SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM, Jerome G. Miller (Cambridge: Cambridge University Press, 1996)

> The mood and temper of the public in regard to the treatment of crime and criminals is one of the most
> unfailing tests of the civilization of any country. A calm dispassionate recognition of the rights of the
> accused and even of the convicted criminal against the State; a constant heart-searching of all charged
> with the deed of punishment; tireless efforts toward the discovery of regenerative processes; unfailing
> faith that there is a treasure, if you can find it, in the heart of every man. These are the symbols which
> in the treatment of crime and criminals make and measure the stored-up strength of a nation and are
> sign and proof of living virtue in it: Winston Churchill.[1]

The importance of Jerome Miller's *Search and Destroy* grows with each passing day
— particularly in the Province of Alberta, a place that sometimes seems a snowy
Alabama.[2] Of late we've heard political figures advocating the return of chain gangs,
the repeal of the *Canadian Charter of Rights and Freedoms*, the amendment of the
Young Offenders Act (to get tough on young offenders),[3] and the elimination of colour
television sets in prisons. Our politicians, unfortunately, reflect the mood of a
significant number of ordinary citizens. The public seems gripped by fear, anger, and
resentment: fear of violent crime, although violent crime rates are dropping;[4] anger at

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[1]   Quoted in J.G. Miller, *Search and Destroy: African-American Males in the Criminal Justice System*
        (Cambridge: Cambridge University Press, 1996), at 280-81, fn. 21 [hereinafter *Search and
        Destroy*].

[2]   Miller will be familiar to some from interviews with David Cayley on the CBC *Ideas* radio
        programme, such as "Prison and its Alternatives" (June, 1996). Miller has extensive practical and
        academic experience in corrections. A former Associate Professor in the School of Social Work
        at Ohio State University, Miller was appointed Commissioner of the Massachusetts Department
        of Youth Services in 1969. He oversaw the State's juvenile detention and reform school system.
        He became convinced that these institutions did more harm than good, so he closed them, returning
        the juveniles to community supervision and treatment. The juvenile crime rate did not increase:
        National Center on Institutions and Alternatives: Staff Highlights, http://www.ncianet.org/
        ncia/staff.html and wall.html. Subsequently, he was appointed Director of the Illinois Department
        of Children and Family Services, Commissioner of Children and Youth for the Commonwealth
        of Pennsylvania, and Special Assistant to the Governor of Pennsylvania. In this last capacity,
        Miller engineered the release of 1,000 youthful offenders from the state's adult prisons. Miller was
        co-founder and is President of the National Center on Institutions and Alternatives, a private, non-
        profit agency based in Alexandria, Virginia, that provides "training, technical assistance, research
        and direct services to criminal justice, social services, and mental health organizations and clients"
        across the United States: National Center on Institutions and Alternatives: Organizational
        Information, http://www.ncianet.org/ncia/ncia.html. Miller is also Clinical Director of the Augustus
        Institute, a non-profit organization that provides clinical programs for the assessment and treatment
        of persons with sexual disorders, compulsions, and paraphilias: The Augustus Institute,
        http://www.ncinet.org/ncia/aug.html.

[3]   The Honourable Anne McLellan, the federal Minister of Justice, has recently released her
        government's strategy for renewing Canada's approach to youth crime: *A Strategy for the Renewal
        of Youth Justice* (Canada: Department of Justice, 1998). Fortunately, only part of the strategy
        focuses on attacking "meaningful" consequences for youth crime; other aspects of the strategy
        concern crime prevention, alternatives to the formal system, and rehabilitation and reintegration.

[4]   In 1996, the violent crime rate dropped by 2 percent, the fourth consecutive annual decrease; fear
        of crime, though, has increased: R. Kong, *Canadian Crime Statistics, 1996* (Juristat: Canadian
        Centre for Justice Statistics, Statistics Canada — Catalogue No. 85-002-XPE vol. 17 No. 8) at 5
        [hereinafter *Canadian Crime Statistics, 1996*].

offenders, who are considered not to pay for their crimes, although imprisonment rates are not decreasing;[5] and resentment of defence counsel and courts, who permit the guilty to escape on "technicalities," although recent memory attests to tragedies of the conviction of the innocent — Marshall, Morin, Milgaard, Nepoose, Hurricane Carter, the Guildford Four, the Birmingham Six.

