5. Parties to offences

a. *Overview* - set out in the *Criminal Code*, in particular in ss. 21 and 22. Through operation of these sections, parties to an offence are guilty of the same offences.

b. *Types of parties*

i. *Principal offenders*

1. *Overview* - includes a sole perpetrator, or co-perpetrator; persons who directly involved in the *actus reus* of a given offence. (s. 21(1)(a))

a. For instance, not aiding, abetting, common unlawful purpose where persons engage in a mutual gunfight or a drag race; such offenders are considered primary offenders where death results via (s. 229(c)). {S.(R.J.)}

2. *Considerations in homicide* - via s. 229(c), can be considered a primary offender if, (1) for an unlawful object one (2) does any thing (3) he knew to be likely to cause the death of a human being (3) and caused the death of a human being. {S.(R.J.)} (see *actus reus* -> causation)

a. For instance, engaged in a gunfight to kill a rival gang member, which he knew was likely to kill persons, and thereby caused death (significant contributing cause), principal murder can be made out. {S.(R.J.)}

ii. Innocent agents

1. *Overview* - where accused uses an innocent agent to commit the *actus reus*, it could be said that the offence was counselled, procured; but nevertheless, will be charged as primary in such circumstances, via s. 21(1)(a) and the *Doctrine of Innocent Agency.* {Toma}

a. For instance, where accused hides drugs in innocent agent's suitcase, who then brings suitcase into Canada; accused is the importer by use of innocent agent, and liable as primary offender.

iii.Aiders

1. *Overview* - one who acts or omits to do anything for the purpose of aiding another person to commit an offence. Includes "doing anything" - very broad. {Greyeyes} (s. 21(1)(b))

a. For instance, providing equipment, acting as a lookout, driving principal offender to the crime site, blocking victim's escape route, all of these would be considered aiding.

b. For instance, where jailer does not intervene to prevent assault of an inmate by other police officers, this violates legal duty to protect, and therefore is aiding that assault. {Nixon}

c. For instance, aiding dangerous driving where one knowingly allows his car to be used for that exact criminal purpose. {Kulbacki}

d. For instance, A has no legal duty to assist kidnapped person being held at the house which A shares with B; therefore, did not aid or abet by omission in failing to intervene. {Laurencelle}

e. For instance, mere *presence* is not sufficient unless there is a further act or a duty to act. {Dunlop} For instance,

properly acquitted where asleep in car while assault occurred outside. {Cosgrove}

f. For instance, there is no aiding or abetting where persons engage in a mutual gunfight or in a drag race; such offenders are properly considered primary offenders. {S.(R.J.)}

2. *Receiver of aid* - broadly defined ("another person"); therefore, even if the person who receives the aid is not the principle offender, s. 21(1)(b) still made out.

a. For instance, where A drives B to a bank so that B can assist C in commission of robbery, this is sufficient to render A an "aider" for the purposes of this section.

3. *Omissions* - while the omission portion of s. 21(1)(b) does not specifically require legal duty to act, this is implied based on general principle of criminal law. {Dunlop}

a. For instance, there is no legal duty to intervene in a crime in progress or report a crime, absent a duty to protect the victim of that crime (eg. s. 215). {Dunlop}

4. *Causality - actus reus* does not require that impugned act *actually* assist in offence commission; *mens rea* made out merely if act was for this purpose (via direct or indirect intent); but, there must be some connection (not causal) between abetting and commission. {Dooley}

a. For instance, aid does not have to have been indispensable; does not require that *but for* the secondary's aid, that the crime would not have been committed, for instance. {Harrer}

b. For instance, counterexample, aiding and abetting should have *some* connection to the commission of the offence through facilitation, etc. Otherwise, would punish inchoate assistance. {Tally, US}

5. *Mens rea* - requires that aid must have been "for the purpose" of commission; ergo, established through intention (d or id); recklessness, knowledge, wilful blindness insufficient. {Hibbert}

a. For instance, where one aided either directly to assist, or was substantially certain that act would assist but persisted anyways, the *mens rea* for aiding is made out. {Hibbert}

b. For instance, counterexample, *mens rea* for aiding has a *knowledge* component (eg. that principal intends to commit crime); wilful blindness sufficient *for this portion of mens rea*. {Briscoe-golf}

c. For instance, counterexample, ONCA held that knowledge insufficient, must have *intended* assistance; however, this ignores indirect intent as a means for making out "purpose" in *mens rea*. {Fergie}

iv.Abettors

1. *Overview* - includes encouraging, instigating, promoting or procuring the crime to be committed; overlap with counselling and with aiding. {Greyeyes} (s. 21(1)(c))

a. For instance, offering words of encouragement to an offender committing an assault on another person, or remaining even where aware that mere presence will urge on the assaulter; each constitutes abetting. {Dunlop}

b. For instance, shouting and laughing as victim is being sexually assaulted by other persons in a small room constitutes abetting of that sexual assault. {Black}

c. For instance, A has no legal duty to assist kidnapped person being held at the house which A shares with B; therefore, did not aid or abet by omission in failing to intervene. {Laurencelle}

d. For instance, there is no aiding or abetting where persons engage in a mutual gunfight or in a drag race; such

offenders are properly considered primary offenders. {S.(R.J.)}

2. *Receiver of abetting* - broadly defined ("any person"); therefore, even if the person who receives the aid is not the principle offender, s. 21(1)(c) still made out.

3. *Omissions* - while the words of s. 21(1)(c) do not specifically allow for abetting by omissions, presumably this *can* occur by omission, where there is a legal duty. {Palombi}

    a. For instance, where a mother did not protect her child from assault by her partner, this could constitute abetting of the offence, given appropriate *mens rea*. {Palombi}

4. *Causality - actus reus* does not require that the abetting act *actually* encourage, instigate, etc. commission of the offence; *mens rea* made out if act was *for* this purpose; {Roach} but, there must be some *connection* (not causal) between abetting and commission. {Dooley}

    a. For instance, abetting does not have to have been indispensable; does not require that *but for* the secondary's abetting, that the crime would not have been committed, for instance. {Harrer}

    b. For instance, counterexample, aiding and abetting should have *some* connection to the commission of the offence through facilitation, etc. Otherwise, would punish inchoate assistance. {Tally, US}

5. *Mens rea* - requires that abetting must have been "for the purpose" of commission; therefore, established through intention; recklessness, knowledge, wilful blindness insufficient. {Roach}

    a. For instance, counterexample, *mens rea* for abetting has a *knowledge* component (eg. that principal intends to commit crime); wilful blindness sufficient *for this portion of mens rea*. {Briscoe-golf}

v. Parties via common unlawful purpose

1. *Overview* - common intention by persons to carry out an unlawful purpose and assist therein; where one such person commits an offence, every person who knew/ought to know that this was a probable consequence of common purpose is a party to that offence. (s. 21(2))

    a. For instance, where three persons agree to commit B&E, one acts as driver, the driver is a party to ancillary offence of possession of B&E tools, knew or ought to have known re: probable consequence. {Zanini}

    b. For instance, there is no common unlawful purpose where persons engage in a mutual gunfight or in a drag race; such offenders are properly considered primary offenders. {S.(R.J.)}

    c. For instance, where there is a common unlawful purpose, all parties to that purpose are also parties to each member's ancillary offences, where these were a "probable consequence." {Zannini}

2. *Mens rea* - while the words "intention" and "unlawful purpose" are used, not restricted to direct intent, but also includes indirect intent; unlawful object does not have to occur. {Hibbert}

3. *Constitutional inconsistency* - "ought to have known" allows for conviction via objective *mens rea* for crimes which require subjective *mens rea*; SCC held that therefore, "ought to have known" not sufficient for stigmatic offences. (see *mens rea* -> constitutional considerations) {Logan}

    a. For instance, where two persons have a common intention to commit robbery, and one offender commits murder; if the other only ought to have known, but did not know that murder was a probable consequence of robbery, cannot be convicted via s. 21(2). {Logan}

4. *Withdrawal* - similar to proving causation portion of *actus reus* w/ multiple accused, parties can withdraw from common unlawful purposes through clear, unequivocal communication. Following withdrawal, no liability for *subsequent* offences. {P.(K.K.)}

    a. For instance, not sufficient to merely have a "change of mind," but must take clear steps to communicate this to the other parties; must also be timely. {P.(K.K.)}

vi. Counsellors to committed offence

1. *Overview* – where one procures, solicits, induces, or incites a person to commit an offence, and that person is afterwards a party to *that offence*, the counsellor is also a party even if the offence was committed in a "different way." (s. 22(1)) {Hamilton}

2. *Definition* - advising, recommending, instigating, persuading, encouraging, hiring/arranging for third party to commit, entreat, urge, stimulate re: *the very offence* ultimately committed.

3. *Receiver of counselling* - the person counselled can be *any type of party* to the counselled offence - for instance, principal offender, or even a counsellor (eg. counselling to counsel).

4. *Mens rea* - intention sufficient, as is "high recklessness" (unlike aiding, etc.) - involves *substantial* risk that offence *likely* to be committed. {Hamilton}

5. *Causality* - must be bare minimum causal connection; if there was "in fact no effect in inducing the actual perpetration," then causation for counselling not made out; similar to aiding and abetting in this manner. {McNulty}

6. *Withdrawal* – parties can withdraw counselling through clear, unequivocal communication; this is effectively a defence of abandonment. {Lacoursiere}

vii. Counsellors to other committed offences

1. *Overview* – counsellors liable for offences other than that which was counselled, if counsellor knew/ought to have known were likely to be committed as a result of counselling. (s. 22(2))

2. *Definition* - advising, recommending, instigating, persuading, encouraging, hiring/arranging for third party to commit, entreat, urge, stimulate re: *the very offence* ultimately committed.

3. *Receiver of counselling* - the person counselled can be *any type of party* to the counselled offence - for instance, principal offender, or even a counsellor (eg. counselling to counsel).

4. *Mens rea* - intention sufficient, as is "high recklessness" (unlike aiding, etc.) - involves *substantial* risk that offence *likely* to be committed. {Hamilton}

5. *Causality* - must be bare minimum causal connection; if there was "in fact no effect in inducing the actual perpetration," then causation for counselling not made out; similar to aiding and abetting in this manner. {McNulty}

6. *Withdrawal* – parties can withdraw counselling through clear, unequivocal communication; this is effectively a defence of abandonment. {Lacoursiere}

7. *Constitutional inconsistency* - "ought to have known" allows for conviction via objective *mens rea* for crimes which require subjective *mens rea*; SCC held that therefore, "ought to have known" not sufficient for stigmatic offences. (see *mens rea* -> constitutional considerations) {Logan}

    a. For instance, where accused has counselled other to commit robbery, and one offender commits murder; if the other only ought to have known, but did not know that murder was a probable consequence of robbery, cannot be convicted via s. 22(2). {Logan}

viii. Counsellors to uncommitted offence

1. *Overview* - where counsellor incites other to commit an offence, and the other does not ultimately commit the offence counselled. (s. 464)

    a. For instance, where newspaper counselled readers to grow marijuana, and there is no evidence that advice followed, guilty of counselling uncommitted offence of cultivating marijuana under s. 464. {Georgia Straight}

    b. For instance, even if the counselled person never formed a real intent to perform the counselled offence, s. 464 nevertheless applies to the counsellor. {Walia}

2. *Initiation unnecessary* - may counsel an offence which one did not initiate; for instance, if B brings A an idea for a scheme, which A then advises/incites, A's acts are counselling. {Root}

3. *Withdrawal* - parties probably cannot withdraw from inchoate offence of counselling an uncommitted offence; offence complete once counselling has occurred. {Walia}

4. *Penalty* - same as if the accused attempted to commit the offence which was unsuccessfully counselled, so effectively inchoate penalty (s. 463).

    a. For instance, if offence punishable by life, 14 years for inchoate; other inchoate indictables, half of the max punishment; summaries, $5000 fine or six months for inchoate.

ix. Accessories after the fact

1. *Overview* - separate offence, in which the aiding party did *not* assist with the underlying offence, but rather provided assistance afterwards. (s. 23)

2. *Requirements* - must *know* that person has been a party to the offence, receive, comfort, or assist (wide) that person for the purpose of enabling that person to escape, eg. avoid detection, apprehension, or lawful custody. (s. 23(1)) {Young}

    a. For instance, accused drove 250 miles to warn principal offender that police were on their way to arrest him - this is assisting escape. {Young}

    b. For instance, falsely supporting alibi of the principal offender is also sufficient to make out s. 23(1) where this is done for the purposes of evading apprehension. {French}

3. *Penalty* - same as if the accused attempted to commit the offence which was aided *ex post facto*, so effectively inchoate penalty (s. 463).

    a. For instance, if offence punishable by life, 14 years for inchoate; other inchoate indictables, half of the max punishment; summaries, $5000 fine or six months for inchoate.

4. *Omissions* - while the words of s. 23(1) do not specifically allow for *ex post facto* assistance by omissions, presumably this *can* occur by omission, where there is a legal duty.

5. *Mens rea* - (1) know or be willfully blind to the fact that the person receiving aid is party to a specific offence; (2) assistance must be *for the purpose* of enabling escape (direct or indirect intent) - despite old case law to contrary. Recklessness insufficient for either. {Zundel}

    a. For instance, aware that person is a party to the offence where seeing news reports linking person to homicides, or where friend says he is in "trouble for murder." {Duong}

6. *Offence other than what accused believes* - question arises where accused believes offence committed by person receiving aid is different than that actually committed; consider transferred intent (see relation between elements -> transferred intent, below). {Ladue}

7. *Evidence* - re: conviction of principal offender offence is admissible against accused re: accessory after the fact; absent evidence to contrary proves that offence was committed. (s. 657.2(2))

c. *See also: vicarious and corporate liability, below.*

d. *Procedural considerations re: parties to offences*

i. *Conviction of primary offender unnecessary* - secondary parties may be convicted even if the primary offender is not (s. 23.1); overrules common law position to the contrary.

    1. For instance, principal offender might be dead, or might have standing to exclude certain evidence via the *Charter* which is nevertheless admissible at trials for secondaries. Acquittal of principal does not preclude s. 23.1. {S.(F.J.)}

    2. For instance, accessories after the fact can be convicted even where charges against the principal offender have been stayed. {Camponi}

ii. *Specification of mode of liability unnecessary* - indictment does not need to specify the mode of participation, though the Crown must prove liability through one mode BRD to convict. {Harder}

    1. For instance, jury does not need to specify through which mode they have found the accused guilty; if six think aider and six think primary, then unanimous that accused is a party, and conviction must follow. {Thatcher}

    2. For instance, if there is an AOR to multiple possible classifications of party, this is a matter of fact to be left to the jury (though whether there is an AOR is a matter of law). {Mena}

iii. *Different crimes may be applicable to primary / secondary offenders* - where the *mens rea* of the offences is different, aiders and abettors may be convicted of different offences.

    1. For instance, where secondary agrees to help primary in assault, and the primary intentionally murders victim instead, primary is guilty of murder; secondary had no intent to assist murder; ergo, guilty of lesser included due to lack of *mens rea*. {Hartford}

    2. For instance, where secondary and primary agree to rob victim, carry out this task; primary kills victim, secondary does not assist with this; each guilty of robbery, primary guilty of murder, secondary not guilty of murder unless aware that murder was a *probable consequence of the robbery*. {Kirkness}

iv. *Excepted offences*

1. *Protected persons* - laws directed at certain protected persons will not draw aiding/abetting offences in certain circumstances.

    a. For instance, prostitutes are not parties via aiding or abetting to a pimp's offence of living off the avails of prostitution under s. 212(1)(j). {Murphy}

    b. For instance, young persons who encourage sexual contact with adults are not guilty of aiding or abetting the adult's sexual offence against that young person under s. 150.1-s. 152.

2. *Buyer and seller* – legislation deals with buyers and sellers differentially, although they act by mutual agreement; sellers are punished to greater degree in narcotics, for instance. {Poitras}

    a. For instance, buyer of illegal drugs may be guilty of possession, but is *not* guilty of aiding and abetting the seller's offence of trafficking. {Greyeyes}

6. Actus reus

a. *Overview* - essential element for criminal liability, though not codified. Prohibited conduct; a voluntary act or omission in (a) prohibited circumstances or (b) which causes a prohibited outcome.

b. Voluntariness

i. *Overview* - acts must be physically voluntary; they are involuntary where they are done *by the muscles* but without *any control of the mind*. Person must have chosen to act or not to act. {Bratty}

1. For instance, that an act must be physically voluntary in order to draw criminal liability was recognized as a PFJ in *Ruzic.*

ii. *Presumption* - per the SCC in *Stone*, acts are presumed voluntary; implies shifted burden, though this was not upheld in *Fontaine* or *Cinous*. As element of offence rather than affirmative defence, conscious involuntariness likely has to be proven BRD by the Crown.

iii. *Moral involuntariness* - voluntariness for the purpose of the actus reus deals with physical voluntariness, eg. whether the persons physically chose to act; however, moral involuntariness may vitiate culpability through operation of the defence of *duress* (see defences, below).

iv. *Conscious involuntariness* - acts performed in a state of unconsciousness or altered consciousness are not culpable through defence of *automatism* (see defences, below); different from where one is conscious, but did not choose to act or fail to act.

