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**WHERE INJURY OR DAMAGE IS FEARED: PEACE BONDS AS COUNTER-LAW?**

By

Brandon Chase

A Thesis  
Submitted to the Faculty of Graduate Studies  
through Sociology, Anthropology and Criminology  
in Partial Fulfillment of the Requirements for  
the Degree of Master of Arts at the  
University of Windsor

Windsor, Ontario, Canada

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Where Injury or Damage is Feared: Peace Bonds as Counter-Law?

by

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April 19, 2012

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## ABSTRACT

Guided by Ericson's counter-law analytic, the focus of this thesis is how peace bonds erode traditional principles of criminal law to govern risk and provide applicants with a "freedom from fear" (Ericson, 2007a). Peace Bonds, proscribed under s. 810 of the *Criminal Code of Canada*, permit the courts to impose a recognizance on anyone likely to cause harm or "personal injury" to a complainant. Drawing on publicly available literature, the leading peace bond case law, the Lori DuPont Inquest, and official Practice Memoranda, this thesis conducted a critical discourse analysis to answer the question: how and to what extent are peace bonds a form of counter-law? Facilitated by the erosion of traditional criminal law principles and rationalized under a precautionary logic, proving that a complainant is fearful under s. 810 can result in the expansion of the state's capacity to criminalize and administer surveillance through police and community notification and supervision.

## ACKNOWLEDGEMENTS

I would first like to thank my loving wife, Cassandra Chase, for encouraging me to attend graduate school. Without her continued support, I would not have had the opportunity to complete this thesis. I would also like to thank my advisor, Dr. Randy Lippert, for his mentorship, insight, and commitment to the completion of this thesis. His guidance has been invaluable to the quality of this paper and my graduate school experience. I am also very appreciative of my second reader, Dr. Danielle Soulliere, and my external reader, Professor Leigh West, for their time, dedication, and expertise. Without the help of both Dr. Soulliere and Professor West, this paper would not have been completed. I must also thank the department of Sociology, Anthropology, and Criminology's graduate secretary, Kelley Allard, and other faculty members for their encouragement and support through this process. Finally, I must acknowledge the support of my mother, father, sister, in-laws, and other family members. Thank-you for always standing by me and reminding me that I can accomplish anything I set my mind to.

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## CHAPTER ONE

### INTRODUCTION

Guided by Ericson's counter-law analytic, the focus of this thesis is how peace bonds erode traditional principles of criminal law to govern risk and provide applicants with a "freedom from fear" (Ericson, 2007a). According to the Newfoundland Provincial Court in *Miller v. Miller*, the power to bind people under a bond to keep the peace "...is of ancient origin, so remote, in fact, that the precise sources and the derivation of it are all but lost to jurisprudential history" (1990: 252-53). Notions of bonds to keep the peace date as far back as 60 A.D. when the Apostle Paul mentioned them in his letters from prison, encouraging the peaceful unity of Christian people within the churches<sup>1</sup>. As a formal legal entity, bonds of peace were used in seventeenth century Scotland to oblige noblemen, gentlemen, tenants and servants to keep the public peace. If this bond was broken, a nobleman would pay his annual rent on all properties, a tenant would pay every tenant's annual rent, and a servant would sacrifice his or her annual fee (Blair, McCrie and Row, 1848: 515). The aforementioned legal obligation to keep the peace is at the core of Canada's contemporary peace bond law. Proscribed under s. 810 of the *Criminal Code of Canada*, peace bonds permit the courts to impose a recognizance on anyone likely to cause personal injury to a complainant. Once proven on a balance of probabilities that a complainant has reasonable grounds to fear a respondent, the respondent is bound by conditions proscribed by the court aimed at keeping the peace between the affected parties. These conditions require that the respondent not associate directly or indirectly with the complainant or anyone named in the court order for a period not exceeding one

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<sup>1</sup> "I, therefore, the prisoner of the Lord, beseech you to walk worthy of the calling with which you were called, with all lowliness and gentleness, with longsuffering, bearing with one another in love, endeavoring to keep the unity of the Spirit in the *bond of peace*" (Ephesians 4:1-4 emphasis added).

year (Neumann, 1994). However, if the court finds it necessary, peace bond orders can be renewed an indefinite number of times upon their expiry (Grant, 1998).

There have been several amendments to Canada's peace bond regime that have extended its reach, incorporating multiple purposes—preventing future crime or reacting to crime in place of probation—and a large number of potential offences. First, in 1993, parliament decided to reform peace bond legislation by extending its scope through Bill C-126, currently found under s. 810.1 of the Criminal Code. According to the Honourable Justice Gordon Kirkby, this law “allows the court to impose an order where there are reasonable grounds to fear that a person will commit a sex offence against someone under the age of 14 years” (Kirkby in Crawford, 2000: 2). Then, in 1997, parliament once again extended the scope of peace bond law under Bill C-55, currently found under s. 810.2. As explained by Kirkby in his speech to parliament:

This new order is designed, somewhat more generally [than s. 810.1], to prevent serious personal injury offences. Despite the controversy swirling around this measure, its underlying principle has been clear from the beginning. The goal has always been to prevent violent incidents, to establish in a court of law the risk presented by certain individuals and to command those individuals to keep the peace and be of good behaviour; in other words, to meet the standard of conduct that is expected of them as participants in society (Parliament of Canada, 1997).

Although applications under 810.1 and 810.2 can be used to impose a recognizance on anyone likely to cause personal injury of a violent or sexual nature to a complainant, these peace bond applications have been largely used in situations when a violent offender, a sex offender, or a violent sex offender has served his or her whole sentence and is released to the community without supervision (Crawford, 2000). In these situations, a peace bond under s. 810.1 or s. 810.2 may also be used in place of probation as a form of community protection and risk management (Petrunik, 2002). Finally, in 2001, parliament

amended s. 810.01 under bill C-36<sup>2</sup>, Canada's *Anti-Terrorism Act*, to expand investigative powers and create new offences to act against terrorism (Roach, 2005). Originally adopted in 1997 as a recognizance aimed at "criminal organizations," s. 810.01 was widened under Bill C-36 to include fear of a "terrorism offence" as grounds to seek a peace bond (Trotter, 2001: 241). According to Ericson, these amendments to Canada's peace bond regime are typical of a counter-law regime, which is designed to cast the net as widely as possible to identify suspected enemies that may cause harm (2007b: 388).

Justice Kirkby admired these community protection and risk management approaches, particularly in comparison to methods used in the United States:

I am not interested in amending the Criminal Code for the benefit of the prison industry. There are some useful American approaches to criminal justice policy, but the facts show that too often prison is seen as the solution to every crime problem resulting in too many non-violent and low risk offenders being caught in the net.

It is too simplistic, too expensive and it simply does not work. The alternative is the one that this government has proposed, a targeted approach where we use imprisonment for serious offenders and use community based controls for others (Kirkby in Crawford, 2000: 3).

Kirkby implies that the approaches used by peace bond provisions "work" better than prison-based sanctions. However, this thesis explores peace bonds, not to determine their effectiveness, but rather as a "governmental technology" in relation to a precautionary "political rationality" (Rose and Miller, 1992). This thesis research examines the assumptions deployed in peace bond discourse and the implications these representations have for the governance of risk using discourse analysis. For this analysis, data was drawn from publicly available texts, specifically pamphlets and handbooks about the

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<sup>2</sup> This bill also created a new peace bond under s. 83.3 of the *Criminal Code* entitled "Recognizance with Conditions." This peace bond will not be discussed because, as noted by Trotter, "...the section is more concerned with arrest and detention, than with recognizances or conditions" (2001: 242).

peace bond process and the text of two important legal decisions regarding peace bonds: *Miller v. Miller* and *R v. Budreo*. As Ericson and Haggerty suggest, although discourse both constitutes and is constituted by practice, analytical separation must be maintained between the two (1997: 84). Accordingly, a small portion of this thesis analyzes practices separately from discourse but it ultimately views their implications under the same theoretical lens. The examination of practices uses data from official “Practice Memoranda” given to Crown prosecutors in the province of Ontario; peace bond statistics from the province of Ontario; and official texts from the Lori Dupont Coroner’s Inquest. Using three prongs of Ericson’s (2007a) counter-law analytic to aid in the analysis of discourse and practices—namely the politics of uncertainty, law against law, and surveillant assemblage—helps answer this thesis’ main research question: how and to what extent are peace bonds a form of counter-law?

## CHAPTER TWO

### THEORETICAL APPROACH: ERICSON'S COUNTER-LAW ANALYTIC

Recent criminological and socio-legal literature has focused considerable attention on notions of risk and harm prevention (e.g. Castel, 1991; Moore and Valverde, 2000; Hudson and Bramhall, 2005; Scott, 2005; Bell, 2006). This fascination is inherent in the modern risk society, which is dominated by the omnipresence of potential risks. The focus of the population becomes more the prevention of socially distributed “bads” than the facilitation of socially distributed “goods” (Beck, 1992: 3; Ericson and Haggerty, 1997: 6). This literature has prompted criminologists like Zedner (2007) to highlight a refocusing of criminological inquiry away from post-hoc reactions to crime, like prison, and toward “pre-crime” or proactive crime prevention. Ericson (2007a) identifies the Western world’s tendency to criminalize all imaginable sources of harm. This trend, a by-product of the risk society, is facilitated by the “politics of uncertainty” and a “precautionary logic” that encourages populations to contingently envisage and actively prevent potential harms. Insecurity caused by the uncertainty of risk and harm has become a main concern for neo-liberal governments that attempt to enterprise their citizens to act autonomously through freedom (Foucault, 1979/2008: 148; Rose, 1996: 340; Hamann, 2009: 53). It becomes the job of the neo-liberal state to transform uncertainty into security that enables both safety and freedom—more specifically, freedom from fear (Ericson, 2007a: 3, 163). This is accomplished by the state acting through risk and the politics of uncertainty—using both scientific and legal methods to “act as if the future is knowable and governable” (Ericson, 2007a: 16). Legally, to act against any potential source of harm, the state must not let the limits within the law stand in its way of criminalizing risky populations. Accordingly, the state must make law that

facilitates and expedites criminalization, even at the expense of eroding the law's traditional principles. This erosion of law's traditional principles for the purposes of preemption and risk governance is what Ericson (2007a) refers to as "counter-law."

