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Section 8 of the Charter and English-Canadian Fiction

ON 5 APRIL 1989 POLICE ARRESTED twenty-four-year-old Kevin Hryciw at the Winnipeg International Airport, suspecting him of having swallowed condoms filled with hashish oil and of attempting to smuggle the oil into Canada. They held him for forty-eight hours, hoping that he would defecate and produce evidence against himself—held him until Judge Linda Giesbrecht ruled against any postponement of the bail hearing. In custody, Hryciw refused rectal examinations and X-rays, invoking Section 8 of the Constitution Act, 1982, commonly known as the Canadian Charter of Rights and Freedoms: “Everyone has the right to be secure against unreasonable search or seizure.”¹ The one stool that Hryciw did excrete did not compromise him, and he criticized the police for their assault on his body. Nearly three years later, another vacationing Winnipegger, twenty-five-year-old John Stocki was jailed in similar circumstances, and likewise tried to invoke Section 8. Having been refused bail by Mr. Justice Kenneth Hanssen and then by Judge Robert Kopstein, Stocki passed more than 35 condoms filled with hashish oil on 7 February 1992, and authorities charged him with attempting to smuggle drugs into Canada.

The disagreement between Giesbrecht and Hanssen/Kopstein about the practical meaning and extent of Section 8 suggests that, whereas the law in Western-style democracies is relatively settled about how search warrants apply to private dwellings, the law is much less settled about how authority may search the body. With

¹ *Pocket Criminal Code 1992*, ed. Gary P. Rodrigues (Toronto: Carswell, 1991) 511.

a warrant or in hot pursuit after a crime, police may enter private dwellings, but how far may they pursue the suspected criminal into his or her body? Recently arguments about the circumstances under which police may obtain DNA evidence have also made the body a focus of search law. To what extent may the individual keep his or her body secure from the mechanisms of state authority, and when may state authorities justifiably intrude into that privacy on behalf of the community? In more general terms, to what extent may the person remain opaque before a mastering eye, and when must the person give self-incriminating evidence? The disagreement between Giesbrecht and Hanssen/Kopstein expresses, I will argue, two opposing meta-narratives that appear in law and in literature: a “Civil Liberties” meta-narrative and an “Expiation” meta-narrative. I take “Expiation” narratives to be those in which certain actions are seen as highly culpable and in which the punishment for those actions is seen as poetically just; conversely, I take “Civil Liberties” narratives to be those in which authorities seem dangerous, contemptuous of privacy, and too quick to punish. Later I will distinguish between legal and literary narratives, but here I want to suggest, beginning with a much-abbreviated history of search and seizure, a homology between legal and literary narratives in which the body is either allowed to remain private or is forced to give evidence against itself.

It is already “a commonplace ... that storytelling is at the heart of the trial”;² even Richard Posner, who is highly conservative in maintaining disciplinary boundaries and distinguishes a self-contained aesthetic sphere from the public sphere of social control, acknowledges that “the trial ... suffers from the same epistemological inadequacies as narrative, which it employs and resembles.”³ Each judicial opinion, therefore, operates editorially to harmonize prosecution and defence narratives—giving weight to one story, dismissing another as implausible, pruning a third—to produce a logically coherent and (it is hoped) a justice-satisfying narrative. The pattern of similar narratives abstracted in verdicts we may call

² Kathryn Temple, “Law’s Hidden Face: Reading Narrative Jurisprudence and its Critics,” *Law and Literature Perspectives*, ed. Bruce L. Rockwood (New York: Peter Lang, 1996) 355.

³ Richard Posner, *Law and Literature*, revised ed. (Cambridge, MA: Harvard UP, 1998) 354.

a meta-narrative. Meta-narratives appear partially because of the ordering functions of language and partially because the adversarial structure of Western legal systems creates bifurcated plots. The bearing of a statute upon the evidence may be highly ambiguous, but the court cannot, to use Posner's apt phrase, "revel in statutory ambivalence";⁴ the court must either allow or disallow illegally obtained evidence, and either convict or exonerate. Somebody pays; somebody goes free. It is not just the metaphors within which particular judgements or particular philosophies of law are couched, but this fundamental bifurcation in trial outcome which creates distinct narratives, as judges and legal philosophers try to explain (in particular and in general) why one person should go free and another shouldn't.

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The Charter right to freedom from unreasonable searches is rooted in the Common Law traditions of British justice. Search and seizure law was initially organized not around the body, but around the concept of private property, as was established in *Semayne's Case* (1604): "The house of everyone is to him his castle and fortress."⁵ With nice restraint, the judge thus cautioned sheriffs to break down doors only if necessary. In 1765, arguing against the state's use of general warrants (a use which had begun back in the days of the Star Chamber), Lord Camden said that the state should not have indiscriminately seized all the papers of John Entick because "the great end, for which men entered into society, was to preserve their property."⁶ Such freedoms, extended thereby to private papers, determined not only the limits to warrants in Great Britain, the United States, and Canada, but also the language within which

⁴ Posner, *Law and Literature* 237.

⁵ (1604) 77 ER 194 at 195. Quoted in David J. Bright, "Search and Seizure," *From Crime to Punishment*, ed. David C. Perrier and Joel E. Pink (Toronto: Carswell, 1988) 269–82. See also Edward C. Fisher, *Search and Seizure* (Evanston, IL: Traffic Institute, Northwestern U, 1970).

⁶ *Entick v. Carrington* (1765) 19 State Tr. 1029. Quoted in Scott C. Hutchison and James C. Morton, *Search and Seizure Law in Canada* (Toronto: Carswell, 1991) 1.1. See also Reginald F. Carter, *The Law Relating to Search Warrants* (Australia: Law Book Co., 1939).

the demand for rights was subsequently couched: "every Man has a *Property* of his own *Person*. This no Body has any Right to but himself."⁷ John Locke's words suggest a gradual growth in the ambit and meaning of "private" property: from the protection of private dwellings, to the protection of personal effects and money against the blanket seizures which once accompanied arrest,⁸ to protection from electronic surveillance wherever the subject has a reasonable expectation of privacy,⁹ to, lately, the protection of the subject's body from unreasonable searches. This last protection, at stake in the Hryciw and Stocki cases, has taken many forms. It was used in order to prevent body searches authorized under 1910 temperance legislation in Nova Scotia and under the Canada Temperance Act.¹⁰ More recently, the protection of bodily privacy became part of the 1970 Bill of Rights and then the Constitution Act, 1982. The two acts have been used to prevent the surgical invasion of the body,¹¹ to limit intrusive rectal examinations,¹² to challenge the warrant-less seizure of blood samples from suspected drunk

⁷ John Locke, "Of Property," *Second Treatise of Government* (Cambridge: Cambridge UP, 1967) 305.

⁸ Hutchison, *Search and Seizure Law in Canada* 3.3.

⁹ *Katz v. US*, 389 US 347, 88 Supreme Court 507 (1967) involved the use of a listening device on the outside of a phone booth in order to gather evidence of bookmaking and gambling. *Hunter v. Southam case*, (1984) 2 SCR 145 at 154, went before the Supreme Court of Canada and also involved telephone wiretapping. Chief Justice Dickson cited *Katz v. US* in his opinion. See Hutchison, *Search and Seizure Law in Canada* 1.1 to 1.4.

¹⁰ James A. Fontana, *The Law of Search Warrants in Canada* (Toronto: Butterworths, 1974) 154–57.

¹¹ *Laporte v. the Queen*. The issue was whether Québec police could authorize the removal of a bullet from a suspect to gather evidence in a trial. Justice Hugesson decided that search of a "place" under Section 443 of the 1955 Criminal Code did not include the human body. See Fontana, *The Law of Search Warrants in Canada* 158–59.

