

Laws 3306B Course Notes

Lecture 1 - January 18: Models of the Criminal Process

Chapter 1 – 11 to 50

Crime Control process – assumes that criminal law can control crime;

The Criminal Process

- **activities** and **actors** which respond to crime
 - o actors: the crowd, lawyers, judge, criminal/ accused, victim/ complainant, parole officers, probation etc
- Inverted triangle: unreported crime as top of triangle; followed by crime that does not make it to court; then a large portion of criminal acts that are resolved through plea bargaining; not many cases make it to trial (tip of the triangle).
- Normal triangle represents spending in the criminal process: bottom of triangle is money spent on policing –the majority; next is money spent on corrections; next is money spent on the trial/process like crown and legal aid nothing compared to money spent on policing and corrections)

Executive Summary – latest study on money spent

- in 2011 and 2012 2.3 Billion dollars spent on criminal justice (only 3% of Canada's spending)

Models – issues

Not one concept will cover our system; there are many models that encompass; all models we will discuss apply to our system

- when a person is arrested by the police, that is **FACTUALLY GUILTY**
- the police need to have **reasonable and probable grounds** that they committed an offence in Canada
- Reasonable and probable grounds = more than **51%** probability to arrest someone
- **LEGAL GUILT** requires proof of guilt **beyond reasonable doubt** that crown has to prove

Packers Two Models

Most successful attempt at explaining the model in America

Crime-Control

Conveyor belt model; Factual Guilt at one end Legal Guilt at the other end

Factual Guilt < -----to-----> Legal Guilt as efficiently as possible

Focused on the accused

- represents a belief that the **legislature** is a validating authority, not the court
- the courts do not define any concepts, this model does not like **judicial activism**
- **sanction** is not seen as a negative thing; positive concept because it guarantees social order; ensures that **punishment** keeps societal order and **encourages prevention**
- employed to protect people, property and **social stability; promotes order in society** by looking for a guilty plea
- recognizes that resources are limited and so efficiency is crucial; only cases where **guilt is guaranteed** make it to conveyor belt and to court
- this is done by limiting the cases that go to trial (**plea bargaining**); crown is responsible for keeping efficiency, getting people to legal guilt as fast as possible and dropping the cases that don't require court
- Only limitation on police: they must use their powers to ensure evidence does not get tainted (ie torture)
- lawyers only come into play after the person has been found factually guilty

It is better to have someone that is guilty acquitted than to have someone that is innocent convicted

- misconduct by state officials is taken very seriously **NO ONE IS ABOVE THE LAW**; if so then **separate** place
- prosecutor given significant amount of discretion
- pre-trial seen as a tool of **coercion**; another way to have someone plead guilty as much as possible/ **deterrent**
- anything that obstructs the efficiency/ slow the system down is the **ENEMY** of this system

Due-Process

Obstacle course model; all the obstacles represent checks and balances; much more difficult to get through

Factual Guilt <----- obstacles/ checks and balances -----> Legal Guilt

Focused on the powers of the state and fairness

Checks and balances ensure there is fairness within the system

- skepticism about the usefulness of the criminal **sanction**
- **significant concern with the intrusiveness of the state in our lives and actions of the state that intrude on our liberties**
- supports **decriminalization**(ie of marijuana); reducing the work load of criminal process in Canada
- we should aim our limited resources at more **serious offences** and accusations
- resources used to respect the **right of individuals**
- less emphasis on **efficiency/ expedience**
- **SCC** is the validation authority; highest level and decide procedure conforms with standard of fairness

- focus on equality and **equal** treatment for minorities in procedures and sanctions
- protecting the rights of those who are most likely to come into contact with the justice system
- **resources of state against one accused person; imbalanced; unequal; this model tries to even this out by placing restrictions on the police, outlining what is allowed, respecting the rights of the individual, each obstacle is a check or balance against the state power**
- can say “the state relied on **misconduct** for evidence against me, that’s not fair I want the **evidence excluded**” and fill out an application **WITHIN THE TRIAL** this ensures protection for all, no separate action needed like other
- deter police officers from engaging in misconduct that leads to violation of civil liberties ie torture;
- the way in which evidence is gathered is analyzed and subject to be excluded from investigation
- presumption of innocence is paramount; liberal bail system
- trial with checks and balances more important than plea bargaining
- no focus on efficiency; instead focus on **decriminalization** to save **money**, and focus on most **serious offences**

1. Context

1980s – Charter increased judicial activism

1960s – States increased judicial activism; reads rights out to ppl when they’re arrested; congress ~~tried~~ to limit this

Packer’s Model Critics:

Fragile

due process – too many obstacles and takes too much time

A. Empirical irrelevance

- state actors within the system work together for an organizational goal
- it easier to plead guilty than to fight the charges with due process
- we become agents of crime control – plea guilty and get out or wait in custody for 3 mos

B. Due process = crime control?

- the formal law enacted by courts and parliament actually enable police and prosecutors to exercise broad discretionary powers; Allows police to act in a manner that is acceptable; due process victory says that the state violates the accused however; this creates a police power or specific limitations on what the police can do and what is acceptable
- just because there is a system of checks and balances, it gives officials a way to legitimize the punishments and feel less guilty
- our prison population continues to increase
- (due process is the dominant system in Canada)

- media covers “technicalities” like getting off scotch free due to rights violations, rather than headlining the fact that there is more protection

C. Limited liberal and adversarial vision

- Packer’s system is based off an adversarial system (crown defense and judge like we have here in Canada) as opposed to other formats

D. Victims?

- no consideration for victims in the models
- some people may want to remain outside of the justice system and deal with in their own way, this has not been given consideration
- our society is based on calculated risks, and rules change based on risks; there are disproportionate percentages of risks with different victims; people use these biased victimization surveys to serve their purposes, getting parliament to change rules and make demands
- victimization reports have changed our laws more than the charter has according to prof; it has a significant impact on procedure in Canada and should not be ignored

New Models

Try to fill in the gaps between significant models; Packers model covers a lot of ground and gives great understanding between the accused and the powers of the state

Focused on dealing with victim’s rights

1. Punitive Model

Rollercoaster model; there is the conveyor belt mixed in with the obstacle course

- Rights of the accused vs rights of victim
- Victims should report crime; unreported crime means the system is failing
- Less deference given to police and prosecutors ensures they have less power and increased scrutiny
- Wants police to act in accordance with their power

2. Non-punitive model (Restorative Justice)

Circular recycling model;

- prevent crime by being proactive
- if crime does occur, it looks to put accused and victim back into community in same shape they were in before
- lowering recidivism
- unreported crime may simply mean people have found other ways to deal with crime and their victim situation
- unreported crime is a failure of social policy
- example: Stockwell Day -- unreported crime means we need more jails (wtf)
- look at crime and study services to understand how people become victims/ decrease the rate of victimization by being proactive

- focused on reducing harm through the circle, which can be closed at any time and the person then sent through criminal justice system at any time
- offender needs to assume responsibility

Dominance of Crime-Control before *Charter*

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Lecture 2 - January 25: The Police & The Charter Application Process

Canadian Charter of Rights and Freedoms – Sections 7 to 24(2)

Chapter 2 – 51 to 87

Factual guilt --> reasonable and probable grounds to think an offence has been committed

Legal Guilt --> guilt beyond a reasonable doubt

The Charter of Rights and Freedoms

Warrantless searches are unreasonable after the charter, it's up to crown to prove it is reasonable.

Section 8 - search and seizure

- An accused person must demonstrate to the court a reasonable expectation of privacy in the place they were searched (home v car is different expectation of privacy);
- warrantless searches are presumed unreasonable; presumed to violate s 8
- this presumption can be rebutted by crown – crown can show the search was reasonable

Test: (1) search authorized by law, (2) law is reasonable, and (3) the search was carried out in a reasonable matter.

eg: officer authorized to give breathalyser if driver consents by saying they have been drinking – reasonable suspicion

Judges have okayed warrantless searches such as pat downs (common law), as well as under the drug act if person has drugs on them and is smoking weed or something

Section 9 - arbitrary arrest/ detention

CCC sets out when and how to arrest; but does not mention *detention* at all, leaves it up for the courts to define

Reasonable and probable grounds for arresting someone s 495 CCC Test set out in R v Storrey (1990) case:

- (1) What is in the officer's mind that makes them believe that person is committing a crime?
- (2) Would a reasonable person share that belief?

