ONLINE CHAPTER: CRIME AND CRIMINAL LAW

LEARNING OBJECTIVES

After you have completed this chapter, you should be able to:

- Understand the relative and evolving nature of law and its purpose as it relates to crime.
- Understand the difference between common law and civil law and their relationship to crime.
- Appreciate the impact the Charter of Rights and Freedoms has had on the meaning of crime and our Criminal Justice System.
- Become familiar with the various types of criminal defences and understand how the Canadian criminal trial process works, as well as its application to the study of crime and criminality.
- Recognize the complexity surrounding the issue of determinism and free will and its implications for the study of crime and criminality.

"Is the law for purposes of social control and social engineering, or for the purpose of moral condemnation and revenge?" B. Wootton, 1963.

The formal study of crime and criminality is relatively new and even newer in Canada (see Chapters 1 and 5). However, the history of crime dates back to earliest times. One of the oldest debates is whether we are born innately 'good' or innately 'bad'. Given the number of federal laws in Canada today (approx. 90,000) and given how busy the courts are (see Goff, 1997), we appear to have our share of evil in society. We also appear to have become more and more dependent on **political law** (i.e., formal law or man-made law) rather than respecting the two common law principles (i.e., informal law or natural laws) of social control presented in this chapter. The notion that formal law has become the backbone to maintaining social harmony in society today can perhaps best be illustrated by a quote from DeKeseredy and Schwartz (1996:67) who observe, "no one who depends on the law can afford to slip the slightest bit behind by using last year's books." The rationale for criminal law is premised on several key objectives such as: the deterring the individual wrongdoer and general public from engaging in legally

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

prescribed wrongs; reinforcing certain social values, and providing notice that certain behaviours are deemed to be undesirable.

Criminologists are interested in the nature, meaning, impact, and origins of criminal law. To understand the principle of criminal law, criminologists need to appreciate the historical and socio-political origins of law. And while most criminology programs offer a course on the *sociology of law* (an essential element of the foundation of the *criminological enterprise* (Chapter 1)), we will focus on the foundation of crime and criminal law, the fundamental legal concepts, and review the defences available to an accused. The purpose is to provide a framework for how criminal acts, such as arson, murder, and rape evolved into their present form. In addition, by understanding how social events have shaped criminal law and criminal procedures it will then be easier to appreciate the need for an *interdisciplinary* and *integrated* approach to understand criminal policy implications. The chapter will conclude with a brief discussion on the relationship between crime, criminal law and criminology.

FOUNDATION OF CRIMINAL LAW

The Canadian ***Criminal Code***, certain federal statues, and other related municipal and provincial laws intended to maintain peace in society are the product of many centuries and influences of many cultures. Within criminology, the sub-area commonly referred to as sociology of law focuses on economics, history, and political circumstances that impinge upon the meaning of criminal law. The foundation of Canadian criminal law involves four basic factors: (1) the history of the concept of 'justice', (2) English legal history, (3) the liberal vs. conservative interpretative models, and (4) the relativity of outlawed behaviour.

HISTORICAL CONCEPTS OF JUSTICE

Cultural anthropological, ethnological, and legal historical evidence has shown that in preliterate and semiliterate times justice was simpler (see, for example, Calhoun, 1927; Hoebel, 1954). During these times, there were three essential features to maintaining social order. First, acts that injured particular individuals were considered *private*

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

wrongs. Secondly, the injured party or family resolved the harm personally against the wrongdoer(s), a kind of self-help justice and third, exacting justice often took the form of blood feuds or vigilantism, as we sometimes refer to it today. Vengeance represented the instrument of social control. Justice was usually *certain* in coming, *swift* in its delivery, and *exacting* to the personal harm done.[1] Justice was based on revenge and retribution as a means for individuals to protect themselves against personal wrongs.

"SELF-HELP" JUSTICE: THE ROOTS OF CRIMINAL LAW

There are five different forms of revenge throughout history. They reflect the evolutionary process of justice and serve to provide insight into the origin of some of the current foundation of criminal law (Shafer, 1978). In chronological order, they include:

1. The era of **private revenge** in which personal "vengeance was his private instrument of social control" (p.28). This occurred in the early days of social development. It was a period marked by self-administered justice. The victim, in the interest of self-preservation, would either take measures to protect him/herself or they would retaliate. Sometimes, the relationship between "criminal-victim" was nebulous.
2. The era of **blood revenge** marked a subtle shift from individual justice to kinship and familial relationships. Families and tribes became involved in the administration of justice process. In some instances the feuding would go on for extended periods of time. Today, the conflicts between different Mafia families, Triads, and youth gangs, or the ethnic cleansing of Georgians trying to return to Abkhazia in the early 1990s, are modern day examples of blood revenge.
3. The era of **superstitious revenge** emerged when religious doctrines became a social and political force. Under church doctrine, crime took on a tone of morality and became associated with sins – "a challenge to, or an act against God" (p.29). Punishments were sanctioned by the church as a means of satisfying the gods or God. The *talio* (revenge) was to be proportionate to the injury caused. Religions were careful to define the limits of revenge. For example, some of the more

1 See Ch. 5 and the Classical principles for elaboration.

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

recognizable principles of the Ten Commandments include, "Though shalt not kill" - today we severely punish the crime of murder (#6, Exodus 20:13); "Though shalt not steal" - modern society punishes theft (#8, Exodus 20:15), and "Remember the Sabbath day to keep it holy" - until recently, in some provinces it was illegal to open a business on Sunday (#4, Exodus 20:8). The legal rules of the Ten Commandments were based on the philosophy of the Code of Hammurabi.

4. The era of **state revenge** arose as statehoods began to emerge. During the Middle Ages, state revenge involved a type of *victim compensation*, or *tariff system* that varied according to situational and personal factors. However, as the state became more powerful, the state exacted compensation and the victim was no longer protected under law.
5. The era of *general mitigation of revenge* began, according to Schafer, on March 9, 1762 when the criminal court in Toulouse in France convicted and condemned to be broken on the wheel Jean Calas. Calas had been accused of murdering his son "when in fact the mentally deranged son had committed suicide" (p.32). The great French philosopher and social reformer Voltaire, upon hearing of the injustice, attempted to get the state to overturn Calas' conviction posthumously. So moved was the public that it awakened their sense of justice. They wanted to be better informed and have greater input into the administration of justice. This marked the beginning of the *Enlightenment* period for criminal justice reform and the emergence of the Classical School of criminological thought (see Chapter 4 in your text).

Over time, the social conventions and rules of etiquette became the guiding principles for maintaining social harmony. As will be discussed shortly, the guiding principles and practices became the basis for **common law** (see Box C-3) which, even today, our legal system uses as benchmarks for interpreting and legislating new laws. While some forms of exacting justice may appear harsh by today's standards, in instances involving a lesser degree of personal harm, disputes could simply have been resolved through a handshake - a gentleman's apology: "Your word is only as good as your handshake." For example, the Inuit are an excellent example of how societies can live

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

relatively crime free with few formal guidelines. The Inuit are representative of when societies use to be more **homogeneous,** less complex and non-specialized than they are today. Justice among the Inuit was marked by strong customs, norms, traditions, and secular beliefs. Justice was informal and most societies prospered under an acephalous (leaderless) structure. In fact, these types of societies lasted for 30 to 40,000 years dating back to the evolution of humankind. Nevertheless, in spite of simpler times, people still violated their customs and values. Why?

THE NEED FOR SOCIAL CONTROL

Law should be like death, which spares no one. Baron de Montesquieu (1689-1755).

Societies slowly evolved from hunters and gatherers and tribal societies to Chiefdoms and Primitive states. The evolutionary process coincided with the social and technological advancements that took place. Communities became structurally and organizationally more complex as the division of power, wealth, and property started to infiltrate tribal existence. Societies became more heterogeneous in their structure. Chiefdoms, like tribes, depended on kinship in order to thrive but slowly there became a need to have a more stable centralized leadership that could set guidelines for maintaining order. This marked the emergence of sovereign authority and the civil state. Customary folkways, values, mores, along with family empowerment were slowly consolidated into the arms of the state (Wright and Fox, 1978).

CODIFICATION OF LAWS

Informal practices of conduct gave way to a systematic compilation of law in written form. These compilations are referred to as **Codes** (e.g., *Canadian Criminal Code*). The codes, in ancient times, were mandated by the rulers who often had their name associated with the Code (see Box C-1). Over time, with the establishment of governments, ruler devised Codes were replaced with legislative bodies.

Box C-1 Ancients Codes

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

Around 2250 BC, Mesopotamian kings created a set of ordinances or laws referred to as *Urkagina's Code*. Although the code has never been discovered it is mentioned in various documents from the period and dealt with private, public, and political life. Punishment was harsh as thieves and adulteresses were to be stoned to death (lapidating) with stones inscribed with the name of their crime. The code also confirmed that the 'king was appointed by the gods'. From hence we derived the long-standing principle *divine rule of king*.

The earliest known written law was **Ur-Namma's Code**. Archaeological evidence shows that it was supported by an advanced legal system that included trained judges and the giving of testimony under oath. However, the most commonly cited code is that of Babylonian king Hammurabi in 1700 BC. It is the earliest known example of a ruler making public the entire body of laws arranged in orderly groups which are carved upon an 8 foot tall black monument. The most commonly cited expression, "an eye for an eye" best symbolizes the harsh principle behind Hammurabi's Code. If, for example, a house
collapsed because the builder did not make it strong enough and the owner's son died, then the builder's son would be executed (Wales, 1996). For further details see:

www.fordham.edu/halsall/ancient/asbook.html

To some criminologists, the evolution and development of law represents an important area of study. Among the issues such criminologists might study include whether the laws that replace customs produce the desired objectives and do the laws represent *consensus* or *conflict* of interests in society? Should punishment of criminal offences be based on the *vengeance* based models of *retribution* or just deserts, or based on a *social protection* code as advocated by Canadian criminologist Grygier (see Ch 4), or the restorative model as advocated by Fattah (Chapter 4)? What impact have these changes had on social order? These and related questions speak to the general function and purpose of law.

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

FUNCTION AND PURPOSE OF CRIMINAL LAW

The more law and order are made prominent the more thieves and robbers there will be. Lao-tzu (604-531 BC).

The formalization of Codes serves several fundamental functions:

1. Order maintenance refers to protecting the lives of its citizenry through prescribed laws (e.g., sexual offence laws);
2. Promoting morality by defining vices (e.g., solicitation laws, pornography, and gambling – see Chapter 12);
3. Resolving disputes and "the conciliation of estranged parties" (p.232) (e.g., civil laws); and
4. Defining the boundaries for the administration of law (e.g., Highway Traffic Act, Income Tax Act, and Controlled Drugs and Substance Act) (Hoebel, 1954).

Within a given society, the degree of respect afforded the laws is directly proportional to the "sense of justice" that justice system portrays. As noted English judge Haines once stated, "in order for justice to be done, it must be seen to be done."

In one of the first Canadian authored textbooks on criminal justice, McGrath (1976) notes trying to achieve a sense of justice, that all can benefit from, is a daunting if not impossible task. McGrath further suggests we do not appear to be able to find uniformity in corrections (e.g., punishment vs. rehabilitation) or within and across other elements of the criminal justice system. The extent to which this occurs is of particular interest to legal scholars and criminologists. A review of cross-cultural and historical events can provide a sound understanding of our current legal practices and the role of law in defining crime – an issue essential in the study of criminology.

The purpose of criminal law, under our adversarial-accusatorial model (see below), became twofold. While criminal laws were meant to ensure social order, they were also intended to be educational by providing written decisions of the courts and conducting open court and extensive media coverage (with the exception of Youth Court).

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

THE EVOLUTION OF MODERN CRIMINAL LAW

From its humble origins we have continued to exercise many of the informal practices which enabled our ancestors to co-exist. Perhaps the most essential, and enduring, common law principles that can be found in virtually every society and within all religious doctrines, include:

1. *Do all you have agreed to do, and*
2. *Do not encroach on other persons or their property* (Maybury, 1993:36).