¹² In *R. v. Greffe* (1990) 55 CCC (3d) 161, appeal from (1988) 62 CR (3d) 272, 41 CCC (3d) 257 (Alberta CA), the examination was disallowed because police had arrested the man on traffic violations. Although police suspected narcotics offences all along, Justice Lamer of the Supreme Court argued that the search was out of keeping with traffic violations. Further, there was, according to Lamer, no fear of the loss of evidence: "surely the detention of the accused in order to facilitate the recovery of the drugs through the normal course of nature would have been reasonable." Quoted in Hutchison, *Search and Seizure Law in Canada* 3.17.

drivers,¹³ to challenge the execution of DNA warrants,¹⁴ and—along with the right to reasonable bail—to get Kevin Hryciw out of jail.

Section 8, the right against “unreasonable search,” and Section 24(2), which allows for the exclusion of evidence after Charter violations, reflect at once the most theoretical and the most practical meaning of civil liberties in Canada: theoretically, these sections grant a certain opacity to the individual subject, at least until guilt is established;¹⁵ practically, the sections prevent, for example, police interrogators without warrants from searching one’s bodily cavities. By slow degrees, and then by constitutional legislation, opacity has been transferred from property to the body so that *privacy* has dislodged *property* as the central principle in the theoretical definition of civil liberties.¹⁶ A discursive example of this theme appears in the Supreme Court ruling (the opinion authored by Judge LaForest) against the seizure of blood samples: “all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit If I were to draw the line between seizure and a mere finding of evidence, I would draw it logically and purposefully at the point at which it can reasonably be said that the individual had ceased to have a privacy interest in the subject matter allegedly seized.”¹⁷

¹³ These challenges have met with mixed success. In *R. v. Dyment* (1988) 2 SCR 417, 45 CCC (3rd) 244, Judge LaForest ruled against police seizure of a blood sample from a delirious person. See Renee Pomerance, “Search and Seizure of Bodily Substances: The Impact of *R. v. Dyment* (Part 1),” *Journal of Motor Vehicle Law* 1 (May 1989): 139–92; “Part 2,” 1 (Oct. 1989): 291–325; Hutchison, *Search and Seizure Law in Canada* 1.6 to 1.9. In a parallel development, the Canadian Civil Liberties Association has argued that employers should not have the right to demand urine samples as a condition of employment; see *Winnipeg Free Press* 23 Feb. 1992: 3.

¹⁴ Winnipeg lawyer David Phillips has argued that three teenagers charged with robbery should not have to submit DNA samples. Alison Bray, “Lawyer Takes Aim at Police Rights to DNA Samples,” *Winnipeg Free Press* 29 July 1997: A5.

¹⁵ The original weak wording of Section 8 was changed after civil libertarian pressure. A broad or liberal reading of the Charter privileges the courts over the Tory legislative heritage in Canada. See Kathy L. Brock, “Polishing the Halls of Justice: A Political Analysis of Section 24(2) and 8 of the Charter of Rights,” unpublished paper 16–20. Thanks to Ms. Brock for allowing me to see her work in progress.

¹⁶ Hutchison, *Search and Seizure Law in Canada* 1.1.

¹⁷ LaForest, quoted in Hutchison, *Search and Seizure Law in Canada* 1.8 to 1.9.

With respect to the legal history of civil liberties, it is impossible to avoid the feeling of a submerged narrative, to which the judicial opinions “answer.” Milton R. Konvitz, speaking of American legal protections, puts it this way: “The Bill of Rights was the culmination of human experience with despotic governments. One hears in its phrases—‘establishment of religion,’ ‘freedom of speech, or of the press,’ ‘a redress of grievances,’ ‘twice put in jeopardy of life or limb’—Wordsworth’s ‘still, sad music of humanity’.”¹⁸ The meta-narrative centres on a king who at the slightest provocation is ready to invade the body, probe openings, make surgical incisions; who legislates, executes the laws, and judges transgressions, all under a transcendent name; who harms, mutilates, and murders the bodies of his subjects, often minorities. He is panoptic, Foucault claims, even when he disperses himself into the bodily minutiae of the civilized self—especially then.¹⁹ He constitutes his “own” divine body upon the body of the condemned, which was once displayed in the marketplace, and his “own” rationality upon the insane. What Terry Eagleton calls “the Enlightenment’s grand narrative of human emancipation”²⁰ animates all bills of rights, charters, and houses of parliament; it belongs to those most cogent defenders of liberal humanism, Locke and Mill: “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of acting of any of their number, is self-protection Over himself, over his own body and mind, the individual is sovereign,” says Mill.²¹ Georges Vigarello, attempting

¹⁸ Milton R. Konvitz, ed., “The Bill of Rights: Amendments I–X,” *An American Primer*, ed. Daniel J. Boorstin (New York: New American Library, 1966) 174. The quotation comes from Wordsworth’s “Lines Composed a Few Miles above Tintern Abbey.” In the British/Canadian context we might add “the rule of law” to Konvitz’s list of phrases.

¹⁹ By “panopticism,” the state of seeing all, Foucault means a kind of social quarantine in which the power of surveillance has been dispersed throughout society to police the most minute details of hygienic and behavioural purity. His trope combines Jeremy Bentham’s plan for a “human” penitentiary based on surveillance and the famous London “Panopticon,” which opened in 1854 to exhibit the discoveries of science and art. See Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Pantheon, 1977) especially 216, 250, 271.

²⁰ Terry Eagleton, “Capitalism, Modernism and Postmodernism,” *New Left Review* 152 (July/August 1985): 63.

²¹ John Stuart Mill, *On Liberty and Considerations on Representative Government* (Oxford: Basil Blackwell, 1948) 8–9.

to write a partial history of the body, depends on the same narrative: “the history of cleanliness consists ... of the establishment, in western society, of a self-sufficient physical sphere, its enlargement, and the reinforcement of its frontiers, to the point of excluding the gaze of others.”²² Locke, Mill, Vigarello, and, despite the War Measures Act, Pierre Trudeau. Trudeau’s 1969 amendments to the Criminal Code (Sections 158 and 159 on anal intercourse) and the 1974 Privacy Act were designed to make the bodies of homosexuals legally opaque to the eyes of the heterosexual majority.

3

The photographic negative of our unsettled civil liberties with respect to the body is the power of search and seizure during arrest: the warrantless breaking down of doors in *Semayne’s Case*, the general warrants under which Entick’s papers were seized, the Nova Scotia temperance legislation, and the judicial permission to hold John Stocki for five days. The suspension of civil liberties during a search also has a history much longer under Common Law than under legislated statute, and was rationalized in the nineteenth century as a way of protecting peace officers (by removing concealed weapons) and as a way of preserving evidence.²³ In practical terms, the need to preserve evidence has meant that some rights can temporarily be abrogated, and that some areas of the body are *not* opaque. The presiding judge in *R. v. Debot*²⁴ argued that police need not let the prisoner seek counsel before a search unless the lawfulness of the search depends upon the prisoner’s consent.²⁵ Fourth Amendment protection (the American equivalent of our Section 8) is often circumvented when judges allow “probable cause” to authorize warrantless searches.²⁶ In Canada, mouth searches of suspected narcotics offenders,²⁷ the seizure of hair samples (as long as they were taken without violence or with a war-

²² Georges Vigarello, *Concepts of Cleanliness: Changing Attitudes in France Since the Middle Ages*, trans. Jean Birrell (Cambridge: Cambridge UP, 1988) 231.

²³ Hutchison, *Search and Seizure Law in Canada* 3.6.

²⁴ [1989] 2 SCR 1140, 52 CCC (3d) 193 at 198–99.

²⁵ Hutchison, *Search and Seizure Law in Canada* 3.12.

²⁶ Ellen Alderman and Caroline Kennedy, *The Right to Privacy* (New York: Knopf, 1995) 29.

²⁷ *R. v. Brezack* (1949) 96 CCC 97 at 101 (Ontario CA). See Hutchison, *Search and Seizure Law in Canada* 3.9 and Fontana, *The Law of Search Warrants in Canada* 157–58.

rant),²⁸ blood samples (under Section 254 of the Criminal Code), and intrusive rectal examinations²⁹ have all been allowed at various times. These cases have fallen under sections of the Criminal Code dealing with the preservation of evidence (Section 487), but in narcotics offences the Crown has additional powers, including warrantless search, granted by Sections 10 and 11 of the Narcotic Control Act. The legal distinction between things which may provide evidence of a crime and things which the mere possession of is an offence,³⁰ implies greater police powers of search for weapons and narcotics.