"detention"? – SCC created this term and concept; Grant case & Subaru case set out *detention*:

Detention can be mental or physical; psychological restraint when individual has a legal obligation to comply

Section 10(b) – right to counsel

Detention becomes arbitrary if the police do not have reasonable suspicion; they must disclose why they are detaining

Once you're under detention or arrest, 10(a) police have a **duty to notify you promptly** why you are being held

Upon police detention or arrest, 10(b) sets out three mandatory police obligations:

i. **informational duty**

The officer has to inform the person about the right to obtain legal counsel as well as phone call or whatever rights

ii. **implementation duty**

Must provide that person with an opportunity to seek the counsel (give them a phone and a number)

iii. **holding off requirement**

Must refrain/ cease questioning/ electing to obtain evidence from the person until they have consulted with their counsel, if they have elected to have legal counsel

Enforcement - Section 24(2) – exclusion of evidence

Sets out that if the police violate a person's rights, they have to face the consequences; 24(2) states that evidence that was **obtained illegally shall be excluded**.

Collins (1987) case define what exclusion of evidence 24(2) actually means; the court defined what happens when evidence gets excluded

Grant case test now used for 24(2). Three things to determine whether or not evidence should be excluded:

- i. What is the **seriousness** of the Charter infringing state conduct that led to the breach? The court considers the nature of the police infringement
- ii. The **impact** on the Charter protected interests of the accused person.
- iii. What **interest** does society have in the adjudication of the case on its merits? Would the truth better be served by the admission of the evidence or the exclusion of the evidence?

These three provisions must be shown to be balanced in order to meet the requirements to have evidence excluded

The Charter application process in Canada

Our system shifted from a crime control model to more of a due process model once the Charter was enacted, forcing the police to comply. First have to prove that the person's rights were violated; next define a remedy pursuant to 24(2);

1982 Due Process revolution and retreat

Prior to Charter, Canada used a crime control model. It was not only parliament that wanted to instill more checks and balances in the process, but also the SCC that tried to narrow down their earlier decisions and protections for the accused. At the end of the day, police were given even more power...

A. rights to counsel – Therens – Due Process Victory

Therens gets wasted and drives drunk, hits a tree. Police investigate and demand him to come to station and get breathe samples. Therens does not ask to speak to a lawyer, blows over .80. Therens went to trial and brought a Charter application saying he **failed to inform him of his 10(b) informational rights**. The judge threw out the breathe samples, the decision was appealed and the SCC made the same decision. Courts said he was required to be told about his rights to legal counsel, and it was decided that police failed the Grant test and the evidence was put under disrepute. Unless the court does not enforce the right, then police can get sloppy!

– RIDE – Revolution Retreat

this is actually a violation of 10(b) rights because you are being detained and questioned, police were not providing informational duty. HOWEVER courts decided it was **saved** and justified under **s.1**. Upheld the RIDE because it is a deterrent from drinking and driving, therefore a reasonable limit.

– Police interrogation – Due Process Protections

Clarkson case: was in such a state of inebriation that he couldn't understand the rights to counsel being recited; Courts decided that the accused must understand rights to counsel before being able to waive it.

Mannien case: the police have an obligation to **hold off** on the suspect if he is not in good state or whatever the case

– Legal Aid, Holding off, Technical Issues

People who can't afford a lawyer?

Brydges Case: a suspect in criminal offence asked detective for free legal advice, was provided a free lawyer; police comply because they want their interrogation to count, this is now expected.

– Quasi-Absolute Exclusionary Rule

Rights to counsel violations mean the case is thrown out; does not matter if the police 'tried their best'

– Retreat of 10(b) – the "iron" triangle

Unfortunately, SCC has limited the rights of an accused person during police interrogation; three cases precedents:

- i. **Oickle [2000] SCC** voluntariness of a statement; courts set out that a confession is not admissible if made under circumstances that cause a reasonable doubt to the voluntariness (choosing whether or not to forgo their right to silence).
- ii. **Singh [2007 SCC]** accused arrested for second degree murder, asserts his rights to silence 18 times and he never confessed to the shooting, he made a number of statements that aided the police, the statements were voluntary and they did not result from the police breaking down the accused's mind or whatever; the fact that he invoked his right to silence did not mean his statements cannot be used against him; the interrogation did not end just because he said he wasn't going to talk, it only permits him to sit there silently. But because he kept talking, the evidence was fair game
- iii. **Sinclair [2010 SCC]** in the US, can have lawyer present during interrogation, this is not the case in Canada. The right to counsel is limited to only that one phone call. No other obligation to give rights to counsel more than once only if jeopardy changes/ charges are upped. Dissent: right to counsel is now just one useless phone call, no longer has the teeth it once had.

B. Arrest and Detention – Crime control has actually been Affirmed by the courts:

– Investigative Stops

SCC justified spot checks for impaired driving for the good of the community;

Ladouceur [SCC?] dissent was concerned because when you give officers power to make these stops, you are letting them make those decisions on a whim and without good reason; officer on the road has the right to stop ANYONE on the road AT ANY TIME. This is a power ripe for misuse by the police > “this person looks suspicious, let's stop them and say it's because of the HTA highway traffic provincial act” (racism)

Simpson Case [OCA] police saw driver leaving known crack house; pulled them over to investigate the hunch, court said this was abuse of the HTA powers; leaving a known crack house was considered to be not a reasonable cause for suspicion. The Charter didn't really affect police powers to arrest

– Bail and PTC (Pretrial custody)

After arrest, police retained the power to decide whether or not a person should be released from the station.

Morales case [SCC] SCC upheld preventative detention on the basis that the bail system does not function properly when ppl commit crime while on release. The accused can remain in custody to prevent flight and to prevent future crime.

11(e) no one can be denied bail – this is entrenched in the Charter, however the courts have really moved away from this, as people can be held if they are flight risk or can injure someone

StCloud Case decision (?) 2:06:00

C. Search and Seizure – A smarter Crime Control

– Writs and response

After the Charter came out, police powers changed. Warrantless searches were considered unreasonable etc. In the past, writs of assistance gave officers ability to conduct evasive searches without judicial authorization.

Parliament amends the CCC giving the police authorization to get a search warrant from a justice of peace/ judge 24h a day at any time, the JJ can just fax the warrant to the officer, as long as they are meeting the reasonable grounds. This gives police more immediate powers. Although the writs of assistance were struck down, they were replaced with this common law “telewarrant”.

– impaired cases and blood seizures

Judicial authorization (Parliament) allows an officer to apply for a warrant to get a person’s blood samples in people who are say unconscious and causing bodily harm etc – much more efficient for police

– **Warrantless** search and response

SCC quashed a number of warrantless search techniques such as wire taps, ‘homing beacons’ on cars etc. Parliament responded by amending the CCC, new legislation to increase the effectiveness of the state, police and crown. New legislation setting out ways to intercept phone calls etc.

Parliament has the foresight to say that any methods of searching that have not yet been conceived yet, this is covered under a “general warrant” you can ask a JJ for and explain the chosen investigation technique and if its okay.

The courts have been less open to invalidating/ quashing investigative techniques in recent history after the general warrant amendment to the SCC. It’s harder than ever to contest a warrant obtained by police now;

– **Warrant** search: Not so absolute exclusionary rule

Searches which have warrants, courts are less inclined to exclude real evidence from a search or a seizure. Hard to prove evidence obtained with a warrant should be excluded, especially with the use of a warrant. Even without a warrant now

– DNA

Borden case [SCC]: DNA sample taken without him knowing what it was for. SCC said that you can’t properly consent without full knowledge of what that consent will potentially mean

SCC responded this by creating a new provision in the CCC which says police no longer need to worry about taking body samples without consent, just need to get a warrant from a judge

DNA warrant legislation, court stressed that this leg is in keeping with law because officers need a warrant prior to taking samples still

Over time, victims’ rights have held weight on the amendments made to the CCC, decisions made by parliament and by court.

D. Feeny Case

SCC reversed a rule that police can enter a home to make an arrest. On Charter, you can't enter a person's home without warrant. In Feeny SCC case, police entered and seized a bloody tshirt, that evidence was excluded. there were no grounds to arrest the accused when the police entered his house

Parliament responded by allowing police to enter homes via tele warrant. You are now allowed to enter a victims home in exigent circumstances without a warrant

Due Process for Crime Control?

Critique of Packer's models:

Basically, in conclusion, prof believes that **Due process equals crime control**.