Maybury suggests that if we could all agree to once again embrace these seventeen simple words; these two natural laws (see Box C-2) and all encompassing common law doctrines, there would be little, if any, need for the complex and often convoluted legal system we have today. However, the operation of various "moral entrepreneurs", those who influence and shape our legal policy. As we have become more *organic* and moved towards a capitalist model, somewhat at the expense of nationalism (i.e., mechanical), we have become more dependent on formal measures of social control. Today, our supreme law is the Canadian Constitution that includes the *Canadian Charter of Rights and Freedoms,* signed April 17, 1982. The Constitution of Canada consists of almost two dozen written Acts and unwritten conventions. The *Constitution Act* (1982), although the better known, is only a portion of our *Constitution.*

The Charter guarantees such fundamental freedoms as freedom of belief, expression, opinion, peaceful assembly and association, thought, and that each individual, regardless of age, mental or physical disability, race, and gender is protected equally. And while the Charter has been heralded as a major breakthrough in its efforts to provide protection of individual rights and the establishment of social justice, it has not gone unscathed. Among their collection of edited articles, Caputo, Kennedy, Reasons, and Brannigan (1989) present a number of articles (see Part 7) that debate some of the limitations of the Charter. Even though it is beyond the scope of this book and chapter to go into detail, the point is simply intended to illustrate that no man-made laws; however carefully constructed, can replace the natural laws. We will return to the Constitution and its role in law and criminality later in this chapter.

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

Box C-2 Natural Law vs. Political Law

The Greek philosopher Heraclitus (circa 6 BC) was, reportedly, one of the first to delineate a natural law doctrine. He suggested that there were certain wisdoms that all people; regardless of race, religion, or politics, valued. Aristotle later added that natural laws are self-evident - they do not require deliberation. The great Greek orator Cicero's (circa 1 BC) remarks, which can be found in his book *De Republica*, reached the Romans and were incorporated in the Roman Law (*Corpus Juris Civilis*) under Emperor Justinian I (534 AD). The law is also referred to as the **Justinian Code,** which consisted of four main parts. And although the code has undergone numerous changes, its fundamental principles of *civil* conduct formed the legal foundation of most European countries, South Africa as well as in the province of Quebec (see "Early law..." below). It is from the Justinian Code that we derived the very spelling of "justice".

Due, in part, to the somewhat ambiguous meaning of the word 'natural', in a legal context, legal theorists more commonly substitute the concept with **utilitarianism** (see Bentham in Chapter 2). *Natural laws* or 'scientific laws', as Maybury (1993) calls them, are based on the premise that scientific laws withstand the test of time. They become a precedent for later decisions. In time, some legal systems evolved laws on this basis. It is now referred to as **case law**. Such law "was based on religious and philosophical principles" (Maybury, 1993:30) and the laws of common usage are what are referred to as **common laws**. These were laws that emerged through a process of discovery and have an enduring acceptance. Canadian Criminal Law and our Constitution are based common law principles. The principles have been entrenched into the Constitution.

Political law is "made up law, created out of nothing" (Maybury, 1993:88). It has no requirement of logic, morality, or precedent. It is based on political will and therefore its stability is limited by who is in power. These laws are subject to change and are often considered inconsistent and discriminatory. Maybury, and supporters of the conflict perspectives (see Chapter 8), assert that today most laws are politically motivated rather than being scientific or natural.

Take a few minutes to flip through the Canadian Criminal Code and see whether the crimes you look at are based on natural or political law. Based on your observations, what implications might this pose for the study of crime and criminality?

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

In summary, as far back as the early days of social development the concept of *crime* represented the violation of individualistic aspects of another person's person or their property. In early times *justice* was based on individualized revenge and retribution. Then, as societies evolved we moved to family or kinship justice, and eventually through the process of codification – state defined crime and justice. Also with urban growth, diversity in cultures, the meaning of crime and process of administering justice began to mix natural law principles with political law principles. The meaning of crime began to evolve but underlying the laws, law makers sought to ensure a consensus of public values in society.

EARLY LAW AND THE MEANING OF CRIME

In the opening comments to his book on the history of criminal justice, Johnson (1988:1) notes, the "roots of civilization reach deep into antiquity as so do the problems of crime and punishment." As noted below, the *Code of Hammurabi* is one of the earliest complete legal codes. It contained 282 sections (i.e., laws) describing behaviour which was either socially unacceptable or constituted a criminal violation. While most of its principles have not been carried forward, the Code provided two principles, which exist to this day: (1) punishment should be regulated and, (2) governments have a responsibility to compensate victims of crime (Mueller, 1955).

The following points serve to highlight some of the major historical legal doctrines, some of whose common law and civil principles (see Box C-3) can be found in Canadian law today.

- Circa 1700 BC: From the Hammurabi Code of Babylon, we have the principle that it is the state's responsibility to compensate victims of crime.
- Circa 1200 BC: The *Mosaic Law* of the Israelites set the foundation for formalizing the difference between crime and tort law. In addition, Mosaic Law introduced the criteria ***lex talionis*** for "an eye for an eye" and "a tooth for a tooth" - just deserts and retaliatory thinking (e.g., the purpose of punishment). Mosaic Law also required that at least two witnesses testify concerning the guilt of the accused. Today, we refer to this practice as

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

providing corroborating evidence**.**

- Circa 450 BC: *The Twelve Tables* of Rome codified customary practices pertaining such matters as: payment of debts, property, fairness of law, and the need for laws to be formalized so that all could see and learn (Durham, 1988). For example, by law patricians, knights and plebs were equally represented on juries. Along with the some of the changes incorporated by the *Justinian Code*, Roman Law has become the foundation of civil-law codes (see Box C-3) for such countries as Belgium, France, Italy, Netherlands, Portugal, Scotland, and Spain while countries like Japan, Thailand, and Turkey voluntarily adopted a civil-law system. In North American the state of Louisiana (former French colony) and the province of Quebec use a civil code based on the French civil-law codes dating back to the *Napoleonic Code* of 1804 (Glendon, Gordon, & Carozza, 1999).
- Circa 7 BC: The Greeks introduced 'democratic' justice with the *Laws of Gortyn* (named after the Goddess on the island of Crete). The laws established tribunals, called a *discastry*, consisting of up to fifty local citizens who would serve as either judge or jury. Each member cast a secret ballot to determine the guilt or innocence of the accused. Your position could change from case-to-case since there was no clear distinction between law and issues of fact and the concept of precedent did not exist. It is perhaps from this practice we have the saying: "you be the judge and jury' or "you be the judge of that!" The Greeks did however have rules of evidence - another of the practices that has been passed down is the "taking of Oath". Both the accused and defendant were required to take an oath pleading truth to their testimony.
- Circa 400-500 AD: *Hebrew Law* which was based on the oral interpretations of the Law of Moses was dependant on interpretation by a rabbi until approximately 400-500 AD when the laws were first put into written form. The code is referred to as the *Talmud*. Since then two versions of the Talmud (the Palestinian and Babylonian) have emerged. Talmudic scholars continue to debate and interpret the civil and religious meanings. From Hebrew Law we have inherited the practice of interpreting and defining law via trained scholars - judges and lawyers (Vito and Holmes, 1994).

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

Box C-3 Common Law vs. Civil Law[2]

The codes of civil law and civil court procedures vary in a number of significant ways from common law:

a) Common law is based on tradition, customs, and precedent. Judges focus on the facts of the case and try to reach a just and fair decision drawing on precedent and existing case law. Judges can change law through their decisions. Therefore, it can be said that common law is dynamic - changing and evolving with the social, cultural, and political biases at the time.

- Civil law is based on a system of codified written law dating back to Roman Law. Judges resolve disputes in accordance with the law. Civil law is less flexible than common law and more classical in orientation. Early civil law was usually fashioned after judges discussed legal problems with aspiring lawyers and other judges. Over time the vast repository of written law was systematized into codes (see below). Today, civil law contains rules for contracts, divorce, libel, unfair practices in hiring, and many other contractual and social obligations.

b) Common law relies on evidence and its interpretation is based on 'experience'. Do the facts add up to find the accused guilty or innocent?

- Civil law has no counterpart. It is based on logic. Under this model, the accused must prove they did not commit the act for which they have been charged.

c) Under common law practices, private and public law disputes are usually decided by the same court. For example, a doctor suspected to have engaged in malpractice may be charged criminally. However, civil action may also be taken. The defendant might choose to seek damages for the wrongful behaviour of the doctor. Such action is referred to as *Tort.* Doctors take an oath of conduct and are expected to meet certain standards in all cases. Civil suits seek compensation and not punishment.

- In most countries where civil law is practised, there is a separate system for public and private law. A hierarchy of administrative courts is used to deal with public law while

2 Although criminal and civil law are the best known types of modern law students there are other areas of law that govern and regulate other aspects of society. *Case law* comes from judicial decisions, *procedural law* is a body of statutory laws and judicial decisions that regulate the processing of an offender in the criminal justice system, and *regulatory law* that is concerned with the regulatory aspects of society. Examples, include tax laws, health codes, environmental laws, customs and immigration, etc. For a more comprehensive overview see Boyd (1995).

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

ordinary courts are responsible for private law and criminal offences (Glendon et al., 1999).

d) Common law based systems regularly use trial by jury. Although more common in the United States than Canada, trial by jury is available under prescribed conditions as defined in the Criminal Code (i.e., some indictable offences but no summary conviction offences). McCormick and Greene (1990) cite research that estimates that only about two per cent of criminal cases and six per cent of the civil cases in the superior and district courts currently involve trial by juries. It becomes incumbent on the judge to ensure due process and that the rules of law are properly adhered to (the bold terms are defined later in this chapter). Why might this be? What implication might it have for fair and equitable justice? Is it necessary to retain the right to a trial by jury? Is it an economically sound practice? Has our legal system become too complex for jurors to fully appreciate the nuances of written law?

- Civil law systems seldom use juries. Depending on the gravity of the offence, the courts will use a number of professional judges or lay persons who act as judges to preside over a case. Civil law judges tend to be participatory and will ask and challenge the defendant on points of law and facts of the charges.

e) Since common law is subject to interpretation, contract law is not necessarily binding. A common law judge is sometimes free to depart from precedent and establish a new rule or decision that sets a new precedent. Therefore, it can be said that common law is based on experience and individual circumstances. Or as Boyd (1995:4) notes, “the law is a malleable human creation, which reflects the movements of particular actors and changing social mores...”

- Civil law by contrast is more specific in upholding contractual agreements. In fact, penalty provisions are often included should the contract be broken in some manner. This is analogous to some financial lending agreements. Should you decide to ‘buy-out’ earlier than the terms agreed upon, you may be required to pay a penalty. Under civil law you agreed to a particular arrangement, then because of a change in circumstances you want to break the agreement! Is it not right that a price should be paid for this privilege? You have ‘inconvenienced’ your lender and they may be required to pay extra taxes in

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

lieu of the sudden windfall. A divorce is another example of a civil law violation. If one or both partners decide to break the contract, compensation is often sought. However, as social circumstances have changed the penalties have become less clear and settlements have and can result in long drawn out civil battles.

The demarcation between civil and common law, while very clear in a number of areas, is more nebulous in others. Their common ground can be found in the ultimate results reached by both systems (Wales, 1996).

Which system do you prefer? Why? Which model do you think would work best in Canada?

In **summary**, even though most of these early penal codes were primarily laws of torts - private wrongs (Maine, 1905 cited in Barlow, 1990) as opposed to laws of crime, the history of early law serves to reflect that the process of codifying an act as a crime represents an intricate interplay of sovereign, cultural and public interests as well as social and economic resources. The overview also demonstrates that the history of law is "forever repeating itself and the same stages that were reached many thousand of years ago" are being recycled (Diamond, 1935 cited in Mueller, 1955:323). The history also reflects the notion that law is an issue of power (i.e., *consensus vs. conflict*). This notion significantly influences the way we view law as a viable entity for establishing and maintaining social order. One such enduring influence on the Canadian legal system has been English law.

ENGLISH LEGAL HISTORY

The transition of common folkways, norms, values, and customs into state law represented the first formalization of criminal law. These common law principles were based on a history of **precedent** (i.e., **case law**). Under this model of settling disputes, outcome decisions were based on the outcome of previous incidents with a similar set of circumstances. The judge-made laws became known as the **common law**.

