

Criminal Process

- The crime funnel:

- CCJS spending:

- Expenditure Analysis from 2011/2012 (federal, provincial, territorial gov. spending):
 - 2.3 billion annually on CJS
 - Spending on per capita basis increasing
 - We're spending more to deal w/ less crime
 - 'Reactionary' spending
 - No correlation w/ crime rate and dollars spent
 - Huge amount of dollars spent on 'get tough on crime' (conservative) agenda- enacting mandatory minimums, amending criminal code
 - Politicians using the 'get tough on crime' agenda to gain votes, despite evidence that contradicts what they're saying
 - Criminalization of Politics: using criminal law to deal w/ social issues
 - Ex: Conservative governments refusal to look into missing Aboriginal women- say it's solely a criminal law issue, however it's a multilayered issue- there are economic and social issues at play (issues that significantly influence placing these women at a higher risk)

Models- Issues

- There are multiple models/theories that interplay to make-up our criminal justice system (they encompass a significant amount of concepts)

- Reasonable and probable grounds (RPG) has a greater standard of evidence than balance of probabilities
- RPG to arrest (factual guilt) vs. Proof beyond a reasonable doubt (legal guilt)
- Proof BRD requires a high standard of evidence to support finding

Packer's Two Models

Crime Control (conveyor belt- efficiency)

- Promotes order, social stability, security, protection
- Represents belief that the legislature is the validating authority (not the courts)- up to parliament
- Not a fan of judicial activism
- Heavy reliance on criminal sanctions (punishment); Punishment is useful/necessary
- Efficiency is key (our resources are limited)- system wants to move people from factual guilt to legal guilt as fast as possible
- Plea-bargains common because they are efficient
 - The police and the crown put people on the 'conveyor belt'- they are responsible for screening out the innocent- they are responsible for ensuring that they secure a guilty conviction- once a person is placed on the conveyor belt, they are most likely to be found legally guilty

- The police have few limitations (they cant torture you; police are not above the law)
- Police misconducts are serious, but dealt w/ otherwise
 - Ex: wrongful collection of evidence against you is still included- cop might be dealt with, however out outside your trial- it's all about efficiency
- Defense counsel has little role in process (other than outside the courtroom)
- Some checks, balances, controls to prevent innocent from being found guilty
 - Not a focus in this model- greatest enemy is things that stand in its way of efficiency and slow down the system
- Uses pre-trial custody as a tool to its own advantage (coerces person in custody- they are more likely to plead guilty or enter into a plea bargain than if they were in the community- a pathway to secure guilty conviction ASAP)
- "Its worse to have a guilty person walk free than it is to convict an innocent person"

Due Process (obstacle course- checks and balances)

- SCC is the validating authority- not legislature put in place by the government
- Concerned about states action that infringe on our civil liberties
- Skeptic of criminal sanction
- A supporter of the decriminalization of certain offences (save money by relying on decriminalization rather than efficiency)
- Less focused on efficiency- aim our limited resources and the most serious offences
- More focused on respect of our rights as individuals- equality
 - Ensures minorities are treated equally (Ex: Disproportionate amount of search/seizures Aboriginals, blacks, etc.)
- Due process is intended to level the playing field by placing limits on police powers and holds them accountable for their actions
 - Recognizes that the state has a significantly greater amount of power/resources (they make the laws, they enforce/ investigate them, they prosecute them)
- When state actors take their actions too far it is dealt with in that same CJ process (unlike crime control)
 - Ex: Police enter home w/ out search warrant- that evidence is excluded
 - Exclusion of evidence potential ensures police will be more likely to operate fairly
- Presumption of innocence is paramount
- Acknowledges pre-trial custody is coercive and that accused should be released on bail
- Encourages accused to go through the trial process rather than make a plea-bargain (because there are checks/ balances in place to ensure fair trial)

Due Process	Crime Control
-	-
-	-
-	-
-	-
-	-
-	-
-	-
-	-

Context (of Packer's 2 Models)