All of these decisions made above are met by parliament's subsequent decision to amend the rules and entrench these type of searches into the CCC anyways. This illusion of protection for an accused person, telling them not to worry because the police will need a warrant for that, but in real life **warrants are ridiculously easy now to obtain**. This is proof that supports how crime control is synonymous with due process now. **Police have more power** than they had before, and this power is much **more difficult to deal** with by way of Charter application.

February 1: The Criminal Trial

Review: Conveyor belt – crime control – factual guilt - reasonable and probable grounds for arrest – legal guilt- beyond reasonable doubt proven by crown – crown must prove mens reas and actus reas (act and mind).

Due process model – checks and balances for example charter rights of accused 8,9,10ab

Crime control misconduct is dealt with outside of court primarily. Evidence is found and everything is okay, not dealing with charter applications or anything else. Due process charter applications is within the court process; closely related to the model we have today. Charter application process -two steps the defence counsel have to prove in a charter application: (1) prove there has been a breach and (2) there is a remedy under 24(2)

Charter Application

irony: in Canadian justice system today, minimal judicial involvement; guilty plea was the most efficient way to go through the system; officials want an iron clad case that is guaranteed to plead guilty; Packer didn't take into account that defence attorneys may want a plea of guilty as well, they are working together with the crown and judges. In Canada, there may be good defence evidence but it's more efficient and just easier to plead guilty.

The due process revolution with all these procedural protections and rights being defined in the best interest of the accused: Further proof for the critique that DP = CC. (1) section 7 and 11b increases the efficiency of the system and legitimizes the plea of guilt; (2) this lecture

Chapter 3 – pgs 88 - 114

Procedural protection

- I. Section 11(b)
- II. Section 7 – Disclosure
- III. Section 24 (1)

11(b) - Right to a trial within a reasonable time

It does not define what 'reasonable time' means. Up to courts to define.

Courts look at the **Morin case [SCC 1992]** four factors to determine whether or not **delay in a trial** is reasonable:

1. Need to determine how long the delay is
2. whether or not the accused has waived any time under 11b or delay that has happened within the trial process
3. Look at the factors for the delay:
 - i. inherent time – recognising that some delays are inevitable, takes time to prepare a case and bail app
 - ii. actions of the accused – has the accused person caused the delay? Are they purposely delaying?
 - iii. actions of the crown – have the crown's actions caused the delay?
 - iv. institutional resources – there are limited courts, judges etc.
 - v. are there other reasons for the delay that have not been considered in the first four
4. prejudice to the accused –

24(2) deals with evidence, we are here looking at procedural protections which does not apply to evidence.

Judicial Remedy is found at 24(1) – wide open remedial clause that is available to the judge when dealing with procedural rights and making the trial fair and protecting the accused. Judge has a wide variety of remedies available under this s

Stay of proceedings by JJ– trial against the accused is halted; prosecution may not continue “the nuclear bomb of remedies because it stops the case”

“Hey judge I haven't had a trial in a reasonable amount of time, I'm looking for the trial and prosecution to halt/ stay in proceedings”

O'Conner Case [SCC 1995] famous stay in proceeding trial – defines what is required for stay in proceedings - Stay - this is an available remedy for jj under 24(1); this is a power that can be exercised in the “clearest of cases

Prior to Charter, courts didn't want to use their common law power to deal with issues such as delay; after the Charter, courts used it to fill in the void of what is a reasonable amount of delay time – parliament failed at setting a time limit prior to charter, courts struggled with this issue as well after Charter.

Askov Case [1990 SCC] – the first decision that dealt with defining reasonable time and the 24(1) remedy

- threatening business partner and arrested (factual guilt) Nov 1983
- released on bail after 6 months from being charged May 1984
- preliminary hearing Sept 84
- ~~Trial 1 nearest date set to Oct 1985~~ this trial does not happen
- Trial 2 nearest date set to Sept 1986, Askov's lawyer brought notice of application stating A's 11(b) rights violated
- 23 month delay between time committed to stand trial to the time that he actually gets to go to trial
 - o The Judge ordered a stay in proceedings under 24(1)
 - o The gov't knew there were struggles with resources and did nothing about it
- Judges in that region were struggling to get more courts and more judges, the gov't was not keeping up with the times
- rare cases where Judges lobbied the gov't for more money and more resources; no one listening
- Judges decided to use the Charter – we need to protect accused rights, if the gov't is not going to listen then we will utilize Charter to start staying proceedings
- OCA tried to reverse the stay saying that he was obviously guilty and using charter to get away from guilt
- SCC stepped in and reversed the OCA decision; anyone charged with a criminal offence is innocent until proven guilty and that burden is on the crown; it's only fair for the accused to restore their name and reputation at the earliest convenience; there should not be any agony in waiting for trial when innocent until proven guilty; he is not a guilty person looking for a loophole.
- It was found an unreasonable amount of time between his factual guilt and trial date.
- Courts concluded it was simply a lack of resources – its the gov't fault.

The courts decided to stand up for the accused rights now just as in therein case

6-8 months is the deadline for waiting for trial from the time you're charged/ after you're committed to stand trial or stay under 24(1) granted.

Today, the courts are so backlogged that the gov't is creating initiatives to open resources, the difference is the courts don't mind waiting

The Gov't in response to the Askov decision went hard on the courts using the media to their advantage:

- the gov't framed the courts as if they were creating an amnesty program for the accused, getting away on a technicality argument
- Lower courts literally apply the 6-8 month guideline model; after the decision every defence counsel was bringing a stay in proceedings, half a year later a significant amount of charges are stayed by the court
- **30,000!!!!** cases that have stayed or been withdrawn 5 months after Askov trial – framed in media to scare the general public; factually guilty people are no longer being found legally guilty
 - o This number was **inflated by the gov't** to prove a point. Got the response they wanted
- the 11b right was not being served well by lower courts following the 6-8 rule rigidly

After Askov:

[we equate DP with lower conviction rate because checks and balances are supposed to get in the way, not the case]

- gov't spending was increased and more resources
- the prison population decreased momentarily then rose higher than ever -more and more ppl guilty
- after many due process victories (search limitations, etc), there is a crime control response
 - decision in Askov provoked a CC response and actually results in a more efficient system; efficiency and money/ resources increases
 - the courts themselves also retreat: the courts retreat from their decision, SCC was not able to revisit Askov case until Morin case which is the state of things today

Morin Case [SCC] – Retreat?

appeal of a drunk driving case that was stayed because of a 13 month trial delay

SCC acknowledged that Morin case and getting off on technicality issue

the court essentially changes the factors that they first set out in Askov, they make it more difficult to obtain a stay in proceeding; they didn't overrule the 6-8 guideline, but stressed that it is not to be a rigid limitation period, but rather just a SUGGESTION; this exception is considered because they believe the 13 month delay is not unreasonable.

- Morin also focuses analysis on the accused's behaviour on the delay... we looked at the factors above.
- failure to object delay – no prejudice
- dissent – now you're requiring the accused to prove prejudice, this is not what 11b is for

RATIO: Accused attitude is subject to change according to judicial attitudes. Protections are subject to their beliefs; trials can become more conservative and limited in accused protections

SCC was not prepared to stay committed to DP when the media got involved

More 11b cases:

Godin [SCC 2009] deals with issue of prejudice

- SCC – if the delay is sooo long, you can start inferring that prejudice will be caused to the accused; this decision provides a way for the accused person to apply the prejudice to make it easier on them
- SCC states court needs to focus on reason for delay – ppl's memories get worse over time/ evidence not available to show innocence/ witnesses die etc – this can burden the accused
- prejudice can be inferred

Lahiry [OSC]

- further retreat from 11b rights
- increases the inherent time requirement and closes down the amount of delay that can be attributed to the institution
- Morin 6-8 time period apply to high volume summary trials only
- makes it harder to prove inherent prejudice from Godin

- DP revolution of 11b retreat, making it harder to show a trial is not taking place within a reasonable amount of time

7 - Right to Disclosure

Disclosure is evidence that needs to be provided from the crown to defence, in possession of the crown that is relevant to the proceedings where there is no issue with respect to confidentiality on behalf of another person; relevant evidence that is discovered throughout the case, no privilege through Stinchcombe, it must be disclosed

i. Pre Stinchcombe

If there is no plea bargain accepted, the person must proceed to trial

Plea bargaining saves resources

Disclosure facilitated plea bargaining; if the evidence is overwhelming, you can make a deal with your client; without disclosure this was risky; right to disclosure and plea bargaining keep the conveyor system operating smoothly; this DP decision actually made it more efficient to put the accused behind bars, so it was contributing to CC.