For Western cultures, the practice of precedence began in medieval time when the ruling monarchs and feudal lords recruited officials to oversee the Kings' laws and criminal trials. The church was thought to be fair in its judgement and was already

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

familiar with the use of precedent through the interpretation of their doctrines. However, as the practice gained acceptance the King appointed circuit court judges to assist the church. This practice continued until 1215 when King John (1199-1216), youngest son of King Richard the Lion Heart, signed the **Magna Carta** that returned the decision-making power back to the King.

Signed on June 15, 1215 by King John of England, the Magna Carta was the first legal document to grant constitutional liberties. King John after refusing to accept the election of Stephen Langton as Archbishop of Canterbury and fairing poorly in war with France was essentially forced to make peace with his barons in order to preserve his throne. The barons, led by Langton, rebelled against John's raising of taxes, extortion of money, and confiscation of land in an effort to support his war efforts.

In addition to defining the relationship between the King and the barons, the Magna Carta guaranteed feudal rights and made the King subject, rather than superior, to the law. Most fundamental of the feudal rights was the statement, "No freeman shall be taken and imprisoned or disseized or exiled or in any way destroyed, nor shall we go upon him nor send upon him, except by the lawful judgement of his peers and by the law of the land." Put simply, this meant life, liberty, and property were protected by law unless the law was broken and then the processes of law could be applied justifiably (see Box C-4). Fundamentally, the Magna Carta formalized the judicial system and especially the rudimentary judicial guarantees such as freedom of the church, fair taxation, and controls over imprisonment (*habeas corpus*). It has been called the "blueprint of English Common Law" (Wales, 1996).

Box C-4 The Magna Carta and the Canadian Charter

Clause #39 of the Magna Carta states, "No freeman shall be captured or imprisoned except by lawful judgement of his peers or by the law of the land." This fundamental right has been entrenched into the Canadian Charter of Rights and Freedom under section 7 – "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Between its signing and 1297, the Magna Carta had no formal body to enforce or interpret its meaning and intention. When King Edward I ascended the throne in 1297 he

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

set-up a Parliament that would become the forerunner for all future Parliaments. The objective of Parliament was to ratify the Magna Carta. Although subject to interpretation, the Charter is still in effect to this day. However, it was not until the 1700s that formal accounts of decisions were published independently by various legal scholars. Then in the 1800s, the courts of Britain began to reproduce court decisions - primarily appellate decisions as they dealt with precedents and the possible establishment of new ones. It was these decisions that laid the foundation of English Common law and have influenced Canadian criminal law.

As the state gained more control in the administration of law, it relied more and more on precedent as a way of ensuring fair and equitable justice. The practice came about after the King's council[3] began to experience case 'backlog' problems as the travelling justices could not be everywhere at once. As judges gained the right to settle disputes, they recorded their decisions and then judges could refer to their records when deciding new cases. Judges attempted, as best as possible, to follow precedent - especially that established by a higher court (McCormick and Greene, 1990). It is from this practice that we derived the concept ***stare decisis*** – "let decided matters stand".[4]

Contrary to some perceptions, *stare decisis* is not rigid. For example, judges have the power to "distinguish", or set-aside, otherwise appropriate precedents. However, such decisions occur in fewer than 25 per cent of cases heard (McCormick and Greene, 1990). In August of 1996, a Manitoba judge was presented with an interesting dilemma that potentially involved challenging a precedent. A pregnant woman with a long history of glue sniffing had her situation brought before the court. Social services wanted to have the court make a ruling but on August 6th, 1996, Court of Queen's Bench Justice Perry

3 After Henry II inherited a justice system that relied primarily on local, traditional courts, the King and his advisory council "created legislation to standardize some of the criminal and commercial laws across England, the council itself heard disputes arising out of these cases" (McCormick & Greene, 1990:8).

4 Today, Canadian lawyers will often cite earlier decisions, similar in fact to argue their case should result in a similar outcome. However, since our neo-classical conventions and positivist ideology (Ch. 5) say that no two cases are identical in their characteristics, judges must deliberate and resolve the subtleties of each case presented before them. The result becomes the setting of new precedent.

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

Schulman avoided the issue of the rights of the fetus by ordering the woman to receive treatment. She was subsequently placed under the care of the Winnipeg Child and Family Services. (Under Canadian law (s. 287 *C.C.*) a fetus has no legal rights) (Baby born to…, 1996).

A few years earlier, in 1988, in a case involving Dr. Henry Morgentaler, the Supreme Court of Canada was called upon to challenge an existing precedent involving the rights to an abortion. However, in a controversial decision, the Supreme Court ruled that enacting a new federal criminal law regulating therapeutic abortions could not be constitutionally justified. It would have represented "an unjustified violation of the rights of women under section 7 of the Charter" (Roach, 1996: 184). The influence of the Magna Carta and common law principles were further reflected in the decision by the Supreme Court of Canada when it ruled that the provincial efforts to deny government funding was also found unconstitutional.

Over time, rather than being at the mercy of the Monarchy, the courts became increasingly more responsible for deciding cases that dealt with wrongs against citizens. This process set the foundation for our state-administered criminal laws today. Neither the Prime Minister, nor any other government official, can try a citizen unless authorized under law.

In Canada, legal scholars and criminologists are interested in studying the role of law in maintaining social order in matters pertaining to both criminal and civil activity. Such scholars may also be interested in understanding the role interest groups and power groups play in law making (see, Burtch, 1992). However, with the growing movement of transnational corporations and transnational crime (e.g., Internet crime, drug Cartels, and international smuggling rings), local or national man-made laws are less adept at addressing such crimes. Veltmeyer (1987) found, for example, that 46 of the top 100 largest economies in the world are transnational corporations. They are expanding two to three times faster than the growth of national economies (for more information on transnational corporations visit: http://www.unctad.org/Templates/Page.asp?intItemID=2443&lang=1).

While much has been written about the intent of law and whose interests are

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

(best) served by law, early laws helped to set the boundaries for the administration of law and the meaning of crime. We can also gather that the concept of crime varies according to cultures, values, social and political trends. Therefore, it can be said that the meaning of law is a social-political process. For example, the expulsion of Japanese Canadians during World War II and the 1970 FLQ crisis represent occasions in Canadian history in which our freedoms were compromised as a result of a perceived threat to Canadian sovereignty. Trudeau (1919-2000) rationalized using the War Measures Act by suggesting the FLQ was a threat to the duly elected government of Canada (political) and was a threat to the "elected representatives of the people" (cited in Berger, 1982: 197).

From our overview of the cross-cultural and historical evolution of law it is possible to identify two ideological and political orientations, which reflect the views of the state in social control. These opposing views serve to further illustrate the complexity of crime and the function of law. On the one hand, some believe state control and interference should be at a minimum. As former Liberal Prime Minister (1968-1979, 1980-1984) Pierre Elliot Trudeau once said, 'the state has no place in the bedrooms of its citizens', while the other view maintains that the state not only has the right, but must exercise social control over its citizens in order to maintain peace and harmony.

Another major influence on our system derives from the Norman Conquest in 1066 AD when William the Conqueror (1028-1087), from Normandy, invaded and defeated the English. Based on his success in Normandy, King William I attempted to separate state and church law. However, the church's long history made this difficult. The church continued to play a role in defining crime and punishment. Applying the Christian doctrine to the criminal laws, the church rationalized trial by *compugatory* oath and by *ordeal*. The former requires the accused to swear an oath and to have witnesses ("oath takers") aid in their defence.

Trial by ordeal involved elaborate tests of torture in which survival was rationalized to be in the hands of God. Over time these superstitious practices gave way to trial by jury (Johnson, 1988). This was largely due to an eroding influence of the church. Yet, as we see today, some of these concepts remain entrenched in our legal system.

From the Normans we acquired the practice of consolidating the ruling power of

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

law. However, as England became more urban and structured, competing interest groups emerged. This set the stage for the consensus and conflict views of law and crime. And as discussed in Chapter 1, these interpretations have formed the traditional basis for understanding the development of legal systems and criminal justice in particular. (It may be worth reviewing these models before moving on).

LIBERALISM AND CONSERVATISM

The liberal philosophy, as is often pointed out by political scientists, is not as different from its conservative counterpart as we might think. Among other issues, crime has flourished under both and the national debt has mushroomed under both parties. However, one area where the two do fundamentally differ is in their explanation of criminal behaviour. Where the conservatives focus on individual moral failure (a positivist model - Chapter 4), the liberals point to social factors (a classical approach - Chapter 5). The liberals attribute criminal behaviour to poor parenting, peer group pressures, poor educational systems, and lack of economic and social opportunity. Hence, while the conservatives focus on reshaping the individual, the liberal theology calls for reforming society. The liberals feel that people can be rehabilitated. Their legacy to criminal justice reforms includes penal reforms, inmate rights, and rehabilitation programs.

THE LIBERAL PERSPECTIVE

The liberal or utilitarian view, as developed by **Jeremy Bentham** (1748-1832), **John Stuart Mill** (1806-1873), and **John Locke** (1847-1889) (see Chapter 4), among others, maintains that we are social creatures who prefer pleasurable situations over painful ones. When was the last time you looked forward to having a tooth pulled without any pain reliever?

The liberalist view asserts that we are rational thinking beings who will freely embrace the norms and values of society as long as they sufficiently meet our needs. This perspective has a number of premises similar to the consensus model. The liberal view maintains that state interference should be at a minimum and the rights of

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

individuals are supreme. At its extreme, Karl Marx's doctrine advocated the need for total state control - hence, communism! The Marxian or conflict doctrine maintains that crime is a product of state systems. Any interference in our natural freedoms is bound to produce resistance, retaliation, and conflict. Factors such as social inequality, unemployment and discretionary punishment are used as examples of injustice. We could go on at length over this very issue, but in a book of this nature, this is not possible. It belongs in the domain of other criminology and political science courses.

As stated earlier, the *Charter of Rights* is intended to respect individual rights and ensure due process. For example, as noted earlier, section 7 of the Charter states, "Everyone has the right to life, liberty and security..." and section 11, of the Charter protect the rights of an accused to a fair trial. In accordance with the utilitarian doctrine, crime control must ensure due process (see sec. 11), the right to a jury trial (see below), and punishment based on retribution and justice. We also have a right to fair compensation but the legal ideology of retribution and revenge is deemed to be debasing. What would be the utility of personal revenge when it does not benefit the whole? You might like to 'get your pound of flesh' but what kind of example and precedent would you be setting for others? Just because someone is sexually abused when young, should they be entitled to abuse their children? What would happen if everyone acted in such a manner?

On the other hand, as was the case in earlier times, is the purpose of law not to allow the victim (i.e., self-help justice), and society at large, to express its disdain and seek revenge against the criminal? Or as the great American judge Oliver W. Holmes argued, the meaning and purpose of law should be to deter and reform criminals. It is much more civil and utilitarian. However, the use of such reactive measures as retribution or *just deserts* is a regressive response to crime. It denies the use of such proactive measures such as reform, treatment and prevention. It does not attempt to prevent crime or reduce the crime rate. Reactive measures as a means of treatment or rehabilitation have generally been found to be less effective than proactive measures (see Romig, Cleland, and Romig, 1989; Ross and Gendreau, 1980).

It has generally been found that empowering people to take responsibility for their actions and 'treatment' has proven more fruitful. As discussed in other chapters, the

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

restorative model (see Fattah, 1995, Zehr, 1995) and relapse prevention programs represent "a self-control program designed to teach individuals who are trying to change their behaviour how to anticipate and cope with the problem of relapse"(George and Marlett, 1989 cited in Bartol, 1995:317).

Another element of the liberal view is the guarantee to be protected from *ex-post facto* law. When Ontario became the first jurisdiction in North America to pass a law, in 1975, making seat-belt use mandatory, or when emission control standards were set, vehicles built before the enactment of the laws were not equipped or designed to comply with the laws (see Friedland, Trebilock, and Roach, 1990). For certain changes, owners were given a grace period in which to either convert their vehicles or were offered a 'buy-out' option. To enforce seat belt legislation would have surely resulted in many disgruntled Canadians! So, the utilitarian thing to do was to exempt cars built before the advent of seat belts. But, is this fair to those of us who pay for seat belts even though we may not necessarily want to wear them? Do vintage car owners represent a sizeable segment of the population to warrant special consideration?