Counter-law takes two forms. One form is "law against law," which enacts a new law or changes an existing law to "erode or eliminate traditional principles, standards, and procedures of criminal law that get in the way of preempting imagined sources of harm" (Ericson, 2007a: 24). High standards of proof and evidence in criminal law create uncertainty and, thus, must be diminished to act against criminal behaviour (Ericson, 2007a: 25). Law against law "...also involves efforts to counter the traditional distinctions between the different legal forms of criminal, civil, and administrative law" (Ericson, 2007a: 25). This method of criminalization is particularly compelling after catastrophic failure in a risk management system for which the government is held responsible (Ericson, 2007a: 24). Counter-law II also uses new law to erode traditional principles in criminal law that hinder the preemption of harm and risk but does so to create new surveillance infrastructures or extend existing methods of surveillance (Ericson, 2007a: 24). Ultimately, the creation and extension of surveillance infrastructures creates a "surveillant assemblage" that operates by abstracting human bodies from their territorial setting and separates them into a series of discrete flows that are reassembled into distinct "data doubles" that can be scrutinized and targeted for intervention (Haggerty and Ericson, 2000: 2). Although the notion of "data doubles" implies that all components of the assemblage must be digital or technological in nature, Haggerty and Ericson explicitly suggest that this may not always be the case—"In situations where it is not yet practical to technologically link surveillance systems, human contact can serve to align and coalesce discrete systems" (2000: 610-11; see also Wilkinson and Lippert, 2011). Examples of this

can be seen in “multi-agency” policing where the police align themselves with, for example, social workers to scrutinize “at risk” individuals (Ericson and Haggerty, 1999: 256-91). Generally, however, nodes of a “surveillant assemblage” have been conceptualized in many forms, including information and communication technologies used in governing mobility in cities (Graham and Wood, 2003), the use of state-wide databases to monitor welfare recipients (Hier, 2003), and traffic cameras that detect an offence and issue a fine (O’Malley, 2010).

This thesis views Ericson’s notion of “precautionary logic”—deployed to transform the “politics of uncertainty” from doubt to preemption through criminalization (Ericson, 2007a: 20-4)—as a political “strategy” or “rationality.” In 1979, Donzelot (1979) refers to three concepts that form a governmentality research program (Lippert and Stenson, 2010). The three concepts in his study are: strategies, technologies, and programmes. “Strategies,” later called “rationalities” (e.g. Rose and Miller, 1992), can be seen as:

A way or system of thinking about the nature of the practice of government (who can govern; what governing is; what or who is governed), capable of making some form of that activity thinkable and practicable both on its practitioners and to those upon whom it was practiced. (Gordon, 1991: 3)

Precautionary logic fits this construct. It is a way of thinking about the uncertain ability of liberal governments to govern the future and provide security (Ericson, 2007a: 21). It is through this rationality that criminalization via counter-law becomes thinkable and practical. Counter-law, then, can be seen as a “technology” meant to deploy the aforementioned political rationality. This suggests that Ericson’s framework fits with a governmentality problematic. Miller and Rose argue that an analysis of governmentality has a discursive character that requires a particular attention to language (2008: 29-30). Given this delineation, this thesis critically analyzes peace bond textual discourse to see

whether tenets of Ericson's counter-law analytic are present in them. Further, since discourse both constitutes and is constituted by practice (Ericson and Haggerty, 1997: 84), a portion of this analysis in effect also examines peace bond practices as they relate to Ericson's counter-law analytic.

A theoretical framework that has gained much scholarly attention in the past decade and which is similar to Ericson's is delineated by Giorgio Agamben's (2005) "state of exception."<sup>3</sup> This framework is explicitly linked to counter-law by Ericson, who states that "[c]ounter-law is officially expressed as a 'state of exception' ...Normal legal principles, standards and procedures must be suspended because of a state of emergency, extreme uncertainty or threat to security..." (2007a: 26; 2007b: 388). However, despite this link, several issues arise when considering adopting the state of exception theoretical framework in the proposed analysis. The most significant issue is that Agamben's construct serves more as a general theory of government than a specific analytic that can be used in the analysis of peace bond discourse and practices. Most literature that engages with the exception views it as a method of governing (Dean, 2007; Lippert and Williams, 2012) and a theory or concept (Aradau and van Munster, 2009; Ralph, 2009). It does not appear to be referred to as an "analytic." The essential themes of Ericson's theory, however, have been used as analytical tools to engage with "lay narratives of insecurity" that legitimized the City of Chicago's former *Gang Ordinance* (Levi, 2009), the regulatory practices employed under the UK's Anti-social Behavior Orders

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<sup>3</sup> According to Agamben's interpretation of Carl Schmitt's (1922/1985) original work, the state of exception is a space devoid of law, where the divergence between legislative power and executive power takes place—a legal normlessness. It is a proverbial "...no-man's-land between public law and political fact..." (2005: 1) in which the state exercises its sovereign power by acting outside the law to bring order during times of perceived chaos while also seeking to prevent possible situations from becoming chaos (Aradau and van Munster, 2009; Dean, 2010).

(Crawford, 2009), and the narrative content of a CCTV/Crime Stoppers “assemblage” (Lippert and Wilkinson, 2010). Agamben’s work does not delineate these essential themes to form an analytic, but rather articulates a more general “diagram” of power (Dean, 2010). Therefore, despite the continued popularity of Agamben’s perspective, this thesis prefers Ericson’s counter-law analytic as its main theoretical perspective. The politics of uncertainty, law against law (counter-law I), and surveillant assemblage (counter-law II) guided the analysis of discourse and practices to determine how and to what extent peace bonds are a form of counter-law.

## CHAPTER THREE

### PREVIOUS RESEARCH ON PEACE BONDS

Peace bonds are a neglected area of study in the criminological and socio-legal literatures. Grant (1998) provides an overview of s. 810.1 and s. 810.2 while comparing the “post-detention” monitoring of high-risk offenders in Canada and the United States. The author suggests that these peace bonds represent a “post-detention regime” that has survived constitutional scrutiny and is a much less extreme alternative to those imposed in the United States (Grant, 1998: 236, 239). MacAlister recognizes that peace bonds are an exception to a fundamental legal rule that sanctions are to be imposed to punish past rather than future conduct (2005: 20). Most attention given to peace bonds, however, is done in reference to sex offender regulation (e.g. Petrunik, 2003). According to Petrunik’s (2002) comparative analysis, the creation of peace bonds specifically for pedophiles (s. 810.1) is found mainly in Canada. Again, if a person is found at risk of committing a sexual offence against children, a peace bond can prohibit him or her from contacting children younger than 14 and from being in locations one would reasonably expect to find children. Petrunik views the use of peace bonds in the regulation of sex offenders as a “community protection/risk management approach” (2002: 496-8). This approach is largely predicated on “community social controls” that include “circles of support.” “Circles of Support” is a program composed of four to seven people who agree to help the offender avoid reoffending by giving him or her daily visits and phone calls (2002: 504).

Petrunik limits his analysis to how peace bonds generate community surveillance via “circles of support.” This is problematic because the support program may not be made available to all sex offenders who are subject to a s. 810 recognizance. As stated by Petrunik, “[o]ffenders considered for the [‘circles of support’] project lack community

support, are considered at high risk to reoffend, and typically are high-profile cases who have been subjected to a peace bond on release and sometimes community notification under provincial community safety legislation” (2002: 504). His example does not draw a clear link between peace bonds and surveillance given that the “circles of support” program is mostly used in “high-profile cases” and the participants must be selected to participate. Other sex offenders subject to a peace bond may escape the communal surveillance employed. This thesis research has attempted to overcome this limitation by examining whether community notification and surveillance are far reaching by-products of Canada’s peace bond regime. Further, this thesis analyzes peace bonds in their own right and not only in relation to “pedophile peace bonds.”

Neumann’s (1994) research also provides a critical examination of peace bonds, particularly as they relate to abused women. In his work, Neumann highlights several issues Canada’s peace bond regime encompasses, including “personal injury requirements” and “procedural delays.” First, the author suggests that judicial interpretations of s. 810 have not created a clear understanding of how “personal injury” requirements are to be met (1994: 189). Since a peace bond is based on a complainant’s ability to prove his or her fear of personal injury, a lacking definition of “personal injury” creates an evidentiary obstacle. Second, Neumann states that “[t]here is perhaps no single matter of greater concern to batter women who decide to seek protection from their assailants than that they receive it without delay” (1994: 184). The author argues that “procedural delays” are largely due to adjournments and the extensive time it takes a peace bond application to be heard in court (1994: 184-5). Overall, Neumann’s research is quite dated. This thesis attempted to update this research by referring to recent discourses and practices that relate to peace bonds. Specifically, analyzing these

discourses and practices questioned whether the issues of “personal injury requirements” and “procedural delays” are still relevant concerns.

Unlike previous literature analyzing peace bonds, this thesis does not limit itself to sex offender regulation or abused women, nor does it merely provide an overview of peace bond legislation. Given the nascent nature of counter-law literature, no research has attempted to make a connection between peace bonds and counter-law. Accordingly, this thesis is the first study to link peace bonds with counter-law, thereby filling a gap in the existing literature. Studying this potential link is important because it may call into question a far-reaching peace bond regime that is being used for multiple purposes, includes many possible offences, and has the capacity to affect the lives of many people. Further, unlike Chicago’s *Gang Ordinance* that was struck down in 1999 (Levi, 2009), peace bonds are still used by both the courts and fearful complainants, making this analysis relevant and contemporary. By adopting Ericson’s counter-law analytic in its analysis, this thesis will attempt to contribute to the existing literature by considering peace bonds as counter-law. Accordingly, the question guiding this thesis is: how and to what extent are peace bonds a form of counter-law?

## CHAPTER FOUR

### DATA SOURCES AND METHOD

To answer the aforementioned research question, this thesis drew on five data sources. The primary data source came from pamphlets and handbooks available to victims, attorneys, and the general public in a digital format through the Internet or as a hard copy distributed through government programs. Generally, this literature is designed to inform its readers about peace bonds, how they function, how to obtain them, and their implications after the court makes an order. It is likely that, since these pamphlets and handbooks are distributed to victims through Victim/Witness assistance programs and the general public through Public Legal Education initiatives or through a simple Internet search, they are read by large numbers of people. The pamphlets can be seen to constitute and circulate a truth in law. It is in their truth-telling ability, or “language of expertise” (Miller and Rose, 2008: 35), that the pamphlets form a power relationship with the reader (Valverde, 2003: 1-2). Thus, this literature has the potential to impact and shape a large number of people’s knowledge about peace bonds through the power relationship it creates.

