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Ties that Bind?: The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law under the Charter

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Ties that Bind?: The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law under the Charter

Abstract

Chief Justice Dickson has suggested that Canadian jurists should consult American authority in Charter cases, but with care. The authors look at how the Court has followed this advice in its own criminal decisions rendered prior to March 1989, in which American authority is cited in less than 50 percent of the cases. The authors conclude that, in some significant areas, the Court has interpreted the interests of the accused more broadly than the American Supreme Court does and has on occasion done so without citing divergent U.S. precedent. The effect of sections 1 and 24(2) of the Charter on this trend remain to be seen.

Keywords

Canada. Canadian Charter of Rights and Freedoms; United States. Supreme Court--Influence

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TIES THAT BIND? THE SUPREME COURT OF CANADA, AMERICAN JURISPRUDENCE, AND THE REVISION OF CANADIAN CRIMINAL LAW UNDER THE CHARTER[©]

BY ROBERT HARVIE* AND HAMAR FOSTER**

Chief Justice Dickson has suggested that Canadian jurists should consult American authority in *Charter* cases, but with care. The authors look at how the Court has followed this advice in its own criminal decisions rendered prior to March 1989, in which American authority is cited in less than 50 percent of the cases. The authors conclude that, in some significant areas, the Court has interpreted the interests of the accused more broadly than the American Supreme Court does and has on occasion done so without citing divergent U.S. precedent. The effect of sections 1 and 24(2) of the *Charter* on this trend remain to be seen.

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I. INTRODUCTION

Since the entrenchment of the *Canadian Charter of Rights and Freedoms*,¹ Canadians have had to get used to a phenomenon that Americans have lived with for some time: judicial review of both legislation and official action for compliance with constitutional rights. Between 1867 and 1982, Canadian judges presiding at criminal trials had virtually no authority to remedy rights violations by police or prosecutors. The only ground for striking down legislation, criminal or otherwise, was that it had been enacted by the wrong level of government.² Thus, courts could neither exclude

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

² The *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*) divided legislative jurisdiction between the Dominion parliament and the provincial legislatures, each of which had plenary authority within its respective realm. The law of evidence provided that so long as evidence was relevant and was not excluded by any common

evidence obtained as a result of such violations, nor hold a law *ultra vires* for any reason other than a breach of the federal principle. This led, over the years, to a number of rather strained decisions in which the courts were obliged to resolve civil liberties issues using only the language of federalism.³ Eventually, the artificiality of this prompted some judges to speak of an "implied Bill of Rights" in the preamble to the *Constitution Act, 1867*.⁴ This led to the passage of the *Canadian Bill of Rights*, an ordinary federal statute, in 1960.⁵ While the Supreme Court ruled in the well-known case of *R. v. Drybones* that it could now declare legislation inconsistent with the *Bill* inoperative, it subsequently proved extremely reluctant to do so.⁶ Yet, *Drybones* was never explicitly overruled. This important phase of Canadian judicial history may have influenced the present Supreme Court's much more activist stance.⁷

law or statutory rule, it was admissible, however obtained. The only remedy available to judges who felt that an impropriety had occurred was the rather nebulous and uncertain one of staying a prosecution on the ground that the judicial process was being abused. In 1977, the Supreme Court of Canada ruled (5:4) that even this power probably did not exist. See *Rourke v. R.* (1977), [1978] 1 S.C.R. 1021, 35 C.C.C. (2d) 129.

³ For example, in cases such as *Saumur v. Quebec (City of)*, [1953] 2 S.C.R. 299 and *Switzman v. Elbling*, [1957] S.C.R. 285, the Supreme Court struck down laws that interfered with freedom of speech and religion under the guise of holding that they trespassed upon federal legislative authority. Thus, in *Switzman*, a Quebec law which prohibited using a house "to propagate communism or bolshevism" was held *ultra vires* because it was criminal and, therefore, federal in nature. The implication, of course, was that rights could be limited (or even abrogated) so long as the right level of government did so. Usually, the provinces argued that they had jurisdiction over this sort of case by virtue of their authority over property and civil rights, conferred by section 92(13) of the *Constitution Act, 1867*.

⁴ See *Reference Re Alberta Statutes*, [1938] S.C.R. 100.

⁵ *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1970, App. III.

⁶ *R. v. Drybones* (1969), [1970] S.C.R. 282, 3 C.C.C. 355 [hereinafter *Drybones* cited to C.C.C.].

⁷ In the twenty-two years between the passage of the *Canadian Bill of Rights* in 1960 and the *Charter* in 1982, *Drybones*, *supra*, note 6 was the only case in which the Supreme Court invalidated a statutory provision (a section of the *Indian Act*, R.S.C. 1952, c. 149) for violating the *Bill*. This "fact of Canadian judicial history" was the subject of comment in the Supreme Court's first right to counsel case under the *Charter*. See *infra*, note 177 and accompanying text at 760.

In the criminal sphere, cases invalidating federal law were especially rare. In fact, the Supreme Court of Canada struck down a provision of the *Criminal Code*⁸ only once prior to 1982.⁹ But, since then, the change has been remarkable, both within the criminal sphere and without it. When Baar compared the Canadian and United States Supreme Courts' rights record thirteen years ago, he found that, in the two decades following 1950, the United States Court invalidated public action in 56.3% of its constitutional cases, whereas the Canadian Court did so in only 25.9%. Yet, Morton and Withey note that the Canadian Court's record in *Charter* cases between 1982 and 1985 is 58%, a figure "identical with the earlier figure for its American counterpart and more than double its own earlier mark."¹⁰ In the criminal area alone, the Supreme Court has, in the past five years, relied upon sections 7 and 11(d) of the *Charter* to strike down two important sections of the *Criminal Code*. Further, a number of other provisions, including a common law rule or two, are in jeopardy.¹¹ Just as important, by providing that

⁸ *Criminal Code*, R.S.C. 1970, c. C-34.

⁹ *Boggs v. R.*, [1981] 1 S.C.R. 49, 58 C.C.C. (2d) 7. However, on occasion the Court struck down provisions in other federal statutes on the ground that they trespassed upon provincial legislative powers, even when the Dominion attempted to defend them as coming within its extensive criminal jurisdiction. See, for example, *Reference Re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, upheld by the Judicial Committee of the Privy Council in *Canadian Federation of Agriculture v. A.G. Quebec* (1950), [1951] A.C. 179.

¹⁰ See F.L. Morton & M.J. Withey, *Charting the Charter, 1982-1985: A Statistical Analysis* (Calgary: Faculty of Social Sciences, University of Calgary, 1986) referring to Baar's work at 79-80. Although the rate plotted by Morton and Withey has since declined somewhat, it is notable that in a randomly selected ten volumes of criminal cases reported in 1987-89 (Volumes 33 through 43, *Canadian Criminal Cases*, Third Series), approximately 50% are *Charter* cases. In the ten corresponding volumes from 1977-79 (Volumes 33 through 43, *Canadian Criminal Cases*, Second Series), constitutional and civil liberties cases are far fewer in number. Volume 34 is typical. In it there are four cases listed under civil rights and constitutional law in the Second Series (1977), compared to 30 in the Third (1987).

¹¹ In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 37 C.C.C. (3d) 449 [hereinafter *Morgentaler* cited to C.C.C.], the Court struck down what was then section 251 of the *Criminal Code*, the abortion law, as violating the right of women to security of the person under section 7 of the *Charter*. In *Vaillancourt v. R.*, [1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118 [hereinafter *Vaillancourt* cited to C.C.C.], it invalidated what was then section 213(d), the felony-murder rule, because of a conflict with section 7 and the presumption of innocence in section 11(d). The Court suggested that other provisions that permitted a conviction for murder without requiring the prosecution to prove subjective foresight were also bad. See section III.D., *infra* at 769ff. Then, in *R. v. Bernard*, [1988] 2 S.C.R. 833, 45 C.C.C. (3d) 1, a plurality even cast

evidence obtained in violation of the *Charter* must be excluded if its admission would bring the administration of justice into disrepute, section 24(2) has meant that police behaviour, found wanting in this sense, may now give rise to a remedy that effectively checkmates the prosecution.¹²

To American lawyers, this might seem like a predictable trend. However, the Supreme Court's conservative approach to the 1960 *Bill of Rights* led many Canadian observers to expect a similar judicial response to the *Charter*. One factor that militated against such a repeat of the past is terminology. The pre-1982 rhetoric of the "rights of the public" as something to be weighed against the "rights of the accused" has been undermined by the *Charter*, which classifies only the interests of the accused as "rights." The interests of the wider society appear as limits on those rights, imposed either by judicial interpretation (section 1) or legislative decree (section 33).¹³ The *Charter* therefore represents a move away from the modified Toryism of the past, in which the interests of neither the community nor the accused were theoretically paramount, towards a more classically liberal regime. In practical terms, these changes

doubt upon the common law restriction of the intoxication defence in prosecutions for general intent offences.

¹² Section 24(1) authorizes courts to grant any remedy that is "appropriate and just in the circumstances" to anyone whose *Charter* rights have been violated. Section 24(2) requires a court to exclude evidence obtained "in a manner that infringed or denied" *Charter* rights, if it concludes that to admit it would "bring the administration of justice into disrepute." The leading Supreme Court case on this provision is *Collins v. R.*, [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1 [hereinafter *Collins* cited to C.C.C.]. Notwithstanding that the Court concluded that real evidence obtained by contravening section 8 will "rarely" operate so unfairly as to require exclusion, it indicated that narcotics obtained during an unreasonable search involving a throat-hold would be excluded. The Court emphasized that the purpose of the rule was not to discipline the police, but to prevent the administration of justice from being tarnished. It has also rehabilitated the "abuse of process" jurisdiction referred to *supra*, note 2, especially in entrapment cases. See, for example, *Amato v. R.*, [1982] 2 S.C.R. 418, 69 C.C.C. (2d) 31; *R. v. Jewitt* (1983), [1985] 2 S.C.R. 128, 21 C.C.C. (3d) 7; *R. v. Keyowski*, [1988] 1 S.C.R. 657, 40 C.C.C. (3d) 481; *R. v. Mack*, [1988] 2 S.C.R. 903, 44 C.C.C. (3d) 513 [hereinafter *Mack* cited to C.C.C.].

¹³ Section 1 provides that the rights and freedoms set out in the *Charter* are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Section 33 permits Parliament or a provincial legislature to declare that a law "shall operate notwithstanding a provision included in section 2 or sections 7 to 15" of the *Charter*. Such declarations need to be renewed after five years.

have meant that the Canadian criminal process has finally become "an appropriate forum for correcting its own abuses."¹⁴

It should not be surprising, therefore, that a debate familiar to Americans has taken shape in Canada. It is a debate about the extent to which the Supreme Court's interpretation of these new powers was intended, or at least anticipated, by the framers of the new constitution (who are still very much alive and willing to talk).¹⁵ However, what is just a little surprising is that, quite early in the process, the Supreme Court of Canada announced that it would be in no way bound or influenced by contemporaneous declarations of intent and acted accordingly.¹⁶ Even more surprising — at least to us — is that, on occasion, the Court has gone even farther than its United States counterpart towards a due process model of criminal justice.¹⁷

One of us is American and is familiar and comfortable with "rights review" of criminal legislation and police practices; the other is Canadian and is less familiar and less comfortable. But neither of us expected that we would find, in cases involving issues such as the use of an accused's prior testimony, the seizure of blood samples, the right to counsel at line-ups and traffic stops, and even the substantive definitions of offences and defences, that the Supreme Court of Canada now protects the interests of the accused more vigorously than its American counterpart. Moreover, this contrast

¹⁴ The phrase is H.L. Packer's, from his *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968) at 167. In it, Packer contrasts the "law enforcement" and "due process" models of the criminal process.

¹⁵ In "More on *Miranda* - Recent Developments Under Subsection 10(b) of the *Charter*" [1987] Ottawa L. Rev. 573 at 580, D.M. Paciocco argues that, although it is "doubtful that many anticipated this result ... *Miranda*-like doctrines" are a product of the "constitutionalization of basic criminal law principles" and are "the legitimate progeny of the accusatorial system that Canada shares with the United States." In what follows, we hope to show that, in some important respects, the Supreme Court of Canada has even out-*Mirandized* - *Miranda*, legitimately or not.

¹⁶ See the reasons of Justice Lamer, for the majority, in *Reference Re Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289 at 306-7 [hereinafter *Motor Vehicle Reference* cited to C.C.C.]. See also J. Cameron, "The Motor Vehicle Reference and the Relevance of American Doctrine in Charter Adjudication" in R. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) at 69-96.

¹⁷ Packer, *supra*, note 14, c. 8.

seems due as much to the wording of the *Charter* and the philosophy and approach of the Supreme Court of Canada as to the conservative trend that many commentators believe has been operative in the United States Supreme Court recently.¹⁸

To do justice to this phenomenon would require a book, rather than an article. Indeed, a satisfactory comparative treatment of the two countries' exclusionary rules would require an article in itself. We therefore decided to address only two aspects of the topic — one quantitative, the other qualitative — and only in the most preliminary and exploratory fashion. The first and more straightforward of the two is the extent to which the Supreme Court of Canada has referred to United States precedent in its criminal decisions. This is dealt with in Section II and is based upon a survey of all the Court's criminal *Charter* cases to date. The second is how the Court has used — or not used — this precedent to analyze a number of issues affecting the *rights of the accused* that lawyers, in both countries, see as among the most basic. This is dealt with in Section III by focusing on about a dozen or so Supreme Court of Canada decisions and by comparing these to relevant United States precedent, whether referred to by the Court or not.

II. UNITED STATES AUTHORITY IN CANADIAN SUPREME COURT *CHARTER* CASES

The Supreme Court of Canada's attitude to the use of United States precedent in Canadian constitutional cases has, traditionally, been a suspicious one. In the past, counsel who cited it were often met with the airy assertion that such material was of limited

¹⁸ See, for example, *New York v. Quarles*, 467 U.S. 649 (1984) establishing the "public safety" exception to *Miranda*; *United States v. Leon*, 468 U.S. 897 (1984) [hereinafter *Leon*], *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), and *Illinois v. Krull*, 480 U.S. 340 (1987) establishing the "good faith" exception to the exclusionary rule; and *Nix v. Williams*, 467 U.S. 431 (1984), holding that evidence, found as a result of an interrogation that violated *Miranda* ("fruit of the poisoned tree"), may still be admissible if it would have inevitably been discovered by other means. An interesting commentary on the latter doctrine may be found in P.E. Johnson, "The Return of the Christian Burial Speech Case" (1983) 32 *Emory L.J.* 349, written in anticipation of the United States Supreme Court's decision in *Nix v. Williams*, *supra*.

relevance due to the very different constitutional structures of our two nations. It is true that, in its early years, the Court flirted briefly with United States jurisprudence in attempting to sort out the meaning of the trade and commerce clause and then again when the *Canadian Bill of Rights* was passed in 1960, but neither relationship lasted.¹⁹ Even now that the *Charter* has brought Canada's constitution much more in line with that of the United States, the Supreme Court's attitude continues to be sensitive to the issue of cultural sovereignty in the law. In *R. v. Simmons*, Chief Justice Dickson described his own view in the following way:

While we must, of course, be wary of adopting American interpretations where they do not accord with the interpretive framework of our Constitution, the American courts have the benefit of two hundred years of experience in constitutional interpretation. This wealth of experience may offer guidance to the judiciary in this country.²⁰

This is a sensible attitude. However, just what the "interpretive framework of our Constitution" is, is much less clear now than seven years ago, when it was based upon the principle of parliamentary sovereignty. Not only did the *Constitution Act, 1982* make serious inroads on this concept, but the Supreme Court's own rather restrictive approach to section 1 (the reasonable limits clause) and relatively expansive interpretation of section 24(2) (the exclusionary

¹⁹ See F. Vaughan, "Precedent and Nationalism in the Supreme Court of Canada" (address to the Annual Meeting of the Association of Canadian Studies in the United States, April 1975. More generally, see J.G. Snell & F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985). A good early example of a Canadian court looking south for guidance is the Supreme Court of British Columbia in the late nineteenth century, when it had to pass on provincial anti-Chinese legislation: see, for example, *Tai Sing v. Maguire* (1878), 1 B.C.L.R. 101 and *R. v. Wing Chong* (1885), 1 B.C.L.R. 150. More recently, the late Bora Laskin, Chief Justice of the Supreme Court of Canada, was more inclined than most to find assistance in American law.