Other examples that might sit closer to home include: banning all smoking in public places and setting a minimum age for the legal consumption and purchase of alcohol. Not only do some of these laws vary between provinces they do not coincide with other 'adult' rights such as owning a passport, having a driver's licence, or being legally eligible to marry. Why so many discrepancies? Well, part of it is, as suggested earlier, due to the fact that our laws (Charter and *C.C.*) Are man-made laws subject to the socio-political environment of the time?

THE CONSERVATIVE PERSPECTIVE

The conservative philosophy was largely influenced by the works of the English philosopher **Thomas Hobbes** (1588-1679) and the great British statesman and orator **Edmund Burke** (1729-79), as well as by the Austrian psychoanalyst Sigmund Freud (Chapter 7). For these scholars, the causes of crime and deviance lie within the individual, not the state. Criminals lack self-control. We are born predisposed to acting bad. The conservative philosophy asserts that we are essentially selfish and needy

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

creatures who will manipulate situations to get what we want (see, for example, Shostrom, 1972). Who has not, 'put their best foot forward' in order to obtain some good; exaggerated the truth to protect yourself; cheated a little on your income tax, attempted to get a peek at another's answers on an exam? Do you know of anyone, figuratively speaking, who has dug himself, or herself, in so deep that nothing they do can help them? At times, our 'passion' or 'id' (Chapter 7) gets the better of us. Therefore, criminal law represents an important mechanism for establishing boundaries to regulate behaviour. In criminological jargon this process is known as *specific* (i.e., punishing the offender) and *general* (i.e., the threat of punishing anyone who might be thinking about committing a crime) *deterrence*.

Hobbes, and his fellow supporters, believed that the need for control takes precedence over individual needs and rights. Without law there would be social unrest and chaos. From a conservative perspective, laws are necessary to maintain social order and harmony. If we want be a member of a community we must be prepared to surrender some of our personal desires. "If you want to live in this house, you'll have to do your part"; in marriage you agree to honour, respect, and obey one another, and if you want to drive a car you (informally) agree to abide by the rules of etiquette. All agreements are based on past traditions and precedents. This process helps to ensure we are not subjected to sudden change (hence the term conservatism). In fact, under conservative governments legal reforms tend to be drawn out processes. The purpose of law then is crime control or "law and order" (see Box C-5). The focus is on enforcing the law through the police and maintaining order by incarcerating criminals. Rehabilitation and social reform are not part of the conservative platform. Instead, retribution and revenge become the motive of law. As was noted above, early legal codes were premised on revenge and vengeance.

The conservative model of crime control is analogous to the patriarchal family. The father, or in this case the state, uses discipline to address wrongdoing and yet also exercises compassion and understanding. For example, under the conservative leadership of Ralph Klein during much the 1990s, Alberta experienced major cutbacks to social services, health care and education as a measure of trying to balance the budget. In addition, the province entertained bringing back chain gangs, work/boot camps for young

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

offenders, restricting prisoners' right to vote, the removal of amenities such as colour television and the use of computers in the cells of provincial inmates. These measures all fall within the parameters of a conservative framework.

Box C-5 To register or not to register - GUNS!

A controversial issue plaguing many Canadians and politicians dates back to Bill C-51 in 1977 that pertains to gun registration. The Bill introduced stricter controls on the issuance of Firearm Acquisition Certificate. However, the most talked about issue is Bill C-68, put into place on December 5, 1995. In the shadows of the University of Montreal massacre of 14 women by Mark Lepine, the Bill bans all military-style assault weapons and requires all gun owners to register the estimated seven million firearms by 2003. Ottawa estimates this will cost taxpayers $85 million over 5 years. Failure to register could result in penalties ranging from a $2,000 fine to ten years in prison. As of January 1, 1996 the government imposed a minimum 4 year sentence for gun-related crimes such as robbery or manslaughter (Bailey, 1996). Under the American Constitution, citizens have a right to bear arms. However, the actual wording of the American right refers to *militia* and it can be argued that there is no private right in the United States. By contrast, under section 7 of the *Canadian Charter of Rights* we have "the right to life, liberty and security." As in the United States, however, this does not mean we have a right to bear arms. Rather, it applies to protection from the government (also see. s. 26 of the *Charter).* Hence, could it be argued that Canadian legislation is an infringement of our fundamental right or does it serve a greater utilitarian function in reducing the number of deaths resulting from homicide? (Are legitimate users being unfairly targeted? Mundt (1993) reports that firearm homicides have dropped 42 per cent and firearm robberies dropped 42 per cent between 1977 and 1988. However, Brunet (1995) suggests there is no correlation between firearm ownership and homicide rates. For example, the number of shootings between 1981 and 1991 were as stable as the number of stabbings for which there is no legislation.

How might this scenario be described in liberal or conservative terms? How would either perspective influence our orientation to the study of crime and criminality?

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

Summary

Before we look at some of the elements of Canadian law let's recap the principles underlying the above material as well as offer some additional "food for thought".

As a student interested in criminology/criminal justice, you might have observed that whether humankind relied on informal (e.g., folkways, customs, and values) measures of social control or formal measures (common law or civil law), neither form of control has eliminated crime. So what is the purpose of law? What is crime? Have we missed something?

Part of the difficulty in trying to answer the above questions is the general lack of consensus over what constitutes a crime (see Chapter 1)? Using Canadian examples, Parker (1996) reviews eight different crimes which, depending on their context, were recognized as either being criminal or not. For example, former mayor of Toronto William Lyon Mackenzie (1795-1861) was once accused of treason after leading a rebellion in Upper Canada in 1837. If a wife has been subjected to years of abuse and then kills her partner, her charge can be reduced to manslaughter, or during times of war killing another is considered an acceptable act. Parker (1996) offers similar examples for crimes of morality, property crime, false pretences, fraud, and public welfare offences. They all serve to illustrate that the meaning of crime is *relative* and dynamic or *evolving*. Or as the Greek philosopher Heraclitus (540-480 BC) once said, "all is flux, nothing stays still." Given their lack of success in controlling crime the conservative and liberal ideologies would appear to rest more on misguided ideological faith than on facts.

If we cannot reach societal, let alone universal, agreement on the role of law in defining crime, how can we expect to do anything about it? Part of our dilemma lies in the debate as to how do we account for human behaviour. To date, we have tended to rely on either the liberal or conservative positions. And as has already been suggested, the respective success rates have been less than impressive. Nevertheless, they have spawned the models for rules of law, procedures of law, the definition of law and justification for punishment or treatment - depending on the dominant ideology at the time.

Now that we have traced the origins of law, its meaning, and its intent, we can look at Canadian criminal law specifically.

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

THE CANADIAN CHARTER OF RIGHTS AND FREEDOM (1982)

Newfoundland's first English governor, John Guy, established the first Canadian law in 1611 which attempted to regulate the fishing industry and control the deforestation of the shoreline. (Canadian Law: A History, 1996).

Prior to Confederation, most of Canada, with the exception of Quebec (then Upper Canada), was a colony of Britain. English criminal law applied to English speaking Canada while the French Penal Code (civil law) was used in New France (Quebec). After the war in 1763 between Quebec and English speaking Canada, Quebec was required under the Royal Proclamation of October 7, 1763, to adopt the English criminal law. The Proclamation guaranteed the residents of Quebec the right to maintain their civil code practices for civil matters – "so far as the laws of England permit."

In 1867 the thirty Fathers of the Canadian Confederation, led by Sir John A. MacDonald (a conservative), met in Prince Edward Island, to delineate and sign the document which would define the powers of the federal and provincial levels of government. The *British North America Act* (**BNA Act**), as it was called gave power to enact criminal law to the federal government (Section 91(27)). Was this a well thought out concept? Only 10 of 400 members were present in the British House when the BNA received third and final reading!

The fathers of Canadian federation deemed it was essential to have a centralized criminal code so that rules of evidence and procedure (s. 91(27)) would make laws more accessible for all Canadians - regardless where one lived. At one time, the final court of appeal in all civil and criminal cases was the Judicial Committee of the Privy Council in England. Then, after certain amendments to the Criminal Code and after a series of cases from 1926 to 1935, the Supreme Court of Canada became the final writ of appeal in all criminal cases – civil not until 1947.

Recognizing the diversity of Canada, and a need to satisfy provincial interests (e.g., Atlantic provinces and fishing rights; prairie provinces and their national resources, and national issues such as language and religion), the provinces were granted autonomy over territorial matters. In this way, the BNA Act created a two-tier model of

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

jurisdictional control. However, appreciating the need for a sense of uniformity, the provinces and federal government powers were designed to compliment one another - hence, the concept of a system (see Sussman, 1976: 26-27, for a concise summary of federal and provincial distribution of law-making powers).

In 1982, the BNA Act was renamed the *Constitution Act.* Among the many things it did, via schedules, was create the *Charter*. The *Charter* places new conditions on the state's ability to legislate and enforce criminal law. It represents a culmination of thousands of years of historical tradition and precedent and represents a blend of natural (common law) and civil law supplemented by political law – legislation.

THE CRIMINAL CODE

To seek a definition of law is like the quest for the Holy Grail. E.A. Hoebel (1954).

Our first *Criminal Code* rooted in the common law of England, was proclaimed in July of 1892 under the soon-to-be Prime Minister Sir John Thompson. Other than including some specific sections relating to social and cultural differences in Canada, the Code was modelled after England's draft Criminal Code that was not proclaimed in England and which Canadian Federal Court judge Allen Linde described as "a bottomless pit of complex case law, petty, anachronistic offences and harsh punishments." The Code did however include a number of crimes specific to Canada, "such as those relating to lumber, railroads, and fencing frozen ponds (Parker, 1996:42).

Unlike the civil law based codes in Europe, our Code is not organized around, and derived from, articulated rational principles, which are adhered to consistently and coherently throughout the body of the code. While it does have a set of guiding principles, or *rules of law* (see below), the Canadian *Criminal Code* was little more than a collection of laws premised on common law principles. In addition, over the years, through piecemeal amendments the code has become convoluted.

Not wanting to abandon the common law tradition, but given the incompleteness of the Code, it was subjected to numerous challenges as Canada evolved into a nation. Being, by design, a fluid and flexible Act, virtually every original law has been

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

supplemented in some form or another (see the Criminal Code Table of Concordance). In 1955, all common law offences were abolished except for contempt of court. The Code was reduced form 1100 sections to 753. Other major Code revisions were undertaken in 1970 and again in 1985. For example, a number of offences were abolished and other offences were added (e.g., hate crime - s. 318 and 319 and child pornography – s. 163 *C.C.*). Aside from being of interest to lawyers, students interested in the sociology of law and criminologists in general attempt to understand the reasons for such reforms and the implications for criminal justice and society at large. However, in 2002 a report prepared by the Law Commission of Canada, many of the participants remarked "that the Criminal Code has become virtually unmanageable, as more and more offences have been added over the past 20 years… it is no longer actually a coherent Code" (Report of Minister's, 2002:4).

In an effort to ensure continuity of law making, the government of Canada established the Law Reform Commission (LRC) of Canada in 1970. Their mandate included:

1. Adopt a *multi-disciplinary* approach to the study of law and the legal system. In order to recognize the broader social and economic climate of Canada, the Commission seeks contributions from a wide range of legal and non-legal expertise, both from individuals and groups.
2. Be *innovative* in its research, consultations and management practices. The use of new technologies, statistical and information gathering techniques, as well as dissemination of information should be, where feasible, flexible, yet progressive.
3. Be *responsive* and *accountable* to key groups who are directly and indirectly concerned with law reform, special interest groups, etc. The Commission is expected to work together building on existing knowledge and expertise through a co-operative partnership with relevant individuals and organizations.
4. Provide advice and recommendations that not only fit into the current legal system but that will be *cost effective*. The emphasis is placed on improving Canada's legal system.

The governing principles of the Commission were intended to reflect the interests

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

and needs of Canada's institutions of common law and civil law systems while defining constructive changes to any new criminal legislation. The Commission was created in 1967 and operated until March 1997 when funding was discontinued. Over the 27 years, the Commission produced more than 140 reports on a variety of topics. Many can still be accessed through the Internet Commission's WWW site (see: isbndb.com/d/publisher/law_reform_commission_of_Canada.html). In 1997 the Law Commission of Canada replaced the LRC. It is an independent federal law reform agency that advises Parliament on how to improve and modernize Canadian laws.