Here are hints of a very different narrative. This “Expiation” meta-narrative focuses on a wayward and intransigent subject, always ready to subvert the state, to injure his (the subject here is usually conceived of as male) neighbour, to harm his own body, and to hide his culpability: a subject in desperate need of correction to maintain the civil order and to save him from his own vices. The ideological sanction for such a narrative was, and often still is, religious, interpreting offences as injuries done to God. “I stank in Thine eyes,” says St. Augustine in *The Confessions*, putting his early lawless self under the gaze of omniscience and of his own later, transcendent self.³¹ Calvin too writes that “we can only be odious to God,” that human evil is “the stench of a corpse,” and insists that human beings may not question God’s judgement.³² Such a vision helped authorize the policing function of the state in Christian Europe, and despite their uneasiness about human authority both

²⁸ R. v. Alderton (1985) 44 CR (3d) 254 at 258 59 17 CCC (3d) 204 (Ontario CA) and R. v. Legere (1988), 43 CCC (3d) 502 (New Brunswick CA). See Hutchison, *Search and Seizure Law in Canada* 3.9 to 3.11.

²⁹ In *Reynan v. Antonenko* (1975), 20 CCC (2d) 342 (Alberta TD), evidence gained from an intrusive rectal examination was allowed (as incidental to arrest) because the police officers saw that the hair around the anus had been greased. Hutchison, *Search and Seizure Law in Canada* 3.16; Fontana, *Supplement to The Law of Search Warrants in Canada* (Toronto: Butterworths, 1977) 12. In the United States, seized blood samples have been allowed on a similar legal basis; see J. Shane Creamer, *The Law of Arrest, Search and Seizure*, 3rd ed. (New York: Holt, 1980) 283–86.

³⁰ Fontana, *The Law of Search Warrants in Canada* 90–91.

³¹ Augustine, *The Confessions*, trans. Edward B. Pusey (New York: Collier, 1909) 2.1.

³² John Calvin, *Institutes of the Christian Religion*, ed. John T. McNeill, trans. Ford Lewis Battles (Philadelphia: Westminster Press, 1960) 3.23.3; 1.17.5; 3.23.1.

Augustine and Calvin supported state coercion, the one to suppress the Donatists, the other to execute Servetus in Geneva.³³ But the king in the “Expiation” meta-narrative sees all in order to publish the truth, to keep the peace, and to mediate between feuding kinship groups; he takes over the *wergild* in order to make equitable the system of expiation and reconciliation, and he punishes in order to safeguard the notion of responsibility (so that a drunk driver’s blood must give him away) and to rehabilitate (so that the addict’s drug supply is, at least in theory, withdrawn). The king claims not to have much to do with the body. This transcendental patriarchal “Spirit” migrated in the nineteenth and twentieth centuries from sin and punishment to the psychologized categories of social aberration and collective safety. The Tory collectivism that gave us the “peace, order, and good government” of the Constitution Act, 1867 certainly operated in this tradition.

4

By moving between legal precedent and narrative, I am implying a close relationship between law and literature. Search-and-seizure law can be taken as a trope for arguments about all those rights which shield the individual against the law, particularly those rights identified in Sections 7–14 of the Charter: for example, the right to “life, liberty, and security of person” [Section 7]; to counsel [Section 10 (b)]; to *habeas corpus* [Section 10 (c)]; to be presumed innocent until proven guilty and to be heard by “an independent and impartial tribunal” [Section 11 (d)]; freedom from arbitrary detention [Section 9]; freedom from self-incrimination [Section 11 (c)]; from “cruel and unusual punishment” [Section 12]; and from criminal conviction for the insane [in cognate statutes such as Section 16 of the Criminal Code].

³³ The euphemistic justifications that Augustine used—“Not everyone who is indulgent is a friend; nor is every one an enemy who smites” (*Epistolae* 93.2.4, *An Augustine Synthesis*, ed. Erich Przywara [New York: Harper and Row, 1958] 274)—convince Peter Brown to call Augustine “the first theorist of the Inquisition”; see *Augustine of Hippo* (London: Faber, 1967) 240. Calvin is more explicit about the relationship between human and divine governments: “It is as if Samuel had said: The willfulness of kings will run to excess, but it will not be your part to restrain it” (*Institutes* 4.20.26).

Turning toward literature, I do not want to suggest that the law can be contained under the broad framework of “discourse,” a simplistic containment strategy too often favoured in the humanities perhaps because it suggests a great deal of plasticity in law, making it easily amenable to utopian reconstruction. It is therefore useful to keep in mind two of Posner’s caveats. First, we cannot rely on literature to discover how law operates.³⁴ Secondly, we must distinguish between law as “a system of social control”³⁵ and literature as an “amoral” aesthetic realm which exerts no direct control over readers. Such a distinction admittedly falls before micro-analyses of how the minutiae of everyday life and everyday discourse create systems of bodily control, and how (despite any transgressiveness) literature and film help to regulate our ethical and social systems. Nevertheless, the distinction *does* operate at the “macro” level, the level at which a text may be said to have a conscious aesthetic “intent.” At the “macro” level, certain texts can maintain their ambiguity in a way that a legal opinion cannot. What, precisely, does a reading of *King Lear* make me do or even believe? The “micro” level of *King Lear* may help instil in me a particularly Western way of putting the individual subject under a gaze, but any “macro” approach to Foucault’s “carceral” in *King Lear* (i.e., an approach that moves away from the details of appropriate conduct and towards larger juridical issues) yields rather uncertain results: does Lear’s mock-trial make me feel that the whole tragic apparatus of expiation is somehow justified, or does it predispose me towards a libertarian and utopian defence of human freedom? I do not know; the evidence cuts both ways. Perhaps more importantly, Posner’s distinction works at a fundamental *operative* level: the Hanssen/Kopstein reading of Stocki’s body resulted directly in Stocki’s penal incarceration (and put others in jeopardy of similar incarceration) in a way that a viewing of Robert LePage’s *Le Polygraphe* (1988, 1993) or a reading of Irvine Welsh’s *Trainspotting* (1993) do not. A few texts can still put us in jeopardy of incarceration, but in our polity very few. Whatever complex entrainments may enter me through literature, the realm of art is, in a fundamental operative way, the realm of freedom, if only of freedom from positive law.

³⁴ Posner, *Law and Literature* 66.

³⁵ Posner, *Law and Literature* 7.

Once we move beyond these fundamental differences, however, we *can* speak of a homology between literary and legal narratives, and not only because novels occasionally contain trials. Earlier I argued that the way a judicial opinion produces a coherent narrative constitutes the primary evidence of such a homology. There are other lines of evidence which I can only hint at here. Epics once conveyed legal structures.³⁶ Children's literature is often presented as an explicit guide to behaviour. Poetic justice operates even in complex and transgressive adult works.³⁷ And in certain law-literature hybrids, the distinction between social control and narrative disappears completely. Television shows like *Cops*—in which a camera follows actual police officers executing warrants by breaking down doors of private dwellings, performing throat-hold searches, and arresting suspects—obscure the distinction between a constructed artistic narrative and legal arrest procedures. Here the specular aspect of the law is quite explicit: the suspect is searched not only incidental to arrest, but also by the camera's narrative eye, which presumes no innocence and X-rays the law-breaker's fascinating and repellent soul for public consumption. The camera eye that we follow is that of the all-seeing Law, since each narrative of arrest and search begins from within the squad car. Other hybrid forms such as the museum of criminality, which initially might seem to owe less to popular culture, also combine legal with literary narratives. At the Kingston Penitentiary Museum, one display asks "Would you like to be a turn-key?" and invites the visitor to perform the act of locking a cell. The visitor, like the viewer of *Cops*, performs the gestures of social control from within a theatrical narrative: *feeling* (rather than just knowing) that I am one with the Law, that police officer and prison guard are metaphorical extensions of my powers of arrest. *Cops* and the "turn-key" display erase the distinction between social control and narrative—are they police-work or are they stories?—but quite clearly express an "Expiation" meta-narrative.