- Formulated in the 1960's during the 'Warren Court' era in the U.S- a time of judicial activism (the court suddenly becomes more involved in the role it is playing)- Warren was Chief of Justice in the U.S from 1953- '59- court expanded its role in defining criminal process, and protection of accused rights significantly increased
- The Canadian Charter of Rights and Freedoms- Canada's version of the 'Warren Court' era- implementation of the Charter was followed by a rise in judicial activism through the 1980s- '90s- a time when the arrested is given rights, evidence is excluded, courts guarantee accused is given legal representation, disclosure to accused, as well as the right to silence
 - Congress tries to limit the rights given to the accused- "Why let someone walk free on a technicality"

Critics (Packer's model is fragile)

- a) Empirical Irrelevance: the cost of due process may be more expensive to the accused**
 - Accused may be better off to enter a plea bargain than sitting in a jail cell saying 'judge my rights were violated; that evidence should be excluded'- and hoping judge will throw it out w/ out in trial (no certainty)- guilty plea might be in the best interest of all parties (even accused)- due process becomes an agent of crime control unknowingly
- b) Due- Process = Crime Control**
 - The formal laws enacted by parliament enable police and prosecutors to exercise broad discretionary powers
 - Pre-Charter there is little on police powers
 - Post- Charter the courts involvement creates roadmaps (through precedents) of what police can/can not do- which itself gives police specific powers by outlining the set limitations
 - The protectors (checks/balances) contained within the Canadian Justice System legitimizes the criminal sanction that the guilty will face (the mere fact that we have a supposedly 'perfect' system allows us to feel OK with holding the guilty party accountable fairly)
 - This 'perfect system is an illusion- people plead guilt rather than go to trial (despite these 'checks' and 'balances') and this legitimizes their sanction
 - As we have more rights recognized after the introduction of the Charter (limits on state conduct and certain rights given to the accused pertaining to their interactions w/ state actors and the system) our prison population goes up and crime rates go down- the logic in this is that due-process= crime control
 - Role of the media is important in this critic- cases where important due process decisions are recognized (clearly defined civil rights- i.e. the exclusion of evidence) it is not headline news- the media doesn't say 'Look at this great new civil right that the SCC has granted us', but instead 'The courts are letting criminals off on technicalities!' ...despite the fact that these 'technicalities' are rights that have been granted to protect us from state intrusion
- c) Limited Liberal and Adversarial Vision**
 - a) Packer's theory is based off of an adversarial system (prosecution vs. defense), and is limited solely to this system
 - b) This model was created in the 60s, when rights were traditionally a negative check on government- he also believed that the interests of the accused individual were always opposed to the state (theories of family model)

d) Packer Ignores Victims

- An important critic because victimization surveys often cause a belief of inadequacy about the CJS- however, unreported crime might be a result of 'legal pluralism' created by a person taking matters into their own hands (dealing w/ it the way they want to as opposed to the way the state does and we need to appreciate that)
- Another issue- notion of 'risk society': our laws, rules, procedure are put into place to balance against risk (of being a victim of a criminal offence)- our rules are based off of these risks- rules change as when a new potential risk comes to light- there are disproportionate levels of risk against certain groups of society- members of these groups are at higher risk (ex: violence against women)- certain groups use victimization surveys to make demands/change laws
- Focus on victimization has significantly shaped the CJS and its procedure- in a more significant way than the Charter has- Packer left all of this out

New Models That Deal With Victims Rights- (important because it focuses on what Packer missed)

a) Punitive Model (mostly crime control)