There were eleven pamphlets and handbooks used in this analysis: a legal rights handbook provided by the Victim/Witness assistance program and published by Community Legal Education Ontario entitled “Do you know a woman who is being abused?” A pamphlet called “Creating a Safety Plan” developed by The Peel Committee Against Women Abuse, also available through the Victim/Witness assistance program. A document found through the Internet called “Peace Bonds” prepared by the Canadian Resources Center for Victims of Crime that, unlike most of the other literature, focuses on general victimization and not just domestic violence. A pamphlet found through the

Internet called “For Your Protection: Peace Bonds and Restraining Orders” published by British Columbia’s Ministry of Public Safety and Solicitor General. A pamphlet available through the Manitoba Justice Victim Services called “Legal Options for Protection from Domestic Violence and Stalking.” A pamphlet called “Peace Bonds: What to do if you are being threatened or harassed” published in Saskatchewan by the Public Legal Education Association. A pamphlet entitled “Peace Bonds and Restraining Orders” found through the internet and published by Public Legal Education and Information Service of New Brunswick. “Teachers Rights,” published by Public Legal Education and Information Association of Newfoundland. “Assaulted, threatened, or harassed?” available through Newfoundland’s Victim Services programs and published by the Government of Newfoundland and Labrador. Another Internet document entitled “Peace Bonds” published by the Legal Information Society of Nova Scotia. Finally, a handbook for Crown prosecutors entitled “Criminal Code Peace Bonds.” These pamphlets and handbooks were not only selected because of their public availability, they were also selected based on the researcher’s desire to have one pamphlet from almost every province in Canada to obtain uniformity.

The next two data sources came from the cases of *Miller v. Miller* and *R v. Budreo*. The court in *Miller v. Miller* delineated the burden of proof required to obtain a peace bond. Alternatively, legal professionals commonly refer to *R v. Budreo* as the leading peace bond case<sup>4</sup>. The courts in both *Miller* and *Budreo* spent considerable time discussing the nature of peace bonds and, because of their legally binding status, the

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<sup>4</sup> Attorneys who commonly work with peace bond applications suggested analyzing this case. During informal discussions with several crown attorneys, they referred to *R v. Budreo* as “the leading peace bond case.”

courts' conceptualizations must be followed by other courts in future cases. Thus, like the pamphlets and handbooks, *Miller v. Miller* and *R v. Budreo* can be seen to constitute and circulate a truth in law. Further, because these cases are both read by legal professionals inquiring about peace bonds and are publicly available through the Internet<sup>5</sup>, it is also conceivable that people's knowledge about peace bonds are shaped by this case law (e.g. Valverde, 1999; 2005; 2008). Based on their ability to shape public knowledge of peace bonds, this thesis considers *Miller v. Miller* and *R v. Budreo* important parts of peace bond discourse. For this reason, they will be included in this analysis.

This thesis used critical discourse analysis. This method was adopted because of the discursive character of governmentality (Miller and Rose, 2008: 29). Since Ericson's (2007a) analytic has been situated in a governmentality problematic, the analysis of text becomes necessary. Currently regarded as one key element of governmentality studies, discourse analysis was almost synonymous with Foucault's name in the early 1990s (Rose, O'Malley and Valverde, 2006: 89). The goal of critical discourse analysis is to explore the relationship between discourse and social developments in different social domains (Jorgensen and Philips, 2002: 60). Discourses can be seen as ways of representing aspects of the world (Fairclough, 2007: 124). For the purposes of this study, the discourse under examination is the representation of peace bonds in written text—pamphlets and case law specifically. This discourse has been analyzed in relation to developments suggested by Ericson's counter-law framework. To aid in the analysis of peace bond discourse, I coded for main themes meant to “capture” something important about these data (Braun and Clarke, 2006). In this case, the analysis of peace bond

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<sup>5</sup> *R v. Budreo* can be found at [vancouver.ca/police/justice/documents/NJCManual/RvBudreo.pdf](http://vancouver.ca/police/justice/documents/NJCManual/RvBudreo.pdf) and a summary of *Miller v. Miller* can be found under Duhaime.org's definition and discussion of peace bonds at <http://www.duhaime.org/LegalDictionary/P/PeaceBond.aspx>.

discourse has sought to capture whether tenets of Ericson's counter-law analytic are present in the texts. Their presence would suggest a counter-law exists, at least to some extent. "Politics of uncertainty" was operationalized in relation to "precautionary logic" and has been expressed through invocation of fear and the threat of crime in peace bond texts. Specifically, this analysis searched for assertions about a complainant's fear of crime, the possibility of future victimization, and how peace bonds can facilitate a "freedom from fear" through a potential capacity to prevent crime. The notion of "law against law" was operationalized in relation to traditional legal principles that, according to Ericson, seem to be embodied in distinctions between forms of law and principles of evidence (2007a: 25). However, I also included those principles reflected in the *Canadian Charter of Rights and Freedoms*. Legal aspects associated with peace bonds that were contrary to an aforementioned traditional legal principle were deemed a law against law. "Surveillant assemblage" was operationalized as the extension of surveillance practices and capacities due to the issuance of a peace bond. Referring back to Haggerty and Ericson (2000), surveillance capacities are not limited to technological surveillance but also include human contact or "human labor" for the purposes of establishing an informal surveillance network (see Wilkinson and Lippert, 2011). Overall, this analysis examined the discourse of Canada's peace bond regime to determine whether and how it fits with Ericson's counter-law analytic.

The examination of practices drew from official texts from the Lori Dupont Inquest that occurred in Windsor, Ontario in 2007. This inquest resulted from Lori Dupont's murder in 2005 and, as noted in the *Toronto Star*, "[t]he jury's recommendations were widespread, targeting provincial ministries, the hospital, the Crown attorney's office and several other public organizations" (The Canadian Press,

2007). Given the apparent influence of this inquest on various institutions, the practices it described were analyzed in direct relation to Ericson's assertion that criminalization through counter-law I is particularly compelling after catastrophic failure in a risk management system for which the government is held responsible (Ericson, 2007a: 24). This examination also analyzed the discourses that resulted from the Dupont Inquest, particularly in relation to Bill 168. According to Workplace Violence News, "Bill 168, an act introduced by the government in April [2009] to amend Ontario's Occupational Health and Safety Act, stems from jury recommendations that followed a coroner's inquest into Dupont's murder..." (Schmidt, 2009). The analysis of discourses included legislative debates, a pamphlet entitled *Protecting Workers from Workplace Violence: What Employers Need to Know*, and Bill 168 itself.

The final data source was official "Practice Memoranda" given to Crown prosecutors and published by the Ministry of the Attorney General. In response to a Freedom of Information (FOI) request, the ministry provided six memoranda that discuss the use of peace bonds in relation to high-risk offenders, sexual offences, domestic violence, and child abuse. Ontario's *Freedom of Information and Protection of Privacy Act* allows the request of information from public agencies that would normally not be available. Gathering data through FOI requests has helped illuminate details of practices that would rarely be uncovered and examined (see Walby and Lippert, 2012; Lippert and Walby, 2012). Accordingly, the analysis of these memoranda examined lesser-known practices that may reflect the fundamental tenets of Ericson's (2007a) counter-law analytic.

## CHAPTER FIVE

### RESULTS

#### *Peace Bonds and the Politics of Uncertainty*

Uncertainty is found to be embodied in several different aspects of peace bond discourse. One aspect is the fear of contingent harm. I say “contingent harm” because of the assumption present in nearly every pamphlet<sup>6</sup> that *fear* of harm is what needs to be proven to obtain a peace bond, not *actual* harm. For example, as stated in the pamphlet *Peace Bonds*, published by the Canadian Resource Center for Victims of Crime, “[y]ou do not need to prove that an assault has been committed [to obtain a peace bond]” (2005: 2). What is said to be needed in a peace bond application is evidence a complainant has “reasonable grounds” to fear that the respondent will cause him or her “personal injury” (Miller v. Miller, 1990: 250; R v. Budreo, 1998: 11)—no one knows whether this harm or “personal injury” will come to fruition, which can produce heightened feelings of uncertainty (see Sunstein, 2005). Further, the assumption that one’s fear is based on “reasonable grounds” is intriguing given the inherent irrationality vested in fear (see Davis, 1999). As stated by Greinacher, fear creates “...the intangible and often irrational motives behind our actions...” (1997: 281). The court in *Budreo* address this by deploying the assumption that:

Fear alone connotes a state of belief or an apprehension that a future event, thought to be undesirable, may or will occur. But “on reasonable grounds” lends objectivity to the apprehension. In other words, the phrase “fears on reasonable grounds” in s. 810.1(1) connotes a reasonably based sense of apprehension about a future event (1998:18).

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<sup>6</sup> The only pamphlet that does not make reference to this is “Creating a Safety Plan” presumably because its focus is on what to do after a peace bond has been given rather than on the peace bond itself.

This assumption suggests that fear under s. 810 is reasonable when it is based on objectivity. The court in *Budreo* emphasized that objectivity is based on “evidence” according to s. 810.1(3) (1998: 19). However, this assumption is questionable. It is unclear how fear can be based on evidential fact or “reasonable grounds” when, by its very nature, fear is “intangible” and “irrational.” *Assaulted, Threatened, or Harassed* is the only pamphlet that relates fear to another provision in the criminal law, criminal harassment. However, this does not clarify how an irrational fear is to be based on “reasonable grounds.” In all other places in the discourse, fear is only discussed in relation to s. 810.

The pamphlets also assume that contingent harm can be caused by anyone and, accordingly, peace bond applications can be filed against anyone the complainant fears. Although some pamphlets focus exclusively on potential harm from spouses and intimate partners<sup>7</sup>, while others focus on the threats and harassment from students and parents<sup>8</sup>, most pamphlets acknowledge more general sources of harm: For example, “[t]he person you fear may be a current or former partner, a co-worker, casual acquaintance or total stranger” (Peace Bonds: What to do if you are being threatened or harassed, 2010: 2)<sup>9</sup>. This broad list of potential harm does also appeals to the politics of uncertainty—the assumption becomes: no one can be sure who may cause him or her harm, but if harm is feared, apply for a peace bond “...to protect the safety of others or property” (Peace Bonds prepared by the Canadian Resource Centre for Victims of Crime, 2005: 1).

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<sup>7</sup> Specifically, “Do you know a woman who is being abused?” “Assaulted, threatened, or harassed,” and “Peace Bonds” published by the Legal Information Society of Nova Scotia.

<sup>8</sup> “Teachers Rights”

<sup>9</sup> Also, see “Peace Bonds & Restraining Orders,” “For Your Protection: Peace Bonds and Restraining Orders,” “Peace Bonds” Prepared by the Canadian Resource Center for Victims of Crime,” and “Legal Options for Protection from Domestic Violence and Stalking.”

