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Constructive Murder and the Charter: In Search of Principle

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CONSTRUCTIVE MURDER AND THE CHARTER: IN SEARCH OF PRINCIPLE

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This article explores the principle of "constructive" murder and how it interacts with the sentencing and the parties sections of the Criminal Code. The authors re-examine these issues in light of the Charter. They conclude that constructive murder has no place in a post-Charter Canada.

I. INTRODUCTION: OLD ISSUES IN A NEW CHARTER CONTEXT

Constructive murder or felony murder[1] as defined in the Criminal Code of Canada has long been considered contrary to the fundamental principle of criminal law that a prohibited act must be accompanied by the requisite *mens rea*. Thus in a general sense it has been considered by both academic commentators and practitioners to be contrary to the principles of fundamental justice in criminal law. Only with the arrival of the Canadian Charter of Rights and Freedoms[2] in 1982 has it been possible to argue that this "fundamental injustice" may render the relevant Criminal Code provisions unconstitutional. Such a Charter challenge to the clearly worded provisions of the Criminal Code directly raises the problem of establishing a proper balance between the role of courts and legislators in the Charter era. The constitutional challenges to constructive murder which form the heart of this article provide an interesting case study in these larger problems of establishing the proper institutional balance in Canadian society.

Before turning to a detailed analysis of the potential conflict between the relevant provisions of the Criminal Code and the Charter, we shall examine briefly the larger institutional context for the debate. Prior to the Charter supremacy of Parliament, as imported from the United Kingdom, was the dominant principle of Canadian constitutional life.[3] The 1960 arrival of the Canadian Bill of Rights[4] did little to subtract from the principle of legislative supremacy because it was statutory in nature and was rarely used to strike down federal laws.[5] Thus with the exception of a few entrenched group rights in the Constitution Act, 1867, the legislators had broad discretion to define the policy content of Canadian laws in areas such as criminal law. So long as the legislators spoke clearly, the role of the Canadian courts was to apply the laws in accordance with the spirit and

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1. Canadian law does not use the term "felony" and felony murder is generally referred to as "constructive murder".
2. Part I of the Constitution Act, 1982 as appended in Schedule B to Canada Act, 1982 (U.K.), c. 11. Hereinafter referred to as the Charter.
3. Supremacy of Parliament which has a long history in the United Kingdom has been imported into Canada by the phrase in the preamble to the Constitution Act, 1867 "a constitution similar in principle to that of the United Kingdom".
4. Appendix III, R.S.C. 1970. Hereafter the Bill of Rights.
5. W. Tarnopolsky, *The Canadian Bill of Rights* (1966) thoroughly canvases the inadequacies of the Bill of Rights.

intent of the provisions. If Parliament felt that provisions on constructive murder were desirable and imposed them in proper statutory form, that was the end of the matter. The wisdom and substantive justice of these provisions were beyond the reach of the courts.

Even since the arrival of the Charter, the Supreme Court of Canada has reaffirmed its reluctance to assess the wisdom of particular legislative or executive acts.[6] Thus an argument that the constructive murder provisions of the Criminal Code are unwise or undesirable cannot succeed in that form. But as Wilson J. suggests in *R.* v. *Operation Dismantle* the courts must now measure legislative and executive acts against the new standards of the Charter.[7] More specifically the courts are now free to evaluate whether the constructive murder provisions offend the principles of fundamental justice in section 7, the presumption of innocence in section 11(d) or, when coupled with the relevant penalty, constitute cruel and unusual punishment as forbidden by section 12. This article emphasizes sections 7 and 11(d) and only considers section 12 as encompassed in the broader section 7 analysis.

An enactment is not contrary to the Charter just because it is harsh or unfair in some general way. The burden on the challenger is to demonstrate at least a *prima facie* violation of a Charter provision. Is there a "principle of fundamental justice" which demands that a criminal act must be accompanied by a relevant or requisite *mens rea* and not just a range of mental states as defined by statute from time to time? Is the effect of the constructive murder provisions of the Criminal Code more extreme than the impugned reversal of onus in *R.* v. *Oakes*?[8] Are there reasonable limits arguments which could save the provisions even if Charter violations are found? These are the central questions to which this article is addressed. Underlying all of them is a tension between courts and legislators in defining criminal conduct.

Before exploring these difficult Charter questions we shall present some general background on the sections of the Criminal Code at issue. The next section will also explore the broader question of what is unfair and unjust about the doctrine of constructive murder. This is a precursor to putting the arguments on the merits of the issue into a constitutional form which the courts can then address under the Charter. Once the inherent problems within the provisions are recognized it will be easier to argue that the relevant sections violate the Charter.

A. THE CONSTRUCTIVE MURDER RULE: SECTION 213(d) OF THE CRIMINAL CODE

1. Introduction

In 1951, James Rowe was convicted of murder and sentenced to hang for the death of Allan Galbraith.[9] Rowe had committed an armed robbery in the city of Windsor and in order to escape, hired a taxi to drive him to

6. *Operation Dismantle Inc.* v. *The Queen* (1985) 3 D.L.R. (4th) 481 (S.C.C.).
7. *Id.* at 504.
8. *R.* v. *Oakes* [1986] 1 S.C.R. 103.
9. *Rowe* v. *R.* [1951] S.C.R. 713.

London, Ontario. By the time the taxi arrived in London, a hundred miles from the scene of the robbery, the Windsor police had still not been notified of the robbery. The taxi driver, on becoming suspicious, drove into a gas station to call the police. Rowe followed the driver to the desk and, when he tried to call the police, Rowe pulled out his gun and ordered everyone into the rear of the station. At no time did Rowe point the gun at anyone. Unfortunately, Rowe slipped on some gasoline causing the gun to go off accidentally. The bullet passed through the door of a room at the rear of the station and killed Galbraith whose presence was completely unknown to Rowe.

Craig and James Munro were two brothers living in Toronto. Both were in dire need of money and decided to rob the manager of a local tavern. James agreed only on the condition that the guns they were to carry would be unloaded. Craig removed the bullets to satisfy his brother but later reloaded the gun without telling James.

The robbery did not go as planned and a long stand off with police ensued in the darkened basement of the tavern. Shots were fired by both sides and one shot fired from Craig's gun hit and seriously wounded a police officer. The brothers got control of the officer and refused to release him. The stand off continued until the emergency task force was brought in. By this time, however, the officer had lost too much blood and died shortly after reaching hospital.

Craig was convicted of murder under s. 213, the constructive murder provisions of the Criminal Code[10] and this was elevated to first degree murder because his victim was a police officer in the execution of his duty.[11] James was convicted of second degree murder because of the combination of s. 213 and s. 21(2) which deals with parties to an offence. The appellate court strongly suggested that the judge had erred in instructing the jury that the murder should be second rather than first degree.[12] The jury was clearly troubled by James' conviction. They asked the judge if he could be sentenced to less than the ten year minimum for second degree murder. On being told that this was not permissible, they recommended mercy.

10. *R.* v. *Munro and Munro* (1983) 36 O.R. (3d) 193 (Ont. C.A.).

11. Criminal Code, R.S.C. 1970, c. C-34, s. 214(4).

12. At issue was s. 214(4) which makes the murder of a police officer first degree. The trial judge had instructed the jury that to apply this section to James, they would have to find that he ought to have foreseen that Craig would use the gun against a police officer in particular. On appeal, Mr. Justice Martin suggested that since the classification into first and second degree murder is simply a sentencing function, there is no requisite mental element — if the victim is a police officer, then the killing is first degree.

The three men in these two examples were all convicted of murder under s. 213(d) of the Criminal Code,[13] Canada's harshest constructive murder provisions.

While all of s. 213 of the Criminal Code is problematic, the emphasis in this paper will be on s. 213(d) as the harshest provision. The two cases described above will be used to illustrate in a factual context some of the main problems with this particular subsection. While this may appear to be a narrow topic, it does raise some of the most fundamental issues in criminal law and the Charter's role in dealing with these issues. A careful examination of the implications of this section will allow us to consider such issues as the reasons for the requirement of *mens rea*, the rationale behind criminal punishment and the relationship between moral blameworthiness and legal culpability.

2. History

The detailed history of what is now s. 213 of the Criminal Code has been thoroughly documented elsewhere and need not be repeated in depth here.[14] However, even a brief overview of this development illustrates how the legislation has become progressively more harsh and how the basic tenets of criminal law have been abandoned.

Prior to the first Criminal Code in 1892, Canada relied on the common law felony murder rule. In its crudest form this rule was thought to stand

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13. Section 213 of the Criminal Code reads as follows:

> Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 76 (piratal acts), 76.1 (hijacking an aircraft), s. 132 or subsection 133(1) or sections 134-136 (escape or rescue from prison or lawful custody), section 246 (assaulting a peace officer), section 246.1 (sexual assault), s. 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm), 246.3 (aggravated sexual assault), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if
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> (a) he means to cause bodily harm for the purpose of
> (i) facilitating the commission of the offence, or
> (ii) facilitating his flight after committing or attempting to commit the offence,
> and the death ensues from the bodily harm;
>
> (b) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (a), and the death ensues therefrom;
>
> (c) he wilfully stops, by any means, the breath of a human being for a purpose mentioned in paragraph (a), and the death ensues therefrom; or
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> (d) he uses a weapon or has it upon his person
> (i) during or at the time he commits or attempts to commit the offence, or
> (ii) during or at the time of his flight after committing or attempting to commit the offence
> and the death ensues as a consequence.

14. *See* P. Burns and R.S. Reid, "From Felony Murder to Accomplice Felony Attempted Murder: The Rake's Progress Compleat?" (1977) 55 *Can. Bar. Rev.* 75; D. Lanham, "Felony Murder — Ancient and Modern" (1983) 7 *Crim. Law J.* 90; W. MacLaughlan, "The Explosive Combination of Forcible Confinement and Constructive Murder: What Are Its Proper Confines?" (1983) 21 *Osgoode Hall L.J.* 701 and J. Willis, "Comment on *Rowe* v. *R.*" (1951) 29 *Can. Bar Rev.* 784.

for the proposition that any killing that took place in the course of a felony was murder. In the late 19th and early 20th centuries, such a rule did not cause great injustice because most felonies were punishable by death and it mattered little to an accused whether he was executed for the killing or for the underlying offence. But even this common law rule had dubious origins. It was thought to have developed through early authorities confusing murder with what is now manslaughter. Any killing that took place in the course of a felony was *unlawful* but not necessarily murder. The judiciary worked actively to curtail the application of the rule so that by the early part of the 19th century there was still more authority against it than in its favour. This being so, Professor Lanham has concluded that,[15]

> the felony murder rule is not a relic of ancient barbarism but an instance of modern monstrosity.