The virtues of *Search and Destroy* are that it provides alternative perspectives, traces the suspect sources of some current and popular thinking about crime and criminals, and points out the dangers of the punitive path too many are now taking. Like Michel Foucault, Miller challenges the network of beliefs, methodologies, representations, and practices that have been accepted as natural and obvious. Like Foucault, he takes on the job of "shaking this false self-evidence, of demonstrating its precariousness, of making visible not its arbitrariness, but its complex interconnection with a multiplicity of historical processes, many of them of recent date."[6] *Search and Destroy* does emerge from the American experience of racial discrimination by the white majority against African-Americans. We, of course, are not innocent. Analogies may be drawn. *Search and Destroy* contains lessons Canadians can take to heart. I shall review these lessons by considering (I) Miller's critique of some currently popular approaches to crime and criminals; (II) some aspects of his reform proposals; and (III) some general reflections on the place of *Search and Destroy* in the literature.

I

Miller is not a post-modern — in fact, I shall suggest below that he is (proudly) an old-fashioned humanist — but much of *Search and Destroy* is complementary to Foucauldian criminological analyses.[7] Miller's critique of popular approaches to crime and criminals can be usefully delineated using a Foucauldian template.

At its deepest level, *Search and Destroy* concerns the mutually reinforcing links between power and knowledge. As Foucault writes, "power produces knowledge ... power and knowledge directly imply one another ... there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations."[8] For Miller, at one pole of the criminological power/knowledge relationship exist privilege, racial antagonism,

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[5]   The rate of imprisonment was up very slightly (1 percent) last year; the rate has levelled off since the 38 percent increase from 1987 to 1993: M. Reed and J. V. Roberts, *Adult Correctional Services in Canada, 1996-97* (Juristat: Canadian Centre for Justice Statistics, Statistics Canada — Catalogue No. 85-002-XPE vol. 18 No. 3) 1, 4 [hereinafter *Adult Correctional Services in Canada*].

[6]   M. Foucault, "Questions of Method," in G. Burchell, C. Gordon, & P. Miller, eds., *The Foucault Effect: Studies in Governmentality*, trans. C. Gordon (Chicago: University of Chicago Press, 1991) 73 at 75.

[7]   Miller refers favourably to Foucault and Foucauldian themes in the book: *Search and Destroy*, *supra* note 1 at 132, 135.

[8]   *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan (New York: Vintage Books, 1979) at 27 [hereinafter *Discipline and Punish*].

and capital; at the other exist statistical and social scientific discourses that both reinforce and are the products of these relations.

Miller identifies a cluster of dominant groups. The first is linked by economic and ideological interests. He describes this group as a "crime control-industrial complex," involving justice, defence, and industrial players.[9] At least in the United States, criminal justice is big business. Police agencies are consumers of defence technology, particularly weapons and surveillance devices, and computer hardware and software.[10] Prison construction provides economic benefits for contractors and for the communities in which prisons are built.[11] The second group is linked by social class. Miller gestures towards the majority "middle class" group, which feels threatened by "unruly" minority groups.[12] While class interests may bridge ethnic or "racial" differences to a degree,[13] the third main dominant group is linked by skin colour; this is the "white" middle class, which harbours racist beliefs about African-Americans.[14]

These dominant groups and their members are suspended in tension with other groups and their members — or, more specifically, with criminals. The primary relational and conceptual move taken by these dominant groups, the presupposition of corresponding criminological knowledge, is the constitution of the criminal as the "Other," the wholly different, the enemy. This is the denial of shared humanity with the criminal, the denial of the criminal in us and the blameless citizen in them. The criminal is understood as belonging to a "different breed, if not a subhuman species."[15] If the criminal is naturally and inherently different than us, it follows that we bear no responsibility for the criminal's behaviour; we could not be said to have any causal effect on criminal activity, say through the maintenance of social conditions. The criminal as Other evaporates "liberal guilt."[16]

The relationship with the criminal as Other is pursued in two intertwined ways, in theory and in practice. Theory provides justifications for practice; practice provides data and confirmation for theory. On the level of theory, Miller identifies problems with the statistical reporting of criminal activity, social science methodology, and the content of some recent positions.