Based on the assumption that nothing inherently criminal needs to happen to obtain a peace bond, a complainant is expected to base his or her “fear of harm” on the existence of threats. Several pamphlets have a tendency to deploy the assumption that filing a peace bond application is the appropriate action to take if you are being threatened or harassed. This assumption can be seen within several pamphlets<sup>10</sup> and also in several titles on outside covers—for example, “Peace Bonds: What to do if you are being threatened or harassed” and “If you are being assaulted, threatened, or harassed, perhaps this pamphlet can help you decide what to do.” To deploy the assumption that a peace bond application is what to do if you are threatened or harassed contributes, at least in part, to the notion that peace bonds have the potential to alleviate one’s fear of harm. This notion is further supported by the pamphlet entitled “For Your Protection: Peace Bonds and Restraining Orders,” implying that peace bonds will protect applicants from their fears. Several pamphlets<sup>11</sup> actually refer to peace bonds as “protection orders,” which are meant to “help protect one person from another” (Peace Bonds & Restraining Orders, 2011: 3). Ultimately, the discourse assumes that peace bonds require the potential harm-doer to “keep the peace and be of good behaviour.” Although this is stated in every pamphlet, none define what “keeping the peace” and “good behaviour” mean, only that a “freedom from fear” is achievable through them.

Despite the assumed potential peace bonds have to alleviate an applicant’s fears, the pamphlets still acknowledge the politics of uncertainty and the “...increasing doubt about the capacity of liberal governments to govern the future and provide security”

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<sup>10</sup> Specifically, “Peace Bonds” from the Canadian Resource Center for Victims of Crime, “Teachers Rights,” “Peace Bonds” from the Legal Information Society of Nova Scotia, and “For Your Protection: Peace Bonds and Restraining Orders.”

<sup>11</sup> Specifically, “For Your Protection: Peace Bonds and Restraining Orders,” Peace Bonds & Restraining Orders,” and “Legal Options for Protection from Domestic Violence and Stalking.”

(Ericson, 2007a: 21). This is seen in the assumption that peace bonds may not prevent future harm. “By itself, a peace bond may not protect you from violence at the hands of the other person” (Peace Bonds: What to do if you are being threatened or harassed, 2010: 3), “Peace bonds are not the perfect solution to ensuring safety” (Peace Bonds & Restraining Orders, 2011: 9), “...[peace bonds] cannot necessarily prevent anyone from breaking the law” (Peace Bonds Prepared by the Canadian Resource Center for Victims of Crime, 2005: 3), or “Any court order is not a guarantee of safety...” (Legal Options for Protection from Domestic Violence and Stalking, 2011: 2). Despite explicit acknowledgement of the politics of uncertainty, most pamphlets employ the logic of precaution shortly after the aforementioned assertions by urging readers to exercise caution and anticipate what one does not yet know (Ericson, 2007a: 21-4). For example, *Legal Options for Protection from Domestic Violence and Stalking* states, “[a]ny court order is not a guarantee of safety—a safety plan is your best defense. No matter what court orders you get, you still need a safety plan<sup>12</sup>” (2011: 2). As described in the pamphlet *Creating a Safety Plan*, safety planning “...involves identifying action steps to increase your safety, and to prepare in advance for the possibility of further violence” (2006: 1). Readers are advised to tell their neighbors, co-workers, and employers about the court order and the conditions therein (Creating a Safety Plan, 2006). The discourse also advises the reader that “[i]f the peace bond includes your children, you should also give a copy to anyone who is responsible for them when they are out of your care, such as their teachers, child care providers, coaches, or other instructors” (For Your Protection: Peace Bonds and Restraining Orders, 2007: 11). It is assumed that these

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<sup>12</sup> Safety planning was also suggested in “Peace Bonds & Restraining Orders,” “Criminal Code Peace Bonds,” “Peace Bonds: What to do if you are being threatened or harassed,” and “Peace Bonds” published by the Legal Information Society of Nova Scotia.

people will ensure the safety of the complainant and/or his or her children and call the police if conditions listed in the peace bond are breached. However, one pamphlet deploys the assumption that even a safety plan may be uncertain: “Peace bonds are not the perfect solution to ensuring safety ...While not a guarantee of safety, having a safety plan or strategy for staying safe can help to increase your safety” (Peace Bonds & Restraining Orders, 2011: 9). Thus, although the effectiveness of both peace bonds and safety plans are uncertain to some extent, one’s safety is seen to be enhanced through an additional precautionary safety plan that attempts to act against what one does not yet know. Responsibility for creating the plan is placed squarely on the shoulders of the complainant and/or dependents.

Uncertainty is also reflected in the ambiguity of harm or “personal injury.” According to Ericson (2007a), a key component of anti-social behaviour legislation is that it is a source of uncertainty due to the “legal relativism” it creates. Specifically, the law is “[o]pen to the incorporation of any troublesome behavior [sic] as defined by the local politics of uncertainty...” (Ericson, 2007a: 211). Like anti-social behavior legislation, peace bond discourse appears to create a similar “legal relativism” by referring to “personal injury” ambiguously. For example, in nine of the ten pamphlets<sup>13</sup>, “personal injury” is conceived in different ways: it is conceived as physical injury, namely to the complainant, the complainant’s children and/or the family pet(s); it is conceived as property damage; it is conceived as emotional damage<sup>14</sup>; and it is also

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<sup>13</sup> “Creating a Safety Plan” is the exception.

<sup>14</sup> Implied in the pamphlet “For Your Protection: Peace Bonds and Restraining Orders” through the notion of one’s “right to *feel* safe.”

conceived as sexual assault<sup>15</sup>. The *Criminal Code* also uses a remarkably broad meaning of “personal injury” by creating four separate peace bond sections: s. 810, where injury or damage is feared; s. 810.1, where a sexual offence against a child is feared; s. 810.2, where a serious personal injury offence is feared; and s. 810.01, where a “terrorist offence” or “criminal organization” is feared. This observation is similar to Neumann’s, who suggests that “[j]udicial interpretation of s. 810 has not produced any clear or consistent understanding of how...[personal injury] requirements are to be met” (1994: 189). Thus, uncertainty also seems to be created by the public literature and the criminal law, where categories of harm become ambiguous and “legal relativism” can take place.

In acting against the risk of contingent and ambiguous harm, the courts are seen to operate on a logic of precaution. Specifically, a peace bond “...is a preventive provision not a punitive provision. It aims not to punish past wrongdoing but to prevent future harm...” (R v. Budreo, 1998: 10). Similarly, the court in *Miller v. Miller* stated that “[t]he provisions of section 810 of the **Criminal Code** [sic]...are categorized as ‘preventative remedies’ designed to enable Provincial Court judges to bind persons to keep the peace where breaches of the peace may be anticipated” (1990: 252). Again, a criminal offence does not need to arise for respondents to be subject to a recognizance order restricting their liberty—only *potential* harm must be feared. This is the logic of precaution, where “[d]ecisions are therefore not made in a context of certainty, nor even of available knowledge, but of doubt, premonition, foreboding, mistrust, fear and anxiety” (Ewald, 2002: 294).

However, to confront uncertainty, the court deploys assumptions that embody the

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<sup>15</sup> See “Peace Bonds” prepared by the Canadian Resource Center for Victims of Crime and its discussion of s. 810.1.

neo-liberal desire to act as if the future is knowable and governable (Ericson, 2007a). For example, according to the court in *Budreo*, the capacity to commit future harm can be determined based on a respondent's past criminal record. Like most actuarial methods in criminal law, a criminal record is used to make predictions about the future criminality of respondents and plays a role in determining criminal justice outcomes for respondents based on their past (Harcourt, 2007: 17). Dealing particularly with fear of pedophilia, the court in *Budreo* stated, "[m]ore common, no doubt, will be cases where evidence will be led at the hearing concerning the individual's general proclivity to abuse children sexually. This could be based on a relevant criminal record and past behaviour around children" (1998: 14). Although it seems a prior criminal record would aid the court in establishing the future conduct of a respondent, the court does not require a criminal record to issue a peace bond. To require that the respondent needed to commit a criminal offence previously would hinder the court's ability to act against the risk of future harm. The court in *Budreo* rationalized this by referring to a precautionary logic inherent in peace bond law: "Requiring a criminal record or some other offending conduct as a condition of a recognizance order under s. 810.1 is at odds with the preventive purpose of the section" (R v. Budreo, 1998: 14). Thus, it is suggested that prior conduct is not necessary for a s. 810.1 order. This assumption becomes more interesting when compared to an assertion made in the Internet document *Peace Bonds*, prepared by the Canadian Resource Centre for Victims of Crime, which refers to s. 810.1 as "pedophile peace bonds" (2005: 1). The term "pedophile" is a psychiatric construct, defined by the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) as a Sexual and Gender Identity Disorder that "...involves sexual activity with a prepubescent child" (American Psychiatric Association, 2000: 571). Unlike all other textual representations of specific

peace bond sections, the “pedophile peace bond” label inherent in the textual representation of s. 810.1 depends upon bringing psychiatric knowledge into the realm of legal knowledge: it assumes that those who are subject to a peace bond under s. 810.1 are pedophiles. However, according to the DSM-IV, to be diagnosed with “pedophilia” one must *act* on his or her sexual urges (Gieles, 2001). As assumed in *Budreo*, a criminal record is not required to be subject to a s. 810.1 order. Also, as shown above, the discourse assumes that peace bond applications focus on the fear of contingent harms, rather than the existence of actual harms. This illustrates the ability of peace bonds to criminalize based on an assumed status generated by the discourse. Namely, those subject to a s. 810.1 recognizance are pedophiles even when a formal diagnosis based on a pedophilic criminal offence may not exist.

Overall, the politics of uncertainty can be seen as an underlying element in Canada’s peace bond regime. Although peace bonds have been used to govern the behaviour of convicted offenders after they have served their whole sentence and are released to the community (Crawford, 2000), the discourse never assumes that peace bonds are a reactive response to crime. Rather, the discourse assumes that the uncertainty embodied in one’s fear of contingent and ambiguous harm should facilitate a precautionary logic. Ultimately, peace bonds are seen as preventive and not punitive. They are based on a pre-crime orientation (Zedner, 2007) that is rationalized through a precautionary desire to prevent harm. The issuance of a recognizance can be seen as a proactive strategy to govern risk, aimed at providing applicants with a “freedom from fear.”