RULES OF LAW AND BURDEN OF PROOF

Criminologists and legal scholars have long debated the meaning and intention of rules of law. While in common law tradition such rules have a long history, their interpretation and transformation over the years have been enshrined into the Canadian *Charter of Rights*.

The Canadian legal system has been described as an **adversarial** model (see below). Under this model one is presumed innocent until proven guilty. It is incumbent on the Crown/prosecution to prove the guilt of the accused.

Following common law tradition, the burden of proof entails two essential elements which are expressed in the Charter and the *Criminal Code* and which can be traced back to Magna Carta (see above). These elements include the physical and mental components of any presumptive criminal act. The physical element, often referred to as ***actus reus*** - Latin 'to act', requires that the Crown must prove; beyond a reasonable doubt, that the suspect did intentionally commit the prohibited act. The mental element, often referred to as ***mens rea*** - Latin 'with forethought' or 'guilty mind', requires that the Crown must prove that the suspect did intentionally commit the offence. Therefore, evidence to support a case is a critical element of a trial process. This is why the police must have evidence in order to lay charges. This is also why we have improved evidence gathering technology such as DNA printing, wiretapping, surveillance techniques, among other techniques, so as to increase the likelihood that a conviction can be achieved in court. Evidence gathering techniques have become a major area of criminological

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

research today as can be evidenced by the growing number of forensic courses.

Criminologists interested in the administration of justice are interested in examining the limits by which evidence may be gathered. Even though the Charter protects us against unreasonable "search and seizure" (see section 8 in the Charter) and other fundamental rights that date back to many of the common law principles, the criminal justice system and in particular the courts are constantly striving to ensure that the law is upheld while at the same time ensuring that the rules of law and burden of proof are respected.

In his widely read book, *Thinking about Crime*, James Q. Wilson (1983) suggests that criminal behaviour is fundamentally shaped by cultural factors (e.g., family, the processes of moral development, and extent of individual freedom). To address criminal behaviour from this line of reasoning calls for an interdisciplinary approach that focuses on providing social and economic opportunity rather than through revising or amending criminal laws. Let us take an abbreviated look at the court system and the elements of a criminal defence.

THE COURT SYSTEM

As was noted above, common law tradition adopted a tiered system of courts. Under the BNA Act, federal (sec. 91(27)) and provincial (sec. 92(15)) legal jurisdictions were defined. Figure 1 illustrates the Canadian court system as it currently exists.

While the federal courts have changed little since Confederation, provincial criminal courts systems have. Depending on were one resides provincially, you may have different names for courts which serve a similar function. The nomenclature differences, in-part, reflect the different ideological philosophies of the Acts that they support.[5] These distinctions serve to further illustrate the fluidity of Canadian law, its linkage to common law tradition, and the utilitarian notion that a degree of provincial autonomy serves the provinces and countries interest. Unfortunately, the good intentions of our tiered judicial

5 For example, child welfare legislation in Alberta is called the *Child Welfare Act* while in Ontario it is called the *Childrens Protection Act*. Similarly, some provinces (e.g., B.C., Nfld., and N.S.) call their *Superior Court* the *Supreme Court* (which is confusing with the Supreme Court of Canada) while other provinces call it *Superior Court* (e.g., Quebec). Alberta and Saskatchewan call their *Superior Court* the *Court of Queen's Bench*.

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

system (see Figure C-1) have not always gone well as the present court system across the country reflects both diversity and complexity. To this end, the Law Reform Commission (1989) produced a working paper calling for a move towards a more unified criminal court system. However, as with most things within the legal arena, their recommendations have largely remained confined to scholarly rhetoric.

Figure C-1

CRIMINAL DEFENCES

The following discussion is sometimes not considered an essential element of an introductory course in criminology. However, in addition to providing an overview of the essential elements of a criminal defence, the section serves to illustrate how criminal law has converted informal rules and common law principles into formal criminal law sanctions. It also serves to illustrate that that law is flexible. What may appear to be a criminal offence (based on the evidence) may not hold up in court! Canadian examples that may readily come to mind include David Walsh and Bre-X, Peter Walker, Sue Rodriguez and assisted suicide, David Latimer and assisted suicide of his severely disabled 12-year-old daughter, Jason Love and DNA evidence used in his trial, etc.

At the onset of the chapter, we saw how self-help justice dominated our sense of justice in earlier times. Then as the state acquired increasing control in the administration of justice, the delicate balance between respecting individual rights and proving guilt

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

spawned the debate as to whether laws represent a consensus or conflict view. Whereas the *Criminal Code* defines what constitutes a crime, procedural criminal law prescribes the powers of the state and certain rights of the accused against the power of the state. The primary powers are defined under the Charter while the *Criminal Code* defines some of the criminal defences are available to the accused. However, not all defences are defined in the *Criminal Code*. Many defences are found in case law. The right to a criminal defence is one of our fundamental rights that can be traced back to common law principles (see Appendix A).

The list of 'excuses' to absolve oneself of criminal responsibility are many, and some are well known to us: "I was framed", "The devil made me do it", "I didn't know it was a crime", "I had no choice, it was either him or me", "I just couldn't take it any more", "I was sleepwalking, when it happened", or "I have a blood sugar sensitivity". The point is that even when the evidence against an accused may appear overwhelming, the defendant may still have grounds to plead not guilty or argue a lack of culpability.

In Canada, there are a number of legitimate defences available to an accused. They include automatism, consent, insanity, mistake, provocation, and self-defence.[6] Although a great deal can and has been written on criminal defences coverage in this chapter will be limited to some of the problematic defences that pose a challenge to criminal law and the study of crime.

AUTOMATISM

Under section 16 of the *Criminal Code,* automatism refers to acts, which are supposedly done unconsciously or involuntarily - the accused had no control over their actions. The range of such conditions could be the result of a brain tumour, epilepsy, drunkenness or intoxication, hypnotism, somnambulism (sleepwalking – see sidebar), somnolence (drowsiness), or in some cases amnesia.

[6] Age is perhaps the most basic of personal defences. Based on early doctrine in the Christian church and later becoming part of the common, anyone under the age of 12, it was believed that children cannot reason logically. However, the minimum age of responsibility varies in different countries. In India, for example, the age of responsibility begins at age 7 but the upper limit for boys is 16 and 18 for girls (Winterdyk, 1997).

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

While crimes committed involuntarily pertain to the element of *actus reus*,[7] some criminologists are more interested in understanding the etiological link. For example, many people drink excessively but do not commit crimes. What differentiates those who are intoxicated and commit a crime from those who are similarly intoxicated but do not commit any crime? Why is it that a comparatively small percentage of people who are affected or afflicted by any of the above commit a crime? Is there some biological, sociological, environmental, or interdisciplinary link? Criminal law does not provide an opportunity for understanding or discerning causal behavioural links. Rather the burden of proof rests simply on mental capacity. However, as Healy (2001) notes to displace the presumption of a mental disorder, and to benefit from a defence of non-insane automatism "the accused must, first, satisfy an unusually weighty evidential burden before the trial judge and, second, meet a legal burden by persuading the jury on the balance of probability." Healy argues that the definition and understanding of automatism by the court is confined in its definition. This is reflected in the 1999 Supreme Court case involving *R. v. Bert Thomas Stone* in which the Court narrowly ruled (5:4) that the accused claiming automatism to satisfy the trier of fact on a balance probability that at the time of the offence the accused was acting involuntarily.

In 1997, a 46 year-old Okanagan man was charged with luring a nine-year-old girl into a neighbourhood house and raping and then dumping her in a field. He claimed no knowledge of the event, arguing that he did it in his sleep. Poslowsky testified he had no memory of the alleged offences. The accused had been drinking heavily the evening of the offence, had used cocaine earlier in the week, and was having difficulty sleeping due to a rib injury. In other words, he tried to suggest he was suffering from sleep deprivation. A defence successfully used by Kenneth Parks' in Ontario, in 1992 ('Sleepwalking' rape…, 1997).

Should the outcome of the trial rest on matters of law or on scientific evidence? Can either be used to prove beyond a reasonable doubt the condition of Poslowsky at the time of the crime?

7 R. v. Parks (1992), 75 CCC (3d) 287 (SCC).

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

CONSENT – "MERCY KILLING"

The Sue Rodriguez case of the early 1990s is one of Canada's most infamous cases involving consent. Ms. Rodriguez had been suffering from a terminally ill disease for several years before the pain and loss of self-control led her to want to have an assisted suicide. She was 43 years of age at the time. Since she was no longer able to take her own life Rodriguez wanted to die with a sense of dignity. And while there are vague provisions in the *Criminal Code* (s. 227) that exempt culpability if the death occurs after one year and one day "from the time of occurrence of the last event by means of which the person caused or contributed to the cause of death", Osborne (1995: 279) suggests there is no rational for the stated time period. Osborne points out that the law does not provide for clear "closure to the uncertainty of human survival." However, the constitutionality of the Rodriguez cases was more specifically about section 241 of the *Criminal Code* – counselling or aiding suicide. (Rodriguez passed away on Feb. 12, 1994).

While still graduate students at Simon Fraser University, two students independently completed groundbreaking research on euthanasia that has drawn North American attention. Unlike previous research, Achilles thesis involved a public survey of over 800 people in Greater Vancouver and compared the acceptability of active euthanasia (e.g., lethal injection) and passive euthanasia (e.g., life-support withdrawal). Using different scenarios, Achille's found that 70 per cent favoured active euthanasia when a patient reached a stage of total dependency and when the scenario was altered to enable passive euthanasia 90 per cent favoured that choice.

One of Ogden's findings revealed that 83 per cent of those surveyed with HIV/AIDS indicated that euthanasia or assisted suicide was an option. Of this group 53 per cent had already taken steps to plan their assisted deaths (Sharp, 1995).

Do you think euthanasia should be legalized? If so, what kind of criteria should be established to ensure such practices are not abused? You can visit a detailed discussion of this case by linking into the Simon Fraser University, School of Criminology website.

Cases of this nature involve ethical and moralistic issues. Does law have a right to

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

legislate morality and ethics? Is it a violation of utilitarian principles, or can it be argued to be in the best interest of society that moralistic standards be established? Dr. Kinsella, Director of Medical Bioethics at the university of Calgary is quoted as saying "I am honestly fearful of what would occur if the law were generally relaxed" (Osborne, 1995:283). If we do allow mercy killing or euthanasia, where and how should we draw the line? Yet, Dr. Will Johnson of the BC Euthanasia Prevention Coalition notes that there is no consensus about so-called mercy-killing, "there is definitely a public consensus for better palliative care service…" (Ertelt, 2003). For example, after Robert Latimer was sentenced for killing his disabled 12-year-old daughter in 1997, a national poll revealed that 70 percent of Canadians supported assisted suicide but by 2003 the support dropped to 49 percent!

INSANITY – "DEFENCE OF MENTAL DISORDER"

To rule a person insane, the courts in Canada apply criteria used in the seminal case in Britain from 1843, the **M'Naghten Rule** (see Chapter 5). Although the criteria have been modernized somewhat since the M'Naghten case, the essential principles are the same. As of 1996, section 16 (Defence of Mental Disorder) of the Criminal Code reads:

16(1)... No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

16(2)... Every person is presumed not to suffer from mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

16(3)... The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility in on the party that raised that issue.

It is often mistakenly thought that the insanity plea is both common and readily successful. The misconception is largely due to the high-profile cases in which the insanity plea has been successful. However, Section 16(2) and 16(3) of the Criminal Code provide that every person is presumed NOT to suffer from a mental disorder that would exempt them from criminal responsibility. Typically, when we think of 'mad

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

murders' we think of American figures. Some of the more notorious examples include John Hinckley who attempted to assassinate American President Ronald Reagan; Mark David Chapman who shot and killed former Beatles' John Lennon; David Berkowitz or "Son of Sam" (Hickey, 1991), or "The 44 calibre killer" who terrorized the citizens of New York city for 13 months while he killed six and severely injured seven. Then there was the unusual case of a former San Francisco, California County Supervisor, Dan White who on May 22, 1979, was convicted of voluntary manslaughter of San Francisco Mayor George Mascone and Supervisor Harvey Milk. His defence was that he suffered from "diminished capacity" caused by a biochemical change in his brain. One defence psychiatrist testified that White's compulsive diet of junk food (in particular Twinkies) aggravated the chemical imbalance. In finding White only guilty of manslaughter, the superior court jury apparently accepted the Twinkie defence as it is now commonly referred to as.