- High level of unreported crime seen as a failure of our justice system- victims should have no reason not to report crime
- In favor of more crime control
 - One thing punitive and crime control don't agree with is the amount of power that should be given to the police/prosecution- police power is limited in the punitive model- police are subjected to scrutiny as a result of their possible failure (punitive model wants police to act in accordance w/ their power- they don't want the possibility of evidence being excluded as a result of a misconduct [under due process] and the accused 'getting off' because then the victim gets no closure)
 - Another aspect that differs from crime control is that the punitive model is not in favor of plea bargains (because it limits the charges/punitive sanctioning placed on accused and is often done w/ out the consent of the victim)
- Still a focus on factual guilt (BRD)
- Restorative justice is rejected- it is seen as revictimization- taking the focus away from the victim and giving it to the accused- ignoring what the victim [this model]wants (punishment)
- Opposes due process- too many protections (barriers)- slows down process and prevents guilty verdicts
- Victims have rights- need and deserve respect (Victims Bill of Rights)
- Victimless crimes: always a victim(s) involved in a criminal offence- expansion of harm since 1960 (no longer just physical- now can be psychological)- people believe less and less in a victimless crime (ex: prostitute now seen as a victim)
- Demands state activism: creation of new offences (limitations on what we can/cant do); ignores sociological factors (ex: terrorism cant just be ended trough laws)
- Victim punitive model believes that victimization can be solved solely through criminal law- instead of looking at proactive measures
- Used to justify crime control approach to protect- however, stiffer punishment can be counter intuitive to better protection

b) Non- Punitive Model (proactive approach- focus is on preventing crime and reintegrating/restoring actors [victim and accused])

- Takes a proactive approach- rather than a reactive approach
- Focuses on: how to deal w/ recidivism; compassion and rehab
- Takes a positive approach to unreported crime- doesn't view unreported crime as a guaranteed failure of our justice system- unreported crime might be the victim finding a better way to deal w/ their victimization
- The state monopolizing the criminal process is seen as a failure of social justice (victim should not have to enter into the CJS (i.e. charge their offender)
- Shares the due process skepticism of the CJS
- Downplays importance of crime control (criminal law doesn't control crime)
- Crime prevention through things like social development; looking how to reduce the risks of being a criminal or victim (ex: child intervention)
- After a crime has been committed, the focus should be on reducing harm (not placing blame)- victims can choose to take part in non-punitive alternatives and can back out at any time (for any reason- i.e. not satisfying enough)
- Examples of non-punitive sanctions include sentencing circles; family conferences; offender rehabilitation programs (ex: Kingston farm)
- Key player is still the victim- they have the power in this model (punitive its taken out of their hands- state says what is 'best' for them)
- Focus on why they did the offence in the first place
- Unlike due process, which encourages the offender to go to trial and evoke their rights, victim non-punitive model encourages the offender to accept responsibility
- Key aspect: offender needs to accept responsibility for this model to work (i.e. before circles, programming w/ victim can begin)
- System works best when it is voluntary (by victim and offender)

<u>Punative Model</u>	<u>Non- Punative Model</u>
-	-
-	-
-	-
-	-
-	-
-	-
-	-
-	-
-	-
-	-
-	-
-	-
-	-
-	-
-	-
-	-
-	-
-	-

Lecture Two: The Police

The Charter of Rights and Freedoms (that apply throughout police investigation)

a) Section 8- Search and Seizure

- Protections from search and seizures that are deemed 'unreasonable' (but what should be considered unreasonable?)- vague language/poorly defined right requires courts to decide on how the right should be interpreted- what was the intention of this right and how should it be applied?

This is what the court said...

i. Accused must have a reasonable expectation of privacy (the court is very protective of private property- the home)- different things have different expectations of privacy- the persons connection to that thing sets the expectation of privacy)

ii. Warrantless searches are presumed to be unreasonable- violates sec. 8- this presumption, however, can be rebutted by the crown (not all warrantless searches are certain to be deemed unreasonable)- crown must prove search complies w/ Charter (responsible to rebut presumption on a balance of probabilities)- must show...

- Search authorized by law- statutory or common law (jurisprudence) authorization- ex: warrantless searches include breathalyzer for drunk drivers
- Law is reasonable
- Search/ seizure carried out in a responsible manner

* All 3 must be shown by the crown to deem a warrantless search reasonable

b) Section 9- Arbitrary Arrest/Detention (right not to be arbitrarily detained or imprisoned)

- Arbitrary detention not defined in legislation- therefore, what is it?