Canadian bill of rights – disclosure was not required; the issue of disclosure came to a head in Donald Marshall trial (aboriginal lecture); wrongfully convicted because of lack of disclosure from defence to crown

Parliament could have set out right to disclosure however, they didn't act so it was up to the courts once again to outline:

ii. Stinchcombe

Lawyer embezzling money; Stinchcombe secretary was confessing before going on trial, Stinchcombe lawyer wanted the tapes before going to court so they could prepare for the trial, trial judge denied the request for the disclosure; SCC used Stinchcombe as a way to announce the general principle that the crown was required to disclose all relevant required info at an early stage.

S7 right to life and liberty gave right to have knowledge of the evidence to be used against you at an early stage

Decision enforced and stressed that the crown is supposed to be impartial in the decision, and they are supposed to stress the TRUTH rather than withholding info to facilitate a W

Therefore disclosure of all relevant and non-privilege info was necessary

Court noted that disclosure increased the amount of plea bargaining

DP = CC was no secret, this was acknowledged by the SCC; "this due process victory may result in a more efficient CC model"

iii. After Stinchcombe

The secretary recordings could not be found, wanted to grant stay in proceedings, SCC said no (CC again); crown was required to hand over all relevant information; the assumption that without a trial

there would be no fairness for the accused, plea bargaining was then recognized and regulated; Charter made police better investigators; this meant the case got stronger against the accused person, increased likelihood that accused would plead guilty; wanted to screen trials early stages – this case is too weak, lets plea bargain instead (CC again!!!); saved hours of judicial resources but this tactic did not work (URGH)

accused encouraged to plea bargain in exchange for lesser sentences or whatever the crown wanted; judge might agree to lessen the sentence in exchange for plea bargaining; openly facilitated as a way to reduce victim testimonies

Third Party and Criminal Trial

Third party usage of the Charter in the trial, hes not talking about jury as a third party, what he means is the judge, defence counsel, and crown their use of the Charter to enter into the criminal trial

Once a third party entered into the trial, their rights were balanced against the rights of the accused?

Dejeuner case [SCC 1985]

Issue of media – freedom of expression vs. the privacy interests of the victim

- catholic kids getting raped, going to be documentary that could affect testimonies or whatever
- defence applied for injunction to delay the airing of the show until the trial was over; it was granted but limited to only Ontario and Montreal
- CBC appealed, the SCC held that the publication ban was violation of freedom of expression 2b
- right to a fair trial was paramount to any other claim; the SCC recognized that procedure failed to provide protection to the prodecure, however that it was better than nothing
- *held that up to trial judge to grant standing to 3rd party; jj has discretion to allow standing (person to make argument)/submission/ evidence and everything to determine whether or not the ban of publication can violate freedom of expression*

Rights of accused to fair trial is being balanced against [whatever other right in question, in this case:] right to freedom of expression

- intervener status granted to family members of accused; they didn't want open court and the public to see the rape happening; the trial judge allowed victims the ability to bring applications for their rights, but that it can never interfere with the trial, crown obligation and the overall investigation
- this case allowed this inherently adversarial process (pitting rights of one side against another within the case)
 - trial judge decided public can hear the rape tapes but not see them
 - “open justice is a concept that can be achieved without showing indignity suffered by the victim”
 - SCC rejected the appeal brought by family interveners, this case highlighted the tension of giving third parties a stake at trial

Presumption of Innocence

*the CC model relied on the presumption of guilt based on police and crown in identifying factually guilty persons based on **reasonable and probable grounds***

*DP relied on presumption of innocence based on the beliefs on judges and the defence counsel **beyond a reasonable doubt***

➤ **Oakes Test** is a landmark decision for the DP model:

Reflected the fact individuals are decent and law-abiding citizens until proven otherwise, and this status rests with them throughout the entirety of the process

Factually guilty does not mean guilty,

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a reverse onus provision was upheld by the SCC – this can violate the presumption of innocence.

Substantive Criminal Law – Charter and murder provisions

- Vinecourt decision -- DP victory that states you need a subjective mens reas (intent) to be convicted of first degree murder;
- Desousa – once you pass a threshold of fault, the seriousness of harm caused should determine societies response to it; eg manslaughter (not as serious as murder, sentence depends on harm caused) vs first degree murder

Regulatory & Corporate Crime

- Absolute (guilty regardless of intent) eg driving with suspended license in BC motor vehicle case – jail.
- Strict Liability (crown has to prove the act, can still prove there was no guilty mind- due diligence)
- criminal liability – mens rea and actus reas

BC Motor Vehicle Ref [SCC]

- using Charter to ensure that those who are blameworthy are the only ones getting convicted
- **absolute liability** offence to drive without licence – mandatory minimum punishment of **jail** regardless of mental intent or moral blameworthiness
 - **this was against s7 right to liberty if someone is going to jail even with due diligence**
- SCC struck down this offence as absolute liability; read into the offence that people can fulfill their due diligence to show they had done everything they could to drive with licence
- imported the standard of strict liability, courts found this can withstand Charter liability

February 8: Victimless Crimes?

Chapter 4 – pgs 115 – 150

What is a victimless crime?

- mutual consensual transaction
- critique in packer's theory: he wrote before feminism was a thing, didn't speak on feminism at all

Since packer, the concept of harm has been expanded; used to be limited to physical harm; now:

- risk of future violence
- psychological damage as a result of anxiety or fear
- anything contributing to unequal societal relations

This expansion of harm has implicated the role of the state in protecting people from harm. Canada has become much more receptive than the US for this reason

Shift more towards accused DP rights vs groups of victims and potential victims

Change in "political case"

Pluralistic politics of victim's rights – there are debates within the groups of people who are lobbying for the same thing; example: 2 different opinions about assisted suicide coming from the same group of people

Prostitution

Packer criticized prostitution laws saying the state was trying to deal with morality by dictating what is right and not

DP prior to Charter

Hutt case [1978] – jj held that only pressing and persistent actions on behalf of the sex trade worker created a nuisance; ruled she was not a nuisance; DP actually helped decrease the use of the sanction

Changes post-Charter

i. CC affirmed through new legislation

3 offences codified into the CCC:

1. communication for the purposes of engaging in prostitution
2. keep a common bawdy house
3. live off avails of prostitution

ii. changes to law instead of social policy

Codified due to the CC perspective – our streets are being overrun, we need to take our society back!

criticisms: very punitive, burdened those who were most vulnerable (the sex trade worker the most disadvantaged) and the sanction fell on them; based on the criminalization of politics; ignores the root of the cause of prostitution; promotes the cycle of violence

Feminist groups opposed this law, wanted to deal with the root of the cause of prostitution

Effects: increased CC activities such as arrests and prosecution; increase in court resources being used; CC being used to justify the legislation

SCC 1991 – entrapment

SCC opposed prostitution laws in order to help with the nuisance concerns

Random virtue testing – arresting in Vanier because of location

iii. Bedford

I KEPT FALLING ASLEEP DURING THIS PART! CLEARLY I ALREADY KNOW THEN?? I MEAN JEEEEEEZ WHO AT THIS STAGE DOESN'T KNOW EVERY SINGLE LITTLE FUCKING THING ABOUT THE BEDFORD CASE?!?!?!?