Despite its origins Coke's famous example from the 17th century seemed to survive and formed the basis of the rule in Canada:[16]

> If A shooteth at poultry of B, and by accident killeth a man; if his intention was to steal the poultry, which must be collected from the circumstances, it will be murder by reason of that felonious intent; but if it was done wantonly, and without that intention, it will be barely manslaughter.

The first Canadian Criminal Code was enacted in 1892.[17] The constructive murder provisions were taken from the Draft Code prepared by the English Criminal Code Commission of 1878-79, which was never enacted in Britain. The inclusion of constructive murder in the Draft Code was surprising because Stephen, the author of the two previous drafts, had not included such a provision and in fact had tried as a judge to limit the scope of the common law rule. The Canadian rule, enacted as section 228 of the Criminal Code, was seen as a compromise between those who wanted to retain the harsh common law rule and those who wanted to abolish constructive murder altogether. The common law rule was limited in two significant ways. First the rule was no longer applicable to all felonies but only to those set out in the legislation. Secondly, the Criminal Code specified three types of conduct causing death that would trigger the rule.[18]

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15. *See* Lanham, *id.* at 101.
16. Foster, *Crown Law* (2d ed., 1791) 258.
17. S.C. 1892, c. 29.
18. Section 228 reads as follows:

    1. Culpable homicide is also murder in each of the following cases whether the offender means or not death to ensue, or knows or not that death is likely to ensue:
        (a) If he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in the section mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury; or
        (b) If he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effects thereof; or
        (c) If he by any means wilfully stops the breath of any person for either of the purposes aforesaid, and death ensues from such stopping of the breath.
    2. The following are the offenses in this section referred to: — treason and other offenses mentioned in Part IV of this Act, piracy and offences deemed to be piracy, escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, rape, forcible abduction, robbery, burglary, arson.

Section 228(a), the predecessor of what is now s. 213(a), was the central provision. The mens rea required for this section was i) the intent to commit the underlying offence and ii) the intent to cause *grievous* bodily harm. Grievous bodily harm has been interpreted as requiring very serious bodily harm.[19] Thus one can see that the *mens rea* requirement in s. 228(a) was not very different from that required for intentional or reckless murder. However, in 1953, an amendment was passed, largely without debate, that deleted the word "grievous".[20] Hence the accused need only intend to commit bodily harm which has been interpreted as not requiring serious or permanent harm.[21] This small change in wording increased the departure from traditional *mens rea* principles. Hooper gives an example of how far this provision can go:[22]

> . . . it would (strictly) be murder if X punched Y in the stomach for the purpose of robbing him and Y fell over, hit his head on the sidewalk and died even if the punch itself could have given no more than a temporary ache.

Thus an intent to commit an underlying offence, coupled with an intent to cause bodily harm is transformed into the intent for the most serious offence in our law: murder.

The present s. 213(d), arguably the most draconian provision in the Canadian Criminal Code, did not enter the scene until 1947.[23] It was intended as a response to the growing use of weapons, and especially guns, during the commission of crimes. More specifically it was triggered by discontent over a recent Supreme Court of Canada decision. In *R.* v. *Hughes* [24] the Court had quashed a murder conviction of an accused who had accidentally shot a storekeeper in a struggle while attempting to rob him. The evidence was unclear but suggested that the victim may well have been the one to pull the trigger. The Court held that a murder conviction could not stand because the death was not caused by the voluntary act of the accused. The proper verdict, therefore, was manslaughter. Again with very little debate, Parliament responded with section 269(d) of the Criminal Code which provided that it was sufficient for the offender to use or even have on his person a weapon for the purpose of committing an offence.[25]

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19. *D.P.P.* v. *Smith* [1961] A.C. 290 at 344 (H.L.).
20. S.C. 1953-54, c. 51, s. 202. This change left subsections (b) and (c) largely redundant since any death that took place under these more specific paragraphs could also be subsumed under the broader subsection (a).
21. *R.* v. *Donovan* [1934] 2 K.B. 498 at 508 (C.A.).
22. Hooper, "Some Anomalies and Developments in the Law of Homicide" (1967), 3 *U.B.C.L.R.* 55 at 74-75.
23. Criminal Code, S.C. 1947, c. 55, s. 7.
24. [1942] S.C.R. 517.
25. *Supra*, n. 23 (emphasis added). Section 260(d) provided:

> . . . culpable homicide is also murder, whether the offender means or not death to ensue, or knows or not that death is likely to ensue . . .
>
> (d) if he uses or has upon his person any weapon during or at the time of the commission or attempted commission by him of any of the offenses in this section mentioned or the flight of the offender upon the commission or attempted commission thereof, and death ensues as a *consequence of its use*.

It is apparent that this section was internally incoherent. The words "or has it on his person" are meaningless because in order to trigger the section, death must result as a consequence of the *use* of the weapon. Thus, mere possession without use would not suffice. John Willis, in the classic attack on s. 213(d), decried this incoherence:[26]

> This is more than drastic; it is savage; and what is more it is incoherent. It is savage because it is solemnly proposing to hang an armed robber whose only connection with the death is that he pulled the gun out of his pocket and the gun happened to go off and kill someone while he was at the scene of the crime or departing from it; even if he pulled the gun out to make it safe by taking the bullets out of it, or to throw it away, and it went off and killed someone that would still be murder under the present section 260(d) (now s. 213(d)). It is incoherent because the words "or has it upon his person" are entirely without effect. They were, I do not doubt, added by the Senate to render guilty of murder the armed robber who carried the fatal gun in his pocket but did not "use" it, that is, pull it out. But they are clearly ineffective to do so, for in order that the section may apply at all, the death must ensue as a "consequence of (the) *use*" of the gun. It is not enough that death ensues as a consequence of having the gun upon his person. The section as it now stands is preposterous. It came into being as an end of session compromise between a stubborn Senate, a reluctant Government and a bewildered House of Commons.

The legislation was amended in 1955 and the words "of its use" were dropped from the end of the section.[27] This law would now convict a person of murder even if he did not use the weapon if "death ensued as a consequence" of having the weapon on his person. Thus while the section may now be more coherent, it has become even more savage as a result of the change.[28]

3. The Application of Section 213(d)

(a) The Substantive Provision

With this brief history in mind, let us now turn to consider s. 213(d) and why it is the subject of such harsh criticism. Constructive murder has on occasion been described as the only form of absolute liability murder. However, at least in the Canadian context, this analysis goes too far. The Supreme Court of Canada has made it clear that s. 213(d) requires both the specific intent to commit the underlying offence and the specific intent to use or have upon one's person a weapon.[29] This intent requirement, in the Court's view, precluded any suggestion that s. 213(d) is an absolute liability offence.

Section 213(d) has also been challenged on the basis that it creates a reverse onus clause with regard to the issue of intent and that it therefore

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26. J. Willis, *supra*, n. 14 at 794.

27. S.C. 1953-54, c. 51, s. 202.

28. J. Sedgwick, "The New Criminal Code: Comments and Criticisms" (1955) 33 *Can. Bar. Rev.* 63 at 71. According to Sedgwick:

> This is a far-reaching change. To imagine a case, a man committing one of the named offenses may have a knife in his pocket — unsheathed — which he has no slightest intention of using and which he never draws. In a scuffle it could well happen that the knife pierces his antagonist and inflicts a fatal injury. In these circumstances, because he had the weapon upon his person and death ensued as a consequence, he could be found guilty of murder, although he did not use, and did not intend to use, the weapon.

29. *R.* v. *Swietlinski* (1980) 55 C.C.C. (2d) 481 (S.C.C.). This was a somewhat puzzling decision because the Court held that the accused had to have the specific intent to commit the general intent crime of rape.

violates the presumption of innocence.[30] While s. 213(d) may well violate this presumption, it is misleading to frame the analysis in terms of a reverse onus provision. Section 213(d) does not require the accused to prove or disprove anything. Even if he could establish that he did not intend to hurt anyone, such a showing would be irrelevant to a finding of guilt under s. 213(d). The legislature is not saying that once the intent to commit the underlying offence is established, the intent to kill will be presumed. Rather it is saying that once the underlying offence is proven, we do not care whether or not there was intent to kill. Thus s. 213(d) is more harsh than the reverse onus provisions struck down under s. 11(d) of the Charter because it denies the accused the opportunity to disprove intent.

Section 213(d) lies somewhat between an absolute liability offence and a reverse onus offence in terms of severity. The section substitutes the intent to commit the lesser offence for the intent to kill. Put another way, the section redefines the *mens rea* of murder so that no intent is required for an essential element, namely, the consequence of death, when the death occurs during the commission of a lesser offence. In this sense, s. 213(d) is an absolute liability provision with regard to this particular and crucial element — the element we generally use to define the offence itself. The accused neither has to intend this consequence nor be reckless as to whether it ensues. By way of legislative definition this provision departs from the basic principle of criminal law with respect to *mens rea*.

That this is a drastic departure from our fundamental principles of criminal law can be illustrated by referring back to the landmark Supreme Court decision in *R.* v. *Pappajohn*.[31] In that case, the issue was whether an accused's honest belief that his victim was consenting was a defence to the crime of rape. The Court held that it was. In terms of the present analysis, the Court was saying that when dealing with real crimes, as opposed to public welfare offences, there must be *mens rea* for every element of the offence.[32] The absence of consent is fundamental to the crime of rape and without it no conviction can lie. This principle, however, does not apply in the context of constructive murder. Intent is not required for the most vital element of the offence. As a result, accidental, negligent, reckless and intentional killings are all put on the same footing.

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30. Such a challenge was made in *R.* v. *Bezanson* (1983) 61 N.S.R. (2d) 187 (N.S.S.C. App. Div.). Professor MacKay prepared the appeal factum for this case and argued the leave application at the Supreme Court of Canada. The Court denied leave to appeal.

31. *R.* v. *Pappajohn* [1980] 2 S.C.R. 120.

