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# THE CONSTITUTIONALIZATION OF THE GENERAL PART OF CRIMINAL LAW

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*This article argues that in almost all its facets, the general part of criminal law is becoming constitutionalized. "Constitutionalization" refers to the process of using principles of criminal law, such as the mens rea requirement, to give content to Charter rights. Constitutionalization also refers to the converse process of adopting constitutional rights and freedoms as doctrinal principles of the general part of criminal law.*

*In order to understand fully this phenomenon of constitutionalization, it is presented in relation to the constitutional requirements for offence definition, the constitutional nature of certain justifications, constitutional aspects of excuse, and the constitutional bases for non-exculpatory defences. In the discussion, the benefits of structuring the general part in terms of definitional elements, justifications, excuses and non-exculpatory defences are explored. In particular, this analytical structure is shown to be valuable in analyzing the constitutionality of shifting burdens of proof.*

*Finally, some comments are offered on the significance of constitutionalization for the process of criminal law reform presently being proposed by the Law Reform Commission of Canada in the context of the Canadian government's "Criminal Code Review".*

*L'auteur soutient dans cet article que les principes généraux du droit pénal se constitutionnalisent sous presque tous leurs aspects. Par "constitutionnalisation", il entend que, pour interpréter la Charte canadienne, on se base sur certains principes de droit pénal. Ce mot sert aussi à exprimer l'inverse, à*

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*savoir l'incorporation des droits et libertés constitutionnels comme principes de l'ensemble du droit pénal.*

*Pour mieux expliquer ce phénomène, l'auteur prend comme exemples la nécessité de se reporter à la constitution pour définir le crime, la nature constitutionnelle de certaines justifications, l'aspect constitutionnel de certaines excuses et les principes constitutionnels sur lesquels se fondent les défenses non-disculpatives. Cette discussion mène l'auteur à explorer les avantages d'une structure des principes généraux de droit pénal qui se basent sur la définition du crime, les justifications, les excuses et les défenses non-disculpatives. Il montre en particulier que cette structure analytique se révèle efficace pour analyser la constitutionalité du transfert du fardeau de la preuve.*

*En conclusion, l'auteur fait mention de l'importance donnée à la constitutionnalisation dans la réforme du droit pénal que propose la Commission de réforme du droit du Canada dans le cadre de la révision du Code criminel entreprise par le gouvernement du Canada.*

## *Introduction*

Any codification, statutory restatement, or reform of the criminal law must face the issue of whether the proposed new criminal law is to be a complete and exclusive source of primary rule or whether the new regime should coexist with competing or complementary rules drawn from other sources in the legal system.[1] The present Canadian Criminal Code[2] strikes a compromise by abrogating previous criminal offences other than contempt of court,[3] and by retaining "[e]very rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge. . .".[4] With the advent of the Canadian Charter of Rights and Freedoms,[5] however, this problem of the authoritative or exclusive nature of a purportedly complete codification of criminal law takes on a whole new dimension. Section 52(1) of the Constitution Act, 1982,[6] provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". Thus, no Canadian criminal code can contain valid

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[1] A useful discussion of this classic problem is found in Law Reform Commission of Canada, Study Paper, Towards a Codification of Canadian Criminal Law (1976, Reprinted 1984), *passim*.

[2] The Criminal Code, R.S.C. 1970, c.C-34, as amended, hereafter cited as the Criminal Code.

[3] *Ibid.*, s. 8.

[4] *Ibid.*, s. 7. This Canadian compromise seems to be mirrored in section 49 of the English Law Commission Report, (Doc. No. 343), Codification of the Criminal Law (1985), at least so far as the retention of common law justifications and excuses is concerned. Section 2 of the proposed English codification bill may not, however, go as far as the Criminal Code in the abrogation of "pre-Code offences".

[5] Constitution Act, 1982, Part I, sometimes hereafter cited as the Charter.

[6] *Ibid.*

provisions contrary to the Charter except in the politically unlikely event that Parliament might choose to invoke the constitution's legislative override provision[7] in such a context.

The Supreme Court of Canada has already struck down provisions in criminal or quasi-criminal legislation as being contrary to the Charter.[8] Several sections of the Charter provide particularly broad scope for this judicial evaluation of the general principles of criminal liability. One of these is section 7 which states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". In the *British Columbia Motor Vehicle Act Reference*[9] the majority of the Supreme Court of Canada held that:

> . . . the combination of imprisonment and of absolute liability violates section 7 of the *Charter* and can only be salvaged if the authorities demonstrate under section 1 that such a deprivation of liberty in breach of those principles of fundamental justice is, in a free and democratic society, under the circumstances, a justified reasonable limit to one's rights under section 7.

The explicit premise upon which this decision is based is that much of that which is thought to be contained in the familiar Latin maxim *actus non facit reum nisi mens sit rea* is a principle of fundamental justice for the purposes of the constitution. It is this process of using certain basic principles of criminal law to give content to the wording of constitutional rights which is referred to in this article as "constitutionalizing the general part of Canadian criminal law". The phrase may also be applied to the converse process of incorporating constitutional rights and freedoms into criminal law doctrine.

The question to be addressed in this article is to what *extent* basic principles of criminal law are or ought to be elevated to a constitutional status. On the one hand, it surely cannot be the case that the constitution can be used to freeze the whole of the common law of crimes in a constitutional mold which cannot be cracked by legislative reform. On the other hand, if one believes as most common law jurists seem to believe, that the evolution of key principles of criminal responsibility at common law does represent some progress toward broadly acceptable, if

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[7] *Ibid.*, section 33.

[8] Among the most important of these cases are *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145, (1984), 41 C.R. (3d) 97 (*sub nom Dir. of Investigation and Research, Combines Investigation Branch* v. *Southam); Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486, (1985), 48 C.R. (3d) 289, hereafter cited as *The B.C. Motor Vehicle Act Reference; R.* v. *Oakes*, [1986] 1 S.C.R. 103, (1986), 50 C.R. (3d) 1; *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, (1985), 18 C.C.C. (3d) 385.

[9] *Ibid.*, at pp. 515 (S.C.R.), 319 (C.R.). Of course, not all Charter challenges elevate criminal law principles to constitutional status. See the text, *infra*, at footnotes 69, 70.

not necessarily universal, principles of justice, then why should these principles not inform our interpretation of phrases found in the Charter of Rights and Freedoms such as "principles of fundamental justice",[10] "innocent until proven guilty according to law in a fair and public hearing"[11] or "equal protection and equal benefit of the law".[12] As the *British Columbia Motor Vehicle Act Reference* and other decisions to be explored below indicate, Canadian lawyers are not merely required to ask themselves whether or not certain principles of criminal law will be constitutionalized. This process is already a reality. The essential question is the *extent* to which this process can or should occur.

In order to analyze this question, it is essential to set out the structure of the general part in Canadian criminal law and measure the elements of this structure against some of the various constitutional yardsticks to be found in the Charter of Rights and Freedoms. While even a cursory examination of the standard textbooks on Canadian criminal law[13] will reveal that there is no unanimity among Canadian jurists on how to describe comprehensively the general part, comparative law scholarship has recently made significant strides forward in this domain.[14] Relying on these developments, and in particular on the work of Paul Robinson,[15] the general part in Canadian criminal law can be analyzed most coherently under the headings of definitional elements of offences, justifications, excuses and non-exculpatory public policy defences. An examination of the constitutionalization of the general part in this article will therefore proceed in relation to these structural elements. Discussion here will take place in sections of the article devoted to an outline of the structure of the general part, constitutional requirements for offence def-

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[10] Charter of Rights and Freedoms, *supra*, footnote 5, s. 7.

[11] *Ibid.*, s. 11(d).

[12] *Ibid.*, s. 15.

[13] Debate in Canadian criminal law circles has recently been enriched by the publication of five major textbooks on the general part of criminal law where none existed before. See E. Colvin, Principles of Criminal Law (1986); A.W. Mewett and M. Manning, Criminal Law (2nd ed., 1985); G. Côté-Harper and A.D. Manganas, Droit pénal canadien (1984); D. Stuart, Canadian Criminal Law (2nd ed., 1987); J. Fortin and L. Viau, Traité de droit pénal général (1982).

[14] German writers have been particularly helpful in this regard. See A. Eser, Justification and Excuse (1976), 24 Am. J. Comp. L. 621; W. Naucke, An Insider's Perspective on the Significance of the German Criminal Theory's General System for Analyzing Criminal Acts, [1984] Brigham Young U.L. Rev. 305. A comprehensive effort to apply these comparative insights to an understanding of the general part is found in G. Fletcher, Rethinking Criminal Law (1978). Some of the most helpful presentations of these conceptual breakthroughs are to be found in the work of P.H. Robinson. See P.H. Robinson, Criminal Law Defences: A Systematic Analysis (1982), 82 Col. L. Rev. 199; P.H. Robinson and J.A. Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond (1982-83), 35 Stanford Law Rev. 681; P.H. Robinson, Criminal Law Defences, Vols. 1, 2 (1984).

[15] See the works by Robinson, *ibid.*

inition, the constitutional validity of selected justifications, constitutional aspects of certain excuses, constitutional problems with non-exculpatory public policy offences, the constitutionality of shifting burdens of proof, and conclusions of interest to reformers of criminal law. Given the constraints of an article of this length, many of these issues will be painted with a broad brush when they merit presentation in minute detail. This is done in the belief that a sketch of the big picture here may constitute the preliminary drawing for a subsequent larger and more detailed canvas.

## I. *The Structure of the General Part*

Analyzing the general part in terms of definitional elements of offences, justifications, excuses and non-exculpatory public policy defences is an exercise which employs familiar words with greater definitional precision than that to which many common law criminal lawyers are accustomed. The Latin labels *actus reus* and *mens rea*, used commonly to refer in a global fashion to the material and mental elements of offences respectively, tend to obscure the importance of analyzing an offence in terms of a number of material elements, each of which may require a matching but separately differentiated mental element.[16] While the terms used in analyzing the material elements of offence definition differ from one jurisdiction to another and from one jurist to another,[17] one might obtain consensus for purposes of discussion on breaking down the material elements of an offence in terms of conduct (either act or omission), circumstances, and consequences (if any).[18] Of course, the way in which the material elements of any particular offence are analyzed depends upon the specific wording of the offence creating provision in the statute. Nevertheless, it might not be entirely obvious to state that the offence of "assaulting a peace officer in the execution of duty" is composed of an act (striking or otherwise assaulting a person) and two required circumstances (the fact that the victim is a peace officer, and the fact that the officer is acting in the execution of duty).[19] Similarly, the offence of "assault causing bodily harm" involves an act (the assault) and a consequence (bodily harm) which is causally connected to the act.[20]

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[16] For a full discussion of the implications of this "element analysis", see Robinson and Grall, *loc. cit.*, footnote 14.

[17] An examination of the Canadian criminal law texts, *supra*, footnote 13, as well as corresponding works by English, American or Commonwealth writers, will reveal surprising differences in terminology and basic analytical structure.

[18] See, for example, the American Law Institute Model Penal Code (1962), s. 2.01.

[19] This corresponds to one of the definitions of this offence in the Criminal Code, s. 246(1)(a).

[20] Criminal Code, s. 245.1 makes this an offence, but complicates matters through an involved definition of assault in s. 244.

Separating the material elements of the offence so as to see them as conduct, circumstances and consequences, rather than speaking about "the *actus reus*" *en bloc*, brings clarity to the analysis of the *mental* elements of offence definition.[21] Since this is not the place to resolve long-standing debates over the appropriateness of the subjective versus the objective standards of criminal liability, suffice it to state that most jurists might agree that in common law jurisdictions the fault elements in statutory offences may be thought of in terms of intention, knowledge, recklessness, or wilful blindness and negligence.[22] The phrase *mens rea* has become problematic because it refers to any or all of these states of mind (recognizing that some would exclude negligence as not being properly a "state of mind" or "awareness").[23] Hence there has emerged the laudable tendency to speak not of "the *mens rea* of the offence" but rather of the "mental elements in relation to the material elements" of offence definition.[24] Considerable analytical precision flows from this approach. In proving the mental elements of an assault causing bodily harm, for example, one might posit the requirements for intention with respect to the act of striking and recklessness as regards the consequence of causing bodily harm.[25] In this case one cannot speak of "the *mens rea* of the offence" as being one of "intention" or of "recklessness", because both elements are required but in relation to different material elements. Similarly, the mental elements of the Criminal Code offence of "storing a firearm in a careless manner"[26] can be viewed as intention

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[21] Aside from Robinson and Grall, *loc. cit.*, footnote 14, one can see evidence of this approach in the Model Penal Code, *supra*, footnote 18, and the English Law Commission's Report, *supra*, footnote 4, although it is not pushed as far as one might wish in the latter two documents.

[22] This might be said broadly to be the case for the Canadian texts cited in footnote 13. While the Supreme Court of Canada has, on numerous occasions, stated that *mens rea* for "true crimes" consists of intention, knowledge, and recklessness or willful blindness, it has also opted for a "half-way house" of liability for negligence with a reverse onus provision in public welfare offences of "strict liability". See *The Queen* v. *City of Sault Ste Marie*, [1978] 2 S.C.R. 1299, (1978), 3 C.R. (3d) 30. (It should be mentioned that the court retained "absolute liability" with no defence of "no negligence" for some classes of public welfare offences). The latest statement from the Supreme Court of Canada is found in *R.* v. *Vaillancourt* (1987), 60 C.R. (3d) 289, which is discussed in some detail, *infra*, the text at footnotes 88-102.

[23] See the approach of Don Stuart, *op. cit.*, footnote 13, *passim*, which follows in the tradition of "subjective orthodox" in this regard, or Mewett and Manning, *op. cit.*, footnote 13, pp. 103-141.

[24] See Robinson and Grall, *loc. cit.*, footnote 14.

[25] Some Canadian courts have recently adopted the approach of saying that for crimes of "general intent" either "intention" or "recklessness" will suffice as *mens rea*. See *R.* v. *Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), per Martin J.A. While this approach may provide helpful flexibility, it is not always carried out with the precise element analysis advocated here.

[26] Criminal Code, s. 84(2).

to store (an *act*) and negligence with respect to *circumstances* in which the act is carried out. It would be confusing, however, to call this an "*offence* of negligence".[27]

This element analysis has important implications for the way in which one views defences. Many arguments and factual circumstances alluded to in criminal trials which are called "defences", must be viewed as failures by the Crown to prove material or mental elements of offence definition beyond a reasonable doubt.[28] Hence alibi, accident, physical compulsion, physical impossibility and certain kinds of automatism properly may be thought of *not* as "defences" in some conceptual sense unrelated to the elements of an offence but rather allegations, sometimes supported by factual circumstances sufficient to meet an evidential burden at trial, that the Crown has not proved the material elements of the offence.[29] In the same way, the so-called "mistake of fact defence" may be a demonstration that the Crown has failed either to show intention, knowledge or recklessness (honest mistake), or to show negligence (honest and reasonable mistake) where these mental elements form part of the offence definition.[30] Robinson calls these kinds of arguments and fact allegations "failure of proof defences"—a useful label.[31]

The distinction between "justification" and "excuse" is basic to this structuring exercise. While some prominent common law jurists have been willing to accord only moral significance to this distinction,[32] its value for legal purposes has now been recognized by doctrinal writers, courts, law reformers, and legislators in common law jurisdictions.[33] A justification exists where an accused's conduct falls within the defini-

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[27] See the ambiguous treatment of this section in *R.* v. *Derkosh* (1979), 52 C.C.C. (2d) 252 (Alta. C.A.).

[28] Law Reform Commission of Canada, Report No. 30, Vol. I, Recodifying Criminal Law (1986), p. 25, recognizes this principle but nevertheless elects to deal with many of these matters as separate defences: "They have been set out as defences, however, in accordance with criminal law tradition." No other reason is given for this decision.

[29] The tension between the Crown's duty to prove guilt beyond a reasonable doubt, and the commonly advanced proposition that the defence may have to meet an evidentiary burden to rebut inferences which may be drawn from evidence presented by the Crown accounts in part for the tendency to continue to label these matters as "defences", and treat them separately from the elements of the offence for purposes of analysis. See the discussion on burdens of proof, *infra*, section VII.

[30] For a Canadian judicial recognition of this principle, see the judgment of Dickson J. in *Pappajohn* v. *The Queen*, [1980] 2 S.C.R. 120, (1980), 14 C.R. (3d) 243.

[31] Robinson, Criminal Law Defences, *loc. cit.*, footnote 14, at p. 203.