³⁶ See Eric Havelock, *Preface to Plato* (Cambridge, MA: Belknap Press, 1963).

³⁷ Jonathan Kertzer—who claims that "when justice is not only done, but seen to be done, then the spectacle is partly aesthetic"—has recently shown how through literary form (not just through content) Canadian writers accept or subvert larger communal narratives about justice. "To disrupt the justness of a narrative," argues Kertzer, "is to subvert its narrative of justice." See Jonathan Kertzer, *Worrying the Nation: Imagining a National Literature in Canada* (Toronto: U of Toronto P, 1998) 31, 182.

English-Canadian fiction which concerns itself with legal compulsions typically either invites the reader to identify sympathetically with the victims of a judicial excess, following the “Civil Liberties” meta-narrative, or to accept the basic integrity of the judicial system, following the “Expiation” meta-narrative. I will briefly sketch what might constitute a Canadian civil liberties ‘canon’ and a Canadian expiation ‘canon’ before examining two novels that fall outside the bounds.

“Civil Liberties” fiction often focuses the narrative gaze on those areas in which the law appears to be narrowly constructed—theocracies, dictatorships, colonial situations, past judicial excesses. The authority punishes acts that once constituted, but no longer constitute, an offence: blasphemy, adultery, and so on. Findley’s *Not Wanted on the Voyage* (1984) takes place in an alternate Genesis where Dr. Noyes, relying upon the questionable transcendent authority of Yaweh, arbitrarily jails those who challenge him, violating Section 9 of the Charter.³⁸ In Atwood’s *Bodily Harm* (1981), Rennie Wilford, a travel writer, feels a little of what nationals feel when the St. Antoine government has her arbitrarily arrested, and held without *habeas corpus*. “We arrestin’ you,” says the policeman. “What for?” she wants to know. “Suspicion,” he replies.³⁹ *The Handmaid’s Tale* (1985) recounts similar security-of-prison violations, pointing to a future theocracy in which sexuality is controlled by the state, and pointing backwards, via the Mary Webster dedication, to judicial excesses in past theocracies. In the difficult choice between “freedom to” make unsanctioned use of one’s body and “freedom from”⁴⁰ pornography, Atwood comes down purposefully, if not always gladly, on the side of civil liberties. The overwhelming American acceptance of *The Handmaid’s Tale* over other Atwood works suggests how closely her construal of fundamentalist legislation as the primary threat to the individual coincides with the assumptions of the American liberal imagination.

Chris Scott’s *Antichthon* (1982), like Umberto Eco’s *The Name of the Rose* (1980), uses the Inquisition’s extreme violations of both

³⁸ Timothy Findley, *Not Wanted on the Voyage* (Markham, ON: Penguin, 1984).

³⁹ Margaret Atwood, *Bodily Harm* (Toronto: McClelland and Stewart, 1981) 262.

⁴⁰ Margaret Atwood, *The Handmaid’s Tale* (Toronto: McClelland and Stewart, 1985) 24.

Section 8 and Section 12 (the protection from cruel and unusual punishment) to represent the Law. The Inquisition declares itself as the instrument of reason; the process of Giordano Bruno's trial involves a gathering of mimetic functions: the threatening of the instruments (*territio verbalis*), the showing (*territio realis*), and finally the *examen rigorosum*.⁴¹ The subject slowly and terribly comes under the gaze, then the physical pressure of authority; authority becomes literal, localized on the body, and mutilating. Bruno's heroism during defeat lies not in his personal goodness (he can be quite unpleasant) but in his ideological resistance against the authorities who want to destroy his religious freedom by stopping him from worshipping an "infigurable"⁴² and nameless God: in this way he seems to agonize for *our* civil liberties.

Postmodern writers—Robert Kroetsch, Leon Rooke, Michael Ondaatje, George Bowering, and David Arnason—distrust the law not only within a legal framework, but in *any* attempts to order or read the body. One might say that here Section 8 becomes diffuse and yet all-pervading, the inverse of Foucault's panopticon. Resistance to a final determination of guilt or innocence can of course appear in novels which, like Atwood's *Alias Grace* (1993), are not postmodern,⁴³ but appears consistently in postmodern works. The title of Kroetsch's *Alibi* (1983) implies that any written order makes some legal defence. The novel's hidden order—the seemingly panoptic Deemer, one who deems—cannot be approached by the protagonist Dorf directly any more than one can approach the names conferred upon things. Dorf, attempting to restore order at the end of the novel, cannot read the signs of his sexual violation in his stool, but Kroetsch hints that Dorf's security of person has been violated by authority, probably by Deemer.⁴⁴ Rooke, alternatively, uses the legal excesses of anti-poaching laws in Elizabethan England to create sympathy for Hooker, the guilty protagonist of *Shakespeare's Dog* (1981); by following Hooker rather than Shakespeare, by putting a libertarian dog in danger of arbitrary detention, Rooke creates an opaque subject.⁴⁵ In *Coming Through Slaughter* (1976),

⁴¹ Chris Scott, *Antichthon* (Dunvegan, ON: Quadrant, 1982) 58.

⁴² Scott, *Antichthon* 265.

⁴³ Margaret Atwood, *Alias Grace* (Toronto: McClelland-Bantam, 1996).

⁴⁴ Robert Kroetsch, *Alibi* (Toronto: General, 1983). Security of person is protected in Section 7 of the Charter.

⁴⁵ Leon Rooke, *Shakespeare's Dog* (Toronto: General, 1981).

Buddy Bolden is similarly opaque, more akin to “hound civilization”⁴⁶ than to the psychological or allegorical intelligibility that one might expect of a ‘human’ literary character. The detective Webb cannot expose Bolden’s private motivations or give him the psychology of a continuous subject, and thus cannot explain why he went berserk in a parade, never mind what he might be guilty of *vis-à-vis* his wife. Nor is his slicing of Pickett a crime Bolden will be called to account for, yet his final evasion of Webb’s pursuit in the mental hospital comes close to an insanity defence, a civil liberty in which the guilty act (*actus reus*) does not constitute a crime unless there is also a guilty mind (*mens rea*). It is a particular violation of Section 8 that Bolden fears; he fears that pervasive rationality (inside and outside him) which searches for order in his music. His detention in the East Louisiana State Hospital is made to seem very disturbing, even if inevitable. *In the Skin of a Lion* (1987) complicates Ondaatje’s allegiances, but despite the expiatory payment implied by Alice’s violent death, Ondaatje fundamentally sympathizes with the crimes and dream-crimes of Patrick and Caravaggio. The reader hardly experiences their actions as criminal, but rather as extravagant signs of much-to-be-desired resistance to an oppressive social order.⁴⁷ Christian Bök has shown the close relation between privacy and violence in Ondaatje’s early work,⁴⁸ and I’d add that Ondaatje romanticized his violent protagonists to shield a certain amount of chaos from public and ideological scrutiny.

The diffuse move toward opacity, something more than simply ‘liberalism,’ also characterizes Bowering’s story, “Nadab” (1994). The story appears in ten sections, each told by a different neighbour, acquaintance, or family member of “Nadab,” as the main character Robbie Best calls himself. In each section Robbie breaks a commandment, breaking the ten commandments in the order that they were set down in Exodus, some of the sins of course still crimes in our polity. Each defiance of Mosaic law *seems* psychologically motivated. Because he makes idols of Vishnu out of butter and because he changes his name to “Nadab” (the priest who in

⁴⁶ Michael Ondaatje, *Coming Through Slaughter* (Toronto: Anansi, 1976) 90.

⁴⁷ Michael Ondaatje, *In the Skin of a Lion* (Markham, ON: Penguin, 1987).

⁴⁸ Christian Bök, “Destructive Creation: The Politicization of Violence in the Works of Michael Ondaatje,” *Canadian Literature* 132 (Spring 1992): 109–25.