32. See *R.* v. *City of Sault Ste. Marie* (1978) 40 C.C.C. (2d) 353 (S.C.C.) (per Dickson, J. at 357-58):

> The doctrine of the guilty mind expressed in terms of intention or recklessness, but not negligence, is at the foundation of the law of crimes. In the case of true crimes there is a presumption that a person should not be held liable for the wrongfulness of his act if that act is without *mens rea*: *R.* v. *Prince* (1875) L.R. 2 C.C.R. 154; *R.* v. *Tolson* (1889) 23 Q.B.D. 168; *R.* v. *Rees* [1956] S.C.R. 640, 4 D.L.R. (2d) 406, 115 C.C.C. 1; *Beaver* v. *The Queen* [1957] S.C.R. 531, 118 C.C.C. 129, 26 C.R. 193; *R.* v. *King* [1962] S.C.R. 746, 35 D.L.R. (2d) 386, 133 C.C.C. 1. Blackstone made the point over two hundred years ago in words still apt: ". . . to constitute a crime against human laws, there must be, first, a vicious will; and secondly, an unlawful act consequent upon such vicious will . . ": see *Commentaries on the Law of England* (1809), Book IV, 15th ed., c. 15, p. 21. I would emphasize at the outset that nothing in the discussion which follows is intended to dilute or erode that basic principle.

In the most extreme cases, s. 213(d) can do even more than redefine the *mens rea* of murder. Consider the facts of the *Rowe* case mentioned earlier. Mr. Rowe slipped on some gas and the gun went off accidentally. Recall also the *Hughes* case which led to the earliest form of s. 213(d) in which the victim may have pulled the trigger. In these cases, s. 213(d) can be used to remove the requirement of an *actus reus* for murder as we traditionally know it. The death in *Rowe* was not caused by a voluntary act of the accused. It was not the product of his operating mind.[33] This is even more evident when the victim actually pulls the trigger — the very case for which s. 213(d) was designed in 1947. Thus, conceivably, we can have a murder conviction without either the *mens rea* or the *actus reus* of murder as we traditionally know them. The substitution of a different *actus reus* and *mens rea* for the ones for which the accused will be punished is surely a violation of the fundamental principles of criminal law. The accused should be punished for the crime he or she commits in a factual sense.

(b) Sentencing Aspects

Section 213(d) does not stand alone in the Criminal Code but rather works in conjunction with the other provisions. Before moving on to discuss the Charter, it is instructive to examine how the sentencing provisions of the Code aggravate the injustice done by s. 213(d) standing alone. There are two related problems raised by the sentencing provisions for murder in the Code: first; the use of s. 213 and s. 214(5) to make a constructive murder first degree murder and secondly, the automatic sentences imposed for the crime of murder.[34]

(i) *First and Second Degree Murder* [35]

In Canada there is only one crime of murder. Once the jury finds an accused guilty, it must then go on to classify the murder as being either first or second degree. The classification process is done strictly for sentencing purposes.[36] This is a vital process because first degree murder has a minimum sentence of twenty five years before parole eligibility whereas the minimum penalty for second degree murder is ten years before parole eligibility.[37] The Code sets out certain types of murders (which are deemed more heinous or more in need of deterrence) and these are subject to the harsher penalties for first degree murder. The most widely used provisions are those dealing with "planned and deliberate" murder and those dealing with the killing of police officers or prison guards.

33. See *R.* v. *Rabey* (1980) 15 C.R. (3d) 225 (S.C.C.).

34. It is possible, in light of the language of Lamer, J. in *Reference Re British Columbia Motor Vehicle Act* (1986) 24 D.L.R. (4th) 536 (S.C.C.) regarding absolute offences and mandatory penalties, that the sentencing aspects of s. 213 are a problem. The question of sentencing also raises the possibility of a section 12 Charter challenge.

35. The use of felony murder to elevate a killing to first degree murder has led to problems in the United States. In some states, felony murder is used first to make the murder first degree and then as an aggravating factor in determining whether the death penalty is warranted. *Lockett* v. *Ohio* 98A S.Ct. 2954 (1978) is an example where the felony murder rule as applied to an accomplice did not violate the constitution but its application to the penalty (the death sentence) did.

36. *R.* v. *Farrant* (1983) 32 C.R. (3d) 289 (S.C.C.).

37. Section 669 of Criminal Code.

Constructive murders, however, are usually not premeditated since the killing is rarely planned in advance and the Canadian courts have not gone so far as to say that planning the underlying offence and the use/possession of a weapon in advance is sufficient to constitute premeditation. In other words, the killing itself must be planned and deliberate. Similarly, while the victim of a s. 213(d) killing may be a police officer, this is not always the case. Hence, when the killing is neither planned or deliberate, the Crown needs some additional means by which to elevate a murder to first degree. Such a tool may be found in s. 214(5) of the Code which elevates some s. 213 murders into first degree murders depending on the underlying offence involved.[38] It is apparent that not all of the s. 213 offences are included. The most common s. 213 offence, i.e. robbery, will not lead to a first degree murder conviction.

The choice of offences in s. 214(5) is largely arbitrary. A forcible confinement, for example, can range from a terrorist hostage-taking to a situation like that in the *Farrant* case where a seventeen year old boy took a gun to force his girlfriend to talk to him.[39] As our Code now stands, both of these cases would be treated identically. Similarly, it is difficult to see how the offences listed in s. 214(5) are inherently more dangerous than those in s. 213 which are not included. Is a forcible confinement, for example, always more dangerous than an armed robbery or arson? The sentences imposed for the underlying offences themselves certainly do not reflect this. Robbery which is included in s. 214(5) has a maximum of life imprisonment, whereas the sexual assault provisions of s. 246.1 have a maximum sentence of only 10 years. Another problem with s. 214(5) is that the classification is not based on whether the murder in question was intentional or accidental. Hence the relationship between the classification and the moral blameworthiness of the accused is eroded. A few examples will illustrate this point:

i) An accidental killing during a forcible confinement is treated the same way as an intentional one; both are first degree.

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38. Section 214(5) provided that:

> Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offense under one of the following sections:
>
> (a) section 76.1 (hijacking an aircraft);
> (b) section 246.1 (sexual assault);
> (c) section 246.2 (sexual assault with a weapon, threats to a third party of causing bodily harm);
> (d) section 246.3 (aggravated sexual assault); or
> (e) section 247 (kidnapping and forcible confinement).

The courts have both broadened and narrowed this provision. It has been broadened by holding that forcible confinement need not be the primary offence for the section to operate. For example, if armed robbers in a bank holdup refuse to let the patrons leave the bank, that would be sufficient confinement to satisfy s. 214(5). *See for example, R.* v. *Dollan and Newstead* (1980) 53 C.C.C. (2d) 146 (Ont. H.C.J.); *affd.* (1982) 65 C.C.C. (2d) 240 (Ont. C.A.); leave to appeal denied (1982) 42 N.R. 351 (S.C.C.). It has been narrowed by holding that s. 214(5) only applies to the principal offender and not to parties. This holding is based on the words of the section "when death is caused by *that person*". See *R.* v. *Woods and Gruener* (1980) 19 C.R. (3d) 136 (Ont. C.A.); MacLaughlan, *supra* n. 14.

39. *Supra* n. 36.

ii) An accidental killing during a forcible confinement (first degree) is more serious than an intentional killing during an armed robbery (second degree).

iii) An accidental killing during a forcible confinement is treated the same way as a planned and deliberate murder.

iv) An accidental killing during a forcible confinement is treated as more serious than an intentional, but not planned and deliberate, murder.

Such examples should trouble anyone who believes that we have a morally based system of criminal law.

(ii) *Mandatory Sentences for Murder*

The significance of the classification process can be seen through the second sentencing issue — that of the automatic sentences for first degree murder imposed by s. 669 of the Code. Section 669 was a concession granted to appease those who were against the abolition of the death penalty. When capital punishment was abolished in 1976, the twenty five year minimum before parole eligibility for first degree murder was implemented in its place. The sentencing judge under s. 669 has no discretion whatsoever to tailor the sentence to fit the crime. Thus an accidental killing during a forcible confinement will result in the same twenty five year minimum as does the brutal, intentional and premeditated killing since both are first degree murder. The relationship between moral blameworthiness and punishment is lost.[40]

The second degree murder sentencing provisions are somewhat more flexible in that they give the judge the discretion to set the minimum period before parole at any point between ten and twenty five years. However, the ten year minimum is mandatory and cannot be reduced. As was seen in the *Munro* case, the jury had serious doubts about sentencing James Munro to even that ten year minimum. The discretion that is available in second degree murder is the kind of discretion and flexibility needed to deal with many constructive murder cases. The danger of s. 214(5) is that it takes a large number of cases out of the judge's discretion by rendering them first degree murder.

4. Parties to an Offence

Section 213 should also be considered in the context of the parties provisions of the Criminal Code. The combination of the parties provisions, found in s. 21 of the Code, and section 213(d) results in a further erosion of the basic tenets of criminal law.[41] The parties provisions are

40. *Lockett* v. *Ohio*, *supra* n. 35 held that a statuted that prevented a court from considering mitigating factors on sentencing violated the American Constitution.

41. Section 21(2) reads as follows:

> Where 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 offense, each of them who knew or ought to have known that the commission of the offense could be a probable consequence of carrying out the common purpose is a party to that offense.

See P. Burns and R.S. Reid, *supra* n. 14 for a discussion of the combination of s. 21(2) and s. 213(d). Combinations of felony murder and parties to an offence have been implicitly upheld in the United States. *Lockett* v. *Ohio*, *supra* n. 37. However, the issue was not directly addressed as the case rested on the death penalty in the felony murder context.

complex and need not be described in detail here. The case law has established that to convict someone as a party on the basis of s. 21(2) and s. 213(d) the following elements, using James Munro as an example, are required:

i) that James formed an intent in common with Craig to commit the underlying offence of armed robbery,

ii) that James ought to have known that Craig had a gun on his person which he would use if necessary,[42]

iii) death results as a consequence.[43]

There are at least two fundamental problems with this combination. First, s. 21(2) prescribes an objective test of foresight. It doesn't matter that James did not foresee that Craig would carry and use a weapon so long as he ought to have foreseen it.[44] Secondly, the objective foresight refers to the elements of s. 213(d) rather than to the death itself. There is no requirement that James ought to have forseen that Craig would kill or even do serious harm.[45] It is only necessary that he should have forseen the possession and possible use of a weapon in the robbery. In a sense, we are requiring James to forsee the unanticipated. This takes us two giant steps away from subjective principles of criminal liability: the test for foresight is objective and the objective foresight need not apply to the consequence of death. Thus, someone like James Munro, who only agreed to participate if the guns were unloaded, can be convicted of murder and, if the victim is a police officer, the proper verdict will be first degree murder.[46]

While there are many other aspects of s. 213(d) that are problematic, we will now turn our attention to a consideration of some of the above problems in the context of the *Canadian Charter of Rights and Freedoms*.

II. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

A. SECTION 7

Prior to April 17, 1982, the supremacy of Parliament was the final word in Canada.[47] The legislature was thus free to re-define the *mens rea* for murder in any way it so chose subject only perhaps to the rather weak constraints found in the *Canadian Bill of Rights*.[48] However, the rules of the

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42. The requirement that Craig would use the gun if necessary is not mandated by either s. 21(2) or s. 213(d). It seems to have been taken from an early case in which on the particular facts *use* was foreseen. Lower courts took this case too literally and interpreted it as requiring foresight of "use if necessary" in every case. Several courts have recently acknowledged this error. See *R.* v. *Munro and Munro, supra* n. 10.

43. *R.* v. *Riezebos* (1975) 26 C.C.C. (2d) 1 (Ont. C.A.) and *R.* v. *Munro and Munro, supra* n. 10.

44. James need not foresee that the gun would be loaded.

45. "Use" of a gun does not necessarily require firing the gun. Merely using the gun to intimidate will suffice. See *R.* v. *Munro and Munro, supra* n. 10.

46. *See* n. 12. Unlike s. 214(5), the provision making the murder of a police officer first degree, applies to all parties to the offence.

47. *See* A.W. MacKay, "Fairness After the Charter: A Rose By Any Other Name?" (1985) 10 *Queen's L.J.* 263.

48. See *R.* v. *Appleby* (1971) 3 C.C.C. (2d) 354 (S.C.C.) and *R.* v. *Shelley* (1981) 59 C.C.C. (3d) 292 (S.C.C.).

game have changed and the courts, especially the Supreme Court of Canada, now have a new mandate to scrutinize legislative acts to see if they conform with the principles set out in the Charter.[49]

The Supreme Court of Canada has shown a surprising willingness to strike down both provincial and federal laws under this provision.[50] Thus, s. 213(d) must now be scrutinized in light of the Charter guarantees and the courts, which have long been critics of constructive murder, now have a new tool with which to limit its confines.

Several of the "legal rights" provisions in the Charter could be invoked to attack s. 213(d). Section 11(d) dealing with the presumption of innocence and s. 12 prohibiting cruel and unusual punishment are but two of the more obvious candidates. However, the focus of this article will be on the s. 7 guarantees of the right to life, liberty and security of the person and the right to be deprived thereof only in accordance with the "principles of fundamental justice".[51] In a recent Supreme Court decision, the *Motor Vehicle Reference*,[52] the majority opinion of Mr. Justice Lamer indicated that s. 7 is the broadest of all the legal rights and that it encompasses within it the more specific protections set out in ss. 8-14. Presumably then, anything that could be struck down under one of the more specific provisions could also be struck down under the broader s. 7.

There are basically three steps to the s. 7 analysis. First, one must establish that there has been a deprivation of life, liberty or security of the person; secondly, one must determine whether the deprivation of the right was done in accordance with the principles of fundamental justice; and finally, if there has been a s. 7 violation, one must consider whether the challenged law can be saved by the reasonable limits clause in s. 1 of the Charter.[53]

The first step in the analysis of s. 213(d) seems so obvious that it will not be dealt with here. It is beyond dispute that imprisonment for a s. 213(d) conviction is a deprivation of liberty — in fact it is the most serious deprivation of liberty known in Canadian law. The second step, whether s. 213(d) operates in accordance with the principles of fundamental justice, raises a more difficult question.

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49. Section 52(1) of the Constitution Act, 1982 provides that:

> The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency of no force or effect.

50. A section of the British Columbia provincial Motor Vehicle Act was struck down as contrary to s. 7 in *In the Matter of the Reference Re. Section 94(2) of the Motor Vehicle Act*, *supra* n. 34, referred to as the *Motor Vehicle Reference*. Sunday closing legislation was struck down under s. 2(a) in *R.* v. *Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295. The Court had even shown a willingness to scrutinize Cabinet decisions. See *Operation Dismantle Inc.* v. *Canada*, *supra* n. 6.

51. Section 7 of the Charter provides that:

> 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.

52. *Supra* n. 34.

53. This three step analysis is enunciated by Wilson J. in *Singh* v. *Minister of Employment and Immigration* [1985] 1 S.C.R. 177.

1. The Principles of Fundamental Justice

The recent *Motor Vehicle Reference* case provides us with some guidance on what the principles of fundamental justice include but its boundaries have not yet been established. One important aspect of this case was the manner in which it dealt with the "process/substance" debate which has raged among academics since the enactment of the Charter.[54] Largely as a result of the American experience with "substantive due process" early in this century,[55] the burning issue under s. 7 has been whether courts could look to substantive standards of review to see if a law conformed with the limits in the Charter or whether the principles of fundamental justice referred only to procedural requirements evolving from such concepts as natural justice, fairness and procedural due process. In delivering the opinion, of the majority, Justice Lamer emphasized the extent to which the substance/procedure dichotomy was bound up in problems regarding the legitimacy of constitutional adjudication in the United States and suggested that substantive due process should not be imported into a Canadian context. The issue for Lamer was not whether s. 7 had a substantive or a procedural content, but rather how best to secure for individuals "the full benefit of the Charter's protections".[56] This, in his view, could be achieved without the Court having to delve into the merits of public policy.

He also suggested that a narrow interpretation of the principles of fundamental justice would make it more likely that individuals would be deprived of basic rights. Hence he advocated a broad purposive approach to s. 7. Madam Justice Wilson agreed:[57]

> I have grave doubts that the dichotomy between substance and procedure . . . should be imported into s. 7 of the Charter. In many instances the line between substance and procedure is a very narrow one. For example, the presumption of innocence protected in s. 11(d) of the Charter may be viewed as a substantive principle of fundamental justice but it clearly has both a substantive and a procedural aspect.

Robert Sedler has argued that process and substance are probably best seen as two points on a continuum rather than as two distinct categories. He describes a "borderland" or grey area between the two, where the substance of the legislation is under review but the defect is a procedural one.[58] The constructive murder provisions of s. 213(d) seem to fall within this borderland. While the problems of s. 213(d) could be described as procedural, in terms of the requirements of proof for the Crown, the Supreme Court has now told us that such a categorization is not necessary to secure review under s. 7.

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54. See A.W. MacKay, *supra* n. 47; M. Manning, *Rights, Freedoms and the Courts* (1983); L. Tremblay, "Section 7 of the Charter: Substantive Due Process" (1984) 18 *U.B.C.L.R.* 201 and J. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter" (1983) 13 *Man. L.J.* 455.

55. See *Lochner* v. *New York* 198 U.S. 45 (1905), and *Griswold* v. *Connecticut* 381 U.S. 479 (1965).

56. *Motor Vehicle Reference*, *supra* n. 34 at 546 quoting *R.* v. *Big M Drug Mart Ltd.*, *supra* n. 50 at 344.

57. *Supra* n. 34 at 571.

58. R. Sedler, "Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms" (1984) 59 *Notre Dame L.R.* 577 at 588.

The majority holding in the *Motor Vehicle Reference* is that absolute liability violates the principles of fundamental justice. If one adds to this a deprivation of liberty (as was the case in the B.C. statute) then there is a violation of s. 7. Madam Justice Wilson reached the same result in a somewhat different manner. In her view absolute liability is not *per se* contrary to the principles of fundamental justice. However, when coupled with mandatory imprisonment, then these principles have been violated.[59]

Nonetheless the majority view is not altogether clear on what these principles include. In rather vague language, Mr. Justice Lamer suggested that these principles include the essential elements of our legal system based on the dignity and worth of the human person and on the rule of law. Hence the principles of fundamental justice are the basic tenets or principles of our criminal justice system.[60] In the *Motor Vehicle Reference*, Lamer held that absolute liability violates the fundamental principle that there should be no liability without a guilty mind. This grew out of earlier Supreme Court of Canada case law in which the Court held that there is a generally held revulsion against punishing the morally innocent.[61]

There are two such fundamental tenets that are violated by s. 213(d) — tenets that are basic to our history as a morally based system of criminal law:

i) There must be a convergence or rational relationship between the guilty mind required for an offence, and the actus reus of the offence. The guilty mind requirement set out in the *Motor Vehicle Reference* does not refer to any guilty mind, but rather only to one that is rationally related to the act in question.

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59. It is possible that Madam Justice Wilson misunderstood the sometimes obscure language of the majority judgment. Lamer J. did not say that absolute liability was a *per se* violation of s. 7 but rather that absolute liability is a *per se* violation of the principles of fundamental justice. It is only when this is coupled with a deprivation of liberty tht s. 7 is violated. Lamer J. expands somewhat on his concept of a deprivation of liberty in conjunction with an absolute liability offence, in *Jones* v. *The Queen*, unreported, 9 October 1986 (S.C.C.). Here the imprisonment would be brief and only on default of payment of a fine.

60. *Motor Vehicle Reference*, *supra* n. 34 at 550. There have been similar formulations of the principles of fundamental justice in earlier lower court decisions. For example, in *R.* v. *Morgentaler* (1984) 11 C.R.R. 116 (Ont. H.C.J.) Mr. Justice Parker held that an inquiry into the principles of fundamental justice should begin by examining the rights Canadian have from the common law or statutory sources. If the right in question is not protected by either of these sources, the inquiry should then consider whether the right is "so deeply rooted in the conscience and traditions of our country as to be ranked as fundamental" (at 171). This test does not seem very different from the Lamer test and probably would encompass the principle that there must be a guilty mind related to the actus reus of the offense in order for there to be liability. However, the Parker test is taken largely from the American experience (see *Palko* v. *Connecticut* 302 U.S. 319 at 325) and the Supreme Court has shown reluctance to rely on interpretations from the American jurisprudential context. See, for example, the *Motor Vehicle Reference*, *supra* n. 34 and *R.* v. *Therens* [1985] 1 S.C.R. 613.