[32] Sir James Fitzjames Stephen, History of the Criminal Law of England, Vol. 3 (1883), p. 11; H.L.A. Hart, Punishment and Responsibility (1968), p. 13; J. Hall, General Principles of Criminal Law (2nd ed., 1960), p. 233.

[33] See: Writers: Forten and Viau, *op. cit.*, footnote 13; Côté-Harper and Manganas, *ibid.*, and the works cited *supra*, footnote 14; Courts: *Perka* v. *The Queen*, [1984] 2 S.C.R. 232, (1984), 42 C.R. (3d) 113; Law Reformers: Law Reform Commission of

tional elements of an offence, but where the law recognizes that he or she acted in furtherance of an interest which takes precedence over that interest protected by the creation of the offence.[34] Hence the argument, *inter alia*: "Yes, I shot and killed the victim intentionally, but I was legitimately acting in self-defence." The social interests protected by justifications may be of various kinds. Private interests are arguably protected by such justifications as self-defence or defence of private property.[35] Similarly, justifications based on the exercise of lawful authority may recognize the social importance of private duties as with medical practitioners, parents, and ships officers, or public duties as with law enforcement personnel,[36] or public officials acting in a host of emergency and regulatory circumstances. Finally, justifications may be grounded in the exercise of constitutional rights and freedoms.[37]

An excuse will exculpate the accused where his or her conduct falls within the definitional elements of the offence and is not justified as acting in furtherance of a legally protected interest, but where the accused's personal disability or debilitating circumstances are legally recognized as rendering the conduct blameless.[38] For example: "Yes, I did it, I know it was unjustified, but someone forced me at gunpoint." Depending upon the nature of the disability or the constraint on the capacity to exercise one's free will, excuses may result in a complete acquittal,[39] a partial reduction in the legal liability to which an accused is exposed,[40] or acquittal only on condition that a regime of treatment be undertaken.[41] Seen from this perspective, immaturity,[42] most mental disorder related

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Canada, Working Paper No. 29, Criminal Law—The General Part: Liability and Defences (1982); Legislation: The Criminal Code presently uses the words justification and excuse in a precise fashion in some areas, such as self-defence (section 34—a person may be "justified") and compulsion by threats (section 17—a person may be "excused"), and in an imprecise manner at other times, such as in a number of offences where certain conduct is criminal where it is engaged in "without lawful justification or excuse" (see, for example, section 408 concerning counterfeit money offences).

[34] See generally the works cited, *supra*, footnote 14.

[35] See Criminal Code, ss. 34-42.

[36] *Ibid.*, ss. 45 (Medical Practitioners); 43 (Parents); 44 (Ships Officers); 25 (Law Enforcement Personnel).

[37] See section IV, *infra*, for an exposition of this approach.

[38] For an exposition of this approach, see generally the works cited, *supra*, footnote 14.

[39] As with compulsion by threats, Criminal Code, s. 17; as in accordance with the common law rules on duress, see *Paquette* v. *The Queen*, [1977] 2 S.C.R. 189, (1976), 30 C.C.C. (2d) 417.

[40] Where, for example, murder may be "reduced" to manslaughter by virtue of provocation (Criminal Code, s. 215), or intoxication (through the operation of common law doctrine): see *The Queen* v. *Vasil*, [1981] 1 S.C.R. 469, (1981), 58 C.C.C. (2d) 97.

[41] As with the defence of insanity, Criminal Code, ss. 16 and 542.

[42] Criminal Code, s. 12, which reads: "No person shall be convicted of an offence in respect of an act or omission on his part while he was under the age of twelve years."

defences,[43] intoxication,[44] some forms of automatism,[45] duress,[46] and some kinds of mistake of law[47] can valuably be analyzed as excuses.

The category "non-exculpatory public policy defences" recognizes the existence of a heterogeneous set of legal arguments based on factual circumstances which will obviate the conviction of the accused even though the definitional elements can be proved and there are no grounds of justification or excuse.[48] These arguments arise from a variety of legal sources. Most have traditionally been viewed as matters of criminal procedure, although many may have a constitutional basis. The unifying analytical concept is that there is a class of "defences" based on the principle that there may be circumstances where it is improper for the state to proceed against an accused for reasons of "fairness" or even *raisons d'état* unrelated to the definitional elements of the offence, or to any justifications or excuses. To the extent that abandonment,[49] *de minimis*[50] and prank[51] are recognized as defences in Canadian criminal law, they can be seen as falling into this category although the courts sometimes erroneously analyze them as failure to prove definitional elements. Procedural fairness underlies defences related to the idea of double jeopardy[52] as well as those linked to the amorphous concept of abuse of process.[53] Finally, some non-exculpatory public policy defences are based on protection of state interests unrelated to fairness narrowly conceived from the criminal justice point of view. Sovereign, diplomatic and military

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[43] Canadian courts have recognized that mental disorder short of "section 16 insanity" may negate nevertheless the specific intent which must be proved in relation to certain offences, such as homicide. See, for example, *More* v. *The Queen*, [1963] S.C.R. 522, [1963] 3 C.C.C. 289.

[44] See *The Queen* v. *Vasil, supra*, footnote 40.

[45] *Rabey* v. *The Queen*, [1980] 2 S.C.R. 513, (1980), 20 C.R. (3d) 1.

[46] *Supra*, footnote 39.

[47] Canadian courts now seem open to the doctrine of "officially induced error of law". See *R.* v. *MacDougall*, [1982] 2 S.C.R. 605, (1982), 31 C.R. (3d) 1. With some effort this doctrine can be viewed as an excuse, but it is better classified as a non-exculpatory public policy defence. See section V, *infra*.

[48] See, generally, the work of Robinson cited, *supra*, footnote 14.

[49] See the helpful discussion in Stuart, *op. cit.*, footnote 13, pp. 551, 584, under the label "voluntary desistance".

[50] See, for example, the discussion in Colvin, *op. cit.*, footnote 13, pp. 77-80.

[51] Canadian courts are in disarray on this one. For example, compare *R.* v. *Kerr*, [1965] 4 C.C.C. 37 (Man. C.A.), and *R.* v. *Heminger and Hornigold*, [1969] 3 C.C.C. 201 (Man. C.A.), with *Bogner* v. *The Queen* (1975), 33 C.R.N.S. 348 (Que. C.A.).

[52] Exemplified by *Kienapple* v. *The Queen*, [1975] 1 S.C.R. 729, (1974), 15 C.C.C. (2d) 524, and the numerous cases which this decision spawned.

[53] See *Rourke* v. *The Queen*, [1978] 1 S.C.R. 1021, (1977), 35 C.C.C. (2d) 129, on abuse of process; *Amato* v. *The Queen*, [1982] 2 S.C.R. 418, (1982), 29 C.R. (3d) 1 and *R.* v. *Jewitt*, [1985 ] 2 S.C.R. 128, (1985), 47 C.R. (3d) 193 on entrapment.

immunities, to the extent to which they exist in Canadian law, can also be thought of in this way.[54]

Analyzing the general part in terms of definitional elements, justifications, excuses and non-exculpatory public policy defences is not without its problems. Legislators and even law reformers have not had the structure in mind when formulating the definitional elements of offences or structuring "defences".[55] Furthermore, while the conceptual distinctions between justifications, excuses and non-exculpatory public policy defences seem clear on the surface, the classification of certain "defences" is extremely difficult and perhaps ultimately an exercise of arbitrary assignment through forms of statutory drafting or judicial conceptualization. The Supreme Court of Canada has recently had difficulty with the classification of necessity.[56] Automatism,[57] consent,[58] entrapment[59] and honest belief in circumstances of justification[60] will no doubt continue to be a source of doctrinal dispute in this regard. However, the schema has significant merits. Its proponents have strongly advanced its value to courts for sorting out doctrinal disputes relating to participation

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[54] Sovereign Immunity: see *The Canadian Broadcasting Corporation* v. *Attorney General for Ontario*, [1959] S.C.R. 188; Fortin and Viau, *op. cit.*, footnote 13, pp. 157-159; Diplomatic Immunity: see B. Vaillancourt, De la possibilité de contraindre consuls et diplomates à comparaître en cour comme témoins ou accusés ou de les incarcérer (1961), 21 R. du B. 421; Military Immunity: see Fortin and Viau, *ibid.*, p. 162.

[55] The present Criminal Code does not adopt this approach, and while the Law Reform Commission of Canada moved toward it in its Working Paper No. 29, *op. cit.*, footnote 33, it has retreated in its Report No. 30, *op. cit.*, footnote 28.

[56] *Perka* v. *The Queen, supra*, footnote 33.

[57] Automatism is treated in some quarters as a matter going to the "voluntariness" of the *actus reus*. See *The Queen* v. *King*, [1962] S.C.R. 746, (1962), 38 C.R. 52. From this perspective it might be classified as a "failure of proof" defence. However, to the extent that "psychological blow" automatism is admitted as a defence, it may be seen properly as an excuse. See *Rabey* v. *The Queen, supra*, footnote 45.

[58] Consent is seen by certain continental writers as negating the "legal element" and therefore analogous to a justification. See A. Decocq, Droit pénal général. Robinson canvasses this problem under the heading "offense modifications", a discussion of which is beyond the scope of this paper; Criminal Law Defenses, *loc. cit.*, footnote 14, at p. 210.

[59] In *R.* v. *Mack* (1985), 49 C.R. (3d) 169 (B.C.C.A.), the court had the opportunity to tackle this issue and resolved the matter in a manner consistent with seeing entrapment as a non-exculpatory public policy defence. The case is on appeal to the Supreme Court of Canada.

[60] The Supreme Court of Canada is not receptive to such defences as seen in its approach to "excessive self-defence". See *The Queen* v. *Gee*, [1982] 2 S.C.R. 286, (1982), 29 C.R. (3d) 347; *R.* v. *Faid*, [1983] 1 S.C.R. 265, (1983), 33 C.R. (3d) 1; *Brisson* v. *The Queen*, [1982] 2 S.C.R. 227, (1982), 29 C.R. (3d) 289; *Reilly* v. *The Queen*, [1984] 2 S.C.R. 396, (1984), 15 C.C.C. (3d) 1. But the Law Reform Commission adopts a limited version of such a defence in Recommendation 3(16), at p. 39 of its Report No. 30, *op. cit.*, footnote 28.

in offences and resisting justified aggression,[61] and its value to law reformers in establishing a rational system of verdicts in criminal cases as well as a proper relationship between civil and criminal liability should not be underestimated.[62] But the purpose of this outline is simply to provide the background for applying this structure in the analysis of the constitutionalization of the general part of Canadian criminal law.

## II. *Constitutional Requirements for Offence Definition*

Offence definition becomes the subject of judicial scrutiny in accordance with a number of constitutional provisions. The principle of legality in a variety of constitutional guises, the newly proclaimed equality provisions of the Charter and the previously mentioned "principles of fundamental justice" will be the focus of attention here.

The principle of legality, sometimes expressed in the Latin maxim *nullum crimin sine lege, nulla poena sine lege*, has long been part of the English constitutional/criminal law tradition.[63] It has been suggested that the principle of legality can be thought of in terms of a number of doctrines: a requirement for a sufficient degree of certainty in the drafting of offences, a rule of strict construction or interpretation of penal statutes in favour of the accused, the rule that substantive penal statutes not be given retroactive application, and the requirement that penal laws be at least publicly promulgated and perhaps even be published in a form easily accessible to the general public.[64] Some aspects of the principle of legality have been explicitly entrenched in the Charter. Section 11(g) of the Charter states the principle of non-retroactivity of criminal law, with an interesting exception in relation to conduct which was "criminal according to the general principles of law recognized by the community of nations". The question at issue here is the extent to which other aspects of the principle of legality may be read into the broad language of section 7 or even of section 9 of the Charter.

Canadian courts of appeal have evidenced a willingness to ensure that legislative definition of elements of offences attain a reasonable standard of certainty in the application of a "void for vagueness" doctrine. In *R.* v. *Robson*[65] the accused had been issued a twenty-four hour roadside licence suspension which purported to prohibit him from driving a motor vehicle. The suspension was issued under section 214(2) of

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[61] See Robinson, Criminal Law Defences, *loc. cit.*, footnote 14, at pp. 273-278.

[62] *Ibid.*, at p. 285.

[63] The classical approach is found in G. Williams, Textbook of Criminal Law (2nd ed., 1985), p. 7.

[64] G. Williams, Criminal Law: The General Part (2nd ed., 1961), pp. 575-608. The latter proposition, of course, is dear to the hearts of law reformers.

[65] (1985), 45 C.R. (3d) 68 (B.C.C.A.).

the Motor Vehicle Act of British Columbia,[66] which authorized a police officer to issue a suspension "when he has reason to suspect the driver of a motor vehicle has consumed alcohol". The court held that the roadside suspension deprived the accused of his liberty in a manner not consistent with principles of fundamental justice, and was thus contrary to Charter section 7. In reaching this conclusion, the court stated that the statute was "riddled with vagueness" in allowing suspension on mere suspicion, and it followed American jurisprudence in holding that "statutory vagueness which encourages arbitrary and erratic arrests and convictions is unconstitutional".[67] While the court apparently based its decision on finding an infringement of section 7 of the Charter, the language used in enunciating this void for vagueness doctrine echoes Charter section 9 which provides that everyone has the right not to be arbitrarily detained or imprisoned. Regardless of the section invoked for the purpose, the significance of the court's finding for this discussion is its willingness to "constitutionalize" this aspect of the doctrine of *nullum crimen sine lege, nulla poena sine lege*.[68]

The definitional elements of criminal offences are, of course, being challenged before Canadian courts on constitutional grounds which do not involve the elevation of criminal law principles to the status of constitutional doctrine. For example, following the proclamation of section 15 of the Charter guaranteeing equality before the law, and equal protection and benefit of the law, there was a spate of cases where male accuseds challenged the constitutionality of section 146 of the Criminal Code.[69] The section makes it an offence for a male person to have sexual intercourse with a female person who is not his wife and is under the age of fourteen years, and the ground for the constitutional challenge was that the definitional elements of this offence discriminated unconstitutionally on the basis of sex. The Supreme Court of Canada has yet to rule on the matter. Another example of a constitutional challenge to elements of offence definition is found in the present controversy over the new section 195.1 of the Criminal Code, which makes it an offence to communicate or attempt to communicate with a person in a public place for the

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[66] R.S.B.C. 1979, c. 288.

[67] *Supra*, footnote 65, at p. 72. The American authorities relied upon *Papachristou* v. *Jacksonville*, 405 U.S. 156, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972).

[68] The "void for vagueness" doctrine was also discussed in another criminal context by the British Columbia Court of Appeal in *R.* v. *Red Hot Video Ltd.* (1985), 45 C.R. (3d) 36, where the Criminal Code definition of obscenity was unsuccessfully challenged. The court held that section 159(8) was not so vague and overbroad as to offend section 7 of the Charter. See also *R.* v. *Ramsingh* (1984), 14 C.C.C. (3d) 230 (Man. Q.B.).

[69] *R.* v. *Lucas* (1985), 16 C.R.R. 1 (Ont. Dist. Ct.); *R.* v. *Neely* (1985), 22 C.C.C. (3d) 73 (Ont. Dist. Ct.); *R.* v. *M.E.D.* (1985), 47 C.R. (3d) 382 (Ont. Prov. Ct.); *R.* v. *Drybones* (1985), 23 C.C.C. (3d) 457 (N.W.T.S.C.); *R.* v. *Bearhead* (1986), 27 C.C.C. (3d) 546 (Alta. Q.B.).

purpose of engaging in prostitution or of obtaining the sexual services of a prostitute. This challenge is being mounted on the basis that the offence interferes in an unconstitutional manner with freedom of expression as guaranteed in section 2 of the Canadian Charter. Early indications are that provincial courts of appeal may find favour with this argument.[70] However interesting and important these constitutional challenges to sections 146(1) or 195.1 of the Criminal Code may be, they fall outside the ambit of this discussion on constitutionalization of definitional elements, although these cases will be reexamined in the next section on the constitutional validity of justifications. The point is that not all constitutional arguments to thwart conviction for a criminal offence can be seen as the constitutionalization of a general principle in relation to definitional elements. The constitutionalization of the principle of legality through the void for vagueness doctrine does fall properly within the topic, as does the constitutionalization of the fault principle to be discussed next.