- Question for the court: what should be considered reasonable grounds for arrest?

- SCC Storrey (1990) decision defines reasonable and probable grounds needed to arrest

- Courts answer: police need a subjective element (why they thought they had RPG to arrest at the time) as well as an objective component (would a reasonable person in the position of the officer also come to this conclusion?)

- Impact: the court deciding the definition creates the 'power of detention'- prior to s. 2 of the Charter, you were either 'arrested' or 'not arrested' now you can be 'detained'- this Charter right actually gives a police officer more power

- In order to find arbitrary detention: 2 things need to be found...

i. person was/is detained

ii. that its arbitrary (SCC defines this)

- Psychological detention: basically- when someone is too scarred to walk away (ex: cops circling in on someone)

- Court creates a framework for to determine whether someone is under psychological detention:

- firstly, the court looks at what a reasonable person would have perceived in that situation: were the police giving them the 'impression' that they didn't have the option to 'walk away' (ex: were the police singling them out?)

- secondly, look at police conduct, behaviour, how the interaction took place

- thirdly, look at characteristics of the individual detained (ex: age, gender, mental capacity/state)

c) Section 10- Rights upon arrest or detention:

- before the Charter, you were either arrested- or not arrested (no inbetween step)
- after '82, you can be detained (without being under arrest) under a reasonable suspicion (for example it would be reasonable to be detained for police investigation if you matched the description of a suspected robber)
- Due process=crime control: officers now have the ability to detain someone under reasonable suspicion that the individual was involved in a criminal offence (detention is a huge police power)

10(a): to be informed properly of the reasons therefore

- 2 principles that underly this duty
 - i. a person is not obligated to submit to arrest if they don't know the reason for it
 - ii. a person's right to counsel can only be used in a meaningful way if they know the reason for their arrest or detention
- Question for the courts: how much do they have to tell you?

10(b): to retain and instruct counsel w/ out delay and to be informed of that right

- How can this be done properly w/ out knowing reasons for arrest?
- 3 obligations imposed by 10(b) on a police officer
 - i. informational duty: inform detainee of their right to obtain and instruct counsel w/out delay
 - ii. implementational duty: provide that person a reasonable opportunity to consult (ex: provide phone and number of lawyer)
 - iii. holding off requirement: refrain from attempting to solicit evidence until that person has counsel present

- Section 10(a) and 10(b) are important specific duties of a police officer once they detain or arrest an individual

Section 24(2)- Exclusion of Evidence (from a breach of your Charter rights)

The Charter Application Process

- Charter applications: legal rights intended to create obstacles in the justice system; and check/balance of the due process system
- Example: defendant brings about an application because of a police misconduct- police entered defendant's home and seized evidence w/out a warrant
- To bring about a successful Charter application, you need to...
 - i. prove they violated your rights- if you can do that, next you...
 - ii. seek a remedy (reason the Charter has 'teeth' is the enforcement mechanism- ex: disclosure of evidence)
- * Charter applications hold the police accountable if they are to violate your civil liberties- defendant can bring within that Charter application a remedy (judge excludes evidence)

Framework of exclusion of evidence- created through criminal trials

- Collins decision (amended in 1997)- the court created the framework of exclusion of evidence
- Grant decision (2009)- the court should consider 3 factors to determine whether or not evidence should be disclosed...

- evaluate the seriousness of the breach of Charter rights caused by state conduct
 - impact of Charter protected interest of the accused
 - look at society's interests in deciding this case on its actual merits- whether the truth seeking function of the CJ process would be better served by the admission or exclusion of evidence (Judge asks themselves, "Would the admission of evidence bring the criminal justice system into disrepute?" - if "Yes", disclude evidence- if "No", include evidence)
- * Its a balancing act between the 3- one is not more important than the other

- Prior to '82, police enjoyed crime control- they had many investigative techniques at their disposal- many of these were lost after w/ the introduction of the Charter- the Charter tried to level the playing feild, however, at the end of the day the police still obtained most of their investigative powers- infact, they were given more investigative powers- this is why due process= crime control

