LEGAL RIGHTS IN CRIMINAL PROCEEDINGS

Class activities*

Class 1 September 14

Introduction

Rapper Tiny Doo facing long prison sentence over lyrics

*(CNN)*Song lyrics that glorify violence are hardly uncommon. But a prosecutor in California says one rapper's violent lyrics go beyond creative license to conspiracy.

San Diego-based rapper Tiny Doo has already spent eight months in prison, and faces 25 years to life in prison if convicted under a little-known California statute that makes it illegal to benefit from gang activities.

The statute in question is California Penal Code 182.5. The code makes it a felony for anyone to participate in a criminal street gang, have knowledge that a street gang has engaged in criminal activity, or benefit from that activity.

It's that last part -- benefiting from criminal activity -- that prosecutors are going after the rapper for.

Tiny Doo, whose real name is Brandon Duncan, faces nine counts of criminal street gang conspiracy because prosecutors allege he and 14 other alleged gang members increased their stature and respect following a rash of shootings in the city in 2013.

Prosecutors point to Tiny Doo's album, "No Safety," and to lyrics like "Ain't no safety on this pistol I'm holding" as examples of a "direct correlation to what the gang has been doing."

No one suggests the rapper ever actually pulled a trigger.

In fact, Duncan may rap about violence but he's got no criminal record.

Duncan told CNN's Don Lemon he's just "painting a picture of urban street life" with his lyrics.

"The studio is my canvas. I'm just painting a picture," he said. "I'm not telling anybody to go out and kill somebody."

He denied any involvement with any gang but said the prosecution has him concerned about future creative expression.

"I would love to continue to rap," he said. "But these people have you scared to do anything around here."

Prosecutors say lyrics aren't the only evidence they have. At Duncan's preliminary hearing, they presented social media posts that they say prove Duncan is still a gang member.

CNN Legal Analyst Mark Geragos says the district attorney may be trying to send a message "that you shouldn't glorify or glamorize gang activity."

"The problem is you're going to run straight head-on into the First Amendment," he said. "If they don't have anything other than the album, this case I don't think would ever stand up."

Travelers Say They Were Denied Entry to U.S. for Twitter Jokes

As American security agencies increasingly take to Twitter, Facebook and other social networking sites in search of potential threats, two European travelers say the system lacks one important quality: a sense of humor.


Mr. Bryan in a photo from his Twitter page, which has been made private.

The travelers, Leigh Van Bryan and Emily Bunting, said they were detained overnight after arriving in Los Angeles International Airport last Monday, questioned by agents from the Department of Homeland Security, and then sent back on a return flight to Europe. All because Mr. Bryan joked on Twitter that he was going to “destroy America” during his trip — an apparent reference to partying — as well as dig up the grave of Marilyn Monroe — a joke.

“The Homeland Security agents were treating me like some kind of terrorist,” Mr. Bryan, a 26-year-old Irish citizen, said in an interview published in the British tabloid The Daily Mail.

“‘You’ve really messed up with that tweet, boy,’” Mr. Bryan remembered one agent saying, using a more profane expression for messed up.

He was questioned under oath about his postings to Twitter, according to images of a document said to be from the agency. The document, posted by The Daily Mail and quoted by The Sun, appeared to demonstrate a less-than-full understanding of social media by agents explaining the

reason for the questioning:

Mr. Bryan confirmed that he had posted on his Tweeter Web site account that he was coming to the United States to dig up the grave of Marilyn Monroe. Also on his tweeter account Mr. Bryan posted that he was coming to destroy America.

The authenticity of the document could not be independently verified. It was photographed by Small World News Service, an independent British news agency that frequently pays its sources for stories. Mr. Bryan and Ms. Bunting posed together for portraits by the SWNS news agency that appeared in tabloids on Monday, including the Daily Mail and the Sun.

A call to Donald Triner, acting director of the agency office overseeing an initiative on "Publicly Available Social Media Monitoring and Situational Awareness," was directed to the press office.

The Department of Homeland Security provided the following statement, from U.S. Customs and Border Protection, on Monday afternoon:

Based on information provided by the LAX Port Authority Infoline – a suspicious activity tipline – CBP conducted a secondary interview of two subjects presenting for entry into the United States. Information gathered during this interview revealed that both individuals were inadmissible to the United States and were returned to their country of residence.