### ***Counter-law I: Law Against Law***

In its quest to govern risk through the issuance of a peace bond, the criminal justice system must not let the limits of the law stand in its way. Traditional legal principles are eroded through the issuance of a peace bond. As stated by Ericson, a main element of law against law “...involves efforts to counter the traditional distinctions between the different legal forms of criminal, civil, and administrative law” (2007a: 25). Weakening traditional evidentiary burdens of proof not only counters traditional distinctions between criminal and civil forms of law, but also helps the state act against risk and uncertainty. Like the UK’s Anti-Social Behaviour Orders (Crawford, 2009), Canada’s peace bond regime is found to reduce the criminal burden of “beyond a reasonable doubt” to the civil burden of “balance of probabilities.” This burden is assigned by the court in *Miller v. Miller*: “...the burden of proof on the prosecution on a section 810 application is not proof beyond a reasonable doubt but on a balance of probabilities” (1990: 254). The assignment of this burden has intriguing implications for this thesis. Peace bonds are found under criminal law where “[t]he burden of proof, at all times, remains upon the Crown to establish the guilt of an accused beyond a reasonable doubt” (Cox, Lafontaine and Rondinelli, 2009: 5) and yet peace bond applications require a burden of proof used in civil court. The fundamental difference between these burdens can be illustrated as follows:

...in a civil trial, where A is suing B for breach of contract, the burden of proof is upon A to establish that breach. In civil cases, the onus is simply on a balance of probabilities. The most vivid example of that onus is the tipping of scales slightly in favor of the person who has the burden. If A tips the scale in his favor, ever so slightly, he wins (Salhany, 1994: 161).

However, in a criminal trial, “[p]roof beyond a reasonable doubt may be described as being achieved when there is a moral certainty in your mind...” (R v. Brydon, 1995: 7). While a balance of probabilities “tips the scale,” beyond a reasonable doubt topples the

scale by relying more on “moral certainty” than “probability.” Thus, based on these definitions and illustrations, it can be argued that by countering traditional distinctions between civil and criminal forms of law, criminalization through the issuance of a peace bond becomes easier when burdens of proof are lowered.

The court in *Miller v. Miller* provided four reasons for its assignment of the burden “balance of probabilities” to peace bond hearings:

1. Proceedings under section 810 are at best quasi-criminal in nature and even where there is a finding that the accused is required to enter into a recognizance this is not a conviction and no penalty follows directly there from.
2. The wording of section 810 of the **Criminal Code** [sic] is to the effect that an application can be taken out by any person “who fears”, and that the court must be satisfied on the evidence adduced that the applicant has “reasonable grounds for his fears”. The use of the words “fears”, “satisfied”, and “reasonable grounds” do not suggest the same severity or significant degree of proof attendant upon the prosecution in bona fide criminal proceedings.
3. While it may be argued that a respondent entering into a recognizance has his liberty restricted, or that a very real consequence will result to those directed to but who refuse to enter into a recognizance, essentially the existence of a recognizance is no penalty or burden for a respondent to bear, simply because he is only binding himself to do what all law-abiding citizens are required to do. It is true that he attracts the risk of further penalty for breaching the peace or failing to be of good behaviour but this is not such an unreasonable burden or expectation for him, such that his exposure to it should be supportable only by proof beyond a reasonable doubt.
4. The recognizance contemplated by section 810 of the **Criminal Code** [sic] may be in form 32 of the **Criminal Code** [sic] and this is the type of form suggested as being the form of a recognizance to be entered into by a person released by the court under the judicial interim release [or bail] provisions is not beyond a reasonable doubt but on a balance of probabilities. Hence, it would follow a fortiori that the burden contemplated by section 810 of the **Criminal Code** [sic] is on the same standard, proof on a balance of probabilities (*Miller v. Miller*, 1990: 254-5).

With these reasons considered, three are based on assumptions that are called into

question by the broader peace bond discourse<sup>16</sup>. First, reason 1 is based on the assumption that proceedings under s. 810 are “...at best quasi-criminal in nature.” If s. 810 proceedings were intended to be quasi-criminal, then peace bonds would presumably be codified under a quasi-criminal law like a provincial regulation. However, as stated by every pamphlet, peace bonds are found under s. 810 of the *Criminal Code*, which implies regular criminal proceedings are to be undertaken. Further, as stated in *Criminal Code Peace Bonds*, “..the application [for a peace bond] is heard in *criminal court* by a provincial court judge” (2010: 1 emphasis added). This assumption also implies that regular criminal proceedings are to be undertaken. Intriguingly, legal scholars associate “quasi-criminal” proceedings more with “public torts” and civil law than with criminal law (e.g. Devlin, 1965; Parker, 1983; O’Connell, 1993; Stoffelmayr and Diamond, 2000). The notion “quasi-criminal” creates confusion and erodes traditional distinctions between forms of criminal and civil law. Overall, the assumption deployed in reason 1 is called into question by the broader peace bond discourse.

Second, reason 2 is based on the assumption that “...the words ‘fears’, ‘satisfied’, and ‘reasonable grounds’ do not suggest the same severity...as bona fide criminal proceedings.” This assumption is confronted by another assumption deployed in the pamphlet *Assaulted, threatened, or harrassed?*, suggesting that “[i]n many situations if you have grounds for a peace bond, you have grounds for a criminal complaint” (2010: 3). This statement assumes that, in many cases, one’s “reasonable grounds” for “fear” in a peace bond application are as severe as a bona fide criminal proceeding, thereby calling

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<sup>16</sup> Reason 4 was not met with opposing assumptions in the discourse. However, I would submit that it is illogical to assume that because peace bonds “*may* be in form 32 of the Criminal Code ” that peace bonds are necessarily in form 32 and, based on this possible association, justifies peace bond hearings mimicking bail hearings. However, a logical appeal to legal reasoning may be given less weight given that “...the life of the law has not been logic: it has been experience” (R v. Budreo, 1998: 13).

reason 2 from *Miller v. Miller* into question.

Third, reason 3 assumes that “...the existence of a recognizance is no penalty or burden for a respondent to bear, simply because he is only binding himself to do what all law-abiding citizens are required to do.” When one examines assumptions in the discourse, however, the conditions that can be imposed in a recognizance under s. 810 seem to go beyond “what all law-abiding citizens are required to do.” Conditions can include “prohibiting the defendant from being at, or within a distance specified in the recognizance...[which may include a distance from the applicant’s] common-law partner or child...[to] report to a probation officer...[to] complete any treatment or counseling that may be directed...[and] abstain from possessing or using any alcohol...” (Criminal Code Peace Bonds, 2010: 22-3); to stay away from the applicant’s “...place of work, or place of worship; [to] not contact [the applicant’s] friends or family members” (Assaulted, threatened, or harassed?, 2010: 4); and to not attempt to contact the applicant indirectly through sending friends or family text or email messages (Peace Bonds published by the Legal Information Society of Nova Scotia, 2007: 2). Thus, the assumptions used by the court in *Miller v. Miller* to justify its decision to assign the civil burden of “balance of probabilities” to peace bond hearings are confronted by those assumptions deployed in the broader peace bond discourse. This confrontation supports the notion that counter-law I has a tendency to reform criminal law without strong and principled justifications (Ericson, 2007a: 25). The reduced burden that these weak reasons justify represents a law against law through an erosion of traditional distinctions between criminal and civil forms of law. A notable observation about the discourse is that the pamphlets never highlighted this lowered burden of proof. Acknowledging this lower burden could conceivably illustrate how a peace bond can ease criminalization, provide security to the complainant,

and aid political authorities in preempting imagined sources of harm—all of which are main components of Ericson's (2007a) counter-law analytic. Since peace bonds can be seen as a form of counter-law, I was surprised to find a lacking acknowledgment of this lower burden in the pamphlets. However, in reference to other aspects of the discourse, there seems to be several more instances where traditional principles of criminal law are eroded under a s. 810 application.

Under the *Charter*, s. 7 guarantees “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Of particular importance are the “principles of fundamental justice,” which have been established to ensure due process and trial fairness (Sharpe and Roach, 2009: 228-9). In effect, if one's liberty is to be limited by the state through a peace bond order, then this liberty restriction must be aligned with the traditional principles of due process and trial fairness. However, the analysis so far suggests that fulfilling these principles might be problematic. First, as suggested in the previous section, peace bond applications are based on the perceived existence of threats. Specifically, *Do you know a woman who is being abused?*, *Peace Bonds* prepared by the Canadian Resource Centre for Victims of Crime, and *For Your Protection: Peace Bonds and Restraining Orders* encourage the reader to document threats made by the respondent to help prove the reader's fear in court. In relation to a s. 810.1 order, it is assumed that “...evidence may be led that the defendant has made a threat or sexual proposition to a specific child or a group of children” to justify one's fear at trial (R v. Budreo, 1998: 13). However, threats are inherently problematic when relied upon as evidence of future conduct. As suggested by Ericson, intent to act upon a threat cannot be proven because threats are based on an unknown future (2007a: 157). This results in an erosion of the

*mens rea* principle, which is a fundamental component of trial fairness under the “principles of fundamental justice” (MacIvor, 2006: 308). Ultimately, *mens rea* is replaced by what Ericson calls *finus reus*—when criminalization appears necessary, no other justification is needed (2007: 48). Again, a liberty restriction based on a reasonable fear that is proven without the element of *mens rea* can be conceptualized as a violation of the *Charter* and, most importantly, a law against law.

Second, the court in *Budreo* suggested that the traditional exclusionary rule of hearsay evidence does not necessarily apply at a peace bond hearing: “...the ‘evidence’ the judge relies on might include hearsay...” (1998: 15). Hearsay evidence has been traditionally excluded due to its lack of reliability (Roach, 2004; R v. Khelawon, 2006). This unreliability is vested in “...a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination” (R v. Khelawon, 2006: 25). However, trial fairness may be hindered through the use of traditionally unreliable evidence to justify a liberty restriction under a peace bond order. This ultimately erodes a “principle of fundamental justice” and, in turn, s. 7 of the *Charter*. Even if a judge deems the evidence “credible” or “trustworthy” and trial fairness is supposedly maintained, the admission of hearsay is still an erosion of the traditional evidentiary principle that excludes it. Thus, a liberty restriction based on hearsay in a peace bond hearing can be conceptualized, not only as a potential violation of traditional legal principles contained in the *Charter*, but also as a law against law that erodes traditional principles of evidence.