- Rights to counsel: Therens decsion (considered a major due process victory)
 - Defendant brings Charter application in trial to exclude breath sample as evidence- judge exludes defendants breath sample as evidence because police failed to inform defendant of right to counsel- crown appeals- SCC rejects crowns appeal
 - The Court said: all suspects are required to be informed of their right to counsel- "What meaning would sec. 10(b) have if police aren't held accountable?"- evidence must be excluded- however, the Therens decision is limited in application of how police work and how much protection it really adds (all police do now is systematically read you your rights)

Due Process Revolution and Retreat

a) Right to Counsel- Therens- Due Process Victory

i. R.I.D.E- Revolution Retreat

- SCC upholds use of RIDE checkpoint in Charter application brough about in trial
- SCC found that RIDE checkpoints violate 10(b) right (to retain and instruct counsel w/out delay)- however, they refer to sec. 1 as justification to uphold their decision (rights subjected to such reasonable limits)
- Upheld as a way to deter drunk drivers- which is in society's best interest
- Won the courts good press
- Emphasis on criminal sanction to deter drinking and driving

ii. Police Interrogation- Due Process Protections

- SCC defines the 'holding off component': Judge excludes Clarkson's murder confession as evidence because police didn't wait (hold off) for Clarkson to be in a sober state; to understand his right to council
- Mannian case also stood for 'holding off' until the suspect has been given a reasonable opportunity to instruct counsel
- * Even with rights to counsel- police have tactics to try and elicit info/confessions from the accused

iii. Legal Aid, Holding Off, Technical Issues

- Brydges case: what happens when you can't afford a lawyer?- is there free legal advice available to you?
- In Brydges case, the police withhold access to a lawyer until accused will give them a statement
- The court says: the right to counsel includes legal aid to those who can't afford a lawyer, as well as the ability to access it immediately (anything said w/out opportunity to speak to a lawyer can be disclosed)
- What does the state/police do in response to the court's ruling?: comply w/ court's decision; provinces set up hundreds of free legal services for accused individuals

iv. Quasi Absolute Exclusion

v. Retreat of 10(b)

b) Arrest and Detention- Crime Control Affirmed

Lecture 3: The Criminal Trial

- Plea of guilt: getting a P of G from the accused is the ultimate goal of the police/crown- its the fastest way to get the accused from factual guilt to legal guilt (Packer saw this)- Packer, however, failed to recognize that a P of G can be beneficial for all parties including the defense (judge, crown, defense)- all parties work together to get what they want
- In many cases, they would rather enter a plea bargain than go to trial- despite the checks/balances that we have in place- why is this?...
- Due process in the trial process: at the end of the day, these rights support the critic that due process=crime control- it happens in 2 ways:
 - 1st way: sec. 7+116 increases the efficiency of the system & legitimizes the P of G
 - 2nd way: erosion of rights as time passes- courts retreat
- Sec. 24(2) deals w/ exclusion of evidence- however, an unreasonably long process isn't considered evidence against you- therefore, your remedy lies sec. 24(1), which deals with procedural rights and inadequacies of the system to protect the accused- sec. 24(1) deals with the enforcement of guaranteed rights and freedoms
- O' Connor decision: defines what is required for a stay of proceedings
 - the trial judge says this remedy is available to the accused, but must be used appropriately- it is a power that can only be exercised in the clearest of cases- you have to show a clear violation of the person's rights

- Before the Charter, courts refused to use common law powers to combat delay- after '82, the courts use the Charter to fill the void of failed legislature attempts to define reasonable time- the courts struggle to this day to decide on the definition of reasonable amount of time and what factors should be considered

