3 at 170.

156. "*Foreman and Butler*", *supra* note 10 at 182.

Manslaughter, and commenting on the evidence as he read it over".[157] Sullivan's notes suggest that he clarified the law for the jury, instructing them of the option to convict the prisoners of a lesser offence. He explained the elements of murder, self-defence and provocation. He instructed the jury on how to consider the evidence of the conflicts between Foreman and Butler, on the one hand, and Edgar and Kenny on the other: "If there was a fight and the next thing at hand was seized up, and with it the homicide committed it would be but manslaughter"; but if after the fight was over, Foreman and Butler got weapons and then, once they "had time to have the blood cooled", returned and killed Edgar, the crime was murder, committed by both.[158] It would seem to me that an argument could have been made on appeal that Butler was not a principal in the second degree, since he attacked Kenny (not Edgar) and not murderously. However, it is by no means clear that Sullivan was wrong in law. In any case, there are no signs that an appeal was brought.[159]

Sullivan's notes give no indication that he took care to review the evidence and the law in relation to each prisoner individually. In the murder case, his notes indicate his intention to

> leave the whole evidence to the jury with the usual charge that if they do not believe the evidence and have serious doubt of the guilt of the prisoners both should be acquitted [*sic*]. If they doubt Foreman's being guilty of murder, they may find him guilty of manslaughter only in which case Butler should be acquitted.[160]

D.B. Read and M. Martin, the *Spectator* wrote, used "their best exertions in lengthy speeches, to throw discredit on evidence which bore against the prisoners. A great deal of stress was laid on the bad character of the

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157. "The Queen vs. George Foreman and Joseph Butler – Murder", *supra* note 40.

158. "*Foreman and Butler*", *supra* note 10 at 184–85.

159. John Weaver explains that the courts of appeal established in 1849 could hear only cases pertaining to errors in law. The right to appeal matters of fact came into existence in 1857. See *supra* note 5 at 62.

160. "*Foreman and Butler*", *supra* note 10 at 185–86. The phrase "serious doubt" may disturb us, but the exact nature of the burden of proof may still have been evolving. Jim Phillips comments that the notions of onus and burden were evolving in the late-eighteenth and early-nineteenth centuries. "Criminal Trial", *supra* note 91 at 494.

witnesses, and the many contradictions in their testimony".[161] Such a strategy could well have enhanced the odds of a finding of guilt by association. In any case, most of the witnesses agreed that the damage to Edgar's skull—so vividly described by the doctors who testified—was delivered by George Foreman with the blade of a shovel.

I did not find any newspaper reports on either burglary case. Tillason's evidence against Dawsey in the Sadleir case was uncontroverted, and Dawsey's conviction is unremarkable. The result of the Notman case, however, is disturbing. There are no records of defence lawyers or defence witnesses. There is no indication that the judge summed up the evidence against each accused, and I would not suppose that the Crown prosecutor did so. It is my suspicion that the jurors were left to draw conclusions from fragments of conflicting testimony, the most salient feature of which was that Butler was a denizen of Prince's Island—not only black, but tainted with the vice that clung to the place—and Cavill was not.

It is also possible that jurors served at more than one of the trials and might therefore have carried testimony from one case to the next.[162] It is unclear whether Sullivan or Freeman took care to prevent this; I do not know who sat on the trial jury. The cases in the assize that term were presented more or less in order of increasing severity. A manslaughter case preceded the Sadleir and Notman burglary trials, followed by a larceny case that had been rescheduled, the trial of Foreman and Butler for murder, two more murder trials, a final larceny case and a nuisance case. If a clerk or Crown prosecutor believed it undesirable to empanel new juries, and was trying to minimize the impact of previous testimony in later cases, he might have scheduled the less serious cases before the more serious ones.

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161. "The Queen vs. George Foreman and Joseph Butler – Murder", *supra* note 40.