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9   *Search and Destroy*, *supra* note 1 at 228.
10   *Ibid.* at 231.
11   *Ibid.* at 229.
12   *Ibid.* at 50, 149, 176, 218.
13   *Ibid.* at 175.
14   *Ibid.* at xii, 54, 87, 149.
15   *Ibid.* at 183; see also *ibid.* at 8, 37, 160.
16   *Ibid.* at 161-62, 183, 205. The conceptualization of the criminal as Other has been strongly reinforced by popular culture (the "fictional netherworld") since the nineteenth century: *ibid.* at 185. Nineteenth century fiction often portrayed the criminal as a monster distinguished by physiological signs of criminality. Contemporary fiction tends not to stress physiology, but creates psychological monsters, vicious and diabolical "psychopaths" (usually serial killers or terrorists) who look like us but do not think like us or have our emotions. They lack our type of soul.

Miller criticizes the UCR ("Uniform Crime Report") statistics generated by the FBI.[17] These statistics have four weaknesses. First, the statistics are based on victim reports of crime, and on incidents substantiated through police investigation and "cleared" through charge. The numbers, then, are "highly susceptible to local police tactics, prosecutorial policies, media interests, and politics,"[18] as well as police record-keeping practices and technology.[19] Second, the statistics may mask over-charging: the statistics do not disclose whether a charge should have been laid at all, whether a charge of the appropriate seriousness was laid, or whether multiple charges were warranted.[20] Third, the statistics are based on complaints and charges, not convictions. Miller reports that "of every 100 individuals arrested for a felony, 43 were either not prosecuted or their cases were dismissed outright at the first court appearance."[21] Fourth, the statistics are not accompanied by narrative information that might explain or put the information in context, or indicate the actual damage caused by the alleged offences.[22] Miller contends that, as a result of these weaknesses, the UCR reports exaggerate the numbers and the seriousness of crime. The statistics fuel the perception of "out-of-control" crime rates.[23] Miller's concerns are legitimate even if statistics show decreases in crime rates, since the information reported may still have been inflated.

Statistical exaggerations are reflected, distorted, and magnified in the "news" media, particularly television news. The media creates "crime waves" by "continuing and heavy coverage of numerous occurrences which journalists report under a single theme."[24] A feed-back loop develops, which Mark Fishman labels the "crime wave dynamic":[25] Some journalists report a crime. Other journalists notice this, and report on the same theme. Others notice this reporting, and the stories and the crime "problem" multiply. It should be borne in mind that "news" does not objectively exist. Events exist, which the media decide to report (or not), decide to report in different ways (features, one column inch), and decide to report once or in multiple stories. Miller refers to a study showing that while crime rates have lately remained relatively stable, crime coverage on major television newscasts has more than doubled.[26] The manner of reporting is also problematic: "By the early 1990s, the country had virtually immersed itself in the world of crime kitsch — one peopled by coifed TV hosts and news readers shedding crocodile tears over the current state of the country while turning

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[17] The Juristat statistics also rely, in part, on the Uniform Crime Reporting model: see *Canadian Crime Statistics, 1996, supra* note 4 at 13.

[18] *Search and Destroy, supra* note 1 at 27.

[19] *Ibid.* at 41.