Section 11(b): Right to a trial within a reasonable time

a) Askov decision: first case trying to determine what a reasonable amount of time is + dealing w/ the sec. 24(1) remedy

i. Background

- 23 month delay from the time that the accused was committed to stand trial to the time that he actually gets to go to trial
- Judges use the Charter, after realizing the shortcomings of the court process/justice system and failing to convince the gov. that more judges need to be appointed, more courts need built, etc. - they use a 'stay of proceedings' to force the gov. to fix the problem
- trial decision goes to OCA and they reverse the stay of proceedings (use crime control model)- court says hes relying on the Charter to escape obvious guilt
- matter further appealed to the SCC who reverses the OCA decision- say the burden is completely on the crown- accused is innocent until proven guilty and therefore shouldn't be forced through a long process
- court says trial should occur within 6-8 months
- court says the delay wasn't caused by the crown or the court- the gov. is responsible

ii. Fallout

- government responds to Askov decision by using the media to go after/attack the court- it works (media convinces the public that courts are letting people off on technicalities)
- lower level courts bound to take SCC decision of 6-8 months (was only meant to be a rough guideline- not to be taken literally)
- in the months following the Askov decision, defense attorneys flooded the courts with 'stays of proceedings' (most jurisdictions were outside of the 6-8 month period)- a significant amount of cases are withdrawn by the crown or stayed by the court
- 5 months after Askov decision: Canadian government releases (bogus) stats showing that 30,000 cases were stayed by the court since Askov- the public is outraged that factually guilty people are getting off on a 'technicality'- 11(b) right is given a bad rap- however, the gov. failed to mention in their report that some of those 30,000 stayed cases would have been stayed anyways- the gov. inflated the number to make it look worse and trigger a public response from groups like MADD- in reality only about 10% of the 30,000 cases that were stayed was a result of the crown or judge deciding that there was too much of a delay
 - Ex of how the stats were misleading: when charged w/ impaired driving, youre charged w/ 2 separate offences, however, you can only be found guilty of one or the other offence- therefore, the court automatically 'stays proceedings' on the other impaired charge
- the lower courts strict application of 11(b) didn't serve that right well- there was lots of public anger and defense lawyers abused this due process right, which resulted in...

iii. After Askov

- Ontario gov. increases spending as a response (builds more courthouses, hires more judges and crowns, etc.)
- strangely during the Askov crisis, the prison pop. increases (the addition of a due process right should have protected more people from going to jail)- however, due process victories often result in a crime control response (increasing spending/efficiency)
- the retreat not only happens by way of gov. response, but also the court retreats from their Askov decision
- they didn't revisit their decision until the Morin case (which is the now the state of the law we know today)

b) Morin- Retreat

- in Morin, the court changes what they had set out earlier in the Askov decision and made it more difficult to obtain a 'stay of proceedings'- say that the 6-8 month period is not to be applied in a mechanical fashion (that its just a suggestion)- court says that a 13 month delay in this case isn't unreasonable because there is a social interest to not let facualy guilty people off on technicalities- the court will look to see if the behaviour/actions actions of the accused created a delay and whether or not the accused objected to the delay at an earlier point- the onus shifts to the accused to prove that their was a prejudice about them caused as a result of the delay
- Morin decision: there are 4 specific considerations that are made to determine whether or not delay is reasonable...

1. length of the delay

2. whether accused waived their 11(b) right

3. reasons for delay [5 specific areas to look at]

a. inherent time requirement (some delays are ineventable- nobodys fault)

b. actions of accused (has the accused caused delay- purposely?)

c. actions of the crown (has the crown casued delay- purposely?)

d. limits on institutional resources (we don't have unlimited judges, crowns, etc.)

e. any other reasons? ('basket clause')

4. what has the delay caused in prejudice to the accused

- Justice Lemaire desents from this decision: 'requiring the accused to prove prejudice is not what sec. 11(b) is supposed to be about- it is intended to protect the accused from systematic delays in the trial process'

- Morin case highlights that due process is fradgile

- Morin decsion proves that the SCC wasn't willing to go with due process over crime control because CC was well publicized and well regarded by the public

c) Godin & Lahlry- further due process revolution and start of retreat

- Godin: SCC decision that deals with the issue of prejudice

- SCC says that if delay is well enough outside the recognized time frame of the trial period, the accused shouldn't have the onus to prove that prejudice was caused (it should be granted automatically)