1. For instance, spasms, twitches, reflexes, mechanical failures of vehicles, tripping, action compelled by physical intervention of another, impossibility to fulfill duty are instances of conscious yet involuntary activities. Remember *Larsonneur* re: brought to England against will (though that case was decided wrongly).

2. For instance, where one hits another person s a result of being stung by a swarm of bees, involuntary; {Wolfe} However, consider *Ryan*, counterexample, where robbing a gas station, accidentally pulled trigger: he *voluntarily* put himself in situation. {Ryan}

3. For instance, psychomotor epilepsy (NCRMD - disease of the mind), sleepwalking (automatism), non-psychomotor epilepsy (automatism), extreme inebriation (intoxication): examples of involuntary unconsciousness or altered consciousness - other means other than voluntariness used to vitiate liability.

v. Involuntariness linked to prior fault of the accused

1. *Overview* - subsequent involuntary offences may arise from prior voluntary fault of accused (eg. drunk driving offence may have been involuntarily committed as a result of prior voluntary intoxication).

2. *Sufficient only where reckless* – however, prior fault or negligence has not been held to substitute *mens rea* for later offences, except for where mens rea for later offence includes recklessness, and accused's recklessness caused subsequent offence. {Daviault} (see also: defences -> intoxication)

   a. For instance, where person gets into self-induced state of extreme intoxication, this does not substitute the *mens rea* requirement for a sexual assault convicted while in that state. {Daviault}

   b. For instance, where one is charged with crim. neg. but is acting involuntarily when harm occurs, can nevertheless be found culpable if earlier behaviour was dangerous or criminally negligent. {Hundal}

   c. For instance, where one is charged with strict liability offence, involuntariness will not avail the accused where the involuntariness arose from the failure to exercise a due diligence standard of care. {Gavin}

c. Causation and consequences

i. Overview – where *actus reus* involves a particular harm or consequence, the Crown *must* prove that this actually came about as a result of the impugned conduct of the accused; often self evident.

ii. Requirements - governed by common law rules which require both factual and legal causation.

1. Factual causation

a. Overview - a causal, logical link between the impugned conduct of the accused and the prohibited consequence; even if not exceeding *de minimis*.

i. For example, where accused writes false information on credit application, but the creditor does not rely on this in granting credit; therefore, offence of obtaining credit *by false pretence* not made out. {Winning}

ii. For example, where accused driving impaired, cyclist swerves into accused's vehicle and is struck and killed, can't be proven BRD that impairment *caused* death; impaired driving causing death not made out. {Wilmot}

iii. For example, where not certain that head injuries caused by accused led to death, or whether death arose from other head injuries, guilty of lesser included of unlawfully causing bodily harm. {Johnson}

iv. For instance, Eaton's did not rely on false info provided by D. in obtaining credit, so it cannot logically be said that her statement *caused* her to receive credit. {*Winning*-Eatons}

2. Legal causation

a. Overview - once logical link established, must then further prove that the cause is sufficiently material so as to invoke criminal liability; more than *de minimis*, {Smithers} or, phrased alternatively, *significant contributing cause* (use this wording). {Nette}

i. For instance, the malfunctioning epiglottis of a victim of a kick, which caused choking and death, does not intervene to vitiate culpability through legal causation; still sig. cont. cause. {Smithers}

b. *Thin skull rule* - legal causation not negated by the thin skull rule, even where thin skull not foreseeable. {Smithers}

   i. For instance, where an assault significantly contributed to subsequent heart attack in victim, the fact that the heart attack would 80-90% have occurred anyways does not vitiate culpability. {Shanks}

   ii. For instance, where JW victim of stabbing refuses blood transfusion, too bad: must take victim as they are ground, {Blaue}

c. *Remoteness* - remoteness may be used as an analytical aid to determine whether sig. cont. cause is made out. {Smithers}

   i. For instance, the actions of Clifford Olson's parents in procreating to create Clifford does not exceed *de minimis* / is too remote to be a significant contributing cause.

3. Causation with multiple accused

a. *Fatal blow unnecessary if acting in concert* - Crown does not have to prove which of multiple accused dealt *coup de grace*; sufficient if acting in concert: co-perp./aider/abettor. {Biniaris}

   i. For instance, each driver in drag racing induces and perhaps abets the other in creating the risk, and therefore each bears responsibility for consequences. {Menezes}

   ii. For instance, each shooter induced the other to engage in a gunfight on a crowded street; but for this decision, Jane Creba would not have been fatally shot; ergo, in concert, causation made out. {S-R. (J)}

b. *Withdrawal before injury* - where two parties are acting in concert, a party can avoid liability where it withdraws from the joint action in advance of the impugned consequence, and the other actor is aware of its withdrawal.

   i. For instance, where parties are drag racing each other, one party withdraws from the race, the other party is aware but does not slow down, the former is not liable for the resultant crash. {Menezes}

c. *Cumulative / constructive causation or direct culpability required if not acting in concert* - if not acting in concert, then Crown must prove BRD *which* was the actual perpetrator, or otherwise must prove that there was a *cumulative* cause. {Biniaris}

   i. For instance, where multiple accused not acting in concert, then can prove causation by showing that initial assault by A made victim more likely to be killed by subsequent, unrelated assault by B; thus, both contributed beyond *de minimis*. {Maybin}

4. Novus actus interveniens

a. *Overview* - factual causation can be undermined where an intervening act renders it insufficient or non-causal; however, this rule does not vitiate where the intervening act is *dependent on the original, impugned conduct*.

b. *Requirements* - following are analytical aids for determining whether claim of *novus actus interveniens* can be made out: {Maybin}

   i. *Overwhelming* - subsequent act or event so strong or overwhelming that the accused's contributing act is now an insignificant contributing cause. {Sinclair}

1. For instance, where accused poisons family member, but the victim dies of a heart attack which occurred independent of poisoning; vitiates liability for the death, though not for the act of poisoning. {White}

2. For instance, where victim assaulted, left unconscious in building while assaulter seeks assistance, earthquake causes building to collapse, killing victim, this is an overwhelming cause.

ii. *Unforeseeable* - the subsequent act or event must *not* have been reasonably foreseeable by the accused when committing the unlawful acts. {Maybin}

1. For instance, the intervention and subsequent assault by a bouncer is an objectively foreseeable outcome of engaging in a bar fight; thus, not a *novus actus interveniens.* {Maybin}

2. For instance, where accused stabs victim; victim taken by ambulance, which is struck by another vehicle en route to hospital, killing victim; unforeseeable, might vitiate causation.

3. For instance, being run over by a car when left helpless, lying in the middle of the road following an assault is not extraordinary or unusual. {Sinclair}

iii. *Independent* - the intervening act must not have been dependent upon or caused by the original, impugned conduct if it is to act as a *novus actus interveniens*. {Lewis}

1. For instance, as per s. 222(5)(c), where one causes one's own death to avoid threats of violence (eg. jumping from moving car), the victims are deemed legally caused by accused.

2. For instance, victim refusing blood transfusion is a result of wounding caused by accused, therefore accused is nonetheless liable for death. Must take victim "as found." {Blaue} Similarly, actions by doctors (eg. removing life support) not intervening causes. {Kitching}

3. For instance, where police shoot at accused due to his own criminal acts, accused uses victim as human shield, the police conduct deemed dependent on accused conduct; not intervening. {Pagett}

4. For instance, would not be foreseeable that the victim of shooting in stomach (fatal, would have died) would slit own throat; nevertheless, dependent on shooting, not intervening. {Lewis}

5. *Causation in homicide*

a. *Overview* - the *Code* provides certain refinements to causation re: murder, manslaughter, which preserve legal causation even where other factors contributed to the death.

b. *General requirements* - caused death directly or indirectly and by any means (s. 222(1));

i. *Means* - includes unlawful acts, criminal negligence, threats, deception, or or any other thing causing death; (s. 222(5)), eg. by wilfully frightening a child or sick person. Mental influence *not* causal except for through frightening child/sick person (s. 228).

ii. *Limited intervening factors* - causation preserved even where death was preventable had the victim resorted to proper treatment (s. 224), where *bona fide* but improper treatment caused the death (s. 225), or where death from other means was "accelerated" (s. 226).

1. For instance, man knocked unconscious in fight; improper attempts to resuscitate caused death; (victim would have recovered if merely left alone); s. 225 should preserve causation {Fergie re: Reid}

iii. Applicability - the limitations concerning homicide are applicable to other offences leading to death, including crim. neg., dangerous driving causing death, etc.

c. Requirements for first-degree murder - culpable homicide becomes first degree murder where death is caused by commission of an enumerated offence (s. 231(5) / s. 231(6)). In this circumstance, a higher standard of "substantial and integral cause" applies. {Harbottle}

i. For instance, the act of holding the victim's legs while the co-accused assaulted and strangled the victim sufficient to make out substantial and integral cause. {Harbottle}

ii. For instance, preventing the escape of a person who was then shot by co-perpetrator sufficient to make out substantial and integral cause; in that case, as integral as that of the shooter. {Norouzali}

d. Types of prohibited conduct

i. Omissions

1. *Overview* - failure to act, leads to criminal liability where one failed to act in the face of a legal duty to take certain action; can be either general or specific omission offences.

2. *General omission offences* - offences which impose a general duty to act on certain persons; failure to do so leads to a charge of criminal negligence or common nuisance.

a. Offence provisions

i. Common nuisance - s. 180(2); unlawful act or failure to discharge a legal duty, thereby (a) endangering lives, safety, health, property or comfort of the public.

ii. Criminal negligence - s. 219(1); one who in action, or in omission contrary to legal duty shows wanton and reckless disregard for lives or safety or others, where this causes death, under s. 220, or bodily harm, under s. 221.

b. Duties applicable to general omission offences

i. Common law duties

1. *Overview* - now roughly codified into the *CC*. Though common law offences are extinguished (s. 9), common law duties are nevertheless recognized as capable of supporting criminal liability as duties (see *Thornton*, below):

a. *Dependency* - relationship of dependency between parties imposes obligation on party to act on behalf of dependent parties, as in jailor to inmate, parent to child, etc. Maps onto s. 215(1).

b. *Undertaking* - where one has undertaken to do a thing, one is under a duty to do that thing. Maps onto s. 217.

c. *Danger* - where one is handling dangerous items or pursuing dangerous activities, one is under a duty to use reasonable care. Maps onto s. 216.

d. *Creation of harm* - not yet recognized in Canada, holds that one is responsible to mitigate harm flowing from accidental conduct; may be resolved by s. 216.

i. For instance, where one accidentally starts a house fire, one may have a duty to mitigate potential harm to others, as recognized in UK. {Miller-cigarette}

e. *Negligence* - common law tort duty recognized as supporting criminal liability for nuisance under s. 180.

i. For instance, accused did not disclose HIV positive status to Red Cross when donating blood, violating neighbour principle (says ONCA: SCC said s. 216) {Thornton-HIV}

ii. Criminal Code duties

1. *Overview* - rough codification of the common law duties found above, but nevertheless inexhaustive of duties recognized in criminal liability, esp. in criminal negligence, which recognizes duties "imposed by law" under s. 219(2):

a. *Specific omission duties* - specific omission duties, below, may be charged under general offence provisions instead.

b. *Dependency* - s. 215(1); must provide necessaries of life to certain dependent persons; includes spouse (b), person under charge (c).

c. *Undertaking* - s. 217; undertaking to do an act, the omission of which may be dangerous to life; requires a "binding commitment," not merely an assertion.

i. For instance, commitment: more than a statement, though reasonable reliance not required; saying "I'm going to take you to hospital" not enough. *Relationship b/w parties irrelevant* except to guide inquiry into whether representations amount to undertaking. {Browne}

d. *Danger* - s. 216; persons undertaking acts which may endanger life are under a duty, eg. reasonable care.

i. For instance, where one fails to disclose HIV+ status when donating blood, can rely on s. 216 (says the SCC); {Thornton-HIV}

e. *Workplace* - s. 217.1; persons directing work of other persons must take reasonable steps to prevent bodily harm to those persons arising from that work.

iii. Other statutory duties

1. *Overview* - other statutory duties, including duties imposed by provincial recognized, have been applied for purposes of criminal liability under s. 221; however, this runs risk of creating criminal law which varies provincially.

a. For instance, BC man did not control pit bull terriers contrary to Animal Control Bylaws, charged with crim. neg. in breaching duty imposed by bylaw. {McEachen}

3. Specific omission offences

a. *Overview* - offences which include specific omissions as part of the offence itself, as set out in the *Code.*

i. *Report treason* - s. 50(b); fails to report to the police a high treason, (s. 46(1)) that is about to be committed.

ii. *Explosives* - s. 80; breach of duty in regard to the care of explosives (s. 79).

iii. *Court orders* - s. 127; failure to obey a court order.

iv. *Assist police officer* - s. 129(b); omits to assist a police officer when requested.

v. *Render assistance in accident* - s. 252(1); failing to stop and render assistance after being involved in an accident.

vi. *Provide breath sample* - s. 254(5); failing to provide a sample of your breath.

vii. *Duty to assist at accident* - s.252 - must not fail to stop and render assistance at scene of accident.

viii. *Duty to guard opening in ice* - s.263(3)

ix. *Failure to collect toll* - s.393

x. *Duties relating to burial* - s.182

ii. Status offences

1. *Overview* - criminalize a state of being rather than positive action; *pure* status offences are rare if extant at all in Canadian criminal law: would run afoul of s. 7, particularly where involuntary.

   a. For instance, "keeping a bawdy-house" or "being nude in a public place" are not pure status offences, as they involve some conduct in the offence, therefore not pure.

   b. For instance, vagrancy under s. 179(1)(a) not a pure status offence, though status forms part of the offence, eg. having "no lawful profession."

2. *Vicarious liability* - employer responsible for acts of employee, merely due to relationship (ie. status) rather than own acts; *not* applicable to criminal law, runs afoul of voluntariness. {Burt} See vicarious liability, below.

e. Interpretation of actus reus

i. *Overview* - inquiry which is individualized for each offence, guided by the principles of statutory interpretation.

ii. *Specificity* - must not be overly broad or unduly vague in prohibiting conduct, otherwise runs afoul of s. 7 of the *Charter*.

iii. *Restraint* - offences tend to be defined narrowly, rather than broadly, in accordance with the principle of restraint.

1. For instance, SCC held that "indecently" was to be judged by whether there was "significant risk of objective harm to a fundamental value," rather than by a "community standard of tolerance." {Labaye}

2. For instance, SCC ruled that "breach of trust by a public official" must be more than a minor breach, but rather a "serious and marked departure." {Boulanger}

7. Mens rea

a. *Overview* - mental blameworthiness required for criminal culpability; initially referred to "moral blameworthiness," eg. wickedness, evil, depravity; now, descriptive of mental element, rather than normative. Stems from PFJ that morally innocent ought not to be punished. {Martineau}

b. Determination of applicable mens rea

i. *Language* - knowingly, intentionally, etc. If there is express language determining the mens rea, this language governs. Otherwise, analysis proceeds.

ii. *Nature of offence* - determination of whether the offence is a "true crime" or merely a regulatory offence.