In the years immediately preceding the advent of the Charter, the Supreme Court of Canada developed an elaborate and relatively coherent body of doctrine describing the scope and application of the fault principles compendiously subsumed under the maxim *actus non facit reum nisi mens sit rea.*[71] This doctrine is usefully summarized in two passages from the judgment of Dickson J. in *The Queen* v. *City of Sault Ste. Marie.*[72] The first passage clearly illustrates the court's adherence to the principles of a subjective approach to finding criminal culpability in what it calls "true crimes":[73]

> Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would

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[70] See *R.* v. *McLean; R.* v. *Tremayne* (1986), 28 C.C.C. (3d) 176 (B.C.S.C.), which upheld the legislation in comparison with *Skinner* v. *R.* (1987), 58 C.R. (3d) 137 (N.S.C.A.), which struck it down as unconstitutional; leave to appeal to the Supreme Court of Canada granted (1987), 59 C.R. (3d) xxxiv.

[71] Key decisions in this body of jurisprudence are: *Leary* v. *The Queen*, [1978] 1 S.C.R. 29, (1977), 37 C.R.N.S. 60 (particularly the dissenting views of Dickson J.); *The Queen* v. *City of Sault Ste Marie, supra,* footnote 22; *Swietlinski* v. *The Queen*, [1980] 2 S.C.R. 956, (1980), 18 C.R. (3d) 231 (S.C.C.); *Pappajohn* v. *R., supra,* footnote 30. The debate on the appropriateness of a fault requirement is one which has raged in the common law world for decades. The particular form of its Canadian denouement was not an obvious outcome of that debate. See A.C. Hutchinson, *Sault Ste. Marie, Mens Rea,* and the Halfway House: Public Welfare Offences Get a Home of Their Own (1979), 17 Osgoode Hall L.J. 415; J. Fortin and L. Viau, La Réforme de la responsabilité pénale par la Cour suprême du Canada (1979), 39 R. du B. 526.

[72] *Ibid.*

[73] *Ibid.*, at pp. 1309-1310 (S.C.R.), 40 (C.R.).

make, or who fails to know facts he should have known, is innocent in the eyes of the law.

The second passage, however, outlines the structure of analysis for making a wholesale derogation from subjective principles of liability in relation to "public welfare offences":[74]

> I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:
>
> 1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
> 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in *Hickey's* case.
> 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.
>
> Offences which are criminal in the true sense fall in the first category. Public welfare offences would *prima facie* be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly", or "intentionally" are contained in the statutory provision creating the offence.

The approach of the Supreme Court of Canada to the issue of "fault" in relation to statutory offences exemplified by these passages set the stage for the debate, when the Charter arrived, as to whether or not any of the principles embodied in this analysis were of constitutional significance, and if so to what extent.

The language used in drafting section 94(2) of the British Columbia Motor Vehicle Act,[75] which was the subject of the constitutional reference case to the Supreme Court of Canada,[76] is undoubtedly the product of the doctrine on public welfare offences enunciated by the Supreme Court of Canada in the *Sault Ste. Marie* case quoted earlier. Section 94(1) made it an offence punishable by fine *and* imprisonment (seven days to six months for a first offence and fourteen days to a year for a second) to drive a motor vehicle while prohibited from doing so or where the driver's licence had been suspended. Section 94(2) stated: "Subsection (1) creates an absolute liability offence on which guilt is established by proof of driving, whether or not the defendent knew of the prohibition

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[74] *Ibid.*, at pp. 1325-1326 (S.C.R.), 53-54 (C.R.).

[75] *Supra*, footnote 66, as am. S.B.C. 1982, c. 36, s. 19.

[76] *B.C. Motor Vehicle Act Reference, supra*, footnote 8.

or suspension." It is perhaps not surprising that such a draconian statutory provision became the object of a constitutional attack. As was stated in the introductory section, of course, the Supreme Court of Canada found the combination of imprisonment and absolute liability to be a violation of section 7 of the Charter which could not be saved by the general proviso in section 1.

In reaching its decision, the majority of the court, speaking through Lamer J., made important pronouncements about the scope of section 7 and, by implication, about the potential process of constitutionalizing the general part of criminal law. The following passage from the judgment, though lengthy, is cited in full since it has become, and will no doubt continue for some time to be, the focal point for argument in the constitutional litigation of these issues:[77]

> The term "principles of fundamental justice" [in Charter section 7] is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.
>
> Sections 8 to 14 address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice"; they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.
>
> Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.
>
> We should not be surprised to find that many of the principles of fundamental justice are procedural in nature. Our common law has largely been a law of remedies and procedures and, as Frankfurter J. wrote in *McNabb* v. *United States* 318 U.S. 332 (1942), at p. 347, "the history of liberty has largely been the history of observance of procedural safeguards". This is not to say, however, that the principles of fundamental justice are limited solely to procedural guarantees. Rather, the proper approach to the determination of the principles of fundamental justice is quite simply one in which, as Professor L. Tremblay has written, "future growth will be based on historical roots". . . (1984), 18 U.B.C.L. Rev. 201, at p. 254).
>
> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves.
>
> Consequently, those words cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7.

Taking the lead from this statement, it is not difficult to extrapolate some far reaching effects for the substance of Canadian criminal law. The constructive murder provisions of the Criminal Code have already

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[77] *Ibid.*, at pp. 512-513 (S.C.R.), 317-318 (C.R.).

succumbed.[78] What about the so-called sexual offence of "statutory rape" where a male commits an offence when he has sexual intercourse with a female person not his wife and under the age of fourteen years whether or not he believes that she is fourteen years of age or more?[79] Must the criminal negligence provisions of the Criminal Code[80] be given a firmly subjective interpretation? Are any or all of the Criminal Code offences which impose liability in terms of objective standards of "reasonableness"[81] now on constitutional thin ice? Is strict liability to be treated in the same manner as absolute liability?[82] There are many other possible examples. But before getting carried away by them one must, as every Canadian first year law student ought to know, advert to the moderating influence of section 1 of the Charter of Rights and Freedoms.

The controversial section 1 of the Charter states that "[t]he Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In the *British Columbia Motor Vehicle Reference* the Supreme Court avoided full discussion of the meaning of the phrase, but clarification was provided in *R.* v. *Oakes*.[83] In that decision a reverse onus provision in the Narcotic Control Act,[84] was found contrary to the presumption of innocence in section 11(d) of the Charter and was not saved by Charter section 1. In *R.* v. *Morgentaler*,[85] Dickson C.J.C. summarized the decision in *Oakes* on applying section 1 in the following manner:

> A statutory provision which infringes any section of the *Charter* can only be saved under s. 1 if the party seeking to uphold the provision can demonstrate first, that the objective of the provision is "of sufficient importance to warrant overriding a constitutionally protected right or freedom". . . and second, that the means chosen in overriding the right or freedom are reasonable and demonstrably justified in a free and democratic society. This second aspect ensures that the legislative means are proportional to the legislative ends. . .. In *Oakes*,. . . the Court referred to three considerations which are typically used in assessing the proportionality of means to ends. First, the means chosen to achieve an important objective should be rational, fair and not arbitrary. Second, the legislative means should impair as

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[78] See *R.* v. *Vaillancourt*, *supra*, footnote 22, which held s. 213(d) of the Criminal Code unconstitutional. The section had to be read in light of the "homicide" sections 205-223. See further the text, *infra*, at footnotes 88-102.

[79] Criminal Code, s. 146.1.

[80] Ss. 202, 203, 204. For a good discussion of the controversy in Canada surrounding the interpretation and application of these provisions, see Stuart, *op. cit.*, footnote 13, pp. 183-203.

[81] See, for example, s. 84(2) on storing firearms, or s. 243.3.

[82] See I. Grant, Combining *Oakes* and the *Motor Vehicle Reference* and the Question of Stigma (1988), 60 C.R. (3d) 336.

[83] *Supra*, footnote 8.

[84] R.S.C. 1970, c. N-1, s. 8.

[85] [1988] 1 S.C.R. 30, at pp. 73-74.

> little as possible the right or freedom under consideration. Third, the effect of the limitation upon the relevant right or freedom should not be out of proportion to the objective sought to be achieved.

Thus, according to what is now standard methodology in Charter analysis,[86] any claim that the definitional elements of an offence are contrary to criminal law principles constitutionalized in section 7 must run the gauntlet of section 1. On their face, the requirements that limitations on Charter rights be directed toward "pressing and substantial objectives" to be attained by "proportionate means" would seem to give only narrow room for exceptions once a statutory provision or course of action prescribed by law is found to run counter to an enumerated right and freedom. Whether the Supreme Court will hold the line on this tough stance has yet to be seen. The court may feel hard pressed in a "law and order" political climate if constitutionalized principles of culpability based on subjective fault might be perceived to bring the administration of justice into disrepute.[87]

While limitations of space preclude a lengthy analysis of the ramifications of a constitutional *mens rea* doctrine, a brief examination of the Supreme Court's approach to the constructive murder provisions of the Criminal Code in *R.* v. *Vaillancourt*[88] will provide some helpful guidelines on how courts will have to approach these issues. Section 213 of the Code provided that a homicide would be murder where a person caused the death of a human being during the course of committing or attempting a number of listed criminal offences, "*whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being*", if the death ensued from a number of alternately listed circumstances, including that where the accused "uses a weapon *or has it on his person*" during the offence or the flight afterward. This definition, of course, stands in stark contrast with the widely understood conception, also found in the definition of murder in section 212(a) of the Criminal Code, that the central aspect of the offence is an intentional killing. It was possible by this constructive murder definition to be convicted of murder where

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[86] For a description of this methodology, see T.A. Cromwell and A. Wayne Mackay, Oakes in the Supreme Court: A Cautious Initiative Unimpeded by Old Ghosts (1986), 50 C.R. (3d) 34.

[87] While one might not wish to suggest that the Supreme Court of Canada respond to issues in a "political" fashion, it is clear that the Charter has thrust the court into a new law making role and a new relationship with the legislature. In particular the court's recent pronouncements on the interpretation of Charter section 24(2)'s phrase "bring the administration of justice into disrepute", bears close attention in this regard. See *Clarkson* v. *The Queen*, [1986] 1 S.C.R. 383, (1986), 25 C.C.C. (3d) 207; *R.* v. *Collins*, [1987] 1 S.C.R. 265, (1987), 56 C.R. (3d) 193.

[88] *Supra*, footnote 22. For a sound analysis of this problem, see I. Grant and A. Wayne Mackay, Constructive Murder and the Charter: In Search of Principle (1987), 25 Alberta L. Rev. 129.

the killing was entirely accidental. The harshness of this definition was compounded where it was combined with the Criminal Code's first degree/second degree murder classification scheme, which makes murder first degree where the victim is one of several listed types of law enforcement officers or where the underlying offence is one of six specially singled out for this purpose.[89] The first degree/second degree classification works to limit eligibility for parole[90] in relation to the mandatory life imprisonment sentence which is imposed for any murder conviction, however defined.[91] The upshot of this savage[92] network of provisions is that the use of section 213(d) definition could lead to a conviction of first degree murder with no eligibility for parole for twenty-five years where an entirely accidental death occurs in the course of a scuffle between a police officer and an accused.[93] The Canadian constructive murder provision was, with some justification, called the harshest such provision in the common law world.

In *Vaillancourt*,[94] Lamer J. speaking for the majority, states that ". . . there are. . . certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a mens rea reflecting the particular nature of that crime". Since the *B.C. Motor Vehicle Reference* case, this proposition does not seem startling. What *is* surprising about the *Vaillancourt* case, however, is that Lamer J., while stating his own preference for a subjective standard of fault for murder, admits that negligence, or an objective standard of fault, may be sufficient *mens rea* to meet the constitutional requirement of section 7 of the Charter.[95] The majority then holds that section 213(d) of the Criminal Code "does not . . . even meet the lower threshold test of objective foreseeability".[96] Proponents of "subjective orthodoxy" will no doubt be surprised that the Supreme Court of Canada is willing to consider negligence as *mens*

[89] Criminal Code, s. 214.

[90] *Ibid.*, ss. 669-672.

[91] *Ibid.*, s. 218.

[92] The section, in a less draconian draft, was first labelled "savage" by John Willis: comment on *Rowe* v. *R.* (1951), 29 Can. Bar Rev. 784. It has been vilified by academic writers ever since. See P. Burns and R.S. Reid, From Felony Murder to Accomplice Felony Attempted Murder: The Rake's Progress Compleat? (1977), 55 Can. Bar Rev. 75; W. MacLauchlan, The Explosive Combination of Forcible Confinement and Constructive Murder: What are its Proper Confines? (1983), 21 Osgoode Hall L.J. 701. See also D. Lanham, Felony Murder -Ancient and Modern (1983), 7 Crim. L.J. 90.

[93] This could occur since assaulting a police officer contrary to Criminal Code section 246.1 is an underlying offence in section 213, and since a police officer is named in section 214 as one of the victims whose death can raise murder from second degree status to first.

[94] *Supra*, footnote 22, at pp. 653 (S.C.R.), 325 (C.R.).

[95] *Ibid.*, at pp. 654 (S.C.R.), 326 (C.R.).

[96] *Ibid.*

*rea*, since that term has become associated with subjective standards of foresight which have traditionally been thought antithetical to objective fault standards.[97] However, this flexibility in determining the appropriate constitutionalized fault standard for criminal law may come as a relief to those who advocate objective fault requirements in exceptional circumstances.[98] Whatever the fault standard to be adopted, the court in *Vaillancourt* also made it quite clear that legislatures cannot avoid the *mens rea* problem by simply using drafting techniques which might avoid having to prove it. The court holds that there are "essential elements" which are constitutionally required, and that the omission of an essential element from a crime may contravene the presumption of innocence in section 11(d) of the Charter, as well as the principles of fundamental justice in section 7. This latter reasoning is apparently based on a concept of proportionality between the definitional elements of an offence and the degree of penalty or stigma associated with the sanction. However, those latter considerations, though fundamental, are not explored in the judgment.

If one might have expected the challenge to section 213(d) of the Criminal Code to cross the hurdle of section 7 of the Charter with relative ease,[99] getting past the proviso in section 1 ought to have been a more strenuous doctrinal exercise. Could section 213(d) of the Criminal Code be a reasonable limit on the section 7 principles of fundamental justice which can be demonstrably justified in a free and democratic society? To answer this question carefully one must drive to the heart of the rationale for criminal sanctions and evaluate them in the light of the test for section 1 enunciated by the Supreme Court of Canada in *R.* v. *Oakes*.[100] What is the "pressing and substantial objective" met by section 213(d)? Does it serve the ends of general or particular deterrence? Can it be justified on retributive grounds? What rehabilitative goals could justify a minimum of twenty-five years in prison for an accidental death?[101]

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[97] For an extensive collection of the citations of the literature on "subjective orthodoxy" see, Stuart, *op. cit.*, footnote 13, p. 117.

[98] See Law Reform Commission of Canada, *op. cit.*, footnote 28, where the Draft Code contains provisions with liability based on negligence. For an excellent argument in favour of objective standards, see Toni Pickard, Culpable Mistakes and Rape: Relating Mens Rea to Crime (1980), 30 U.T.L.J. 75.

[99] Such has not, of course, been the case: see *R.* v. *Laviolette* (1985), 55 Nfld. and P.E.I. R.10 (overturned by the Supreme Court of Canada with *R.* v. *Vaillancourt, supra*, footnote 22), and *R.* v. *Bezanson* (1983), 61 N.S.R. (2d) 187 (N.S. App. Div.). However, these decisions predate the *B.C. Motor Vehicle Act Reference, supra*, footnote 8.

[100] *Supra*, footnote 8.

[101] For a critical analysis of the policy basis for sentencing, and by implication for the policies underlying the whole of the general part of criminal law, see Sentencing Reform: A Canadian Approach, Report of the Canadian Sentencing Commission, Ministry of Supply and Services, Ottawa, 1987. The Supreme Court of Canada's most recent

These issues are unfortunately not analyzed in the majority judgment in *Vaillancourt* which only states in a cursory manner that deterring the use of weapons in the commission of offences is a sufficiently important objective. In accordance with *Oakes* the court then turned to the proportionality of the means used. Having determined that the purpose of the legislation was to discourage the use and carrying of weapons during the commission of offences, the court merely finds, with little difficulty or depth of analysis, that the means used in the drafting of section 213(d) restrict Charter rights "unduly"—stiff sentences for manslaughter convictions in cases where weapons are used ought to be sufficient. The full consideration of the means used in relation to the purposes of punishment, which one might have expected, is absent.[102]

At this point, it may be apposite to recall that with the *British Columbia Motor Vehicle Reference*, the constitutionalization of *mens rea* principles was begun. The controversy over section 213(d) of the Criminal Code in *Vaillancourt* is merely one example of the process, albeit an important one. The issue is to determine how far the process will go in individual cases. The methodology so briefly presented for the analysis of the constitutional validity of section 213(d) will, in all likelihood, be repeated with respect to many other offences containing definitional elements of absolute liability or where fault is defined in objective terms—including public welfare offences of strict liability. If the combined effect of the *British Columbia Motor Vehicle Reference*, *Oakes* and *Vaillancourt* has been depicted accurately here, one might expect that many statutory provisions will fall afoul of the principles of fundamental justice in section 7 of the Charter. The real battle lines will be drawn around Charter section 1 where it will be decided whether the limitation is a reasonable one, demonstrably justified in a free and democratic society. One thing is certain—section 7 has more than procedural import. A criminal law fault requirement is now part of Canadian constitutional doctrine.