Facilitated by the erosion of traditional criminal law principles, proving that a complainant is fearful of a respondent under s. 810 can result in the expansion of the

state's capacity to criminalize through potential recognizance breaches. An assumption deployed by all the pamphlets is that if a condition listed in a peace bond is breached, then punitive criminal charges will follow. All the pamphlets advise the reader that peace bonds alone do not result in a criminal record. However, if a peace bond *is breached*<sup>17</sup>, the defendant "...will have a criminal record and may also be: placed on probation for up to three years, fined up to \$2,000.00, and/or sent to jail for up to six months" (For Your Protection: Peace Bonds and Restraining Orders, 2007: 12). One can be charged with a recognizance breach by, for example, merely being present at the home of the complainant (For Your Protection: Peace Bonds and Restraining Orders, 2007: 18). Assumed to be an "advantage of peace bonds" (Do you know a woman who is being abused?, 2004: 34), this process can be seen as an expansion of the state's capacity to criminalize risky populations where nothing inherently criminal needs to occur. Further, the ability to enforce a peace bond breach under s. 811 of the *Criminal Code* alters the practices of Crown attorneys. A practice memorandum that was incorporated in the Crown Policy Manual as of March 31<sup>st</sup>, 2006 instructs prosecutors in the province of Ontario that "[w]here there are concerns about the safety of the victim, Crown counsel should endeavor to obtain a peace bond pursuant to section 810, rather than obtaining a common law peace bond<sup>18</sup>" (Practice Memorandum: Spouse/Partner Offences: Miscellaneous Issues, 2002: 5). When a peace bond under s. 810 is breached, a person can be charged criminally under s. 811. Common law peace bonds cannot be enforced

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<sup>17</sup> Which requires having a peace bond placed against a person in the first place, thus subjecting only those who have one against them to a possibility of breaching.

<sup>18</sup> A common law peace bond is a recognizance ordered by a judge under his or her common law jurisdiction. A complainant cannot apply for one under s. 810. Since this was the only instance where the data mentioned a common law peace bond, they were not included in this analysis.

under the *Criminal Code*<sup>19</sup>. It is implicitly assumed in the memorandum that possible criminalization under s. 811 will enhance the safety of the victim. However, it is also implicitly assumed that by pursuing a peace bond under s. 810 over the common law counterpart, more people can now be criminalized under s. 811. Thus, peace bonds under s. 810 can be seen as an expansion in the state's capacity to criminalize risky populations.

As mentioned by Ericson, criminalization through counter-law I is particularly compelling after a catastrophic failure in a risk management system for which the government is held responsible (2007a: 24). Under Canada's peace bond regime, an example of this can be seen in the Lori Dupont case that occurred in Windsor, Ontario. Lori Dupont, a registered nurse working at the Hotel-Dieu Grace Hospital recovery room, had a romantic relationship with Marc Daniel, an anesthesiologist working in the operating room in close proximity to Ms. Dupont. Lori tried to end the relationship but Mr. Daniel pursued her relentlessly inside and outside the workplace. This prompted Ms. Dupont to apply for a peace bond against Mr. Daniel in April of 2005. Unfortunately, the peace bond hearing did not occur within a seven-month span and Mr. Daniel murdered Ms. Dupont and then took his own life on November 12, 2005 (Schmidt, 2006). This resulted in an investigation of several agencies, including the Ministry of the Attorney General and its peace bond procedure in cases where domestic violence is feared. Some of the blame was eventually assigned to lawyers because of the untimely manner in which peace bond applications were reviewed. To combat this, The Coroner's Jury made eight recommendations for the Ministry of the Attorney General in 2007, but most notably:

14. The MAG [Ministry of the Attorney General] should ensure that in each jurisdiction in Ontario, a protocol exists between Court Administration offices and the Crown Attorney's office which will ensure that details of each peace

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<sup>19</sup> A Crown prosecutor disclosed this information to me during an informal conversation.

bond application (s. 810 application) made to the court, with a component of domestic violence, is brought to the attention of the Crown Attorney's office within one working day.

18. Throughout Ontario, the Attorney General should ensure that there are dedicated domestic violence courts, which focus on early intervention and vigorous prosecution... (Dupont Inquest, 2007: 7).

These recommendations assume that the Ontario government will expedite criminalization under Canada's peace bond regime. The practices recommended by the Dupont Inquest suggest that the "procedural delays" discussed by Neumann (1994) are now a less relevant concern for peace bond applicants. Since the release of this inquest report in 2007, statistics indicate that more people in Ontario seem to be relying on peace bonds to alleviate their fears (see Table 1 in Appendix A). Raw numbers have increased from 2007 to 2010 compared to those from 2003 to 2006. An average of 80% of all peace bond applications have been granted to fearful complainants in the province of Ontario in the years following the Dupont Inquest<sup>20</sup>. What is also interesting is the increased number of criminal trials that have resulted in s. 810 peace bond orders where no peace bond applications were initially filed (see Table 3 in Appendix A). This is interesting because official Practice Memoranda explicitly advise Crown Attorney's against dropping criminal charges to peace bond applications, particularly in domestic related cases: "Peace bonds must not be used as an alternative remedy to criminal charges in spouse/partner offences" (Practice Memorandum: Spouse/Partner Offences: Miscellaneous Issues, 2002: 5). These statistics suggest that criminal justice actors seem more compelled to rely on peace bonds to criminalize since this mass failure. This

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<sup>20</sup> To calculate the average number of peace bond applications granted after the Dupont Inquest, I simply added the raw numbers of total peace bond applications filed between 2007-2010 from Table 1 and used this sum as a denominator. I then added the raw numbers of total peace bond applications granted between 2007-2010 from Table 2 and used this sum as a numerator. I divided the numerator by the denominator and converted the result to a percentage (e.g.  $30963/38499=0.80$  or 80%).

supports Ericson's notion that criminalization through counter-law I is particularly compelling after a catastrophic failure in a risk management system for which the government is held responsible (2007a: 24). Thus, with an assumed expedited peace bond regime, it appears that both the public and the criminal justice system in Ontario are relying increasingly on peace bonds to address the fear of uncertain victimization.

As stated earlier, the recommendations made during the Dupont Inquest were considered to be "widespread." Other precautionary and risk based legal reform resulted from the Coroner's Jury. Perhaps the most notable result was Bill 168, *An Act to amend the Occupational Health and Safety Act* (2009), that, according to Workplace Violence News, "...stems from jury recommendations that followed a coroner's inquest into Dupont's murder..." (Schmidt, 2009). In his speech during the second reading of the bill to the legislature, the Honorable Peter Fonseca—Minister of Labour—stated that under this bill "employers would better understand their responsibilities, and workers their rights, in preventing workplace violence and addressing harassment" (Legislative Assembly of Ontario, 2009: 41). Mr. Fonseca noted that this bill would require that "[i]f an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstance for the protection of the worker" (Legislative Assembly of Ontario, 2009: 41). Under Bill 168, "workplace violence" can be interpreted as "a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker." Intriguingly, this definition seems to rely on a politics of uncertainty that is similar to the politics of uncertainty inherent in peace bonds. Like the fear of contingent harm, "workplace violence" is based on threats of harm, which

may not come to fruition, but is feared by other workers. The bill also focuses attention on the governance of risk through assessment and control—found under s. 32.0.2 and s. 32.0.3. A pamphlet published by the Occupational Health and Safety Council of Ontario entitled *Protecting Workers from Workplace Violence: What Employers Need to Know* deploys the assumption that employers will “[a]ssess the risks of workplace violence that may arise from the nature of the workplace or the type and conditions of work. Include measures and procedures in the workplace violence program to control the risks” (2010: 4). Risk assessment not only seeks to keep employees safe, but as assumed by Mr. Fonseca, also helps businesses: “Preventing injuries and absences translates into...reduced lost-time injuries and reduced workplace insurance premiums and costs” (Legislative Assembly of Ontario, 2009: 42). Referring back to Ericson’s (2007a) counter-law analytic, we see both the politics of uncertainty and logic of precaution hard at work. Based on the uncertain possibility of “workplace violence,” employers are responsabilized to “take every precaution reasonable” by assessing and controlling risks to keep employees safe and insurance premiums down. It appears that the Dupont inquest offers some evidence to substantiate Ericson’s notion that mass failures in risk management systems often result in new or reinvented counter-law regimes (2007a: 24). Perhaps future research should examine if Bill 168 erodes traditional principles of criminal law to act against uncertain “workplace violence.”

Overall, based on the assumptions deployed in the discourse, it appears that peace bonds take the form of a law against law. Legal aspects associated with peace bonds can be seen to erode traditional principles of law embodied in distinctions between criminal and civil forms of law, due process and trial fairness, and rules of evidence. Further, peace bonds can also be seen to exhibit other aspects of a law against law. Specifically,

the Lori Dupont Coroner's Inquest offers some evidence to substantiate Ericson's (2007a) notion that mass failures in risk management systems often result in a more compelling counter-law regime. Since the inquest, more Ontarians are relying on peace bond applications to alleviate their fears, a high number of applications are being ordered by courts in Ontario, and Ontario's criminal justice system has increasingly relied on peace bonds as an alternative to other criminal charges. Thus, not only do peace bonds appear to erode traditional principles of law, they also seem to embody several other aspects of Ericson's (2007a) conceptualization of a law against law.

### ***Counter Law II: Surveillant Assemblage***

The extension of surveillance practices and capacities due to the issuance of a peace bond can be seen from two perspectives. First, the extension of surveillance practices is seen through the use of technological surveillance. Although one may not receive a criminal record solely by entering into a peace bond, the issuance and conditions of the order are still recorded in a database. Specifically, in Ontario, it is assumed that "once a peace bond is ordered, the court sends it to the police and it is entered on the police computer system. This makes it easier for the police to confirm that there is a peace bond to enforce" (Do you know a woman who is being abused?, 2004: 34). Official Practice Memoranda in Ontario instruct Crown prosecutors to advise the Deputy Director of High-Risk Offenders at the Crown Law Office (DD-HRO) of peace bonds ordered under s. 810.1 and s. 810.2. According to the memoranda, as part of a National Flagging Program, "[s]uch offenders will be flagged on CPIC [Canadian Police Information Center database] as a high-risk offender" (Practice Memorandum, 2008: 4). Other provinces also assume that police notification under Canada's peace bond regime is national. For example, "[t]hrough a Canada-wide computer system, the police in any province or territory can

contact the British Columbia Protection Order Registry to confirm the terms of the peace bond, and act to enforce it” (For Your Protection: Peace Bonds and Restraining Orders, 2007: 13). Thus, even when a criminal offence has not materialized, the police are presumably informed of a peace bond through their computer network to ease enforcement of the order’s stipulated conditions.

Canada’s peace bond regime can be seen to extend technological police notification into the realm of uncertainty. Notification-driven police surveillance is usually based on criminal offending. For example, sex offender registry and notification under *Megan’s Law* is based on a sex offender’s criminal conduct (Finn, 1997) and is established to prevent “risky” sex offenders from reoffending (Simon, 1998). However, police notification under Canada’s peace bond regime is quite different—police are notified even when a criminal offence has not been committed. As shown previously<sup>21</sup>, the discourse assumes that a criminal record is not required to order a peace bond, nor is the commission of a criminal offence needed to obtain an order from the court. Thus, based on the uncertainty of whether a respondent will breach a condition of a peace bond, notification driven police surveillance under Canada’s peace bond regime is extended to situations where no criminal conduct has occurred.