CBP strives to treat all travelers with respect and in a professional manner, while maintaining the focus of our mission to protect all citizens and visitors in the United States. CBP denies entry to thousands of individuals each year on grounds of inadmissibility, some of which include: improper travel documents, prohibited activities or intent, traveling under the Visa Waiver Program without qualifying for participation in that program, smuggling of contraband or prohibited goods, criminal activity or history, immigration violations such as prior overstay, attempting to gain entry with fraudulent documents or posing as an imposter, and national security concerns, among others.

We recognize that there is an important balance to strike between securing our borders while facilitating the high volume of legitimate trade and travel that crosses our borders every day, and we strive to achieve that balance and show the world that the United States is a welcoming nation.

The Department of Homeland Security and other federal agencies have recently taken steps to improve their monitoring of social media. The Federal Bureau of Investigation said in a document released this month that it was seeking help from developers on an application to scan and scrape information from a variety of public sites and from government terrorism data.

According to the document, the application would have the "ability to instantly search and monitor key words and strings in all 'publicly available' tweets across the Twitter site and any other 'publicly available' social networking sites/forums (i.e. Facebook, MySpace, etc.)" The F.B.I. outlined the goals of its "social media analysis" as:

Detecting potential threats developing threat profiles, outline possible courses-of-action, determine timeframe for action by bad actors, identify and develop tactical picture of the location for threat events, develop intelligence products for counter-measures.

Discussion questions

- Why was Tiny Doo prosecuted? Do you agree with his prosecution? Why or why not?
- Is there a connection between (rap) music and crimes? Does music, e.g. rap and hip-hop, influence crimes? Are listeners influenced to do violence as a result of listening to music?
- What is the tension between free speech and crime control?
- Is there a connection between social media and crimes? Can postings on social media influence the commission of crimes?
- How can police and other criminal justice officers use social media to investigate and solve crimes?
- Can social media postings be used to prevent crimes? What is the danger, if any, of this use?
- Do people mean all that they post on social media? What are the risks, if any, of treating all postings literally?
- Can someone be a victim of a crime committed solely on social media? If so, how?
- Do we rely too heavily on criminal law and the criminal justice system to deal with complex social issues?

When everything is a crime

By George F. Will Opinion writer April 8 THE WASHINGTON POST

What began as a trickle has become a stream that could become a cleansing torrent. Criticisms of the overcriminalization of American life might catalyze an appreciation of the toll the administrative state is taking on the criminal justice system, and liberty generally. In 2007, professor Tim Wu of Columbia Law School recounted a game played by some prosecutors. One would name a famous person — "say, Mother Teresa or John Lennon" — and other prosecutors would try to imagine "a plausible crime for which to indict him or her," usually a felony plucked from "the incredibly broad yet obscure crimes that populate the U.S. Code like a kind of jurisprudential minefield." Did the person make "false pretenses on the high seas"? Is he guilty of "injuring a mailbag"?

In 2009, Harvey Silverglate's book "Three Felonies a Day" demonstrated how almost any American could be unwittingly guilty of various crimes between breakfast and bedtime. Silverglate, a defense lawyer and civil libertarian, demonstrated the dangers posed by the intersection of prosecutorial ingenuity with the expansion of the regulatory state.

In 2013, Glenn Harlan Reynolds, University of Tennessee law professor and creator of Instapundit, published in the Columbia Law Review "Ham Sandwich Nation: Due Process When Everything is a Crime." Given the axiom that a competent prosecutor can persuade a grand jury to indict a ham sandwich, and given the proliferation of criminal statutes and regulations backed by criminal penalties, what becomes of the *mens rea* principle that people deserve criminal punishment only if they engage in conduct that is inherently wrong or that they know to be illegal?

Now comes "Rethinking Presumed Knowledge of the Law in the Regulatory Age" (Tennessee Law Review) by Michael Anthony Cottone, a federal judicial clerk. Cottone warns that as the *mens rea* requirement withers when the quantity and complexity of laws increase, the doctrine of *ignorantia legis neminem excusat* — ignorance of the law does not excuse — becomes problematic. The regulatory state is rendering unrealistic the presumption that a responsible citizen should be presumed to have knowledge of the law.