Clifford Olson is perhaps the most notorious Canadian serial killer. In late 1980 and early 1981 he knowingly killed 11 children before being caught. At his August 1997 hearing for early release under section 745.6 of the *C.C.* ("commonly referred to as the "faint hope" clause) Tony Marcus, a B.C. psychiatrist described Olson as being self-deluded and a "quintessential psychopath" (Olson 'morally insane': Hearing, 1997). And although the insanity defence was not used in his defence, Olson does suffer from a psychiatric emotional disorder? More recently, other Canadian serial killers such as Paul Bernardo, who killed two girls in 1991, although he did not plea insanity was a fan of stories about serial killers, including Bret Easton Ellis's *American Psycho. He also assumed the* surname, "Teale", which was apparently an *homage* to the fictional killer *Martin Thiel* featured in the movie *Criminal Law* (Serial Killer, 2005). Meanwhile, another Canadian serial killer, then 53 year-old Robert Pickton's defence lawyer tried to use the insanity plea for his client – not an uncommon practice for those accused of serial killing. At the time of preparing this chapter in 2005, Pickton was accused of killing some 15 prostitutes. He is classified as a *mission-oriented* killer who targeted prostitutes. In Dec. of 2004 the presiding judge postponed the trial until 2006 as he had to wade through over 40,000 pieces of evidence – four years after his initial arrest!

Another mass murder incident involved Marc Lepine who on December 6th, 1989

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

killed 14 women and wounded 13 others, mostly women at a technical school in Montreal. The incident is often referred to as the "Montreal Massacre" and each year a vigil is held in memory of the killings (Gomme, 1998). He was known to have a history of emotional problems. However, as in the Olson case, neither case used the insanity plea as a possible defence.

Although Canadian courts have been more willing than American and British courts to allow the Crown to raise the mental disorder defence, under section 7 of the Charter, and in keeping with common law practice, it cannot be done until after the accused has been found guilty[8] (Roach, 1996). The party who raises the possibility of a mental disorder must provide, beyond reasonable doubt, evidence as to the state of the individual's ability to(have formed the mental thought - *mens rea*. However, pleading insanity is a seldom used defence although Gomme (1998) points out that it has become more common because of the very lengthy sentences now meted out for homicide. This has been, more or less, the case since 1976 after capital punishment was officially abolished.

Not only is there public misconception about the use of the defence of mental disorder, but within the legal profession it also has been the subject of much controversy. In court, the concept of "mental illness" is by definition a sickness in the mind. Today, the term 'insanity' is now referred to as "not criminally responsible on account of mental disorder." One's **fitness to stand trial** (s. 672.22-672.33) is based on a psychiatric interview. However, as Faust and Ziskin (1988) observed, psychiatrists are unable to make accurate clinical judgements on the mental status of a defendant. The dilemma in the courtroom is commonly referred to as the "battle of psychiatrists" (Jeffery, 1985). For every opinion one might get confirming the mental illness of an accused, another psychiatrist could be found to oppose the diagnosis. One of the more famous American cases in which such a "battle" took place involved the serial killer Ted Bundy (see Hickey, 1991).

One of the more vocal, and influential, anti-psychiatry spokespersons is Thomas Szasz. Szasz (1987) claims that mental illness is a myth. Referring to the general lack of consensus among psychiatrists in their diagnosis of clients, Szasz argues that the labels

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

are simply an excuse for the profession to control and manipulate people. Rather sanity or lack thereof, is simply an artifact of social, moral, and life experiences. The distinction between sanity and madness, according to Szasz is based in politics and ideology. For example, he notes, it was during the Industrial Revolution, with the rise of capitalism and a need to control certain individuals that the concept of feeblemindedness and moral imbeciles were given a special status. Within a short time asylums and mental hospitals emerged (see Foucault, 1965 for an interesting account) (see Box C-6).

Box C-6 Mental Illness: Real or a Case of Bad Timing?

If my grandfather had changed jobs or professions several times during his working years he would have surely been thought to be unstable and an unreliable worker. If he were alive in the nineties, and only did one job all his life we might consider him conservative, limited, and perhaps insecure. A man who has several relationships before he settles down with his "soul mate" is likely to be considered mature in his decision. Women, until a few years ago, conducting herself in a similar manner might be considered less than pure.

Are such beliefs justifiable? What constitutes normal? Do you know anyone who is "normal"? What makes them different from you or others? What role does/should moralities play in criminal law?

By contrast, Andrews and Bonita (1994), from eastern Canada, are strong proponents of the medical model for explaining insanity. They argue that mental illness is a disease that resides in the brain and is qualitatively different from emotionally diseased persons. Relying on their diagnostic skills and using the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV), psychiatrists try to provide the court with an objective assessment as to the mental stability of the client - their ability to stand trial, their ability to understand criminal responsibility, and their potential dangerous or risk to society and/or themselves.

In Canada, we have only one standard for testing mental disorder insanity. Such is not the case in other parts of the world. For example, in the United States, which allows individual state jurisdiction over such matters, there are six different models in use. They range from: No standards (e.g., Montana and Idaho), several which use the M'Naghten

8 R. v. Swain (1991), 63 CCC (3d) 481 (SCC).

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

Rules (Arizona, Kansas, Maine, and Florida, among others), others such as New Mexico and Colorado use the M'Naghten Rules and Irresistible Impulse Test, while states like California, Oregon, and Ohio rely on the Model Penal Code. Only New Hampshire uses the Durham Rule, and a few states (e.g., New York and North Dakota) use a combination of the above tests (Vito and Holmes, 1994).

In spite of the controversy surrounding the meaning of insanity, numerous examples can be found in the criminological literature showing a relationship between mental illness, emotional disturbances and crime. (For example, Chapter 7 of the text explores the psychological explanations of crime).

MISTAKE OF FACT

"But officer, I did not know that I was carrying a controlled substance for my friend, he told me it was some special powder for his grandmother!" While the accused is admitting to the act (*actus reus)* he/she claims he/she was operating under mistaken facts (lack of *mens rea).* Should the person be exempt from culpability?

Although the law clearly requires both elements to be present in order to find guilt, the defence of mistake of fact is an example of how subjective the law can be in interpreting criminal responsibility. In order for an accused to use such a defence two conditions must be met:

1. The mistake must be an honest one, and
2. No offence would have been committed if the circumstances had been as the accused believed them to be.

In the scenario above, the carrier could be acquitted on the basis that he honestly did not know he was carrying a banned substance. Such was the case of *R. v. Beaver* in 1957. Beaver was charged with possession of heroin. The defence argued that Beaver honestly believed the package contained nothing unlawful. Although the Supreme Court of Canada upheld the defence, in recent years the decision has come under criticism.

Controversy around mistake of fact drew considerable attention when legal feminists argued that "mistake of fact" should not be reason for men to commit a sexual assault because they thought the woman was consenting. It was the case of *Pappajohn v. The Queen* (1980) in which the accused alleged the woman was consenting to the sexual

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

liaison (not unlike Los Angeles Lakers basketball star Kobe Bryant who on July 18, 2003 was charged with forcing a 19-year-old to have sex with him. Through his lawyers he claimed it was consensual - a mistake in fact! Bryant was convicted).

While the Supreme Court agreed there might have been a mistake of fact, the conviction was upheld because Mr. Justice Dickson ruled that while the mistake of fact might be reasonable it was not honest. Therefore, the guilt was dependant not on the act but on personal responsibility.

Mistake of fact has been described as a very complex law but it is a more useful form of defence than mistake of law (see below). Today, with the *Charter*, changing values, the proliferation of laws, and the growing diversity of multi-cultural and multi-ethnic groups, it seems unrealistic for all Canadians to be able to know everything let and therefore be able to proof mistake of fact or *mistake of law.*

MISTAKE OF LAW

In spite of the fact that there are thousands of federal, provincial, and municipal laws, Canadian courts do not recognize ignorance of the law as a viable defence. Section 16 of the *Criminal Code* embodies this rule: “Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.” However, if the accused can convince the court that his orchestrations were based on a "mistake of fact" he or she may have a legal defence.

Interpretation what constitutes a mistake of fact defence tends to be very subjective and the law has been subject to challenges. And while the law may have a practical basis, it has posed numerous difficulties when applied to situations involving ethnic groups and Aboriginal peoples of Canada who are often unaware of our legal concepts. Is it fair that new immigrants should be expected to know all the laws? Is it right that our Aboriginal peoples who survived for many centuries before Caucasians arrived and who had their own systems of justice, should be expected to understand and know our laws? For example, the Inuit do not even have a word in their language for "guilty."

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

SELF-DEFENCE AND COMPULSION

Section 34 of the *Criminal Code* provides that a person may use force in order to protect him or herself against unprovoked assaults, and section 35protects one from provoked assault. Self-defence is probably the best-known situation of a situational defence (others including mistake, accidental, duress, necessity, consent, etc.) and it is an essential part of Canadian law. However, Roach (1996:174) notes that the "statutory provisions in the *Criminal Code* governing self-defence are notoriously complex." He further notes that the basic elements of self-defence are concerned with "the accused's subjective perceptions and reasonableness of those perceptions" (ibid, 174). Self-defence was developed as a specific application of the common law defence of necessity and traditionally required no choice since it was the result of immediate danger. Yet, even the Department of Justice recently commented “there is no denying that…self-defence continues to confuse and trouble counsel, judges and juries…” (Self-defence, 2005).

If someone breaks into your house and you defend your family by killing an intruder in the ensuing struggle you might not be charged with a crime. The law recognizes that we have the right to save our lives or those close to us. However, if you were to use excessive force and simply shot the intruder without due provocation then the defence provided by section 34 is not available. You could be charged with homicide.

Perhaps one of the more controversial examples of self-defence pertains to cases in which abused wives/partners kill their significant others. In *R. v. Lavellee* (1990), the Supreme Court of Canada had to decide whether evidence relating to "battered-wife syndrome" could be used as a defence. Issues of sufficient threat, justifiable force, and the necessity to force a person to kill in self-defence are difficult issues to address legally. While in theory such defences are justifiable, in Canadian courts they seldom work in practice.

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

A related defence that is also unclear under Canadian law is related to superior orders. In 1996, the Somalia inquiry examined certain actions taken by Canadian soldiers that fell outside professional military conduct, against innocent Somalian citizens. Several of those accused claimed they were simply responding to orders from their superiors. Part of the dilemma was that the shooting incident was unprovoked and resulted in grievous bodily harm. However, using s. 17(compulsion by threats) it was argued that the soldiers were ordered by a former U.S. Green Beret to carry out the order during a riot. Yet the law (s.17) does not apply to acts of murder, assault with a weapon, etc.

A final example of self-defence and compulsion pertains to laws involving war criminals. Section 7(3.71) of the *Criminal Code* allows the prosecution of individuals who committed mass murders, executions, or other heinous crimes during times of war. In the interests of society, many might argue that such heinous behaviour can never be condoned under any circumstances. However, under the duress of war, could it be argued that some acts were the result of self-defence or compulsion? Should such laws be binding for the natural life of the individual?

We have only done a cursory overview of the major types of criminal defences. Students interested in learning more about criminal defence should take a class in criminal law and/or evidence and procedure. In these courses you will go into greater depth and examine specific cases and the controversial issues that surround the applications of various defence strategies.

SUMMARY

In this section, we have examined some of the major criminal defences as they relate to the intention of the act. The accused can either deny the *actus reus* (e.g., self-defence or entrapment) or argue that he or she has been wrongly accused or lacked the *mens rea* (insanity, intoxication, duress, etc.). The various defences clearly demonstrate the difficulty of proving intent and also illustrate how norms and values continue to raise new issues as to what should or should not be

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

socially sanctioned. Because of their relative nature, many summary offences have **statutes of limitation** -- after a prescribed period of time those crimes can no longer be prosecuted. During the Vietnam War, numerous draft dodgers fled into Canada trying to avoid the draft and wait out the prosecution period. The fact that people attempt to avoid prosecution, and have a viable "out" raises the question as to the purpose and effectiveness of punishment as a deterrent (see Chapter 2 re classical principles and the purpose of punishment). It also raises questions about *decriminalization* (the process of removing the criminal law), lack of deterrence effect, disrespect for the law, development of a subculture such as the Hell's Angels who moved into western Canada in the mid-1990s. Ironically, Jeremy Bentham (1864:62) recognized the dilemma of trying to regulate certain behaviours when he wrote: "instead of suppressing one vice, the laws would produce other vices, new and more dangerous."