The second perspective is based on the extension of surveillance capacities through community notification and supervision. Referring back to Haggerty and Ericson (2000), the surveillance capacities of an assemblage are not limited to technological surveillance but also include human contact or “human labor” for the purposes of establishing an

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<sup>21</sup> Based on the assumptions deployed in *R v. Budreo*, “Do you know a woman who is being abused?”, “Peace Bonds” prepared by the Canadian Resource Centre for Victims of Crime, and “For Your Protection: Peace Bonds and Restraining Orders”.

informal surveillance network (see Wilkinson and Lippert, 2012). One notable observation is that some pamphlets assume that police play a passive role in peace bond enforcement: "...the police will probably not take action unless you ask them to" (Peace Bonds published by the Legal Information Society Of Nova Scotia, 2007: 10)<sup>22</sup>. Accordingly, peace bond enforcement is expected to rely, at least to some extent, on community notification and supervision to ensure conditions are followed and police are contacted if a condition is breached. However, community notification under a peace bond regime differs from community notification under, for example, a sex offender registry. Although community notification under a sex offender registry has been seen as a national problem rather than a communal problem (Levi, 2000), community notification in a peace bond situation can be seen as a community problem, and a particular community at that. Unlike *Megan's Law*, where notification is given by police officers directly while on patrol and through a request for information from the state for a small fee (Finn, 1997; Smith, 1998), complainants under a peace bond regime are mobilized to notify their neighbors, employers, and fellow employees of the conditions of a peace bond so the community can call the police in the event that a condition has been breached<sup>23</sup>. Notification is also encouraged at other sites: for example, "If the peace bond includes your children, you should also give a copy to anyone who is responsible for them when they are out of your care, such as their teachers, child care providers, coaches, or other instructors. Tell them to call the police if your partner or ex-partner does not follow the conditions in the peace bond" (For Your Protection: Peace Bonds and Restraining

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<sup>22</sup> Police passivity was also suggested in "Peace Bonds," prepared by the Canadian Resource Centre for Victims of Crime, and "Assaulted, threatened, or harassed?"

<sup>23</sup> Found in "For Your Protection: Peace Bonds and Restraining Orders," "Peace Bonds & Restraining Orders," and "Creating a Safety Plan."

Orders, 2007: 11). Similar to managing risks associated with “date rape drugs,” these “trusted friends” are mobilized as a collective risk-monitoring strategy to protect the complainant from potential harm (Moore and Valverde, 2000: 525-26). However, community notification and supervision under Canada’s peace bond regime is not unilateral, it may also mobilize the defendant and his or her “trusted friends.” Specifically, a judge may order that the defendant post an amount of money and obtain a surety. A surety is “...a person who vouches for the defendant and agrees to supervise him or her to make sure the conditions are obeyed” (Peace bonds published by the Legal Information Society of Nova Scotia, 2007: 7). This form of community notification and supervision constitutes an informal surveillance network where human contact is used for the purposes of establishing a node of an assemblage (Haggerty and Ericson, 2000).

The discourse ultimately suggested that information sharing under this notification system rely on a mobilized public and their capacity to police themselves. Under Canada’s peace bond regime, the private community—charged with ensuring the complainant’s security—are assumed to report breaches and mobilize the public police by providing them with intelligence about the respondent’s whereabouts based on their knowledge of conditions stipulated in a peace bond. The assemblage is both panoptic and synoptic: it seeks to discipline the respondent while also allowing a number of people to focus on the respondent to ensure the complainant’s safety and, in turn, security (Haggerty and Ericson, 2000: 607, 618). Also, as assumed in the document “Peace Bonds,” prepared by the Canadian Resource Centre for Victims of Crime, the network’s synopticism can also be used to scrutinize public officials: “It is important to note that the police may not always respond positively in enforcing peace bonds. If the officer responding to your call does not provide an effective remedy, you should talk to his/her

supervisor” (2005: 3). Haggerty and Ericson suggest that the ability to scrutinize public officials is an element inherent in the synoptic capacity of a surveillant assemblage (2000: 618). The discourse assumes that private members of the community will share information with the public police in the event of a peace bond breach. This network can also be conceptualized as synoptic and used to scrutinize public officials, thereby exhibiting multiple aspects of a surveillant assemblage.

Overall, surveillance through a peace bond order can be seen to extend police and community notification and supervision into a realm where a criminal conviction is not registered. Rationalized through a precautionary logic to prevent uncertain harm, police databases are presumably updated and “trusted friends” are presumably mobilized to ensure the safety of the complainant and his or her children. Community notification and supervision may also mobilize the defendant and his or her “trusted friends” through the acquisition of a surety to ensure the conditions of the peace bond are obeyed. If the conditions are broken, the public presumably mobilizes the police to charge the defendant with a recognizance breach.

## CHAPTER SIX

### CONCLUSIONS

Ericson's (2007a) counter-law analytic guided this thesis by raising the question: how and to what extent are peace bonds a form of counter-law? However, the answer to this question has two parts. To answer, "how are peace bonds a form of counter-law?" I will summarize the findings of this thesis to illustrate how each tenet of Ericson's counter-law analytic are reflected in the discourse. To answer, "to what extent are peace bonds a form of counter-law?" I will summarize the different aspects embodied in each tenet of Ericson's analytic that the discourse addresses. This answer will also discuss aspects of Ericson's analytic that are not embodied in peace bond discourse.

#### *How are peace bonds a form of counter-law?*

Peace bonds are a form of counter-law because their representations in the discourse exhibit the tenets of Ericson's (2007a) counter-law analytic. Under the tenet "politics of uncertainty," this analysis searched the discourse for assertions that dealt with a complainant's fear of crime, the possibility of future victimization, and how peace bonds can facilitate a "freedom from fear" through a potential capacity to prevent crime. The analysis found that fear of harm is what needs to be proven to obtain a peace bond, not actual harm. The possibility of future victimization was exhibited through the pamphlets acknowledgement that peace bonds may not prevent future harm. Assumptions about safety planning appear to facilitate, at least in part, the possibility of a "freedom from fear." This freedom is further enhanced through the assumption that peace bonds have the capacity to protect the applicant if they are being threatened or harassed. This was implied through pamphlet text and titles, and through the notions of protection, peacekeeping, and good behaviour. Thus, the peace bond discourse deploys assertions

dealing with a complainant's fear of crime, the possibility of future victimization, and how peace bonds can facilitate a "freedom from fear" through a potential capacity to prevent crime, thereby reflecting Ericson's (2007a) notion of the "politics of uncertainty."

Second, "law against law" was operationalized in relation to traditional legal principles that, according to Ericson, seem to be embodied in distinctions between forms of law and principles of evidence (2007a: 25). However, I also included those principles reflected in the *Canadian Charter of Rights and Freedoms*. Legal aspects associated with peace bonds that acted contrary to an aforementioned traditional legal principle were deemed a law against law. This thesis' analysis suggested that peace bonds erode three traditional principles of law. First, peace bonds erode distinctions between criminal and civil forms of law by reducing the traditional criminal burden of "beyond a reasonable doubt" to the civil burden of "balance of probabilities." Second, due process and trial fairness are also eroded under Canada's peace bond regime. This is done through a dependence on threats and traditionally unreliable evidence. Since s. 810 relies on the existence of threats, the *mens rea* principle is eroded. As stated by Ericson, intent to act upon a threat cannot be proven because their execution is based in an uncertain future (2007a: 157). Further, a reliance on traditionally unreliable hearsay evidence at a peace bond hearing can also be seen to erode the principles of trial fairness and due process. This reliance not only violates s. 7 of the *Charter*, but also creates a law against law. Finally, peace bonds erode traditional rules of evidence through the use of hearsay. Although an increased reliance on hearsay evidence does seem to be a recent trend in

Canadian law<sup>24</sup>, the assumption deployed by the court in *Budreo* justifying its use during peace bond hearings erodes the traditional exclusionary rule of hearsay evidence.

Finally, the extension of surveillance practices and capacities due to the issuance of a peace bond can be seen from two perspectives. First, technological police notification under a peace bond can be seen as an extension of existing surveillance practices. Unlike technological police notification under *Megan's Law*, which is based on a sex offender's criminal conduct (Finn, 1997), notification-driven police surveillance under Canada's peace bond regime is extended into the realm of uncertainty. Police databases are updated with information about the conditions and issuance of a peace bond when a criminal offence may not have actually occurred. Second, community notification and supervision extends surveillance capacities through the use of human contact for the purposes of establishing a node of an assemblage (Haggerty and Ericson, 2000). Complainants under a peace bond regime are mobilized to notify neighbors, employers, fellow employees, and others of the conditions of a peace bond so the community can call the police in the event that a condition has been breached. In conclusion, surveillance through a peace bond order can be seen to extend police and community notification and supervision into a realm where "personal injury" is feared but a criminal conviction may not be registered.

Overall, the analysis of peace bond discourse has captured the tenets of Ericson's (2007a) counter-law analytic that are present in the texts. After illustrating that the results of this thesis' discourse analysis fits with the operationalization of each tenet of Ericson's analytic, it can be concluded that peace bonds are a form of counter-law. The extent to which peace bonds form a counter-law will be discussed in the following section.

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<sup>24</sup> For example, the Supreme Court in *Khelawon* stated that "a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth" (2006: 9-10).

*To what extent are peace bonds a form of counter-law?*

This section will discuss two things: the different aspects embodied in each tenet of Ericson's analytic that the discourse addresses, and the aspects that are not embodied in peace bond discourse. Examining these elements will also integrate the self-reflexive component of qualitative research into this thesis. A researcher maintains self-reflexivity by "paying attention to ones place in the discourses and practices that are being analyzed" (Denzin and Lincoln, 2008: 566). I will maintain this component of qualitative research by acknowledging my assumptions and impressions of the discourse in relation to the results of this thesis' analysis.