1. *Analysis*

a. *Offence in Criminal Code* - nearly irrebuttable presumption of true crime raised if offence is in the *Criminal Code*. {Prue & Baril}

b. *Offence not in Criminal Code* - must then consider nature of conduct, severity of penalty; intrinsic nature of conduct (eg. something which requires absolute prohibition vs. something which requires regulation). {Wholesale Travel}

i. For instance, the sale of narcotics is one which would draw an absolute prohibition, and therefore be criminal, whereas the sale of lobsters is a lawful, though regulated activity. {Beaver}

ii. For instance, must consider whether the impugned behaviour is mala in se (bad in itself) rather than mala prohibita (not bad in itself, but merely because it is regulated). {Wholesale}

iii. For instance, regulatory offences seek to avoid future harm by promoting best practices, while criminal offences punish previous bad conduct. {Wholesale}

2. *Result*

a. *True crimes* - presumptive position for true crimes is *any* subjective form of *mens rea*; only limited through express wording in statute. {Lucas} *Cannot go lower than penal negligence.* {Hundal}

i. For instance, *mens rea* in careless use of firearm, is objective, not subjective. This is allowable because it is not a stigma offence, and the standard is penal negligence: marked departure. {Gosset}

b. *Regulatory offences* - presumptive position for regulatory offences is *strict* liability. Absolute

liability only applicable where due diligence specifically negatived, either expressly or by necessary implication; exceptional and rare, following decision in SSM. {Levis}

i. For instance, relevant considerations include regulatory pattern of statute, subject matter, importance of penalty, and precision of language used. {SSM}

iii. *Constitutional considerations*

1. *Stigmatic offences* - cannot have stigmatic offences associated with objective *mens rea*. Must be subjective *mens rea*. {Vaillancourt}

   a. For instance, murder, attempted murder, theft, and war crimes, including accessory liability to these offences are identified as stigmatic. {Martineau}

2. *True crimes* - cannot be paired with absolute or strict liability; must be higher than civil negligence (eg. penal negligence, criminal negligence). {Hundal}

   a. For instance, dangerous driving (s. 249, *Hundal*) and careless use of a weapon (s. 86(1), *Gosset*) are true crimes in the *Criminal Code* to which penal negligence attaches; allowable, greater than civil neg.

   b. For instance, *mens rea* in careless use of firearm, is objective, not subjective. This is allowable because it is not a stigma offence, and the standard is penal negligence: marked departure. {Gosset}

   c. For instance, while shifting of burden in strict liability violates s. 11(d) presumption of innocence, this is justifiable under s. 1, but only where applicable to regulatory offences; unjustifiable for true crimes. {Wholesale}

   d. For instance, certain predicate offences require subjective *mens rea* for the underlying offence, but not for the prohibited consequences caused. Allowable, as FMR req. for predicate (see symmetry, below). {De Sousa}

3. *Strict liability offences* - restriction of due diligence applicable to a strict liability offence (eg. requiring "timely retraction" means that offence has become absolute liability; this will offend s. 7 where penal consequences are also associated with the offence. {Wholesale}

4. *Absolute liability offences* - cannot be paired with penal sanctions, including probation or imprisonment for defaulting on payment of fine. {Re: MVA}

   a. For instance, restriction of liberty associated with an absolute liability offence will violate PFJ, ergo no force or effect; includes *probation*, which restricts liberty, or imprisonment for defaulting on payment of fines. {Re: MVA}

   b. For instance, this is why BC enacted ss. 6, 82, of the *Offences Act*, which preclude imprisonment for absolute liability offences and for default on fine payment, respectively.

c. Levels of fault

i. Subjective or full mens rea

1. Wilfully, intentionally, purposefully

a. *Overview* - interchangeable. Means that the person must have intended the act, and any prohibited consequences of the act in the *actus reus*. {Buzzanga}

i. For instance, wilfully promoting hatred means to intentionally promote hatred; ergo, acts which recklessly promote hatred lack the mens rea to make out the offence. {Keegstra}

ii. For instance, counterexample, assault and ACBH held by NLCA to include intentional and reckless, though s. 265 specifies "intentional" application of force; wrongfully decided per Fergie. {Sullivan}

b. *Recklessness insufficient* - recklessness *not* sufficient to make out wilfulness except for where specified, eg. under s. 429 for Part XI offences. {Buzzanga}

c. *Wilful blindness may be sufficient* - wilful blindness may be sufficient to impute *indirect* intent, eg. accused *would have been virtually certain* if inquiries had been made. Not so if the knowledge would only have been *possible/probable*. {Harding}

i. For instance, if the accused suspected that course of action was substantially certain to promote hatred, and neglected to make inquiries, then wilful blindness imputes intent. {Harding}

d. *Directness of intent* - intent can arise in two different ways; either is sufficient to make out wilfully/intentionally/purposefully *mens rea*.

i. *Direct intent* - intent, purpose or desire of bringing about prescribed harm. Intent exists regardless of whether the act will certainly, probably or only possibly cause the harm.

ii. *Indirect intent* - intent, purpose or desire of bringing about something *other* than prescribed harm, while knowing/foreseeing that prescribed harm is "certain or substantially certain" to occur. {Chartrand}

2. Knowingly

a. *Overview* - one is aware of a certain state of affairs but persists in a prohibited course of action anyways; eg. it is bigamy when one marries another who is known to the accused to already be married (s. 354(1)).

b. *Wilful blindness sufficient, recklessness insufficient* - wilful blindness will impute knowledge, however, recklessness will not.

i. For instance, where one is merely aware that property is possibly or probably stolen, this is not sufficient; must show that accused had strong suspicion, failed to make inquiries. {Vinokurov}

3. Wilful blindness

a. *Overview* - arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. Imputes knowledge to the accused; narrowly defined, to differentiate due diligence. {Briscoe}

i. For instance, queries whether the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge. {Briscoe}

ii. For instance, accused realized probability of impugned fact, but refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. {Sansregret}

b. *Depth of inquiry* - where accused has some suspicion, it is not sufficient to make merely

some inquiry into the truth; rather, this must have been sufficient to assuage suspicions, thus precluding the need for further inquiry. Not a shift in onus; Crown burden. {Legace}

c. *Relation w/ recklessness* - where accused has made all reasonable inquiries, one will not be wilfully blind, *but* nevertheless reckless if inquiries did not assuage suspicions. {Fergie}

4. Recklessly

a. *Overview* - accused aware that prescribed harm may possibly/probably occur, though not certain; the accused does not *desire* that the harm occur, but pursues acts which nevertheless create the risk. {Sansregret}

b. *Probability vs. possibility* - in extending definition of wilfulness under s. 429 for Part XI offences, *Criminal Code* specifies foresight of *probability*, not mere *possibility*, that harm will occur. Similarly, likely rather than possibly used under s. 229(a)(ii), s. 21(2).

i. For instance, SCC referred to recklessness as a conscious disregard of a substantial and unjustified risk, in that case re: counselling, that an offence was "likely" to be committed. {Theroux}

ii. For instance, counterexample, recklessness referred to as conduct which *could* bring about the result prohibited by criminal law; "could" appears to accord better with likely than w/ probably. {Sansregret}

ii. Objective mens rea

1. *Individualization* - required in application of the standard; must be considered in the context of facts existing at the time and in relation to the accused's perception of those facts; {Tutton} however, there is only *one standard*; as age, experience, education: irrelevant. {Beatty}

a. For instance, must determine reasonable person standard in context of events of incident; further, for driving offences, personal factors are limited due to the general standards imposed through licencing. {Hundal}

b. For instance, persons who have experience and training with firearms are not held to a higher standard of reasonableness than those who do not have these characteristics. {Creighton}

c. For instance, counterexample, in defining the "reasonableness" standard applicable in defences (self-defence, duress, necessity), reasonableness is modified to take human frailties of the accused into account. {Hibbert}

d. For instance, counterexample, in corporate liability under s. 22.1, representatives of a corporation are held to the standard of a reasonable representative, not a reasonable person. (s. 22.1(a))

2. Criminal negligence

a. *Overview* - (1) marked and substantial departure from conduct of a reasonable person, with (2) wanton and reckless disregard for lives or safety of others; both judged on an objective standard. {F.(J.)}

i. For instance, see various forms of culpable homicide, ss. 219-221, 222(5)(b).

3. Penal negligence

a. *Overview* - marked departure from the standard of care that a reasonable person would use in the circumstances; lower standard than penal neg. {Hundal}

i. For instance, see careless use or storage of a firearm, s. 86(1), dangerous driving, s. 249, failure to provide necessaries of life to a child, ss. 215(1), (2), child abandonment, s. 218.

4. Strict liability

a. *Overview* – once *actus reus* proved BRD, the accused will be convicted unless a defence of due diligence is made out on a balance of probabilities. {SSM}

i. For instance, while shifting of burden violates s. 11(d) presumption of innocence, this is justifiable under s. 1. {Wholesale}

5. Absolute liability

a. *Overview* – once *actus reus* proved BRD, the accused is convicted, not withstanding whether due diligence can be shown BOP. {SSM} Other defences which operate notwithstanding *mens rea*, such as necessity and self-defence, continue to be valid. {Stuart}

8. Relation between mens rea and actus reas

a. Symmetry of elements

i. *Overview* – as a general principle, *mens rea* applies to all essential elements of the *actus reus* – the principle of symmetry. Few exceptions, as defined in the *Code* and in case law. {Metro News}

1. For instance, mens rea must be proved in relation to all elements of the offence, including the absence of consent in the offence of sexual assault. {Pappajohn}

ii. Exceptions to symmetry rule

1. *Overview* - generally involve subjective *mens rea* offences where the legislature or courts have determined that part of the offence requires merely objective *mens rea*, or no *mens rea* at all.

2. Legislative exceptions

a. For instance, statutory rape per s. 146(1) (repealed) criminalized intercourse with females under 14 years of age, regardless of whether accused believed she was aged 14 or older; this effectively eliminated the knowledge requirement of a prohibited circumstance of the offence (and the defence of mistake of fact). This was ruled unconstitutional by the SCC. {Hess}

b. For instance, statutory rape per 150.1(4) now holds that mistake of fact can only avail as a defence if the accused took all reasonable steps to ascertain the age of the complainant; an objective component in an otherwise subjective offence.

c. For instance, in sexual assault, honest but mistaken belief can only avail where the accused to reasonable steps to ascertain consent "in the circumstances known to the accused"; mixed subjective-objective component in an otherwise subjective offence.

3. Judicially defined predicate offences

a. *Overview* - offences which are aggravated by a specific outcome (assault causing bodily

harm, aggravated assault, unlawfully causing bodily harm, and unlawful act manslaughter) - the *specific harm* (and this alone) does *not* require subjective *mens rea*.

i. For instance, in unlawfully causing bodily harm under s. 269, must have subjective *mens rea* regarding some culpable aspect of the *actus reus,* but no *mens rea* required regarding the consequences. {De Sousa}

ii. For instance, in unlawful act manslaughter under s. 222(5)(a), foresight of death (whether objective or subjective) is not required; merely objective foresight of harm neither transient nor trifling. {Creighton}

iii. For instance, in aggravated assault, s. 268(1) there must be subjective intention to assault; there must also be objective foreseeability of prohibited consequence (wounding, maiming, etc.) {Godin}

b. Contemporaneity of elements

i. *Overview* - as a general rule, the *actus reus* and *mens rea* must be present at the same time; however, if the criminal act is complete before the *mens rea* arises, then the crime is not made out.

1. For instance, where A accidentally hits V with vehicle; did not know at the time that the person hit was V; A says afterwards that if A had known it was V, would have hit V intentionally; not liable due to lack of concurrence.

2. For instance, accused did not know that he was HIV positive, had unprotected sex with victim; later discovered that he was HIV positive, persisted in unprotected intercourse with victim not guilty of aggravated assault, because knowledge of A's infection was subsequent to actual infection of V. Guilty of attempted agg assault. {Williams}

ii. *Complete concurrence unnecessary* - only necessary for the *mens rea* to be present at some time between the beginning and the end of the *actus reus.* {Cooper}

1. For instance, if one began strangling a victim with intent to kill, but blacked out during the act, this is sufficient contemporaneity between *actus reus* and *mens rea* to make out murder. {Cooper}

2. For instance, where necessary, concurrence will be found to exists by treating an accused's separate acts or omissions as a continuous transactions, even where this requires stretching logic. {Cooper}

c. Transferred malice or intent

i. *Overview* - exception to the rule that the mental state of the offence must relate to the *actus reus* of the crime charged, and not some other crime; allows for substitution of *mens rea*. For instance, in murder, intent "follows the bullet" per s. 229(b) of the *Code.*

1. For instance, where one believed that he/she was importing one unlawful item (eg. obscene literature) but was in fact importing another (eg. heroin), accused will be convicted of the crime actually committed through this doctrine.

2. For instance, where accused thought importing mescaline, but actually importing LSD, *mens rea* for mescaline importation sufficient for LSD conviction, therefore convicted of LSD importation. {Kundeus}

3. For instance, if assaulter attempts to assault A, but accidentally assaults B instead, nevertheless guilty of assaulting B. {Deakin}

ii. *Limitations re: similarity in offence* - where substituting one *mens rea* for another *mens rea;* generally, offences must not be too dissimilar - should be "the same type of offence."

1. For instance, sexual assault requires intent/recklessness or wilful blindness to sexually assault and that an intent to get extremely intoxicated (while bad and dangerous) is not an adequate substitution. {Daviault}

2. For instance, *mens rea* for smuggling cigarettes, booze, and other commodities is *not* sufficient to substitute for *mens rea* for smuggling narcotics; one is avoiding tax, other is importing illicit substance. {Blondin}

iii. *Limitations re: inchoate offences* - transferred intent does not apply to inchoate offences. Transfer of intent only meaningful in crimes which prohibit consequences (eg. engage one outcome, but bring about another); inchoate offences are complete upon preparatory steps. {Gordon}

1. For instance, where accused attempted to shoot victim, unintentionally wounding others in the process, attempted murder charge applies only for intended victim; other victims lead to aggravated assault charges. {Gordon}

9. Defences

a. Air of reality test

i. *Overview* - before a trial judge instructs a jury to consider a defence, there must be an "air of reality" to the existence of that defence in the evidence presented at trial. {Cinous}

ii. *Operation*

1. *Test* - whether there is sufficient evidence, which if believed (eg. taken at its highest) would make out the defence in question. {Cinous}

2. *Applicability* - test of general application and applies to all defences including mistaken belief in consent, as well as automatism/due diligence, where accused bears burden on BOP. {Fontaine}

3. *Weighing of evidence* - trial judge must not "weigh" the evidence in deciding whether the "air of reality" test for raising a defence has been met. {Davis}

4. *Mistake of fact in sexual assault* - Supreme Court has outlined additional guidelines which must be considered where the mistaken belief in consent defence is raised in sex assault. {Osolin}

a. *Sources of evidence immaterial* - there is *no* requirement that there be a source of evidence other than the accused. {Osolin}

b. *Nature of evidence* - mere assertion "I believed she was consenting" is not sufficient; there must be something in the facts (evidence) to support that assertion. {Osolin}

i. For instance, there must be evidence capable of explaining how the accused could honestly have mistaken the complainant's lack of consent as consent. {Davis}

c. *Weighing of evidence* - trial judge must not "weigh" the evidence in deciding whether the "air of reality" test for raising a defence has been met. {Davis}

d. *Perfection unnecessary* - where positions are diametrically opposed, AOR possible if portions of each person's stories can be accepted and reasonably spliced together. {Davis}

e. *Defence raised implicitly* - claim by the accused that "the complainant consented" implicitly includes the alternative claim "or at least I believed the complainant consented." {Davis}

b. Determination of applicable defence

i. Overview - the question of which defences are available to be put to the trier is a question of mixed fact and law for the judge; whether the defence is made out is for the jury. {Stone} Defences are available where AOR met: some evidence on which reasonable jury could acquit. {Cinous}

ii. Involuntariness - accused can raise reasonable doubt as to *actus reus* if the act was conscious but nevertheless involuntary (see *actus reus* -> voluntariness, above). If unconscious and involuntary, intoxication or automatism may avail: see below.

iii. Intoxication - if the accused has raised involuntariness caused by intoxication, the accused can rely on the intoxication defence (see defences -> intoxication, below). {Daviault} Voluntary intoxication is not a "disease of the mind." {Bouchard-Lebrun}

iv. Insane vs. non-insane automatism - if the accused has proven involuntariness *caused by a disease of the mind,* NCRMD (via *s. 16*); otherwise, automatism -> acquittal. {Stone}

1. *Application* - tied together by a common concern for public safety, disease of the mind analysis operates as follows:

    a. *Internal cause* - disease of the mind is a malfunctioning that is primarily *internal* and rooted in organic, psychological, or emotional makeup. {Rabey-rock}

        i. For instance, includes any illness or disorder which impairs the mind and its functioning; but excludes self-induced states caused by alcohol or drugs.{Bouchard-Lebrun}

    b. *Continuing danger* - whether the unconscious criminal conduct is likely to recur; if so, then state non-transient, and insane automatism appropriate. {Parks}

    c. *Policy concerns* - fear of fabrication, public perception of admin. of justice related to acquittal, lack of monitoring related to acquittal; factors motivate for insane. {Stone}

    d. *Other factors* - severity of trigger, corroborating evidence and medical history of dissociative states, presence or absence of motive. {Stone}

2. *Examples of insane automatism*

    a. For instance, where a person has suffered a psychological blow which is *not* beyond the normal stresses of life, and responds with a dissociative state due to own non-transient emotional makeup. {Rabey}

    b. For instance, where one suffers from recurrent sexsomnia (sleepwalking) {Luedecke} or from psychomotor epilepsy. {Bratty}

    c. For instance, not transient malfunctioning due to external factors, such as concussions or blows to the head; in those cases, non-insane automatism applies. {Rabey-rock}

    d. For instance, counterexample, temporary psychosis caused solely by voluntary consumption of drugs is not a "disease of the mind" and therefore the insanity defence does not apply. {Bouchard-Lebrun}

3. *Examples of non-insane automatism (rare)*

    a. For instance, where a person commits a murder while sleepwalking {Parks} though this was held to be a

disease of the mind in subsequent cases. {Stone} {Luedecke}

b. For instance, where a person has suffered an extraordinary psychological blow, one which is beyond the normal stresses and disappointments of life: more than merely being jilted. {Rabey-rock}

c. For instance, a physical blow to the head caused a concussion, which then led an accused to leave the scene of an accident, {Desbien}, or hypoglycemia caused by diabetes {Quick}

d. For instance, where one unexpectedly fell asleep while driving due to undiagnosed, chronic insomnia, {Jiang} suffered a stroke or non-psychomotor epilepsy. {Hill}

e. For instance, where a person has committed murder while sleepwalking, {Parks} though this may now be categorized as insane automatism. {Campbell}

c. NCRMD / insanity

i. *Overview* - defined in *Code*; applies where accused suffered from *disease of the mind*, thus "incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong." *s. 16* See also: mental disorder short of insanity, below.

ii. *Operation*

1. *Presumption* - under *s. 16(2)*, accused is presumed not to suffer from a mental disorder until the contrary is proved on a balance of probabilities.