- SCC wanted to ensure that in times when delay is significant, the court focuses on analyzing the reasons for that delay

- SCC recognizes in this decision that over time peoples memory fades- witness that may benefit the accused case can forget/die

- the bottom line is that the accused doesn't always have to prove prejudice, it can be infered- however, in Lahlry the Ontario Superior Court further retreats from 11(b) rights

- Lahlry: the accused attempts to bring an application for a stay of proceedings under 24(1) and Justice Code retreats from the SCC decisions in Askov, Morin, and Godin- this is what he does...
 - expands the neutral intake period (more time is considered neutral)
 - questions the applicability of Morin guidelines- not all cases are that simple
 - converts some institutional delays into inherent time requirements
 - case makes it harder for courts to recognize inferred prejudice that the court seeks out in Godin
 - * the 6-8 month period only applies to those short, efficient, high volume summary trials for basic issues

Section 7: Right to Disclosure (life, liberty, security)

- Right to disclosure facilitated plea bargaining by forcing the crown to assemble their case and it put the defense in a position where they can make a deal if the evidence against their client is overwhelming
- Without plea bargaining, too many cases would go to trial- right to disclosure keeps the conveyor belt running smoothly (another due process=crime control)
- 'No deal Peel': Peel region in GTA not willing to offer plea bargains- placed more people on the conveyor belt which slows down the system and wastes resources- very ineffective

a) Pre- Stinchcombe

- Under the Canadian Bill of Rights (pre-Charter), disclosure not required- issue of disclosure brought to light in the wrongful conviction of Donald Marshal (lack of disclosure by crown to defense of relevant evidence that would have served in the interest of Marshal)
- For legitimacy sake, the government didn't legislate any laws on disclosure and left it up to the court to decide in the Stinchcombe decision

b) Stinchcombe

- the witness offered the police evidence against the accused (through a statement), but wasn't willing to speak to Stinchcombe's defense- the defense asked police for the tapes of the witness statement, in order to prepare a defense against what they had to say about their client- the crown refused to give up the tapes- the defense made an application to the trial judge for disclosure- the trial judge denied request- Alberta Court of Appeal denied the request w/out offering a reason for their decision- the SCC stepped in to defend Stinchcombe- the SCC used this case to announce as a general principle that the crown is required to disclose all relevant, non-privileged information in their possession at an early stage to the defense council- the SCC took the sec. 7 right and found that it also includes the right to have the knowledge of the evidence that will be presented against you at trial- court acknowledged that the wrongful conviction of Donald Marshal was a justification for the right to disclosure (aka the right to make full answer in defense)- it enforced the idea that the crown is to be impartial- full and early disclosure will foster resolution of many charges w/out having to go to trial and it will increase the amount of plea bargains that are made