### III. *The Constitutional Nature of Certain Justifications*

The moral basis for the concept of justification is imbedded in popular language. When we think someone was *right* in doing something we say

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views on sentencing and the purposes of punishment may be gleaned from *R.* v. *Smith*, [1987] 1 S.C.R. 1045, (1987), 58 C.R. (3d) 193, where the court strikes down a provision of the Narcotic Control Act, *supra*, footnote 84, which imposed a mandatory minimum punishment of seven years for "importing" on the grounds that it was "cruel and unusual" punishment contrary to section 12 of the Charter.

[102] Even the Law Reform Commission in its Recodifying Criminal Law, *op. cit.*, footnote 28, has not attempted to relate the principles of criminal liability in the General Part to the purposes of the criminal sanction. European observers may find this astonishing—particularly German jurists familiar with the criminal law re-codification debates in their own country. See the German writings, *supra*, footnote 14, as well as C. Roxin, The Purpose of Punishment and the Reform of Penal Law (1970), 2 Law and State 66;

he or she was justified.[103] Though Sir James Fitzjames Stephen may have been of the view that the distinction between justification and excuse was of no legal consequence, his Draft Code, as passed down to us in the form of the Canadian Criminal Code of 1892, makes a careful use of the verb "to justify".[104] Sections 25 through 44 of the Criminal Code, dealing with the exercise of public authority, self-defence and defence of property, *etc.*, are proper examples of justifications which indeed use the language of justification quite correctly.

As stated earlier, the principle governing justification is that while a person may have caused the harm prescribed through the definitional elements of an offence, this conduct is nevertheless made lawful by a concurrent rule which recognizes the primacy of another legally protected interest. The concern is not with the actor and his or her disabilities or blameworthiness as is the case with excuses. Rather the analysis looks to the situation in which the actor finds himself or herself, and the relative importance of his or her conduct in those circumstances. Hence the social interest in protecting bodily integrity through criminalization of the acts which are labelled assault or murder yields, under defined conditions, to the higher interest of the enforcement of justice or the protection of oneself or one's property. German criminal law theory holds that a justification negates the "wrongfulness" of the conduct described in the definitional elements of the crime, while French doctrine states that grounds of justification negate the "legal elements" of the offence.[105] The central concept behind these various verbal formulations of the concept of justification is explicit recognition that the legal rule according protection to one social interest against harm may have to give way to another rule protecting against another greater harm.

As we suggested above, justifications can be grouped usefully for purposes of analysis into three categories: those which weigh private interests against those interests protected in defining a crime, those which weigh the interests of law enforcement against behaviour which otherwise would be criminal, and those which involve the exercise of funda-

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H.H. Jescheck, The New German Criminal Law in the International Context (1975), 12 Law and State 85.

[103] The Concise Oxford Dictionary (1964), p. 660, defines the verb to justify as "show the justice or rightness of; vindicate. . ." and shows its derivation from the Latin root *jus* meaning "right". By contrast, p. 422, the verb to excuse is defined as "to attempt to lessen the blame attaching to (person, act); obtain exemption for. . .", and links its origins to the Latin root *causa* meaning cause.

[104] The Criminal Code, Stats. Can. 55 & 56 Vict., c. 29. See Stephen, *op. cit.*, footnote 32, p. 11. See also the concurring views of Hart *op. cit.*, footnote 32; Hall, *op. cit.*, footnote 32.

[105] In addition to the sources cited, *supra*, footnote 14, see, for French Law, A. Decocq, *op. cit.*, footnote 58; J. Pradel, Droit pénal: Introduction Générale: Tome I (3d ed., 1981).

mental freedoms or constitutional rights in ways which might otherwise be unlawful. The purpose of this segment is twofold: first, to examine the way in which the first two categories of justifications, the legal sources of which are embodied in statute and common law precedent, may be strengthened by their incorporation into constitutional doctrine; secondly, to examine the manner in which the exercise of constitutional rights and freedoms may be viewed, from the perspective of criminal law theory, as falling under the rubric of justifications.

One way in which to address the first issue is to ask the question "what justifications are so basic that any statutory attempt to excise them from the law would be found unconstitutional"? Several examples spring to mind immediately. There appears to be no advanced legal system which does not recognize the right of self-defence. One might therefore expect that any attempt to eliminate the justification of self-defence could be found to infringe the right to security of the person in a way contrary to the principles of fundamental justice and not reasonably justified in a free and democratic society. While the likelihood of this example occurring may seem far fetched, only a slight modification will make the constitutional dimension of the argument far more plausible. What if a law reform body were to propose changing the widespread rule, in Canada found in section 34 of the Criminal Code, which authorizes a person attacked to stand firm and retaliate with reasonable force to a rule which required a person under attack to retreat where possible and resist using only that force necessary to prevent the infliction of grievous bodily harm?[106] The Supreme Court of Canada might accept such a statutory injunction to "turn the other cheek" as a constitutional exercise of legislative authority. On the other hand, it might be persuaded to adopt the position that such a limitation on the security of the victim's person is contrary to the principles of fundamental justice and not demonstrably justified in a free and democratic society.[107] The point here is really to demonstrate that section 7 of the Charter provides ample basis upon which to ground an argument for the constitutionalization of the justification of self-defence.

By way of contrast, it might be far more difficult, given present Charter language, to entrench constitutionally the notion of defence of property. Unlike the European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1, Article 1, the Canadian Charter does not give constitutional protection to property rights *per se*.

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[106] This approach has been mooted about by a variety of jurists. See, for example, A.J. Ashworth, Self-Defence and the Right to Life (1975), 34 Camb. L.J. 282.

[107] The constitutional right to bear arms does not exist in Canada the way it exists in the United States with its attendant macho and frontier psychological baggage. However, the Criminal Code, section 25(4) authorizes police officers to shoot fleeing suspects and pre-Charter cases find courts upholding the provision with few apparent questions. See *Priestman* v. *Colangelo*, [1959] S.C.R. 615, (1959), 124 C.C.C. 1.

On the other hand, some argument has been advanced that the phrase "security of the person" in section 7 should be interpreted as going beyond mere protection of a person's body from abuse or improper treatment in a physical sense.[108] After all, section 12 of the Charter already provides for the right not to be subjected to any cruel or unusual treatment or punishment. At any rate, without going into the details of the argument, one might advance the position that use of considerable force in order to prevent intrusion upon a family dwelling[109] might be viewed as a constitutionally valid protection of the security of the person, whereas protection of chattels through the use of force[110] could be a legislative policy which cannot be constitutionally entrenched.

The prospects for constitutionalization of justifications based on the exercise of lawful public authority also provide fertile ground for fascinating disputes. Section 25 of the Criminal Code is one statutory provision which may provide the focus for constitutional debate. Subsection (1) of that provision states that "[e]veryone who is required or authorized by law to do anything in the administration or enforcement of the law. . . is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose". Just as the common law was unwilling to accept, or at least severely restricted, any superior orders defence,[111] section 7 of the Charter must, one would hope, limit the scope of the literal wording of section 25. The Nuremberg trials surely demonstrate that not every exercise of purported lawful authority ought to be viewed as a justification which impinges validly upon life, liberty or security of the person in accordance with the principles of fundamental justice.[112] A less emotive Canadian example might be sought in circumstances where law enforcement officers were privately prosecuted for acting pursuant to a warrant later found to be constitutionally invalid.[113] While circumstances might induce courts to provide such officers with a "good faith"

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[108] See P. Garant, Fundamental Freedoms and Natural Justice, in W.S. Tarnopolsky and G.A. Beaudouin (eds.), The Canadian Charter of Rights and Freedoms (1982), p. 257.

[109] *Cf.*, Criminal Code, s. 40.

[110] *Ibid.*, s. 38.

[111] For a brief discussion of this defence, see Stuart, *op cit.*, footnote 13, pp. 466-467.

[112] See the Nuremberg Charter of 1945, Article 8.

[113] In a case involving an illegal, though not (at the time) unconstitutional search by police officers, the Attorney General for Ontario entered a stay of proceedings in relation to such a private prosecution. See *Dowson* v. *The Queen*, [1983] 2 S.C.R. 144, (1983), 7 C.C.C.(3d) 527.

excuse where appropriate,[114] constitutional doctrine can certainly place *limits on the ambit of justifications.*[115]

These illustrations show how justifications may be constitutionally entrenched and constitutionally limited by the Charter. However, it has become clear that the Charter is also the source of a whole range of legal arguments which, when advanced as "defences" in the context of a criminal trial, must be analyzed as justifications. The type of argument envisaged here is not the assertion that the offence is unconstitutional. The argument is rather that while the offence is valid, the conduct at the time was a legitimate exercise of a constitutional right or fundamental freedom which in the circumstances trumps the interest protected through the offence definition. A statutory analogy to this kind of argument is found in the Criminal Code provisions on defamatory libel. Publishing a defamatory libel is made a crime in order to protect a person's reputation from improper hatred, contempt or ridicule.[116] On the other hand, the Code provides a special "plea of justification" where it is to be argued that the statement is true and that its publication is of public benefit.[117] Perhaps the most widely litigated issue where this technique has been employed is the claim by native Canadian Indians that they be exempted from the application of statutes which make it an offence for anyone to hunt other than during prescribed seasons.[118] The claim by native peoples was that their treaty rights took precedence over the statutory provisions and that they were justified in hunting "out of season". The claim was not that the statutory offences were unconstitutional or unlawful, but rather that their conduct was justified on legitimate grounds despite the generality of the wording of the offence.

Applying this approach to find "justifications" in constitutional rights and freedoms requires the courts to engage in judicial techniques which have been described as "reading down" and "reading out". The Supreme Court of Canada was willing to do this on rare occasions in the pre-Charter period. In *McKay* v. *The Queen*,[119] for example, the court held that a municipal ordinance prohibiting the erection of unauthorized signs, though expressed in unlimited language, could not be read to encroach upon federal competence over federal elections, and should be "read

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[114] For the invocation of such an excuse in an unconstitutional search, see *Hamill* v. *The Queen*, [1987] 1 S.C.R. 301, (1987), 56 C.R. (3d) 220.

[115] This is, of course, what the courts are doing when deciding, for example, that a statutory provision authorizing a search is unreasonable and therefore unconstitutional. See *Hunter* v. *Southam Inc.*, *supra*, footnote 8.

[116] Criminal Code, ss. 261-265.

[117] *Ibid.*, s. 539(1).

[118] *Simon* v. *The Queen*, [1985] 2 S.C.R. 387, (1985), 23 C.C.C. (3d) 238.

[119] [1965] S.C.R. 798, (1965), 53 D.L.R. (2d) 532.

down'' so as not to apply to election signs.[120] Similarly, the Ontario Court of Appeal was willing to uphold Sunday closing legislation as being generally valid but not constitutionally applicable to orthodox Jews who, in compliance with their religious convictions, closed their businesses on Saturday.[121] Thus, one category of persons, whose actions were justified on constitutional grounds, were ''read out'' of the statute.

The courts clearly feel uncomfortable in these ''reading out'' and ''reading down'' situations.[122] It seems somehow less daunting either to uphold the general constitutional validity of a statutory provision or to strike it down altogether. But to the extent that reading down or reading out is advanced as a defence to avoid the application of an offence to classes of individuals in constitutionally relevant circumstances, it is from the point of view of the criminal law a matter of justification. As with the constitutionalization of *mens rea* through the principles of fundamental justice, the question is not one of *whether* fundamental freedoms will be invoked as justifications, the question is to what *extent* this approach will be upheld. The results, however, may be seen as another facet of the constitutionalization of the general part in criminal law.

## IV. *Constitutional Aspects of Excuses*

Just as the exercise of one's freedom of will and the choice of whether to engage in conduct defined as an offence is central to the mental elements of defence definition, so it is to the principle underlying excuses. With excuses, however, the law's concern is not with the choice itself but rather with *disabilities* which may vitiate the *capacity* to control conduct or to exercise rational choice.[123] Here the focus is on the actor and the internal, personal factors or the external, abnormal circumstances which render him or her incapable of complying with the requirements of the law. ''Acts are justified; actors excused''.[124] Those who do justified acts are worthy of praise, while those who are excused for abnormal disabilities are to be treated with compassion and understanding. Unlike the approach to justifications, where a balancing of objective social interests underpins exceptions to particular rules, the policy con-

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[120] In *Hunter* v. *Southam Inc.*, *supra*, footnote 8, at pp. 169 (S.C.R.), 121 (C.R.), Dickson C.J.C., speaking for the unanimous court, advocated caution in the use of these techniques. See D. Gibson, The Law of the Charter: General Principles (1986), pp. 186-191.

[121] *R.* v. *Videoflicks et al.* (1984), 15 C.C.C. (3d) 353 (Ont. C.A.), per Tarnopolsky J.A. See also *R.* v. *Cancoil Thermal Corporation and Parkinson* (1986), 52 C.R. (3d) 188 (Ont. C.A.), per Lacourciere J.A.

[122] See *Hunter* v. *Southam Inc.*, *supra*, footnote 8.

[123] See the works of Robinson, *supra*, footnote 14, particularly Criminal Law Defences: A Systematic Analysis, at pp. 221-228.

[124] This pithy phrase is based on Fletcher, *op. cit.*, footnote 14, p. 759.

cerning excuses is to identify disabilities which absolve the actor from blame. The factual result of the incapacity may be sometimes to preclude the existence of one of the material or mental definitional elements of the offences.[125] This may reinforce the tendency to call mistake of fact an "excuse", for example. At other times the surface appearance of "voluntary conduct" or "intention" may be provable, while the incapacity robs these apparently responsible acts of their truly responsible nature. The source of the incapacity may have an exculpatory impact beyond the definitional elements of the offence. For example, the insane person may "intend" certain acts but not appreciate their consequences.[126] Thus, it is important to separate excuses from failure of proof defences.[127] A second reason to treat "excuses" separately from definitional elements of the offence or justifications is the fact that their frequent basis in a medical disability or incapacity links them not merely to arguments about whether an accused ought not to be "punished" for a particular crime, but whether he or she ought to receive "treatment" for the disability.[128]

Since the concept of an excuse relates to the moral basis for the imposition of the criminal sanction, it is not surprising that questions concerning the constitutionalization of excuses should revolve round the notion of "the principles of fundamental justice" in section 7 of the Charter. However, the particular "actor oriented" nature of excuses and their fragmented doctrinal development at common law may also leave certain excuses open to the impact of the equality provisions in section

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[125] Thus excuses are "general defences" to all offences. The person who is insane cannot be convicted of murder (which requires proof of a mental element) or parking in a prohibited zone (which does not require proof of a fault element). Were insanity linked to the subjective element of the offence it would be no "defence" to illegal parking. The example is a bit strained, however, since the consequences of an insanity plea are such that its use in relation to a parking offence might bring counsel's mental capacity into question.

Conditions presently dealt with as automatism or insanity, for example, may "negate" both material and mental elements.

[126] The significance of the word "appreciate" in the Criminal Code section 16, as opposed to the word "know" in *M'Naghten* 's case, has been the subject of considerable debate in Canada. See, for example, Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases (The McRuer Report) (1956), p. 12.

[127] In relation to "immaturity" and "mental disorder", Law Reform Commission of Canada, *op. cit.*, footnote 33, p. 36, uses the label "exemption", though the choice of this word over "capacity" is not given any explanation. Apparently adopting the Law Reform Commission of Canada format, Côté-Harper and Manganas, *op. cit.*, footnote 13, pp. 385-411, also use this approach. Stuart, *op. cit.*, footnote 13, pp. 311 ff, uses the traditional "capacity".

[128] This opens a "Pandora's Box" about the nature of the criminal sanction and the proper role of treatment options in relation to it. These issues are beyond the scope of this article.

15. These two sets of issues will be addressed consecutively in the discussion which follows.

As with the preceding discussion of justifications, the most valuable approach to measuring the potential for the constitutionalization of excuses is to start by asking the question "which excuses are so basic that any statutory attempt to eradicate them might be contrary to the principles of fundamental justice?" The most clearcut candidate for constitutionalization may be the excuse of incapacity based on age or immaturity. However, excuses based on mental disorder, intoxication, duress and provocation all merit brief analysis.