61. *R.* v. *City of Sault Ste. Marie*, *supra* n. 32. It is not being suggested that s. 213(d) killers are morally innocent nor that they do not deserve severe punishments. What is being suggested is that they should be punished without sacrificing fundamental principles of our criminal law. As was said by the Michigan Supreme Court in *People* v. *Aaron* 299 N.W. (2d) 304 (1980) at 318.

> While it is understandable that little compassion may be felt for the criminal whose innocent victim dies, this does not justify ignoring the principles underlying our system of criminal law.

ii) The punishment imposed for an offence must fit the crime — there must be a rational relationship between the moral blameworthiness of the accused and the punishment imposed.[62]

Support for the first tenet can be found in the majority opinion of Mr. Justice Lamer in the *Motor Vehicle Reference* while the second tenet flows more from the minority view of Madame Justice Wilson.

The first tenet, that there must be a rational relation between the *mens rea* and *actus reus*, is not a radical suggestion. It is one that merits space in most first year Criminal law courses at law schools. Consider for example the old Irish case of *R.* v. *Faulkner*.[63] Mr. Faulkner had broken into the cargo area of a ship to steal some rum that was stored there. When he got what he came for, he attempted to plug the hole in the cask so that the rest of the rum would not spill out. Foolishly, he lit a match to see what he was doing. The rum caught fire and the entire ship was destroyed. Mr. Faulkner clearly had a guilty mind vis-a-vis stealing the rum and he was properly convicted for this offence. However, he had no guilty mind with regard to the offence of arson and he was thus acquitted on this charge. What this case tells one is that a guilty mind for one crime cannot be extended to make an accused liable for unintended consequences. *Any* guilty intent is not enough — it must be guilty intent with regard to the specific offence with which a person is charged.

Consider also the words of one American commentator which were quoted by the Michigan Supreme Court in abrogating the common law felony murder rule:[64]

> If one had to choose the most basic principle of criminal law in general . . . it would be that criminal liability for causing a particular result is not justified in the absence of some culpable mental state *in respect of that result*.

The Supreme Court of the United States also lends support to this proposition:[65]

> The contention that any injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

The landmark Canadian case on the requirement of mens rea is *R.* v. *City of Sault Ste. Marie*.[66] In that case, Dickson, J. (as he then was) did not have to address the question of whether the *mens rea* had to relate to the particular acts of the crime and its consequences; this was just taken for granted. Hence there are no clear statements deciding the question raised by s. 213(d). However consider the following passage:[67]

> The doctrine of the guilty mind expressed in terms of intention or recklessness but not negligence, is at the foundation of the law of crimes. In the case of true crimes there is a presumption that a person should not be liable for the wrongdoing of his act if *that act* is without *mens rea*.

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62. This could also be raised under s. 12 as a proportionality argument. This seemed to be implicitly accepted in *Lockett* v. *Ohio supra* n. 35.
63. (1977) 13 Cox Crim. Cases 550 (Ireland, Court of Crown Cases Reserved).
64. B.E. Gegan, "Criminal Homicide in the Revised New York Penal Law" 12 *N.Y.L. Forum* 568 at 586 (1966), cited in *People* v. *Aaron*, *supra* n. 61 at 316.
65. *Morissette* v. *United States* 342 U.S. 246 at 250-51 (1952).
66. *Supra* n. 32.
67. *Id.* at 357-58.

Justice Dickson speaks in terms of *mens rea* for the particular act — the act for which the accused is being punished. In the case of s. 213(d) the act refers to the killing.

It is also interesting to note in this vein, Professor Tremblay's formulation of the principles of fundamental justice. In his view, these principles encompass the common law presumptions which were developed by the judiciary to protect fundamental principles of criminal law from erosion by legislatures.[68] One such presumption is that referred to by Dickson J. above: the presumption that the particular act in question shall be accompanied by *mens rea*. While the legislatures were free in the past to rebut such a presumption by clear statutory language, such is not permissible under the Charter if the presumption is part of the principles of fundamental justice.

The Lamer judgment in the *Motor Vehicle Reference* also supports this tenet. The common law developed a presumption against absolute liability because it violates the principle of fundamental justice that an accused must have a guilty mind. But if one considers why the law requires a guilty mind, one can see that the Lamer judgment only makes sense if it is read as requiring the guilty mind to relate to the particular act in question. Why must one have a guilty mind? Because it is repugnant to punish people for things they did not mean to do. Unless we insist that the guilty mind converge with the guilty act, then we may well end up doing just that — punishing people for things they did not mean to do. No one is morally innocent in all respects. Hence we must be talking about moral innocence with regard to the particular offence. To say that some redefined *mens rea* will suffice is not much better than requiring no *mens rea* at all. Both result in punishing people for consequences they did not intend.

The reason why it is so hard to find authoritative statements from the judiciary on this issue is that it is usually assumed that we are talking about the *mens rea* for the particular act. On the facts of the *Motor Vehicle Reference* there could be no other possible *mens rea*. Constrictive murder is the one glaring exception to this premise and prior to the Charter the courts were unable to examine s. 213(d) on this basis. Now, however, where liberty is at stake, the legislature can only re-define *mens rea* within the confines of the principles of fundamental justice. If one accepts that one such principle is that the particular act in question must have *mens rea* then one can see that s. 213(d) violates s. 7.

The first tenet leads one directly into the second tenet, or is perhaps explained by the second tenet. The reason we want a rational relation between the *mens rea* and the *actus reus* is so that we can retain the relationship between the moral blameworthiness of an accused and the punishment imposed.

Madam Justice Wilson, who also spoke in terms of fundamental tenets of our justice system, clearly elucidated this principle:[69]

> It is basic to any theory of punishment that the sentence imposed bear some relationship to the offense; it must be a "fit" sentence proportionate to the seriousness of the offense. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.

68. L. Tremblay, *supra* n. 52.

69. *Motor Vehicle Reference*, *supra* n. 34 at 572.

We would suggest that when Wilson J. says the punishment must bear some relation to the offence, she is referring to the moral gravity of the offence and not to the objective gravity of its consequences. For when talking about just desserts, one cannot escape the concept of morality. An individual is being punished for things he/she meant to do — the things for which he/she is morally blameworthy. This was the whole point of the *Motor Vehicle Reference*; someone convicted under the Act who did not know that his licence had been suspended did not *deserve* imprisonment. It was not fair precisely because there was no moral wrongdoing with regard to the offence. Why else would she stress "the principle that punishment is inappropriate in the absence of moral culpability"?[70] Clearly the s. 213(d) killer is morally culpable. What is not always so obvious, however, is that he is culpable with regard to the particular offence for which he/she is being punished. Surely this moral culpability must be defined in terms of an intention or guilty mind. If we are imposing our most serious punishment for our most serious offence, we should also insist on the most serious intent.

This "fitness" relationship is distorted by the automatic nature of s. 213(d). There is little room for the jury to consider individual circumstances. This is aggravated by the automatic sentencing provisions of s. 214(5) and s. 669 of the Code. The judge has no room to tailor the punishment to *fit* the offence. A system that can impose a twenty five year minimum for an unintentional killing and a ten year minimum for an intentional, but not premeditated one, can hardly be said to be rational. For however bad the accidental killer is, the intentional one is surely worse. This should be reflected in the punishment imposed.

It was this combination of the felony murder rule and the automatic imposition of a penalty found to violate the Eight and Fourteenth Amendments to the American Constitution in *Lockett* v. *Ohio*.[71] The relevant Ohio statute prevented the sentencing judge from considering the mitigating factors such as age and previous record in sentencing. Because the penalty for aggravated murder was execution, this denial of individual treatment was held to violate the Constitution. Burger C.J. speaking for the majority concludes that there might be no violation in a non-capital offence. While there are no capital offences in Canada, it has been recognized in the *Motor Vehicle Reference* that a combination of an absolute liability offence and a mandatory sentence can offend the principles of fundamental justice in section 7 of the Charter. Section 213(d) presents an even more compelling case for judicial activism. There should be a proportionality between the offence and the penalty.

White J. in *Lockett* v. *Ohio* made the following statement about the proportionality of offence and penalty:[72]

> Under these circumstances the conclusion is unavoidable that the infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to contribute significantly to acceptable, or indeed any perceptible goals of punishment.

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70. *Id.* at 566.

71. *Supra* n. 35.

72. *Id.* at 2984.

The lack of proportionality between offence and sentence also caused the essential rationales of felony murder, deterrence and retribution, to flounder. Both a rational theory of deterrence and retributive principles call for some degree of proportionality. In fact the concept of retribution embraces the very notion of fitness. By equating accidental killings with intentional ones this relationship is lost. For as Justice Wilson notes:[73]

> Justice requires that the sanction of imprisonment not be disproportionate to the offence, and humanity dictates that it must not be heavier than necessary to achieve its objective.

Hence we conclude that s. 213(d) does violate two crucial principles of fundamental justice — a convergence between intentions and consequences and a fitness between offences and punishments — and since it results in a deprivation of liberty, it violates s. 7 of the Charter.[74]

B. SECTION 11(d) AND THE PRESUMPTION OF INNOCENCE

Section 11(d) of the Charter provides constitutional recognition for the presumption of innocence.[75] The presumption of innocence is undoubtedly one of the most fundamental tenets in our criminal justice system. In fact this view has led the Supreme Court to hold that the s. 11(d) presumption is also part of the principles of fundamental justice under s. 7. Because s. 11(d) can be subsumed under s. 7 and because most of the s. 11(d) litigation focuses on reverse onus clauses, s. 11(d) will be dealt with in a more limited fashion than was s. 7.

The presumption of innocence has strong roots in the common law. The classic statement was set out in *Woolmington* v. *Director of Public Prosecutions*:[76]

> Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with *a malicious intention*, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

Several Supreme Court decisions indicated that this was the law in Canada. The presumption of innocence applied unless Parliament provided otherwise by statute. The Charter has changed one crucial aspect of Lord Sankey's words. The reference to allowable statutory exceptions no longer applies in Canada. To allow such exceptions would, in the view of the Supreme Court: "subvert the very purpose of the entrenchment of the

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73. Law Reform Commission of Canadian, *Studies on Imprisonment*, Working Paper, 1976, at 10, cited by Madam Justice Wilson at 572 of her minority judgment in the *Motor Vehicle Reference*, *supra* n. 34.

74. A separate consideration of whether constructive murder and the related sentencing provisions violate the protections against "cruel and unusual punishment" in s. 12 of the Charter could also be advanced, but the basic arguments are subsumed in our s. 7 analysis.