2. *Timing* - may be raised by defence during trial, or by either party following rendering of verdict by TOF. Crown can only raise *during* trial if Court satisfied that D. has put matter in issue.

3. *Incapacity* - party raising NCR defence must make out either of the following, on BOP: *s. 16(3)*

a. *Appreciating nature and quality* - narrow meaning; sufficient if the accused knew the nature of act and physical consequences. {Abbey} That the accused was in a paranoid state does not negate this element.

i. For instance, accused aware that he/she in possession of knife, knew that stabbing the victim may cause the victim's death, even if he/she thinks the victim is the devil in a paranoid delusion.

b. *Knowing that act was wrong* - whether a mentally disordered person lacks the capacity for rationale perception of what is right and wrong.

4. *Analysis of evidentiary foundation*: (threshold)

a. *Expert evidence* - accused (or, rarely, Crown) must assert inability to differentiate between right and wrong, and must call expert evidence to confirm this.

i. *Irresistible impulse insufficient* - while an irresistible impulse may be evidence of an NCRMD condition, it is not a defence itself. {*Abbey*}

ii. *Diminished responsibility insufficient* - impairment must meet full definition required in s.16 re: understanding. No relief is provided for partial impairment. {*Abbey*}

iii. *Meaning of wrong* - if asserting inability to tell right from wrong, be incapable of understanding that act was in some sense wrong; either morally or legally. {Chaulk}

1. For instance, did not know that it was wrong to kill his friend, because he suffered from delusion which led him to believe that he was killing Satan on God's orders. {Landry-Satan}

b. Assumption insufficient - burden cannot be met if the expert evidence is based on assumptions of the truth and accuracy of the accused's account, without further supporting evidence; {Stone}

5. *Analysis of nature of disorder* - if threshold met, judge must decide, as matter of law, whether evidence indicates insane versus non-insane automatism, based on whether involuntariness due to *disease of the mind.* {Stone} (see determination of applicable defence, above).

iii. Function - negates *mens rea;* special verdict which puts accused under jurisdiction of review board re: detention in hospital, conditional discharge, absolute discharge.

d. Automatism (non-insane)

i. *Overview* - common law defence which persists due to s. 8(3) of the *Code*; applies where persons are capable of acting, though are not conscious of their behaviour - thus, unconscious involuntariness; contrast with conscious voluntariness (see *actus reus*, above). {Rabey-rock}

ii. *Relation to voluntariness* - voluntariness is an essential element of criminal liability, and therefore automatism operates to vitiate voluntariness, thus providing an acquittal by negating the *actus reus*.

iii. *Statutory requirements* - governed by s.33.1 of the *Criminal Code.*

1. *Defence not available if marked departure* - if accused, by reason of self-induced intoxication, lacked the basic intent or voluntariness to commit the offence, but markedly departed from standard of care, then the defence of intoxication is not available.

2. *Definition of marked departure* - inducement by self of state of intoxication rendering one unaware of or incapable of consciously controlling behaviour, and thereby voluntarily or *involuntarily interferes / <u>threatens</u> to interfere with <u>bodily integrity</u> of others.*

iv. *Operation* - persons presumed to act voluntarily; therefore, accused bears onus of rebutting presumption on BOP. {Stone} SCC overrode *Rabey*, which applied normal AOR/BRD paradigm. *<u>The AOR/BRD paradigm was restored by the SCC in Fontaine/Cinous.</u>*

1. *Analysis of evidentiary foundation*: (threshold)

a. *Expert evidence* - accused must assert (1) involuntariness, and must call expert evidence to confirm this state in all cases of automatism; {Stone}

b. Assumption insufficient - burden cannot be met if the expert evidence is based on

assumptions of the truth and accuracy of the accused's account, without further supporting evidence; {Stone}

c. *Presence of trigger* - if asserting non-insane automatism, there must be an extraordinary trigger beyond the ordinary disappointments of mankind. {Rabey}

2. *Analysis of nature of disorder* - if threshold met, judge must decide, as matter of law, whether evidence indicates insane versus non-insane automatism, based on whether involuntariness due to *disease of the mind.* {Stone} (see determination of applicable defence, above).

v. Function - negates *actus reus.*

e. Voluntary intoxication short of automatism/insanity

i. *Overview* - where an intoxicant negates the *subjective* mental element required compels an acquittal through lack of *mens rea*; only applicable to "specific intent offences".

ii. *Does not defend operate re: objective mens rea* - reasonable person is never intoxicated, and so therefore voluntary intoxication never protects against culpability w/ objective offences.

iii. *Operation* – focuses on distinction between b/w specific and general intent offences; acts done to achieve an immediate end are general intent, and acts done to achieve a specific, ulterior motive are specific intent offences deliberate steps taken towards illegal goal. {George}

1. *Specific intent offences* - where *specific* intent is essential element of an offence, intoxication rendering D. *incapable* of forming that intent begs acquittal. {Beard}

i. For instance, D. violently manhandled a person and knew that he was carrying out an assault; this is an offence which cannot be excused by voluntary drunkenness short of insanity. {George}

b. *Definition* - an intention which goes beyond the intent to do the act in question and involves some external purpose - eg. "with intent to," "for the purpose of." {George}

c. *Inquiry* – focus is on whether the actual intent exists, and not the *capacity* to form intention. {Daley}

d. *Burden* – on the Crown BRD to prove that the accused had the specific intent required in the working of the offence.

e. *Component offences* - specific intent offences may contain components which are general intent offences. A state of voluntary drunkenness might excuse the former, but never the latter. {George}

i. D. assaulted victim for purposes of robbery; while this theft is specific intent, the common assault part is general intent, for which D. has no excuse. {George}

2. *General intent offences* - not excusable via intoxication *short* of insanity. See intoxication akin to insanity, below if the offence is general intent or has lesser included gen. intents. {Daviault}

a. For instance, having care or control of motor vehicle while one's ability to drive is impaired is a general intent offence. {Daviault}

iv. *Function* - negates *mens rea*.

f. Intoxication akin to automatism

i. *Overview* - distinction between *insanity* due to drunkenness, and drunkenness which negates capability to form *specific* intention. If *insanity* occurs, then furnishes D. with same answer to criminal charge as insanity induced by cause *other than disease of mind* - acquittal. {Beard}

ii. *Level of extremity required* - must be such that it is akin to automatism or insanity, raise a reasonable doubt re: ability to form mens rea to commit a crime. {Daviault}

1. For instance, one who is so drunk that he/she is an automaton; can move arms legs, but cannot form simple intent. {Daviault}

2. For instance, counterexample, some courts have held that scientific evidence indicates it is not possible to go into a state akin to automatism by drinking liquor alone. {Down}

iii. *Standard and burden of proof* - accused must establish this level of drunkenness BOP. Unlike other defences, does not follow AOR->BRD model of proof. {Daviault} Counterintuitive, because Crown should have to prove *mens rea* (eg. intent) BRD.

iv. *Statutory requirements*

1. *Defence not available if marked departure* - if accused, by reason of self-induced intoxication, lacked the basic intent or voluntariness to commit the offence, but markedly departed from standard of care, then the defence of intoxication is not available. *s.33.1(1)*

2. *Definition of marked departure* - inducement by self of state of intoxication rendering one unaware of or incapable of consciously controlling behaviour, and thereby voluntarily or *involuntarily interferes / threatens to interfere with bodily integrity of others. s.33.1(2)*

v. *Function* - negates *actus reus* (act was effectively involuntary: similar to automatism).

g. Mistake of fact

i. *Overview* - includes ignorance of fact, effectively the same thing. As mistake of fact vitiates *mens rea*, cannot avail where no *mens rea* is required (absolute liability offences, or re: prescribed harm arising from predicate offences).

ii. *Operation*

1. *Innocence of mistake* - in certain cases, has been held that this defence only operates where conduct was innocent but for the mistake of fact. {Tolson} Certain courts have ignored this requirement (see relation between elements -> transferred intent, above). {McLeod}

a. For instance, one cannot rely on mistake of fact for causing indignities to dead body by claiming mistake re: death, because alternative is sexual assault if believed alive, which is nevertheless culpable. {Ladue}

2. *Material or essential element* - is the mistake of fact in respect of an essential or material element of the offence? Only mistakes concerning material elements will vitiate culpability.

    a. For instance, on charges of possession of counterfeit currency under s. 450(b), belief that item is *not* counterfeit acts as a full defence to the charges; belief that item is counterfeit, but different (eg. $100 bills vs. $20 bills) than reality does not. {Santeramo}

    b. For instance, in murder, if one erroneously believes that weapon unloaded, this vitiates culpability; however, if one mistakes identity of victim and accidentally kills wrong person as result, culpability preserved; s. 229(b).

    c. For instance in sexual assault, an honest but mistaken belief that the complainant is consenting to the sexual act is a full defence to the charges, vitiating the *mens rea*. {Osolin}

3. *Offence mens rea* - determines whether the mistake must merely be subjective, or rather whether it must also be objectively reasonable; requirement follows the MR for the offence.

    a. *Subjective mens rea offences* - subjective mistake sufficient. Mistake must be honest, though not necessary reasonable. Must fall short of wilful blindness and recklessness, however.

        i. For instance, for subjective mens rea offence of possession of narcotics, subjective belief that one was in possession of baking soda, not heroin will vitiate even if unreasonable, short of wilful blindness, etc. {Beaver}

        ii. For instance, certain offences will require a mixed objective-subjective analysis for mistake defence; see sexual assault, in which case subjective belief in consent must be bolstered by reasonable steps per s. 273.2(b); subjective application to subjective elements, objective application to objective elements.

    b. *Objective mens rea offences* - mistake must be both honest and reasonable, eg. one which is consistent with applicable reasonable person standard - mistake would not, for instance, constitute a marked and substantial departure from expected conduct.

        i. For instance, under *criminal negligence causing death*, belief that a gun was unloaded will only vitiate where not a marked and substantial departure from reasonable conduct (contrast w/ murder).

        ii. For instance, in *strict liability offences*, mistake of fact will only vitiate where this is reasonable - a mistake which does *not* arise from a lack of due diligence, in that case, would vitiate.

        iii. For instance, in *absolute liability offences*, mistake of fact does not operate as a defence.

iii. *Function* - negates *mens rea*.

h. Self defence

i. *Overview* - statutory defence covered in sections 34-37; overlapping, inconsistent, and confusing sections. Follows AOR->BRD paradigm.

ii. *Sections (old)*

1. *s. 26*

    a. *Overview* - persons who exceed the force authorized under ss. 34-37 are liable criminally for that action.

2. *s. 34(1) (old)*

a. *Overview* - authorizes force to defend self if reasonably apprehend force/threat of force against self; must not *intend* to cause death or GBH with responsive force. {Pawliuk}

i. For instance, s.34(1) is not always excluded where death or GBH occurs; only excluded where the defender intends to cause death or GBH in defending against the assault. {Pawliuk}

b. *No apprehension of death / serious bodily harm required* - section applies where the person using self-defence does *not* apprehend that their attacker intends to cause death or serious bodily harm; should avail themselves of *s. 34(2)* instead. {Pintar}

c. *No provocation* - this by virtue of the wording of the section, it is *not* available to persons who have provoked the assault from which they are defending themselves. {McIntosh}

i. For instance, not available in consent-fight situation: would violate requirement that the assault was not provoked. Cannot say that assault not provoked when engaging mutual combat. {Jobidon}

d. *Subjective-objective* - (1) apprehension or threat of force must be (2) subjectively held & (4) objectively reasonable. *s. 34(1)(a)*

3. *s. 34(2) (old)*

a. *Overview* - authorizes force to defend self if (1) reasonably apprehend force amounting to death/GBH to be used against self; (2) can respond in a manner which intends to cause death or GBH (3) *if there is no other way to preserve/defend self*.

b. *Apprehension of death / serious bodily harm* - section applies where the person using self-defence does apprehends that their attacker intends to cause death or serious bodily harm; {Pintar}

c. *Provocation* - this section *is* available to persons who have provoked the assault from which they are defending themselves. SCC refused to read in provocation requirement from s, 34(1), despite that this leads to absurdity. {McIntosh}

d. *Subjective-objective* - (1) apprehension of death/serious harm as well as (2) inability to otherwise preserve self must be (3) subjectively held & (3) objectively reasonable. Test is contextualized to accused's situation and circumstances. {Lavallee}

i. For instance, while a drunken person may hold reasonable beliefs, and therefore may avail via s. 34(2), cannot use intoxication as excuse for holding *unreasonable beliefs* under the section. {Reilly}

ii. For instance, psychiatric disorder may affect ability to perceive; such as where Asperger's sufferer assaults roommate but claims self defence. {Kagan}

iii. For instance, inmate claims that others planning to kill him, took preemptive action. Expert evidence established that person could apprehend attack *without* immediacy, no other way to defend. {McConnell}

4. s. 35 (old)

a. *Overview* - defender provoked attack through assault (but not intending GBH/death) or other means without justification can use force to defend if under reasonable apprehension of death / GBH, necessary to protect.

b. *Subjective-objective* - (1) apprehension of death/serious harm as well as (2) inability to retreat (3) subjectively held & (3) objectively reasonable.

c. *Function* - not useful, as obviated by the fact that following *Pintar*, s. 34(2) operates to exculpate defenders who have provoked the attack.

5. *s. 37 (old)*

a. *Overview* - only used where *ss.34-35* are not applicable; authorizes use of force in defence others; anyone who needs help or protection. {Weber} No more force than necessary to prevent assault, must be attuned to the nature of the assault protected against.

b. *Definition of others is generous* - justifies defence of others, not just oneself. Not limited to formal guardianship; anyone who requires protection which the accused may be able to provide. Webers (ONSC 1994)

iii. *New provision, Bill C-26 (now in effect)*

1. *Overview* - abolishes ss. 34-37 of the Criminal Code which governed the defence of self-defence and replaces those four provisions with one new provision.

2. *Provocation* - no more express distinctions between provoked/unprovoked attacks, initial aggressors, apprehension, etc; always one standard of reasonableness, regardless of these issues. May also defend not only from unlawful assaults, but lawful assaults perceived unlawful.

3. *Response* - defenders not limited to assault in responding to force/threat of force; could also use as a defence for mischief, break and enter, etc.

a. For instance, consider the battered spouse / hitman case; could not avail self-defence under old provisions, because did not directly apply force; new provisions would cover that situation. {Ryan}

4. *Operation*

a. *Apprehension or threat of force* - belief on reasonable grounds that force / threat of force being used against self or another person; subjective/objective; *s. 34(1)(a)*

b. *Defence* - the impugned act must be one committed for the purpose of defending self/others from the use of the threat or force; *s. 34(1)(b)*

c. *Reasonable* - impugned act must be reasonable in circumstances, *s. 34(2),* re: nature of force/threat, imminency, other means to respond, role in incident, use/threat of weapons, physical capabilities and demographic factors of parties, history/prior altercations/communications between parties, proportionality of response, whether D. knew that attack/threat was lawful.

d. *Authorized by law* - no application if force used or threatened was employed for the purpose of doing something which attacker was required/authorized by law to do in admin or enforcing law, *unless* defender believes attacker acting unlawfully (subjective-objective).

iv. *Function* - renders impugned act non-culpable: exculpatory, outright acquittal.

i. Necessity

i. *Overview* - common law defence recognized by the SCC; morally involuntary conduct; accused consciously does the act but did not have any other "realistic option" except to break the law. Operates on AOR->BRD paradigm.

ii. Operation

1. *Peril* - there must be an urgent situation of clear and imminent peril that the average person would not be expected to withstand; modified objective standard; {Perka}

2. *No other means* -there must not be any reasonable "legal way out", that is, there must not be any other reasonable lawful way or method to avoid the imminent peril; modified objective standard; {Perka}

3. *Contributory fault / illegality* - does not deprive an accused of right to rely upon necessity as a defence unless the peril was *clearly* foreseeable but the accused proceeded in any event: {Perka}

4. *Balance of harm/proportionality* - the harm from the offence must be comparable to or less than the harm that would have occurred if the imminent peril was allowed to occur. Strict objective standard. {Latimer}

iii. *Function* - operates as an excuse, rather than a justification. {Perka}

j. Duress

i. Overview - previously existed as a statutory defence, but common law defence resurrected following the SCC decision concerning constitutionality of *s. 17* in *Ruzic.* Operates on AOR and BRD.

ii. Relation with necessity - both address liability in situations of extremity. Necessity deals with *circumstances* that produce extremity, where as duress deals with situations where person produces extremity through threats or coercion. {*Hibbert*-Lobby}

iii. Common law defence (available to secondary offenders, primary offenders charged with excluded offences)

1. *Threat of serious injury or death* - accused must be subject to a threat of death or serious injury to self or another person; this need not be immediate, but must be "a close temporal connection between the threat and the harm threatened." {*Ruzic*-Heroin}

2. *Threat must be sole cause of the commission* - accused must be committing the offence *solely* as a result of threat.