*refer to notes for exceptions

c) After Stinchcomb

- the crown is now required to hand over all relevant information- the crown and police changed the way they operate to comply with Stinchcombe decision (huge administrative changes)- police increase their paperwork and expenditures
- these administrative responses are largely designed to increase and legitimize the use of plea bargains as a tool in our justice system- before the Charter, plea bargaining was seen as 'taboo' ('a dirty little secret') and had no place in the CJS- this attitude reflects Packer's belief that w/out a trial, the accused can't be treated fairly- that belief disappeared from our justice system by '89 and plea bargains became recognized and regulated
- after Stinchcombe, police enhanced the quality of the police investigation- made police better- this means the case gets stronger against the accused and increased the likelihood that they would plead guilty
- they said the 'No deal Peel' model didn't work- its better/more efficient to do a quick screening and get the weaker cases to enter into a plea bargain
- after Stinchcombe, unfortunately most defense lawyers don't take advantage of the right to full disclosure- the Martin Task Force rejected calls to make disclosure automatic
- accused person encouraged to enter plea bargains via better deals (dropping charges, reduced sentencing)- judges encouraged to go along with the practice of plea bargaining- when plea bargains are made, there are 2 different approaches to dealing with sentencing
 - the 1st way is the crown and defense agree on charges but not a sentence and so the judge makes the determination at a sentencing hearing based on aggravating/mitigating factors
 - the 2nd way is a joint submission: crown and defense present a joint submission and the judge is expected to accept it, unless doing so would place the system into disrepute
- judges are encouraged to facilitate plea bargaining at pre-trial conference (off record)- judge might offer the defense a lighter sentence than what the crown wants- defense must consult w/ client
- plea bargaining no longer a 'dirty little secret'- legitimized on the basis that it would spare victims the burden of testifying- also benefits the accused by reducing their charges and possible criminal sanction (can leave victims with a 'sour taste')- many victims groups against plea bargaining (refer to new punitive model)
- the Martin Task Force acknowledges urges that victims be consulted- however victim doesn't get to make the final call (aka they have no veto power)- the mere fact that they're the victim doesn't give them any insight to how the system should operate- victims rights being used to support crime control approach without empowering the victim- facilitation of plea bargains to say you're sparing the victim- in reality, you're not allowing the victim to participate and creating a more efficient crime control model

Third-Party and the Criminal Trial

- 3rd parties are actors outside of the accused, defense council, crown and judge
- victims fought their way into the criminal trial process by claiming a violation of their Charter rights
- there are a number of cases that have recognized the standing of victims and other 3rd parties and have challenged the idea that it is simply the state vs. the accused
- in most cases the focus is on minimizing the revictimization from the criminal trial process
- in cases where victims rights are recognized, they must be balanced against the rights of the accused to a fair trial
- victims and others not guaranteed rights to appeal in most serious of cases

- Examples of 3rd party entry to the criminal trial process via Charter
 1. Media: the first party to gain entry into the criminal trial process outside of normal actor/players- battle of the medias freedom of expression vs. the privacy interests of the victim- case called Dagenais v. CBC- outlined the balance of the accused rights to freedom of expression (courts encouraged to try to balance everyones rights)
 - Dagenais v. CBC: 4 Catholic priests charged with molesting school kids- CBC produces mini series exposing sexual scandals- scheduled to be broadcasted before the trial- defense asks it not to be shown- judge instead instructs jury to not watch it- day before airing defense applies for an injunction to prevent CBC from broadcasting until all 4 trials are complete- injunction is granted and the COA upholds the injunction but only for Ont. and Quebec- OAC said it was a matter that involved the crown and the defense and that a right to a fair trial overruled freedom of expression- CBC appeals to SCC and they decide that a publication ban is in violation of freedom of expression under 2(b)- SCC says in overruling the OCA that the trial judge retains discretion to determine whether or not a ban would be in violation of freedom of expression
 2. Families of victims granted the right to decide whether or not the footage of their daughters being raped and killed should be shown in court- they decided against having it played in open court (because it would then be made available to the public)- trial judge accepted the healthy inclusion of victims rights
 - 3rd party entries into the process was intended to lessen tensions by balancing rights- however by this very nature, it creates an adversarial conflict- media stresses in the Bernardo trial the importance of freedom of expression- judge takes a pragmatic approach and allows for only the audio to be released

Presumption of Innocence

- in crime control, presumption of innocence happens when police put person on the conveyor belt or not
 - in due process, presumption of innocence occurs at the time of the trial (from the judge and jury)
 - presumption of innocence demands proof beyond a reasonable doubt
 - principle of POI is the golden thread that runs through the CJS- the system would collapse without it
 - in reality, people often assume guilt upon arrest (and youre guilty until you prove your innocence)
- Oakes case: the first case that the SCC deals w/ after the Charter dealing with the presumption of innocence- a landmark case for the due process model- reflects the belief that individuals are decent, law abiding citizens until proven otherwise
 - prior to Oakes decision, you could be charged with possession for the purpose of trafficking (no matter how small of an amount)- you had to prove you werent trafficking