75. Section 11 (d) states:

> Any person charged with an offence has the right
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

76. [1935] A.C. 462 (H.L.) at 481-482.

presumption of innocence in the Charter."[77] Thus, Parliament is no longer free to manipulate the presumption of innocence to suit its legislative ends.

The Chief Justice, in *R.* v. *Oakes* [78] indicated that there are at least three aspects to the presumption of innocence: first, the accused must be proven guilty on every element beyond a reasonable doubt; secondly, the state has the burden of proof on every element of the offence; and finally, this proof must be presented in accordance with fair procedures.

Section 11(d) has received a great deal of judicial scrutiny in the context of "reverse onus" provisions.[79] The most frequently litigated provision is s. 8 of the *Narcotic Control Act*.[80] Under this section once the Crown has proved possession of a narcotic, the onus shifts to the accused to prove that he did not intent to traffic. This group of cases provides an interesting point of comparison for s. 213(d) because, as will be shown, s. 213(d) goes even further than does s. 8 of the *Narcotics Control Act*.

Under s. 8 of the *Narcotics Control Act*, once the Crown proves possession, the burden shifts to the accused to disprove the intent to traffic. If under s. 213(d) the Crown only had to prove the underlying offence and the possession of a weapon before the onus shifted to the accused to disprove the intent to kill, Chief Justice Dickson's test regarding the presumption of innocence would be violated.[81] In actuality, the task of the Crown under s. 213(d) is even simpler: once the basic facts are established, the issue of intent to kill will be removed from consideration altogether. The accused does not even get the chance to prove that he did not intend to cause harm for the issue has been rendered irrelevant. Surely Parliament cannot avoid Dickson C.J.'s stringent criteria regarding the necessity of the Crown proving every element of the offence beyond a reasonable doubt simply by removing crucial elements. To do this would entirely subvert the purpose of s. 11(d) of the Charter.

In *Oakes*, Dickson was troubled that a conviction under s. 8 of the *Narcotics Control Act* could take place even when the jury had a reasonable doubt as to the intent to traffic. In constructive murder, a conviction can and should take place when the jury is absolutely convinced that there was no intent to kill or even to cause harm.

Prior to the Supreme Court decision in *Oakes*, lower courts had held that a reverse onus clause could stand up if the basic facts which the Crown had to prove were rationally related to the presumed facts.[82] If one were to analyze s. 213(d) in a manner analogous to reverse onus provisions, one

77. *R.* v. *Oakes*, *supra* n. 8 at 121.

78. *Id.*

79. While in the early *Charter* cases with respect to s. 11(d), the presumption of innocence has become identified with the absence of "reverse onus" provisions, in our view this is only one of the many ways in which the presumption of innocence can be violated.

80. R.S.C. 1970, c. N-1.

81. It is true that in the context of the *Narcotic Control Act* there has been no overt act of trafficking and the entire offence is one of intent only whereas in the constructive murder context there has been an act causing death. However, even this distinction is not always valid. The "act" involved in s. 213(d) killing may not be a voluntary one in the sense that it is not a product of an operating mind. To allow such an act to constitute the *actus reus* of an offence goes against well established principles of the *actus reus* requirement. Similar considerations apply if the victim pulls the trigger.

82. *R.* v. *Oakes* (1983) 145 D.L.R. (3d) 123 (Ont. C.A.).

might ask if the intent to commit the underlying offence and to carry a weapon is rationally related to the intent to kill. Can we assume that an armed robber probably has the intent to kill? By creating a definition of murder which deems that the *mens rea* relevant to the *actus reus* of robbery shall be sufficient proof of the *mens rea* relevant to the *actus reus* of causing death, Parliament has precluded the need for a rational connection to the underlying elements of the offence. The Supreme Court has now told us that a rational connection test linking possession of a drug to the intent to traffic cannot be supported under s. 11(d) for it would result in inadequate protection for the presumption of innocence. The whole spirit of s. 213(d) is that Parliament is purposefully breaking the rational connection between the proven facts and the presumed offence. Surely this must be regarded as an even more serious violation of the presumption of innocence.

C. THE COMBINATION OF S. 213(d) AND S. 21(2) AND S. 11(d) OF THE CHARTER

The Supreme Court of Canada has recently granted leave to hear two appeals from convictions involving s. 213(d): *Vaillancourt* v. *The Queen* and *R.* v. *Laviolette*.[83] However, neither appeal involves this section on its own but rather in combination with the "parties to the offence" provision in s. 21(2) of the Criminal Code. In both cases, the appellants were convicted of constructive murder as a result of being involved in robberies during which an armed accomplice killed someone in the process of carrying out the offence.[84]

The main ground of appeal in both cases is whether the combination of s. 213(d) and 21(2) of the Criminal Code violates the rights of the respective appellants under s. 11(d) of the Charter.[85] Under our present laws, an unarmed accomplice may be held equally guilty of murder when he should have forseen the possible use of a weapon in a robbery.[86] It has been suggested that contrary to the right to be presumed innocent this does not permit an acquittal when there may be a reasonable doubt about the accused's intention "to commit the consequential offence of the princi-

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83. 18963 *Vaillancourt* v. *R.* (Que.) and 19545 *Laviolette* v. *R.* (P.E.I.).

84. In *Vaillancourt*, the Appellant and an accomplice committed an armed robbery at a billiards room. Both were armed with knives but the accomplice also carried a "sawed-off" rifle. The Appellant insisted that this weapon not be loaded and personally removed its bullets. Unknown to him, the accomplice later loaded the rifle again and shot and killed someone during the robbery. The accomplice later fled and was not apprehended. There is a striking similarity to the facts of *R.* v. *Munro*, *supra* n. 10.

In *Laviolette*, the Appellant had been involved in a break and entry of a house with his brother and a third party. The brother carried a heavy metal pipe which he later used to beat into submission, the clergyman who lived in the house. The clergyman died on the scene from the wounds that were inflicted upon him. The facts in this case bear some resemblance to those in *R.* v. *Beazanson*, *supra* n. 30 but this latter case did not involve parties to the offence.

85. In *Vaillancourt*, the appellant also suggests that the combination of the two sections also deprives him of his s. 7 rights by depriving him of his liberty in a manner not in accordance with the principles of fundamental justice. *See Memoire de l'appelant* at 30-34.

86. For a critique of this doctrine of "constructive knowledge" see text accompanying nn. 42 to 45 *supra*.

pal"[87] and thus the assumption behind this position is that in combination, the operation of s. 21(2) and s. 213(d) presents an even more serious infringement of Charter rights than does s. 213(d) on its own.

While we are reluctant to speculate on the results of these appeals, there are certain implications if the above arguments are accepted. If the Court does conclude that the combination of the parties provision and the constructive murder provision constitutes a violation of s. 7 or s. 11(d) Charter rights, they would still be free to reserve judgment on the effect of s. 213(d) standing on its own. Such a decision would permit the fundamental injustice that results from convictions under the constructive murder provision to remain untouched. Thus the constitutionality of s. 213(d) standing on its own may not be resolved by the cases currently before the Supreme Court of Canada. If the Court concludes that the combination of constructive murder and the parties provisions of the Code do not violate the Charter, there is little hope for a challenge to s. 213(d) by itself.

D. SECTION 1 — REASONABLE LIMITS

Once a Charter violation has been established, one must then go on to consider whether the legislation in question can be saved by the reasonable limits clause in s. 1 of the Charter.[88] While some of what will be discussed below refers specifically to s. 7, most of it also applies to s. 11(d). Since we believe the s. 7 challenge is the most likely to succeed, the s. 1 discussion will be focussed accordingly.

The first question is whether s. 1 even applies in the context of a s. 7 violation.[89] Prior to the *Motor Vehicle Reference*, the most common view

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87. *R.* v. *Laviolette* (1985) 55 Nfld. & P.E.I.R. 10 at 11 per MacDonald J. The P.E.I. Court of Appeal dismissed the concept of intention as being irrelevant to both s. 21(2) and s. 213(d). These sections are seen as providing definitions of offences which require no intention. This is an example of extreme deference to legislative intent that marked pre-Charter litigation on felony murder.

88. Section 1 of the Charter states:

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

89. Madam Justice Wilson, in what is a novel approach, suggests that even when a deprivation of life, liberty or security of the person *is* in accordance with the principles of fundamental justice, it must still meet the s. 1 requirements.

> There must first be found an impairment of the right to life, liberty or security of the person. It must then be determined whether that impairment has been effected in accordance with the principles of fundamental justice. If it has, it passes the threshhold test in s. 7 itself but the Court must go on to consider whether it can be sustained under s. 1 as a limit prescribed by law on the s. 7 right which is both reasonable and justified in a free and democratic society. (at 565 of the minority opinion)

This is a somewhat unusual conclusion. Section 1 usually only comes into play when some other section of the Charter has been violated. It would be consistent if Justice Wilson was asserting a two rights theory of s. 7, i.e. that there is an independent right to life, liberty and security of the person regardless of the principles of fundamental justice. However, she does concede that a deprivation in accordance with these principles would meet the threshhold s. 7 test and she does not make clear that she is referring to section 7 *rights* rather than a section 7 *right*.

was that it does[90] although this was by no means unanimous.[91] The contrary argument, put forth most forcefully by Paul Bender, is that in the context of s. 7, the principles of fundamental justice provide the only modifier of the right to life, liberty and security of the person. Any deprivation of these rights not in accordance with such principles could not be a reasonable limit that could be demonstrably justified in a free and democratic society.

This debate was also reflected in the Supreme Court judgments in the *Motor Vehicle Reference*. Madam Justice Wilson, representing the minority view espoused by Professor Bender, held that s. 1 had no application once there had been a deprivation of liberty which was not in accordance with the principles of fundamental justice:[92]

> If . . . the limit on the s. 7 right has been effected through a violation of the principles of fundamental justice, the enquiry, in my view, ends there and the limit cannot be sustained under s. 1. I say this because I do not believe that a limit on the s. 7 right which has been imposed in violation of the principles of fundamental justice can be either "reasonable" or "demonstrably justified in a free and democratic society". The requirement in s. 7 that the principles of fundamental justice be observed seems to me to restrict the legislature's power to impose limits on the s. 7 right under s. 1. It can only limit the s. 7 right if it does so in accordance with the principles of fundamental justice and, even if it meets this test, it still has to meet the tests in s. 1.