3. *Subjective-objective belief* - accused must believe that threat will be carried out if he/she fails to commit the offence, and threat must cause reasonable person placed in circumstances to respond by committing impugned offence. {*Ruzic*-Heroin}

4. *Safe avenue requirement* - duress presents a choice between two alternatives; one of which is so disagreeable that a serious infraction of the law seems preferable. Only when all other licit choices have been ruled out does duress excuse illicit behaviour. {*Hibbert*-Lobby}

5. *Standard of proof re: safe avenue* - whether there is a safe avenue is to be judged on a modified objective basis, one which takes into account particular circumstances and human frailties of accused. {*Hibbert*-Lobby}

6. *Can't be voluntary member of criminal association* - the accused must not be a voluntary member of a criminal association whereby he or she knew that he/she may be subject to compulsion by threats. {*Ruzic*-Heroin}

iv. Statutory defence (not available to secondary parties, or for excluded offences)

1. *Definition - s.17* applies where one commits an offence under compulsion by threats of death or bodily harm, except for where the offender is a secondary offender (aider, abetter, or common unlawful purpose) {Paquette} or the offence is excluded under s 17.

   a. For instance, no treason, murder, piracy, attempted murder, sexual assault, SAWW, ASA, threats to a third party or causing bodily harm,, forcible abduction, hostage taking, robbery, AWW, ACBH, AA, unlawfully CBH, arson or an offence under sections 280 to 283 (abduction and detention of young persons). *s. 17*

   b. For instance, explicitly "person who commits an offence" not "person who is party to an offence." s.17 does not apply where criminal liability as a party is determined through s.21(2), s.21(1)(b) or s.21(1)(c). {Paquette}

2. *Immediacy and presence requirements of s.17 unconstitutional* - because they could lead to convictions for persons who had voluntariness undermined through the coercion of a third party, for instance through threats to third parties. {*Ruzic*-Heroin}

v. Function - usually, operates as excuse. May also negate *mens rea* for certain offences where presence of coercion is inconsistent with *mens rea*. {*Hibbert*}

k. Provocation

i. Overview - partial defence to murder. Reduces murder to manslaughter: not complete acquittal. *S. 232(1):* murder in the heat of passion caused by sudden provocation; must have been acted on, on the sudden before there was time for passion to cool.

ii. What amounts to provocation - s.232(2) - wrongful act or insult, would deprive ordinary person of self control. Cannot be provoked where the other party is doing something that they had the *legal right* to do, or where insulting party incited by accused to provide D. with an excuse.

iii. Legal right - refers to a right sanctioned by law, not merely something which one may do without incurring legal liability. {*Thibert*}

1. One does not have a legal right to taunt a cuckolded husband in a parking lot. It's not illegal, but nor is it sanctioned. {*Thibert*}

iv. Burden of proof - for AOR, must be some evidence to suggest that the provocation would have caused the ordinary person to be deprived of self control, and some evidence to show that the accused was actually deprived of self control. If AOR, Crown must disprove BRD. {*Thibert*}

v. Operation

1. *Would an ordinary person be deprived of self-control by act or insult* - determined on objective standard; reasonable person *under the circumstances*. {*Hill*-Brother}

   a. *Modification* - age, sex, race, physical infirmity, shameful incident, or any attribute of the accused which would make the insult *more offensive*. {*Hill*-Brother}

      i. For instance, drunkenness is not a factor which is to be taken into consideration, nor idiosyncrasies; ordinary person has normal temperament, is not excitable or drunk. {*Hill*-Brother}

      ii. For instance, race of person not relevant consideration if provoking insult concerns physical characteristic. {*Hill*-Brother}

      iii. For instance, actions could be seen as reflecting badly on both husband and wife in Sikh community - include smoking, socializing with men other than husband/family, etc. {*Nahar*-Sikh}

      iv. For instance, reaction of an average Vietnamese male to infidelity on part of his wife was *not* considered in defence of provocation, cultural factors only relevant if slur is racial in nature: *R. v. Ly* (BCCA 1987)

   b. *Limitation* - ordinary person not affixed with values which are antithetical to Canadian values, eg. gender equality, accepting violence against women, etc. {*Humaid*-UAE}

2. *Did the accused in fact act in response to provocative acts* - based on the facts, whether or not the accused was in fact provoked into the ultimate response; subjective approach. An assessment of what actually occurred in the mind of the accused. {*Hill*-Brother}

3. *Was the accused's response sudden, before time for passion to cool* - based on the facts, subjective approach. Provocation must hit a mind unprepared for it. {*Hill*-Brother}

   a. For instance, can hardly claim that you are unprepared to receive insult when you have provoked, for instance by pointing a gun at someone. {Thibert}

   b. For instance, taunted by man who has broken up marriage could provoke one so as to lose the power of self control. {Thibert}

   c. For instance, rejection in romantic relationship does not constitute basis for provocation defence, however (could be dangerous to hold otherwise). {Thibert}

vi. Function - partially negates *mens rea* for murder as a concession to human frailty. {Hill}

l. Due diligence

i. *Overview* - once Crown has proved *actus reus* of offence BRD, accused may establish on BOP that acted with reasonable care or due diligence to avoid the harm (*actus reus*) occurring. {SSM}

ii. *Function* - negates *mens rea* for strict liability offences.

m.Actus reus not proven BRD

i. Criminal harm

1. *Overview* - Crown must prove BRD in certain crimes that a certain prohibited harm actually came about. Not a true defence, no need for AOR.

2. *Function* - negates *actus reus*.

ii. Causation

1. *Overview* - In crimes specifying a criminal harm, Crown must prove that the impugned act caused criminal harm. Not a true defence, no need for AOR. See *actus reus* -> causation, above.

2. *Function* - negates *actus reus*.

iii.Voluntariness

1. *Overview* - Crown must prove BRD (notwithstanding *Stone*) that impugned acts arose from conscious action by accused. See *actus reus* -> voluntariness, above; as an affirmative defence, see automatism (non-insane) above.

2. Accident

a. *Overview* - accused may claim that conduct was involuntary (negating *actus reus*), or otherwise that not all consequences of the act were intended (negating *mens rea*).

i. For instance, hitting another person as a result of a reflex, falling down stairs, hitting a person/property due to fault in motor vehicle brakes, etc.

3. Act of god / nature

a. *Overview* - claim that activity resulted necessarily from factors outside of accused's control, or that prohibited harm was caused by intervening act. Seldom arises in true crimes, where Crown must prove BRD. In strict liability, D. may have to prove due diligence.

i. For instance, sudden tidal wave or landslide hit my car forcing my car to swerve involuntarily into the opposite lane, or flood broke septic tank thereby causing a pollutant to enter a nearby stream.

4. Physical impossibility

a. *Overview* - if accused is under a legal duty but is physically incapable of complying, the accused is entitled to a defence: omission to comply with the law was not "voluntary".

5. *Function* - negates *actus reus*, unless claiming that consequences were unintended (see accident, above).

iv. Consent

1. *Overview* – absence of consent on the part of the complainant is an essential element of many offences, explicitly (assault: see *s. 265,* theft) or implicitly (break and enter). Crown must prove lack of consent BRD.

2. Vitiated consent generally

a. *Coerced consent* - consent does not exist at law where it was obtained through force, threats/ fear of force, fraud, or exercise of authority; *s. 159(3)(b)(i)*

b. *Mental disability* - no consent if the court is satisfied beyond a reasonable doubt that the person could not have consented to the act by reason of mental disability. *s. 159(3)(b)(ii)*

c. *Death* – no one may lawfully consent to his/her death and such consent will not relieve others from causing, assisting in causing or attempting to cause that person's death. *s. 14*

d. *Jobidon exception* - assault requires proof of non-consent BRD; but, not applicable where adults *intend* to apply force causing serious hurt/non-trivial bodily harm. {Jobidon} Must both *intend* and *cause* bodily harm for consent to be vitiated on this basis. {Paice}

i. For instance, consent would *not* be vitiated where parties *intended* to cause serious harm, but this did not actually come about. {Paice}

ii. For instance, where consent fight between youths, one suffers bodily harm, other charged with ACBH, claims defence of consent; not available, b/c of intention to do serious harm to one another. {W. (G.)}

iii. For instance, consent may be vitiated where injuries exceed "public policy" limitations on force set out in *Jobidon*, in domestic context as in bar fights; {Bruce} May be diff. levels of harm in diff. venues. {Fergie}

iv. For instance, consent *not* vitiated in a circumstance where the accused did not *intend* to cause bodily harm or other than trivial harm. {B. (T.B.)} {A. (C.)}

v. For instance, knee to the face causing a broken job exceeds the harm threshold set out in *Jobidon*, and therefore was not able to be consented to by complainant, even had consent existed. {Sullivan}

3. *Vitiated consent in sexual assault*

a. *Implied consent* - while the implied consent of complainant is a defence in certain circumstances (eg. for contact sports), specifically negatived for sexual assault by the SCC. {Ewanchuk}

b. *Sexual assault causing bodily harm* - similar to *Jobidon* exception, above; though consent is a defence to sex assault charges, one cannot consent to infliction of serious bodily harm, unless this arises in the course of a *generally approved social activity.* {Welch}

i. For instance, sexual violence is not a *generally approved social activity* - bondage and intentional infliction of injury are "inherently degrading/dehumanizing": therefore, cannot be consented to. {Welch}

ii. For instance, CA held in A. (J.) that consensually rendering a person unconscious for sexual asphyxiation may constitute *bodily harm*, complainant's consent would be void. SCC ruled on other grounds. {A. (J.)}

iii. For instance, counterexample, no forcible confinement if the accused and the victim engaged by common consent in an act of sexual bondage, including sexual asphyxiation: no intent to cause harm. {McIlwaine}

c. *Fraud* - fraud in the context of sexual assault involves two elements: dishonesty and deprivation. {Cuerrier} Decision has been subsequently criticized. {Mabior}

i. For instance, pre-*Cuerrier*, test was whether fraud related to "nature and quality of the act" - fraudulent claims that act was "medical treatment" sufficient; but representing to prostitute that she would be paid, when accused had no intention to pay does not go to "nature and quality" - consent valid. {Petrozzi}

ii. For instance, dishonesty made out with deceit regarding accused's HIV+ status; deprivation made out through significant risk of serious harm to complainant via exposure to HIV. {Cuerrier}

iii. For instance, if the accused in Cuerrier had used condoms, the risk of harm would not be sufficient to be considered significant, therefore would not have vitiated consent. {Cuerrier}

iv. For instance, accused acquitted for charges re: incidents when his viral load was too low to be infections, and for others where condom used, but convicted where viral load high and no condom. {Mabior}

d. *Statutory limitations*

i. *Unacceptable forms*, *s. 273.1* – no consent if expressed by person *other* than complainant; complainant *incapable* of consenting; abuse of *trust*/authority; complainant expresses *lack of agreement*; or, consent *withdrawn* by words/conduct of complainant.

1. For instance, incapable of consent where complainant unknowingly drugged with PCP - "felt out of control." Consent not valid where under influence of surreptitiously administered drugs. {Daigle}

2. For instance, cannot consent in advance to sexual activity that will continue while unconscious, because complainant must have the ability to withdraw consent. *R. v. A. (J.)*

ii. *Mistaken belief limitations, s. 273.2* – accused cannot claim defence of consent / mistaken belief in consent where this arose from self-induced intoxication, recklessness, wilful blindness, or where no reasonable steps taken to ascertain consent.

iii. *Age of consent*, *s. 150.1* - no consent can be given by a complainant under the age of sixteen.

4. *Function* - negates *actus reus*.

v. Identity / alibi

1. *Overview* - Crown must always prove that accused is person who committed or was otherwise a party to prohibited act; accused may dispute by claiming otherwise, through mistaken identification or by alibi. Not true defence, no need for AOR: always Crown burden.

2. *Eyewitness identification* - as a major cause of wrongful conviction (see *Sophonow*), jury must be given clear instructions on the dangers of relying on eyewitness testimony.

3. *Alibi* - two elements: (1) must be disclosed to Crown in a timely manner, so that its veracity may be investigated, and (2) must be adequate (eg. establish that accused was elsewhere at *all* relevant times). {Cleghorn} If requirements not satisfied, court *may* draw adverse inference:

   a. *Disclosure requirements:* {Cleghorn}

      i. Disclosed in a timely manner, so that police may investigate (usually following prelim);

         1. For instance, counterexample, there is no need for disclosure of alibi evidence when the police/ Crown are already aware of witness; not truly "alibi" evidence but rather merely exculpatory. {Wright}

      ii. Statement that accused was not present at the scene of the crime at time of crime;

      iii. Whereabouts of the accused at that time; and

      iv. The names of any witnesses to the alibi.

   b. *Fabrication* - if the jury simply does not believe alibi evidence, this should not directly support an inference of guilt. However, if other evidence indicates that alibi fabricated specifically to deceive court, can be used to support inference of guilt (not determinative, though). {Tessier}

4. *Function* - negates *actus reus*.

n. Mens rea not proven BRD

i. *Overview* - sometimes an accused may claim other factors negated the existence of mens rea. For example the accused may claim confusion or forgetfulness as a defence to shoplifting.

ii. Prank

1. *Overview* - may successfully raise defence of prank on a charge of theft: lack of a fraudulent motive negates the necessary intent (but this approach confuses motive with intent); better to recognize this as part of a distinct excuse or a *de minimus* defence.

iii. Mental disorder short of insanity

1. *Overview* - where insanity not bade out BOP, should consider whether Crown has proven requisite intent BRD: could lead to conviction on lesser included offences. {Bailey}

iv. Cumulative effect of Provocation, Intoxication, Automatism or Insanity etc.

1. *Overview* - evidence falling short of proving these defences may cumulatively be sufficient to negate the requisite intent for the offence charged; jury instructed to that effect.

v. *Function* – negates *actus reus*.

10.Inchoate offences

a. Overview - offences which are incomplete, including attempts, conspiracy, and counselling a crime that does not occur (see parties -> counselling, above). Transferred intent inapplicable to these offences.

b. Attempts

i. Overview - attempted offences are set out under s. 24(1). It is a question of law (not fact) whether the preparatory steps taken by the accused constitute an attempt or mere preparation.

ii. Lesser included - attempt to commit an offence is always considered a lesser-included component of the offence, via s. 660. However, if attempt charged, but Crown proves full offence, the accused may either be convicted of attempt, or may be retried for the full offence, via s. 661.

iii. Offences - offence of attempt is an intentional *mens rea* offence; thus, presumably only intentional *mens rea* offences are subject to attempt; for instance, no offence of attempted manslaughter. {Jack}

1. For instance, cannot attempt other inchoate offences, eg. attempt to *conspire* to commit theft. {Dungey} However, may be able to attempt substantive offence of conspiracy itself. {Dery} Conspiracy to attempt to obstruct justice is allowable because substantive offence is worded as "attempt to obstruct." {May}

2. For instance, other offences already have attempts built into their *actus reus* and therefore treat attempts the same as full offences; eg. s. 212(1) attempting to procure a person for illicit sexual intercourse.

iv. Penalty - same as if the accused attempted to commit the offence which was unsuccessfully counselled, so effectively inchoate penalty (s. 463).

1. For instance, if offence punishable by life, 14 years for inchoate; other inchoate indictables, half of the max punishment; summaries, $5000 fine or six months for inchoate.

v. Impossibility – attempts are punishable regardless of whether the attempted offence was factually or legally possible to actually complete, under s. 24(1). {Dynar}

1. For instance, in a sting operation, it is legal impossible to launder money (because the currency would be lawful, not unlawful); however, attempt to launder is nevertheless able to be made out. {Dynar}

vi. Withdrawal – parties probably cannot withdraw from inchoate offences, which are complete once sufficient steps have been taken, regardless of whether full offence made out. {Walia}

1. For instance, voluntary desistance has been rejected as a defence for attempted arson (*Goodman*) and attempted burglary (*Kosh*).