[20] *Ibid.*

[21] *Ibid.* Similarly, in Canada in 1996, nearly one-third of cases taken before the courts resulted in a stay or withdrawal of charges, 3 percent resulted in acquittals, and 4 percent were resolved "through other means": R. Du Wors, *The Justice Data Factfinder* (Juristat: Canadian Centre for Justice Statistics, Statistics Canada — Catalogue No. 85-002-XPE vol. 17 No. 13) 5.

[22] *Search and Destroy, supra* note 1 at 27.

[23] *Ibid.* at 28.

[24] *Ibid.* at 154-55.

[25] *Ibid.* at 155, citing M. Fishman, "Crime Waves as Ideology," *Social Problems* (June 1978).

[26] *Ibid.* at 156.

human complexity into melodrama."[27] Miller provides a marvellous quotation from Garrison Keillor: "Every murder turns into 50 episodes. It's as bloody as Shakespeare but without the intelligence and the poetry. If you watch television news you know less about the world than if you drank gin out of a bottle."[28]

Miller attacks social science methods that might be described as "bad positivism" — "static" methods that focus analysis at single points in the administration of justice,[29] rely uncritically on official data,[30] and ignore the contexts and "life histories" of those swept into criminal justice processing.[31]

Miller's grave concern with a static or "snapshot" method is that it may obscure or prevent the detection of biases in the administration of justice. For example, suppose that a study focussed only on the "racial" or ethnic characteristics of offenders sentenced to imprisonment for serious offences. In the United States, African-Americans make up only about 13 percent of the total population, yet comprise over 50 percent of the state and federal penitentiary population.[32] One might look at the representation statistics, and conclude that African-Americans are imprisoned because "they're the ones committing the violent crimes."[33] Moreover, if the rates of imprisonment for a type of crime are examined, it may be found that rates of imprisonment for African-American and "white" Americans are about the same, dispelling an impression of racist treatment. Miller concedes that race effects may not be manifest at a particular stage of processing. To determine race effects, however, the entire process of the application of criminal justice to offenders must be scrutinized. Race may influence whether a person is charged or not; whether a person is charged with more than one offence or the most serious offence potentially applicable; whether the person is granted bail or not; whether the person has the means to meet bail conditions or not; whether the prosecution is willing to withdraw charges or to plea bargain; whether the person is convicted or acquitted; whether the person is sentenced to prison; whether the person serves his or her time in minimum security facilities with good programs or not; whether the person is paroled at an early date or not.[34] A static research method reinforces the constitution of the criminal as Other by exhibiting the over-representation of certain types of offenders at stages of processing, without elaborating the selection mechanisms that led or contributed to the over-representation. The method contributes to the fear that certain groups of persons pose a significant threat to "us."

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[27]   *Ibid.* at 161.
[28]   *Ibid.*; from "News from Lake Wobegon," on National Public Radio's *Prairie Home Companion* (December 1993).
[29]   *Search and Destroy, supra* note 1 at 62, 69.
[30]   *Ibid.* at 41, 56f.
[31]   *Ibid.* at 58, 145.
[32]   *Ibid.* at 54-55. In Canada, aboriginal peoples represent 3 percent of the total population, but 16 percent of provincial and territorial prison admissions and 15 percent of federal admissions: *Adult Correctional Services in Canada, 1996-97, supra* note 5 at 7.
[33]   *Search and Destroy, supra* note 1 at 49.
[34]   *Ibid.* at 56, 71f., 78. Miller's main concern is with racist biases in the criminal law. Classist or other biases may also be traced. See M. Mandel, "Democracy, Class, and Canadian Sentencing Law" (1984) 21-22 *Crime and Social Justice* 163; and M. Mandel, "Democracy, Class and the National Parole Board" (1985) 27 Crim. L.Q. 159.

Miller cautions against the over-reliance and uncritical acceptance of the "records by which the justice system memorializes itself."[35] Miller quotes Lakoff and Johnson to express the basic difficulty — those in power "get to impose their own metaphors."[36] Official documents — from arrest documents, charging documents, trial and sentencing transcripts, to judgments — may contain inaccuracies, rationalizations, fabrications, and exaggerations.[37] Miller warns that each record may be an apologia for the next stage of processing.[38] If we accept official versions of events without question, and if official versions express biases and prejudgments respecting those subjected to criminal justice processing, repeating and relying on the records risks replicating the biases and prejudgments.