The remaining six members of the Court who sat on the case, however, agreed with the Lamer view that s. 1 was applicable. While Lamer J. does make clear that s. 1 applies to s. 7 and does suggest that the burden of proof will be on the party seeking to sustain a limitation,[93] the interests to be balanced under s. 1 remain obscure. In the very recent case of *R.* v. *Oakes*,[94] however, the Court gives us some of the long awaited analysis of s. 1. While *Oakes* dealt with s. 1 in the context of s. 11(d), the findings of the Chief Justice are sufficiently general that they can be applied in the context of all the legal rights.

The most striking aspect of the s. 1 analysis in *Oakes* is the narrow scope given to s. 1 and hence the broad scope given to the Charter rights themselves. Section 1 is the only justification for limiting constitutional rights (other than s. 33), and requires "exceptional"[95] criteria to justify a limit. The Crown must satisfy a "stringent"[96] standard of justification and

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90. See A.W. MacKay, "Fairness After the Charter", *supra* n. 47, in which Professor MacKay supports the view that s. 1 should apply to all the legal rights.

91. Professor Bender, for example, has argued that it is a contradiction in terms to speak of a "reasonable limit" on an unreasonable search, or a "cruel and unusual punishment" that could ever be demonstrably justified as reasonable. He would argue that substantive rights contain their own modifiers and are not limited by s. 1. See P. Bender, "Justification for Limiting Constitutionally Guaranteed Rights and Freedoms: Some Remarks About the Proper Role of Section One of the Canadian Charter" (1983) 13 *Man. L.J.* 669. One of the few lower court decisions to follow this view was *Re Moore and The Queen* (1984) 45 O.R. (2d) 3 (H.C.J.).

92. *Motor Vehicle Reference*, *supra* n. 34 at 565 of the minority opinion. However, Wilson J. seems to be somewhat inconsistent on this issue as she did apply s. 1 to the s. 7 violation in *Singh* v. *Minister of Employment and Immigration*, *supra* n. 53.

93. *Id.* at 561 of the majority opinion. The Chief Justice confirms in *R.* v. *Oakes*, *supra* n. 8 that the burden on the state is the civil standard of a preponderance of probabilities.

94. *Supra* n. 8.

95. *Id.* at 38.

96. *Id.* at 58.

must provide "cogent and persuasive"[97] evidence to justify any limit on constitutional rights.

There are three components to s. 1. The limit must be prescribed by law, reasonable, and demonstrably justified in a free and democratic society. Since it is obvious that s. 213(d) is prescribed by a duly enacted law, that element need not be dealt with here. The Chief Justice in *Oakes* seems to combine the analysis of reasonableness and demonstrable justification using the latter almost as a modifier of the former, i.e. that the word demonstrable puts the onus on the party seeking to uphold the limitation to establish reasonableness.

In determining whether a limit is reasonable and demonstrably justified there are two central criteria: first, the state interest involved must be of sufficient importance to warrant overriding constitutional rights and secondly, the means used to pursue that objective must be reasonable. This examination of means under the second criteria is in essence a proportionality test which can be further broken down into three prongs.

i) The measures must be designed to achieve the objective involved, i.e. the measures must be rationally connected to the objective and not arbitrary, unfair or irrational.

ii) The means must pursue the objective in the least restrictive manner possible — the infringement on constitutional rights must be kept to a minimum.

iii) There must be proportionality between the effects of the limitation and the objective sought. In other words, the more serious the deprivation of rights, the more important the objective must be to justify it. As the Chief Justice cautions:[98]

> Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

These criteria will now be examined in the context of s. 213(d).

1. Objective of Section 213(d)

Parliament had particular purposes for our constructive murder provisions. Justifications come under two general headings: those based on utilitarian grounds and those based on theories of retributive justice. Consideration of these justifications provide a useful backdrop for the evaluation of whether the impugned provisions can be saved as a reasonable limit under section 1 of the Charter.

The utilitarian argument most often put forth to justify s. 213(d) is that of general deterrence. The state has a valid and compelling interest in deterring people from committing serious crimes, especially those involving weapons. However, whether s. 213(d) accomplishes this end is at least open to doubt. There seems to be little evidence that criminals or the public in general are aware that should death occur even by accident during the

97. *Id.* at 40.

98. *Id.* at 42.

commission of an offence the application of s. 213(d) would result automatically in a murder conviction. While the state can try to deter negligent, reckless or intentional conduct as those involved in the underlying offences of s. 213, it seems futile to try to deter purely accidental conduct.[99]

Finally even in theories of deterrence it is necessary to consider the concept of proportionality. The law recognizes that we do not use excessive penalties because they may deter. Drunk driving, for example, is a very serious crime in Canada; one that takes many more lives each year than do constructive murders. Yet we do not impose a mandatory life sentence whenever a death is caused by a drunk driver. Even though such a sentence might help to deter drunk driving, we somehow see it as disproportionate to the wrongdoing of the individual. John Rawls describes the relationship between deterrence and proportionality this way:[100]

> [I]f utilitarian considerations are followed, penalties will be proportional to offences in this sense: the order of offences according to the seriousness can be paired off with the order of punishments according to severity.

According to this criterion, accidental killings could never be put on a par with intentional ones. This point was also considered in relation to the s. 7 violation.

A second utilitarian ground for s. 213(d) is that of expediting conviction. It is urged that we need harsh provisions to deal with those who kill while committing violent crimes. According to this view, it would not be desirable for a bank robber who shoots an innocent bystander to be sentenced only for robbery simply because he did not intend to kill anyone. This justification, however, is largely a red herring since in the vast majority of constructive murders s. 213(d) is not required since it accomplishes little that s. 212, with its intentional, reckless and unlawful object murder, could not. In most cases the only advantage of using 213(d) is that it saves the prosecution from having to prove intent. The only value is prosecutorial expedience. Such expendience is an insufficient basis on which to justify the rule under s. 1.[101]

The other central argument raised in support of s. 213(d) is that of retribution: people committing serious crimes must accept responsibility for all of the consequences of their actions, especially when they carry weapons.[102]

> The rationale of the doctrine is that one who commits a felony is a bad person with a bad state of mind, and he has caused a bad result, so that we should not worry too much about the fact that the fatal result he accomplished was quite different and a good deal worse than the bad result he intended.

However, this argument is also flawed. Theories of retributive justice are based on the notion that the degree of retribution, or punishment, should reflect the moral blameworthiness of the accused. Section 213(d) distorts

99. G. Williams, "Constructive Manslaughter" [1957] *Crim. L. Rev.* 293 at 294.

100. J. Rawls, "Two Concepts of Rules" (1955) 64 *Philosophical Rev.* 3 at 7.

101. *Singh* v. *Minister of Employment and Immigration*, *supra* n. 53 at 218.

102. W. La Fave & Scott, *Criminal Law* at 560.

this relationship by putting accidental and intentional killings on the same basis. The Law Reform Commission of Canada puts this point well:[103]

> This leaves only the argument for retribution: The offender in such cases has only himself to blame: he has to take the consequences. Seductive as it is this will not work because essentially it puts intended and unintended killings on the same footing. It draws no distinction between the bank robber who kills unintentionally and the bank robber who kills on purpose, for instance, to get rid of a potential witness. Yet clearly, however bad the first bank robber's conduct is, the second is worse. This difference in moral gravity should, in our view, be reflected by any morally based system of criminal law. This, not the constructive murder rule, is the corollary of retributive principles.

The above objectives must be evaluated in the context of s. 1 of the Charter. The argument dealing with expedience can be discarded outright. While it may be a valid concern in a strictly regulatory regime, the consequences of a s. 213(d) conviction are just too serious to give this objective much weight. In Mr. Justice Lamer's view in the *Motor Vehicle Reference*:[104]

> Administrative expediency . . . will undoubtedly under s. 1 be invoked and occasionally succeed. Indeed, administrative expediency certainly has its place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s. 7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7 but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like.

Constructive murders, however serious, cannot be classified as an emergency situation in Canada. Note also that Justice Lamer rejected expediency in the context of an offence calling for a minimum seven days in prison. A s. 213(d) conviction results in a minimum ten years and often a minimum of twenty five years in prison.

The deterrence and necessity rationales cannot be dispensed with so summarily. The need to deter violent crimes, and especially those with weapons, is certainly a compelling justification in Canada. Similarly, if there are large gaps in the law, such that a significant number of killers are going free or receiving disproportionately low sentences then the state surely has not only the power but also the duty to fill such gaps — both to punish criminals and to protect society. Just as the Chief Justice found the crusade against the drug problem a compelling objective in *Oakes*, so too is the need to deter violent crimes with weapons and the need to fill any gaps in our existing homicide provisons. The problem with s. 213(d) then, is not that the alleged objectives are invalid, but rather that the means by which those objectives are pursued are not reasonable.

2. Means Used To Pursue Objectives

As noted above, this means inquiry can be broken down into a three-prong proportionality test. Section 213(d) immediately runs into trouble with the first of Chief Justice Dickson's criterion — the requirement that there be a rational connection between the object and the means and that the means not be arbitrary, irrational or unfair.

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103. Law Reform Commission of Canada (1984), *Homicide* Working Paper at 49-50.

104. *Motor Vehicle Reference*, *supra* n. 34 at 561.

Most of the flaws in the deterrence rationale have been addressed above. What is important to stress here is that the Crown will have to show in court that there is a rational relationship between s. 213(d) and deterrence, i.e. that s. 213(d) does in fact work as a deterrent. The burden on this particular issue is not clear from the case law but the Crown would at least have to convince the Court that s. 213(d) probably deters. Given that there is *no* empirical evidence to this effect and given that s. 213(d) murders may be unforeseen, accidental or even a result of the victim's conduct, the Crown has a heavy burden indeed.

Similarly with necessity, the Crown would have to show that there is some need for s. 213(d); that without it some offenders would either go free or not receive sufficiently severe sentences. It has already been suggested that the vast majority of s. 213(d) killers could be convicted of murder under s. 212; the few who could not, probably should not be convicted of murder at all. Nonetheless, virtually all of the remaining accuseds could be convicted of at least manslaughter which carries with it a possible life sentence.[105] There is just no gap in Canada's homicide provisions. The only "need" for s. 213(d) is the need for prosecutorial expedience and as mentioned, expedience has no role in the crime of murder.