2. For instance, counterexample, UK courts have recognized definition of attempt which requires "fixed and irrevocable intention" which would therefore allow withdrawal as a defence. {Stonehouse}

vii. Actus reus - no general criteria for what amounts to attempt; qualitative analysis re: common sense, facts and nature of complete offence. Earlier in violence than in fraud, for instance. {Deutsch}

1. For instance, accused charged with attempt to procure persons for prostitution, places ad in newspaper, engaged in interviews where sexual nature of job became clear; conduct was an "important step," ergo an attempt. {Deutsch}

2. For instance, the fact that significant time may have elapsed before completion of the offence and impugned conduct, or because further acts were required does not render an attempt "mere preparation." {Deutsch}

3. For instance, plan to rob bank foiled when accused are driving to the job, spot a police car nearby, then keep driving. Sufficient to make out attempted robbery. {Henderson}

4. For instance, possession of all the materials and instructions to manufacture LSD make out attempt even absent evidence that the accused had begun to produce. {Godfrey}

5. For instance, hopping into a car, making a plasticine image of the key (in the ignition), and then leaving (did not steal car or create copy of key) not sufficient to make out an attempt. {Lobreau}

6. For instance, counterexample, UK courts apply a text of proximity, requiring effectively that the accused's conduct must be the last step before completion of the offence. {Eagleton} Not followed in Canada {Olhauser}

viii. Mens rea – requires intention to commit offence, for the purpose of carrying out that intent; includes both direct and indirect intent, recklessness insufficient. (see *mens rea* –> intent) {Hibbert}

1. For instance, in attempted murder, the intention to cause the death of another human being is sufficient, via s. 229(a)(i); however, intent to cause bodily harm which is likely to cause death is not sufficient. (s. 229(a)(ii))

2. For instance, doctrine of transferred intent is not applicable to inchoate offences, particularly attempts (see relation between elements –> transferred intent).

ix. Policy rationale

1. *Prevention* - to wait until the crime is complete would unnecessarily cause harm to crime victims

2. *Moral fault* - people who attempt to commit crimes are demonstrating a criminal disposition and deserve to be punished.

3. *Deterrence* - punishing attempts may be necessary to deter this offender and others who may be contemplating committing a similar crime.

c. *Conspiracy*

i. *Overview* - offence which punishes an (1) actual agreement (2) by two or more persons persons to (3) jointly pursue commission of offence.

ii. *Offences* - ss. 465(1) unlawful purpose means indictable offences (c) including (a) murder and (b) false prosecution, *and* summary conviction (d) offences. If conspiring to commit indictable, guilty of indictable; if conspiring to commit summary, guilty of summary.

1. For instance, this definition does not refer to non-criminal summary offences; *Blamires* compromise presumably applies, so that only serious summary crimes against public interest are included. {Fergie}

iii. Conspirators and legal persons

1. *Corporate persons* – courts have generally held that flesh persons and corporate persons cannot conspire with one another in a criminal conspiracy. {Martin} (see: corporate liability, below)

2. *Spouses* - spouses considered one legal person at common law, therefore could not be guilty of having conspired with one another. {Kowbel} Rule remains today, but only where the spouses are the *sole conspirators;* {Rowbotham} likely extended to conjugal/same-sex. {Thompson}

iv.Actus reus

1. *Agreement - consensus ad idem* between persons to work together to commit an offence; mutual decision to pursue offence. Consensus, not formality of agreement required. {Cotroni}

    a. For instance, agreement need not bend itself to the formalities of contractual agreement; there is no need for signature, documentation, consideration, etc; may be express or implied.

2. *Changes to offence* - as long as there is a continuing overall plan, there may be changes in the methods of operation, personnel, or victims, without bringing the conspiracy to an end.

3. *Mutuality* - no requirement that *all* conspirators know one another or communicate with each other, as long as each conspirator knows and agrees to be part of common criminal scheme.

4. *Offence complete with agreement* - no action need be taken in furtherance of crime; conspiracy complete with agreement. But, if still negotiating whether to pursue, there is no agreement.

    a. For instance, contingency upon an externality is not sufficient to undermine existence of an agreement; if agreement subject to externality, conspiracy stands; eg. persons agree to burgle if homeowner away. {Root}

    b. For instance, cannot have attempt to conspire to commit theft, too preliminary an offence to be criminally punishable. Where conspiracy is *substantive offence* (eg. seditious conspiracy) this may be possible. {Dery}

5. *Withdrawal* - parties probably cannot withdraw from inchoate offences, which are complete once agreement has been reached, regardless of whether underlying offence made out. {Walia}

v. Mens rea - intention to agree; where there is no *true* intention to agree between two conspirators, neither can be convicted (though counselling uncommitted/s. 464 may apply). {O'Brien}

1. For instance, where one member of conspiracy, Tully, does not *truly* agree, but rather only did so in order to grass on co-conspirator for plea bargain leverage, there is no *true* conspiracy. {O'Brien}

vi.Impossibility - conspiracy is punishable regardless of whether the offence which was the subject of the conspiracy was factually or legally possible to actually complete; impossibility will only avail as a defence where the offence was imaginary or not a crime. {Dynar}

1. For instance, in a sting operation, it is legally impossible to launder money (because the currency would be lawful, not unlawful); however, conspiracy to launder is nevertheless able to be made out. {Dynar}

vii.Kienapple and merger - conspiracy is a separate offence from the underlying offence, and therefore accused can be convicted for both, though courts have shown distaste for doing so.

1. For instance, could be argued that matter should be treated like attempt, eg. that the conspiracy offence should be considered a lesser included which is merged when full offence is completed.

viii.Penalty - unlike other inchoate offences, such as attempts, punishment for conspiracy is generally

the same as for the completion of the full offence; ss. 465(1)(c), (d).

1. For instance, this is counterintuitive, because once there has been an agreement, might as well continue on with the substantive offence, since the penalty is the same. {Fergie}

ix. *Special considerations in party to conspiracy* - can only be a party to a conspiracy if one aids with the *formation* of the conspiracy; if only aiding the substantive offence, and not formation, then not guilty of conspiracy; guilty of substantive offence, however. {Trieu}

x. *Historical development* - see Appendix A; originally re: false prosecutions, evolved to include agreement to commit lawful *or* unlawful act by unlawful means; now limited to crimes.

d. *Counselling uncommitted offence, s. 464*

i. *Overview* – see parties -> counselling uncommitted offence, above.

11. *Corporate liability*

a. *Overview* - corporations are separate legal entities, separate from shareholders, officers, etc. which can own property, enter into contracts, be sued, etc. Can also be convicted of crimes. Included under s. 2 definitions of "every one" as organizations, which are liable for conduct of its "representatives" (broad).

b. *Historical development* - lacking *mens rea*, corporations could initially only be held responsible for regulatory offences and not true crimes; changed in early 20th century: "every one" incl. corporations.

c. *Modes of corporate liability*

i. *Vicarious liability*

1. *Overview* – corporation is liable for the acts and the *mens rea* of its employees/agents where these are acting within the scope of authority within corporation. Broad test.

ii. *Director liability*

1. *Overview* – corporation is liable only where the directors knew of and approved of or encouraged commission of criminal offences. Narrow test.

iii. *Directing mind liability*

1. *Overview* - pragmatic test between two extremes above; the actions persons who are the directing will of the corporation become the actions of the companies themselves. {Lennard's}

a. For instance, where active managers of a corporation enter into an agreement to commit a false pretence, there is no reason why the corporation is not liable for that action. {Fane}

2. *Identification doctrine* - legal fiction through which the mental states of employees and officers can be attributed to a corporate entity; directing mind coincides with corporate mind when acting within scope of authority {Canadian Dredge}

a. *Crucial question* - which employees/officers are directing mind for purposes of identification

doctrine. {Canadian Dredge}

b. Process - if duty and responsibility of officer/employee arises to "virtually" directing mind, then that person's action and intent within scope of authority (express or implied) is attributable to the corporation; depends on size/organization of corp. {Canadian Dredge}

i. For instance, tug captain was master of flotilla of tugs, troubleshooter for other boats, subject to very little control by supervisors; nevertheless, not a directing mind; must exercise decision making on matters of corporate policy, rather than mere implementation of policy. {Rhone}

ii. For instance, truck driver responsible for waste collection, property maintenance, billing, etc. s gave false information on waste disposal form; not attributable: no control over shaping policy. {Safety-Kleen}

iii. For instance, counterexample, prior to *Rhone* (1993), salespersons, managers regional supervisors, etc. have been held to be directing minds despite lack of control over corporate policy; shift towards centralized, narrow notion where only senior officials are liable. {Fergie}

c. Merged entities - does not have to be the mind or action of a single person; merged entities, such as the board of directors, may be considered a directing mind. {Canadian Dredge}

d. Multiple minds - corporations may have multiple directing minds; delegation and subdelegation in large entities make this a reality.

e. Divergence - where directing mind's actions exceed authority, are *totally in fraud* of corporation, or benefit directing mind *exclusively*, the actions no longer attributable.

i. For instance, Crown must therefore prove that the actions were within authority, not totally in fraud of corporation, and that some benefit accrued to the corporation.

3. Negatived defences

a. Contrary instructions - it is no defence for a corporation to claim that other directing officers issued instructions prohibiting criminal conduct; the corporation and its directing mind are one, and therefore, prohibition from one controlling arm to another has no effect.

b. Awareness - it is no defence for a corporation to claim that the directing mind (eg. Board of Directors) had no awareness of the criminal conduct, or did not authorize/approve it.

iv. Senior officer liability

1. Overview - replaced directing mind liability with Bill C-45 (2003); the common law definition of persons whose actions are attributable has been *broadened* to include both policy makers and managers (eg. persons who manage or give effect to policy). Follows Westray disaster.

2. Definition - role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities.

3. Process

a. Negligence offences - organization is a party if, acting within scope of authority, reps. are parties to the offence directly, or multiple reps. act *or* omit action which, aggregated, would

have made them parties; must depart from "representative" standard of care. (s. 22.1)

b. Subjective offences - org. is a party if, intent in part to benefit org., reps. are party to offence, or with *mens rea*, reps direct work of other reps to commit the offence, or, knowing that offence to be committed by other rep, *does not* take reasonable steps to prevent. (s. 22.2)

4. Issues

a. Strict liability - s. 22.1 deals with penal and criminal negligence and s. 22.2 with subjective *mens rea* offences, no scheme to deal with strict liability (for prov. offences). {Fergie}

b. Redundancy - s. 22.2(b) redundant (directing to commit) when viewed in light of s. 22.2(a) (party to offence), as directing to commit would amount to aiding/counselling. {Fergie}

c. Narrowing re: benefit - under s. 22.2, intent partial benefit to corp. is more narrow than common law, which held "design or result" - eg. unintentional benefit sufficient. {Fergie}

d. Focus on parties - the focus on "party to offence" is difficult, because party liability is laden with subtleties which, combined with complex corp., difficult to unravel. {Fergie}

d. Penalty - dealt with under s. 718.21 of the *Code*; subject to probation and fines.

i. Probation - includes extra conditions, such as "shaming orders" (s. 732.1(3.1)(f))

ii. Fines - for indictables (s. 735(1)(a) not subject to upper limit (though must be proportionate, under s. 718.1); fines for summaries limited to $100k under s. 735(1)(b).

12. Vicarious liability

a. Overview - common law concept developed to hold master liable for acts of servants, regardless of act or fault on the part of the master (setting apart from party liability). *No place in the criminal law*. {SSM}

b. Common law exceptions - there were recognized exceptions to rule against vicarious liability for crimes: public nuisance, criminal libel, and criminal contempt of court; former two abolished by s. 9, and the latter by the SCC. {Bhatnager}

c. Charter issues - vicarious liability amounts to absolute liability, and is therefore unconstitutional where paired with a penalty which restricts liberty (eg. imprisonment, probation). {Burt} More unjust than absolute liability, because neither *actus reus* nor *mens rea* required for conviction. {Stuart}

d. Regulatory exceptions

i. Delegation in liquor licencing - liquor licence holders may be vicariously liable for offences committed by employees under certain statutes. {Levesque} Limited only to where the provision holds only the licence holder (and any other persons) liable for the offence. {Stevanovich}

ii. Absolute liability offences- various applications prior to SSM, however unclear whether this is applicable today, and such offences are rare in any case.

iii. Legislated exceptions - s. 77 of the BC *Liquor Licencing Act* imposes vicarious liability on owner for employee offences; while this is absolute liability, does not involve imprisonment, therefore acceptable. {Capozzi}

13. Miscellaneous

a. Historical Development of Conspiracy

i. Early History

1. 1279 - order to itinerant justices to inquire into confederacies [agreements] to defeat the ends of justice [e.g., false prosecutions]

2. 1611 - Poulterer's Case - Star Chamber holds that conspiracy to falsely prosecute another person is punishable although the agreement was never put into effect (i.e., no overt act other than agreement required)

ii. Common Law Developments

1. 1700s - Common law courts extend the offence of conspiracy to encompass an agreement to commit any crime.

2. 1800s - expanded beyond crimes; catch-all provision: "conspiracy includes an agreement to commit an unlawful act or a lawful act by unlawful means" (Jones (1832) - 683; Mulcahy (1868) - 688; Parnell (1881))

iii. Canada: 1892 to 1954

1. *Section 527 of the 1892 Code* - offence (punishable by 7 years imprisonment) to conspire with any person to commit an indictable offence. In addition, there were a few specific Code provisions for specific conspiracy offences.

2. *Summary offences* - Conspiracy to commit summary conviction offences or other unlawful acts was not codified, but still existed as a common law crime of conspiracy (as set out in Jones and Mulcahy).

iv. Canada: 1954 to 1985

1. *Extinguishment* - common law crime of conspiracy was abolished (along with all other common law crimes). Parliament enacted (in 1954) a replacement for the common law crime of conspiracy.

2. *Section 423(2)* - Everyone who conspires with anyone (1) to effect an unlawful purpose, *or (2)* to effect a lawful purpose by unlawful means, is guilty of an indictable offence punishable by two years imprisonment.

3. *Gralewicz* - SCC held in 1981 that "unlawful purpose" under s. 423(2) meant "prohibited by federal or provincial legislation" but not otherwise unlawful conduct at common law (such as breach of contract). Left open the status of non-criminal summary offences.

4. *Blamires compromise* - "unlawful purpose" means "serious summary offences" which involve "harm to the general public" or "a threat to a public interest;" no word from SCC. Unfair, b/c conspiracy to commit prov. offence indictable, even though underlying offence *not* a true crime.

b. Development of the Criminal Code

i. Definition - law code is a statute which brings together all the law in a given area; should be exhaustive in criminal law, at least concerning offences. Object is to remove conflicts, inconsistencies, obscurities, making law intelligible to the layperson.

ii. Figures in international codification

1. Bentham

a. CV - father of utilitarianism and the codification movement in the 19th century; ultimately a manque, never produced a code.

i. Manque - wrote far and wide to obtain a codification commission, in England, in the US (federally and at the state level) and in Russia, but was never granted a commission. Never produced a completed code, which historians feel is "just as well" based on the fragment he left behind. Contribution to codification was in energy and inspiration.

ii. Style of codification - created distinctive style; drafted by learned philosophes, removed from political process, proceeding systematically from basic principle to practical corollary in a system which is internally harmonious and philosophically grounded.

b. Code - N/A

2. Livingston

a. CV - lawyer, versed in French/Roman/common law, man of affairs serving in government and legislative posts. Embraced utilitarianism and commitment to codification.

i. Completion - though his *Penal Code* was never enacted, it represents the first comprehensive codification of law that followed from the Benthamite philosophy; he wrote to Bentham that the effort was directly attributable to his philosophy.

ii. Underlying principles - utilitarian; one in which society's institutions are shaped in accordance with utility. Precedent and tradition eschewed on this basis.

1. Clarity - unclear, unsettled, conflicting laws considered a curse; legitimacy of law dependent on its knowability by those it governs.

2. Common law distrust - common law allows judges to govern in the worst way: by *ex post facto* laws grounded on judges own prejudice/preference masquerading as the product of legal logic.

3. Jeffersonian revolutionary / Jacksonian democracy - also applied American political

principles, indeed going beyond rights extended in the Bill of Rights in crimpro: see libertarianism, below.

b. *Code – Louisiana Penal Code*, 1826, Louisiana. Not enacted there or in other jurisdicions: his *Civil Code* and *Code of Practice* for LA were enacted however. Also drafted a *Commercial Code*.

i. Structure

1. *Overview* - four separate codes: *Crime and Punishments, Procedure, Evidence,* and *Reform and Prison Discipline*. Completed in two years.

ii. Style

1. *Conversational* - distinct, provides command and explanation; full, frank discussion with reader, treating persons like rational beings who, in reading, must reflect as well as obey.

2. *Principle to application* – before discussing conspiracies to fix prices, first established the general principle that individuals have the right to set the price of their own goods, or wages for their own services. Also provides illustrations.

iii. Substantive issues

1. *Expansive duty in homicide* - person who sees a blind man walking towards a precipice, declines to inform of the danger would be guilty of homicide.

2. *Multiplication* - acts should not be criminal when private suit is sufficient to repress them, nor should unenforceable acts (due to public opinion, etc.) be criminal.