Leviticus 10:1–7 offered “strange fire” on the altar) we suspect early on that Robbie is an artistic iconoclast, perhaps someone from Doug Harvey’s Waffle Shack. However, in the last section his motives become *profoundly* obscure. With the point of view finally shifting to “Nadab,” we realize with a shock that he is not intelligent enough to understand why he has broken the commandments *in order*. The order clearly belongs to the persona of the author. To speak in Roman Jakobson’s terms, the addresser (the author who plays with the Tetragrammaton) is increasingly foregrounded until the literary code (the “character” Robbie) and the extra-literary context—a moral or legal code, for example—become opaque.

Expiation arrives at the end of the story, but arrives tongue-in-cheek. Apparently Nadab’s “strange fire” is calling down the Apocalypse: “bad enough we got this god damned storm and now there’s some crazy asshole out there blowing his trumpet.”⁴⁹ Gone are hints of the blue god; gone as well are the sly and epigrammatic complaints about Hare Krishna art—“all brass, no butter”;⁵⁰ instead of the exotic “Nadab,” we are left with a lot of words from a menacing, not over-bright, self-incriminating Robbie, guilty of talking too much. But of course the ending is parodic. The impossible distances not only between history (the middle-class suburban world of Robbie’s parents) and the Apocalypse (Gabriel trumpeting judgement), but also between “Nadab” and “Robbie” keep even murder on a self-referential level. Poetic justice—Robbie’s ‘transcendental’ punishment—is clearly simulated.

The opaque body completely disappears in Arnason’s philosophical murder mystery, *The Pagan Wall* (1992). Police Inspector Kessler, unable to locate the apparent corpse that Richard and Lois have discovered and photographed on a Druid altar near Strasbourg, says, “the image will be almost as good as the body for our purposes, though it will be difficult to do an autopsy.”⁵¹ The material body, a wished-for final arbiter of guilt or innocence, refuses to coalesce and remain static as *corpus delicti*, refuses to be subject to search and interpretation. “How judges and juries love physical evidence, so welcome a relief from words!” Posner has exclaimed;⁵²

⁴⁹ George Bowering, “Nadab,” *The Rain Barrel* (Vancouver: Talonbooks, 1994) 80.

⁵⁰ Bowering, “Nadab” 68.

⁵¹ David Arnason, *The Pagan Wall* (Vancouver: Talonbooks, 1992) 48.

⁵² Posner, *Law and Literature* 265.

but in Arnason's novel such a relief from representation is not available. Even when, toward the end of the novel, another body with the same name (David Mann) is killed at the same sacrificial rock, the corpse's arrival at the murder scene is much too late to give readerly comfort. Instead, the corpse sinisterly announces that a *real* body may enact a *real* narrative commanded ahead of time by an image. When Kessler paraphrases Lacan—"I found a story. The story of my life. A brutal father, a gentle mother, a monstrous self. Everybody's story" (49)—one might expect a parody of civil liberties, yet *The Pagan Wall* ultimately affirms the right of the self to be opaque from unreasonable search, in that Richard's and Lois's sexual liaisons require only minimal confession and no expiation. Their bodies are private. "We are alone in our skins," Lois thinks at the end of the novel, and she therefore experiences a social horizon limited to the performative functions of language: "All we can do is make promises" (304). If, as Kessler says, the policing problem is usually not the discovery of the criminal, but of "sufficient evidence" (180), then it seems appropriate that details of the infidelities become known only to the reader; Richard and Lois are allowed to keep the details away from the panoptic law, and Arnason averts the expected sacrifice of Richard, who looks like David Mann and who preceded Mann as the lover of Alexandra.

After the second, less spectral murder, it's not clear whether the dead Mann's repetition of ancient Druidic sacrifices was an accidental parody or someone's purposeful re-enactment. It's also not clear whether the murder was the passionate revenge of an individual (Alexandra) or the intrusion of state interests (of the Iraqis, the Libyans, the Israelis, or even, god forbid, the Canadians). Power, for Arnason, is Foucauldian: distributed from the policing institutions of the state across a range of cultural practices, from attitudes about adultery to literary genres. For this reason, perhaps, Arnason resists the writer's traditional policing role in detective fiction and refuses to explain all events and motives at the end of the story. The lack of resolution, summed up by Kessler's statement that "the best story wins" (302), evades the expiatory unmasking of the criminal, preventing us from identifying with omniscience and returning us instead to Charter freedoms and the reasonable doubts of the courtroom, where the best *story* wins.

If justice cannot be seen to be done, then only a set of broadly construed civil liberties can balance against power. These postmodern versions are more powerful expressions of the "Civil

Liberties” meta-narrative precisely because they are more abstract, subliminal, and less dependent upon the mimesis of a legal trial. The abrogation of civil liberties comes not only through legal procedures, but is already implied in the searching and systematizing gaze of any kind of authority; postmodernists seem to expand the protection of the individual subject not only from specific legal/political intrusions, but also from the systematic gaze of reason. Along with postmodern appeals to “heterogeneous matter,”⁵³ we might call the “Civil Liberties” meta-narrative a *normative* aspect of postmodern practice.

6

To the “Expiation” meta-narrative, on the other hand, belongs fiction which, like *Crime and Punishment*, is symbolically tied to religious rituals of guilt, confession, and expiation. Such a structure is less common now than before the twentieth century, but the work of Robertson Davies, David Williams, Guy Vanderhaeghe, F.P. Grove, and Mordecai Richler may be taken as paradigmatic. For example, despite the differences between Davies’s *The Rebel Angels* (1981) and Williams’s *Eye of the Father* (1985), lives are seen and judged, bodies deciphered by a transcendent civilized text. To preserve social order, the novelist may punish the guilty in direct fashion, as in *The Rebel Angels* where Urquhart McVarish’s sexual eccentricities and theft of the Gryphius manuscript do not directly harm but certainly threaten Maria Theotoky with sexual harassment. Davies subjects McVarish to John Parlabane’s search and seizure, and then has McVarish horribly murdered.⁵⁴ The reader doesn’t protest the presumption of guilt: the ‘probable cause’ is convincing enough. Authors confirm the theoretical value of the law by making those who evade fallible human legal institutions pay in other ways for the harm they cause, as Williams makes Magnus Vangdal do in *Eye of the Father*. The scapegrace Magnus suffers no legal repercussions for sodomizing Georgie Halliday, but he is eventually impoverished and must undergo an ostomy, so that punishment is localized on his body in a cruel and unusual

⁵³ Reinhold Kramer, *Scatology and Civility in the English-Canadian Novel* (Toronto: U of Toronto P, 1997) 162–80.

⁵⁴ Robertson Davies, *The Rebel Angels* (Harmondsworth: Penguin, 1981).

way, exactly fitting the crime.⁵⁵ While it is again not the state that searches here, the accused is nevertheless forced to give up sovereignty over his own body. Occasionally the expiation may come as overwhelming shame and mental derangement, as for Shorty McAdoo in *The Englishman's Boy* (1996), where Shorty undergoes penance and rehabilitation after his role in the Cypress Hills Massacre. Though sceptical about the empire-building role of the RCMP, Vanderhaeghe still makes necessary the entry of the law into the Canadian West.⁵⁶ Even the self-invented Frederick Philip Grove demanded that a character like Niels Lindstedt in *Settlers of the Marsh* (1925) incriminate himself in the murder of his wife rather than using civil liberties as escape clauses: "During a preliminary investigation a doubt had risen as to his sanity. He protested strongly against that suspicion."⁵⁷ Grove uses the *mens rea* language of religion directly: confession (not so much of murder as of the culpable lust that caused it), expiation (in jail), forgiveness (by Ellen), and a muted "resurrection" (216) from jail at the end of the novel.