²⁰ [1988] 2 S.C.R. 495, 45 C.C.C. 296 at 312 [hereinafter *Simmons* cited to C.C.C.]. For other references to the use of American precedent by the Supreme Court, see D.M. Paciocco, *Charter Principles and Proof in Criminal Cases* (Toronto: Carswell, 1987) at 81-85; J. Atrens, *The Charter and Criminal Procedure* (Toronto: Butterworths, 1989) at 1-19ff; and W.H. Charles, T.A. Cromwell & K.B. Jobson, *Evidence and the Charter of Rights and Freedoms* (Toronto: Butterworths, 1989) at 27ff. The last mentioned study gathers a number of comments by Supreme Court justices on how the courts should use American law in the *Charter* age.

rule) has served to emphasize and to confirm this change.²¹ So has governmental reluctance to use the section 33 override.²²

In working out a new framework, the American experience is clearly of critical importance. As Chief Justice Dickson points out, United States courts have been at this sort of thing for some time and certainly the *Charter* was forged with one eye on the *American Bill of Rights*.²³ Although courts would be ill-advised to ignore American doctrine, making effective use of it is a daunting task. One commentator contends that this "diffuse and obtuse" mass of precedent cannot be understood out of context, concluding that the Supreme Court "could only feel confident applying American doctrine to the *Charter* after conducting a far-reaching and time-consuming inquiry."²⁴ We agree. However, the cases discussed in Section III raise the question of whether the Court has the time and the resources for engaging in such inquiry. In a number of them, it would appear that the justices have not referred to United States law for the guidance recommended by Chief Justice Dickson in *Simmons*.²⁵

In assessing the extent to which the Supreme Court of Canada has consulted United States and, primarily, Supreme Court authority

²¹ In *R. v. Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321 [hereinafter *Oakes* cited to C.C.C.], the Court set out stringent criteria for invoking section 1 to save otherwise bad legislation. In subsequent cases, these criteria have been applied in a manner that seems rather difficult to square with *Oakes*. And in such cases as *Collins*, *supra*, note 12 and *R. v. Manninen*, [1987] 1 S.C.R. 1233, 34 C.C.C. (3d) 385 [hereinafter *Manninen* cited to C.C.C.], the Court has, notwithstanding the inherent flexibility of section 24(2), interpreted the exclusionary rule as virtually an automatic one in certain circumstances. As Paciocco points out, statements obtained in violation of the section 10(b) right to counsel may even be more readily excluded than "non-Mirandized" statements in the United States. See Paciocco, *supra*, note 15 at 577.

²² Even knowledgeable commentators in Canada have referred to the Quebec government's decision to invoke the section 33 override to preserve its commercial signs law as a "defiance" of the Supreme Court. Yet, section 33 is as much a part of the *Charter* as any of its other provisions.

²³ U.S. CONST. amend. I-XV. Although it probably owes just as much to European and international documents, such as the *International Covenant on Civil and Political Rights*, G.A. Res. 220 (XXI) 21 U.N. GOAR, supp. (No. 16), 52, U.N. Doc. A/6316 (1966).

²⁴ J. Cameron, "Liberty, Authority, and the State in American Constitutionalism" (1987) 25 Osgoode Hall L.J. 257 at 260, note 10.

²⁵ See *supra*, note 20 and accompanying text at 736.

in developing Canadian criminal law under the *Charter*, we had to impose a number of limitations. In the first place, we chose a cut-off date of February, 1989. Consequently, no rulings made by the Court subsequent to that date are included for the purposes of quantitative analysis. Second, we excluded specialty areas such as immigration and extradition and, of course, all non-criminal decisions (e.g., human rights, labour law), unless some issue in the case justified inclusion.²⁶ These two limitations left us with a total of 65 cases. Finally, we excluded ten more cases because they were decided wholly by mechanically applying an earlier or companion case or were otherwise deemed to be statistically insignificant. These considerations reduced the total number of cases to 55, all of which are listed in Appendix I.²⁷

In the end, we were able to come to only two clear conclusions. First, the Supreme Court of Canada decided the issues in 30 of these 55 cases (54.5%) without referring to any American authority.²⁸ In fact, the real number of such cases is even higher. In at least five more cases, the reference to United States precedent was only to the American "rule" or "experience" or was in some

²⁶ For example, although *B.C.G.E.U. v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214, 44 C.C.C. (3d) 289 is a labour law case, it involved a citation for criminal contempt and was therefore included. Similarly, *R. v. Amway Corp.*, [1989] 1 S.C.R. 21 [hereinafter *Amway*] made the list because it involved self-incrimination and section 11(c) of the *Charter*, notwithstanding that this issue arose on discovery in an action for forfeiture.

²⁷ See *infra* at 784ff. Cases excluded under the latter category were *Lavolette v. R.*, [1987] 2 S.C.R. 667, 38 C.C.C. (3d) 476, companion case to *Vaillancourt*, *supra*, note 11; *R. v. Dairy Supplies*, [1988] 1 S.C.R. 665, 40 C.C.C. (3d) 382, applying *Collins*, *supra*, note 12; *Carter v. R.*, [1986] 1 S.C.R. 981, 26 C.C.C. (3d) 572, companion case to *Mills v. R.*, [1986] 1 S.C.R. 863, 26 C.C.C. (3d) 481 [hereinafter *Mills* cited to C.C.C.]; *Trask v. R.*, [1985] 1 S.C.R. 655, 18 C.C.C. (3d) 514 and *Rahn v. R.*, [1985] 1 S.C.R. 659, 18 C.C.C. (3d) 516 companion cases to *R. v. Therens*, [1985] 1 S.C.R. 613, 18 C.C.C. (3d) 481 [hereinafter *Therens* cited to C.C.C.]; *Burnham v. Ackroyd*, [1987] 2 S.C.R. 572, 37 C.C.C. (3d) 115, *Trumbley and Pugh v. Metropolitan Police Force*, [1987] 2 S.C.R. 577, 37 C.C.C. (3d) 118 and *Trimm v. Durham Regional Police Force*, [1987] 2 S.C.R. 582, 37 C.C.C. (3d) 120 companion cases to *Wigglesworth v. R.*, [1987] 1 S.C.R. 541, 37 C.C.C. (3d) 385; and *Hamill v. R.*, [1987] 1 S.C.R. 301, 33 C.C.C. (3d) 110 and *Sieben v. R.*, [1987] 1 S.C.R. 295, 32 C.C.C. (3d) 574 companion cases to *Collins*, *supra*, note 12.

²⁸ For a discussion of some of the more important of these cases, see below, section III, *infra* at 740ff.

other way inconsequential.²⁹ Second, in only one of the 25 cases in which some reference to comparable United States law was made did the Court explicitly and firmly reject it, although it was partially rejected or, at least, modified in a few more.³⁰ In the remaining cases, United States authority was cited ostensibly to support and sometimes to shape the result reached by the Court, but in most of these the influence can be described as marginal.³¹ In some, American precedents were referred to briefly and without any real effect;³² in others, they were considered on one issue, but ignored, or at least not referred to, on another.³³ This category is therefore

²⁹ The quoted references are to *Collins*, *supra*, note 12 at 12 and the *Motor Vehicle Act Reference*, *supra*, note 16 at 296, respectively. In *Therens*, *supra*, note 27, *Miranda v. Arizona*, 384 U.S. 436 (1966) [hereinafter *Miranda*] was referred to, but inconsequentially: see *infra*, note 82. The remaining two cases in this category are *Amway*, *supra*, note 26 and *Spencer v. R.*, [1985] 2 S.C.R. 278, 21 C.C.C. (3d) 385. On the other hand, some cases that do not refer to American law refer to earlier Supreme Court decisions that do so, and this phenomena can only increase with time. The numbers, like all numbers, must therefore be treated with caution.

³⁰ The clear case is *Hufsky v. R.*, [1988] 1 S.C.R. 621, 40 C.C.C. (3d) 398 [hereinafter *Hufsky* cited to C.C.C.] discussed below, section III.E., *infra* at 776ff. In *R. v. Big M Drug Mart*, [1985] 2 S.C.R. 295, 18 C.C.C. (3d) 385, Chief Justice Dickson remarked that American First Amendment cases were "not particularly helpful" to freedom of religion issues under the *Charter*. In *Rahey v. R.*, [1987] 1 S.C.R. 588, 33 C.C.C. (3d) 289 [hereinafter *Rahey* cited to C.C.C.], United States precedent is adopted, but in a modified form. Note also that in *Mack*, *supra*, note 12 the Court referred extensively to two lines of American authority on entrapment in order to opt for a version of the minority view. This issue did not directly involve the *Charter*, however. Arguably, the Supreme Court's willingness in the *Motor Vehicle Reference*, *supra*, note 16 to plunge into what is referred to in American jurisprudence as "substantive due process" could also be classified as a rejection of American law, but no cases were considered.

³¹ Although any list will be somewhat subjective, examples of cases in which United States authority appeared to have an important influence on the outcome include *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97 [hereinafter *Hunter* cited to C.C.C.]; *Oakes*, *supra*, note 21; *Mack*, *supra*, note 12 (an entrapment case in which the *Charter* was not the primary issue); *R. v. Clarkson*, [1986] 1 S.C.R. 383, 25 C.C.C. (3d) 207 [hereinafter *Clarkson* cited to C.C.C.] which is discussed below, sections III.A.1. and III.B., *infra* at 748ff., 759ff.

³² See *supra*, note 29. In some cases, of course, different justices cited the authority in different ways, or some cited it and others did not. A good example of both phenomena is *Rahey*, *supra*, note 30, discussed in note 171, *infra*.

³³ See, for example, *R. v. Dymnt*, [1988] 2 S.C.R. 417, 45 C.C.C. (3d) 244 [hereinafter *Dymnt* cited to C.C.C.]. See also *Simmons*, *supra*, note 20. Both are discussed below, section III.B., *infra* at 759ff.

difficult to break down in terms of meaningful numbers or percentages. Instead, we offer an analysis of a number of cases, some referring to American precedent and some not, in which the Supreme Court of Canada has attempted to work out the constitutionalization of Canadian criminal law. In our opinion, this analysis shows, not only that American law is not being systematically and regularly consulted, but also that, in key areas, it does not protect the accused as much as Canadian law now does.

III. FUNDAMENTAL LEGAL RIGHTS

The time-honoured constitutional liberties, generally regarded as fundamental to the Anglo-American criminal process, have an almost talismanic quality, even though in practice they may not function quite as the textbooks might lead one to believe.³⁴ In the United States, notwithstanding the recent rhetoric of "bright lines," the working out of their implications has led to such a wilderness of precedent that so-called basic rights threaten to become the arcane preserve of the specialist.³⁵ In public debate, on the other hand, they can all too easily degenerate into a sort of legal *mantra* or trump card that easily defeats arguments based upon considerations that the dominant ideology declines to classify as rights. Professor Nagel argues that the controversy over the right to bail, for example, is expressed "in the form of the phrase 'presumption of innocence' — an idea that, like the equally simplistic right to bear arms,' is usually invoked in order to shut down normal processes of

³⁴ There are those who contend that the elaborate American scheme of constitutional rights has contributed to a situation in which only the few who actually go to trial receive its protection. The rest trade these rights in a plea bargaining process that Packer, *supra*, note 14, describes as more administrative than judicial. See, for example, M. Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" (1973) 121 U. Pa. L. Rev. 506.

³⁵ The phrase is used, for example, in *Edwards v. Arizona*, 451 U.S. 477 (1981) [hereinafter *Edwards*], a right to counsel case. On the "bright lines" issue in another context see E.J. Butterfoss, "Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins" (1988) 79 J. Crim. L. and Criminology 437.

thought."³⁶ It is, of course, the job of the courts to make sense of such phrases, but, in an era of conflicting ideologies, this daunting assignment is difficult in the extreme.³⁷

In Canada, the absence of rights review and an exclusionary rule between 1867 and 1982 meant that, compared to the United States, very little appeared to turn on fundamental concepts such as the presumption of innocence. This was probably because, to most of its managers, the system seemed to be functioning at least as well as the American one. They believed that the presumption of innocence and related ideas infused the process, even if they could not be invoked to invalidate laws or to exclude evidence. However, during this period, Canadian law departed significantly from American and, to some degree, British law in a number of important respects. For example, it permitted writs of assistance and Crown appeals of jury acquittals, denied witnesses the right to refuse to answer incriminating questions, encouraged but did not require police to advise suspects who were about to be interrogated that they had a right to a lawyer, and admitted all relevant and otherwise admissible evidence, however obtained.³⁸ If these were failings, and certainly many thought that they were, reform lay with the legislators, not the courts. The *Charter* has, of course, provided reformers with a new tool and legislators with a new excuse for not acting.³⁹

³⁶ R. Nagel, "The No-Bail Solution" in *The New Republic* (24 April 1989) 13. On rights as "trumps," see R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978).

³⁷ See, generally, A. MacIntyre, *After Virtue: A Study in Moral Theory*, 2d ed. (Notre Dame: University of Notre Dame Press, 1984) and *Whose Justice? Whose Rationality?* (Notre Dame: University of Notre Dame Press, 1988).

³⁸ A quick way to assess how strikingly Canadian criminal law has changed is to compare the pre-*Charter* British Columbia Court of Appeal decision in *R. v. Spearman* (1982), 70 C.C.C. (2d) 371 with the Supreme Court of Canada's judgment in *Manninen*, *supra*, note 21. Of the listed differences between Canadian and Anglo-American law, only Crown appeals and the rule respecting incriminating questions have, thus far, survived the *Charter*.

³⁹ In *Vaillancourt*, *supra*, note 11, the Federal Government did not even show up in court to defend the felony-murder rule, although they had neglected to move its repeal themselves. And on the abortion issue in *Morgentaler*, *supra*, note 11, neither Parliament nor the Court seems especially anxious to re-write the law. At time of writing, the federal government has just introduced its long-awaited attempt at such a law.

At bottom, the working out of the meaning of constitutional liberties (or "legal rights," as most of them are called in the *Canadian Charter*) involves analysis of the idea of fairness, especially procedural fairness, as applied to the criminal law.⁴⁰ In the United States, the drafters of the Fifth and Fourteenth Amendments called this legal concept of fairness "due process." Their counterparts in Canada, attempting unsuccessfully to avoid some of the pitfalls of the American jurisprudence, chose to call it "fundamental justice."⁴¹ The Americans defined it in terms of life, liberty, and property. The Canadians, nervous about provincial jurisdiction and especially the power to regulate and nationalize natural resources companies, left out property and substituted "security of the person." But whatever the terminology, in both countries fairness in the criminal context has at least two components. One is the idea of privacy and individual autonomy, which, although mentioned in neither the *American Bill* nor the *Canadian Charter*, has been read into both (the Fourth Amendment and section 8, respectively).⁴² The other is the presumption of innocence, set out in section 11(d) of the *Canadian Charter*, but which, again, had to be read into the *American Bill of Rights*, this time into the Fifth and Fourteenth Amendments.⁴³

⁴⁰ See, for example, *Rochin v. California*, 342 U.S. 165 (1952) at 170 [hereinafter *Rochin*] where the "vague contours" of the due process clause (the Fourteenth Amendment) were invoked to attack a search by means of a stomach pump. Convictions, wrote Justice Frankfurter for the Court, "cannot be brought about by methods that offend 'a sense of justice.'" *Ibid.* at 173.

⁴¹ The Fourteenth Amendment (1868) applies due process to the individual states by providing that no state shall "deprive any person of life, liberty, or property, without due process of law." Section 7 of the *Charter* states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 15, subject to an affirmative action exception, guarantees that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination."

⁴² *Katz v. United States*, 389 U.S. 347 (1967) [hereinafter *Katz*] commended and adopted by the Supreme Court of Canada in *Hunter*, *supra*, note 31. It should also be noted that in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court based the right of privacy on the combined influence of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments, the latter of which formed the basis of the right of privacy asserted in *Roe v. Wade*, 410 U.S. 113 (1973).

⁴³ See *Oakes*, *supra*, note 21 and the United States cases cited therein.