3. *Treatment of common law* - reference to common law crimes, terms, and any means for judicial discretion in definition of crime eliminated. Curtail judicial discretion. Better that evil acts go unpunished than for judges to assume legislative powers.

4. *Contempt* - no more judicial power to hold persons contempt: sets out specific offences re: interference with judicial proceedings, which are standalone offences (no more summary judgment on the matter by the offended judge).

5. *Judicial improprieties* - imposed offences for judges who received bribes, acted in cases of conflict, advised other judges, interfered with freedom of speech/press, etc.

6. *Libertarianism* – certain libertarian principles expressed in the Code, though subject to overarching utilitarianism; for instance, held that impositions of burdens on property of wealthy so that poor might survive was essential to society (utilitarian).

   a. *Rights* - accused entitled to counsel at every stage, court had to appoint lawyer if unable; no confession admissible against accused unless "given freely."

   b. *Civil liberties* - Code made it an offence to prevent a person from exercising

freedom of speech or religious worship through violence or threats; protects civil liberties with the criminal law.

c. *Reasons* - judge must pronounce reasons for judgment, which had to be available for public scrutiny and criticisms.

d. *Privacy* – recognized importance of privacy, made it a crime to open a letter addressed to someone else or publish its contents maliciously.

iv.Punishment

1. *Principles* - no retributive justice; only objects in imposing punishment are specific and general deterrence. Follows from utility. Recognized that the sources of crime were poverty, etc, and codified accordingly.

2. *Capital punishment* – no capital punishment, which departs from Bentham (who accepted it in aggravated murder).

3. *Discretion* - sought to limit discretion with imposition of gradation through detailed specification of aggravating and mitigating circumstances. Complex.

4. *Prisons* - recognized that prisons spawn crime: code segregated incarceration by seriousness of offence; imposed minimum conditions of imprisonment: includes educational/moral instruction; must achieve goals by inflicting minimal suffering.

5. *Reintegration* - provided House of Refuge and House of Industry for offenders reintegrating into community; provided support and employment, etc. (like a halfway house).

v. Obstacles to enactment

1. *Fire* - first completed draft accidentally destroyed in house fire; therefore, had to be redrafted from scratch, which took another two years.

2. *Legal professionals and capitalists* - vehement attack on judges / curtailment of judicial power, and making problem of unemployment part of problem of crime alienated slaveholding society.

vi.Influence – no enactment, but influenced heavily the *Indian Penal Code*.

3. Macaulay

a. *CV* – politician and man of letters, but primarily a jurist. Served as law member in India from 1834-1838, a position which was subsequently filled by Stephen, the other great English codifier. Trinity College (Cambridge) and private school education. Called to the bar, but focused mostly on politics and writing. Was virtually the sole author of 1837 draft.

b. *Code – Indian Penal Code*, submitted in 1837 but not enacted in that nation until 1860, CIF 1862. Enacted also in Asiatic and some African commonwealth nations.

i. Structure - 26 chapters, 488 sections; drew largely on Livingston's code and the French *Code Penal*, but largely improved version of contemporary English law.

ii. Style

1. *Focus on clarity* - unlike other projects, Macaulay was not called upon to codify an existing body of law; fresh start without minutiae and arcaneness of common law. This allowed for a focus on clarity and intelligibility: did not resemble contemporary English statutory jargon.

2. *Comprehensive and understandable* - vague terms should be avoided, but what was not in the code would not be law: exhaustive. Wrote with elegance and flair.

iii. Substantive issues

1. *Principle to application* - similar to *Livingston's* code, expresses the leading idea in the most explicit/pointed form possible, following into explanations/definitions, and exceptions accompanied by their own explanations. Concludes with illustrations.

2. *Defences* - despite Macaulay's objections, includes provision for necessity/duress; also codifies a defence of *de minimus* (eg. no person of ordinary sense and temper would complain of impugned harm). Meets problems of the time, eg. cooked caterpillar in a tin of peas, better than other tools of crim. law (such as an absolute discharge).

3. *Homicide* - Stephen held that M's definitions of homicide were obscure; this is not true, narrow and specific, includes a very forward-looking clause re: culpable homicide (eg. intends death or does act/omission with knowledge that this is likely to cause death); recognizes mitigation (manslaughter, consent, provocation etc.). Scheme works well in practice.

4. *Consent in homicide* - due to sanctity of life, killing with consent less culpable than murder because of respectable motives (eg. soldier putting comrade out of pain), and because it does not produce insecurity or spread terror in society: forward thinking.

5. *Constructive crime* - Macaulay showed an abhorrence for constructive crime, and deliberately left out punishing the causing of death by injuries not likely or intended to do so, or by negligence. Stephen critical, inserted a section in 1860 to deal with this.

iv. Punishment - death penalty for murder, 14 years maximum for mitigated forms of homicide. Explicitly *Benthamite*, held that smallest suffering needed to suppress crime should be inflicted. Similarly, with procedure, smallest cost of time and money to get at the truth.

v. Obstacles to enactment

1. *Educational controversy* - in 1834, India embroiled in controversy re: whether education should continue in Indian tradition, or supplanted by English system.

Macaulay was an *Anglicist*; critical of Indian education. Ultimately this viewpoint won out. However, extreme aversion to boldly imposing English institutions.

2. *Legal professionals* - despite that Macaulay's code was to be a fresh start, would be applied by English-trained judges and lawyers who may have spent time living under English law while in India; therefore, some opposition to complete departure, because they felt that this would produce confusion and difficulty.

3. *Bethune* - law member following Macaulay, produced an entirely fresh code of his own, opposed Macaulay's code vehemently. However, when forwarded to committee in England, led by Peacock, they favoured Macaulay's code (with some alterations).

4. *Mutiny* - according to Peacock, the only reason why the Code was not enacted before 1860 was the mutiny and its aftermath - which apparently did away with some of the English aversion to boldly replacing Indian institutions with their own.

vi. Influence – enacted in India, CIF 1862. Enacted also in Asiatic and some African commonwealth nations.

4. Field

a. *CV* – dominant figure in NY codification efforts; no professional or scholarly training in criminal law (but was a prominent lawyer). Nevertheless critical to *NY Penal Code*; however, this was drafted by Noyes, an NY district attorney. Prominent codifier in middle-50 of the 19th century.

b. *Code* – highly influential on *NY Penal Code*, drafted in 1864-65; enacted 1881 in NY, elsewhere in the interim. Worked directly on *Political Code*, *Civil Code* (together, "Field Codes"); it is said that the codification died with the Field codes: one of the most influential of all codes.

i. Structure - comprehensive, incorporated many separate statutes *in toto* and separately.

ii. Style - little joy or instruction to contemporary reader: pedestrian. Burdensome formulations, particularly in homicide.

iii. Substantive issues

1. *Jacksonian democracy* - as with Livingston's code, relied upon Jacksonian democracy, which was aligned with Bentham's approach to codification in law. Advanced causes of producing classes against capitalists: human vs. property rights. Codification an enemy of conservatism, b/c restricted judges from declaring law undemocratically. However, Field rather conservative, and his codes were not radical/reformist.

2. *Education of lawyers* - felt that lawyers must be trained in entirely of law, relationship of parts, etc.

3. *Homicide* - provisions tend to be overly complex, burdensome: "acts evincing a depraved mind, imminently dangerous to others, regardless of human life;"

excusable homicide where "committed by accident/misfortune in the heat of passion, upon sudden/sufficient provocation, upon sudden combat."

4. *Bounds of commission* - while Macaulay/Stephen found reason to violate bounds of commission, Field did not re: comprehensiveness; brought every statute in scope which imposed criminal penalty, which was at the time the major regulatory sanction. Therefore, included regulatory subjects: intoxicated physicians, overloaded passenger vessels, etc.

5. *Ad hoc legislations* - retained crimes which had been brought about by ad hoc legislation as well as those from common law; recognized that this was duplicative, etc., but did not trim the detritus (except for the crime of perjury). Reproduced statutes virtually whole, though some errors/deficiencies would be corrected.

6. *Common law* - eliminated common law offences, avoided common law terms (so that no recourse to common law required); however, many offences defined so vaguely so as to require recourse to common law (eg. referring to case law directly).

iv.Punishment

1. *Degrees of murder* - despite that degrees of murder had been introduced precisely to allow juries to withhold capital punishment, Field eliminated them from Code on the ground that jurors would be unwilling to unite in a capital conviction where other options were necessary.

v. Obstacles to enactment

1. *Opposition of legal professionals / capitalists* - similar to Livingston's code, curtailment of judicial power met with opposition from upper classes, those opposed to Jacksonian democratic principles. However, with rise of Jackson, came Constitutional Convention, 1846: abolishment of tenured judiciary, appointment of codification committee (due largely to Field's pamphleteering/campaigning).

2. *Savigny school* - Carter, NY lawyer, held that law could not be produced through legislative fiat because would not represent the experience/social standards of culture, which are explored/discovered by judges/lawyers; serious challenge.

3. *Nationalism vs. cosmopolitan* - codifiers seen as provincialists against cosmopolitan adherents of common law; would oust the traditions of the English law, allowing for creation of American law adaptive to American circumstances and sentiments.

vi.Influence - basis for codes in various states, including California; became very influential in western states as a result, enacted in NY as well, most influential code (though "least deserving of its influence").

5. Stephen

a. *CV* - influential and learned writer on the criminal law; educated at Eton, Cambridge, and London University, called to the bar; did not have a top-class practice however. Law

member for India in 1869; drafted *Homicide Act,* 1872 (not enacted); wrote *Digest of Criminal Law*, 1877 formed basis for subsequent code; wrote *History of Criminal Law in England*, 1883.

b. Code – Stephen was directed by Attorney General to prepare code with changes in 1877, to be introduced in 1878. Basis for Canadian and New Zealand codes, never enacted in England. Also assisted Wright on the Jamaica code.

i. Structure – initially would have been three bills; one with amendments, with subsequent bills codifying substantive and procedural criminal law; Stephen decided to introduce all in a single bill.

1. Commission alterations - commission released altered bill following commission in 1879; increase in number of clauses, mainly due to detailed provisions on self-defence, defence of property, prevention of crime; detailed model, rather than a general standard of reasonableness.

a. Excluded voluntary drunkenness provision, modified duress, removed necessity.

b. Changed homicide provisions to intention to cause death/GBH, or reckless concerning actions likely to cause death/GBH which result in death (unlike 1878 draft); includes "unlawful object" (eg. constructive) homicide without intention to kill, against Stephen's wishes. Narrower: 1878 definition would convict of murder someone who shoots at constable's legs to flee crime.

ii. Style

1. Digest - the style used in Stephen's digest is insufficiently cited to be useful to practitioners, and too concise to be useful for students; nevertheless, forms an important basis for the subsequent preparation of code.

2. Overdefinition - held that overdefinition would lead to increased quibbling; however, view of crime as a sin led to carelessness in definition.

3. Judicial discretion - middle of the road codifier, left ample room for exercise of judicial discretion; attempted to distill 700 years of common law.

iii. Substantive issues

1. Homicide - long-time critic of felony murder: "A shoots at a fowl, intending to steal it; one grain of shot hits B, who dies of lockjaw a month after: this is murder." Punished for crimes, not for matters unintentionally/accidentally connected. Held that definition was unduly broad, commended the 1860 definition in *Indian Code.* Opposed "degrees" system ultimately implemented in that Code.

2. Murder - Stephen's position: should be homicide committed *without* provocation, and *with* either an intention to kill, *or* an intention to inflict GBH likely to cause death, with indifference as to whether death is caused. In 1878 draft, "intention to cause death or GBH, or knowledge that act/omission will probably cause death or

GBH, *regardless of whether person actually killed.*"

3. *Alterations* - held that accused competent defence witness in all cases; did away with distinction between felonies/misdemeanours, abolished marital coercion, recognition that words may constitute provocation, simplification of law of theft.

4. *Insanity defence* - available to accused who would not have prevented from committing the act by the knowledge that this would lead to the greatest punishment allowable by law.

5. *Voluntary intoxication* - codified defence regarding the ability to form specific intent; omitted from 1879 version of the bill because it "might suggest misunderstandings."

6. *Duress* - allowed for duress only in cases where the accused had aided/abetted principles, but was not a principle. Changed in 1879 version, available to all parties to all crimes excepting treason, murder, etc.

7. *Necessity* - included statutory defence of necessity; this was removed in 1879, though recognition of common law defences in Stephen's code would not have barred its development in any case.

iv.Punishment

1. *Denunciatory theory* - combination of retributivism/emotivism; law prevents crime by terror: some abstain from murder because they fear being hanged. Most abstain because they regard murder with horror, in large part because murderers are hanged with the hearty approbation of all reasonable persons. Also, law sanctions and provides a legitimate means through which the passion of revenge may be sated.

2. *Death penalty* - held that no other punishment is so effective in deterrence; difficult of course to prove this, because it is more obvious than proof can make it (ie. it's self evident).

3. *Hatred* - went further in *History*; held that not only does punishment allow for vengeance and disapproval of crime, but also highly desirable that criminals should be hated, punishments should give expression to that hatred. Grave departure from the Benthamite principles seen in other codes, notably Livingston.

4. *Conspiracy* - not limited to commission of indictable offences, includes summaries; (as with *CCC)* contrast w/ Wright which excludes summary offences.

v. Obstacles to enactment

1. *Single bill* - see Stephen's decision to proceed with a single bill rather than three bills, above.

2. *Government*- plagued by changing governments, as well as by parliamentary preoccupation with the Irish question.

3. *Cockburn letter* - Chief Justice, opposed opposed the Stephen code; believed in codification, but not *partial* codification as presented by Stephen (only dealt with indictable offences), and further, *did not do away* with extant principles and offences from common law. Cockburn admitted later that it would be impracticable to include all summary offences.

4. *Alteration* - the changes introduced in the substantive and procedural law by Stephen were also a likely source of opposition.

5. *Anti-labour influence* - trade unions supported codification, as a means of preventing the use of criminal law to curtain union powers; as a conservative, however, Stephen produced a moralistic, authoritarian, and anti-labour document. Thus, Liberal government in 1880 ultimately killed the bill.

6. *Poor drafting* - the commissioner's version of the code was highly criticized concerning its technical merits by draftsmen in England.

7. *Statute Law Committee* - concerned about combining codification and reformation efforts; held that these improvements could clash and obstruct one another; gradual approach (eg. not a single bill) would be more likely to succeed.

vi.Influence - basis for Canadian (enacted 1892, based on the 1880 version) and New Zealander codes; basis also for Northern Nigerian and subsequent African codes. Stephens may have become senile due to opium smoking.

6. *Wright*

a. *CV* - author of Wright on Conspiracy (which is actually a pro-labour brief seeking to limit use of conspiracy in curtailing trade unions), Pollock and Wright on Possession; barrister, Oxford educated, charged with writing a code to serve as a model for all colonies, crown and self-governing, and perhaps for England itself: rival to Stephen's code.

b. *Code* - *Code of Criminal Law* for Jamaica, *Code of Criminal Procedure*, 1876, latter based on Indian Procedure Code; both passed, 1879, but never brought into force.

i. Structure - two sections: code of criminal law and code of procedural law (based on Indian Procedural Code)

ii. Style - considered a much better work than Stephen's by many influential persons.

1. *Utilitarianism* - rather than enforcing morality, followed JS Mill in ensuring utility served; also believed in democracy/equality more than Stephen, and this led to different handling of certain offences (eg. sedition).

2. *Illustrations* - following Stephen's objections and contrary to Wright's wishes, includes illustrations.

3. *Detail* - if provision necessary to meet a case when it arises, should not be omitted from code merely because it is extraordinary or unusual; omit only that which is

unnatural or very extreme. If judge would be puzzled by absence, should be included.

4. *Definition* - defined at the outset many words used in code, indicated in the text every time a word was used which had such a special definition.

iii. Substantive issues

1. *Conspiracy* - limited to commission of indictable offences; contrast w/ Stephen (and *CCC*) which includes summary offences.

2. *Mens rea* - Wright carefully defines general mental elements required for various offences (eg. tells us what intention, negligence mean); therefore, did not have to repeat for each individual offence; enhanced clarity.

3. *Procedural innovations* - appointment of public prosecutors, examination of the accused, rights of appeal set out. Though based on Indian Procedural Code, innovated in these ways nonetheless.

iv. Obstacles to enactment - largely unplotted and accidental.

1. *Stephen's objections* - upon review of Wright's draft; objected to lack of illustrations, to which Wright responded that careful drafting rendered these unnecessary (illustrations eventually added). Also held that Wright was over-elaborate; unfair, probably too sparse. Stephen opposed use of *mens rea* definition, would leave this to common law.

2. *Stephen's code* - if this code had not made its appearance and monopolized the stage, Wright's scheme for consolidation -> codification would likely have been accepted. In Jamaica, officials wanted to see what would come of Stephen's efforts before pursuing Wright's; and in England, unions gave Stephen their support, rather than Wright.