The "Expiation" narrative often shows trials where the convictions, even by extra-legal means, are needed to maintain the social order. This is certainly true of Mengele's trial *in absentia* during Richler's *St. Urbain's Horseman* (1971). Hardly an 'independent and impartial tribunal,' the other court presiding over the novel's main trial—of Harry Stein and Jake Hersch for the rape and buggery of Ingrid Loebner—also reaches the correct verdict even though "everybody's lying," despite a biased judge, and despite a Crown prosecutor who wants the jury to punish the defendants for the excesses of "the permissive society."⁵⁸ Richler sets up the trial so that Harry—who really has sodomized Ingrid—speaks in ways sure to alienate the upper-class judge: "She begged me to, but it's not my line. I'm not an establishment type. I was nobody's fag at Eton" (439). Moments later when he reveals his criminal record he carelessly waives the opacity, the presumption of innocence, granted him under British law prior to conviction. Jake, despite being guilty only of marital infidelity, does not feel that he has been railroaded

⁵⁵ David Williams, *Eye of the Father* (Toronto: Anansi, 1985).

⁵⁶ Guy Vanderhaeghe, *The Englishman's Boy* (Toronto: McClelland and Stewart, 1996).

⁵⁷ Frederick Philip Grove, *Settlers of the Marsh* (Toronto: McClelland and Stewart, 1925) 192.

⁵⁸ Mordecai Richler, *St. Urbain's Horseman* (Toronto: McClelland and Stewart, 1971) 444–45.

by the justice system. Rather, he is almost pleased to be on trial: “‘When they tote up our contribution,’ Luke once said, ‘all that can be claimed for us is that we took “fuck” out of the oral tradition and wrote in plain.’ In lieu of *Iskra*, *Screw*. After Trotsky, Girodias-in-exile What [Jake] couldn’t satisfactorily explain to Nancy was that he was more exhilarated than depressed by the trial because at last the issues had been joined” (88). Even though Jake is not legally culpable, like Augustine he feels that he deserves punishment for the sins which no longer break an English legal code. With Jake, too, the judge reaches the correct verdict—scolding Jake, but not jailing him. Richler thus signifies that behind the interested and fallible legal system is some higher court.

Through justice, “Expiation” narratives often attempt to mediate between opposed social factions and for this reason the “Expiation” meta-narrative cannot be simply called an extension of political conservatism. In Williams’s *The River Horsemen* (1981), Jack Cann suffers for his own sins and for those of white Anglo-Canadian culture. At the end of the novel he pays with his body for his own hubris and lawlessness, and for the dispossession of the Cree.⁵⁹ Richler, in *Joshua Then and Now*, also emphasizes individual accountability, but legal procedures are complicated by social and political biases:

A few weeks after the Parti Québécois had bounded into office ... René Lévesque Hit a derelict, who was snoozing on the street, and killed him. Montreal’s intrepid police, who used to gleefully crack Separatist skulls with riot sticks in the days when they were still demonstrating in the street, quickly adjusted to the new power structure. On the spot almost instantly, they assessed the situation and grasped where their duty lay. They tenderly escorted the distressed premier and his mistress from the scene, out of sight of obnoxious reporters, and booked the offending corpse, removing it to the hospital for a blood test, to establish whether or not it had been drunk.⁶⁰

⁵⁹ David Williams, *The River Horsemen* (Toronto: Anansi, 1981).

⁶⁰ Mordecai Richler, *Joshua Then and Now* (Toronto: McClelland and Stewart, 1980) 57.

“The Law” here seems to be another name for the status quo, no more, no less. Indeed, the main representative of the policing function in *Joshua Then and Now* (1980) is the bigoted and dangerous policeman McMaster:

You're a faggot today, and you want it written in the bill of rights that you got the right to teach gym in elementary school and soap the boys down in the shower room. A Jew elbows ahead of you in a line-up outside a movie and you shove him back a little, just to keep him honest, and right off he's hollering about the six million. (16)

“... so we break down the door,” McMaster continued as the Sony whirled, “and this little Pepsi runt ... Scrub that. This disadvantaged habitant—he's a holy terror with a gun, but he hasn't got it now—he's cowering in the corner. A rat at bay. Trembling from head to foot. And Sweeney, he was my partner in those bygone days, he's moving in, ready to pistol-whip him. I step right in there, stopping him. I say to Sweeney, quote, We are not vigilantes, but officers of the law. I cannot, in conscience, acquiesce to violence. It does not behoove me. We should endeavour to dig to the roots of this miasmatic problem. Social injustice, unquote. And that little punk, he's still shit-scared, he trips and falls down all the stairs, head first. And how's this for irony? Afterwards, his lawyer claims it was us who marked him up so badly. Well, I tellya. That's when I became cognizant of the veracity to be found in the works of that well-known French writer Albert Camus. Our lives are absurd. Hoo boy, are they ever.” (361)

Nevertheless, despite the fallibility of the justice system and despite the way that McMaster seems to invite a “Civil Liberties” reading, there are few innocents (apart from Holocaust victims) who need safeguarding in Richler's worlds. The uneven social power of the “disadvantaged habitant” and McMaster can be distinguished only at the moment of “cruel and unusual” police brutality, but not in terms of innocence, since the tonal shifts suggest that McMaster

is telling the truth when he says that the victim was “a holy terror with the gun”; and since that other ‘habitant,’ René Lévesque, uses the law’s search powers to his advantage. Similarly, the reader is not meant to be outraged at the seizure of a blood sample from the “offending corpse,” as much as to acknowledge the partisan nature of all human institutions. Richler’s social “mediations” depend less upon good will between groups than upon a recognition of the fundamentally selfish nature of all groups, and upon the individualized punishment of lawbreakers no matter which rights they invoke. The justice system in *Joshua Then and Now* does eventually right itself despite rogue policemen and social biases, when Richler has McMaster pay for his crimes.

If even a fallible legal system can do justice to corrupt humans, then authority seems necessary, not terrifying. Someone, after all, must mediate between private conflicts. The searches and punishments in “Expiation” narratives often occur without too much focus on state penal systems, as if it were not an institutional agency but natural justice taking its course. In the “Expiation” narrative the law magically operates, but hides or disguises itself so that one nearly fears it doesn’t exist.

7

Two recent novels, Ondaatje’s *The English Patient* (1992) and Margaret Sweatman’s *Sam and Angie* (1996), show that the “Civil Liberties” and “Expiation” narratives need not be exclusive, and that legal bifurcations may be comprehended within a single text, another sign that the liberal/conservative distinction cannot fully gloss literary “search and seizure.” While Ondaatje and Sweatman in the past relied upon the “Civil Liberties” meta-narrative,⁶¹ their evident discomfort about remaining inside a single meta-narrative is, I think, a good omen.

The English Patient begins with a number of withdrawals from the omnipresent and warlike nation-state into the private

⁶¹ I have already suggested how Ondaatje’s novels might fit the “Civil Liberties” narrative. Margaret Sweatman’s only other novel, *Fox*, combines historical documents with a lyrical narrative to evoke the 1919 Winnipeg General Strike. Throughout the novel the authorities represent class interests, and they are clearly repressive even long before the Strike leaders are arrested. See *Fox* (Winnipeg: Turnstone, 1991).

sphere: Hana decides to care only for the English patient and not “for the greater good”;⁶² Caravaggio decides to “Reveal nothing. Whether they came at him with tenderness or subterfuge or knives (27); and Count Ládíslaus Almásy withdraws from war into the affair with Katherine Clifton. “All I desired,” he says, “was to walk upon such an earth that had no maps” (261). In part, Ondaatje endorses Almásy’s postmodern wish to avoid reason. Larger crimes (war, the atomic bomb) remain in the public domain, to be laid at the feet of the map-makers and the European war machine, while the desert territory—with appearing and disappearing oases and Bedouin—will not conform to the map. The private lives there remain opaque to judgements of good and evil. The English patient’s early assessment of himself—“He could have been, for all he knew, the enemy” (6)—already hints that he belongs to the “wrong” side, but hints in such a way as to remove moral culpability (he exhibits no *mens rea*) from the private individual. The novel’s private climax occurs in the Cave of Swimmers, where Almásy nearly succeeds in making Katherine’s body eternal. The lovers have escaped the eyes of society, judging husbands, and the system of civilized courtesy.