Miller's fundamental concern with "bad positivism" is its lack of narrative and overreliance on numbers, as opposed to the "street pounding," interview-based methods of sociologists like Erving Goffman.[39] In Miller's view, knowledge of the personal circumstances of offenders, of offenders' "life histories," is an essential prerequisite to an understanding of their activities and our responses to their activities. Without an understanding of personal circumstances, we cannot really know what people have done, why they did it, or what their activities meant for them. To grasp the meaning of deviance, we must also investigate the responses of those affected by the deviance, since the mode of reception of deviance defines whether and how the deviance enters the criminal justice system. We must investigate not only victims and neighbours, but police officers, lawyers, and judges, to determine how the reality of the crime has been constituted.[40]

At the level of researchers themselves, Miller warns of the pressures that may be exerted by granting agencies that have interests in promoting views about the criminal justice system (players in the crime control-industrial complex): "The ready availability of research monies from an ideologically driven U.S. Justice Department led to the ascendancy of a new stable of researchers who all but jettisoned any critical sense.... The research agenda followed the money, and the conclusions followed the power."[41]

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[35]   *Search and Destroy, supra* note 1 at 58.
[36]   *Ibid.* at 56, fn. 25, 255; the quotation is from G. Lakoff and M. Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980) 157.
[37]   *Search and Destroy, supra* note 1 at 57.
[38]   *Ibid.*
[39]   *Ibid.* at 145. E. Goffman's classic work in the area is *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Garden City, N. Y.: Anchor Books, 1961).
[40]   *Search and Destroy, supra* note 1 at 58, 62, 145. Miller's call for a return to narrative has a Foucauldian flavour. It is a call to investigate "subjugated knowledges," the know-how and ideas of people who have been excluded from the heights of power, those who have been marginalized or oppressed, or whose voices are not typically heard: M. Foucault, "Two Lectures," in C. Gordon, ed., *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, trans. C. Gordon, *et al.* (New York: Pantheon Books, 1980) 78 at 81. This research orientation may be supported by Foucault's theory that the operation of power is to be understood in an "ascending" fashion; power is to be understood "from the bottom up": *ibid.* at 99. Local, grassroots, particular, naive knowledge and experience lay close to the "micro" level of power, and may demonstrate more about the structures of power in a society than more visible, large-scale, legitimized indicators of power, which rely on the micro organizations: *ibid.* at 82.
[41]   *Search and Destroy, supra* note 1 at 143; see 170.

Like Foucault, Miller emphasizes the "perspectival" nature of research.[42] Miller favourably cites Quentin Skinner, who bids researchers to acknowledge openly "the political and ideological worlds within which they operate and from which they come (and, one might add, which fund them)."[43] Miller, though, unlike Nietzsche and (perhaps) Foucault, is not a thoroughgoing perspectivist — he does not suggest that there are only different perspectives and no right or wrong answers. His point is that biases may not be acknowledged, and may stem from the very financing arrangements that allow research to be conducted.

Bad methods are followed by bad causal explanations. Miller is very disturbed by the modern "stampede to genetic explanations" of crime.[44] Influential writers in the United States have linked IQ and criminal behaviour to heredity.[45] Miller contends that there is an inadequate scientific basis for claims linking genetic traits to criminal behaviour. The evidential basis for the genetic link to crime alleged by Wilson and Herrnstein in *Crime and Human Nature*[46] was flawed: a reviewer, Leon Kamin, determined that Wilson and Herrnstein "had described a control group that did not exist, reported statistically nonsignificant results as though they were significant, and cited a preliminary study as though it were definitive without mentioning 'later, larger and better-controlled studies from the same laboratory, which produced contradictory outcomes.'"[47] Regardless of the merits or demerits of Wilson and Herrnstein's work, researchers have not established any significant links between criminal behaviour and genes.[48] Certainly there is no significant link between criminal behaviour and "race." Following a 16 year study, Cavalli-Sforza, Menozzi and Piazza concluded that "once the genes for colouration and stature are dealt with, the differences between and among individuals are so great as to render the concept of 'race' virtually meaningless."[49] Despite the intellectual, moral, and political bankruptcy of the notion of "race," the tendency of those who promote genetic explanations of crime is to couple criminal behaviour with race: "Those who would lead us down this path characteristically start by suggesting biology and end in shouting race."[50] Genetic explanation has been a