Dickson C.J. also considered under this first prong whether the means were arbitrary, unfair or irrational. Section 213(d) seems to be at least arbitrary and unfair. While the central problem is its overinclusiveness, it is under-inclusive and hence arbitrary. The choice of underlying offences in s. 213 is a limited one. Is there something more inherently dangerous about breaking and entering than for example, extortion, assault, child abuse or even drunk driving? An accidental killing during a robbery or during a break and enter will almost certainly result in a murder conviction whereas a killing by a driver, who knowingly drives while drunk and kills, will virtually never even be prosecuted as murder. The extortionist will only be convicted of murder if he kills intentionally or recklessly.

That s. 213(d) can operate unfairly seems to be only a common sense observation. If Mr. Rowe had not slipped on the gas and his gun not gone off accidentally, he would be at worst an armed robber. His fatal slip turned him into a murderer and led to a sentence of death. James Munro insisted that any weapons used be unloaded so that no one would be hurt. Is it not unfair that the proper verdict in his case, according to present law, would be first degree murder?

If s. 213(d) fails to meet the first prong of Dickson C.J.'s test there is, theoretically, no need to consider the other two prongs. However, let us examine them briefly to illustrate that s. 213(d) fails at every juncture.

The second prong of the proportionality test requires that when the pursuit of a state objective involves a limitation on constitutional rights, it must be done in the least restrictive manner such that the infringement on fundamental rights is kept to an absolute minimum. Section 213(d) fails this test abysmally. It brings within its scope far too many situations to be justified in the name of crime control; cases for example where the victim pulls the trigger or where the gun goes off accidentally. By sweeping in both

105. This is in addition to the sentence for the underlying offence which for many of the s. 213 offences is life imprisonment.

accidental and intentional killings, there can be no rational distinctions made on the basis of moral wrongdoing. Even by constructive murder standards, s. 213(d) is "preposterously wide".[106] Professor Stuart explains the fatal weakness in s. 213(d) this way:[107]

> (I)t is too automatic. Legal categories cover very disparate conduct. A robbery may be the highly organized operation of a gang armed with shotguns or one drunk "rolling" another with a club. It seems inappropriate to maintain a rule that a killing in the course of either robbery is automatically *murder*, under subsection (a) as there was an intent to cause bodily harm or under subsection (d) because the accused had a weapon on his person and death ensued as a consequence. The vital issue of whether there was a culpable mind respecting the death is simply predetermined and withdrawn from the jury. In the case of a robber who chooses to use a loaded firearm and kills with it, few would find a murder conviction inappropriate. So too with the arsonist who throws a lighted gas canister into a crowded discotheque. On the other hand, a killing by a robber who has a knife, by a drunk "robber" attacking another drunk with a club, or by the 17-year-old arsonist who set fire to a barn mistakenly believing it deserted, may be more difficult. All these cases would more appropriately be determined by jurors applying sensible criteria rather than by a fixed and harsh rule.

The automatic nature of s. 213(d) is aggravated by the automatic sentencing provisions set out above. Could the Crown not pursue its objective of crime control without removing such crucial determinations from the jury?

Let us finally weigh the seriousness of the deprivation against the importance of the objective. This importance must surely be discounted by the fact that s. 213(d) probably does not serve its objective. The deprivation on rights, however, is substantial. An accused can be convicted and sentenced for the most serious crime known to Canadian law even when he had no intent to commit that offence nor even to cause harm or injury whatsoever. While practically speaking it may make little significant difference because the accused can still receive two life sentences; one for manslaughter and the other for the underlying offence, our system should not be able to sacrifice fundamental principles to do so. There are differences between a murder and a manslaughter conviction: the ability of a jury/judge to take individual circumstances into account, the stigma attached and the chances for parole are all pragmatic considerations from the perspective of the accused. But there is one overriding concern that should trouble anyone concerned with a morally based system of criminal law — if we punish people for the most serious crime, when they did not intend to commit that crime, then the integrity of our justice system and of our society as a whole is weakened if not eroded. We would suggest that it takes a very strong objective to override this limitation — and an objective that is clearly brought about by the means chosen. Section 213(d) can satisfy none of these criteria.

Before leaving this discussion of s. 1, let us look briefly to the situation in other western nations.[108] Constructive murder is largely a North American phenomenon. There are some versions of it in Australia, New Zealand and Scotland but none of these countries has anything approaching the breadth of s. 213(d). The penal Codes of France and Germany have no felony murder provisions. In England, the last vestiges of the common law felony

106. D. Stuart, (1982) *Canadian Criminal Law* at 223.

107. *Id.*

108. This summary is taken from D. Stuart, *Id.* and W. MacLaughlan, *supra* n. 14.

murder rule were abolished by the *Homicide Act of 1957*.[109] Even in the United States the rule has rarely been extended to the flight context. Let us look briefly to the experience of that country to see how the judiciary are consistently seeking to narrow the application of the rule.

There have been several narrowing doctrines developed by the United States courts who have realized that felony murder (the equivalent of constructive murder) is abhorent and should be limited in its application. Courts have recognized that felony murder is "a highly artificial concept that deserves no extension beyond its required application".[110]

The draftsmen of the Model Penal Code have summarized the limits imposed by various American courts:[111, 112]

(1) The felonious act must be dangerous to life.
(2) and (3) The homicide must be a natural and probable consequence of the felonious act. Death must be proximately caused.
(4) The felony must be *malum* in *se*.
(5) The act must be a common law felony.
(6) The period during which the felony is in the process of commission must be narrowly construed.
(7) The underlying felony must be independent of the homicide.

American courts have also required that the trigger be pulled by the actual felon and that the death be reasonably foreseeable. In Canada, foreseeability is totally irrelevant.

Perhaps the leading American case to date is *People* v. *Aaron* [113] decided by the Michigan Supreme Court in 1980. Many American states, including Michigan, relied primarily on the common law felony murder rule to elevate all *killings* in the course of a felony to murder. This was then supplemented by a statute requiring that all *murders* that took place during a felony were to be first degree. Thus the common law rule made any killing a murder and the statute made that murder first degree. Hence accidental killings during a felony were always first degree murders and could, as such, be subject to the death penalty. The Michigan Court abolished the common law felony murder rule. Thus, murders during a felony would still be first degree murders according to the statute but would require an independent finding of *mens rea*. The state would have to establish that there had been a murder with malice. The reasons given by the Court were similar to those dealt with above under s. 7: the principle that criminal liability for some result cannot be imposed unless there was *mens rea* for that result. The Court stated that:[114]

> The most fundamental characteristic of the felony-murder rule violates that basic principle in that it punishes all homicides, committed in the perpetration or attempted perpetration of proscribed felonies whether intentional, unintentional or accidental, without the necessity of proving the relation between the homicide the and perpetrator's state of mind. This is most evident when a killing is done by one of a group of co-felons.

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109. 5 & 6 Eliz. 2, c. 11, s. 1(1).
110. *People* v. *Phillips* 64 Cal. 2d 574 at 582-583 (1966).
111. The reader will recall that in the *Rowe* case, *supra* n. 9, the killing took place over a hundred miles from the scene of the crime and several hours after the crime had taken place.
112. Model Penal Code, (Tentative Draft No. 9, 1959), s. 201.2 cited in *People* v. *Aaron*, *supra* n. 61 at 312-313.
113. *People* v. *Aaron*, *supra* n. 61.
114. *People* v. *Aaron*, *supra* n. 61.

> The felony murder rule completely ignores the concept of determination of guilt on the basis of individual misconduct. The felony murder rule thus "erodes the relation between criminal liability and moral culpability", *People* v. *Washington* 62 Cal. 2d 777.

Thus in conclusion, not only does s. 213(d) fail Dickson's three-prong proportionality test on every element, it is also far more severe than any provisions found in any other free and democratic society. Surely s. 1 cannot be used to uphold so *draconian* a provision.[115]

III. CONCLUSION

The crucial question for the Supreme Court will be whether s. 213(d) violates s. 7 of the Charter since if it does, it is very unlikely that it could be saved by s. 1 given the narrow application the Court has attributed to the limitations clause.

We would suggest that s. 213(d) (and probably the rest of s. 213) does violate s. 7 of the Charter and that it should be struck down under s. 52, of the *Constitution Act, 1982*. Section 214(5) should also fall because it makes distinctions between first and second degree murder on an irrational and arbitrary basis.[116] The Crown can continue to rely on s. 212 murder, the sentence for the underlying crime, and the life sentence for manslaughter to punish unintended killing which occurs in the course of a crime. If we are more careful about who we classify as a first degree murderer, then it may be legitimate to retain the harsh mandatory minimum 25 year sentence for first degree murder prescribed by s. 669 of the Code.

In striking down the common law felony Murder rule, the Michigan Supreme Court summed up its view this way:[117]

> We believe that it is no longer acceptable to equate the intent to commit a felony with the intent to kill, intent to do great bodily harm, or wanton and wilful disregard of the likelihood that the natural tendency of a person's behaviour is to cause death or great bodily harm. . . . Malice requires an intent to cause the very harm that results or some harm of the same general nature. . . . In a charge of felony murder, it is the murder which is being punished. A defendant who only intends to commit the felony does not intend to commit the harm that results. . . . Although the circumstances surrounding the commission of the felony may evidence a greater intent beyond the intent to commit the felony, or a wanton and wilful act in disregard of the possible consequence of death or serious injury the intent to commit the felony, of itself, does not connote a "man-endangering-state-of-mind". Hence, we do not believe that it constitutes a sufficient mens rea to establish the crime of murder.

The *Aaron* Court clearly did not need s. 7 to abolish felony murder. Our own Supreme Court, with the additional tools provided by the Charter, should provide an equally thorough and principled analysis. As stated at the outset, whether the courts will be willing to use the Charter to strike down s. 213(d) of the Criminal Code depends in large measure on how they view their institutional role. The kinds of problems raised by s. 213(d) are those which fall within the general expertise of judges and they should thus not shrink from assessing the challenged section in accordance with the

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115. If the Supreme Court were to strike down s. 213(d), Parliament could always resort to the s. 33 override provisions if it felt the legislation was essential.

116. If all of s. 213 were struck down then s. 214(5) would become meaningless except in cases where intentional killings take place during one of the offences listed in s. 214(5).

117. *People* v. *Aaron*, *supra* n. 61 at 326.

principles of fundamental justice. In concluding that the constructive murder provisions were in violation of Charter the courts would not only be vindicating basic rights but also re-affirming a criminal law based upon the principle of moral blameworthiness. We predict that the courts will rise to the challenge.