The common law early negated its orginal rule imposing criminal liability upon children in favour of a rule based on the notion that children, being too immature to take moral responsibility for their acts, are by definition incapable of committing crimes.[129] This basic concept is still reflected in recent changes to the Canadian Criminal Code whereby children under the age of twelve years cannot be convicted of an offence.[130] While those young persons over twelve years and under eighteen years of age are now legally responsible for conduct which constitutes an offence, they are not in general to be "punished" as adult offenders.[131] Rather, they are to be supervised, disciplined, controlled, guided and assisted (though not "rehabilitated" or "reformed"), because of their "state of dependency and level of development and maturity".[132]

The effect of these rules is thus to create an excuse which exculpates entirely the person under twelve years of age on the basis of presumed incapacity and to remove him or her entirely from the purview of the criminal justice system. With respect to those between twelve and eighteen years of age, a mitigated responsibility is recognized which, while not completely excusing the young offender, channels him or her toward a specialized regime of sanctions and/or treatment. Thus, while immaturity is not a "disability" in the normal sense of the word, it is accepted as imposing constraints on the child or young person's capacity to conform to the exigencies of the law in a responsible fashion. As such, immaturity founds an excuse which may exculpate an accused com-

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[129] See A.W.G. Kean, The History of Criminal Liability of Children (1937), 53 Law Q. Rev. 364. The analogy to incapacity due to insanity harks back to Roman law. See M. Hale, History of Pleas of the Crown, Vol. 1 (1736), pp. 29-30.

[130] Criminal Code, s. 12.

[131] For the recently revised procedures dealing with young offenders in Canada, see The Young Offenders Act, S.C. 1980-81-82, c. 110, *passim*. An excellent short discussion of the origins of this legislation, its application and potential difficulties is to be found in R.G. Fox, The Treatment of Juveniles in Canadian Criminal Law, in E. Greenspan and A. Doob (eds.), Perspectives in Criminal Law: Essays in Honour of J.Ll.J. Edwards (1985), pp. 149-185.

[132] The Young Offenders Act, *ibid.*, Declaration of Principle, contains this list of verbs.

pletely or partially, and which may lead to a specialized social response which is, or at least ought to be, tailored to the nature of the "incapacity".

Given the harrowing inter-governmental negotiations which led to the present Young Offenders Act system, it is unlikely that major change to the present system is contemplated by legislators. For the sake of argument, however, if one were to posit a return to the early common law rule imposing full criminal liability upon children of whatever age, it would take little imagination to concoct a constitutional argument to the effect that the deprivation of a child's liberty in such circumstances would be contrary to principles of fundamental justice and contrary to section 7. Certainly, the present regime, in imposing sanctions or providing for "dispositions" relating to young persons between ages twelve and eighteen in conflict with the law, shows a careful regard for what might be termed the principles of fundamental justice. The law has by and large withstood constitutional challenge, even with respect to the provisions which authorize in camera hearings.[133] In the package of reforms brought in with the Young Offenders Act, however, the federal government may have handed the provinces a social problem the solutions to which are fraught with constitutional difficulty. The minimum age for the imposition of criminal sanctions was raised from the traditional seven years to twelve years.[134] Disciplinary problems with children under twelve years, which according to police and social service agencies can be of significant proportions in urban areas, now fall to be dealt with under provincial social welfare legislation. To the extent that provincial measures to "discipline", "treat", "rehabilitate", "train" or "whatever" wayward children under twelve years of age may deprive such children of their liberty, the procedures implementing such measures must be in accordance with principles of fundamental justice in section 7 or be justified as limitations under section 1. There is thus in all likelihood a constitutional minimum content to the immaturity excuse.

Canadian criminal law has evolved a number of accepted exculpatory arguments founded on evidence of mental disorder which fall under the analytical rubric of excuse. The defence of insanity is the pillar of the mental disorder excuses, while arguments based on lesser types of incapacitation provide peripheral doctrinal support. These arguments proceed from heterogeneous evidentiary bases, take differing doctrinal forms, and have varying judicial effects upon the outcome of the criminal trial.

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[133] See generally *Regina* v. *R.L.* (1986), 26 C.C.C. (3d) 417 (Ont. C.A.); *Re M.H. and the Queen (No. 2)* (1984), 21 C.C.C. (3d) 384 (Alta. C.A.). With respect to in camera hearings, see *Re Southam Inc. and the Queen* (1986), 25 C.C.C. (3d) 119 (Ont. C.A.). The Juvenile Delinquents Act in camera provisions failed to meet the constitutional test: *Re Southam Inc. and the Queen* (No. 1) (1983), 3 C.C.C. (3d) 515 (Ont. C.A.).

[134] The Young Offenders Act, *supra*, footnote 131, s. 72.

Nevertheless, they can all properly be thought of as excuses based on mental disability.

The insanity excuse in Canada is based on a statutory reformulation of the famous *M'Naghten* rule.[135] The rule is premised on the assumption that some individuals may be so affected by mental disorder as to vitiate their responsibility for voluntary conduct which they have caused in a physical sense and may even have intended in a mental sense. The rule has two limiting aspects. The first is the description of the disability as a "disease of the mind or natural imbecility".[136] The second consists of the conditions which must result from the disability: suffering "to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong".[137] The effect of establishing the existence of the defined mental disability leading to the required resulting conditions is not merely to excuse the accused from responsibility for his or her crime, and bring about a release from custody. A finding of not guilty by reason of insanity, in the face of proved conduct which would otherwise be criminal, triggers the invocation of an indeterminate period of incarceral treatment on the presumption that such an accused is not only ill but, by virtue of having "committed" the offence, dangerous.[138]

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[135] *M'Naghten's Case* (1843), 10 Cl. & Fin. 200, 8 E.R. 718 (H.L.). See now Criminal Code, s. 16. The literature on the meaning of section 16 is, of course, voluminous. A particularly valuable specialized collection is S.J. Hucker, C.D. Webster and M.H. Ben-Aron (eds.), Mental Disorder and Criminal Responsibility (1981).

[136] Criminal Code, s. 16(2). The notion "natural imbecility" has fallen into desuetude, and discussion in the cases and among writers is focused on the meaning to be given to "disease of the mind". A majority of the Supreme Court of Canada has held that "[t]he term 'disease of the mind' embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion": *Cooper* v. *The Queen*, [1980] 1 S.C.R. 1149, at p. 1159, (1979), 51 C.C.C. (2d) 129, at p. 144. The court decided personality disorders may constitute a disease of the mind.

[137] Criminal Code, s. 16(2). The word "appreciates" has been held to import a requirement beyond mere knowledge of the physical quality of the act and requires a capacity to apprehend the nature of the act and its consequences. Again, see *Cooper* v. *The Queen* (1980), *ibid.*; and *The Queen* v. *Barnier*, [1980] 1 S.C.R. 1124, (1980), 51 C.C.C. (2d) 193. For a controversial decision that wrong means "legally wrong" and not merely "morally wrong", see *Schwartz* v. *The Queen*, [1977] 1 S.C.R. 673, (1976), 29 C.C.C. (2d) 1.

[138] Criminal Code, s. 542 provides that where a person "is found to have been insane at the time the offence was committed" he or she is to be kept "in strict custody in the place and in the manner that the court, judge or magistrate directs, until the pleasure of the lieutenant-governor of the province is known". For release procedures, see Criminal Code, s. 547.

This whole system, recently the subject of extensive proposals for reform from the Government of Canada, has also been the subject of constitutional challenge in *R.* v. *Swain*.[139] The accused was found not guilty on several charges of assault and aggravated assault by reason of insanity. There was considerable evidence given, however, that by the time of the trial the accused had responded well to treatment while on bail and that neither his own condition nor the public interest required him to be hospitalized "at the pleasure of the Lieutenant Governor" as required by section 542 of the Criminal Code. This mandatory provision was challenged as being contrary to principles of fundamental justice under section 7 of the Charter, causing an arbitrary detention contrary to section 9, creating cruel and unusual punishment contrary to section 12, and being contrary to the accused's entitlement to equal protection and benefit of the law under section 15. While the majority in the Ontario Court of Appeal found that the procedures under the Criminal Code for the Lieutenant Governor's Review Boards were sufficient to withstand constitutional challenge, there was a strong dissent and the matter is on its way to the Supreme Court of Canada.[140] In any event, the courts are being asked to intervene on constitutional grounds to reorder aspects of the criminal justice system in relation to the mental disorder excuse which is, at least conceptually and doctrinally, at the core of the general part. Almost regardless of the Supreme Court of Canada's decision in *R.* v. *Swain*, it is an example of the manner in which the constitutionalization of the general part is moving ahead apace. One wonders, for example, how Canadian courts might react to legislative proposals similar to those adopted in Scandinavia[141] whereby mental disorder does not relieve one of criminal liability, but is simply a matter to be taken into account, not at the point of "sentencing", but rather at the point of "disposition" somewhat akin to Canadian Young Offenders legislation.

While immaturity and mental disorder represent excuses at the core of our notions of criminal responsibility and thus constitute strong cases for some degree of constitutionalization, duress and provocation might be thought to be more conceptually peripheral and therefore less likely to receive constitutional reinforcement. While duress and provocation may properly be thought of as excuses, neither flow from an "internal" condition which vitiates mental capacity. Both flow from morally significant constraining situations where an "ordinary" person engages in what is considered understandable if not laudable conduct. The person under duress is excused where he or she "commits a crime" rather than sacrifice his or her own life or bodily integrity, because we think that

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[139] (1986), 24 C.C.C. (3d) 385 (Ont. C.A.).

[140] See Bulletin of Proceedings taken in the Supreme Court of Canada, [1987] 390.

[141] See I. Strahl, Grandes lignes du nouveau code pénal suédois (1964), 19 Revue de Sciences Criminelles et de Droit Pénal Comparé 527; R. Screvens, Nouveau code pénal suédois (1966), 46 Revue de Droit Pénal et de Criminologie (Bel.) 618.

any ordinary person might be unable to resist the temptation to act in the same way.[142] The Canadian Code provision defining provocation as an excuse which may reduce murder to manslaughter specifically states that the provoking incident must be such as "to deprive an ordinary person of the power of self-control. . .".[143] Moreover, neither duress nor provocation negate the mental elements of the offences to which they apply. They represent one of the rare situations where motive is properly taken into account in assessing criminal liability.[144] The person under duress says "I did it knowingly to save myself", while the person provoked says "I did it knowingly but in a state of uncontrollable rage which you might experience too". In situations where the limited statutory definitions which excuse from liability by reason of duress or provocation are not applicable, these matters may be taken into consideration in mitigation of sentence.[145]

This latter point provides a useful entry into the debate on the constitutionalization of duress and provocation. What if Parliament advocated the abolition of the duress excuse and the inclusion of duress as one of a number of factors to be taken into account in sentencing?[146] The Law Reform Commission of Canada has made an analogous recommendation with respect to the removal of provocation as an excuse in relation to murder.[147] Could such proposals be judicially blocked on the grounds that duress or provocation, in relation to offences the penalties for which might deprive one of life, liberty or security of the person, are principles of fundamental justice? If contrary to section 7, might their removal as matters of liability and their placement at the point of sentencing be seen as reasonable limits under section 1? While space does not allow a full exploration of the arguments pro and con, one might speculate that the legislative removal of duress or provocation from the Criminal Code as excuses to certain kinds of criminal offences might be thought to be entirely constitutional. The stakes in the argument, and indeed the likely outcome, might be far different, however, if the recent parliamentary debates had led to the return of capital punishment.

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[142] See Criminal Code, s. 17.

[143] *Ibid.*, s. 215(2). The meaning of the phrase "ordinary person" was recently addressed by the Supreme Court of Canada in *R.* v. *Hill*, [1986] 1 S.C.R. 313, (1985), 51 C.R. (3d) 97.

[144] On the general rule about the relationship between motive and intent, see *Lewis* v. *The Queen*, [1979] 2 S.C.R. 821, (1979), 10 C.R. (3d) 299.

[145] *R.* v. *Cunningham* (1958), 43 Cr. App. R. 79 (C.A.).

[146] This is not the position of the Law Reform Commission of Canada which advocates retaining a modified excuse of duress in its Recodifying Criminal Law, *op. cit.*, footnote 28, p. 32.

[147] This is the position of the Law Reform Commission of Canada as first proposed in its Working Paper No. 33, Homicide, (1984), pp. 72-73, later reiterated in Recodifying Criminal Law, *ibid.*, pp. 52-59, at least by implication.

In the foregoing discussion, the potential constitutionalization of excuses was examined primarily in the light of section 7. It was mentioned in passing that the system of holding persons on a Lieutenant Governor's warrant has been challenged under section 15 of the Charter, but there are other excuses which may come under constitutional review by reason of their contravention of the principles of equality. An interesting equality based critique might be levelled at those excuses which derive their doctrinal form from the distinction between specific and general intent.

The awkward nature of responsibility for acts undertaken while voluntarily intoxicated has spawned this distinction between "specific intent" and "general intent" offences in Canadian jurisprudence as elsewhere in common law jurisdictions.[148] The doctrine states that voluntarily induced states of intoxication may negate the specific intent which must be proved in some offences while it never can be acknowledged as the reason for the absence of the "general intent" required for most crimes.[149] While in some offences the "specific" intent may correspond to special mental attitudes or purposes defined by the legislature as required mental elements,[150] in other crimes the "specific intent" is indistinguishable from the normal mental requirements of intent and knowledge.[151] Nevertheless, this fictional device for controlling the ambit of the defence of drunkenness created reified "offences of specific intent" by virtue of appellate court *fiat*.[152] While intoxication may arguably prevent the formation of "intent", the defence based upon impairment of functions by

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[148] The source of the voluntary intoxication, alcohol or drugs for example, is irrelevant. See *R.* v. *Lipman* (1969), 53 Cr. App. R. 600 (C.A.) which has been followed in Canada. Canadian courts adopted the formulation of the "drunkenness defence" which originated in *D.P.P.* v. *Beard*, [1920] A.C. 479, at p. 502 (H.L.) per Lord Birkenhead. See *The Queen* v. *George*, [1960] S.C.R. 871, (1960), 128 C.C.C. 289; *Leary* v. *The Queen*, *supra*, footnote 7. For the history of this development in Canada, see especially A.D. Gold, An Untrimmed Beard: The Law of Intoxication as a Defence to a Criminal Charge (1977), 19 C.L.Q. 34; D. Labreche, La défense d'intoxication volontaire en droit pénal canadien (1979-80), 14 R.J.T. 161. For an assessment of the development of drunkenness defence in England, see Williams, *op. cit.*, footnote 63, pp. 464 to 484; J.C. Smith and B. Hogan, Criminal Law (5th ed., 1983), pp. 190-201.

[149] See *The Queen* v. *George*, *ibid.*, (common assault); *Leary* v. *The Queen*, *ibid.*, (rape).

[150] For example, robbery, breaking and entering, theft, assault with intent to wound and carrying a weapon with the intent to use it. See Stuart, *op. cit.*, footnote 13, p. 369, for a collection of citations for cases where the statutory provisions requiring proof of particular states of mind for these offences have been qualified as ones of "specific intent".

[151] For example, attempted murder, possession of stolen property, assaulting a peace officer in the execution of duty, and wilful damage to property. See Stuart, *ibid.*, for a collection of citations.

[152] The artificiality of the device is recognized by virtually all doctrinal writers who clamour for reform. See Côté-Harper and Manganas, *op. cit.*, footnote 13, pp. 438-439;

alcohol or other drugs is best conceptualized as an excuse. The effect of the ingestion of the toxic substance is to create a disability, and the conditions resulting from this disability may prevent the actual formation of intent or may prevent the actor from controlling behaviour which is in some sense knowing or intentional.[153]

Where the intoxication is involuntary, courts have had no difficulty with recognizing the fully exculpatory nature of the excuse in relation to any offence, even though it may be characterized either as a negation of the voluntariness of the material element or the negation of the existence of the mental element of the offence.[154] Where the intoxication is voluntary, courts and legislatures are faced with a dilemma. On the one hand, the elements of an excuse are present which, in formal terms, ought to exculpate the accused who did not intend or could not control his or her conduct because of the disability. On the other hand, the accused who allows himself or herself to become intoxicated ought to take some responsibility for the conduct which occurs during that state. The judicially evolved doctrinal solution based on the creation of a dichotomy between specific intent and general intent offences is generally recognized to be inadequate. It is based on a false factual understanding of the nature of intoxication which is then tied to equally unreal distinctions about the mental elements of offences.