162. See *Jury Act*, *supra* note 107, ss 36, 38. There might have been as many as 144 and as few as 72 potential jurors, whose names would have been drawn by ballot to form the jury panels for the various cases. When a case was finished, the names were to be thrown back in the ballot box. However, if there were no objections "on the part of the Queen, or any other party", the Court could simply keep the same jury, or part of it, for the next case.

VI. The Aftermath

The sentencing took place on November 3, 1852.[163] Cooper and Ashby were convicted first for larceny, the jury providing no recommendation of mercy. They received three years in Kingston Penitentiary.[164] Dawsey was sentenced to seven years in the penitentiary for the Sadleir burglary. He pleaded guilty to the Notman burglary and received ten years for it; convicted, Tillason received seven. Butler was not sentenced for burglary, since he and Foreman were sentenced to hang on the morning of December 22.[165] They did not, however. On December 6, for unknown reasons, their sentences were commuted to life in the penitentiary, and they left the Hamilton jail on January 24, 1853.[166]

John Weaver has noted that between 1826 and 1849, if a judge believed a convicted murderer was a "fit candidate for royal mercy" the judge did not don a black cap and sentence the prisoner to death in open court; the death sentence was simply recorded. Weaver notes that at the Gore assizes from 1822 to 1832, only one in nine capital sentences actually resulted in a hanging, largely because so many offences carried a death sentence.[167] Commutation may have been more frequent than is generally supposed, at least for a period in the early 1850s. One writer complained in the *Gazette* that the "general system of pardoning culprits" made a mockery of the criminal justice process. The writer referred to a couple convicted of murder at the Cobourg assize, whose

163. "The Assizes", *supra* note 4.

164. Their sentence may have been unremarkable. It was the same as the one received for larceny by a sixteen-year-old English woman with no previous convictions, for whom mercy was recommended. See "*R v Eliza Young*" in Sullivan Benchbook, *supra* note 1 at 170–71, 209. John Weaver has remarked that "Irish men and women were definitely under-represented among those prisoners released either for want of a bill of indictment or from acquittals by trial juries". *Supra* note 5 at 57.

165. "The Assizes", *supra* note 4.

166. "The Murderers Reprieved", *Dundas Warder* (10 December 1852); *Jail Register*, *supra* note 27.

167. *Supra* note 5 at 62.

sentence was commuted to transportation for life. Interestingly, they too were labelled "colored".[168]

In a limited sense, Foreman and Butler beat the odds. They were committed to Kingston Penitentiary, but what happened to them subsequently is unclear. They do not turn up in the 1861 census. Perhaps they had died.[169] Peter Oliver found that between 1792 and 1869, about half of those convicted of homicide in Upper Canada were actually executed; the other sentences were commuted to banishment or, more commonly after 1835, to life imprisonment.[170] Barrington Walker has noted that 47 per cent of black prisoners were hanged in 22 capital cases from 1858 to 1958 in Ontario. Another thirty per cent of sentences were commuted, and the rest escaped the noose in other ways. Half of the cases in which the murderer and victim were different races resulted in the death penalty, and one additional person died before his execution date.[171]

Oliver Dawsey provides the epilogue. Less than a year after being sent to Kingston's still unfinished penitentiary, he escaped, in the middle of the night. Leaving the others behind, he scaled a forty-foot-high outer wall with a rope, supposedly after using a piece of iron the size of a ruler to penetrate the three-foot-thick wall of his solitary confinement cell.[172] The *Dundas Warder* marvelled at the escape; "it must be acknowledged that his industry and perseverence [*sic*] almost entitle him to a better fate than the dungeon of the Penitentiary".[173] There were rumours of a stash

168. Untitled column, *Hamilton Gazette* (1 November 1852).

169. "Convictions, Kingston Penitentiary—Foreman, George; Butler, Joseph; Tipple, George" in *Operational Records of the Penitentiary Branch* (17 November 1852), Ottawa, Library and Archives Canada (RG 13, D-1, vol 1041).