Looking at the state imposed trauma being caused as a result of locking ppl up; violation of s7 rights overturning protection using the risk of harm caused by the criminal sanction

Drugs

Marijuana example

Mandatory minimums were not helping because it was doing nothing but keeping young people in jail, holding them back and ruining their lives

Gambling

Gambling has become much more liberalized because the government makes money off it; using criminal sanctions to ensure they are the only ones (monopolizing) controlling that money

It may not always be a consensual transaction for addicts – they need certain protections put into place

Abortion

Criminal sanctions on abortions made abortions expensive and dangerous; Packer was for total decriminalization

Morgentaler Case [SCC]

- SCC used DP to restrict the sanction
- expansion of harm used by courts to put people away

Assisted Suicide

Shouldn't matter whether or not you are disabled, doesn't affect that persons choice to die LOL

Criminal sanction based on that allowing people to kill themselves will mean everyone will want to do it

Carter vs Attorney general of Canada

- ALS, sought exemption to kill herself literally
- 241 violated her charter rights
 - o court struck down to make suicide constitutional
 - o court found 241 unjustifiable infringed s7 and not saved under s1
- these examples are used to show that assisted suicide can be a thing without rampant misuse

241 will likely be unconstitutional in a few months

Hate Propaganda

hate: 318 and 319

- only if there is very specific proof and the willful hate is done deliberately
- Freedom of expression is the main component of this issue

Keegstra [1990 SCC]

- SCC upheld the CCC provision of hate under freedom of expression
- willfully spreading hate against Jews (you know this case)
- argued that using CC to prevent further risk of harm was justifiable

Earnest Zundel [SCC]

- POS that was spreading propaganda that the holocaust was fake!
- sent to jail for 15 mos; this was new
- abuse during the trial process by Zundel's prosecutor to the victim testimonies
- provision in the CCC was struck down – leg that says spreading false news
 - o court held that even lies that cause pain are protected under freedom of expression

the gains in keegstra were countered by zundel where freedom was allowed rather than sanction

Pornography

Packer – obscenity laws there to prevent public nuisance, another way to enforce morals by using sanctions, it should not be up to the court to do this

- no evidence linking porn to harm
- victimization of porn women should instead be dealt with by addressing the root of the issue

THE CRIMINALIZATION OF POLITICS is looking at an issue and thinking it can be addressed with legislations and sanctions, when in fact really it is the root of the issue that needs examining. Thinks like better equality for women, more protections, more help to single mothers, increase funding for victims of sexual assault etc **

Butler Case [SCC]

- operated a video store, Packer would have just put a sign on the door saying if you're offended then LEAVE
- trial judge acquitted Butler saying under Charter parliament can only outlaw violent or incriminating sexual behaviour that limits human rights
 - o Charter would only allow for sanctions in the name of rights for the victim
 - o **corrupting morals 163 of CCC is a focus on what is obscene, Butler sets out what is considered obscene**

3 categories of porn

1. explicit sex with violence or threats of violence
2. explicit sex without violence but subjects participant to treatment that is degrading or dehumanizing
3. explicit sex without violence that is not degrading

Aftermath: parliament enacted legislation and imposed sanctions on child porn; not dealing with the root problem again

the defence of the sanction in the victim's rights and the focus on equal protection of the criminal law came dangerously close to replicating the assumption that criminal law controls crime (CC model) and prevents criminal behaviour from taking place

MIDTERM

40 percent

2 sections

essay question [20 marks]

4 short answer questions section [20 marks]

SKIP SPACES

February 29: Women

Chapter 5 – pgs 151 - 190

Lecture Five: Women

1. Introduction

Feminist played an important role; there was a need for the law to respond to sexual/domestic violence

1970s – Focus on raising awareness, education and reducing harm through crisis shelters and counseling/proactive methods to deal with sexual and domestic violence

1980s (after charter) more emphasis on achieving legal reforms making it easier to report and prosecute offences against women in sexual and domestic context

Feminist groups want legislative reform.

Criminalization of politics – the reforms made were done through the use of criminal law rather than looking at social and economic reform because those cost more money

- government seems to be reforming laws for the good of the people, but in reality it is because the change will be more cost effective
- dealing with societal issues through criminal law
- Cases that pitted DP rights of accused vs equality and security of the victim & what certain feminist groups want

2. Female Criminality: Due Process?

a. Battered Women and Self-Defence

1970s - Applied packer's DP to women and called for crimes against women such as vagrancy, prostitution etc to be decriminalized but this did not happen

- New argument > argued past victimization such as battered women's syndrome this is due process
- This led to more DP=CC because BWS was being used as a way to get women to plead guilty and plea bargain
- BWS – influential and controversial

i. Walker's Cycle of Violence and Learned Helplessness

Explains why women stay in abusive relationships; women stay because the psychological pathology of learned helplessness: don't touch the thing after it gives you shock, even when the shock mechanism is removed still won't touch

- Woman believes she has no way out and believes getting help is useless, she feels trapped
- Victims withdraw from case or may be reluctant
 1. **tension building stage** where women often attempt to placate the partners growing anger, trying not to trigger the violence
 2. **acute and unpredictable battering** and lack of control – unprovoked
 3. **kindness** and loving behaviour from the male
- this aims to explain why women remain in abusive relationships

ii. Self-Defence Provisions: Then and Now

iii. Lavallee

Lavallee Case - in abusive relationship and shot her husband as he walked away following an argument when he threatened her life; defence claimed she was terrorized during relationship

Court of appeal – doctor who testified on behalf of case should not have been admissible; BWS should not serve as a defence to shooting husband in back

SCC – no feminist group interveners, SCC restored the acquittal and held that the doc was admissible to help understand Lavallee's abuse

Two different aspects to look at for this case: defence under section 34

- 34(1) – self-defence against unprovoked assault
- **34(2)** – used in Lavallee case – ppl who are unlawfully assaulted and causes death or bodily harm are **JUSTIFIED**
 - (a) Was it a reasonable apprehension of death or bodily harm? (this part requires objectivity/ reasonable man)
 - (b) person believes they cannot otherwise preserve themselves from death or bodily harm (requires objectivity in whether or not they are preserving themselves from death through actions taken)

The wording of the self-defence provisions limited the application on people who have never been assaulted before;

SCC – did not condone use of violence to fight violence, however they said the expert testimony was relevant because it would assist with the analysis of 34(2)a/b. This allows insight and understanding into her thought process and this evaluation is necessary for a reasonable person to be put into the shoes of an abused person, better understand the person subjected to dom violence behaviour, and better evaluate 32(4)b. It helps the jury look objectively but in victim POV

SCC- decision did not recognize an “abuse excuse”

Ratio – the accused state of mind is important in understanding the victim POV

3. Wife (Spousal) Assault: Crime Control or Victims Rights?

This is a DP victory, court recognized victims behaviour

BWS became more of a mitigating factor on sentencing; 98 cases of battered women killing husband, only 3 applied to BWS and resulted in acquittals

Guilty pleas – to mitigate the punitive aspect of punishment to reduce sentence;

Victimization surveys

there's an assumption that a greater efficiency in prosecuting reported crimes, the more likely we can control crime (CC)

Victimization surveys – provoke legislation response from government;

- they reveal that, often **unreported crime** was a huge portion of the crime going on; people just don't report crime
- high unreported crime was the reason to reform the justice system – seen as a bad thing, conservative govt relied on victimization surveys as a reason to justify building more prisons, even though violent crimes are going down (“but there is unreported crime!!”)
- VS enforced zero tolerance and more arrests with the aim of reducing crime to zero – this is not possible and just leads to many reforms

Domestic Abuse Reforms

1 in 10 people in relationships are abused – magic number that causes changes to the justice system

Parliament discussed that violence against women should be prosecuted even without the victim's consent, even though the mandatory prosecution in the face of the victim not wanting to participate; and even though it has no effect on the victim's pain and suffering or on rehabilitation of the abuser

- this led to **amendments** in the criminal code **s. 495** arrest powers of a police officers – police can make arrests even if they did not witness the assault; only require reasonable and probable grounds
- CC mandatory arrests level of success was measured by the **amount of arrests**, and if it was increasing

Canada is a risk society that operates on calculated risks/ facts and figures rather than trying to control the risks

“The assault victim is marginalized by the initiatives taken in their name” – when the victim does not want to participate, they don't care = victims' rights v crime control

4. Sex Assault Law Reforms: Victims Rights

3 classifications of offences changed from rape to sexual assault; reclassification of offences led to less punitive summary offences

before the reform of sexual assault laws, rape was penetration

after the reform, the intentional application of force without consent that is objectively sexual in nature

5. Due Process v. Victims Rights – The New Political Cases

- a. Seaboyer – “Rape Shield”
- b. Daviault – “Intoxication defence”
- c. O’Connor – “3rd Party Records”
- d. Carosella

March 7: Young People

Chapter 6 – pgs 191-220

Lecture Six: Youth

Changes being made to try and avoid young people as victims
the attitudes of treating youth as offenders has changed – if they are not acting lawful then they are subjected to heavy reliance on sanctions

1. Sexual Abuse: Victims Rights and Crime Control

a. The Badgley Report (1984)

90% of those who reported unreported sexual abuse reported that it occurred when they were young; these victimization surveys call for a need to protect future victims, children and young people have rights and need protection as well

- Stressed the need for victim sanction criminal reporting. The media joined the call for this protection. the focus should have been on prevention, punishment and protection;
- shift from what does the victim want to what does the **community** want – politicians believed the community wanted the full protection of the law to prevent people from becoming victims

Badgley committee reported on the inadequacy in the criminal law to protect youth from criminal and sexual violence.