From the point of view of constitutional equality requirements, one wonders how this system will ultimately fare. With respect to general intent offences, it can be argued normally that the Crown has failed to prove the subjective fault elements where there is a reasonable doubt as to a relevant mistake of fact on the part of the accused. For example, "I struck him on the head as a gag, thinking he was a lifeless mannequin" might ground this failure of proof defence to a charge of common assault. If, however, there is evidence that the accused was drinking, and that the mistake may be attributable to intoxication, the defence will fail since "common assault is a general intent offence to which drunkenness is not a defence".[155] In other words, a failure of proof defence is removed by evidence of intoxication where it would be available otherwise. Dickson

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Fortin et Viau, *ibid.*, pp. 213-223; Stuart, *ibid.*, pp. 376-383; Law Reform Commission of Canada, *op. cit.*, footnote 33, pp. 24-62; Glanville Williams, *op. cit.*, footnote 63, pp. 464-483.

[153] For a discussion of the physiological effects of the ingestion of alcohol and other drugs on the human body and its functioning, see: R.W. Hill, Drunkenness and Criminal Responsibility: The Psychiatrists Contribution, in Hucker, *op. cit.*, p. 79, footnote 135.

[154] See *The Queen* v. *King, supra*, footnote 57; *R.* v. *Saxon* (1975), 22 C.C.C. (2d) 370, at p. 375 (Alta. C.A.); *R.* v. *Lipman, supra*, footnote 148. Note that the sources in footnotes 147 and 148 are concerned with voluntary intoxication.

[155] See *R.* v. *George, supra*, footnote 148.

C.J.C. among others has pointed out the illogical nature of this doctrine,[156] and law reformers have suggested a variety of solutions which would reunite doctrinal clarity with a sensible policy for dealing with drunken misconduct.[157] But from a constitutional perspective the drunken person has been deprived of a generally available failure of proof defence, and arguably has been denied equal benefit of the law in a discriminatory fashion. While the specific/general intent dichotomy might survive as a reasonable limit pursuant to section 1 of the Charter, it is submitted that there is a live constitutional issue to be litigated here on the right set of facts.

The specific/general intent problem and the constitutional difficulties which it may pose, have in fact gone beyond the bounds of an intoxication "excuse". Once an offence has been certified as one of "specific intent" for purposes of allowing a negation of the mental element by reason of voluntary intoxication, why could this "specific intent" not be "negated" by other phenomena? Defence counsel quickly pressed this sort of argument, with some success in relation to provocation, mental disorder and excessive self defence.[158] In each case, however, the effect was to push beyond the limits of the statutorily defined "defence", whether of provocation, insanity or self defence, but only in relation to those offences which for one reason or another, had come to be known as "specific intent" offences. The difficulty, of course, is that the availability of the "excuse" will depend upon what has been shown to be an arbitrary process of classification.

Two solutions are consistent with applying the law in the interests of equal protection and equal benefit. The first would be to say that mental disorder, provocation or belief in a right to self-defence, as grounds for arguing that the Crown has failed to prove the mental requirements of offence definition, must be available across the board to all offences.[159] The other might be to limit this failure of proof defence by rigourous adherence to the prescribed conditions for the availability of mental dis-

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[156] Particularly in his dissenting judgment in *Leary* v. *The Queen, supra*, footnote 71.

[157] For proposed Canadian variants on the Butler Committee solution, see the Law Reform Commission of Canada, Working Paper No. 29, *op. cit.*, footnote 33, pp. 59-63 and Report No. 30, *op. cit.*, footnote 28, pp. 27-28.

[158] Provocation: *R.* v. *Campbell* (1977), 38 C.C.C. (2d) 6, at pp. 14-16 (Ont. C.A.); Mental Disorder: *R.* v. *Baltzer* (1974), 27 C.C.C. (2d) 118 (N.S. App. Div.); *R.* v. *Hilton* (1977), 34 C.C.C. (2d) 206 (Ont. C.A.); *R.* v. *Meloche* (1975), 34 C.C.C. (2d) 184 (Que. C.A.); *R.* v. *Lechasseur* (1977), 38 C.C.C. (2d) 319 (Que. C.A.); *R.* v. *Browning* (1976), 34 C.C.C. (2d) 200 (Ont. C.A.); Self-Defence: *R.* v. *Gee, supra*, footnote 60; *R.* v. *Faid, ibid.; Brisson* v. *The Queen; ibid.; Rielly* v. *The Queen, ibid.*

[159] This undermines, of course, the precise statutory definitions given to the formal defences in each category.

order, provocation or self-defence defences.[160] The present solution, relying on the specific/general intent dichotomy, is inherently unequal and irrational, and constitutionally suspect as a result.

The upshot of this discussion, some of which may seem to be the needless advancement of arguments designed to destabilize an acceptable and pragmatically functioning *status quo*, is merely to demonstrate that, in the realm of excuses, constitutionalization may have just begun. The courts of appeal may not be willing to accept some of the arguments advanced here. It may be safe to predict, however, that they will be listening to such arguments with increasing regularity.

## V. *Constitutional Problems with Non-Exculpatory Public Policy Defences*

As noted above, there are a large number of heterogeneous arguments available in Canadian criminal law which can best be described by the somewhat cumbersome label "non-exculpatory public policy defences". These defences rest upon various considerations of equity in the application of the substantive doctrine, procedural fairness, and the protection of certain state interests. Hence the designation "public policy" as a general term to cover these varying concerns. The other adjective, "non-exculpatory", describes the fact that these defences are not linked to definitional elements of offences, nor to justifications or excuses. These defences may lead to an acquittal, a dismissal or a stay of proceedings, regardless of the fact that the accused has committed an act falling within the definitional elements of the offence and has done so with no claim of justification and no grounds for an excuse. A typical example of such a defence is one based on a statutory limitation period or the Charter right to be tried within a reasonable time. In this situation the accused does not necessarily deny "guilt", but rather claims it is unfair to convict for other reasons of public policy. The claim is thus a "non-exculpatory" one in so far as it is unconnected to arguments about personal liability for the conduct *per se*.

There may be some objection to treating these kinds of defences as a component of the "General Part". Normally such matters are analyzed as relating to subjects such as criminal procedure, constitutional law, and human rights. Indeed, the heterogeneity of sources for such arguments deprives the category "non-exculpatory public policy defences" of the neatness and precision of failure of proof defences, justifications or excuses. However, it is this very contrast which helps to clarify the nature of non-exculpatory defences, and prevent doctrinal confusion where

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[160] This approach would appear to collide with general principles of fault where some factual circumstance or disability appears to demonstrate the absence of a definitional element, yet the disability or circumstance does not meet the definitional conditions of the justification or excuse in issue.

some of these arguments are sometimes falsely described as "negating *mens rea*",[161] "providing an excuse"[162] or showing no material element.[163]

Given the doctrinal diversity of non-exculpatory public policy defences, it should not be surprising that the constitution impacts upon such defences in a variety of ways. Some non-exculpatory public policy defences are directly constitutional in nature and rely for enforcement on remedies granted under section 24 of the Charter. Others have evolved through the common law or are established by statute and may be constitutionally entrenched or challenged through judicial decisions. An exploration of these issues will be briefly undertaken in relation to non-exculpatory public policy defences classified according to the scheme presented in section I of this article, that is, defences based on procedural fairness and substantive fairness, although space does not permit investigation in relation to those based on the protection of miscellaneous state interests.

Under the procedural heading, three examples may serve to illustrate the nature of non-exculpatory public policy defences and some of the constitutional issues which arise in relation to them. These examples are the right to be tried within a reasonable time accorded by section 11(b) of the Charter, and the related common law defences of abuse of process and entrapment. As pre-Charter jurisprudence on abuse of process indicated,[164] delay in getting matters to trial is one of the most serious problems facing the Canadian criminal justice system. It is therefore understandable that the Charter right to a trial within a reasonable time should have become one of the most frequent bases for Charter litigation. There is no need here to explore in detail what the Supreme Court of Canada has found to be the parameters of how to judge whether a delay prior to trial is a reasonable one. However, what is key to the court's approach is the determination that a stay of proceedings is the appropriate remedy in the event of an unconstitutional delay in being brought to trial.[165] Breach of this Charter right combined with this remedy exhibits all the characteristics of a non-exculpatory public policy defence: the accused makes no claim that he or she has not committed

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[161] See the discussions of entrapment, *infra;* also prank is sometimes treated this way; see Stuart, *op. cit.*, footnote 13, p. 465.

[162] State induced error of law is put in this category. See Colvin, *op. cit.*, footnote 13, pp. 209 ff.

[163] Colvin, *ibid.*, p. 77, seems to put *de minimis* here.

[164] *Rourke* v. *The Queen, supra*, footnote 53, a case dealing with delay, was thought by many to have killed the defence of abuse of process. See, for example, K. Chasse, Abuse of Process: Will it Survive Rourke? (1977), 38 C.R.N.S. 270. One might speculate upon the degree to which section 11(b) owes its existence to the apparent unwillingness of the Supreme Court of Canada to control delay through the abuse of process doctrine, as was apparently evidenced in the *Rourke* decision.

[165] See *Rahey* v. *The Queen*, [1987] 1 S.C.R. 588, (1987), 57 C.R. (3d) 289, and in particular the judgments of Lamer J. and Wilson J.

the offence or was justified or should be excused. The proceeding is put to an end and the accused "gets off" not because he or she is not *guilty*, but rather because the state has failed to proceed in accordance with constitutional requirements. Fittingly, the accused is neither entitled to nor receives an acquittal, but benefits from a definitive judicial stay of the proceedings.[166]

The existence or non-existence of a common law remedy for abuse of process was a matter of controversy among Canadian courts of appeal until the issue was put to rest by the Supreme Court of Canada's acceptance of the doctrine in *R.* v. *Jewitt*.[167] In this case, Dickson C.J.C. approved the following passage from a decision of Martin J.A. in *R.* v. *Young*:[168]

> I am satisfied on the basis of the authorities that I have set forth above that there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can be exercised only in the clearest of cases.

Thus, the court confirms the existence of a common law remedy of a judicial stay for abuse of process in a form which corresponds exactly to the general structure of a non-exculpatory public policy defence advanced here. However, the fact that the reference in the passage from *R.* v. *Young* to "fundamental principles of justice" echoes the wording of section 7 of the Charter is no accident. *R.* v. *Young* was a case decided not on the basis of the common law but rather in application of section 7.[169] It would appear that the courts are entrenching the common law abuse of process "defence" as a part of constitutional doctrine through the mechanism of Charter section 7.[170]

A brief word about the defence of entrapment may serve as a convenient way to bring this discussion of the constitutionalization of "procedure based" non-exculpatory public policy defences to a close. The *Jewitt* decision was on its facts a case of entrapment, but that issue, for procedural reasons, was not argued on its merits before the Supreme

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[166] This result is characterized in *Rahey, ibid.*, at pp. 615 (S.C.R.), 306 (C.R.), as the "minimum" remedy in circumstances of unreasonable trial delay.

[167] *R.* v. *Jewitt, supra*, footnote 53. In this case the court summarizes the jurisprudential controversies.

[168] (1984), 40 C.R. (3d) 289 (Ont. C.A.), quoted in *R.* v. *Jewitt, ibid.*, at pp. 135 (S.C.R.), 201 (C.R).

[169] *R.* v. *Young* was a case involving trial delay, but relied upon section 7 rather than section 11(b) because the facts disclosed "pre-charge" delay which would exclude the application of the latter provision.

[170] Note, however, the caveat of Wilson J. in *Keyowski* v. *The Queen* (1988), 62 C.R. (3d) 349 (S.C.C.).

Court of Canada. Thus, the highest court, while apparently approving of the defence of entrapment as a species of abuse of process, has not yet made a binding pronouncement upon the elements of the entrapment defence.[171] There has been no formal resolution by the Supreme Court of Canada on the long-standing doctrinal dispute as to whether entrapment is, on the one hand, a "substantive defence" which negates *mens rea* or operates as an excuse, or, on the other hand, a "procedural defence" which operates to estop prosecution based upon police misconduct.[172] The first conceptualization is sometimes called the "subjective approach" because it is said that the purpose of the exercise is to focus on the initial predisposition of the accused to commit the crime and on whether his or her independent judgment has been overborne by pressures from agents of the state.[173] The second is sometimes dubbed the "objective approach" since it focuses on the propriety of police or governmental conduct and the propensity of prosecutions based on such conduct to bring the administration of justice into disrepute notwithstanding the guilt of the particular accused.[174] As has been recognized by the British Columbia Court of Appeal,[175] the *Jewitt* decision from the Supreme Court of Canada impliedly provides the basis for the resolution of this controversy. If entrapment is a species of abuse of process in which the proper remedy is a judicial stay of proceedings, the consistent analysis is to prefer the "objective" over the "subjective" rationale. Or to put the matter in the language of the structure adopted here, entrapment is not a failure of proof defence in relation to the mental element nor an excuse. It is rather a non-exculpatory public policy defence. What is more, if the doctrinal line is traced back through *Jewitt* to *Young*, it may be persuasively argued that the entrapment defence has been elevated to the status of constitutional doctrine through the mechanism of the principles of fundamental justice protected in section 7.[176]

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[171] In the case of *Amato* v. *The Queen*, *supra*, footnote 53, the Supreme Court's most recent consideration of entrapment prior to *Jewitt*, the court split on the availability of the defence as a matter of law, and found that if, as a matter of law the defence did exist, it was not available on the facts.

[172] This, like most dichotomies, is a bit crude. However, it is the scheme which has been adopted by the courts. See *R.* v. *Mack*, *supra*, footnote 59.

[173] See the majority judgment of the United States Supreme Court in *Sorrells* v. *U.S.*, 287 U.S. 435 (1932).

[174] See *Sherman* v. *U.S.*, 356 U.S. 369 (1957); *U.S.* v. *Russell*, 411 U.S. 423 (1973); *Hampton* v. *U.S.*, 425 U.S. 484 (1976).

[175] *R.* v. *Mack*, *supra*, footnote 59.

[176] Whether all the implications of *Jewitt* as worked out in *Mack*, *ibid.*, are desirable is another question. Of particular significance may be the British Columbia Court of Appeal's holding that the decision of whether there has been entrapment and whether to grant a stay are matters of law for the judge, unlike an acquittal on the merits which would be within the purview of a jury.

The idea of a non-exculpatory public policy defence based on notions of "substantive fairness" is more difficult to elaborate conceptually than those based on procedural fairness, and there are fewer examples which fall neatly into such a category. However, pranks as a defence to theft of property, *de minimis* in relation to drug possession, and abandonment as a defence to inchoate offences[177] are difficult to classify in any other way. In each case it can be argued that the definitional elements of the offences can be proved by the Crown, there are no social interests personal to the accused to be protected by a countervailing justification and there are no disabilities on which to found an excuse. Yet in each of these sets of circumstances, courts have been unwilling to convict because the prejudicial, social and economic consequences to the accused of a conviction seem to outweigh the benefits of upholding the law through a prosecution. Each may represent situations where the court is really saying that the Crown ought not to have exercized its discretion to prosecute, because prosecution would tend to bring the administration of justice into disrepute. To the extent that Canadian courts may be tentatively groping toward Charter based control over the exercise of prosecutorial discretion,[178] one might find in relation to these examples a doctrinal basis for a constitutionalized non-exculpatory public policy defence. However, the fact that prank, *de minimis* and abandonment are based on very slim jurisprudential footings, as well as the advent of conditional and absolute discharges in the arsenal of alternatives available to Canadian sentencing courts,[179] may present practical impediments to their doctrinal development through litigation.

Recent developments in Canada, however, of the notion of "state induced error of law" hold out far greater promise for the constitutionalization of a non-exculpatory public policy defence which might be thought to rest on notions of substantive fairness. The injustice of a blanket rule that everyone is presumed to know the law has become more and more apparent to Canadians living in a modern regulatory state where every citizen is subject to the application of literally thousands of statutory offences.[180] As a compromise between the injustice of the general rule and the chaos of all becoming a law unto themselves, a number of Canadian courts have proposed solutions similar to this one from the Ontario Court of Appeal:[181]

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[177] For a discussion of this latter subject, see Colvin, *op. cit.*, footnote 13, p. 300.

[178] See *R.* v. *Young* (1984), *supra*, footnote 168.

[179] Criminal Code, s. 662.1, introduced in 1972.

[180] See P.G. Barton, Officially Induced Error as a Criminal Defence: A Preliminary Look (1980), 22 Cr. L.Q. 314; A.J. Ashworth, Excusable Mistake of Law, [1974] Crim. L. Rev. 652.