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[42]   See M. Foucault, "Nietzsche, Genealogy, History," in D. Bouchard, ed., *Language, Counter-Memory, Practice*, trans. D. F. Bouchard & S. Simon (Ithaca, New York: Cornell University Press, 1977) 139 at 156, 157.

[43]   *Ibid.* at 181, citing Q. Skinner, *The Return of Grand Theory in Human Sciences* (Cambridge: Cambridge University Press, 1985) 9.

[44]   *Search and Destroy, supra* note 1 at 198.

[45]   Miller refers in particular to R. Herrnstein & C. Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (New York: Free Press, 1994), and J.Q. Wilson & R. Herrnstein, *Crime and Human Nature* (New York: Simon and Schuster, 1985) [hereinafter *Crime and Human Nature*].

[46]   *Supra* note 45.

[47]   *Search and Destroy, supra* note 1 at 194, quoting L. Kamin, "Reply" (May 1996) *The Scientific American* 7.

[48]   *Search & Destroy, ibid.* at 196-203.

[49]   *Ibid.* at 179, relying on L. Cavalli-Sforza, P. Menozzi & A. Piazza, *The History and Geography of Human Genes* (Princeton, New Jersey: Princeton University Press, 1994).

[50]   *Search and Destroy, ibid.* at 183.

scientific façade for racist and classist policies.[51] It is the reflection in scientific rhetoric of the positing of the criminal as the Other.

Research identifies an enemy and assesses the enemy's number and danger. On the level of practice, the apparatus of the criminal law is deployed against those identified as the enemy. A key point made by Miller is that the deployment of the criminal law is not inevitable. Given social conflicts, there is no necessity to address the conflicts through the criminal law. Any particular conflict may be understood and addressed through a variety of mechanisms — discussions between the participants, traditional conflict resolution, mediation, civil law, religious law, or criminal law. Hence, decisions must be made to identify certain social conflicts as worthy of State attention. Further decisions must be made to address those conflicts through the criminal law. We decide to criminalize certain types of behaviour.[52]

Criminal justice is itself a multivariant tool. Criminal justice systems across the world promote different policies, treat accuseds, complainants, and community members in different ways, and impose different types of sanctions. To the extent that a criminal justice system presupposes that the offender is an incorrigible, genetically pre-disposed menace, an entity outside the community that the criminal law protects, to that extent the criminal law may abandon efforts to rehabilitate or reform. Certainly there is no need to address "root causes," since the criminal is a product of genes alone, not social conditions. Since the criminal is different than us, we need not extend the same comforts to the criminal in punishment that we might want for ourselves. There is no reason not to make punishment harsh.[53]

If the expansion of a harsh criminal justice system worked, if the result of "tough on crime" tactics were the promotion of a safe, peaceful, and just society, there might be little cause to complain (unless one were targeted as a criminal). One of Miller's important claims is that "tough on crime" policies do not work. Far from making society safer, more peaceful, and more just, criminal justice interventions create more crime. Miller traces the "iatrogenic" features of the interventions on multiple levels.