Badgley report recommendations to deal with victimization of youth:

- I. offences become gender neutral

- II. statutory rape be retained and expanded; they believed this dealt with teen pregnancy
- III. new offences created other than sexual assault that were more specific
- IV. reforms with respect to laws of evidence – eliminate traditional mistrust of testifying youth; youth are competent enough to testify
- V. wanted courts to be more inclined to have hearsay evidence when dealing with youth testimonies
- VI. names and identity protected from the media and not published

Impact of Charter: not a consideration back then

b. Legislative Response

In response to the B committee recommendation, the minister of justice focused on the report extensively = Bill C15, the law was in need of reform

[[[focus was on enacting crime control responses in dealing with victimization issues]]]

Bill C-15

- Changes made to statutory rape;
- easier for children to testify by abolishing the requirement of corroboration and abolishing requirement for complainant – abolishing the mentality that youth were not competent

Critiques:

- criminalization of politics, only focusing extensively on youth criminal abuse from perspective of crim law, not other root issues like poverty homelessness hunger etc
- “war against sexual and physical abuse of young persons” focus

c. Evidence Counter-Revolution

laws on evidence and how they pertain to youth

Judges are becoming activists in trying to prosecute these issues on evidence – SCC jurisprudence that changes hearsay evidence rules; there were a number of exceptions allowed:

(Hearsay evidence test: is the evidence NECESSARY and RELIABLE?)

Khan SCC case

- SCC facilitated prosecution of sexual assault against young person, court allowed a statement made to the mother to be used in court because it was necessary and reliable
- SCC found mother could come and testify about what the young person said regarding the abuse done to her child
- there should be a willingness to accept the testimony of young child, and trust them

- how are we protecting them when we are not accepting their testimonies?! SCC said its not right; in order to give them full benefit of law must give them full protection

LDO SCC Case

- upheld Bill C-15 that allowed video testimony as evidence – child making a video statement of what happened and application to play that video at trial – this is a form of hearsay evidence as the statement is recorded at the police station
- this is ok because it protects rights of the victim as well as due process; still allows cross examination

SCC upheld one way screens to be used during testimony to protect young people identity; rights of victim

d. Pre-charge Delay Counter-Revolution

LWK Case 1991 SCC

- delay in reporting led to a stay in proceedings
- complainant makes allegation that too much time has elapsed since allegations and trial judge granted stay in proceedings (much like 11b)
- SCC said NO young persons should not have a requirement to report before they are physiologically ready to; state imposed psychological stress is not what SCC wants
- this limitation period could also have been taken advantage by sexual abusers

e. Statutory Rape

Badgley committee recommended absolute liability offences for sex under 14, no defence. Believed act as deterrent

(Review: AL =AR only and guilty; SL= AR DD; CL = AR MR)

SCC found this unconstitutional; could lose liberty even if Due Diligence was taken

Legislative changes made through belief that criminal law can adequately deal with the victimization of young people>

Bill C-2

Protection of children proposed amendments to CCC; sexual exploitation, abuse, neglect, testimonial aids for victims

- I. expanded scope of existing crim offe
- II. narrowed avail of statutory offences
- III. increased the penalties available following conviction
- IV. voyeurism
- V. facilitate testimonies by young persons and accommodate needs of youth in justice proceedings

Mandatory min punishments to do with sexual touching and sexual interference under age of 18
“Voyeurism” offence created

Broaden child porn definition through SCC Sharp Case Decision – narrow defences available
Expand use of CCTV and technology

Bill C-13

Protecting Canadians from Online Crime

In response to girl bullied for nude photos and committed suicide

Conservatives created new classification of offences, more punitive punishments, changes made to issue of what type of mens rea required for cyber bullying

Conservatives using crim law to deal with issue, and using it to push their agenda, gain more private information for their extremely broad bill

2. The Young Offenders Act: Due Process and Crime Control

a. Juvenile Delinquents Act

The first legislation that dealt with youth; contained a section that said state should deal with youth like misguided children that need guidance *in loco parentis* – state acting in the place of a parent, state could intervene

- JDA best interest of child
- CC
- CC assembly line – like a criminal court without protections to accused youths
- the adversarial system we had in place back then was not acting in the best interest of youth
- led to development of Young Offenders Act

b. Development of YOA

introduced under banner of RIGHTS AND RESPONSIBILITIES

Promote reconciliation of offender and victim

fast transition from CC to DP

Due Process rights now extended to youth, examples:

- c. Due Process and the development of YOA led to
 - I. DP Rights to counsel
 - II. automatic exclusion of evidence in certain situations
 - III. s 11 of YOA – counsel must be publicly funded; youth could not afford lawyers; more defence lawyers more DP
 - *R v JJT* – concern about street smart 17 year olds; incriminating statements made by 17year old that were excluded because they did not conform with requirements of YOA
 - dissent thought this was the end of police being able to prosecuting youth, agreed with CC and media created the image of youth running around laughing at adults and getting away with murder

- this is NOT TRUE, the 17 year old was actually convicted

d. Was Due Process for Crime Control?

YES. 6 new prisons built!!!

There was an attraction to short jail sentences, though this would break youth out of criminality

Convictions increased under the YOA, it enabled CC!!

Public protection was used as a highway to send youth to adult court

At the end of the day, DP was for CC in this case

3. Alternatives

a. Risk and Information

Amendments in the YOA that allowed the release of information to the state so they could identify high risk youth

b. Crime Prevention

Amendment to address crime before it happens, targeting at risk groups with social funding

c. Family Conferences

The ability for the courts to get together and gather everyone involved (much like native sentencing circle) with relatives, school authorities, etc anyone involved with the young person

There were some alternatives to punitive justice but they were not used often

4. The Youth Criminal Justice Act

CANADA became the highest jailer of youth per capita!!!!!!!!!!!!!!!!!!!!!! Under the YOA. Parliament had to do something. Parliament enacts Bill C-4 that came into force 2003. Addressed weaknesses within the system

a. The need for new Youth Justice legislation

- i. Rate of incarceration and use of custody as a punishment overused
- ii. system lacked coherent youth justice policy or philosophy
- iii. courts overburdened with cases that could have been dealt with outside of court
- iv. sentencing resulted in disparity in regions within Canada which resulted in unfairness for youth
- v. YOA not concerned with integration back into community after release from incarceration
- vi. YOA did not make clear distinction between non-violent offences and offences
- vii. no recognition given to concerns and interests of the victims

Ways to improve youth crime, published by government with YCJA:

- "There are limitations on what can be solved through legislative change alone"
- "The new legislation should only be seen as one aspect of the government's much broader approach to youth crime and the reform of Canada's youth justice system"

Other non-legislative efforts to reduce youth crime, as listed by GOC:

- increased federal funding to provinces
- crime prevention
- innovative approaches
- research
- collab with other sectors such as education

So what exactly does the YCJA implement?

b. Preamble and Declaration of Principles

YOA had a lack of clarity which the YCJA addressed in the preamble and declaration of principles. Statements on **values** and aims of the YCJA, dealing with UNDERLYING CAUSES, that youth have rights and freedoms, ensure accountability through meaningful consequences, reduce overreliance on incarceration.

Declaration sets out **framework**: reintegrate and rehabilitate youth, understanding that youth have reduced maturity and that they must be held accountable; dealing with theft differently than aggravated assault, protect rights of victims, coming together as a community

this preamble shapes and forms the way the courts and system approach, interpret and apply the YCJA

c. Extra-judicial Sanctions

Boys and girls club, writing letter of apology, volunteering etc
This should be the go-to, starting point for first time offenders

d. Conferences

Authorizes and encourages conferences to assist decision makers in the youth justice system
People giving advice to police, judges and those making decisions under the Act

e. Pre-Trial Detention

Can't use pre-trial custody to hold someone as a substitute of dealing with other issues such as homelessness or mental health

f. Youth Sentences

YJCA just sanction to promote their rehabilitation

Sentencing principles:

- similar to what other youth are getting as sentences
- cannot be more than what adults are being sentenced
- proportionality between offence and sentence
- must be the least restrictive sanction available
- must be the option that is most likely to rehabilitate and reintegrate
- has to promote sense of responsibility and acknowledgement of harm done

STARTED FROM THE BOTTOM NOW WE HERE – move up the ladder accordingly from reprimand to jail, least severe to most restrictive (jail)

Special Rules s. 39

Custody =

- I. Violent offence
- II. failed to comply with custodial sentences, previously convicted and violated probation a number of times
- III. committed serious indictable offence and history that indicated pattern of offences
- IV. exceptional circumstances/ cases

if the youth does not qualify under these 4 headings, the judge CANNOT send the youth to jail.