[181] *R.* v. *Cancoil Thermal Corporation and Parkinson*, *supra*, footnote 121, at p. 199. See also *R.* v. *MacDougall* (1981), 60 C.C.C. (2d) 137 (N.S. App. Div.)

> The defence of "officially induced error" is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors, including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.

Similarly, the Law Reform Commission of Canada has proposed to give a defence to a person who acts reasonably under a lack of knowledge or mistake of the law based upon the non-publication of a rule of law or reliance upon the decision of an appellate court or the advice of a competent administrative authority.[182] While some writers appear to view the reliance on a state-induced error of law as an "excuse" because "the accused has acted reasonably",[183] it is submitted that the defence is more appropriately conceived as a non-exculpatory public policy defence. The accused has acted with knowledge of the factual circumstances, with no justification and where there are no excusing disabilities. It is manifestly unfair, however, for the state to prosecute where the accused has relied on a branch of the state for what was reasonable advice in the circumstances. For the purposes of this article, the question then arises as to whether the injustice is made so manifest in such circumstances that a prosecution is contrary to the principles of fundamental justice in section 7 of the Charter. The value to an accused of a constitutional status for the defence of state induced error of law might be particularly acute in relation to an offence where the statutory rule that ignorance of the law is no excuse[184] is thought to have displaced any possible common law defence of state induced error.[185]

## VI. *The Structure of the General Part and the Constitutionality of Shifting Burdens of Proof*

While the structure of the general part of criminal law outlined above helps to resolve a number of troubling doctrinal issues,[186] it is appropriate here to concentrate on its value in analyzing the constitutionality of shifting burdens of proof in criminal matters. The shifting of a burden of proof strikes at the very heart of the criminal trial process and inevitably brings into play the operation of section 11(d) of the Charter, which

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reversed, [1982] 2 S.C.R. 605, where the defence was rejected on the facts but left open as a matter of law.

[182] Law Reform Commission of Canada, *op. cit.*, footnote 28, p. 31.

[183] Barton, *loc. cit.*, footnote 180.

[184] Criminal Code, s. 19.

[185] Such would seem to be the approach in *Molis* v. *The Queen*, [1980] 2 S.C.R. 356, (1980), 55 C.C.C. (2d) 558.

[186] See text, *supra*, at footnotes 61 and 62.

guarantees any person charged with an offence the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". To address properly this subject it will be necessary first to summarize the relevant Canadian law on presumptions and the shifting of burdens of proof in criminal matters as it has evolved through pre and post-Charter litigation. Then, it will be possible to proceed to an analysis of how a clearer conception of the general part may assist in the elaboration of sound constitutional doctrine in this area.

The conceptual bedrock upon which these discussions rest is the presumption of innocence in Charter section 11(d), which the Supreme Court of Canada tells us in *R.* v. *Oakes*[187] means, at a minimum, three things: (a) an individual must be proven guilty beyond a reasonable doubt, (b) it is the state which must bear the burden of proof, and (c) criminal prosecutions must be carried out in accordance with fair, lawful procedures. The deceptive simplicity of these propositions must be viewed against a background of common law and statutory devices which mediate between the general principles and the complexity of proving criminal cases in practice. Chief among these for purposes of analysis here are presumptions.

While presumptions can be classified in a number of ways for different purposes, the Supreme Court of Canada has reminded us that:[188]

> Presumptions can be classified into two general categories: presumptions *without* basic facts and presumptions *with* basic facts. A presumption without a basic fact is simply a conclusion which is to be drawn until the contrary is proved. A presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact.

An example or two may help to clarify analysis. The presumption of innocence and the presumption of sanity are two so-called "presumptions" which operate without proof of basic facts. They are, in essence, rules of law which determine how one is to proceed in criminal cases in the absence of certain kinds of proof being made.[189] Fact based presumptions compel the court to presume the existence of a fact in issue where the court finds that an underlying basic fact has been proved. In other words, the presumed fact is deemed proved upon proof of the basic fact unless rebutted by evidence having a certain degree of cogency.[190]

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[187] *Supra*, footnote 8, at pp. 121 (S.C.R.), 16 (C.R.).

[188] *Ibid.*, at pp. 115 (S.C.R.), 12 (C.R.).

[189] For a concise discussion of the operation of these two kinds of presumptions, see Cross on Evidence (5th ed., 1979), pp. 122-123. It will be recalled that Canadian Criminal Code section 16(4) states: "Everyone shall, until the contrary is proved, be presumed to be and to have been sane."

[190] S.A. Schiff, Evidence in the Litigation Process, Vol. II (2nd ed., 1985), pp. 1085-1119, calls these rebuttable fact based presumptions "compelled unless determinations' '—language which helps to elucidate their nature.

For example, in relation to impaired driving charges, where the basic fact that the accused occupied the driver's seat is proved, he or she must be presumed to have had care and control of the vehicle, *unless* he or she *establishes* that the seat was occupied for a purpose other than setting the vehicle in motion.[191] Similarly, where someone is charged with being in possession of a thing obtained by the commission of an offence, once the basic fact of possession of a motor vehicle with an obliterated identification number is proved, it must be presumed that the vehicle was obtained by the commission of an offence unless evidence is presented which is capable of raising a reasonable doubt on that issue.[192]

While in both these examples of fact based presumptions a mandatory outcome is compelled by statute in the absence of some countervailing proof, the examples have been thought to be significantly different. In the impaired driving example, the accused must "establish" or "prove" something on the balance of probabilities to rebut the presumption. Because this requires the accused to do something more than merely "raise a reasonable doubt" it has been characterized as a "shift in the *legal* burden of proof".[193] In the example of possessing something obtained by crime, where proving the basic fact is only deemed to be proof in the absence of evidence to the contrary (that is evidence capable of raising a reasonable doubt), this is said to shift only an *evidential* burden and not the *legal* burden which remains on the Crown to prove its case beyond a reasonable doubt.[194]

These general principles about the presumption of innocence, classes of presumptions and the different ways in which and degree to which burdens of proof can be shifted, are understood to operate in Canada in relation to a number of specific rules about elements of offences and "defences". A presentation of the operation of some of them in terms of the categories of definitional elements, justifications, excuses and non-exculpatory public policy defences will assist in determining the

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[191] Criminal Code, s. 241. In *The Queen* v. *Appleby*, [1972] S.C.R. 303, (1971), 3 C.C.C. (2d) 354, it was held that to rebut the presumption, an accused must go beyond merely raising a reasonable doubt to "establish" his or her purpose by a preponderance of evidence or on a balance of probabilities.

[192] Criminal Code, s. 312 containing this presumption and another relating to knowledge of how the goods were obtained.

[193] See *The Queen* v. *Appleby, supra*, footnote 191.

[194] *The Queen* v. *Proudlock*, [1979] 1 S.C.R. 525, (1978), 43 C.C.C. (2d) 321. Some Charter cases prior to *Oakes* in the Supreme Court of Canada held a shifting of evidential burdens would be constitutional while shifting legal burdens was not. See *R.* v. *Carroll* (1983), 4 C.C.C. (3d) 131 (P.E.I.C.A.); *R.* v. *Cook* (1983), 4 C.C.C. (3d) 419 (N.S.C.A.). This approach has recently been found to be inadequate by the Ontario Court of Appeal which favours an analysis based on whether the presumption is mandatory or permissive, regardless of whether the associated reverse onus is a legal or evidential nature. See *Re Boyle and The Queen* (1983), 5 C.C.C. (3d) 193 (Ont. C.A.).

constitutionality of many presumptions, and particularly those which are *not* fact based.

The definitional elements of offences, of course, fall under the operation of the general rule that the Crown must prove all the elements of the offence beyond a reasonable doubt.[195] The polar opposite of this approach would be a system in which the state need only make an accusation that the accused has committed an offence, without proving anything, and the accused must then prove his or her innocence to some required degree of cogency.[196] While Canadians would rightly be shocked if they thought accused persons were required to prove their innocence in Canada in this extreme sense, it is clear that Canadian criminal law has in the past made rather heavy use of fact based presumptions and reverse onus provisions in the proof of some definitional elements of offences. While presumptions have sometimes been used to prove material elements of offence definition, as in the example of possession of objects obtained by the commission of an offence cited above, their primary use has been in relation to proving the mental elements of offence definition. In this regard, the older common law approach, that one was presumed to intend the natural consequences of one's acts, has been reduced to the status of an "inference" on the view that treating such matters in the language of "presumption" ran counter to the presumption of innocence. A jury can be told they may conclude from the proved evidence of the accused's behaviour that he or she *intended* the conduct if they are convinced beyond a reasonable doubt of the correctness of the inference; however, they cannot be told they are entitled to *presume* the intent from proof of the act.[197] Nevertheless, the same kind of result is often obtained through the use of statutory presumptions. Thus, breaking and entering is, in the absence of evidence to the contrary, *proof* of intent to commit an indictable offence on the premises, when this latter presumed fact is a required mental element of offence definition.[198]

Despite these apparent statutory departures from the presumption of innocence in the proof of offence definition elements, Canadian courts have remained faithful to general principles in relation to "failure of proof defences", even where there has been a tendency to label some of these arguments as "excuses". Where an accused raises issues of alibi,[199]

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[195] The "golden thread" from *Woolmington* v. *D.P.P.*, [1935] A.C. 462, at p. 481 (H.L.) is as much cited in Canada as in other Commonwealth jurisdictions.

[196] I have always considered this example to be purely hypothetical. Are there concrete modern examples which carry matters this far?

[197] *R.* v. *Gianotti* (1956), 23 C.R. 259 (Ont. C.A.).

[198] Criminal Code, s. 306(1), (2).

[199] While there is no shift in the burden of proof respecting the alibi defence, there are particular rules of evidence which may apply to it. See Mewett and Manning, *op. cit.*, footnote 13, pp. 352-365.

physical compulsion,[200] accident[201] and even automatism[202] the courts have consistently held that the Crown bears the burden of proving the material elements of the offence beyond a reasonable doubt. Of course, where the accused relies for the "negation" of a material element on factual circumstances which would not necessarily form part of the Crown's case, such as the existence of an alibi or the intervention of a third party, the accused must meet the evidential burden of making this a live issue; that is, presenting defence evidence or pointing to Crown evidence which would be capable, if believed, of raising a reasonable doubt.[203] Similarly, with respect to mental elements, the accused bears no "legal" burden of proof in relation to "failure of proof" defences. This is true not only for mistake of fact,[204] but also for those offences involving a "negation" of a specific intent. Where it is alleged that intoxication, provocation or mental disorder have rendered the accused incapable of forming the specific intent,[205] the accused need only meet an evidential burden and the Crown retains the obligation to prove beyond a reasonable doubt that the accused's apparent intentions were not vitiated by the presence of one of these causes.[206]

Despite the apparently widespread tendency in the United States to label many justifications and excuses "affirmative defences" where the accused bears a burden of proof beyond a simple evidentiary burden,[207] Canadian courts are holding firm to the general principle that the Crown must "prove guilt" beyond a reasonable doubt. Hence an accused must only meet an evidential burden in claiming to be justified on grounds of necessity, self-defence or defence of property, or excused by reason of duress.[208] Many justifications and excuses are applied by the courts without specific reference to the issue of burdens of proof,[209] although there

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[200] J.W.C. Turner, Kenny's Outlines of Criminal Law (19th ed., 1966), p. 66.

[201] Mewett and Manning, *op. cit.*, footnote 13, pp. 376-382.

[202] *R.* v. *Berger* (1975), 27 C.C.C. (2d) 357 (B.C.A.A.), leave to appeal to the Supreme Court of Canada refused.

[203] *United States* v. *Shephard*, [1977] 2 S.C.R. 1067, (1976), 34 C.R.N.S. 207.

[204] *Pappajohn* v. *The Queen*, *supra*, footnote 30.

[205] *Incapacity* to form the specific intent was for many years the universally accepted approach in Canada derived through *D.P.P.* v. *Beard*, *supra*, footnote 148; see *R.* v. *George*, *ibid.* The Ontario Court of Appeal, however, is persuaded that failure to form the intent rather than lack of capacity is the better approach. See *R.* v. *Otis* (1978), 39 C.C.C. (2d) 304 (Ont. C.A.).

[206] See the cases cited, *supra*, footnote 154.

[207] See B.D. Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases (1977), 86 Yale L.J. 1299.

[208] Necessity: *Perka* v. *The Queen*, *supra*, footnote 33; Self-Defence: *R.* v. *Bogue* (1976), 30 C.C.C. (2d) 403 (Ont. C.A.); Defence of Property: *R.* v. *Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.); Duress: *R.* v. *Carker* (No. 2), [1966] 4 C.C.C. 212 (B.C.C.A.).

[209] For example, in cases of arrest by police officers, the usual dispute is whether or not there were grounds for arrest (for example, a question of law) and not a dispute

is no reason to think that the general requirement for the Crown to prove all elements of guilt beyond a reasonable doubt is not the guiding principle. Indeed, it is commonly stated that the "defence" of insanity, at common law[210] and as statutorily restated in Canada in section 16 of the Criminal Code, is the only "general defence" in relation to which there is a reversal of the burden of proof.[211]

Despite the uniformity of Canadian jurisprudence in keeping the legal burden of proof away from the accused on general justifications and excuses, there are a handful of statutory exceptions which are of considerable conceptual interest and are beginning to cause real practical difficulties. A number of heterogeneous offences scattered throughout the Criminal Code are drafted so as to read: "Everyone who, without legal justification or excuse, the proof of which lies upon him . . . does . . . [x] . . . is guilty of an offence".[212] Another group makes the conduct an offence when "without legal justification or excuse" but does not shift a burden of proof.[213] This formulation is varied in relation to a different set of offences where conduct is criminal where it is "without *lawful* excuse"[214] and still others where it is "without *reasonable* excuse",[215] often with the burden of proof placed on the accused. This technique is also used to criminalize certain conduct when done "without lawful authority", sometimes with a reversal of the burden of proof and other times without.[216] While these examples reverse burdens with reference to the particular defences named in the section of the Criminal Code which creates the offence itself, there is a blanket mechanism in section

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about what the police officer did on the facts to claim the justification. In such cases where the facts are "obvious", issues about the burden of proof are simply ignored as irrelevant in practical terms.

[210] *M'Naghten's Case, supra,* footnote 135.

[211] Early drafts of the proposed Canada Evidence Act attempted to use the distinction between general defences and others for the purpose of allocating burdens of proof in criminal cases, but this has been abandoned in the most recent drafts. See section 12 of the proposed draft of February 23, 1987.

[212] See, for example, sections 308, 386, 408, 409, 410, 416 and 417.

[213] See, for example, sections 159(2), 262.

[214] See, for example, sections 58, 78, 79, 80, 84, 102, 106.5, 115, 116, 133, 170, 173, 178, 185, 193, 197, 201 (repealed), 239, 287.1, 307, 309, 330, 334, 401 and 412. It is apparent from the breadth of circumstances in which these "excuses" might be invoked in relation to this plethora of crimes that the statutory drafters were probably not employing the word "excuse" in the disability-linked sense used in this paper. One can envision many circumstances which might be thought of as "justifications" which ought to exonerate people accused of these offences.

[215] See, for example, sections 70, 118, 238(5), 402 and 472. Here, too, the drafters probably intended to include under the rubric "excuse" many arguments which might properly be analyzed as "justifications" according to the principles enunciated in this paper.

[216] See, for example, sections 46, 71, 76, 247, 249, 258, 327, 332, 334, 352, 363, 373, 375, 377, 381 and 382.

730(2) of the Criminal Code for summary conviction offences which reads:

> (2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception does not operate in favour of the defendant, whether or not it is set out in the information.

All these provisions demand some sort of analysis of how to distinguish justifications from excuses, and these from the other "defence labels" used in drafting. Moreover, since some of these provisions reverse the burden of proof in relation to labelled defences, the issue arises as how to resolve disputes over burdens of proof where no explicit statutory reversal is given. Finally, as will be made apparent below, the constitutionality of the provisions reversing burdens of proof can be challenged.