These two, in turn, give rise to at least three overlapping ideas that are also fundamental to both the rhetoric and the reality of American and Canadian criminal justice. The first is the privilege against self-incrimination, which, once again, is not specifically mentioned in either constitutional document, but which is clearly the idea behind the Fifth Amendment and sections 11(c) and 13 of the *Charter*.⁴⁴ The second is the right to be secure against unreasonable searches and seizures, contained in the Fourth Amendment and section 8 of the *Charter*. The third, the right to counsel, is really a facilitative right, which both the Sixth Amendment and section 10(b) of the *Charter* specifically guarantee and which the United States Supreme Court has read into the Fifth Amendment as well.⁴⁵ Both the *Bill* and the *Charter of Rights* enumerate many other guarantees, but it is submitted that these are even more derivative.⁴⁶

Whether these ideas are called rights, presumptions, protections, or privileges, it is interesting to note that the more fundamental the concept, the less likely it is to have been expressed or, at least, expressed with precision.⁴⁷ Perhaps that is proof positive of our common, and common law, heritage. A second point worth noting is that the different ways in which key ideas have been arranged in

⁴⁴ The Fifth Amendment provides, in part, that "[n]o person shall ... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." Sections 11(c) and 13 state, again in part, that a person charged with an offence "has the right ... not to be compelled to be a witness in proceedings against that person in respect of the offence," and that a witness "has the right not to have any incriminating evidence ... given [by him or her] used to incriminate that witness in any other proceedings." Because Justice Lamer in the *Motor Vehicle Reference*, *supra*, note 16 was of the opinion that the legal rights set out in sections 8 to 14 of the *Charter* are merely examples of the principles of fundamental justice, it has been argued that an even wider privilege against self-incrimination than that referred to in sections 11(c) and 13 is protected by section 7. So far, the courts have reacted warily to this notion, and it has yet to come squarely before the Supreme Court. [Since this was written, it has. See the split and rather inconclusive decision of the Court in *Thompson Newspapers Ltd v. Director of Investigation & Research*, [1990] 1 S.C.R. 425, 54 C.C.C. (3d) 417 [hereinafter *Thompson* cited to C.C.C.].]

⁴⁵ See *Miranda*, *supra*, note 29, and see also section III.A., *infra* at 744ff.

⁴⁶ Thus, the right to reasonable bail and not to be arbitrarily detained can be derived from the presumption of innocence. The right not to be subjected to cruel or unusual punishment can be derived from the right to privacy and personal autonomy, etc.

⁴⁷ Note also that this characterization is based, not upon history, but upon the courts' approach. Historically, the notion of a witness' privilege against self-incrimination would appear to be older than the presumption of innocence.

the two constitutions may well have had important consequences for how they have been interpreted.⁴⁸ To explore this further, we now turn to a comparison of some of the cases. We do so with a view to isolating the ways in which three of these ideas, the right to counsel, the privilege against self-incrimination, and the protection against unreasonable search and seizure, combine in each jurisdiction to produce particular results.

A. *The Right to Counsel and Self-Incrimination*

There are three distinct questions involving the right to counsel: (1) whether there is such a right at all; (2) at what point, if any, police are obliged to inform persons with whom they deal that they have this right; and (3) whether the right includes a right to court-appointed counsel. It is primarily the second of these that will concern us here.⁴⁹

In both jurisdictions, it was resolved long ago that persons accused of criminal offences have the right to retain counsel of their choice to represent them.⁵⁰ In the United States, this is guaranteed by the Sixth Amendment, which provides that in "all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defence." As its wording suggests, the Sixth Amendment does not apply until after the initiation of criminal proceedings. It is only at that point that "the government has committed itself to prosecute, and ... the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and

⁴⁸ See Appendix II, *infra* at 786ff.

⁴⁹ Many of the cases decided by the United States Supreme Court have focussed upon the issue of court-appointed counsel. Perhaps, the most famous is *Gideon v. Wainwright*, 372 U.S. 335 (1963), extending the right, *via* the Fourteenth Amendment, to the states. The Supreme Court of Canada has yet to address the issue of whether detained persons are entitled to such counsel. However, *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.) is a recent, important provincial appellate court ruling.

⁵⁰ The relevant date in England and Canada is 1836, at which time the right to have counsel address the jury on the accused's behalf, previously confined to misdemeanors and treasons, was extended to felonies.

procedural criminal law."⁵¹ Therefore, the right enshrined in the Sixth Amendment attaches, not only at trial, but whenever persons subject to criminal charges find themselves "immersed in the intricacies" of the law: for example, at post-indictment line-ups, preliminary hearings, and arraignments.⁵² It must be emphasized, however, that, unlike Canada, it is not a right that arises simply because the police arrest or detain an individual.⁵³

The Canadian right to counsel is contained in section 10(b) of the *Charter*, which recites the pre-existing right to seek the advice of counsel and adds a new one:⁵⁴ "Everyone has the right on arrest or detention, [not only] to retain and instruct counsel without delay, [but also] to be informed of that right." This wording, which clearly goes beyond the Sixth Amendment, reflects developments in the United States during the 1960s, when the Supreme Court held that there is also a limited Fifth Amendment right to counsel that arises earlier in the process. The policy behind this right, which was set out in the famous case of *Miranda v. Arizona*, is quite different from that contained in the Sixth Amendment.⁵⁵

⁵¹ *Maine v. Moulton*, 474 U.S. 159 (1985) at 170, quoting from *Kirby v. Illinois*, 406 U.S. 682 (1972) at 689 [hereinafter *Kirby*]. This may be an appropriate place to note that Canadian indictments are preferred much later in the process than in the United States by agents of the Attorney-General instead of grand juries. In Canada, prosecutions are commenced by laying an information (which may be sworn by anyone), but in serious cases the information is replaced by an indictment prior to trial.

⁵² *United States v. Wade*, 388 U.S. 218 (1967) [hereinafter *Wade*]; *Coleman v. Alabama*, 399 U.S. 1 (1970); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Brewer v. Williams*, 430 U.S. 387 (1977), where arraignment on an arrest warrant was viewed as the equivalent of an indictment. *Brewer* invoked the earlier case of *Massiah v. United States*, 377 U.S. 201 (1964), where federal agents, using a "wired" informant, elicited an incriminating statement from the defendant after he had been indicted and had retained counsel. The Court held that this deprived him of the assistance of counsel and violated the Sixth Amendment.

⁵³ In *Escobedo v. Illinois*, 378 U.S. 478 (1964), the Court broke new ground and held that the Sixth Amendment right to counsel attaches at the investigatory stage. *Escobedo*, however, was eroded by *Miranda*, *supra*, note 29 and implicitly overruled in *Kirby*, *supra*, note 51.

⁵⁴ The pre-existing right referred only to retaining and instructing counsel, not to being advised of the right. It was contained in what is now section 650 of the *Criminal Code* and, after 1960, in section 2(c)(ii) of the *Canadian Bill of Rights*, which was only a federal statute. The guarantee therefore did not apply to provincial prosecutions, and even federally it could be repealed in the ordinary way.

⁵⁵ *Miranda*, *supra*, note 29.

In *Miranda*, it was held that the right to have counsel present at a "custodial interrogation"⁵⁶ was "necessary to make the process of police interrogation conform to the dictates of the privilege [against self-incrimination. The] presence [of counsel] would insure that statements made in the government-established atmosphere are not the product of compulsion."⁵⁷ This right is not concerned with helping suspects to cope with legal technicalities. Rather, it is designed to protect them in the exercise of their privilege against self-incrimination during custodial interrogation, that is, from being compelled to speak.⁵⁸ To accomplish this, the Court in *Miranda* set out a four-part warning that is triggered when a suspect is in police custody and the police wish to question him or to engage in behaviour which is the functional equivalent of questioning.⁵⁹ These are: (1) that he has the right to remain silent; (2) that anything he says can be used against him in a court of law; (3) that he has the right to the presence of an attorney; and (4) that, if he cannot afford an attorney, one will be appointed for him prior to any questioning, if he so desires.⁶⁰ Because *Miranda* requires that even a confession that is otherwise voluntary be excluded if the warnings

⁵⁶ *Ibid.* at 444.

⁵⁷ *Ibid.* at 466.

⁵⁸ In both Canada and the United States, if a suspect asserts his right to counsel, all questioning must cease. See *Manninen*, *supra*, note 21 and *Edwards*, *supra*, note 35. *Manninen* makes no reference to *Edwards*, which held that the initial assertion of the right to counsel is waived only if the defendant personally initiates a subsequent conversation with the police. Although the Sixth Amendment right to counsel does not depend upon the defendant requesting a lawyer, the United States Supreme Court held in *Michigan v. Jackson*, 475 U.S. 625 (1986) [hereinafter *Jackson*] that the *Edwards* rule also applies to Sixth Amendment situations, for example, at an arraignment. The shelter afforded by the right to counsel at this stage, said the Court, has two aspects: protecting defendants from compelled self-incrimination (the Fifth Amendment), and providing them with legal advice because an adversary proceeding has been initiated (the Sixth Amendment). These issues are discussed more fully below. See section III.A.1., *infra* at 748ff.

⁵⁹ *Rhode Island v. Innis*, 446 U.S. 291 (1980) [hereinafter *Innis*].

⁶⁰ On *Miranda*, *supra*, note 29 and the *Charter*, see Paciocco, *supra*, note 15 and his earlier essay "The Development of Miranda-like Doctrines under the Charter" (1987) 19 *Ottawa L. Rev.* 49. Recently, the United States Supreme Court held that *Miranda* warnings need not be given in the exact form described in that decision. "The inquiry," wrote Chief Justice Rehnquist, "is simply whether the warnings reasonably convey[ed] to [a suspect] his rights as required by *Miranda*." See *Duckworth v. Eagan*, 109 S. Ct. 2875 (1989) at 2880.

are not given, it may in effect go beyond the strict requirements of the Fifth Amendment.⁶¹

Only a version of the third warning is set out in section 10(b) and, thus far, none of the other warnings have been read into the section. However, the drafters of the *Canadian Charter* probably had Miranda in mind when describing the warning as being applicable at the detention stage and requiring that, at that stage, suspects be advised of it.⁶² Yet, the Miranda principle is narrower than may first appear. As the actual wording of the Fifth Amendment indicates, it is based upon the non-compellability of the accused at trial. Although this was extended in Miranda to pre-trial custodial interrogation, the Fifth Amendment, like the common law privilege against self-incrimination, does not extend to physical evidence.⁶³ Nor are the Miranda warnings legally triggered by detention or even arrest. As a consequence, police are not required to warn suspects before they are placed in pre-indictment line-ups, before hand-writing samples are obtained, or before blood-samples are taken.⁶⁴ The warnings are mandated only if an individual "is taken into custody or otherwise deprived of his freedom by the

⁶¹ Indeed, the Miranda warnings have been described as mere procedural guarantees which are distinct from hallowed constitutional protections. The failure to read Miranda gives rise only to a presumption of compulsion, not the actual compulsion prohibited by the Fifth Amendment. See *Oregon v. Elstad*, 470 U.S. 298 (1985) [hereinafter *Elstad*] and see also *infra*, note 126. In *Elstad*, the majority wrote that the Miranda exclusionary rule "sweeps more broadly than the Fifth Amendment itself." *Ibid* at 306. The Court held that using a voluntary confession made subsequent to an earlier, unwarned, but uncoerced statement does not violate the Fifth Amendment.

⁶² As a matter of practice, Canadian police regularly advise suspects of their right to silence when they read them their section 10(b) rights. [Since this was written, the Supreme Court has held that detainees should be routinely informed of the availability of duty and legal aid counsel: *R. v. Brydges*, [1990] 1 S.C.R. 190, 53 C.C.C. (3d) 330. The Court has also ruled that, although there is no mention of the right to silence in the *Charter*, it is a principle of fundamental justice protected by section 7: *Hebert v. R.* (21 June 1990).]

⁶³ It protects the accused only from compelled testimonial evidence, which is generally defined as written or oral statements, made in or out of court, which incriminates the maker.

⁶⁴ See *Kirby*, *supra*, note 51, *Gilbert v. California*, 388 U.S. 263 (1967) [hereinafter *Gilbert*]; *Schmerber v. California*, 384 U.S. 757 (1966) [hereinafter *Schmerber*]. Each is discussed below. See sections III.A.3. and III.B.1., *infra* at 755ff. and 760ff respectively. The statement in the text does not mean, however, that in these situations police will not facilitate access to counsel upon request.

authorities in any significant way and is subjected to questioning."⁶⁵ Section 10(b) of the *Charter*, on the other hand, requires police to advise persons of their right to counsel upon arrest or detention. The Supreme Court of Canada appears to have interpreted this as applying whether the police intend to ask questions or not.

1. Waiving the Right to Counsel

Before looking at how the Canadian Court has tended not to apply the more limited American view of what triggers the right to counsel, it would be helpful to consider briefly a case on waiver that illustrates some of the difficulties facing Canadian judges forced to navigate through American criminal jurisprudence.

R. v. Clarkson concerned the admissibility of a confession to the police and the validity of an intoxicated and emotionally overwrought accused's waiver of her right to counsel.⁶⁶ Mrs. Clarkson was arrested soon after the shooting death of her husband and was told, on at least two occasions, of her section 10(b) rights. Nonetheless, she steadfastly and drunkenly maintained, against the advice of a relative who was present at her interrogation, that she did not need a lawyer. The police, as might be expected, took her at her word.

In deciding that Mrs. Clarkson's waiver was invalid, the Court, in effect, ruled that a waiver will not be upheld simply because there was an absence of coercion by police.⁶⁷ The majority reasons cite

⁶⁵ *Miranda*, *supra*, note 29 at 478. Thus, although American police routinely Mirandize suspects to avoid legal quibbles later on, many such warnings are not, strictly speaking, necessary. Justice L'Heureux-Dubé, dissenting on this point in *Simmons*, *supra*, note 20 at 332, recognized this difference when she urged that, as in the United States, self-incrimination should be a concern "chiefly" during custodial interrogation and not during a detention and search. See below, section III.B.2., *infra* at 764ff.

⁶⁶ *Supra*, note 31.

⁶⁷ See Paciocco, *supra*, note 15 at 575, note 12. In the United States, the Supreme Court held in *Colorado v. Connelly*, 479 U.S. 157 (1986) that where police did not coerce the waiver, there was no constitutional requirement that the effect of the defendant's mental illness on its voluntariness be examined. In *Connelly*, however, the police were unaware of the mental state of the suspect. The Supreme Court of Canada, in *R. v. Baig*, [1987] 2 S.C.R. 537, 37 C.C.C. (3d) 181, declined an opportunity to say more about when police should inquire further about a failure to invoke the right to counsel.

and quote passages from three United States cases, two of which, *Von Moltke v. Gillies*⁶⁸ and *Adams v. United States*,⁶⁹ are decisions of the Supreme Court. The excerpt from the former reads as follows:

To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offences included within them, the range of allowable punishments thereunder, possible defences to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.⁷⁰

Wilson, J. relied upon what she called this "wealth" of American case law to support an "awareness of consequences" test in Canada and ruled against the waiver. But she questioned whether one had to go as far as *Von Moltke* did in "requiring an accused to be tuned in to the legal intricacies of the case."⁷¹

The answer is that the United States Supreme Court does not go this far. *Clarkson* was a case that in the United States would give rise only to the Fifth Amendment right to counsel, that is, to *Miranda* and to the jurisprudence respecting the waiver of *Miranda* rights. The Fifth Amendment most certainly does not require that the defendant understand all the legal consequences of speaking before a waiver will be upheld.⁷² *Adams* and *Von Moltke*, on the other hand, were cases involving defendants who had purported to waive their Sixth Amendment right to counsel, one at trial, the other

⁶⁸ 332 U.S. 708 (1948) [hereinafter *Von Moltke*].

⁶⁹ 317 U.S. 269 (1942) [hereinafter *Adams*].

⁷⁰ *Von Moltke*, *supra*, note 68 at 724. Quoted in *Clarkson*, *supra*, note 31 at 218.

⁷¹ *Clarkson*, *supra*, note 31 at 218-19.