Policing tactics may promote crime. Where police are governed by the notion of the criminal as Other, the police may distance themselves from the communities in which they work, adopt military uniforms and weapons, detain or arrest persons without probable cause, and rough up and humiliate detainees. A "culture of opposition" may be fostered.[54] Persons subjected to uncivil policing may come to identify with criminals, and adopt the culture of the street. The result is further conflict with the

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51   Miller, it should be noted, does not reject *a priori* the possibility of genetic links to criminal behaviour. He is concerned about the irresponsible use of unsubstantiated genetic hypotheses: "it may be irresponsible to carelessly and publicly toy with the putative genetics of social deviance while at the same time bypassing the more pressing, obvious, and remediable environmental and social factors involved" (*ibid.* at 210).

52   *Ibid.* at 2-3; 150-51.

53   *Ibid.* at 218-19.

54   *Ibid.* at 97.

police, which further entrenches oppositional culture.[55] A particular policing tactic that Miller deplores is the use of informants — "snitching:" "No single tactic of law enforcement has contributed more to violence in the inner city than the practice of seeding the streets with informers and offering deals to 'snitches.'"[56] Miller does not have any misplaced concern for the criminal organizations that are broken only through the use of informers. The use of snitching, however, extends beyond investigations into these organizations: "arrests have become so pervasive in the inner city that they have affected most families and peer relationships. As a result, relying on informers threatens and eventually cripples much more than criminal enterprise. It erodes whatever social bonds exist in families, in the community, or on the streets — loyalties which, in past years, kept violence within bounds."[57] Many are arrested. They are told that they face serious charges, with very serious penalties (whether the evidence supports the charges is not fully discussed). They are offered a deal — inform, or be punished. So people inform. They inform on friends, on family, on acquaintances. The information they provide may or may not be true. The result is that no one can be trusted. The result is anger and resentment unencumbered by the restraint of social bonds. The result is more crime.

Severe deterrent measures tend not to reduce crime.[58] There is evidence that imprisonment (as opposed to less intrusive penal alternatives) increases the probability of re-arrest.[59] The longer offenders are locked up, the less likely they are to have job stability once released; prison cuts off opportunities and prospects for stable employment.[60] Imprisonment also has intergenerational effects. The labelling of not only sons but of fathers as criminals has been identified as a predictor of sons' future delinquency.[61] There also is evidence that the labelling of parents as criminals diminishes their childrens' job prospects: "A record of parental criminality had a better-substantiated causal effect on a son's unemployment than did the father's unemployment."[62]

If "tough on crime" measures do not work, one might wonder why such measures continue to be promoted. Miller looks to Merton's distinction between the "manifest" and "latent" purposes of rituals. A ritual may serve a manifest purpose, such as the production of rain. Failure to achieve the manifest purpose does not necessarily lead to a perceived failure of the ritual, which might cause its abandonment. The ritual may successfully achieve its latent purpose, such as the reinforcement of group unity in a time of drought.[63] Miller suggests that the latent purpose of criminal justice rituals is

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[55]   *Ibid.*

[56]   *Ibid.* at 102; see 239.

[57]   *Ibid.*

[58]   *Ibid.* at 95.

[59]   *Ibid.* at 112, 121.

[60]   *Ibid.* at 116 and 266 fn. 52, citing J.H. Laub & R.J. Sampson, "The Long Term Effect of Punitive Discipline" (February 1993), a revision of a paper presented at the Life History Research society Meeting, May 6, 1992.

[61]   *Search and Destroy, supra* note 1 at 114.

[62]   *Ibid.* at 117.

[63]   *Ibid.* at 92.

also to promote a sort of group unity, by confirming beliefs concerning offenders: "[v]iewed in this context, the criminal justice rite ... may exist not so much to lower crime as to reassure the larger society that its metaphors regarding offenders in general, and the black male offender in particular, are sustained. Cutting actual crime seems beside the point."[64] Criminal justice practice serves, if only in part, to reproduce and confirm the notion of the criminal as Other, a notion supported by pseudo-science.

II

Were Miller a post-modern, he might rest with critique, and not be inclined to recommend any reforms. Miller, though, is a humanist. He believes that there is a right and a wrong in the treatment of those who run afoul of the law. He sees quite clearly what should be done, although he does not believe that his suggestions will be implemented. He provides a list of recommendations.[65] Three aspects of Miller's position are particularly significant.