Before addressing these issues analytically, however, it may be helpful to complete the descriptive process by giving a general picture of burden of proof issues in relation to non-exculpatory public policy defences. As might be expected, there is not complete uniformity of approach, but there is general consistency. Where arguments here classified as non-exculpatory public policy defences based on policies of substantive fairness have been incorrectly analyzed as a negation of the definitional elements of offences, as with *de minimis* and prank, it is not surprising that there has been no attempt to shift a burden of proof to an accused.[217] However, other such defences in the "substantive" category have done so. The leading case on the defence of abandonment in cases of secondary liability uses language which might be thought to shift a burden on this issue to the accused on a balance of probabilities.[218] The recent authorities on state induced error of law, while labelling the defence an excuse, contemplate the reversal of the burden of proof to the accused on the balance of probabilities in a manner consistent with many other non-exculpatory public policy defences.[219] The trend in relation to procedural defences is almost uniformly in the direction of putting the burden of proving the defence on the accused. This holds true for special pleas of *autre fois acquit* and *autre fois convict*, for *res judicata* and issue estoppel, for entrapment, for abuse of process, and for non-exculpatory public policy defences based on a breach of the Charter of Rights and Freedoms.[220]

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[217] See authorities cited *supra*, footnotes 50 and 51.

[218] *R.* v. *Whitehouse* (1940), 55 B.C.R. 420, 75 C.C.C. 65 (B.C.C.A.).

[219] *R.* v. *Cancoil Thermal Corporation and Parkinson*, *supra*, footnote 121.

[220] *Autre fois convict: R.* v. *Suleyman Sanver* (1973), 12 C.C.C. (2d) 105 (N.B.C.A.); *Res Judicata: R.* v. *Feeley, McDermott and Wright*, [1963] 1 C.C.C. 254 (Ont. C.A.); Issue Estoppel: *Gushue* v. *The Queen*, [1980] 1 S.C.R. 798, (1979), 50 C.C.C. (2d) 417; Entrapment: *R.* v. *Mack*, *supra*, footnote 59; Abuse of Process: *R.* v. *Jewitt*, *supra*, footnote 53; Non-Exculpatory Public Offences: *R.* v. *Hamill* (1984), 13 D.L.R. (4th) 275 (B.C.C.A.) (appeal dismissed, *supra*, footnote 114).

In summary one can say that as a general rule Canadian legislation and jurisprudence at the core of criminal law reflect a determination to ensure that the Crown bears the burden of proving beyond a reasonable doubt all facts in issue regarding definitional elements of offences, justifications, and excuses. One may observe also a general tendency to shift the burden of proof to the accused to prove on a balance of probabilities the facts which would establish a non-exculpatory public policy defence, and to do so as well in relation to certain exceptional definitional elements, excuses and justifications. This general picture is entirely in accordance with a proper operation of the relevant Charter provisions. Charter section 11(d) guarantees the right of an accused to be presumed innocent until proven *guilty*. The key concept for analysis is the nature of criminal *guilt*.[221] Parliament sets out definitional elements of offences, it provides general justifications to protect socially important interests and it allows for excuses where disabilities make it morally inappropriate to impose criminal sanctions for otherwise criminal conduct. All these matters go to the accused's individual responsibility for the alleged criminal conduct and are properly elements of criminal *guilt* to be procedurally protected by Charter section 1. Any exceptions must be justified by virtue of Charter section 1. On the other hand, non-exculpatory public policy defences block a conviction for reasons of substantive or procedural fairness unrelated to definitional elements, justifications or excuse —that is, unrelated to *guilt* in the sense of the accused's individual responsibility for the conduct forming the basis of the offence. Thus, non-exculpatory public policy defences are not properly the objects for constitutional protection under Charter section 11(d) although they might form elements of the principles of fundamental justice in Charter section 7 as was discussed earlier.

Post-Charter litigation has addressed these structural issues only tangentially. The leading decision from the Supreme Court of Canada on the constitutionality of burdens of proof is that of *R.* v. *Oakes*.[222] The case involved a challenge to a fact based presumption which shifted to

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[221] The most satisfying discussion of the analysis of the meaning of *guilt* for Charter section 11(d) is to be found in T.A. Cromwell, Proving Guilt: The Presumption of Innocence and the Canadian Charter of Rights and Freedoms, in W. Charles, T.A. Cromwell, A.W. Mackay and K. Jobson (eds.), The Charter of Rights and Evidence Law (forthcoming).

[222] *Supra*, footnote 8. As this article was going to press, the Supreme Court of Canada released its judgment in *Holmes* v. *The Queen* (unreported, May 26, 1988). The majority of the court held that Criminal Code section 309(1) making it an offence for a person "without lawful excuse, the proof of which lies upon him" to possess housebreaking instruments, does not contravene section 11(d) of the Charter. While some *obiter dicta* in the majority judgment clearly contradicts the analysis put forward in this article on the constitutionality of shifting burdens of proof in relation to "excuses", it is submitted that the reasoning of Dickson C.J.C., concurring in the result, is to be preferred in relation to the analysis made here.

the accused a burden of proof on a balance of probabilities on the key definitional element of the offence of possession of a narcotic for the purpose of trafficking.[223] The Narcotic Control Act set up a complex two stage trial whereby once the court had found the accused to be in possession of a narcotic, he or she was presumed to be in possession for the purpose of trafficking unless he or she established the absence of any intent to traffic. The court found that the provision violated the presumption of innocence in Charter section 11(d), and while it was directed toward an important legislative objective, the means used were disproportionate to the end sought so that the scheme was not a reasonable limit demonstrably justified under Charter section 1. Although the case established important methodological principles and demonstrated that the shift of a legal burden to an accused through a fact based presumption on an important definitional element of an offence may be unconstitutional, it leaves many questions unanswered. In particular, it does not provide clear guidelines for the analysis of legal rules which shift burdens by means other than fact based presumptions. Nor does it address the meaning of "guilt" in Charter section 11(d).

Recent litigation over one of the exceptional Criminal Code provisions shifting a burden of proof in relation to "justifications and excuses" demonstrates both the importance and limitations of *Oakes* as a precedent in resolving these difficulties. In *R.* v. *Burge*[224] the British Columbia Court of Appeal was required to address the constitutionality of sections 408(b) and 410(a) of the Criminal Code which criminalize the possession and the uttering of counterfeit money, respectively, where the accused does these things "without lawful justification or excuse, the proof of which lies upon him". In what can only be described as an extraordinary decision,[225] the court finds (a) that *knowledge* of the counterfeit nature of the money is not a definitional element of the offence requiring proof beyond a reasonable doubt by the Crown, but rather a matter of "excuse", (b) that the accused must prove on a balance of probabilities that he did not know the money was counterfeit in accordance with the statutory requirement to prove "lawful justification or excuse", and (c) that the statutory shift of the burden of proof on this issue is constitutional. Using the structure of analysis presented in this paper, it can be argued persuasively that the court is doctrinally incorrect on all three points.

The Supreme Court of Canada has consistently held that for true crimes, the Crown must establish a mental element "namely, that the

[223] Narcotic Control Act, R.S.C. 1970, c. N-1, s. 4 creates the offence; section 8 creates the reverse onus in a two-step trial.

[224] (1986), 55 C.R. (3d) 131 (B.C.C.A.).

[225] In his annotation of the case at 55 C.R. (3d) 131, T.A. Cromwell goes so far as to say: "One would look for a long time to find a more superficial treatment of the right to be presumed innocent than that given it by the majority in *Burge*."

accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them''.[226] Moreover, there is no allegation that *Burge* suffered any disability whether physical, mental or situational in which would ground a proper analysis of a lack of knowledge based on an ''excuse'' as understood in this article. But perhaps the most important aspect of the British Columbia Court of Appeal's mistreatment of the statute in this case is its demonstration of the capricious nature of what has been called the ''inside-outside conundrum''.[227] The court assumes that by labelling the knowledge issues a matter of excuse ''external'' to the definition of the offence rather than an ''internal'' element, it can legitimate reversing the burden of proof and even clothe it with constitutional respectability. As Jeffries and Stephan have argued:[228]

> . . . the distinction [between elements of an offence and defences] is essentially arbitrary. ''Crimes'' and ''defences'' both set forth substantive conditions of liability. The issue raised in both categories of doctrine must be resolved against the defendant in order to convict. . . [T]here is no substantive difference between a penal code that states the doctrines of murder and self-defense in separate provisions and one that redefines murder as the killing of a human being done with malice aforethought and not in self-defense. There are, to be sure, issues of statutory economy at stake. . . But this matter of convenience does not itself furnish any functional basis for distinguishing the applicability of a constitutional doctrine regarding burden of proof.

The essential point relevant to constitutional analysis in *Burge* is that while the issue of ''knowledge'' in sections 408(b) and 410(a) of the Criminal Code should be seen properly as an element of the offence, it is an issue going to the *guilt* of the accused whether called a definitional element or an excuse. As such, a reversal of the burden of proof in relation to it falls afoul of the presumption of innocence in Charter section 11(d) and ought to be justified only if the Crown demonstrates its compliance with Charter section 1.[229]

It is submitted that while this brief analysis of the problems in *Burge* is doctrinally correct and consistent with the Supreme Court of Canada decision in *Oakes*, the issues are not specifically dealt with in that decision. *Oakes* established a two step process for analyzing Charter breaches and section 1 justifications, but did not deal with shifting burdens of proof on other than fact based presumptions. The statutory

[226] *The Queen* v. *Sault Ste. Marie, supra,* footnote 22, at pp. 1309 (S.C.R.), 40 (C.R.), per Dickson J. But *cf.* the discussion of *Vaillancourt* in the text, *supra,* at footnotes 94-99.

[227] This is the label used by Cromwell, in Charles *et al., op. cit.*, footnote 221.

[228] T.C. Jeffries and P.B. Stephan, Defenses, Presumptions and Burden of Proof in Criminal Law (1979), 88 Yale L.J. 1325, at pp. 1331-1332.

[229] For a discussion of this general extension of the *Oakes* methodology, see: Cromwell and MacKay, *loc. cit.*, footnote 86. With respect, it is submitted that the *obiter dicta* of the majority of the Supreme Court of Canada in *Holmes* v. *The Queen, supra,* footnote 222, suffers from some of the same weaknesses as the judgment in *Burge*.

provisions which shift burdens of proof for the insanity defence and certain other "justifications and excuses" have been the subject of constitutional challenge.[230] However, these decisions by and large pre-date the *Oakes* methodology on burdens, and present no coherent understanding of either the "inside-outside conundrum" or the general nature of *guilt* in Charter section 11(d).[231] For example, the requirement that an accused who is relying on the defence of insanity must prove the defence on a balance of probabilities has been held to be constitutionally valid.[232] While the outcome may or may not be a desirable one, the Manitoba Court of Appeal held that the reverse onus merely codifies a common law presumption which is a part of the presumption of innocence.[233] This denies the idea that the insanity excuse relates to *guilt* in a fundamental sense, and that any reverse onus in relation to it thus contravenes section 11(d) and can be saved only by the operation of section 1.

As litigation proceeds in the years to come, it is clear that some statutory shifts in burdens of proof will be found constitutional while others will not. The general thesis advanced here is that shifting legal burdens on definitional elements, justifications and excuses will contravene section 11(d) and will be constitutional only when demonstrably justifiable under section 1. On the other hand, a reverse onus on a non-exculpatory public policy defence will be constitutional unless found contrary to section 7 because it, by definition, does not involve matters of "guilt" for purposes of section 11(d). Analytical clarity in resolving any of these issues requires an understanding of the distinctions among the basic concepts by which one structures the general part of criminal law.

## VII. *Conclusions of Relevance to Criminal Law Reform*

If this discussion of the constitutionalization of the general part in Canadian criminal law has any validity, there are a number of broad conclu-

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[230] See *R.* v. *Godfrey* (1984), 11 C.C.C. (3d) 233 (Man. C.A.)—insanity; *R.* v. *Law* (September 3, 1982), 9 W.C.B. 12 (Alta. Q.B.)—Criminal Code section 102(4); *R.* v. *Conrad* (1983), 8 C.C.C. (3d) 482 (N.S.C.A.)—Criminal Code section 106.7; *R.* v. *Stagg* (1982), 2 C.R.R. 380 (Ont. Prov. Ct.)—Criminal Code section 133(1)(b); *R.* v. *Francis* (1982), 17 M.V.R. 177 (Alta. Prov. Ct.)—Criminal Code section 233(3), now 236(2); *R.* v. *Whyte* (1983), 10 C.C.C. (3d) 277 (B.C.C.A.)—Criminal Code section 237(1)(a); *R.* v. *Leclerc* (1982), 1 C.C.C. (3d) 422 (Que. S.C.)—Criminal Code sections 306(2)(a), 307(1) and 308(1)(b); *R.* v. *Holmes* (1983), 4 C.C.C. (3d) 440 (Ont. C.A.)—Criminal Code section 309(1); *Re Boyle and The Queen, supra*, footnote 194—Criminal Code section 312; *R.* v. *Bunka* (1984), 12 C.C.C. (3d) 437 (Sask. Q.B.)—Criminal Code section 320.

[231] These difficulties are particularly clear in *R.* v. *Holmes, supra*, footnote 230, dealing with Criminal Code section 309(1) where a recognition of the artificiality of the "inside-outside" distinction would have improved the reasoning significantly.

[232] See *R.* v. *Godfrey, supra*, footnote 230.

[233] *Ibid.*, at pp. 244-245.

sions which may be drawn in relation to proposals for criminal law reform. While the discussion has very much been confined to the Canadian constitution and Canadian criminal law doctrine, these conclusions may be of interest in any jurisdiction where criminal law doctrine is in a less than perfect state and where courts have authority to review the content of legislation by reference to constitutional principles or binding international conventions constraining legislative action. The implications of constitutionalization of the general part for criminal law reform concern both the need for the reform itself, and the substance of the reform to be carried out.

The constitutional litigation in Canada to date impinging upon the general principles of criminal law has demonstrated that there is significant confusion about the basic structure of the general part and how to relate general principles to particular statutory provisions. The courts now face the additional pressure of having to relate criminal law doctrines to constitutional principles at a high level of abstraction and yet reach just results in each individual case. The need for reform of the criminal law is heightened by this situation. The Canadian Criminal Code is a list of offences with penalties, accompanied by rules on criminal procedure. It does not have a coherent outline of the general principles of criminal liability. While it does provide statutory restatements of some "defences" there is no mention, for example, of general *mens rea* requirements. Small wonder that the courts are achieving very uneven results when constitutional rights begin to intersect with criminal law doctrines. A reform of the criminal law presenting the general part in a holistic fashion based on an understanding of definitional elements, justifications, excuses and non-exculpatory public policy defences would go a considerable distance toward easing the burden on the courts, thereby providing more certainty in the administration of justice. This in turn might enhance the likelihood of justice being done in individual cases, and should result in a decrease in needless and expensive constitutional litigation.

The constitutionalization of the general part, of course, has an impact on the substantive content of any reform. First, no reform can ever purport to be a complete codification in the sense of an authoritative single source of rules from which solutions in individual cases *must* be deduced. A code may repeal the previously existing common law and statutes to replace them with comprehensive new law, but constitutional principles may always alter the legislative solution if a constitutional breach can be made out. Secondly, there is now a constitutional "minimum content" in relation to definitional elements, justifications, excuses and non-exculpatory public policy defences. While it is doubtful that any modern law reform body would advocate proposals which are obviously unconstitutional, the policy options underlying law reform proposals must be presented to the public in the light of constitutional stan-

dards. The vagaries of the political process might otherwise produce unconstitutional outcomes, particularly if comprehensive law reform proposals receive piecemeal amendment during parliamentary debate.[234] Third, drafting format must be elaborated with a weather-eye to constitutional litigation. For example, drafting offences in the special part with specific defences built-in must be done with an awareness of the constitutional dimensions of "the inside-outside conundrum".

The introduction to this article held out the prospect of an evaluation of the extent to which basic principles of criminal law *are* or *ought to be* elevated to constitutional status. It is hoped that the foregoing discussion has demonstrated the extent to which the constitutionalization of aspects of the general part is now an established fact of the Canadian criminal justice system. The discussion may have presented, as well, a useful framework for analysis of the extent to which constitutionalization may be pushed. However, it should also be evident from the matters canvassed here that the degree to which this process *ought* to occur is a question which admits of no simple answer. The merits of constitutionalization must be argued carefully in relation to each and every definitional element, justification, excuse, or non-exculpatory defence established by Parliament or the common law. Creating the balance between those situations which are to be governed by legislative policy alone, and those which are to be given constitutional reinforcement will be an on-going process. All one can say as a general proposition is that the process has well and truly begun.

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[234] The chaos caused by the piecemeal adoption of the reform proposals from the Quebec Civil Code Revision Office are an object lesson in this regard. See E. Caparros, Overview of an Uncompleted Journey: From the Civil Code of Lower Canada to the Civil Code of Quebec, in R.A. Landry and E. Caparros (eds.), Essays on the Civil Codes of Quebec and St. Lucia (1984), p. 15.