3. *Testimony of accused* - Colonial Secretary wanted to innovate, allow for accused to testify at own trial; forward-thinking, but in a way which drew opposition to the code. Wright insisted that both Codes, and not merely the *Criminal Law Code* must be passed (the Procedural Code contained the impugned provision) - led to repeal.

4. *1900 redrafting* - Stephen's son selected to redraft Wright's code in 1900, effectively transformed it into his father's code; destroyed primacy of Wright's code, which was no longer being encouraged for colonial adoption.

v. Influence - enacted in Honduras, Tobago, St. Lucia, Gold Coast; would have been more influential in Africa had not Northern Nigeria enacted a version based on Stephen's code.

7. Wechsler

a. CV - American, taught at Columbia Law School, pre-eminent 20th century codifier;

b. Code - Model Penal Code (chief reporter), 1962, USA. Not enacted: serves as model for other US legislative bodies.

iii. Figures in Canadian codification

1. Gowan

a. CV - judge, correspondent of Wright; attempted to interest Sir John A. and others in codification, but Fed preoccupied with Pacific Scandal; preferred Stephen's work to Wright's however. Founded Canada Law Journal, 1855, which published many articles concerning the merits of codification in subsequent years.

b. Involvement - political force behind codification of criminal law in Canada; claimed to have been pushing the idea on SJA since 1867. Pushed name change from *Criminal Law* to *Criminal Code*.

i. Superficial - name change, insistence on "scientific" numbering system indicate that approach to codification somewhat superficial. Nevertheless, was concerned that the 1880 Stephens draft was incomplete re: principles and rules.

ii. Presentation - political acumen clear, held that the Bill was not meant to reform criminal law, but rather was merely declarative of criminal law. Important point is to get the bill through, so that it can be polished and completed with subsequent amendments.

iii. Opposition - signed out book of collection of criticism to the 1880 draft code; no other person requested it, and therefore Gowan gauged that opposition to the measure would be minor.

2. Taschereau

a. CV - Supreme Court Justice, had a detailed commentary on Canadian criminal law, had offered to draft a code previously but was denied.

b. Involvement - primary opposition to codification of Canadian criminal law. Thompson had previously angered Taschereau by stating that the latter could not order 400 copies of his book, and by turning down his offer to draft the code.

c. Letter with objections - published on Jan 1893, when bill already passed, but not yet in force; (too late to make a difference): held that the Code was replete with contradictory clauses, redundancies, ambiguities, asymmetry, lack of pruning of obsolete branches: shook his belief in codification altogether.

i. Specifically, noted exclusion/lack of definition of *mens rea* (compare with *Wright's* code: telling that Stephen himself objected to Wright's *inclusion* of *mens rea* definition)

ii. Also critical of lack of comprehensiveness of code, and recourse to the common law to fill in various lacunae.

3. Burbidge

a. *CV* - judge, former Deputy Minister of Justice, admirer of Stephen's Digest of the Criminal Lawl disciple of Stephen, judge. Wrote Digest of Criminal Law of Canada, but this was largely verbatim copying of Stephen's digest (with permission). No principles, etc; involved CH Masters.

b. *Involvement* - initially refused offer to draft code, but later accepted, acknowledging that his refusal had been out of a wish to avoid affecting sales of his own digest. Analytical/drafting.

4. Sedgewick

a. *CV* - Deputy Minister of Justice; successor to Burbidge, later SCC judge.

b. *Involvement* - analytical/drafting.

5. CH Masters

a. *CV* - lawyer, reporter in the SCC.

b. *Involvement* - drafter of the 1892 Code.

6. Thompson

a. *CV* - political face of the bill, Minister of Justice.

b. *Involvement* - enlisted Burbidge/Sedgewick, introduced the bill in 1891, reintroduced in 1892 when it was eventually passed.

iv. Codification efforts generally

1. American efforts

a. *Codification* - see Livingston, Field.

b. *Recodification* - see Wechsler: produced *Model Penal Code* in 1962, which serves as a model for US criminal legislation across the country. 1966, Fed report indicated that new Criminal Code was necessary in 1971; not enacted, though passed by senate in 1978, favourable reports in 1980s. Unlikely in Reagan administration, however.

2. Civil codes / continental European efforts

a. *Enlightenment* - Prussian and French codes product of enlightenment and revolution; measures for national unity and the absorption of local custom. This is not relevant in a unitary state such as England.

3. English efforts

a. See Stephen, Wright.

b. Judicial supremacy - 17th and 18th century legal minds held that law was certain, immutable, unambiguous, left to judiciary to articulate - Blackstone in particular, who felt that criminal law specifically was not given to arbitrary discretion.

c. Utilitarianism - Bentham disagreed vehemently with Blackstone's position, holding that the common law was given to ambiguity, chaos, and fictions -> could be classified on utilitarian principles. Austin, professor of law, also critic of Blackstone, but held that historical approach to codification more apt than utilitarianism: but Bentham won out.

d. Intelligibility - commissions in the 1830s determined that unwritten system, while flexible, was not intelligible to citizens and therefore had little deterrent effects.

e. Colonial attitude - English legislators had a colonial attitude towards codification, holding that it was not good enough for England, but was good enough for the colonies; truth, however is that English law was so encumbered by precedent that it was impossible to reduce to a cohesive set of principles.

f. Renewal - began producing new code in 1968 (90 years after Stephen's code introduced as draft bill). By 1980, wrote that this was still a long way off, and unlikely to see the light of day given the political climate in England.

4. Canadian codification efforts

a. Initial codification

i. Upper Canada - commission in 1840 and 1858 advised a completed, classified consolidation, which led to consolidated statutes of 1859.

ii. Opposition - misunderstanding as to what was meant by codification (eg. whether the code could be amended), or whether this would obviate dependence on the mother country for its laws were common forms of opposition.

iii. Commission report - in 1875, a commission looking into consolidation/revision in Ontario held that codification in that province would be almost impossible.

iv. Unity - Legal News held in 1878 that the unification of criminal laws in Virginia with other states is something which should be embraced by any person who loves is country, as this would form a strong bond. In 1879, praised Stephen's draft code.

v. Unreal expectations - editorial in *Canada Law Journal* in 1887 warned against the idea that intelligibility/deterrence could be achieved merely by codification, particularly due to the complex nature of the habits/traditions of a society. Best that could be achieved was minimizing judicial interpretation.

vi. Uniformity - Sir John A. wanted a uniform criminal law; held that the lack thereof in the U.S. was one of the major defects of the constitution in that country; important in post-confederation times.

vii. Thompson's bill - Thompson sought a draft of a code in 1889; turned down Taschereau, but turned to Burbidge who ultimately agreed. Drafted over one year, ready for parliament in 1891.

viii. Campaign - carefully planned introduction; gave 2,000 copies to judges, AGs, etc. Trial balloon. Did not want to introduce and pass in the same session, to allow for amendments inbetween sessions. In 1892, provided copy to every member of judiciary (20,000 copies in English, 2,800 in French).

ix. Internal documents - anonymous discussions of the process; includes political considerations, such as presentation in a way which would not offend innate conservatism of the bench/bar; few amendments/changes to the extant law.

1. Held that courts would strong subordinate legislatures; held that this was adoption of English, not American law; and that the failure of Stephen would not be replicated in young and growing country like Canada.

2. *Sources* - referenced the 1880 draft, Stephen's digest, Burbidge's digest, and the consolidation of Canadian Criminal Statutes from 1869 as sources, speeches concerning the 1880 draft in English parliament, and periodical literature.

3. *Livingston* - borrowed preamble from Livingston's code, re: foundational of criminal law to prevent crime, punish offences proportionately, explicitly define offences.

x. Reforms - did away with "malice" in homicide, as overlap with common language led to miscarriages of justice; limited to changes which were necessary to adapt law to Canadian circumstances. Thompson avoided using language which implied change.

1. Did away with distinction b/w felony and misdemeanour (replaced with summary/indictable). Expansion of theft. Procedure for appeals, pleadings. Granted JPs wider powers. Encouraged proportionality in sentencing. No reforms original to Canada.

2. Thompson's claim that the bill was not reformist was misleading, designed to head off opposition to the effort, particularly from entrenched judiciary. Was in reality pushing for as much reform as he could manage; this is what Tachereau picked up on (for instance, doing away with felony/misdemeanour: not a mere change in language, but reordering of offences logically re: severity).

xi. Public reception - only few correspondences received pro or con; largely from judges/crowns/JPs.

1. *Begbie* - BC judge, discussed many substantive issues, particularly the increased power given to JPSs.

2. *Grierson* - ON magistrate, held that the code is overly verbose in a manner not needed to further the ends of justice.

3. *JP discretion* - held that increased power to JPs, esp. under *Speedy Trials Act*

(incorporated into the Code) was inapt; JPs of low quality, ignorant and illiterate, subject to prejudice/partiality, but nevertheless try complex matters. Held that "squire" JP in England (eg. gentlemen) not replicable in Canada; land of farmers, not gentry. However, no changes made to this end.

4. *Gambling* - source of controversy

5. *Sexual morals* - source of controversy, *Watt* campaigned for laws re: lax sexual morals, including offences protecting young women from predators; incorporated into bill. Also wanted to increase age of consent.

6. *Canadian concerns* - should fence ice holes, make it an offence to neglect to rescue persons who would otherwise freeze to death.

xii. Debate/grand jury - mild affair; 1891 version had clause abolishing *grand jury*; this was removed for questionable constitutionality in 1892. However, Thompson focused on this provision in debate, drew all opposition fire towards that issue which was now moot. Bill passed on that basis.

xiii. Comprehensiveness - half-hearted approach to comprehensive codification; content to fill in gaps in the code with recourse to the common law.

xiv. Committees - bill went to Senate committee again following HOC debate in 1892; senate nearly scuttled code due to lateness of the session (large bill at a time when senators eager to leave Ottawa), but nevertheless decided to pass it after amending with some typographical errors.

1. Main opposition in senate from Scott, who did not attend meetings of committee, and therefore lost his credibility.

xv. Taschereau's letter, Sedgewick's response - following Taschereau's critical letter, Stephen responded that a comprehensive code was only theoretically, but not practically impossible. Held that common law indispensable: would reassert itself tomorrow if disposed of today.

xvi. In force - proclaimed on the 1st of July, 1893; described by McLeod as with "scarcely a ripple" of opposition, despite that Field's efforts in the US and Stephens in the UK had largely failed.

b. Development of code from 1893 to 1902

i. Canada Evidence Act - 1893, indicative of Thompson's zeal for reform. Allowed for testimony of the accused (compellable and competent) and spouse. This had already been eased in civil cases. Thompson held that it was an incremental change, as a result; however, was a large change, easily identified in small bill (unlike CC): senate refused to pass portion re: accused testimony.

ii. Parliamentary source - true effect of Thompson's bill was to change source of law: from judicial fiat to legislation. Benthamites in favour: Wright, Livingston held that the

common law allowed too much discretion, judicial legislation. Blackstonians, such as Stephen, would not have approved.

iii. Amendments - changes to *Code* debated almost every year until 1902; some resistance to substantive changes in Senate (eg. Lougheed believed this should only occur when the common law indicates need to change); less in HOC. However, in 1900, extensive amendments put through by MOJ Mills.

iv. Subsequent changes - pattern established in 1893-1902 prevailed; comprehensive amendments once every eight years or so, until the 1950s. Grew modestly (1152 sections at its peak); other codes (NY civpro) grew much larger. Pruning of obsolete sections as well, which preserved internal consistency. Routine maintenance of a well-oiled machine, effectively.

v. Source of changes - varied; some from the Courts, others from the expertise of the Department of Justice, some from laypersons, etc. Often from lobby groups, because Code provides a visible target for reform: Fed was initially hostile, but later quite receptive of such changes. Also looked at other countries and philosophical principles.

1. For instance, over twenty years, Charlton submitted bills to raise age of consent to 21, succeeding finally in 1899 when bill requested 18 instead; however, Senate threw out the bill.

2. For instance, also began to include American innovations, particularly from border states such as Maine and Michigan.

3. For instance, Art Union lotteries in Quebec (which actually awarded cash by buying back awarded art) operated as a loophole, which was eventually shut due to lobbying efforts.

4. For instance, though prize fights illegal, Senate refused bill prohibiting motion pictures of such fights through criminal law, holding that the matter more apt for regulation (new technology).

vi. Orientation of changes - tightening up the law by creating new offences, broadening offences, increasing penalties. Punitive age for a punitive document, with 21 offences carrying a max death penalty, 96 with life imprisonment.

1. *Corporal punishment* - popular during this period; bills involving flogging as penalty were brought on multiple occasions. However, Fed less ferocious than public, rejecting calls increasing such penalties, as well as for minimum/indeterminate sentences.

2. *Classism* - while could have been interpreted as benefitting the wealthy, laws protecting property were little changed; further, poor disproportionately victims of crime. Restriction of trade provisions exempted trade unions (over Senate opposition) in 1900. Idea was that all stood to benefit from rational criminal law.

c. 1953-1954 revision

i. Overview - established 1949, reconvened 1951 to: clarify, render uniform and consistent, rearrange, simplify (combine/omit), render comprehensive, and amend the criminal law. Began drafting in 1951, finished in Jan 1952.

ii. Process

1. Introduced in senate in May 1952, got to second reading, referred to committee; sent back to senate due to lack of time left in session. Reintroduced in November, passed with amendments.

2. Introduced in HOC in Jan 1953, second reading, referred to committee. Back to HOC with report, but not enough time to reintroduce. Brought back in December 1953, HOC sat as a committee *in toto* to examine bill, until April 1954. Passed by HOC, on to senate.

3. Senate passes bill w/ amendments, so back to HOC, who accepted amendments. Bill approved June 15, 1954 Effective on April 1st, 1955.

iii. Considerations re: process - commission took too long, parliament took too long; only passed through the advocacy of Garson, Minister of Justice. Characterization of bill as merely a new enactment of old law, rather than as substantial revision in substance was not accurate. Shortened from 1100 sections to 753.

d. Recodification / modernization

i. Just society - enthusiasm in late 1960s to promote such a society stimulated notion for law reform on a broad scale, rather than through *ad hoc* revision (anathema to the 8-year process set out in the decade following codification). *Ouimet* report recommends establishing commission to examine criminal law.

ii. Law Reform Commission - established by Fed in 1971; complete rewriting of criminal law as first project. Undertook research programme to study code, enact comprehensive but contemporary replacement: pretrial to post-conviction. Still underway in 1981. Concluded in 1976 that Canada must work towards a genuine, intelligible code. Work did not translate into actual legislation: efforts largely a failure; abolished in 1992.

iii. Subcommittee on Penitentiary System - critical of glacial pace of Canadian reform, lack of coherent CJS policy. Justice Lamer endorsed this criticism, holding that no further amendment be undertaken until a comprehensive reform policy in place.

iv. Accelerated Review - undertaken in 1979, following Fed and PG ministers meeting, recommending thorough review of the Code was necessary; arose following the glacial pace of the LRC's progress on the issue. To avoid Stephen's obstacles, will alter *Code* in stages. Fed and PG both committed to the effort.

1. *Systematic reform* - inductive, *ad hoc* model flawed, must be systematic and comprehensive reform, accomplished through incremental legislation:

   a. *Phase one* - research and development of policy;

   b. *Phase two* - government review of policy, determination of matters proceeding to legislative stage;

c. *Phase three* - introduction and implementation of legislation. Four packages: crimes, procedure, sentencing, and evidence, TBC by 1987.

2. Process was impeded by repatriation/*Charter* between 1979 and 1982. While *Code of Substantive Law and Procedure* (general and special parts) prepared by 1987 by LRCC; Code of Criminal Procedure by 1991; neither made it to Phase three.

v. Recodification by subject area

1. *Evidence* - new code on this subject proposed in 1975; experienced significant opposition, particularly through use of the word "code;" drew ire and suspicion of LRCC in legal community. Catalyzed Fed and PG task force on evidence rules; languished in the senate, however. 1997 draft of Military Rules of Evidence briefly revitalized the movement.

2. *Sentencing*

   a. LRCC working papers not converted into legislation, though judicial practices changed; new guiding principles appeared in *Criminal Law Reform Act* 1984; massive bill, which died in HOC at first reading. Report on sentencing that same year provided rationale for the *Act*. Pared down version of *Reform Act without* sentencing provisions introduced that year.

   b. Sentencing commission produced report, 1987, calling for extensive changes. Act introduced on that basis died in May, 1993. In 1995, sentencing reform finally passed, but did not include commission's recommendations for presumptive guidelines or permanent sentencing commission.

3. *Criminal procedure* - LRCC code published in 1991, never made it to legislation, despite the clearly deficient procedures section in the criminal code.

4. *Substantive law* - LRCC 1987 report set out general principles and specific offences; has not been acted upon. MOJ requested study from standing committees on this matter in 1990, recommended recodification in 1993; as did CBA recodification task force; white paper tabled in 1993, but without reference to these authorities; but never legislated to that effect.