YJCA is a great piece of legislation that is focused on the due process protections of young person, focuses on non-punitive aspects, part of a multifaceted approach that deals with youth crime, clear guidelines set out, clear guidelines, keeping them out of the system as much as possible. YESSSSSSSS

5. The Conservatives Respond

Changes made to YCJA heavily focused on punitive and CC aspect;

- Nunn Report 2006 – made 34 recommendations dealing with YJA
 - youth goes on crime spree and police chase where someone dies – why was this youth out even though he was committing serious crimes
- amended general principles – removed deterrence and read in deterrence AND denunciation which resulted in more sentencing and more punitive forms of punishment
- removed pretrial detention provision – youth can be kept in custody pretrial
- amended general principles – protection of the public is now a key goal of the Youth justice system
- added sentencing criteria – violent offence has been broadened which increases the potential use of incarceration
- amended to require crown to consider seeking adult sentences for those more serious crimes
- amendment to give discretion of judges to lift publication ban for violent offences

March 14: Minorities

Chapter 7 – pgs 221-249

1. Minorities and Due Process

the idea of DP would promote a sense of equality before the law, Packer hoped it would restrain the state on acts against minorities. The focus is it has gone from incidents to a systemic issue in terms of sanctions, victims.

Packer = DP should respond to rights of minority groups. However looking at cases, there has been no effect on overrepresentation.

“changes to the criminal law procedure will control crime” this is simply not true.

a. Investigative Stops in an abusive fashion against certain minority groups

Ericson Study – Police engaged in “constant proactive stops” as a not so subtle way to remind them the way things are, that they are a different class of persons, seemingly “out of order”, making sure nothing bad is going on. SYSTEMIC RACISM IS ALMOST BEING CONDONED.

- Police in Toronto stopping disproportionate amount of blacks because they associated them with drugs and violence

Proactive Police Stops – 43% blacks being stopped by police as compares to 25% white males and 19% Asian males

1990 Hufsky Decision SCC – authorized random stopping of vehicles, officer can stop you at random to check for license, registration and insurance, fitness of vehicle, sobriety

- does not have to be any suspicion, police have power to stop anyone
- random stopping designed to increase safety on the highway

Ladouceur case Review

Simpson decision – officer has no grounds to arrest other than a hunch based on the crack house, arbitrarily stops vehicle according to HTA and s.9 reasonable suspicion; NO NOT ALLOWED.

Mellenthin SCC Decision – court excluded drugs that were discovered when police used their powers to stop vehicles and questions not related to highway safety; using pretext of a stop to investigate criminal activity is NOT ALLOWED.

- Police cannot abuse these powers of detentions
- if they do, the correct recourse is to bring a charter application stating rights were infringed, bring action by enforcing rights against misbehaviour of state
 - o No evidence? You can sue police for blatant disregard for charter, however the damages are limited and its exponentially more expensive to file the suit to begin with

Complaints against Police

- another recourse is to file a complaint through the Ottawa police professional standard section
 - o impartiality becomes a concern because the board reviewing these complaints are connected to the police force

Drummond Case – man rights infringed and he was pulled over at gunpoint because a “witness” which they conveniently couldn’t locate claimed they saw him with a gun in his car

Bail s. 515 Judicial Interim Release

s. 515 (10) sets out justification for **detaining** someone

- a) Primary ground – **attendance** – person must show up
- b) secondary ground – **ensuring the safety of the public**, those who show pattern of disregard for law can be held in custody
- c) tertiary – other 4 factors that decide if the detention is **necessary in the administration of justice**

Reverse Onus s. 6

S. 6 allows the accused to show why they should be released from custody – **reverse onus**

Overrepresentation of minorities in custody can have to do with unemployment

supports CC = DP because people don’t even know the system is not working properly, its not a fair system and we don’t even realize

Pearson Case SCC – Reverse Onus s.6 provision and trafficking, where the court acknowledges the holding would affect “small fish” street level dealers; because they often have no employment, mental illness, no money or community support etc that the huge dealers like Pearson have

- this reverse onus may contribute to the overrepresentation of black males in pre-trial custody

Bail system in Canada is broken. Pre trial detention works on risk calculations, if a person is released and commits another crime, those who allowed his release are responsible

Many of those on bail are innocent and awaiting trial, and it's all because of the risk adverse society, and stats are showing there is an overrepresentation of minorities who are being denied bail

b. Jury Selection

Bradley Case – jury selection mechanism was challenged because there was not one black person available for selection in the jury; black people misrepresented on juries;

the BEST CASE that proves the critique that DP = CC:

The Parks Case SCC denied – the OCA decided it was essential for fairness for the accused to ask prospective jurors if their ability to decide a case fairly if that ability would be affected by race. **“Are you racist?” DP veneer of fairness** for black accused

- Parks is a black male convicted of manslaughter by white male
- coke deal gone wrong
- court took note of systemic discrimination within society and considered those victims of racial prejudice
- the accused might be a victim of racial discrimination
- the court of appeal concluded that inquiring about prejudice would eliminate prejudicial jurors

Case – Other judges didn't want to implement this because they felt racial discrimination is only a GTA issue?!?!?!?!?

belief that system is fair, doing everything to root out racism, however that DP victory is only applicable to the black cases, which is a very small percentage of cases that go to court, which is an even smaller percentage of all crime overall

2. Minorities and Crime Control

The victimization of minorities through crime was symbolized in individual cases which did 2 things: Inspired crime control measures for minority victims, and perpetuated DP rights of accused vs victims

a. Police Shootings

policy response to 10 deaths resulting from police shooting black males; all cases, officers were acquitted as a result of DP:

- police frequently refused to speak to investigators about what happened
- peremptorily challenged jury to keep away all blacks from being on jury

Lines 1993 SCC – the CROWN brought a charter application (!!!) stating the wording of the CCC deprives victims of their right to security of person, not justified under s. 1

Parliament responds – enacted s. 25(4) CCC protection of persons acting under authority.

- balance between a proportional response and the need for police to protect themselves from the public
- This new defence as it is written does not restrict deadly force to be used by police under the threat of death, bodily harm or even for future harm of others!

Deane Case – Shooting of a native protester by police officer, PO charged with manslaughter and only sentenced to conditional discharge. -__-

Sammy Yateem Case - Shot and killed on subway by police. Officer is charged with attempted murder; the first round of shots was likely justified under 25(4), however the second round where the PO shot Yateem's dead body allowed the jury to find him guilty of attempted murder

b. Latimer & Disabled Groups

Victimization surveys reveal that 67% of women with a disability had been assaulted as a child etc and the emphasis was on changing criminal law to fix this issue – classic example of criminalization of politics

Latimer Case – Father killed daughter with cerebral palsy; convicted of second degree murder; appealed decision saying it was a mercy killing

- the court of appeal was rejected because saying it was a mercy killing implied her life was of lesser value because she was disabled
- although he was charged with second degree murder (life imprisonment), jury recommended 1 year in prison which caused outrage
- CC mandatory minimum – crime control as demanded in reaction to this decision; he is locked away for life ☹️

Hate Crimes

Principles of sentencing are amended to make it a aggravating feature of sentencing if the offence is motivated by bias prejudice or hate based on race etc; HATE CRIMES = AGGRAVATING FEATURE (this goes without saying, parliament...) useless.

Rather than increasing funding for education or anything to lessen the discrimination that may occur, they read in this useless provision.

c. War Crimes laws failed to punish any war criminals

s. 11g of charter allows the prosecution of war criminals;

3. Alternatives

a. Crime Prevention

- i. much more expensive than reactive policies
- ii. eg carefully select and train officers, make sure ppl are educated to avoid stereotyping, early intervention in school and the community, increasing the resources in the community
- iii. Proactive.

b. Restorative Justice

- i. police complaints

these alternatives depend on willingness of the victim to participate; often results in the highest level of satisfaction, the victim controls the process rather than placing the concern of the community over the concern of the victim

March 21: Aboriginal People

Chapter 8 – pgs 250 - 277

Aboriginals

The system has failed aboriginal people. :(

Proactive approach needs to address the issues of the offender – sentencing circles and aboriginal corrective justice is something we can draw on to amend our own justice system, to ensure fairness for all.