A main element of Ericson's framework is that counter-law exists to confront uncertainty by eroding existing laws and traditional legal principles that "...get in the way of preempting imagined sources of harm" (2007a: 24). Accordingly, I had assumed to see a more explicit acknowledgement of s. 810's ability to confront uncertainty in the discourse. Although the ability of peace bonds to provide a "freedom from fear" is implied through pamphlet titles, text, and the assumed purpose of s. 810, the discourse never explicitly suggests that peace bonds will effectively confront the risk of harm one fears. However, the reintroduction of uncertainty in the discourse can be seen to support a different aspect of the politics of uncertainty. Precautionary measures such as counter-law are implemented "...for political authorities to try to maintain the upper hand in the politics of uncertainty" (Ericson, 2007a: 24). Political authorities need to maintain the upper hand in the politics of uncertainty because they are charged with acting as if the future is knowable and governable to ensure the security of the population (Ericson, 2007a: 21). When the discourse acknowledges that peace bonds may not prevent future harm, the suggestion of a precautionary safety plan assumes to enterprise the complainant

to govern his or her own risk of future harm. In this way, political authorities maintain the upper hand in the politics of uncertainty by downloading the responsibility of governing risk to the complainant. By appealing to neo-liberalism, political authorities do not assume responsibility for future harm but rather use uncertainty as “...a source of creative enterprise” (Ericson, 2007a: 5). Complainants provide themselves with a “freedom from fear” by creating their own safety plan. Accordingly, this aspect of the politics of uncertainty appeals to its neo-liberal component and highlights a different way in which political authorities maintain the upper hand in relation to uncertainty.

Peace bonds are an extensive form of counter-law. The results of the discourse analysis supported additional aspects of law against law that were included in Ericson’s (2007a) work. For example, criminalization through counter-law is said to be more compelling after a mass failure in existing risk management systems (Ericson, 2007a: 24). The Lori Dupont inquest represented a mass failure that resulted in a more compelling counter-law regime. Since the Coroner’s Inquest was released in 2007, the courts and the people of Ontario have relied more heavily on peace bonds to criminalize individuals who cause fear (see Appendix A).

At this point, a counter argument must be addressed. According to the discourse, a peace bond order does not result in a recorded criminal conviction. To imply that peace bonds “criminalize” individuals who cause fear through a formal criminal conviction is not supported by this study. This anticipated counter argument highlights a criticism of Ericson’s work. Although Ericson seems to employ the term “criminalization” freely to describe the affects of counter-laws, he never conceptualizes the concept. The confusion this causes is evident, not only in the case of peace bonds, but also in Ericson’s own discussion of anti-social behaviour laws. According to Ericson, anti-social behaviour laws

“...criminalize a potentially unlimited range of imagined sources of harm...” (2007a: 158). However, like peace bonds, laws of anti-social behaviour only “criminalize” through a criminal conviction after their conditions are breached (Ericson, 2007a: 160; Crawford, 2009: 817-18). Consequentially, the reader is left wondering what is meant by “criminalization” in the literature.

According to Mosher and Brockman (2010), the confusion surrounding “criminalization” is vested in the term’s ambiguity. The authors highlight three ways that criminalization can be understood. First, criminalization can refer to a particular category of behaviour that is defined by legislation as undesirable. An individual is “criminalized through categorization” when they have broken a law and a formal criminal conviction results (Mosher and Brockman, 2010: 3). Second, criminalization can refer to the deployment of “crime” and crime control. “Criminalization through law in action” is done when resources, enforcement practices, and surveillance are selectively deployed based on a particular type of person, whose acts become problematized and, in turn, criminalized (Mosher and Brockman, 2010: 8-9). This notion of criminalization is illustrated by Mosher and Hermer, who argue that a plethora of investigative tools have been deployed to combat the misuse of social assistance in Ontario. This resulted in the criminalization of welfare recipients through constructing their actions as “fraud” even when most misuses of social assistance lack intent to deprive another and are simply due to ignorance of the rules (2010: 32). Finally, criminalization can also refer to “governing through crime” (see Simon, 2007). As stated by Mosher and Brockman, “In our current neo-liberal society wherein hierarchy, order, and self-responsibilization are integral features, governing through crime is centered upon the attempt to identify or predict risky situations or risky populations” (2010:11). It is through this notion that peace bonds and

anti-social behaviour orders criminalize. Specifically, the discourse suggested that the preventative nature of peace bonds seek to identify and predict risky situations by relying on a complainant's fear of future harm. The discourse also assumed that peace bonds attempt to identify risky populations. This is reflected in the textual representation of s. 810.1 as "pedophile peace bonds." Under this label, individuals subject to a s. 810.1 recognizance are assumed to be pedophiles even when a formal diagnoses based on a prior or even present pedophilic criminal offence may not exist. Even when s. 810.2 was being debated in the House of Commons, the Honourable Justice Gordon Kirkby highlighted that the section's "...underlying principle has been clear from the beginning. The goal has always been to prevent violent incidents, to establish in a court of law the risk presented by certain individuals and to command those individuals to keep the peace and be of good behaviour" (Parliament of Canada, 1997). These situations and sub-populations can be seen to pose a risk to the values and practices integral to neo-liberalism (Mosher and Brockman, 2010: 11). Insecurity caused by the uncertainty of risk and harm has become a main concern for neo-liberal governments that attempt to enterprise their citizens to act autonomously through freedom (Foucault, 1979/2008: 148; Rose, 1996: 340; Hamann, 2009: 53). According to Ericson, it becomes the job of the neo-liberal state to transform uncertainty to security that enables both safety and freedom—more specifically, "freedom from fear" (2007a: 3, 163). As this thesis has shown, peace bonds are a form of counter-law that seeks to govern risk by limiting the liberty of those individuals that cause a complainant fear. Once a "freedom from fear" is achieved through the criminalization of risky situations and populations, the neo-liberal citizen is once again enterprised to act autonomously, a practice that is integral to neo-liberalism (Ericson, 2007a: 5).

The aspect of this discourse analysis that was most surprising was the extent to which peace bonds contribute to a surveillant assemblage. Admittedly, police and community notification and supervision are widely used in reaction to criminal offending—under a sex offender registry for example. As noted by Ericson, sex offender registries represent government programs that mobilize citizens as agents of surveillance. Intriguingly, these programs started far before similar programs that were given unprecedented impetus in the aftermath of 9/11 (2007a: 187). Surveillance under Canada's peace bond regime also mobilizes citizens as agents of surveillance, and has been doing so prior to 9/11 as well<sup>25</sup>. However, unlike sex offender registries, peace bond programs assume that these methods of surveillance are extended to situations where past or present criminal offending may not exist. A comparable surveillance network can be found under the anti-social behaviour laws discussed by Ericson (2007a). These laws encourage local people to participate in their policing and enforcement, even when it is not known whether harms will come to fruition (Crawford, 2003; Ericson, 2007a: 160-1). Although the community notification and supervision component of this assemblage is comparable to Canada's peace bond regime, Ericson (2007a) never mentions whether police databases are updated as a result of these laws. The use of technological police notification when an inherently criminal act may not have occurred seems to be exclusive to s. 810.

The extent to which peace bonds contribute to a surveillant assemblage is also reflected in their panoptic and synoptic capabilities. According to Haggerty and Ericson, there is a distinct disciplinary element vested in panoptic observation (2000: 607).

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<sup>25</sup> Recall that in 1993 and 1997, parliament decided to reform peace bond legislation by extending its scope through Bill C-126 and Bill C-55 respectively. These Bills did not create peace bond surveillance, but they illustrate that these measures were being used well before 2001.

Apparatuses of discipline can be seen as top-down observation that “...concentrates, focuses, and encloses” (Foucault, 1978/2007: 44). This was reflected in the use of a surety to supervise individuals subject to a peace bond to ensure that conditions of a recognizance are not broken. Alternatively, an assemblage’s synoptic element facilitates “bottom-up” forms of observation and parallels Foucault’s panopticon by allowing a large number of individuals to focus on something in common (Haggerty and Ericson, 2000: 618). This was supported by the discourse, which assumes that a large number of people in the community will focus on the respondent to ensure the complainant’s safety and, in turn, security. Not only did the discourse imply that community notification and supervision could provide a peace bond applicant with security, but it also suggested that this assemblage has the capacity to scrutinize public officials. This capacity was not considered in the original operationalization of the surveillant assemblage tenet, but this is an important aspect of an assemblage’s synoptic character according to Haggerty and Ericson (2000: 618). Overall, however, this thesis has shown that peace bonds are an extensive form of counter-law. This is reflected in the different aspects embodied in each tenet of Ericson’s analytic that were captured by this discourse analysis and were not considered by the original operationalization of each tenet. The results of this thesis’ discourse analysis suggested that peace bonds govern risk by relying on uncertainty, embodied in one’s fear of contingent and ambiguous harm. This facilitates a precautionary logic that seeks to prevent harm by mobilizing police and community notification and supervision, and restricting a respondent’s liberty even when a criminal act may not have occurred. By eroding traditional criminal law principles, proving that a complainant is fearful of a respondent under s. 810 can result in the expansion of the state’s capacity to criminalize and administer surveillance through police and community

notification and supervision.

After summarizing the results of this research, several similarities can be drawn between Canada's peace bond regime and the UK's Anti-Social Behaviour Orders (ASBOs). As highlighted by Crawford, ASBOs are precautionary orders based on the fear of future harm, which rely on a civil burden of proof, and deploy "webs of affiliation" that charge the local community to report breaches and mobilize the police (2009, 818-22). Although the discourse never explicitly associates peace bonds with notions of "anti-social behaviour," future research should examine how notions of anti-social behaviour are constructed in the law and if the conduct peace bonds seek to minimize are similar to the conduct governed by Anti-Social Behaviour Orders. An analysis of this nature may ultimately ask: are peace bonds Canada's Anti-Social Behaviour Order?

In conclusion, Canada's peace bond regime is being used for multiple purposes, includes many possible offences, and has the capacity to affect the lives of many people. It will be interesting to see what the future holds for peace bonds, particularly since the advent of Bill 168. Perhaps peace bonds will be integrated into managerial "risk management" techniques. Or, perhaps the conditions imposed by a peace bond will become even more invasive<sup>26</sup>. However, in their expansion, "counter-law regimes organize their own disasters by creating new harms and incubating risks" (Ericson, 2007a: 219). It will be interesting to see if peace bonds develop consistently with Ericson's warning.

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<sup>26</sup> See the recent amendments under Canada's *Response to the Supreme Court of Canada Decision in R. v. Shoker Act* (2011).

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### Appendix A: Peace Bond Statistics from the Province of Ontario (2003-2010)

Table 1: Total number of peace bond applications filed in the Ontario Court of Justice

YEAR	ONTARIO
2003	8,401
2004	8,635
2005	8,564
2006	8,578
2007	9,220
2008	9,112
2009	10,250
2010	9,917

Table 2: Total number of peace bond orders made in the Ontario Court of Justice

YEAR	ONTARIO
2003	6,692
2004	6,773
2005	6,858
2006	7,026
2007	7,473
2008	7,424
2009	8,167
2010	7,899

Table 3: Charges With NO Application Filed under s.810 (but where Peace Bond order was made)

YEAR	ONTARIO
2003	9,778
2004	8,976
2005	8,528
2006	8,860
2007	9,130
2008	9,249
2009	10,246
2010	11,373

**VITA AUCTORIS**

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