⁷² As Justice O'Connor put it in *Moran v. Burbine*, 475 U.S. 412 at 422 (1986) [hereinafter *Burbine*], the defendant need only know that he "could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction." The Court, therefore, upheld a Fifth Amendment *Miranda* waiver where the police had told Burbine's lawyer that they would not question him or place him in a line-up, but had not told Burbine that the lawyer was trying to reach him. (Note that the passage in the text accompanying this footnote was written prior to our discovering that Professor M.T. MacCrimmon makes a similar point in "Developments in the Law of Evidence: The 1985-86 Term" (1987) 9 Sup. Ct. L. Rev. 363 at 380ff.)

on a guilty plea.⁷³ The majority reasons in *Clarkson*, therefore, apply United States Supreme Court precedent for a Sixth Amendment waiver to a Fifth Amendment situation.⁷⁴ How much turned on this misunderstanding, assuming that is what it was, is debatable. But the case is a good indication of how easily United States precedent, which is a maze that ought to daunt the hardest of foreign travellers, can be misapplied. In *Clarkson*, this blending of American law may have contributed to a premature narrowing of the options available to judges attempting to fashion a sensible waiver doctrine. There is, in fact, a good chance that the waiver would have been ruled voluntary in the United States. As that country's Supreme Court said in a 1980 decision, the definitions of "interrogation" in Fifth and Sixth Amendment cases are "not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct."⁷⁵

⁷³ While both Fifth and Sixth Amendment waivers must be "knowingly and intelligently" made, the trial judge's duty under the Sixth is to ensure that the defendant is "aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open'." See *Faretta v. California*, 422 U.S. 806 (1975) at 835 [hereinafter *Faretta*]. Thus, if *Burbine*, *supra*, note 72 had been a Sixth Amendment case, the waiver there would not have been upheld. Once formal proceedings have been instituted, the lawyer becomes a medium between the defendant and the state. Unless the defendant initiates a conversation with the police, they cannot question him without contacting his lawyer first. See *Jackson*, *supra*, note 58.

⁷⁴ This is being done at a time when, absent the complicating factor of alcohol, the United States Supreme Court is resisting arguments similar to those accepted by Wilson, J. in *Clarkson*, *supra*, note 31. See, for example, *Patterson v. Illinois*, 108 S. Ct. 2389 (1988) [hereinafter *Patterson*], where the police questioned the defendant after an indictment had been returned, but before a lawyer had been appointed. Patterson had been read his Miranda rights, which he waived, and he conceded that the Miranda warning may have been sufficient for the purpose of protecting his Fifth Amendment rights. His argument was that the indictment entitled him to Sixth Amendment protection and that, in the absence of a specific warning about the dangers of talking to police, his waiver was neither knowing nor intelligent. See *Faretta*, *supra*, note 73. The Court disagreed. Noting that Patterson had never asserted his right to counsel, the majority ruled that, "[a]s a general matter ... an accused who is admonished with the warnings ... in Miranda ... has been sufficiently apprised of the nature of his Sixth Amendment rights [as well]." *Ibid.* at 2396-97. *Burbine* was explained in the manner set out *supra*, note 73.

⁷⁵ *Innis*, *supra*, note 59 at 300, note 4. For a statement of what these distinct policies are, see text accompanying notes 51-57, *supra* at 745ff. The fact that *Clarkson* had a relative present throughout the interrogation, who repeatedly urged her to consult a lawyer before answering any questions, underlines this. Of course, all cases ultimately turn on their facts. For a list of United States decisions holding that a waiver was voluntary despite the

2. Traffic Stops

The detention of motorists is perhaps the best example of a situation in which the two Supreme Courts have differed on the question of limits on the right to be informed of the right to counsel. The leading Canadian case is *Therens*.⁷⁶ It is a case which began on the evening of 24 April 1982, just a week after the *Charter of Rights* came into force, including the new section 10(b) obligation to inform detainees of their right to counsel. Therens lost control of his automobile and collided with a tree in Moose Jaw, Saskatchewan. The investigating officer, pursuant to what was then section 235(1) of the *Criminal Code*, demanded that Therens accompany him to the police station to provide breath samples for blood-alcohol analysis. (Refusal to do so was — and is — a criminal offence, whereas in the United States it tends to be penalized by licence suspension.) Therens co-operated and was convicted on the basis of the breathalyzer readings obtained. He was not advised that he had a right to counsel.

The Supreme Court of Canada rejected the view that the term "detained" should retain the meaning it had in earlier cases. Citing the *Charter* as a "new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection,"⁷⁷ the Court shed its earlier *Canadian Bill of Rights* jurisprudence, including its own 1979 ruling that someone in Therens' situation was not detained.⁷⁸ It now held that a detention occurs whenever "a police officer or other agent of the state assumes control over the movement of a person by a demand or a direction which may have

intoxicated state of the accused, see D.M. Nissman, E. Hagen & P.R. Brooks eds, *Law of Confessions* (Rochester, New York: Lawyers' Cooperative Publishing, 1985). In any event, the case underscores Chief Justice Dickson's warning in *Hunter*, *supra*, note 31 at 109 that "American decisions can be transplanted to the Canadian context only with the greatest caution." He did not take part in *Clarkson*, *supra*, note 31.

⁷⁶ *Supra*, note 27.

⁷⁷ *Ibid.* at 501.

⁷⁸ See *Chromiak v. R.* (1979), [1980] 1 S.C.R. 471, 49 C.C.C. (2d) 257.

significant legal consequences and which prevents or impedes access to counsel."⁷⁹

A majority of the Court (6:2) then excluded the blood-alcohol certificate. It called the failure to read *Therens* his right to counsel a "flagrant" violation of the *Charter*, holding that to countenance admitting such evidence would, in the words of section 24(2), "bring the administration of justice into disrepute."⁸⁰ Justice Lamer, in particular, stressed the fact that this was a situation where detainees were required by law to provide evidence which might be — and in this case was — incriminating.⁸¹ The only reference to American authority was a somewhat cryptic statement by Justice Lamer to the effect that there was no need to decide the extent to which section 10(b) might encompass the *Miranda* "principle."⁸² Subsequently, a unanimous Court applied the same analysis to roadside screening devices, but read a limitation on the right to counsel into the relevant legislation and upheld this limit as reasonable under section 1 of the *Charter*.⁸³

In marked contrast, the United States Supreme Court has refused to extend the Fifth Amendment right to counsel to situations where suspects are merely detained. In *Berkemer v. McCarty*, which is not mentioned in *Therens*, an Ohio Highway

⁷⁹ *Therens, supra*, note 27 at 504.

⁸⁰ *Ibid.* at 489.

⁸¹ *Ibid.* at 490. Although legal advice may be of little use in such situations, in a recent case the Court decisively rejected the argument that this has any relevance to the right to counsel. As Justice Wilson put it in *R. v. Black* (1989), 50 C.C.C. (3d) 1 at 12: "If the Crown's argument on this point were sound, each time an accused was asked to blow into a breathalyzer there would be no need to advise [him] of his s.10(b) rights since ... counsel would advise ... that he should submit ... on the basis that failure to do so constitutes a criminal offence. Such reasoning runs directly afoul of ... *Therens*." Compare Dickson C.J. in *Simmons, supra*, note 20 at 315-16.

⁸² "Whether s.10(b) extends any further, so as to encompass, for example, the principle of *Miranda v. Arizona* ... and apply to matters such as interrogation and police line-ups, need not be decided in this case and I shall refrain from so doing." *Ibid.* at 491. For line-ups, see section III.A.3., *infra* at 755ff.

⁸³ *R. v. Thomsen*, [1988] 1 S.C.R. 640, 40 C.C.C. (3d) 411 [hereinafter *Thomsen* cited to C.C.C.]. The Court cited at length the studies submitted by the Crown as proof of the hazards created by drunk drivers and concluded that roadside testing is an important mechanism for increasing the likelihood of detecting them. A limitation on the right to counsel was, therefore, in the words of section 1, "demonstrably justified."

Patrol officer observed the defendant weaving in and out of traffic, stopped him, and decided then and there to make an arrest.⁸⁴ The officer asked Berkemer to perform a field sobriety test (which he could not do without falling) and then inquired whether he had used intoxicants. Berkemer replied that he had drunk two beers and smoked some marijuana a short time before. After successfully eliciting this statement, the officer then formally arrested Berkemer and transported him to the county jail, where a blood test failed to detect the presence of alcohol. However, at this point questioning resumed, and Berkemer admitted once again that he had consumed alcohol. At no time was he warned that he had a right to remain silent or that he had a right to consult an attorney.

The United States Supreme Court was faced in *Berkemer* with two issues. The first was whether the Miranda warnings applied to misdemeanors as well as to felonies. The second was, if they did, whether roadside questioning by police officers in these circumstances amounted to custodial interrogation. The Sixth Amendment right to counsel was irrelevant because it does not apply to arrests or detentions. In a unanimous opinion, the Court held that Miranda did apply to misdemeanors, but it is their ruling on the second issue that reveals the difference between the two jurisdictions.

Defence counsel in *Berkemer* invited the Court to endorse a rule that motorists detained and questioned pursuant to a routine traffic stop were subject to custodial interrogation. The Court declined, holding that to extend Miranda in this way would be unwarranted. Justice Marshall said that the issue was "whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights."⁸⁵ He stated that a traffic stop is brief, executed in public view, and, at most, involves only one or two police officers. It is not, he concluded, the kind of police-dominated environment which the Miranda warning

⁸⁴ 468 U.S. 420 (1984) [hereinafter *Berkemer*].

⁸⁵ *Ibid.* at 437. Although Justice Lamer in *Therens* stated that there was no need to decide whether section 10(b) represented a version of the Miranda principle, it is precisely the issue isolated here by Justice Marshall that *Therens* decides in the accused's favour. See *supra*, note 82 and accompanying text at 24.

was meant to alleviate, nor did the record indicate that anything had occurred to bring Mr. Berkemer within *Miranda*.

This difference in approach is highlighted by the Court's ruling on the statements made by Berkemer in the county jail after he was formally arrested. Because this was the sort of police-dominated environment that the Court deciding *Miranda* had in mind when it required the reading of rights in the first place, these statements were excluded. What triggered the need for the warnings was the fact that Berkemer was in custody and was being interrogated about the crime by the police. In a nutshell, the Court — speaking unanimously through Justice Marshall, hardly a representative of the conservative wing — held that the initial stopping of a motorist does not by itself render the motorist in custody and therefore does not require a warning.⁸⁶

Therens and *Berkemer* are, of course, not perfectly comparable. In *Therens*, the exclusion of physical evidence, a breathalyzer certificate, was at issue. In *Berkemer*, the issue was not the blood sample, but the statement made at the scene. However, this only makes the contrast all the more remarkable. The Supreme Court of Canada would have excluded, while the Supreme Court of the United States would have admitted, both the statement and the physical evidence. Not only does the *Miranda* decision not apply to routine traffic stops, its recited rights are not necessary if the police

⁸⁶ The Court in *Berkemer*, *supra*, note 84 at 440 supported its reasoning by noting that in *Terry v. Ohio*, 392 U.S. 1 (1968) [hereinafter *Terry*], in which a "stop-and-frisk" search without probable cause was held not to be unreasonable, there was no suggestion "that *Terry* stops are subject to the dictates of *Miranda*." Nor did it matter that the officer decided to arrest Berkemer as soon as he stopped him: "A policeman's unarticulated plan has no bearing on the question whether a suspect [is] 'in custody' at a particular time." *Ibid.* at 442. See also *Orozco v. Texas*, 394 U.S. 324 (1969) [hereinafter *Orozco*] and *Beckwith v. United States*, 425 U.S. 341 (1976) [hereinafter *Beckwith*] concerning questioning at the home of someone who had become the focus of an investigation, and *Oregon v. Mathiason*, 429 U.S. 492 (1977) [hereinafter *Mathiason*] concerning suspects who voluntarily attend at a police station for questioning. It appears that such questioning is deemed custodial and subject to *Miranda* only if a reasonable person in the suspect's position would have regarded himself as in custody. [Since this was written, the Supreme Court has addressed this issue in *R. v. Hicks*, [1990] 1 S.C.R. 120, 54 C.C.C. (3d) 575 by adopting the reasoning of the Ontario Court of Appeal reported at (1988), 42 C.C.C. (3d) 394.]

intend only to obtain a breath sample. There is, therefore, a considerable gap between the two courts on this issue.⁸⁷

3. Line-ups

The distinction between testimonial and non-testimonial evidence, which grounds both the common law privilege against self-incrimination and the United States Fifth Amendment, can be seen in how the American Supreme Court views the right to counsel at pre-indictment line-ups. In *Wade*, the Court held that the Sixth Amendment confers an absolute right to have counsel present at pre-trial confrontations such as line-ups.⁸⁸ Although the Fifth Amendment did not apply because the privilege against self-incrimination covers testimonial evidence only, the Court reasoned that line-ups, like trials, had to be properly conducted and, therefore, fell within the Sixth Amendment right to counsel.⁸⁹ *Wade* had been indicted when the line-up was held.

The force of the Court's reasoning would seem to apply to line-ups generally, whether or not the suspect has been indicted. However, somewhat surprisingly, that is not what was decided in *Kirby* five years later.⁹⁰ There, the Court confirmed its earlier view that the Fifth Amendment did not apply because no question of

⁸⁷ The holding in *Berkemer*, *supra*, note 84 (that *Miranda* does not apply to routine traffic stops) was recently reaffirmed in *Pennsylvania v. Bruder*, 102 L. Ed. (2d) 172 (1988).

⁸⁸ *Supra*, note 52.

⁸⁹ The same day that *Wade*, *supra*, was decided, the Court held in *Gilbert*, *supra*, note 64 that requiring a suspect to give a handwriting exemplar in the absence of counsel did not violate either Amendment. A distinction was therefore made between eyewitness identification and scientific methods, such as fingerprints, blood samples, clothing, hair, etc., to which the right to counsel did not apply. *Gilbert* also held that even if a post-indictment line-up is tainted by a lack of counsel, the identification of a suspect may be made so long as it can be demonstrated that the identification was made independently of the tainted pre-trial procedure.

This became known as the *Wade-Gilbert* rule. On the issue of the effect of line-up improprieties on subsequent identification in Canada, see the reasons of Wilson, J. in *R. v. Mezzo*, [1986] 1 S.C.R. 802, 27 C.C.C. (3d) 97 expressly reserving the question of constitutional fairness for another day.

⁹⁰ *Supra*, note 51.

testimonial self-incrimination was involved, but went on to hold that the Sixth was also inapplicable because Kirby, unlike Wade, had not been indicted. Thus, the decision forecloses the argument that the Sixth Amendment right to counsel may be relied upon at the pre-indictment stage. Not only is there no need to Mirandize suspects at such a line-up, there is no constitutional right to have counsel present.⁹¹

These cases reveal the American Supreme Court's restrictive approach to an accused person's right to counsel at pre-indictment line-ups. The Canadian Supreme Court, on the other hand, is clearly of a rather different view. In *R. v. Ross*, three teen-aged accuseds were arrested in the early morning hours as break and enter suspects.⁹² They were advised of their right to retain and instruct counsel, but, given that it was between 2 and 3 a.m., they were unable to reach their lawyers by telephone. The police then told them to participate in a line-up, and they did. The Supreme Court of Canada ruled unanimously that the accused were denied a reasonable opportunity to consult counsel, and the majority (4:2) excluded the line-up evidence. No United States authority was cited, nor was the American position referred to in any way.⁹³

Like *Therens*, the decision in *Ross* is remarkable, not only as a contrast to the unacknowledged American position, but also for the way in which it departed from previous Canadian doctrine. Prior to *Ross*, the leading authority, although it was not a right to counsel case, was *R. v. Marcoux and Solomon*.⁹⁴ In *Marcoux*, Justice

⁹¹ In *United States v. Ash*, 413 U.S. 300 (1973), the majority of the Court held that showing a photographic display to a witness, after an indictment had been handed down, was analogous to pre-trial preparation and refused to extend the Sixth Amendment to it. In *Neil v. Biggers*, 409 U.S. 188 (1972) at 199, the Court ruled that the relevant test for a due process violation under the Fourteenth Amendment was whether the line-up identification was reliable, "even though the confrontation procedure was suggestive."

⁹² [1989] 1 S.C.R. 3, 46 C.C.C. (3d) 129 [hereinafter *Ross* cited to C.C.C.].

⁹³ This omission seems especially odd, when one considers Justice Lamer's remarks in *Therens*, *supra*, note 27 about deferring the issue of line-ups and the right to counsel, presumably to an appropriate case: see *supra*, note 82.