One could therefore defend a purely “Civil Liberties” interpretation of *The English Patient*. Almásy claims, “I do not believe I entered a cursed land, or that I was ensnared in a situation that was evil” (257). A “Civil Liberties” interpretation would emphasize the role of the state in incarcerating Almásy, thereby ensuring Katherine’s tragedy; emphasize Caravaggio’s decision, finally, not to punish Almásy; emphasize the Cave of Swimmers, where canonization of the lovers takes place. The possible autobiographical parallels to Ondaatje’s life⁶³ would then contain no ironies, and Almásy’s crime, judged only by Kip, would simply be his former complicity in Europe and in map-making. It is not difficult, in such a reading, for an Almásy or an Ondaatje to be absolved: he simply recants the map. In a more sophisticated version of a “Civil Liberties” interpre-

⁶² Michael Ondaatje, *The English Patient* (Toronto: Random House, 1992) 14.

⁶³ At nineteen, Ondaatje wooed the thirty-four-year-old Kim from her husband and his professor, D.G. Jones. According to Kim, her first marriage was already over and there was “no deception, no betrayal,” though one presumes that things weren’t quite that clear for the student Ondaatje. Ondaatje’s later affair with Linda Spalding, his biographer suggests, betrayed Kim. See Ed Jewinski, *Michael Ondaatje: Express Yourself Beautifully* (Toronto: ECW Press, 1994) 34, 111.

tation, Stephen Scobie argues that the naming of the English patient involves a reduction of the primal wound—a burning man falling from the sky—to a particular identifiable body, and of an anonymous poetic image to the mimetic smugness of the novel form. For absolution in Scobie's reading, one must also recant the name and form, which Ondaatje does imperfectly.⁶⁴

These interpretations, however, would need to insist that the burning of Almásy is not a socio-political and personal expiation branded onto his flesh, not, in other words, *just*. As Scobie argues, it's not merely Caravaggio but the *narrative* that names the patient;⁶⁵ it's the *narrative* which forces the subject to lose his opacity. While Ondaatje's public defence of the historical Count Lászlo de Almásy (strangely presuming him innocent of spying) enacts a "Civil Liberties" narrative,⁶⁶ Ondaatje's ironies *within* the novel develop along the lines identified by Christian Bök: throughout his career Ondaatje has increasingly qualified his violent romantic heroes.⁶⁷ The once-endorsed chaos comes, late in Ondaatje's career, under the searching eye of a moral censor, perhaps even a purposely self-incriminating censor; and the moral ironies work against Almásy, suggesting that the man falling from the sky is expiating a crime. If the map in *The English Patient* is the quintessential panoptic tool, a European search engine preparatory to seizure, Almásy's wish for freedom from maps nevertheless seems to be a naïve appeal to the authority of a guiltless body, an appeal that Ondaatje makes ironic by confronting the patient with his own compromised history, by naming him, and, most subtly, by displaying the

⁶⁴ Stephen Scobie, "The Reading Lesson: Michael Ondaatje and the Patients of Desire," *Essays on Canadian Writing* 53 (Summer 1994): 92–106.

⁶⁵ Ondaatje, *The English Patient* 98.

⁶⁶ Elizabeth Pathy Salett, remembering a very different Almásy, characterizes the film version of *The English Patient* as "amoral and ahistorical"; see "Casting a Pall on a Movie Hero," *The Globe and Mail* 6 December 1996: C6. A report of Ondaatje's defence appears on C1 of the same paper. The argument about whether or not Almásy was on the "right" side obscures the novel's ending, in which the atomic bomb is a European, not just a German or American phenomenon. An account which makes clear that Almásy was a spy, but also that Hungarian authorities generally sided with the Germans and that Almásy was well-enough regarded in Egypt after the war to become director of Cairo's Desert Institute in 1951, may be found in Steven Tátásy de Zepetnek, "The English Patient: 'Truth is Stranger than Fiction'," *Essays on Canadian Writing* 53 (Summer 1994): 141–53.

⁶⁷ Bök made his perceptive judgement before the publication of *The English Patient*; see 398n48.

military structures in Almásy's private life. Almásy's and Katherine's imagined privacy was a "public" affair all along, and not only because the British state was watching: *outside* of the Cave of Swimmers Almásy and Katherine engaged in very aggressive contests. These contests find a less savage echo in Kip and Hana's game of stalking one another in the dark; Hana uses Caravaggio to catch Kip, puts her foot on his neck, and says "Confess" (223). This spectre of the law characterizes male-female relationships in the novel, and the law emanates not just from the state, but from the desiring individuals themselves. Caravaggio's ruse of stripping to get past suspicious guards suggests that the naked body cannot be trusted to be innocent, and at the crux of nakedness in the Gyges and Candaules myth (that Katherine tells) is the power obtained by breaking a privacy. The myth combines the public sphere of the tyrant (who takes power not because of aristocratic birth but because he can) and private adultery (which becomes not simply an expression of a freed desire but a game of power). Ondaatje's ironies thus work partially against opacity and against Almásy, judging him, less emphatically perhaps than Elizabeth Pathy Salett would want, but judging him.

For Ondaatje and other writers who came of age during or after the 1960s, the "Civil Liberties" narrative carries a great deal of symbolic power. In *Sam and Angie*, Sharon's comments about criminal law indicate this too: "Angie is sexy. Defence is sexy."⁶⁸ Angie's job as a defence attorney places her squarely within a "Civil Liberties" narrative, and her husband Sam's early instincts, too, conform to a strong advocacy of civil liberties: "Sam had a nightmarish fear that the judge would charge Angie with a crime" (7). Even witnesses are protected against self-incrimination (except through perjury), but Sam still fears that under the gaze of some greater eye, the defence attorney's proximity to the accused creates guilt by association, and positions Angie outside of the law.

But it is precisely the "sexy" transgressions associated with Angie that call for a simultaneous "Expiation" reading of *Sam and Angie*. The defence counsel *is* compromised, and while Angie has not perjured herself, her evasions of justice do become disturbing. Her legal defence of Patrick, who watched a woman and eventually trespassed in the woman's house, is understood by Angie as a

⁶⁸ Margaret Sweatman, *Sam and Angie* (Winnipeg: Turnstone, 1996) 9.

game which she wins (41). In this, she follows Lyotard's postmodern conceptualizing of social, linguistic, and philosophical structures as a series of language games, and his sense that what matters now is not some foundation to the game, but the performativity principle, whereby the moves in the game are judged by the desired result of maximum performance, not by truth.⁶⁹ In fact, the highly stylized positions in a court—two players (plaintiff and defendant), rule-governed moves (a charge, the presumption of innocence, trial protocol), the taking of turns (first the crown attorney speaks, then the defence counsel), and a final victory or loss—suggest that legal proceedings could be analyzed only very poorly without recourse to the notion of “game.” Yet the price of a performativity-oriented ethic, Sweatman suggests, is a certain dehumanization: “This was [Angie’s] strength furthered by her study of law, to see clearly our estrangement from the people we love” (141). Angie’s later resort to game-moves in her marriage—“She took [Sam’s] hand and pulled him into the kitchen. It was Blondie talking to Dagwood but it would have to do till the dry body would lose some territory to hope” (184)—are less successful. Early on, Patrick says that trespassing is “something I like to do It’s the kind of thing everybody wants to do” (35–36), a seductive articulation of Angie’s own sense of game perhaps, but not, she realizes, an approach that will wear well in the expiatory context of a courtroom. Relying upon the protection against self-incrimination and upon the right to retain counsel, she advises him to say nothing: “His innocence would be explicit. She would speak for him” (39).

The game-move which insists upon the presumption of the defendant’s innocence also affects her later tactical “confessions” to Sam, and her successful performance at the trial glosses over not only innocence and guilt, but also the complainant’s *loss* of civil liberties. Patrick’s intrusion into the complainant’s home suggests that, no, it is not only authorities who violate the right to security against unreasonable search. While Patrick’s trespasses (including his purposeful brushing against Angie’s breast) eventually seem *comparatively* benign, Angie’s next defendant, Joey, has trespassed a step or two further. He took part in a home invasion and watched while a lawyer, Marlene Cook, was raped and strangled.

⁶⁹ Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*, trans. Geoff Bennington and Brian Massumi (Minneapolis: U of Minnesota P, 1984).