These and related questions speak directly and indirectly to the meaning of crime, criminality, its etiology, and its control and also raise questions about the role of science in law. Therefore, as part of the criminological enterprise, it is essential to study the concepts and purpose of law.

ADVERSARIAL VS. INQUISITORIAL MODEL OF JUSTICE

Truth will arise from a free and open competition over who has the correct facts – Samaha, 1988.

A Canadian criminal trial is nothing like what we see on American television. The process is formal and there is very little, if any, posturing, leading questions, or trickery in court. Goff (1997:219) describes the trial process as "extremely complicated, with the judge having to make decisions about questions of procedure and what evidence can be allowed to enter the court." The great American jurist Roscoe Pound (cited in Boyd, 1986) argued that social control could only be attained through an organized and systematized exercise of power and that law was the operative vehicle. Parker (1968) defined the process as a

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

"due process model" as opposed to a "crime control model" (which describes the inquisitorial system). Given some of the misconceptions that may exist surrounding our criminal trial proceedings we should look at how these models operate.

Based on common law tradition, an accused is presumed innocent until proven guilty. In American movies we regularly see defendants taking the Fifth Amendment. This simply means they can refuse to say anything so that nothing can be used against them. It prevents an accused from self-incrimination. Who has not heard the following words in a cops and robbers movie, "Whatever you say can be used as evidence against you."

Under our **adversarial** (also called accusatorial) model of due process, it is incumbent on the Crown to prove (legal) guilt - not the responsibility of the accused to prove his or her innocence. In the O.J. Simpson case, Mr. Simpson never took the stand to testify in his own behalf. In the Airbus scandal involving former Prime Minister Brian Mulroney, Mulroney also refused to testify. In Canada, these rights are protected under the *Charter* (s.11(c)). On the eve of the Airbus trial on January 5, 1997, the RCMP settled out of court (Airbus letter wrong..., 1997)!

The adversarial model can trace its roots to the earlier practices involving trial by ordeal and trial by battle (see Chapter 2). It grew in popularity during the tenth to thirteenth centuries. These practices were eventually replaced by the civil process of trial by judge, or by judge and jury. Today, both the Crown and defence are responsible for structuring the legal issues to be decided in the criminal trial. Battles occur as both sides play an aggressive role in summoning and questioning witnesses. To ensure proper decorum, the judge acts as a referee to ensure the various *rules of evidence* are followed by both parties and that the jury (if there is one) is properly instructed in the relevant legal issues (Law Reform Commission,1974; Schmalleger, MacAlister, McKeena, and Winterdyk, 2000).

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

Countries that practice civil law (see Box C-3) more commonly use an **inquisitorial** (non-adversarial) approach. This system had become a standard and required procedure for all French courts by the mid-sixteenth century (Reichel, 2002). Under this model, judges play a much more active role in the criminal process. For example, during the investigation into Diana's car crash, the judge questioned the witnesses, something that would not occur in our system. As Hackler (1996) observed while viewing court procedures in France, the judiciary plays a vital role in both the collecting of evidence and in defining the issues that are to be settled by the criminal trial. The process of determining guilt is more factual than legally-based. In contrast to our model, the Crown and defence assume a relatively passive role. Also contrary to our legal adversarial process, a trial under the inquisitorial system is more like a continuing investigation where the parties in the case must provide all relevant evidence during the proceedings. The trial becomes a type of screening process in which evidence is carefully examined to arrive at the truth. Furthermore, the judge, not the Crown or defence, calls and actively examines witnesses and the defendant.

Under the civil law system, trials are an important element of the proceedings. Ingraham (1987) points out that an admission of guilt by the defendant is not the same as a guilty plea. It acts instead as additional evidence to be evaluated. It is still possible, however, in certain countries (e.g., France, Italy, and Germany) to have uncontested trials in which the defendant provides support for the charges laid against him or her. In such instances a case can be completed in as little as 15 minutes (Ingraham, 1987).

Both adjudication processes reflect how social control mechanisms have evolved. Under the accusatorial model, the means of extracting justice (i.e., vengeance) evolved from the wronged person, to relatives of the victim, then to any member of the person's group, before responsibility for the well being of the person finally rested with the government (Reichel, 2002). The process of resolving disputes is

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

still characterized by many of these early practices, except that today it is more formal and considered to be fairer.

The inquisitorial system followed a slightly different path. Reichel (1996:149) notes "the wronged person is eliminated as private accuser and replaced with a public official." Over time the private accuser's role was replaced with an investigative process, which complemented the development of its civil law roots and socialist traditions. By contrast, the Islamic legal system is the only one that "offers a unique combination relying on private accusation in an inquisitorial-type setting" (Reichel, 1996:149). During a trial the accused sits at arm's length from the judge and "questions and answers flow, as at a conference rather than a formal trial" (Daniszawski, 1997:C1). The underlying principle of all Islamic law is that God is the law and disputes are addressed from the point of view that the accused and the court are "doing God's work to reach the truth" (ibid, C1).

CRIMINOLOGY AND LAW

So far, we have examined both the historical roots of law as well as the key elements of law in Canada today. What we have been examining is the philosophy and sociology of law, or **jurisprudence,** as it is commonly known. Jurisprudence involves four major areas of study:

1. **Law and philosophy**: pertains to the relationship of law to morality, natural law doctrine, God, and ethics. The assumption is that we are rational beings who recognize certain inalienable and natural laws which are revealed to us through a deity. However, we noted earlier that most laws today are positive laws, or human-made laws. So what then is the meaning and purpose of law today? Is it possible to separate natural law from people's social, psychological, and biological natures? History has clearly shown us that it is not possible, since law cannot exist without the workings of human behaviour.

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

2. **Law and power**: involves the relationship of law to the state system. Maybury (1993) referred to this type of law and positive law (see above). The advent of the idea of the divine right of kings began a shift from law as given to us through the church (i.e., God) to law being prescribed by kings and later governments. These are the human-made laws that we have today.

3. **Law and society**: the relationship of law to major social and historical events. As noted in Chapter 1, this is known as the sociology of law.

4. **Law and science**: the relationship between law and the physical and social sciences. Referred to as **legal realism**, in Chapter 1 it was noted as the weakest area of study within jurisprudence.

   The first of these views can be described as idealistic while the latter three are supposedly based on empiricism, science, and human experience. Aside from the inherent contradiction between what Maybury (1993) described as natural vs. scientific law, all are premised on the classical (Chapter 5) philosophy of free will and moral responsibility.

   From a consensus perspective, law is supposed to reflect public opinion and natural law, but as we have seen throughout this chapter, law is no longer natural nor is public opinion consensual (a conflict perspective). For example, the *Youth Criminal Justice Act*, though a federal act, is administered provincially and not necessarily uniformly. Transfer rates to adult court, for example, are higher in some provinces than others. Similarly, some provinces 'young offender systems are considered more liberal than others (see, generally Winterdyk, 2004).

   The future direction of criminal law in Canada, and globally, will continue to present challenges for the legal system and criminology in general. In the1990s, for example, we have been victim- conscious and there has been a need for criminologists to better understand the relationship between victims and offenders. Science and technology has also been increasingly used in the courtroom. This has prompted criminology to further expand its boundaries into

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

forensics. New crimes (computer, credit cards, transnational crime, etc.) will require new legal responses. Criminologists will need to examine how best to prevent and respond to these emerging forms of criminal activity.

SUMMARY

"Ignorance of the law excuses no man; not that all men know the law, but because 'tis an excuse every." John Selden (1584-1654).

Criminal law is a vital force that provides the framework for our individual, political, and social lives. Criminal law, and laws in general, help to maintain social order. Laws reflect the values held by society. As Boyd (1995:4) suggests, criminal law is a "barometer of the nation's view of human relations." Laws are the formal expression of human values and norms and their origins run deep.

In this chapter, we traced the roots of criminal law, and its function and purpose in Canadian society. We looked at how Canadian criminal law came to be and how it is administered. We saw that a criminal offence entails two fundamental elements -- the act and the unlawful intentions behind the act. In addition, we have seen how self-help justice has been codified to promote social order through the threat of punishment. We also looked at the role of the *Charter* in protecting our individual rights while also ensuring that society's interests are protected. The *Charter* has entrenched many of our traditional and common law principles.

Many of these concepts make up a wide range of defences to a criminal charge. The overview of some of the more innovative and controversial criminal defences illustrated how important it is for criminologists to be familiar with sociology of law and jurisprudence, to integrate law and the social sciences and to embrace the role of law in the study of crime. As the social sciences and behavioural sciences continue to play an increasingly important role in the outcome of criminal trials, it is imperative that the legal profession embraces the social sciences.

Questions were raised as to the effectiveness of criminal law in maintaining crime control. These questions evolved around the philosophical doctrines underlying the premises of common law and civil law. The chapter concluded with a brief discussion about the nature of criminology and law. It was further noted that criminal law has

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

continued to evolve as society, technology, and norms change. Criminologists must be aware of these inter-relationships and be prepared to study (criminal) law from an integrated and interdisciplinary approach in order to appreciate the social and political nature of law.

DISCUSSION QUESTIONS

1. How have historical practices of justice affected current attitudes toward crime prevention and crime control?
2. Is it necessary to formally codify behaviour? What are the strengths and weaknesses of common laws versus political laws?
3. Using the liberal and conservative approaches to law, explain the controversy surrounding the euthanasia.
4. Although Canada employs an adversarial model of justice, would there be any advantages to entertaining elements of the accusatorial model? Clarify your answer.
5. Collect at least a dozen crime articles from media sources. What type of defences are used? Referring to Appendix A (below), see how they apply to common law defences. How do the current defences differ from common law defences?
6. Discuss the contemporary problems in criminal defences. What are the implications for criminal law? How might an interdisciplinary and integrated approach help to address some of the problems?

Key Concepts

Canadian *Criminal Code*	jurisprudence	
Self-help justice	private revenge	blood revenge
State revenge	common law	codification
Civil law	Charter of Rights	burden of proof
Criminal defence	fitness to stand trial	liberalism
Conservatism	mistake of fact	mistake of law
Compulsion	codes	accusatorial

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

Inquisitorial	natural laws	political laws
case law	Justinian Code	adversarial
Code of Hammurabi	*lex talionis*	superstitious revenge
corroborating evidence	Ur-Namma's Code	retribution
Due process	rules of law	precedent
Magna Carta	*stare decisis*	BNA Act
Statute of limitation	*actus reus*	*mens rea*
Social control	criminal law	revenge

Key Names

John Stuart Mill	John Locke	Jeremy Bentham
Thomas Hobbes	Edmund Burke	

Helpful Web Links

Canadian Charter of Rights and Freedoms www.laws.justice.gc.ca/en/**charter**/ The full text of the Charter.

Department of Justice (Canada) **canada**.**justice**.gc.ca/en/ This government site provides a rich source of information about the ministry, includes a range of publications and links to various federal acts and regulations.

Canadian *Criminal Code* www.efc.ca/pages/law/cc/cc.html The entire text for the *Criminal Code.*

Civil law en.wikipedia.org/wiki/Civil_**law A link that offers a wide range of information on civil law.**

Common law en.wikipedia.org/wiki/Common_**law A link that offers a wide range of information on common law.**

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

References

Alder, F., Mueller, G.O.W., & Laufer, W.S. (1991). *Criminology.* New York: McGraw-Hill.

Airbus letter wrong: Court. (1997, March 03). *Calgary Herald.* (Online).

Andrews, D.A., & Bonita, J. (1994). *The psychology of criminal conduct.* Cincinnati, OH: Anderson.

Bailey, I. (1996, Sept. 27). New gun policies may have denied killer firearm used in rampage. *Calgary Herald,* A3.

Barlow, H.D. (1990). *Introduction to criminology* (5th ed.). Glenview, Ill: Scott, Foresman/little Brown.