⁹⁴ (1975), [1976] 1 S.C.R. 763, 24 C.C.C. (2d) 1 [hereinafter *Marcoux* cited to C.C.C.]. Prior to the *Charter*, relatively few cases were right to counsel cases in this sense. Notable exceptions include *R. v. Ballegeer* (1968), [1969] 3 C.C.C. 353 (Man. C.A.), and *R. v. Hogan* (1974), [1975] 2 S.C.R. 574, 18 C.C.C. (2d) 65 in which the Supreme Court of Canada held

Dickson (as he then was) ruled for a unanimous Court that evidence of bodily condition or conduct, such as line-up evidence, is not covered by the privilege against self-incrimination. Somewhat less convincingly, he concluded that, so long as the police behave reasonably, compelling a suspect to take part in a line-up is "an incident to the police power to arrest and investigate, and no more subject to objection than compelling the accused to exhibit his person for observation by a prosecution witness during a trial."⁹⁵ Although *Marcoux* was referred to in *Ross*, it was not regarded as precluding the Court from holding that a suspect has no obligation to appear in a line-up. Instead, Justice Lamer noted that there was no statutory obligation to do so and stressed that Canadian courts had never gone beyond the actual holding in *Marcoux*, that evidence of a refusal to participate was admissible in the circumstances of that case.⁹⁶

More significantly, however, *Ross* parts company with the common law position enunciated in *Marcoux* (and in the American cases) that confines the privilege against self-incrimination to testimonial evidence.⁹⁷ This departure had been already hinted at in *Collins*, when Justice Lamer spoke of excluding evidence where, as a result of a *Charter* violation, "the accused is conscripted against himself through a confession or other evidence emanating from him."⁹⁸ Then, two months later, the Court prohibited police questioning of detainees who stand on their section 10(b) rights, until a reasonable opportunity to consult counsel has been

that breathalyzer evidence obtained in violation of the right to counsel was nonetheless admissible.

⁹⁵ *Ibid.* at 7.

⁹⁶ *Ross, supra*, note 92 at 137. In *Marcoux, supra*, note 94 the accused had refused to take part in the line-up. He then attacked the Crown's identification evidence on the ground that no line-up had been held. In these circumstances, the Court held that evidence of his refusal was admissible.

⁹⁷ The leading Canadian case is *Quebec (A.G.) v. Begin*, [1955] S.C.R. 593.

⁹⁸ *Collins, supra*, note 12 at 19.

afforded.⁹⁹ In *Ross*, Justice Lamer combined these rulings and extended them to line-ups, concluding that the police were not only under a duty to cease questioning, but also to refrain from "otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel."¹⁰⁰ There was, he said, no legal obligation to appear in a line-up and counsel could have played an important role in advising a client about participating. Because the police had not allowed the appellants an adequate opportunity to exercise their right to counsel, holding the line-up was a serious *Charter* violation. So serious, in fact, that to admit the identification evidence it yielded would bring the administration of justice into disrepute. To repeat: in the United States, not only does the Sixth Amendment right to counsel not operate at this stage, but because line-up evidence is non-testimonial, the Fifth Amendment right, based as it is upon the privilege against self-incrimination, is of no help either. The American Supreme Court would have approved the line-up identification in *Ross* and admitted the evidence.

B. *Search and Seizure*

While this contrast between the two Courts is readily discernable in search and seizure cases as well, in its first criminal *Charter* case, the Supreme Court of Canada sent a rather different

⁹⁹ *Manninen, supra*, note 21. *Collins, supra*, note 12, however, involved the fruits of an illegal search which, in the United States, would have been decided under the Fourth Amendment. *R. v. Genest* (1989), 45 C.C.C. (3d) 385 at 403, in which Chief Justice Dickson suggested that evidence obtained by requiring an accused to identify objects seized in an illegal search should be excluded. This is similar, although any statements made would also entail Fifth Amendment considerations in the United States. The Canadian Supreme Court goes its own way, however, when the notion of an accused being "conscripted against himself" is applied to non-testimonial evidence in situations such as pre-indictment line-ups, in which American courts decline to extend Fourth, Fifth, or Sixth Amendment protections. This notion was first expressed by Justice Lamer in *R. v. Dubois*, [1985] 2 S.C.R. 350, 22 C.C.C. (3d) 513 [hereinafter *Dubois* cited to C.C.C.].

¹⁰⁰ *Ross, supra*, note 92 at 136, using the same phraseology used in *Manninen, supra*, note 21. Justices L'Heureux-Dubé and McIntyre dissented, but cited no United States authority. The dissent was to the effect that line-up evidence does not "emanate" from an accused in the way a confession does, and that to admit the evidence would not bring the administration of justice into disrepute.

signal. Asked in *Hunter* to assess the search provisions of the *Combines Investigation Act*¹⁰¹ against section 8 of the *Charter*, Chief Justice Dickson wasted no time in embracing United States Supreme Court authority in order to find them inadequate and strike them down.¹⁰² Relying upon *Katz*, he reasoned that section 8, like the Fourth Amendment, protects people, not places.¹⁰³ Warrantless searches, he said, are "*prima facie* unreasonable" and prior authorization for a search is necessary whenever possible.¹⁰⁴ In language that very much reflects the American approach, he concluded that

[t]he guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.¹⁰⁵

In *Simmons*, the Supreme Court referred to and relied upon United States case law once again, this time to rule that border searches

¹⁰¹ *Combines Investigation Act*, R.S.C. 1970, c. C-23.

¹⁰² *Supra*, note 31. Section 8 provides that "Everyone has the right to be secure against unreasonable search and seizure." The Fourth Amendment is more detailed: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

¹⁰³ *Supra*, note 42.

¹⁰⁴ *Hunter*, *supra*, note 31 at 108-10. *Katz*, *supra*, note 42 required a two-part inquiry to determine whether there was a reasonable, that is, constitutionally protected, expectation of privacy. First, did the individual have a subjective expectation of privacy? Second, is society willing to recognize this expectation as reasonable? Cases that have been viewed as narrowing the *Katz* approach include: *United States v. Place*, 462 U.S. 696 (1983), *United States v. Jacobsen*, 466 U.S. 109 (1984) and *California v. Ciraolo*, 476 U.S. 207 (1986). See also A. Loewy, "The Fourth Amendment as a Device for Protecting the Innocent" (1983) 81 Mich. L. Rev. 1229.

¹⁰⁵ *Ibid.* at 108.

are one of those "particular situations" where the privacy interest must yield.¹⁰⁶

1. Blood Samples

In two section 8 cases involving blood samples, however, the Court went well beyond its United States counterpart in the protection it was prepared to extend to the accused. References to American case law in *R. v. Pohoretsky*¹⁰⁷ and *Dyment*¹⁰⁸ are conspicuously absent. In *Pohoretsky*, the accused had been injured in a single-vehicle accident and was incoherent and delirious. At the direction of the police and without the consent of the accused, the attending physician took a blood sample that was not required for medical purposes. But *Pohoretsky* is the less significant of the two cases because the Crown conceded that the taking of the blood sample was an unreasonable search. It did so on two grounds. First, the summary conviction appeal court had found that the police had not established the necessary grounds, pursuant to the province of Manitoba's *Blood Test Act*, for taking the sample.¹⁰⁹ Second, the *Act* was probably irrelevant in a criminal prosecution anyway. What was then section 237(2) of the *Criminal Code* provided that no one was required to give a blood sample.¹¹⁰ The only real issue in the

¹⁰⁶ *Supra*, note 20. The American law relied upon was *United States v. Ramsey*, 431 U.S. 606 (1977) and *Carroll v. United States*, 267 U.S. 132 (1925). See also *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) [hereinafter *Montoya de Hernandez*] which was not referred to in *Simmons*.

¹⁰⁷ [1987] 1 S.C.R. 945, 33 C.C.C. (3d) 398 [hereinafter *Pohoretsky* cited to C.C.C.].

¹⁰⁸ *Supra*, note 33. For the quantitative part of this study, we classified *Dyment* as a case which referred to United States law because, although there is no mention of the leading American precedent on blood samples, there is a reference to the Court having adopted *Katz*, *supra*, note 42 in *Hunter*, *supra*, note 31 and an even more peripheral quotation from Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438 (1928). This sort of thing illustrates the classification difficulties already noted. See *supra*, text following note 32 at 739.

¹⁰⁹ *Blood Test Act*, 1980 (Man.), c. 49 (C.C.S.M., c. B63).

¹¹⁰ The Manitoba statute provided that a qualified medical practitioner who had reasonable and probable grounds to believe that a person whom he was treating had, within the previous two hours, been driving a vehicle under the influence of alcohol, could seize blood from that person. However, because provinces have no jurisdiction to legislate with

case was therefore whether evidence of the sample should have been excluded under section 24(2). Justice Lamer, for the Court, ruled in favour of such exclusion. Given the state of the *Criminal Code* at that time, it is hardly surprising that no consideration appears to have been given to finding some sort of common law authority for what was done.

Although in *Dyment* section 237(2) of the *Criminal Code* was also in force at the relevant time, both the facts and the position taken by the Crown were somewhat different. There, the physician held a vial under Mr. Dyment's free-flowing wound in order to collect a blood sample for medical purposes. Moreover, the police officer who attended the accident scene did not request a sample, nor when he came to the hospital did he know that one had been taken. Dyment subsequently told the doctor that he had consumed a beer and some antihistamine tablets. When the doctor spoke to the police officer, he handed over the sample. The Crown argued that this was not a seizure and, if it was, that it was not unreasonable.

In two separate sets of reasons, the majority (6:1) ruled against the Crown and excluded the evidence. The gist of the ruling is that patients in hospital have a reasonable expectation of privacy. This includes the expectation that their blood will be used for diagnostic purposes and will not be given to strangers for non-medical reasons. Accordingly, the doctor could not give the blood to the police to be used as evidence in a criminal prosecution unless required to do so by law. Any law that purported to require this would also be subject to *Charter* scrutiny. There was no search, but by accepting the sample the police seized it within the meaning of section 8 of the *Charter*. This seizure, in the absence of compelling reasons, violated the personal autonomy of Mr. Dyment. To admit evidence obtained so unreasonably would bring the administration of justice into disrepute.

respect to criminal law matters, it is highly doubtful that the Crown could rely upon this authority. There are now detailed provisions in the *Criminal Code* (sections 254 and 256) for taking blood samples from persons suspected of impaired driving. This may have influenced the Supreme Court's decision in *Dyment*, *supra*, note 33.

No mention is made in *Dyment* of the leading United States Supreme Court decision on this issue.¹¹¹ *Schmerber* involved a blood sample taken by a physician at the request of the police and after the defendant, on the advice of counsel, had objected. The United States Supreme Court, after rejecting (5:4) defence arguments based upon the Fifth and Sixth Amendments, approached the question much as the Canadian Court would do twenty years later in *Pohoretsky* and *Dyment*, that is, as a Fourth Amendment search and seizure case. However, it noted that "the values protected by the Fourth Amendment ... substantially overlap those the Fifth Amendment helps to protect."¹¹² It then held that individuals have a privacy interest in their bodies, but that it was not unreasonable to require suspects to submit to involuntary blood tests in this sort of situation. Because the percentage of alcohol in the blood begins to diminish shortly after drinking stops, and because the police took time to investigate the accident and to bring the accused to the hospital, the officer faced an exigent situation. If he did not act, the evidence would be lost. Furthermore, the procedure was an accepted one and was carried out in a reasonable manner by a trained physician in a hospital: "The extraction of blood samples for tests is a highly effective means of determining the degree to which a person is under the influence of alcohol."¹¹³ Thus, what had been done was no more intrusive than was reasonably necessary.

¹¹¹ *Schmerber*, *supra*, note 64. Mention is not even made by the sole dissenting justice, McIntyre, J., who held that the only seizure was by the doctor and that admitting the evidence would not bring the administration of justice into disrepute. *Schmerber* was, however, referred to by the Manitoba Court of Appeal in *Pohoretsky* (1985), 18 C.C.C. (3d) 104 at 118ff. and, without comment, by the Prince Edward Island Supreme Court - but not the Appellate Division - in *Dyment* (1984), 12 C.C.C. (3d) 531 at 538 (P.E.I.S.C.); (1986), 25 C.C.C. (3d) 120 (P.E.I. S.C., App. Div.). Both the Manitoba Court of Appeal and the Prince Edward Island Supreme Court ruled that the seizures violated sections 7 and 8 of the *Charter*, and in Prince Edward Island the evidence was excluded. In Manitoba, however, it was admitted notwithstanding the violation.

¹¹² *Ibid.* at 767. The Fifth Amendment argument was rejected because blood samples were not evidence "of a testimonial or communicative nature." The Sixth Amendment was also of no assistance. As Justice Brennan put it, since *Schmerber* "was not entitled to assert the privilege [against self-incrimination], he has no greater right because counsel erroneously advised him that he could assert it." *Ibid.* at 765-66.

¹¹³ *Ibid.* at 771.

Like the Supreme Court of Canada in *Pohoretsky*, the American Court found that the police had probable cause to believe that Schmerber had been driving under the influence of alcohol and that they had directed the physician to extract blood from a suspect who did not, or could not, consent. Unlike the Canadian Court, the justices in *Schmerber* found the search/seizure reasonable and the evidence admissible. Even more striking is the comparison with *Dyment*. There, the doctor acted on his own for medical purposes, without physically invading the suspect's body at all. Yet, the Supreme Court of Canada held that, in seizing the vial of blood for non-medical purposes, the police "seriously" violated *Dyment*'s personal autonomy and "infringed upon all the spheres of privacy ... spatial, personal and informational."¹¹⁴ Clearly, the two Courts differ sharply on the nature and degree of the expectation of privacy involved. Years after it decided *Schmerber*, the United States Supreme Court continues to regard blood tests as commonplace, holding that they "do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity."¹¹⁵

¹¹⁴ *Dyment*, *supra*, note 33 at 261, *per* La Forest, J., who had earlier identified these three "spheres" by referring to *Privacy and Computers*, the report of the Task Force established by the federal Departments of Justice and Communications (1972). It is noteworthy that Justice La Forest made no reference to *Schmerber*, *supra*, note 64 in *Dyment*. A week earlier, he had cited it in *R. v. Beare*, [1988] 2 S.C.R. 387, 45 C.C.C. (3d) 57 at 79 [hereinafter *Beare* cited to C.C.C.] as a leading case on "the much broader provision of the Fifth Amendment against self-incrimination in the United States Constitution." *Schmerber* had also been referred to in one of the lower courts. See *supra*, note 111.

¹¹⁵ *Winston v. Lee*, 470 U.S. 753 at 762 (1984) in which the Court held that, in certain circumstances, surgery to remove a bullet for evidentiary purposes can be a violation of the Fourth Amendment. Compare the pre-*Charter* Canadian case of *R. v. Laporte* (1972), 8 C.C.C. (2d) 343 (Que. Q.B.). There, it was held that because the *Criminal Code* authorized warrants to search only a "building, receptacle or place," a warrant authorizing the surgical removal of a bullet from the accused's body had to be quashed.

2. Search, Seizure, and the Right to Counsel

The American Court would also disagree with the majority of the Supreme Court of Canada's ruling in *Simmons* that a failure to advise suspects of their right to counsel under section 10(b) affects the reasonableness of a search under section 8.¹¹⁶ It will be remembered that in *Simmons* the Court, following United States precedent, held that border searches constitute an exception to the general rule because the expectation of privacy at border crossings is necessarily lower. The majority also ruled that persons subjected to strip searches at Customs are detained within section 10(b) and must be read their right to counsel.¹¹⁷ As this was not done in *Simmons*, the majority was of the view that, although the law authorizing the search did not violate section 8, the manner in which the search was carried out did. Chief Justice Dickson reasoned that, if *Simmons* had been informed of her right to counsel and had availed herself of that right, much of the uncertainty concerning the authority for the search would have been clarified. As he put it, "the denial of the appellant's right to counsel cannot avoid having an impact upon the reasonableness of the subsequent search of the

¹¹⁶ *Simmons*, *supra*, note 20 at 322. Compare the even stronger position taken by Wilson, J. in her concurring judgments in *Simmons* at 327-28, *R. v. Jacoy*, [1988] 2 S.C.R. 548, 45 C.C.C. (3d) 46 at 55 [hereinafter *Jacoy* cited to C.C.C.], and *R. v. Strachan*, [1988] 2 S.C.R. 980, 46 C.C.C. 479 at 503. In all three cases, the evidence obtained in violation of the *Charter* was nonetheless admitted, because to do so would not "bring the administration of justice into disrepute." [Since this was written, a majority of the Court appears to have gone even further down this path. See *R. v. Greffe*, [1990] 1 S.C.R. 755, 55 C.C.C. (3d) 161, in which the evidence was excluded.]