First, he urges us to recognize the value of each person's life, and to treat offenders decently and with respect.[66] We should reject the fundamental conceptual move of constituting the criminal as Other. We should recognize ourselves in the offender and the offender in ourselves, and should be prepared to accept some responsibility for the conditions that may contribute to the commission of offences.

Second, if the humanity of offenders should be respected, the State should treat offenders decently in the criminal justice system, in the same way that we would want ourselves or our children to be treated. Miller advocates a "least harm" or "minimal impairment" orientation to punishment.[67] Imprisonment should not be the first, but only the last resort. Instead of focusing on imprisonment, criminal sentences should be geared toward community based programmes. These programmes should be tailored to the particular strengths and weaknesses of offenders — the programmes should respect their individuality.

Third, if we should respect offenders' humanity in the criminal justice process, we must ensure that courts, at least at the sentencing stage, receive adequate information on the "life histories" of offenders and on the type of programmes that might assist offenders, reintegrate them into society, and thereby lead to a more just, peaceful, and safe society. Funding, diverted from prison construction and the militarization of the police, should be available to support such programmes.

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[64] *Ibid.*; see also 236. Foucault confronts this very problem of the real justification for the persistent prison. In his view, punitive measures "are not simply 'negative' mechanisms that make it possible to repress, to prevent, to exclude, to eliminate; but ... they are linked to a whole series of positive and useful effects which it is their task to support." *Discipline and Punish*, *supra* note 8 at 24. A large part of the burden of *Discipline and Punish* is to establish those "positive and useful effects" of the prison.

[65] *Ibid.* at 239-42.

[66] *Ibid.* at 242.

[67] *Ibid.* at 239.

These aspects of Miller's position are, one should note, consistent with the "Purposes and Principles of Sentencing" set out in our *Criminal Code*, and our *Criminal Code* has probation and conditional sentence mechanisms which allow individualized community-based programmes to be crafted.[68] There are no legislative bars to the fulfilment of Miller's vision in Canada.

III

Search and Destroy is not a work of original primary research. Rather, it is founded on a review of the literature. Miller does have extensive relevant experience as an administrator, activist, and advocate. At times he does refer to his own experience to support his contentions. Generally, though, he relies on others' empirical studies.

As he himself admits,[69] many of Miller's arguments and approaches have been heard before. His pleas for humanity in punishment are the pleas of many penal reformers. Others have recognized the racist functions of criminal justice processing. Certainly Marxists would be familiar with the contention that criminal justice is an extension of the marketplace, and that powerful factions may manipulate the justice system to serve their economic interests. The argument that prison does not work, and in fact makes offenders worse, has been with us since the modern penitentiary system emerged in the nineteenth century.[70]

Why, then, is *Search and Destroy* exciting and important? Its charges are recent, and are based on fresh evidence. Miller speaks with passion, intensity, and wisdom based on over 30 years experience with actual participants in the justice system — he speaks from inside. Most importantly, though, *Search and Destroy* is a reminder and a warning. Its lessons may be old, but we have forgotten them. Each generation seems fated to forget these lessons. We return to the ritual of imprisonment without thought, without reflection on options. We ignore, negligently or wilfully, the racial implications of our criminal justice practices. Miller will not let us simply forget. He also performs the great service of suggesting alternative approaches to old problems. Were we bold enough to follow Miller, we might achieve a just, peaceful, and safe society, without the sacrifice of so many offenders. Were we to try to follow Miller, we would probably not do worse than we are doing now.

Wayne N. Renke
Associate Professor
Faculty of Law
University of Alberta

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[68]   R.S.C. 1985, c. C-46, ss. 718-718.2; 732.1; 742.3.
[69]   *Search and Destroy, supra* note 1 at 236.
[70]   *Discipline and Punish, supra* note 8 at 266-67.