170. Peter Oliver, *"Terror to Evil-Doers": Prisons and Punishment in Nineteenth-Century Ontario* (Toronto: University of Toronto Press for the Osgoode Society for Legal Canadian History, 1998) at 30.

171. Barrington Walker, *The Gavel and the Veil of Race: "Blackness" in Ontario's Criminal Courts, 1858-1958* (Ph D Dissertation, University of Toronto, 2003) [unpublished] at 47-48.

172. "Escaped Convict", *The [Hamilton] Weekly Spectator* (10 November 1853); "Kingston Penitentiary—Warden's Letterbook (DE MacDonell)" in *Operational Records*, *supra* note 169; Province of Canada, Legislative Assembly, *Journals*, 5th Parl, 1st Sess, vol 13 (5 September 1854 - 30 May 1855) at DD-[34].

173. "Extraordinary Industry!", *supra* note 144.

of ill-gotten gold in the Hamilton vicinity, but whether or not Dawsey recovered it is unclear.

Conclusion

These cases show why legal redress was more accessible to some people than others. Crown attorneys were not yet involved in pre-trial processes, and neither, it appears, were defence lawyers. An accomplice like Tillason could make a deal: he would give evidence in the Notman case in exchange for escaping prosecution in the Sadleir case. Joseph Butler, however, went to trial even though the evidence was very weak. The energy that William Notman in particular put into pursuing the culprits, combined with the absence of prosecutions for other burglaries that occurred in the same year, are signs of the discretion exercised by constables and magistrates. This selectiveness about prosecuting may also have obscured signs of crime rings in the records.

The transient, marginal segment of the population featured in these cases encountered a criminal justice system that was, in formal doctrine, almost entirely "colour-blind". Then as now, however, access to lawyers was an issue. Some accused had defence counsel; others did not. There are hints that Oliver Dawsey retained his own lawyer, perhaps thanks to the gunsmith Benjamin Harris. It seems that not only serious crimes warranted a legal defence: a Dundas innkeeper charged with assaulting a constable had counsel. The Irish women and the other Notman burglary suspects, however, likely did not. None of those accused testified in their own defence. Those without counsel called no witnesses to defend them. Without defence counsel to sift the evidence and argue points of law, these trials were lopsided.

The language of the courtroom and the choice of Samuel Freeman as prosecutor suggest that in Hamilton in 1852, race was not supposed to matter in the formal operation of law. However, Joseph Butler's conviction for burglary, without any evidence placing him at Notman's house, suggests that it did matter. The meaning ascribed to skin colour worked alongside understandings of class, ethnicity, sexual morality and a propensity to drink; the emergence of "scientific" racism may also have played a part. The judge and the Crown prosecutor seem to have

tried to keep the trial formally colour-blind. The construction of Prince's Island as a den of vice where the races mixed, though, gave particular meaning to facts that ought not to have been so incriminating, such as Joseph Butler's mere departure and return to Prince's Island with Oliver Dawsey. Butler did not benefit from the more circumspect approach to determining guilt that the jury took in the case of Thomas Cavill, who was white and untainted by Prince's Island. It seems likely that prejudice lingered and was—surely inadvertently—amplified by the judge's failure to meticulously recap for the jury the evidence against each prisoner. It may be that Butler was convicted simply because he was black, but it seems more likely that his skin colour was considered along with his lifestyle and the company he kept. The effect of these factors was compounded by the lack of counsel, which went along with economic and social marginality.

As I have indicated, I think that the keepers of the Upper Canadian legal system were ideologically committed to a belief that guilt or innocence should be determined without reference to skin colour. As Sullivan's notes indicate, race can be hard to see in the legal records of the mid-nineteenth century—where people like Peter Price, Benjamin Harris and even Oliver Dawsey appear unmarked—but we cannot assume it played no role. It was not a transcendent and all-determining factor, but as Joseph Butler and Thomas Cavill must have concluded, it mattered all the same.