¹¹⁷ Sections 143 and 144 of the *Customs Act*, R.S.C. 1970, c.C-40 authorize a customs officer to search any person if the officer has reasonable cause to suppose that the person has goods subject to entry at customs or prohibited goods secreted about his person. They also provide that before anyone can be searched, he or she may ask to be taken before a magistrate, justice of the peace, or chief officer at the port. These sections were posted on a wall and *Simmons*' attention was directed to them. However, there was no evidence that she read them, and they were not read to her.

appellant.¹¹⁸ He therefore found the search to be in violation of section 8, but admitted the evidence anyway.¹¹⁹

Not all the justices agreed with this analysis. Justice L'Heureux-Dubé dissented, as she did in *Ross*.¹²⁰ There, she argued that line-up evidence does not "emanate" from the accused "in the same way that a confession does," thus rejecting the majority's contention that line-ups could be brought within the *Collins* principle.¹²¹

The identity of the accused existed prior to the violation, as did the perceptions of the witnesses to the crime. In my view, such evidence comes into existence when an accused is seen committing the crime. The evidence cannot be considered as "emanating" from the accused simply because it may later be used to establish the credibility of identification evidence.¹²²

In *Simmons*, which was in fact decided a few weeks earlier, she took a similar line, holding that the right to counsel "is primarily aimed at preventing the accused or detained person from incriminating herself."¹²³ Thus, "the main concern would be with coerced or uninformed confessions. In such circumstances, the accused would be manufacturing the evidence against herself. ... However, [at] a

¹¹⁸ *Simmons*, *supra*, note 20 at 322.

¹¹⁹ It would not bring the administration of justice into disrepute to do so. See section 24(2) of the *Charter*.

¹²⁰ *Ross*, *supra*, note 92. Compare Justice L'Heureux-Dubé's dissent in *R. v. Duguay*, [1989] 1 S.C.R. 93, 46 C.C.C. (3d) 1 [hereinafter *Duguay* cited to C.C.C.] where the issue was the admissibility of both real evidence and statements secured by the police after they had arbitrarily detained the accused.

¹²¹ *Ross*, *supra*, note 92 at 141. See also, *supra*, note 99 and accompanying text at 756. Justice L'Heureux-Dubé cites *Leon*, *supra*, note 18 in *Duguay*, *supra*, note 120 at 28, but neglects to refer to such cases as *Brown v. Illinois*, 422 U.S. 590 (1975) [hereinafter *Brown*] which held that a confession obtained subsequent to an arrest made without probable cause should be excluded, notwithstanding that the defendant had been Mirandized.

¹²² *Ross*, *supra*, note 92 at 141. Justice Lamer, for the majority, agreed that line-up evidence does not emanate from the accused, but held that an accused who takes part in a line-up "is participating in the construction of credible inculpatory evidence." *Ibid.* at 139. Compare Chief Justice Dickson's statement in *Jacoy*, *supra*, note 116 at 50, where he justified admitting evidence of narcotics obtained as a result of an illegal search. Such evidence, he said, exists "independently of the *Charter* violation," unlike the breath sample in *Therens*, *supra*, note 27, which "was created by the accused as a result of the violation."

¹²³ *Simmons*, *supra*, note 20 at 331.

customs search ... [s]he is not being interrogated; she is merely being searched."¹²⁴ In her view, the search was not conducted in an unreasonable manner, so there was no need to consider the admissibility issue.

American jurisprudence was cited on the question of border searches generally, but not on this point, not even by the dissent. In fact, it supports Justice L'Heureux-Dubé's view. An otherwise reasonable search will not be held unlawful simply because the police failed to advise an individual of his right to counsel. The reasonableness of the search hinges upon the language of the Fourth Amendment and the behaviour of the police, not upon the implied right to counsel in the Fifth Amendment, nor the explicit right in the Sixth.¹²⁵ Certainly, the Court will exclude evidence which was seized as a result of obtaining an unconstitutional confession (the so-called "fruit of the poisoned tree"), but that is not the same as invalidating an otherwise lawful search simply because the police failed to warn a suspect of his right to counsel.¹²⁶ Indeed, in many situations, there is no right to such a warning under United States law.¹²⁷

¹²⁴ *Ibid.* at 331-32.

¹²⁵ On the other hand, a proper reading of the defendant's *Miranda* rights will not remedy a Fourth Amendment violation. See *Brown, supra*, note 121. There is, according to the Supreme Court, a difference between the purpose behind excluding evidence for Fourth, as opposed to Fifth, Amendment violations. The latter is to deter compelled confessions; the former is to deter unconstitutional searches and seizures, whether they produce incriminating evidence or not. In practice, of course, the two amendments tend to coalesce because there is often a close relationship between the search and subsequent statements. See *infra*, note 126 and accompanying text at 766.

¹²⁶ The "fruit of the poisoned tree" doctrine is activated by the violation of a constitutional norm. See *Wong Sun v. United States*, 371 U.S. 471 (1963). However, if *Miranda* is merely a procedural guarantee, the doctrine may not be as strong as first supposed. See *supra*, note 61. In a number of decisions, the Court has refused to apply it to derivative evidence where, although the police failed to give the *Miranda* warning, there was no constitutional violation, that is, the sort of actual compulsion contemplated by the Fifth Amendment. For example, in *Michigan v. Tucker*, 417 U.S. 433 (1974) it was held that a failure to read the *Miranda* warning will not necessarily render inadmissible the testimony of a witness found as a result. And in *Elstad, supra*, note 61, the Court ruled that a failure to read the warning before an otherwise uncoerced confession will not render a second confession, voluntarily made after a warning, inadmissible.

¹²⁷ See, for example, *Berkemer, supra*, note 84, and the cases listed *supra*, note 64.

C. *Self-incrimination and the Prior Testimony of the Accused*

In all of the cases examined so far, at least two of the three basic ideas identified at the beginning of this section, the privilege against self-incrimination, the right to be secure against unreasonable search and seizure, and the right to counsel, have been relevant. In two Supreme Court of Canada decisions, however, the Court dealt with one of these ideas, the privilege against self-incrimination, in relative isolation.

In the first case, *Dubois*, the accused testified and was convicted, but won a new trial on appeal.¹²⁸ On this re-trial, the Crown entered, as part of its case, Dubois' testimony at the first trial. Dubois objected to this unsuccessfully, electing not to testify in response. Although using the testimony of an accused at his first trial was standard practice prior to the *Charter*, the Supreme Court held (6:1) that it now violated section 13, which provides, in part, as follows: "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings." Holding that the re-trial was an "other proceeding" for the purposes of this section, Justice Lamer invoked Dubois' section 11(c) right not to testify and his 11(d) right to be presumed innocent in aid of this result. He reasoned that these provisions made it clear that the purpose of section 13 is to prevent an accused from being "conscripted" to help the Crown discharge its burden of establishing a "case to meet." In his words:

To allow the prosecution to use, as part of its case, the accused's previous testimony would, in effect, allow the Crown to do indirectly what it is estopped from doing directly by s.11(c), i.e., to compel the accused to testify. It would also permit an indirect violation of the right of the accused to be presumed innocent and remain silent until proven guilty by the prosecution, as guaranteed by s.11(d) of the *Charter*.¹²⁹

¹²⁸ *Supra*, note 99.

¹²⁹ *Ibid.* at 537-38. Sections 11(c) and (d) provide, in part, that anyone "charged with an offence has the right ... not to be compelled to be a witness in proceedings against that person in respect of the offence ... [and] to be presumed innocent until proven guilty according to law."

The result is that an accused, who makes a "voluntary" statement in a police station after being read his rights and who chooses to testify at his trial, can prevent the prosecution from using his testimony against him at a new trial, but not the unsworn statement made to the police. A year later, the Court went further, holding that this sort of prior testimony cannot even be used to cross-examine the accused at his re-trial.¹³⁰

Because these cases turned largely upon section 13 of the *Charter*, a provision that reflects Canada's unique approach to the privilege against self-incrimination, comparing their results with the American position is tricky.¹³¹ However, it would seem that, in the United States, *Dubois* would have been regarded as having waived his privilege by testifying. His earlier testimony would be inadmissible only if it could be shown that he felt compelled to testify at his first trial in order to respond to evidence, such as a coerced confession, that was wrongly introduced by the prosecution.¹³²

The importance of *Dubois* lies in Justice Lamer's notion of "conscriptioin." Coupled with his position in *Collins*, which tends to lump confessions and "other evidence emanating" from the accused together, it points the way to a vigorous, new life for the privilege

¹³⁰ *Mannion v. R.* (1987), [1986] 2 S.C.R. 272, 28 C.C.C. (3d) 544. Appellate courts have differed as to whether *Mannion* constitutes a complete bar to cross-examination or continues to permit it where the object is simply to discredit the accused rather than show actual evidence of guilt. See, for example, *R. v. Kuldip* (1988), 40 C.C.C. (3d) 11 (Ont. C.A.), and, *contra*, *Re Johnstone and Law Society of British Columbia* (1987), 40 D.L.R. (4th) 550 (B.C.C.A.) and *R. v. W.D.B.* (1987), 38 C.C.C. (3d) 12 (Sask. C.A.). Based upon the reasons given by the Court in *Mannion*, the former would appear to be the correct view. The issue is discussed more fully in D.M. Paciocco, "Self-Incrimination: Removing the Coffin Nails" (1989) 35 McGill L.J. 73.

¹³¹ In Britain and the United States, a witness may refuse to answer a question on the ground that to answer would tend to incriminate. In Canada, this privilege was abolished by statute in the late nineteenth century, and the predecessor of section 5 of the *Canada Evidence Act*, R.S.C. 1970, c. E-10 and section 13 of the *Charter* were substituted. It provided that the witness, including an accused if he chooses to testify, must answer, but the answer cannot be used against him in any other proceedings.

¹³² *Harrison v. United States*, 392 U.S. 219 (1968).

against self-incrimination in Canada.¹³³ Although a final assessment must await a detailed examination of the role of the exclusionary rule contained in section 24(2) of the *Charter*, cases such as *Ross*, *Pohoretsky*, *Dyment*, and *Simmons* are clearly significant.¹³⁴ They show that the trend that began with *Dubois* has already led the Supreme Court of Canada to extend protections to accused persons that, at least in the situations examined in this article, go significantly beyond those developed by the Warren, Burger, and now Rehnquist Courts in the United States.

D. A Substantive Example: Felony-Murder

Although this article is concerned primarily with procedural rights, some mention must be made of a striking development in Canadian substantive criminal law.¹³⁵ As stated earlier, the Supreme Court of Canada decided in the *Motor Vehicle Reference* to discount evidence that the framers of the *Charter* intended to confine section 7 to so-called procedural violations.¹³⁶ This meant that the Court was prepared to review the substance of legislation as well as to monitor procedural flaws. Invoking this authority in *Morgentaler* and

¹³³ See Paciocco, *supra*, note 130. These developments may account in part for the reservations expressed by Justice LeDain in his separate, concurring judgment in *Collins*, *supra*, note 12 at 23, where he said that he was concerned about the "possible implications [of Justice Lamer's reasoning] for such matters as self-incrimination." [It may have been reservations such as these that account, in part, for the different views expressed in *Thompson Newspapers*, *supra*, addendum to note 44, which was decided after this text was written.]

¹³⁴ Only in *Simmons*, *supra*, note 20 was the impugned evidence admitted, and the combination of sections 10(b) and 24(2) seems to have produced an exclusionary rule every bit as vigorous as that associated with *Miranda*. In "The Charter Right to Counsel: Beyond *Miranda*" (1987), 25 *Alta. L. Rev.* 190 at 191-92, Peter Michalyshyn makes a similar point. He states that "arrest or detention" has been substituted for "custodial interrogation" as a touchstone for the right against self-incrimination. It is our thesis that it is the Supreme Court of Canada's broad interpretation of this substitution that has carried us well beyond the American jurisprudence.

¹³⁵ On the effect of the *Charter* in this area generally, see B.P. Archibald, "The Constitutionalization of the General Part of Criminal Law" (1988), 67 *Can. B. Rev.* 403.

¹³⁶ *Supra*, note 16 at 297-307. Justice Lamer justly criticized the substantive/procedural dichotomy, dismissing it as "largely bound up in the American" experience. He did this, however, not to shy away from the bottomless pit of what Americans call substantive due process, but to justify, at least in criminal cases, jumping in head first.

Vaillancourt, it proceeded to strike down two important sections of the *Criminal Code*.¹³⁷ While it is *Morgentaler*, the abortion law decision, that has attracted all the public attention, it is, in fact, *Vaillancourt* that represents the greater departure from precedent.

At issue in *Vaillancourt* was the notorious felony-murder rule. The accused argued that it was unconstitutional because it violated both sections 7 and 11(d) of the *Charter*. The Supreme Court agreed. What was then section 213(d) of the *Criminal Code* provides, in part, as follows:

[W]here a person causes the death of a human being while committing ... robbery, [he is guilty of murder] whether or not [he] means to cause death ... and whether or not he knows death is likely to be caused to any human being, if ... he uses a weapon or has it on his person ... at the time he commits the offence ... and the death ensues as a consequence.

The rule is a severe one, especially in this Canadian version. Thomas Macaulay, Chairman of the first Indian Law Commission, did not include the rule in his *Indian Penal Code* in 1838.¹³⁸ A number of jurisdictions, including the Parliament of Great Britain in 1957, have abolished it. The Canadian Parliament, however, not only did not follow suit, but actually made the rule even more draconian. The courts had no authority to challenge this development prior to 1982. It is to be questioned whether the framers of the *Charter* intended that this should be any different afterwards.

The facts of *Vaillancourt* are straightforward. He and an accomplice decided to rob a poolroom and agreed to arm themselves with knives. When the accomplice arrived and produced a gun, Vaillancourt objected because he was afraid of an accidental discharge. The accomplice therefore removed three bullets from the gun and Vaillancourt put them in his glove, where the authorities subsequently found them.¹³⁹ During the robbery, the accomplice

¹³⁷ *Supra*, note 11.

¹³⁸ *A Penal Code, Prepared by the Indian Law Commissioners* (London: Pelham, Richardson, Cornhill, 1838) at 110.

¹³⁹ The decision of the Quebec C.A. in *R. v. Vaillancourt* (1984), [1987] 31 C.C.C. (3d) 75, reveals that the bullets fell out of Vaillancourt's glove in front of the jurors: "It seems," wrote McCarthy J.A., "that they were not particularly impressed by this." *Ibid.* at 81.

went to the back of the poolroom, became involved in a struggle with a customer and shot him. Vaillancourt testified that he had been certain that the gun was unloaded. It is true that he could have been lying, but his accomplice was never caught so there was no real possibility of contradiction. On this evidence, it was difficult for the prosecution to prove that Vaillancourt had the necessary *mens rea* to be a party to murder, so they relied upon the felony-murder doctrine. Because he had not been the one with the weapon, they had to do this by invoking section 21(2) of the *Criminal Code*, which, coupled with section 213(d), made him as guilty as the man who actually pulled the trigger.¹⁴⁰

The Supreme Court ruled that section 213(d), in effect, imposed absolute liability upon Vaillancourt for murder, an offence carrying a mandatory sentence of life imprisonment. Because the Court had already decided in the *Motor Vehicle Reference* that absolute liability plus even the possibility of imprisonment violated the section 7 guarantee of security of the person, Vaillancourt's conviction could only stand if section 213(d) could be construed as a reasonable limit. The Court held that it could not. Moreover, the section also violated the presumption of innocence. In *Oakes*, the Court had cited United States authority to conclude that unreasonable reverse onus clauses violated section 11(d) of the *Charter*.¹⁴¹ In *Vaillancourt*, they reasoned that a law that did not actually reverse the onus of proof, but which removed the prosecution's obligation of proving an essential element of the offence, was just as repugnant. As Justice Lamer put it:

[B]efore an accused can be convicted of an offence, the trier of fact must be satisfied beyond reasonable doubt of the existence of all of the essential elements of the offence.

¹⁴⁰ Section 21(2) provides that "[w]here two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence." Unlike s.213(d), s.21(2) requires at least objective foreseeability.

¹⁴¹ In *Oakes*, *supra*, note 21, the Court struck down section 8 of the federal *Narcotic Control Act*, R.S.C. 1970, c. N-1. This section provided that, once the prosecution had proved that a person charged with possession for the purpose of trafficking had been in possession of a narcotic, the onus of proof shifted to him to establish, on a balance of probabilities, that he did not possess it for that purpose.