DP and Aboriginal People

Many cases today are being resolved by plea bargaining, this is an issue that shows how little progress and issues being resolved. The SCC can make pro DP victories for the accused people, however looking at the prison population, we can see that overrepresentation is actually increasing. These DP victories are not really having an effect, the proof is in the prisons. DP is provoking and legitimizing crime control. All of these decisions coming from the SCC dealing with bias and overrepresentation that have a veneer of fairness and seeming as though they are good ideas, however they are really doing nothing. All it is doing is making the system seem fair, “Oh, if you’ve gone through the fair system and are now going to jail, well you certainly do deserve the punishment!” DP=CC

a. Donald Marshall Jr. (1970s)

one of the main components of the DP is to stop wrong convictions. After Marshall was acquitted from being wrongfully accused, it was determined that if everyone had done their job correctly and professionally, this would not have happened.

Crown withheld statements from the main witnesses; full disclosure of ALL evidence related to the charge (Marshall was referenced in this Stinchcombe disclosure precedent); without a competent lawyer, all DP safeguards will fail. Marshall's counsel did not work hard enough, they didn't even do the basic minimum; they did a bad job.

b. Jury Selection

In Canada there is a prohibition on discussing what happens in jury deliberation. Professional jury pickers allowed in USA; the jury was not impartial in the Marshall case:

- the white people on the Marshall jury used racist language; there was no evidence to prove the racist tone affected the verdict
- there is no evidence correlating jury selection and overrepresentation (small percentage parks holding applicable to, ppl could justify the system using the parks verdict but in reality those types of DP wins don't change impartiality)

Osbourne Case where 2 white men tried by all-white jury despite 30% of the city being native. 6 aboriginals had been challenged and removed from jury!!!

JJ Iacobucci native report – language issues, the natives testifying should have access to a translator; “dysfunctional relationship between native in the province and the justice system”; overrepresentation symptom of underrepresentation on jury

- how to get more natives on jury? >> his report

Kokopenasse SCC- the jury set up discriminates against aboriginals; natives are not being judged by their peers but by those who have a different culture

- SCC said that there is no right to a jury role of a particular composition or one that is representative to Canada because it would create insurmountable problems, it is impossible.
- Dissent – representative jury lays the foundation for fair trial, fundamental right for fair trial; should reflect Canada and background of accused person

c. Investigative Detention and Over-policing

Harper Case – said no when police asked him for identification, he was exercising his charter rights; PO grabbed him and shot him to death! The detention was inappropriate and violated s9 of Charter as held in Simpson (right to detention) case;

Strengthened DP: Anunga Rules (Australia model)

Canada looking to implement Australian system:

- aboriginals are allowed to have either a friend or counsel present during police interrogation
- accused must have clear and full understanding if they're waiving their right to counsel
 - onus on police to make sure aboriginals understand
- these came about through judges and jurisprudence; judged fund the playing field needed to be evened
- After these changes, NOTHING MUCH REALLY CHANGED AND THE ANUNGA RULES HAD NO EFFECT ON OVERREPRESENTATION!
 - DP veneer of fairness that does nothing but justify the sanctions given

Individual Abuse to Over-representation

THERE IS A THEME OF TRYING TO DEAL WITH ISSUES THROUGH CRIMINAL LAW RATHER THAN DEALING WITH THE UNDERLYING ISSUES >>>>>Exam

Unfortunately the govt has focused on crim justice initiatives rather than broader holistic reforms that would deal with the issue. ts cheaper to focus on crim justice reforms as opposed to more expensive forms of social and economic justice.

d. *Gladue*

718.2(e) is remedial in nature and directs sentencing judges to treat aboriginals separately and differently to reflect the needs of that specific aboriginal person

Two principles in *Gladue* decision that relate to 718.2(e):

- I. judge must consider the **unique background factors** that brought the native to court
- II. judge must consider **types of sentencing procedures and sanctions that will be appropriate** for the native

This should lead to less and less aboriginals in prison. Prof is so excited about this Gladue report!!

Aboriginals as victims or potential victim

Why are they victims of crime?

- aboriginal crime was used as a veiled way to express crime towards natives
- one that people still believe is that natives don't know how to govern themselves

2. CC and Aboriginal People

a. Helen Betty Osborne

- i. Aboriginal was abducted, attempted rape and murdered

- ii. 4 white males charged with murder, only 1 convicted of murder
- iii. failure of crime control

Number of social and economic issues that have led to the increased risk of violence and victimization of aboriginals in Canada.

b. Under-policing or under-serving

if the same level of policing natives have were in Ottawa, it would be a huge issue, why do they have lower standards

missing native women, dealing with these murdered women with crim law, govt not doing much, hopefully new govt will

3. Sentencing Circles

used in conjunction with sentencing principles and procedures, an aspect that can be used to influence the decision maker, much more relaxed and flexible than court, does not threaten our current system ; seen as a small addition to the actual punishment, a way to reintegrate into the community; creates an opportunity for increased participation for all; (right now, victims don't have much say in the process, they have a stake in the outcome); circle may not be appropriate for more serious cases like sexual assault, not in Ottawa because not enough resources, not going to replace crime control. 1.54.00

4. Aboriginal Justice

elders do not judge but work to understand rather than focus on guilt. respect and harmony

5. Challenges from DP and CC

March 28: Crime Victims

Chapter 9 – pgs 278 - 309

Crime Victims

Victimization Surveys reveal time and time again that there is a significant amount of unreported crime. Unreported crime can either be a bad thing that indicates the justice system needs reform. On the other hand, it can mean that people are satisfied by taking matters into their own hands and dealing with it outside of the justice system don't need radical reform every time a survey comes about

The victim is look at like a customer within the justice system, victims are the consumers and they must be satisfied, ad this legitimizes the crime control approach

1. Rise of Victims Rights

- a. Victimization Surveys

part of a crime prevention strategy, treating victims as consumers of criminal law, claims that back up numbers,

high unreported crime used to justify reform;

- b. Task Forces on Crime Victims

restitution order – order the offender to pay back the damage

victims should be treated with respect and supplied with more info

- c. Victims Bill of Rights

- d. Canadian Victims Bill of Rights

2. Victims Rights in the Criminal Trial

- a. Focus on Punishment

- b. Victim Impact Statements

- c. Faint Hope

- d. Victim Fine Surcharge

- e. Restitution

3. Alternatives

April 4: Conclusions and Future Direction

Chapter 10 – pgs 310 - 320

Course Review and Exam Review/Preparation

- structures of the justice system
- packers theories and its critiques
- use of the victim, models that included the victim
- the criminal justice system – police powers and the charter, rights being shaped by jurisprudence
- trial process and how it changed, focus on fairness and no state misconduct
- victimless crimes
- women
- young people
- minorities
- aboriginals
- why we have the procedures we have
- the offender and the accused

laws are always changing every day, some changes are more important and felt through the system more than others

we will not recognize our system in the future, what does the future hold?

- alternative justice
- restorative justice is much more important than any other type of justice?

theories

the rapid rise of due process and victims rights

lots of case law where DP rights of accused were protected and well defined; charter benefited accused person, DP overtook Canadian justice system, but DP went through a retreat

the rise of victims rights was important and shaped our laws and procedures

criminalization of politics – crime control to deal with issue

victims rights should be explained by the punitive model, and this causes reversion to CC theory

the new political case; moving away from the accused v the state to the rights of the accused to the rights of the victim

themes

the defence of the criminal sanction has become a crime control assumption

- in order to drop crime, we have to change our system to a more crime control approach – we know this is not true

criminalization of politics

- born out of parliament's response to DP victories and DP rights, parliament responds by changing law in a way that still allows police to do their job, just much easier
- cultural, social, economic issues dealt with through criminal law rather than dealing with underlying causes
- not just looking through a crime law perspective

due process = crime control critiques

- DP threatened punitive forms of victims rights
- Parks decision where fairness was a veneer; only a small portion of cases are applicable to Parks. Although it was a significant decision, it didn't really change much in the system, the average case was not affected by the Parks decision
- prison population is steadily increasing still
- YOA belief we've put in protections and systems for youth, however this leads to more youth in jail than even the states – justify