Bartol, C.R. (1995). *Criminal behaviour: A psychological approach* (4th ed.). Englewood Cliffs, NJ: Prentice-Hall.

Baby born to glue sniffing mom. (1996, Dec. 17). *Calgary Herald.* (Online).

Bentham, J. (1864). *Theory of legislation.* Trans. Hildreth. London: Routledge.

Berger, T. (1982). *Fragile freedom: Human rights and dissent in Canada.* Toronto: Irwin.

Boyd, N. (Ed.). (1986). *The social dimensions of law*. Scarborough, ON: Prentice-Hall.

Boyd, N. (1995). *Canadian law: An introduction.* Toronto: Harcourt Brace.

Brunet, R. (1995, April 24). *Alberta Report.* pp. 28-29.

Burtch, B. (1992). *The sociology of law.* Toronto: Harcourt Brace.

Calhoun, G. (1927). *The growth of criminal law in ancient Greece*. Reprinted by Greenwood: Westport, Conn. in 1977.

Caputo, T.C., Kennedy, M., Reasons, C.E., & Brannigan, A. (Eds.). (1989). *Law and society: A critical perspective.* Toronto: Harcourt Brace.

Crim 1110 resource manual. (1997). Dept. of Criminology, Mount Royal College, Calgary, Alberta.

Daniszewski, J. (1997, Feb. 8). Sharia: Islamic law under scrutiny as British nurses face possible death sentence. *Calgary Herald,* C1.

DeKeseredy, W., & Schwartz, M.D. (1996). *Contemporary criminology*. Belmont, CA:

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

Wadsworth.

Durham, A. (1988). The justice model in historical context: Early law, the emergence of science, and the rise of incarceration. *Journal of Criminal Justice, 16:* 331-346.

Ertelt, S. (Sept. 8, 2003). Poll shows Canadian's support for assisted suicide on the decline. Retrieved Jan. 10/05 www.lifenews.com/bio41.html

Fattah, E.A. (1995). Restorative and retributive justice models, A comparison. In H-H. Kuhne (Ed.), *Festschrift fur Koichi Miyazawa.* Baden-Baden, Germany: Verlagsgellschaft.

Faust, D., & Ziskin, J. (1988). The expert witness in psychology and psychiatry. *Science*, 241: 31-34, July.

Foucault, M. (1965). *Madness and civilization: A history of insanity in the age of reason*. New York: Random House.

Friedland, M.L., Trebilcock, M., & Roach, K. (1990). Regulating traffic safety. In M.L. Friedland (Ed.), *Securing compliance.* Toronto: University of Toronto Press. (Ch. 4).

Gelndon, M.A., Grodon, M.W., & P.G. Carozza. (1999). *Comparative Legal Traditions.* St. Paul, Minn.: West Group.

Goff, C. (1997). *Criminal justice in Canada*. Toronto: Nelson.

Gomme, I. (1998). *The shadow line: deviance and crime in Canada* (2nd ed). Toronto: Harcourt Brace.

Hackler, J. (1996). Anglophone juvenile justice: Why Canada, England, the United States, and Australia are behind other developed countries. In J. Winterdyk (Ed.), *Issues and perspectives on young offenders in Canada.* Toronto: Harcourt Brace. (Ch. 12).

Healy, P. (2001). Automatism confined. *McGill Law Journal.* Retrieved Jan. 10/05 www.journal.law.mcgill.ca/abs/451healy.htm

Hickey, E.W. (1991). *Serial murders and their victims*? Pacific Grove, CA: Brooks/Cole.

Hoebel, E.A. (1954). *The law of primitive man*. Cambridge, Mass.: Harvard University Press.

Holmes, O.W. (1881). *The common law*. Boston: Little, Brown.

Ingraham, B.I. (1987). *The structure of criminal procedure: Laws and practice of France, the Soviet Union, China, and the United States.* Westport, CT: Greenwood.

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

Jeffery, C.R. (1985). *Attacks on the insanity defence*. Springfield, Ill: Charles C. Thomas.

Johnson, H.A. (1988). *History and criminal justice*. Cincinnati, OH: Anderson.

Law Reform Commission. (1974). *Study Report: Discovery in Criminal Cases*. Ottawa: Information Canada.

Law Reform Commission (1989). *Toward a unified criminal court*. Ottawa: Law Reform Commission of Canada.

Maybury, R.J. (1993). *Whatever happened to justice?* Placerville, CA: Bluestocking.

McCormick, P., & Greene, I. (1990). *Judges and judging.* Toronto: James Lorimer and Co.

McGrath, W.T. (Ed.). (1976). *Crime and its treatment in Canada (2nd ed.).* Toronto: McMillan. (Ch. 1).

Mueller, G.O.W. (1955). Tort, crime and the primitive. *J. of Criminal Law, Criminology and Police Science*, 46: 303-332.

Mundt, R.J. (1993). Rejoinder to comments on "Gun control and rates of firearms violence in Canada and the United States. *Canadian Journal of Criminology,* 35(1): 42-48.

Olson 'morally insane': Hearing. (1997, Aug. 19). *Calgary Herald.* (Online).

Osborne, J.A. (1991). The Canadian law. In M.A. Jackson & C.T. Griffiths (Eds.), *Canadian criminology.* Toronto: Harcourt Brace. (Ch. 2).

Osborne, J.A. (1995). The Canadian law. In M.A. Jackson & C.T. Griffiths (Eds.), *Canadian criminology* (2nd ed.). Toronto: Harcourt-Brace. (Ch. 8).

Parker, G. (1996). Crime, law, and legal defences. In R. Linden (Ed.), *Criminology: A Canadian perspective*. Toronto: Harcourt-Brace. (Ch. 2).

Parker, H.L. (1968). *The limits of the criminal sanction*. Stanford, CA: Stanford University Press.

Reichel, P.L. (2002). *Comparative criminal justice systems* (3rd ed.). Englewood Cliffs, CA: Prentice-Hall.

Reichel, P.L. (1996). *Comparative criminal justice systems* (2nd ed.). Englewood Cliffs, CA: Prentice-Hall.
`

Report of Minister's Roundtable on Criminal Law. (Nov. 1, 2002). Ottawa: Law

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

Commission of Canada.

Roach, K. (1996). *Criminal Law.* Toronto: Irwin Law.

Romig, D.A., Cleland, *C.C.*, & Romig, L.J. (1989). *Juvenile delinquency: Visionary approaches.* Columbus, OH: Merrill.

Ross, R.R., & Gendreau, P. (Eds.). (1980). *Effective correctional treatment.* Toronto: Butterworths.

Samaha, J. (1988). *Criminal justice*. St. Paul, MN: West.

Schafer, S. (1978). *Introduction to criminology*. Reston, VA: Reston Pub.

Schmalleger, F., MacAlister, D., McKenna, P.F., & Winterdyk, J.A. (2000). *Canadian criminal justice today: An introductory text for the twenty-first century.* Toronto: Pearson Education.

Self-defence. (2005). Department of Justice Canada. Retrieved Jan. 12, 2005 http://canada.justice.gc.ca/en/cons/rccd/section1p2.html

Serial Killer. (2005). Retrieved Jan. 10, 2005. http://www.voyagenow.com/travel-references/en/wikipedia/s/se/serial_killer.html

Sharp, A. (1995, Fall). Euthanasia. *Simon Fraser University Alumni Journal.* pp. 10-12.

Shostrom, E. (1972). *Man, the manipulator.* NY: Bantam.

'Sleepwalking' rape defence surprise Crown prosecutor. (1997, May 11). *Calgary Herald,* A9.

Somalia inquiry. (1997). *Calgary Herald.* (Online – general search).

Szasz, T. (1987). *Insanity: The idea and its consequences*. NY: Wiley.

Turner, C. (1997, Jan. 18). Hunting Nazis. *Calgary Herald,* C 1.

Veltmeyer, H. (1987). *Canadian corporate power*. Toronto: Garamond Press.

Vito, G.F., & Holmes, R.M. (1994). *Criminology, theory, research and policy.* Belmont, CA: Wadsworth.

Wales, H. (1996). Criminal law. *Encarta* CD Rom Encyclopedia.
World legal history.

Wilson, J.Q. (1983). *Thinking about crime (*rev. ed.). NY: Basic Books.

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

Winterdyk, J. (Ed.). (2004). *Issues and perspectives: Young Offenders in Canada* (3rd ed.). Toronto: Harcourt-Brace. (Ch. 2).

Winterdyk, J. (Ed.). (1997). *Juvenile justice systems: International perspectives.* Toronto: Canadian Scholar's Press. (Introduction).

Wootten, B. (1963). *Crime and the criminal law*. London: Stevens and Sons.

Wright, B., & Fox, V. (1978). *Criminal justice and the social sciences.* Philadelphia, PA: W.B. Saunders.

Zehr, H. (1995). A restorative lens. In N. Larsen (Ed.), *The Canadian criminal justice system: An issues approach to the administration of justice.* Toronto: Canadian Scholars Press.

Legal cases sited:

R. v. Beaver (1957). 118 *C.C.*C. (3d) 129 (S.*C.C.*).
R. v. Lavallee (1990). 55 *C.C.*C. (3d) 97 (S.*C.C.*).
R. v. Pappajohn (1980). 52 *C.C.*C. (2d) 481 (S.*C.C.*).
R. v. Parks (1992), 75 *C.C.*C. (3d) 287. (S.*C.C.*).
R. v. Swain (1991), 63 *C.C.*C. (3d) 481 (S.*C.C.*).
R. v. Stone (1999), 2 SCR 290.

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

Appendix A: Common Law Principles

1. A man is innocent until proven guilty. (*C.C.* sec. 11(d)). (France takes the opposite view).
2. A man's home is his castle. (Entry can only be obtained against the will of the owner by due process of law).
3. A man cannot be convicted twice for the same offence – once they have stood trial. This applies when the offence is under the same statute. (*C.C.* sec. 12 & *Charter s. 11(h)*).
4. A person under twelve years of age cannot be prosecuted. (*C.C.* sec. 13).
5. A man can only be charged and convicted with a crime known to law. (sec. 9 of the *C.C.* – exception is the charge of contempt of court).
6. A man can only be punished after conviction, and then only within the limits authorized by law. (*C.C.* sec. 6).
7. A man is entitled to be tried by his peers. In Canadian law, this is only true for certain indictable offences for which the *C.C.* so provides.
8. The accused must be given the benefit of a reasonable doubt. Therefore, circumstantial evidence must be overwhelming.
9. The Crown must prove their case beyond a reasonable doubt.
10. No charge can be laid against a person for a common law offence – except for contempt of court. See sec. 9 of the *C.C.*
11. A person can only be arrested by due authority of the law. (*C.C.* sec. 494-495).
12. Ignorance of the law is not an excuse (*C.C.* sec. 19). However, in some cases there may be exceptions – see main text.
13. The accused is entitled to make a full answer in defence to a charge. In other words, a person cannot be tried while under the influence of alcohol or drugs and an insane person cannot be tried – see main text.
14. The accused is entitled to have counsel without delay and to be informed of the right. (Charter of Rights and Freedom – sec. 10b).
15. The accused cannot be compelled to incriminate themselves. (Charter sec. 11(c)).
16. Generally speaking the accused's character or general reputation is not at stake. Exceptions are if such information is essential to the crime such as with Clifford Olson and Paul Bernardo.

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario

17. With the exception of a few crimes, neither the husband or wife are compellable witnesses for the prosecution. (see Canada Evidence Act, sec. 4(2), 4(4) and 4(5) for exceptions.
18. Corroboration is required by law in certain cases.
19. In most crimes, guilty mind (*mens rea)* has to be established.
20. In some cases compulsion will be a defence (*C.C.* sec. 17 – see main text).
21. In many cases where stark necessity compels a person to commit an offence, that may be a defence.
22. Insanity is a defence if pleaded at the time of the trial (*C.C.* sec. 16 – see main text).
23. People who become insane before they are brought to trial cannot be tried (see 14 above).
24. People who become insane during the term of imprisonment must be placed in some institution until they recover.
25. Provocation may form a defence – this does not include impulsive insanity. Provocation must be instantaneous – not over a period of time (see main text).

Source: Adapted from *Crim 1110 Resource Manual* (1997).

Copyright © 2006 Pearson Education Canada Inc., Toronto, Ontario