These essential elements include not only those set out by the legislature in the provision creating the offence but also those required by s. 7 of the Charter. Any provision creating an offence which allows for the conviction of an accused notwithstanding the existence of a reasonable doubt on any essential element infringes ss. 7 and 11(d).¹⁴²

Sections 7 and 11(d) will also be infringed where the statutory definition of the offence does not include an element which is required under s.7 ... [W]hat offends the presumption of innocence is the fact that an accused may be convicted despite the existence of a reasonable doubt on an essential element of the offence, and I do not think that it matters whether this results from the existence of a reverse onus provision or from the elimination of the need to prove an essential element.¹⁴³

What was the essential element that was missing in a murder charge based upon section 213(d)? According to Justice Lamer, the section permitted conviction for murder even where the death was not objectively foreseeable. This element of objective foreseeability was the minimum *mens rea* required by the constitution for a murder conviction.¹⁴⁴ Indeed, Justice Lamer and at least three others indicated that they would go even further in the next case and hold that subjective foresight was the minimum requirement, thus placing even more *Criminal Code* provisions in jeopardy.¹⁴⁵

What this of course amounts to is a constitutionalization of the doctrine of *mens rea* or, rather, of a version of it. The Court has sent a clear signal to Parliament that, under the constitution, murder is an offence which requires, at the very least, that the prosecution prove objective foresight.¹⁴⁶ In support, Justice Lamer cited two decisions from American state courts, *People v. Aaron*¹⁴⁷ and *State*

¹⁴² *Vaillancourt*, *supra*, note 11 at 126.

¹⁴³ *Ibid.* at 135.

¹⁴⁴ *Ibid.* at 134.

¹⁴⁵ In fact, the Ontario Court of Appeal recently relied upon Justice Lamer's reasons to hold that the phrase "or ought to have known" in section 21(2) must be "read down" when a party is charged with attempted murder or murder as defined in what is now section 229(a). See *R. v. Logan* (1989), 46 C.C.C. (3d) 354 (Ont. C.A.) and *R. v. Harris* (1989), 48 C.C.C. (3d) 521 (Ont. C.A.). Compare *R. v. Collins* (1989), 48 C.C.C. (3d) 343 (Ont. C.A.) and *R. v. Arkell* (1988), 43 C.C.C. (3d) 402 (B.C.C.A.).

¹⁴⁶ More generally, it also gave notice that Parliament cannot avoid the sterilizing effects of the *Oakes* decision, *supra*, note 21 by deleting an offence's *mens rea* requirement along with its offending reverse onus clause.

¹⁴⁷ 299 N.W. 2d 304 (1980) [hereinafter *Aaron*].

v. *Doucette*,¹⁴⁸ describing them as abolishing the felony-murder rule in their respective states. However, he neglected to add that neither did so on constitutional grounds. State courts which have considered the rule have, instead, limited its application. They have done so either by requiring proof of a direct causal connection between the perpetrator and the act or by compelling the prosecution to prove *mens rea*, rather than relying upon a presumption. They did not so by constitutionalizing *mens rea*.

In *Aaron*, the Supreme Court of Michigan required the prosecution to prove malice, saying that they were exercising their "role in the development of the common-law by abrogating the common law felony-murder rule."¹⁴⁹ But before doing so, Justice Fitzgerald pointedly noted that Michigan had no statutory rule.¹⁵⁰ If it had, they might have resorted to the principles of statutory interpretation to limit the doctrine, as the Supreme Court of Vermont did in *Doucette*. There, the statute read, in part, that murder "committed in perpetrating ... robbery ... shall be murder in the first degree."¹⁵¹ The defence argued, much as Vaillancourt would do, that the provision violated both the State and the Federal Constitutions' guarantees of due process. However, this argument proved unnecessary once the Court ruled that, by using the term "murder" rather than "killings," the legislature had intended to require the prosecution to prove malice.¹⁵²

Although it may well be that the United States Supreme Court would follow the Canadian Court's lead and strike down a felony-murder rule that could not be interpreted away, there are at least two reasons why this would be more difficult than it was in *Vaillancourt*. In the first place, jurisdiction over criminal law in the United States belongs primarily to the states. A substantive issue such as this one does not fit easily within the usual categories of review. The only obvious pigeon-hole is the one argued in *Doucette*,

¹⁴⁸ 470 A.2d 676 (1983) [hereinafter *Doucette*].

¹⁴⁹ *Aaron*, *supra*, note 147 at 329.

¹⁵⁰ *Ibid.* at 328-29.

¹⁵¹ *Doucette*, *supra*, note 148 at 682.

¹⁵² *Ibid.*

that is, the due process clause of the Fourteenth Amendment and substantive interpretations of that provision are the black hole of Supreme Court jurisprudence.¹⁵³ Secondly, some time ago the United States Court expressed its reluctance to arrogate to itself such expansive powers of review. As Justice Marshall put it in *Powell v. Texas*, that Court has "never articulated a general constitutional doctrine of mens rea,"¹⁵⁴ and it was simply "not yet the time to write into our Constitution formulas cast in terms whose meaning ... is not yet clear."¹⁵⁵ Perhaps, with the Supreme Court of Canada leading the way, that time will come sooner rather than later.

Most of the signs, however, suggest otherwise. In *Patterson v. New York*, decided some nine years after *Powell* and only two years after a decision that many took as heralding a more activist stance in this area, the United States Supreme Court upheld a law that shifted the burden of proof by deleting an element of the offence and reinserting it as an affirmative defence.¹⁵⁶ Although the Court stated that "there are obviously constitutional limits beyond which

¹⁵³ On the general question of state jurisdiction over criminal law and the reluctance of the United States Supreme Court to constitutionalize substantive criminal law, see A. Saltzman, "Strict Liability and the United States Constitution: Substantive Criminal Law Due Process" (1978), 24 *Wayne L. Rev.* 1571. Reverse onus clauses have certainly been struck down in the United States as violating the presumption of innocence (which is read into the Fifth and Fourteenth Amendments), and some of these decisions are referred to in *Oakes*, *supra*, note 21 at 341-42. In appropriate cases, due process can also be coupled with the Eighth Amendment prohibition against cruel and unusual punishment. See, for example, *Robinson v. California*, 370 U.S. 660 (1962).

¹⁵⁴ 392 U.S. 514 (1968) at 535 [hereinafter *Powell*].

¹⁵⁵ *Ibid.* at 537.

¹⁵⁶ 432 U.S. 197 (1977) [hereinafter *Patterson*]. The case, decided two years earlier, that seemed to point in another direction, is *Mullaney v. Wilbur*, 421 U.S. 684 (1975) [hereinafter *Mullaney*], where the Court held that the requirements of due process include, in a murder case, that the prosecution prove malice and the absence of such affirmative defences as provocation, beyond a reasonable doubt. It is this sort of sequence that has prompted some commentators to conclude that the question "of the existence of constitutional constraints on the substantive criminal law [in the United States] is largely terra in-cognita," even though the courts there have had over two hundred years to address it. See J.C. Jeffries & P.B. Stephan, "Defences, Presumptions and Burden of Proof in the Criminal Law" (1979), 88 *Yale L.J.* 1325 at 1366, quoted in Charles, Cromwell & Jobson, *supra*, note 20 at 183. In contrast, it took the Supreme Court of Canada only three years (the *Motor Vehicle Reference*, *supra*, note 16) or, at most, five years (*Vaillancourt*, *supra*, note 11).

the States may not go," the decision implies that legislators can usually avoid such limits, whatever these may be, by deleting and substituting elements of the offence.¹⁵⁷ It is unclear what this means in terms of the probability of substantive criminal law in the United States being constitutionalized. Professor Fletcher is probably correct in reading the decision as being about respect for "the independent evolution of state systems of criminal law," rather than an endorsement of the legislation in question. He goes on to suggest, however, that the reluctance of the Court can also be justified in the way Justice Marshall did in *Powell*. As he puts it, the "retreat" in *Patterson*

is not a setback, but a recognition that the Supreme Court cannot undertake to specify the principles that bind the states in the ongoing process of law reform. The aim of criminal theory should not be the working out of principles for the Supreme Court to enact as the mandate to the Constitution, but to refine the criteria of just punishment as an intermediate body of theory. There is room in our system of justice for a set of principles below the Constitution, but higher than the rules of positive law.¹⁵⁸

The question for Canadians is whether the fact that the criminal law in Canada is federal, rather than provincial, is sufficiently important to override the arguments of those who counsel restraint. The Supreme Court would appear to believe that it is. In *Vaillancourt*, the justices were provided with the perfect case to make the point.

¹⁵⁷ *Ibid.* at 210. When the Supreme Court of Canada came to consider this sort of issue, they did not refer to *Patterson*. See *Oakes, Holmes, Whyte, and Schwartz* (Appendix I, *infra* at 784).

¹⁵⁸ G.P. Fletcher, *Rethinking Criminal Law* (Toronto: Little Brown, 1978) at 551-52. "Retreat" refers to the contrast with such cases as *Mullaney*, *supra*, note 156. Fletcher calls *Patterson*, *supra*, note 156 an "about-face," but seems willing to stand behind it. *Ibid.* at 55. "The task of re-thinking the criminal law requires constant criticism and debate," he argues, and to "incorporate transient results in the Constitution is both to confess the failure of an intermediate body of theory and to stunt the process of debate and development." *Ibid.* at 552. Compare the rather different approach of C.P. Erlinder, "Mens Rea, Due Process and the Supreme Court: Toward a Constitutional Doctrine of Substantive Criminal Law" (1981) 9 Am. J. Crim. L. 163.

E. *Some Counter-examples*

It would not do to close here and risk leaving the impression that the Supreme Court of Canada cites United States authority only when convenient, or that it has always gone further in protecting the interests of the accused than its American counterpart. In *Hufsky*, for example, it specifically rejected the American Supreme Court's condemnation of random motor vehicle spot-checks, notwithstanding that its own pre-*Charter* case law required it to hold such stops a violation of section 9 of the *Charter*.¹⁵⁹

The Court was faced with the United States Supreme Court decision in *Delaware v. Prouse*, where police found marijuana in an automobile they had stopped to determine whether the driver had a licence.¹⁶⁰ Balancing the state's interest in safe highways against the driver's Fourth Amendment right to privacy, the American Court held that the former could be protected in a less intrusive manner than by arbitrary and random stops of individual motorists and that state laws authorizing such practices were unconstitutional.¹⁶¹ The Canadian Supreme Court, on the other hand, relied upon extensive material presented by the prosecution that was designed to show how difficult it was to detect impaired drivers without using such stops and which referred to other democratic societies – with the notable exception of the United States – which gave police officers this authority.¹⁶² Justice Le Dain, writing for a unanimous Court, referred to *Prouse*, but he neither described nor analyzed it. Instead, he simply concluded that Canadian law enforcement efforts in this area should not "be subjected to the kinds of conditions or restrictions reflected in the American jurisprudence, ... which would

¹⁵⁹ *Supra*, note 30. Section 9 provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned," and the pre-*Charter* case of *R. v. Dedman* (1985), [1985] 2 S.C.R. 2, 20 C.C.C. (3d) 97 accepted that such stops were arbitrary. The majority, however, found common law authority for them.

¹⁶⁰ 440 U.S. 648 (1979) [hereinafter *Prouse*].

¹⁶¹ One alternative that the Court suggested was that the police establish roadblocks at which all motorists were stopped. [Since this was written, the U.S. Supreme Court has upheld just such a roadblock. See *Michigan Dep't of Police v. Sitz*, 110 L. Ed. 2d 412 (1990).]

¹⁶² A similar argument was made and accepted in *Thomsen*, *supra*, note 83.

appear seriously to undermine its effectiveness while not significantly reducing its intrusiveness.¹⁶³ He accordingly upheld the provincial law, pursuant to which the stop was made, as a reasonable limit upon Hufsky's section 9 right not to be arbitrarily detained. In rejecting *Prouse*, the Supreme Court of Canada seems therefore to have restricted the concept of privacy to section 8 of the *Charter*.¹⁶⁴ In the United States, on the other hand, the Supreme Court regards the privacy interests protected by the Fourth Amendment as extending to the subject matter of both sections 8 and 9, that is, to detentions and arrests as well as to searches.¹⁶⁵

Hufsky appears to be the only case in which the Supreme Court of Canada has explicitly rejected a decision of its American counterpart in this area which favoured the interests of the accused. However, there are many other Canadian cases where the Court referred to United States authority to make rulings that do not protect the accused as much as, or any more than, American law does. In *Beare*, for example, the Court rejected a battery of arguments, some of which had been accepted by the Saskatchewan Court of Appeal, designed to show that fingerprinting accused persons prior to conviction violated the *Charter*. Some American precedent was cited in support.¹⁶⁶ In *R. v. Corbett*, the Court refused to strike down section 12 of the *Canada Evidence Act*, which imposes no restrictions upon the prosecution's right to cross-examine an accused person on his criminal record, even where (as in *Corbett* itself) both the charge and the previous conviction are murder.¹⁶⁷

¹⁶³ *Hufsky*, *supra*, note 30 at 409-10. Justice LeDain also referred to *Little v. State*, 479 A.2d 903 (1984). [Since this was written, the Court has gone even farther in protecting random stops. See *R. v. Ladouceur* (1990), 56 C.C.C. (3d) 22. (S.C.C.)]

¹⁶⁴ Later, in *Beare*, *supra*, note 114 at 77, the Court expressed "sympathy" for the idea that section 7 also protected privacy interests.

¹⁶⁵ However, there are two standards of detention under the Fourth Amendment: probable cause and reasonable suspicion. The latter represents a significantly lower standard and is resrepresented by such cases as *Montoya de Hernandez*, *supra*, note 106, *Terry*, *supra*, note 86, and *Adams v. Williams*, 407 U.S. 143 (1972).

¹⁶⁶ See *supra*, note 114.

¹⁶⁷ [1988] 1 S.C.R. 670, 41 C.C.C. 385 [hereinafter *Corbett* cited to C.C.C.]. *Canada Evidence Act*, R.S.C. 1970, c. E-10. Section 12 provides that a "witness may be questioned" about prior convictions. It makes no distinction between an ordinary witness and an accused.

Although the majority did hold that trial judges would in future enjoy a discretion to exclude where the mechanical application of the section would lead to injustice, this is no more generous to the accused than the *United States Federal Rules of Evidence*, and arguably less so.¹⁶⁸ Some American authority was referred to, but as the sole dissenting judge suggested, the position in the United States "is not free from controversy."¹⁶⁹ In *Oakes*, the Court cited American law in support of its approach to reverse onus clauses.¹⁷⁰ In *Rahey*, it did so in aid of its interpretation of section 11(b) of the *Charter*, which guarantees accused persons the right to be tried within a reasonable time.¹⁷¹ Other examples could be cited.

IV. CONCLUSION

Still, it is difficult to resist the conclusion that, *Hufsky* excepted, there is a tendency in the Court to cite United States law when it helps or, at least, does not stand in the way of a result it wishes to reach, but not otherwise.¹⁷² Certainly, that is what has been done, thus far, in a number of cases involving traffic stops, line-ups, breath and blood samples, and the use of the accused's prior testimony. Thus, *Therens* makes no mention of *Berkemer*; *Ross* contains no reference to *Kirby*; *Dubois* does not consider *Harrison*; and *Dymont*

¹⁶⁸ See 28 USCS Appendix, *Federal Rules of Evidence*, Rule 609(a). *Corbett*, *supra*, note 167 overrules *R. v. Stratton* (1978), 42 C.C.C. (2d) 449 (Ont. C.A.), which held that the wording of section 12 meant that trial judges had no discretion on this issue.

¹⁶⁹ *Corbett*, *supra*, note 167 at 437.

¹⁷⁰ *Supra*, note 21.

¹⁷¹ *Supra*, note 30. See also *Mills*, *supra*, note 27. These are difficult cases to classify because of the number and variety of the judgments. In *Rahey*, for example, the eight justices delivered four separate judgments on the unreasonable delay issue, and American authority is referred to in only two of them. Basically, the Court appears to have adapted the American precedents for *Charter* purposes. Justice Lamer (Dickson, C.J., concurring) agreed with the United States Supreme Court that a balancing test was needed, but differed "on the elements ... and the factors which are to be weighed in that test." *Ibid.* at 302.