At the same time as Angie becomes increasingly identified with the “Civil Liberties” narrative, hiding her adulterous affair with Patrick from Sam, Sam becomes increasingly identified with the authorities, at first because his business partner betrays him and can’t be found to make expiation. Here and elsewhere, Sam, “an idealist,” continually finds “fresh evidence of the world’s betrayal”: “Honest to god, it makes me sick, these people should be in jail” (55). After Angie’s affair with Patrick becomes explicit, Sam turns into the judge, the all-seeing eye. The novel’s *film noir* sight lines suggest that the panopticon too is not simply housed among state authorities, but is an essential feature of perception. Sam’s early watching of Angie, thematized in chapter headings like “*a scrutiny he calls love*” (12), slowly shades into police techniques as a later subheading to the chapter “Fidelity” suggests: “*a surveillance more intimate, a scrutiny called love*” (77). It goes without saying that Sam’s “searches” of Angie occur without a warrant. Sam’s searches are so thorough that he quotes her private writings back at her, complaining that he is “tired of hearing about *a surveillance called love*” (174). Since his surveillance has no immediate sexual purpose and since he is her husband, Angie has no legal recourse to the reasonable expectation of privacy which would make his actions culpable.⁷⁰ Formally, Sam’s voice intrudes even into Angie’s point of view: “She . . . imagined Sam patiently taping and copying, same posture when he worked at polishing his stones, simple devotion . . . *Confess Angela, confess, and then we’ll turn on every light in the house*” (169–70).

Despite all the fear of unreasonable searches, however, power and authority have erotic appeal in *Sam and Angie*. Of Sam, Angie says, “If he were to prove weak, if she were to discover him, it would destroy the balance of their erotic life” (117). Power resides not only in Sam, but is dispersed among characters and among the details of everyday life, blurring the borders between mere watching, voyeurism, and warrantless search. When Patrick is watching, eating becomes erotic because it exposes Angie’s body: “how revealing it is to open her mouth and put food in it” (114). At the same time, Angie’s sexual aggressiveness with the young cabby and her willingness to copy Patrick’s crime by trespassing in some-

⁷⁰ See for example, Alderman and Kennedy, “Privacy v. the Voyeur,” *The Right to Privacy* 227–76.

one's private office with Patrick and Regina, imply a certain pleasure in intruding. Angie has been associated with civil liberties, and her trespasses therefore undermine faith in a "Civil Liberties" narrative, since her erotic pleasure increases as she moves back and forth between playing scrutinizer and playing the object of scrutiny. But neither does Sweatman glamorize the "Expiation" narrative through the erotic appeal of power. Sam, nearly omniscient and omnipresent so that Angie no longer needs to approach him "because he's everywhere" (171), derives satisfaction from his watching position, even if it is fundamentally a sad and repressive satisfaction. The object of the warrantless search—Angie—is guilty and compromised by pleasures that ally her with Joey; yet the one who watches—Sam—is neither innocent, nor divine, nor even just, as Sam's final beating of Angie declares. In *Sam and Angie* neither of the two narratives can give an innocent account of the individual subject.

Joey's conviction best reveals the narrative fault lines of the two opposed systems. In the opinion, the judge convincingly argues for a continuous and responsible subject (where Angie sought to create opacity): "The defence, he said, hadn't recognized the cumulative power of each circumstantial fact. She had tried to obscure that power by distracting the court with discontinuous observations." A "Civil Liberties" interpretation might counter that the verdict is not impartial, for the judge appears "peevisish and myopic," the relic of an era easily fooled by rapidly flashing facts, and because Angie identifies his biases: "All women worship effortless power. Therefore all women worship the law. A syllogism. A headache." However, since he is perceived only from Angie's point of view, and since there are no textual marks to distinguish her editorializing from the judge's actual words, Angie may be giving us a false light. The same indeterminacy of voice occurs in the final appearance of the judge: "No one holds the power, not the judge, who holds it in trust as best he can. The learned judge. As best he can. He looked at her for the desperate fraction, and then resumed authority. He was very tired and he knew he had failed. A wise judge" (176–77). If we assume that the point of view is only Angie's, then the words register ironically, sounding the distance between the sceptical victim and the law, perhaps confirming the "Civil Liberties" meta-narrative by denying that authority can grasp its own conflicted nature, never mind the complexity of Angie's position. However, if we assume that the point of view is the judge's (with

the last three words coming either from an objective narrator or from Angie), then the words register more seriously, perhaps confirming the “Expiation” narrative by allowing the law a measure of self-knowledge. No signs tell us which interpretation to prefer.

The resulting expiations—Joey’s and Angie’s—seem both appropriate and excessive. In detention, Joey finds “that long-denied maternal rhythm” (150), yet there is a real possibility that he was only a frozen watcher and not an accessory to the murder. During Sam’s rhythmic beating of Angie, she is finally forced to bear responsibility for the game-moves that she has made in the courtroom and in her marriage, yet she is also victimized in the most basic way possible—in a cruel assault on her body.

8

The homology between judicial opinions and literary texts that I identified early on might easily have invited a conclusion emphasizing the general cultural bifurcation between liberalism and conservatism, a bifurcation which often depends more upon American political rhetoric than upon Canadian experience. But even the ‘canonical’ instances of each meta-narrative cannot so easily be placed. Furthermore, since each literary work addresses a different context, it would be presumptuous to prefer a “Civil Liberties” narrative over an “Expiation” narrative or vice versa, or even to prefer a more ambiguous narrative over the first two. Nevertheless I do find it encouraging that some writers are unwilling to let a single meta-narrative dominate the politics of their novels. Like Williams’s forthcoming *The Resurrection of Louis Riel*, which also suggests the difficult balance between civil liberties and expiation (both in the historical echoes of Riel’s trial and in the contemporary evasions and confessions of Jean-Marie Prud’homme),⁷¹ *The English Patient* and *Sam and Angie* show indecisiveness about legal narratives. Were Almásy simply favoured and kept opaque, Ondaatje would be guilty of what his critics allege—that he romanticizes violence in the dark, amoral contours of the hero. On the other hand, were Caravaggio or Kip able to submit Almásy to a final accounting, Ondaatje would attain the kind of post-World War II banality and media *doxa* in which one need only name the enemy as a Nazi in

⁷¹ Thanks to David Williams for allowing me to see the novel in manuscript.

order to suspend all his or her civil liberties. The refusal is comparable in Sweatman's work. To allow Angie to remain opaque and unpunished would be to celebrate her lack of responsibility, her legal manoeuvring on the scene of another woman's violent death. And yet, to make her punishment seem fitting would be to legitimize a whole range of repressive practices, from stalking to domestic abuse. Any *particular* historical and legal case may need to be judged as requiring *either* a broader interpretation of civil liberties *or* some form of expiation, but in the symbolic framework of art, the occasional neutralizing of political concerns (by a refusal to choose) allows for a less pre-determined approach to individual responsibility.

It's too early to make a general summation about the place of the two meta-narratives in English-Canadian fiction, but let me risk one concluding hypothesis. Judging by the inconsistent applications of Section 8 of the Charter in the Hryciw and Stocki cases, Canadian jurisprudence has not yet chosen between the two meta-narratives. Admittedly, the notion of "balance" may be partially illusory when applied to particular cases: Andrew D. Heard has documented that Charter interpretations in the Supreme Court depend upon which judges are on the bench (or "panel," since the nine justices rarely sit as a complete group), and he argues that a politicization of the Supreme Court (copying the US example) would be preferable to the veiled ideology in Canadian Supreme Court decisions.⁷² But what Heard calls a judicial "lottery" may be a symptom—like the opposing provisions of Section 8 of the Charter and Section 487 of the Criminal Code, or like the competing meta-narratives in Canadian fiction—of the Canadian refusal to institutionalize a final choice between civil liberties or the legal power of arrest, between the opaque and the guilty subject. The inconsistency of Supreme Court decisions may allow for a broad range of interpretation for lower courts, and the hedging of novelists for a broad range of social positions.

⁷² Andrew D. Heard, "The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal," *Canadian Journal of Political Science* 24.2 (June 1991): 289–307.