¹⁷² Nor have the dissenters made effective use of American precedent to buttress their views. Moreover, sometimes the American law that is cited is not quite as relevant as it is made to appear. For discussions of *Clarkson* and *Vaillancourt*, see above, sections III.A.1. and III.D., *supra* at 760ff. and 776ff respectively.

ignores *Schmerber*. Again, more examples could be cited, but the latter is especially interesting because *Dymnt* does refer to other, rather peripheral, American authority and because *Schmerber* was referred to by the trial court in that case. Moreover, it had also been cited by one of the Supreme Court of Canada justices in *Beare* just a week earlier.¹⁷³

The Court's somewhat selective approach to United States jurisprudence is matched by its relatively consistent commitment to liberal values. It is true that the Court has not yet extended section 10(b) to cover the full range of Miranda warnings, but by not reading the American limitations on Miranda into the section, the Court has given it a force that, in some important respects, exceeds that of the Fifth and Sixth Amendments.¹⁷⁴ Whereas Miranda is triggered by custodial interrogation, section 10(b) applies whenever an individual is detained. Therefore, Canadian police must warn earlier in the process than their American counterparts. Further, the right to counsel in the Fifth Amendment is confined to protecting the privilege against self-incrimination through testimonial evidence. The warning required by 10(b) is not so limited and is required even where the sole issue is the admissibility of non-testimonial evidence, for example, a breathalyzer certificate. Perhaps, most interesting of all is the Court's willingness to tie sections 8 and 10(b) together. Declaring a search unreasonable because of a failure to advise a detainee of his right to counsel is an idea strange to American jurisprudence. Coupled with this is an increasing divergence between the two Courts, originally very much in line with each other, in their respective approaches to the doctrine of privacy.¹⁷⁵

¹⁷³ See *supra*, notes 108 and 114.

¹⁷⁴ We say "yet," because in practice police routinely advise suspects of their right to silence, and because of the developments referred to in note 62, *supra*, which at the time of writing were still only at the provincial appellate level.

¹⁷⁵ For example, the contrast between *Dymnt* and *Schmerber* and between *Hufsky* and *Prouse*. See above, sections III.B.1. and III.E., *supra* at 32ff. and 48ff. respectively. On the extent to which recent cases in the United States may be seen as narrowing the the Fourth Amendment right to privacy set out in *Katz*, *supra*, note 42, see M. Campbell, "Defining A Fourth Amendment Search: A Critique of the Supreme Court's Post-Katz Jurisprudence" (1986) 61 Wash. L. Rev. 191.

Why this has happened is not clear. The different wording and organization of the *Charter*, coupled with the philosophical orientation of three or four of the justices, are certainly important factors.¹⁷⁶ So, too, is the perception that it was judicial hostility to the 1960 *Bill of Rights* that effectively sterilized that document. Many of today's judges, it seems, have been influenced by nearly three decades of academic and political support for American-style rights review and do not wish to be accused of backing away from the *Charter* in the way many of their predecessors backed away from the *Bill*. As Justice Le Dain put it in the first *Charter* case in which evidence was excluded pursuant to section 24(2):

In considering the relationship of a decision under the Canadian Bill of Rights to an issue arising under the Charter, a court cannot, in my respectful opinion, avoid bearing in mind an evident fact of Canadian judicial history, which must be squarely and frankly faced: that on the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of the Canadian Bill of Rights because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament.¹⁷⁷

This pre- and post-*Charter* contrast is most clearly revealed in the reasons of those judges, such as the present Chief Justice, who had occasion to consider the nature and limits of judicial review before the enactment of the *Charter*. For example, in *R. v. Perka*, the facts of which arose prior to 1982, Dickson, J. (as he then was) wrote that to ask the Court to expand the defence of necessity is "to invite [the judges] to second-guess the Legislature and to assess the relative merits of social policies underlying criminal prohibitions. Neither is a role which fits well with the judicial function."¹⁷⁸ Yet,

¹⁷⁶ See *supra*, note 13 and accompanying text at 733. There have been several retirements and resignations from the Court recently, and a number of important decisions have therefore been rendered by benches of less than the full nine judges. For example, *Ross*, *supra*, note 92 was a 4:2 decision. One justice who heard the case resigned before judgment was given and therefore took no part, and two more have resigned since then. Only three who were in the majority remain on the Court. The impact that new appointees will have upon the Court's jurisprudence is as yet unclear.

¹⁷⁷ *Therens*, *supra*, note 27 at 501. This reticence is discussed *supra*, note 7 and accompanying text at 731ff.

¹⁷⁸ [1984] 2 S.C.R. 232, 14 C.C.C. (3d) 385 at 398. Ironically, the Chief Justice relied upon his reasons in the first, pre-*Charter Morgentaler* case, reported at (1975), 20 C.C.C. (2d) 449 (S.C.C.). He might also have referred to his reasons in *Harrison v. Carswell*, [1976] 2 S.C.R. 200, 25 C.C.C. (2d) 186, delivered in the course of restoring the conviction of a

only a few years later, the Chief Justice joined with his colleagues in striking down the abortion law and the felony-murder rule,¹⁷⁹ declaring that he had "no doubt" that even "disputes of a political or foreign policy nature" were now "cognizable by the courts."¹⁸⁰

There is also a tendency to justify this new approach in terms of what, with respect, is an untenable distinction between policy and law. Justice Lamer, for example, maintained in the *Motor Vehicle Reference* that, although the Court had been given the power to invalidate laws for violating the principles of fundamental justice referred to in section 7, this did not mean that they could "decide upon the appropriateness of policies underlying legislative enactments" or "question their wisdom."¹⁸¹ Yet surely, this is exactly what it means. The power to decide the content to be given to such potentially broad guarantees as "fundamental justice" is considerable, and the Court has not shrunk from it. How, after all, can one can strike down the felony murder rule without "second-guessing" the legislature about the "relative merits of social policies underlying criminal prohibitions"?¹⁸²

picketer for trespass. There, he described the process of weighing property rights against the right to picket advocated by the dissent as raising "important and difficult political and socio-economic issues, the resolution of which must ... be arbitrary and embody personal economic and social beliefs." *Ibid.* at 200.

¹⁷⁹ *Morgentaler and Vaillancourt*, *supra*, note 11.

¹⁸⁰ *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441 at 459.

¹⁸¹ *Motor Vehicle Act Reference*, *supra*, note 16 at 297 (the latter phrase is Chief Justice Dickson's). Justice Lamer ruled that the principles of fundamental justice reflect "objective and manageable standards" that "are to be found in the basic tenets and principles ... of our legal system." *Ibid.* at 299 and 309. He does not refer to the United States Supreme Court's opinion in *Rochin*, *supra*, note 40, but he might well have. There, Justice Frankfurter wrote that the "vague contours of the Due Process clause do not leave judges at large" because the limits of the concept of due process of law "are fused in the whole nature of our judicial process." *Ibid.* at 170. However, he could not define due process "more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice'." *Ibid.* at 173.

¹⁸² Learned Hand made this same point in *The Bill of Rights* (Cambridge, Mass.: Harvard, 1958) at 39. He did not, he wrote, "see how a court can invalidate [a legislative choice of values] without ... declaring whether the legislature's [choice] is what the court would have coined to meet the occasion." He added that judicial rhetoric to the contrary "does not disguise the fact that [the court's choice] is an authentic exercise of the same process that produced the statute."

However, while these considerations may explain why the Supreme Court has not backed away from the liberal and interventionist possibilities presented by the *Charter*, they do not explain why it has occasionally gone well beyond the United States Supreme Court in protecting the interests of the accused, nor why it has usually done so without referring to contrary American precedent. It may be that the justices are overwhelmed by their caseload and simply do not have the time to familiarize themselves with this jurisprudence and its context. It may also be that, in some cases, they have been influenced by developments that were likely, in future cases, to limit the otherwise broad implications of their approach.¹⁸³ Whatever the reasons, proceeding in this fashion means that the "wealth of experience" represented by American law is not being systematically consulted and analyzed.¹⁸⁴ It is, of course, not binding on Canadian courts and, in fact, need not be referred to at all. However, once the general value and relevance of United States law has been recognized, however cautiously, it ought not to be resorted to in a random fashion. The current selective, almost eccentric, use of precedent tends to create the misleading impression that the Court is either rejecting American law that is too liberal or, at the very least, is doing no more for the accused than the Americans do. In fact, in many cases where United States law is cited peripherally or not at all, the Court is doing more.

While only time and a detailed look at the workings of section 1 and the exclusionary rule in section 24(2) will tell, it may be that, in the future, Canadians will no longer be able to point south and, nodding their heads in approval or shaking them in disbelief, ponder

¹⁸³ For example, the majority in *Dyment*, *supra*, note 33 may have foreseen the sort of ruling recently made by the Saskatchewan Court of Queen's Bench in *R. v. Pelletier* (1989), 50 C.C.C. (3d) 22. See above, section III.B.1., *supra* at 760ff. In that case, the validity of the new *Criminal Code* provisions authorizing the taking of blood samples for non-medical purposes was at issue. Matheson, J. invoked section 1 to rule that, even if these sections run afoul of *Dyment*, they constitute a reasonable limit upon the *Charter* rights they violate. Interestingly, *Schmerber*, *supra*, note 64 was cited in support.

¹⁸⁴ The phrase is Chief Justice Dickson's in *Simmons*, *supra*, note 20 at 312.

the liberal rights accorded to accused persons in that country.¹⁸⁵ Instead, Americans may look north with equally divided sentiments, perhaps (dare we suggest it?), even citing Canadian precedent as examples of enlightened progress or confused liberality. In any event, there is no doubt that the Court, even more so than in the period succeeding the abolition of appeals to the Judicial Committee of the Privy Council in 1949, is at last marching to its own constitutional drummer. It remains to be seen how steady a beat this is and whether American courts will take any notice.

¹⁸⁵ However, cases such as *Smith v. R.* (1989), 50 C.C.C. (3d) 308 (S.C.C.), a decision reported after the text of this paper had been written, suggest that retrenchment may have already begun. In *Smith*, an accused who was arrested for a robbery committed some five months earlier decided, due to the lateness of the hour, to wait until morning to call his lawyer. He made it clear that he did not want to talk to the police without his lawyer present, but relented and agreed to speak "off the record" when the police told him a lawyer would just tell him not to talk and that he should set a good example to his children by being honest. Distinguishing both *Ross*, *supra*, note 92 and *Manninen*, *supra*, note 21, a bare majority (4:3) of the Court held that the duty to cease questioning was suspended by the accused's lack of diligence, hence the right to counsel was not violated.

APPENDIX I

SUPREME COURT OF CANADA CRIMINAL LAW CHARTER
DECISIONS INCLUDED IN SURVEY**A. Decisions Citing American Precedent*

- Hunter v. Souham Inc.*, [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97.
R. v. Big M Drug Mart, [1985] 2 S.C.R. 295, 18 C.C.C. (3d) 385.
R. v. Therens, [1985] 1 S.C.R. 613, 18 C.C.C. (3d) 481.
R. v. Spencer, [1985] 2 S.C.R. 278, 21 C.C.C. (3d) 385.
Reference Re Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289.
R. v. Oakes, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321.
R. v. Clarkson, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 207.
R. v. Mills, [1986] 1 S.C.R. 863, 26 C.C.C. (3d) 481.
R. v. Jones, [1986] 2 S.C.R. 284, 28 C.C.C. (3d) 513.
R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, 30 C.C.C. (3d) 385.
R. v. Collins, [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 289.
R. v. Rahey, [1987] 1 S.C.R. 588, 33 C.C.C. (3d) 289.
R. v. Smith, [1987] 1 S.C.R. 1045, 34 C.C.C. (3d) 97.
R. v. Lyons, [1987] 2 S.C.R. 309, 37 C.C.C. (3d) 1.
R. v. Vaillencourt, [1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118.
R. v. Morgentaler, [1988] 1 S.C.R. 30, 37 C.C.C. (3d) 449.
R. v. Hufsky, [1988] 1 S.C.R. 621, 40 C.C.C. (3d) 398.
R. v. Corbett, [1988] 1 S.C.R. 670, 41 C.C.C. (3d) 385.
R. v. Gamble, [1988] 2 S.C.R. 595, 45 C.C.C. (3d) 204.
R. v. Simmons, [1988] 2 S.C.R. 495, 45 C.C.C. (3d) 296.
R. v. Beare, [1988] 2 S.C.R. 387, 45 C.C.C. (3d) 57.
R. v. Dymont, [1988] 2 S.C.R. 417, 45 C.C.C. (3d) 244.
R. v. Mack, [1988] 2 S.C.R. 903, 44 C.C.C. (3d) 513.
R. v. Amway Corp., [1989] 1 S.C.R. 21, 56 D.L.R. (4th) 309.
R. v. Duguay, [1989] 1 S.C.R. 93, 46 C.C.C. (3d) 1.

* For an explanation of the criteria for including cases in this list, and representative examples, see *supra*, note 27 and accompanying text at 731ff.

B. Decisions Not Citing American Precedent

- R v. Krug*, [1985] 2 S.C.R. 255, 21 C.C.C. (3d) 193.
R v. Staranchuk, [1985] 1 S.C.R. 439, 22 C.C.C. (3d) 512.
R v. Dubois, [1985] 2 S.C.R. 350, 22 C.C.C. (3d) 513.
R v. Valente, [1985] 2 S.C.R. 673, 23 C.C.C. (3d) 193.
R v. Mannion, [1986] 2 S.C.R. 27, 28 C.C.C. (3d) 544.
R v. Pohoretsky, [1987] 1 S.C.R. 945, 33 C.C.C. (3d) 398.
R v. Manninen, [1987] 1 S.C.R. 1233, 34 C.C.C. (3d) 385.
R v. Albright, [1987] 2 S.C.R. 383, 37 C.C.C. (3d) 105.
R v. Trask, [1987] 2 S.C.R. 304, 37 C.C.C. (3d) 92.
R v. Tremblay, [1987] 2 S.C.R. 435, 37 C.C.C. (3d) 565.
R v. Dawson, [1987] 2 S.C.R. 461, 38 C.C.C. (3d) 575.
R v. Milne, [1987] 2 S.C.R. 512, 38 C.C.C. (3d) 502.
R v. Baig, [1987] 2 S.C.R. 537, 37 C.C.C. (3d) 181.
R v. Wigglesworth, [1987] 1 S.C.R. 541, 37 C.C.C. (3d) 385.
R v. Cornell, [1988] 1 S.C.R. 461, 40 C.C.C. (3d) 385.
R v. Thomsen, [1988] 1 S.C.R. 640, 40 C.C.C. (3d) 481.
R v. Keyowski, [1988] 1 S.C.R. 657, 40 C.C.C. (3d) 481.
R v. James, [1988] 1 S.C.R. 669, 40 C.C.C. (3d) 576.
R v. Holmes, [1988] 1 S.C.R. 914, 41 C.C.C. (3d) 497.
R v. Thibault, [1988] 1 S.C.R. 1033, 42 C.C.C. (3d) 1.
R v. Upston, [1988] 1 S.C.R. 1083, 42 C.C.C. (3d) 560.
R v. Whyte, [1988] 2 S.C.R. 3, 42 C.C.C. (3d) 97.
Canadian Newspapers Co. v. A.G. Canada, [1988] 2 S.C.R. 122, 43 C.C.C. (3d) 24.
B.C.G.E.U. v. A.G. British Columbia, [1988] 2 S.C.R. 214, 44 C.C.C. (3d) 289.
R v. Jacoy, [1988] 2 S.C.R. 548, 45 C.C.C. (3d) 46.
R v. Schwartz, [1989] 2 S.C.R. 443, 45 C.C.C. (3d) 97.
R v. Strachan, [1988] 2 S.C.R. 980, 46 C.C.C. (3d) 479.
R v. Bernard, [1988] 2 S.C.R. 833, 45 C.C.C. (3d) 1.
R v. Ross, [1989] 1 S.C.R. 3, 46 C.C.C. (3d) 129.
R v. Genest, [1989] 1 S.C.R. 59, 45 C.C.C. (3d) 385.

APPENDIX II

LEGAL RIGHTS IN THE *CANADIAN CHARTER*
AND THE *UNITED STATES CONSTITUTION**Canadian Charter**United States Constitution*

Section 1

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

No counterpart

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.

Fifth Amendment

No person shall ... be deprived of life, liberty, or property, without due process of law.

Section 8

Everyone has the right to be secure against unreasonable search or seizure.

Fourth Amendment

The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Section 9

Everyone has the right not to be arbitrarily detained or imprisoned.

Section 10

Everyone has the right on arrest or detention ...

(b) to retain and instruct counsel without delay and to be informed of that right;

Section 11

Any person charged with an offence has the right ...

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

Section 13

A witness who testifies in any proceeding has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

Fifth Amendment

No person ... shall be compelled in any criminal case to be a witness against himself ...

No counterpart.

No counterpart.

Section 24(2)

Where ... a court concludes that evidence was obtained in a manner that infringed or denied any right or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice of justice into disrepute.

No counterpart.

Section 33

Legislative override allows Parliament or legislature to enact legislation notwithstanding that it may violate sections 2 or sections 7 to 15 of the *Charter* (paraphrase).

No counterpart.