There are an estimated 4,500 federal criminal statutes — and innumerable regulations backed by criminal penalties that include incarceration. Even if none of these were arcane, which many are, their sheer number would mean that Americans would not have clear notice of what behavior is proscribed or prescribed. The presumption of knowledge of the law is refuted by the mere fact that estimates of the number of federal statutes vary by hundreds. If you are sent to prison for excavating arrowheads on federal land without a permit, your cellmate might have accidentally driven his snowmobile onto land protected by the Wilderness Act.

Regulatory crimes, Cottone observes, often are not patently discordant with our culture, as are murder, rape and robbery. Rather than implicating fundamental moral values, many regulatory offenses derive their moral significance, such as it is, from their relation to the promotion of some governmental goal.

The presumption of knowledge of the law is, Cottone argues, useful as an incentive for citizens

to become informed of their legal duties. Complete elimination of the presumption would be a perverse incentive to remain in an ignorance that might immunize a person from culpability. But "there can be no moral obligation to do something impossible, such as know every criminal law," let alone all the even more numerous — perhaps tens of thousands — regulations with criminal sanctions. The morality of law, Cottone argues, requires laws to be, among other things, publicized, understandable and not subject to constant changes. Otherwise everyone would have to be a talented lawyer, "a result hardly feasible or even desirable."

Overcriminalization, says professor Reynolds, deepens the dangers of "a dynamic in which those charged with crimes have a lot at risk, while those doing the charging have very little 'skin in the game.' " With a vast menu of crimes from which to choose, prosecutors can "overcharge" a target, presenting him or her with the choice between capitulation-through-plea-bargain or a trial with a potentially severe sentence.

Given the principle — which itself should be reconsidered — of prosecutorial immunity, we have a criminal justice system with too many opportunities for generating defendants, too few inhibitions on prosecutors and ongoing corrosion of the rule and morality of law. Congress, the ultimate cause of all this, has work to undo.

Discussion Questions

1) Why do governments want to make "everything a crime"?
2) What are the techniques that governments use to make "everything a crime"? Do a web search and give specific examples.
3) Listen to the song Crime by Najwajean. Is this a crime? If so, what does this crime exemplify?
4) Does this phenomenon take place in Canada? Search online for examples.
5) What is the ham sandwich metaphor? Explain it.
6) What is Michael Anthony Cottone's thesis about mens rea? Why is this a problem?
7) What is the problem with the presumption of the knowledge of the law in today's criminal law landscape?
8) Give examples of Silverglate's thesis that every citizen can commit three felonies a day.
9) Choose a well-known law-abiding citizen and play the game mentioned in Tim Wu's article.
10) Analyze section 163 of the Criminal Code. What is a crime comic? Why is it a crime? Who can commit this crime? Find other outdated offences in the Canadian Criminal Code.
11) Analyze section 126 of the Criminal Code. Do a web search of laws that can fall within the scope of this section.

Class 2 September 21

Criminal Justice Models

1. **Dirty Harry**

    a. Which Criminal Justice model predominates in the prosecutors (D.A.) and in the judge's arguments?

    b. Which Criminal Justice model predominates in the police officer's arguments and actions?

    c. What due process rights has the police officer violated?

    d. Do you agree with the use of the exclusion of evidence here?

2. **10 To Midnight**

    a. Which Criminal Justice model predominates in the police officer's behavior?

    b. What is the police officer's attitude towards the legal system?

    c. Why did he plant evidence?

3. **Curb Your Enthusiasm**

    a. Which Criminal Justice model predominates in the judge’s sentence?

    b. Which Criminal Justice model predominates in the accused’s arguments?

4. Find a short clip online dealing with an aspect of the criminal justice process.

    a. Show or describe the clip.

    b. Analyze the predominant criminal justice models.

5. Read the following article and identify the predominant criminal justice model/s.

US: Sex on the beach lands Florida man more than 2 years in jail

- By Nicole Rojas East Coast Correspondent July 6, 2015 22:20 BST

A 40-year-old Florida man convicted of having sex in a public beach in front of a four-year-old was sentenced to two and a half years in prison on 6 July, a state prosecutor announced. According to Reuters, Jose Caballero was arrested last July at Bradenton Beach in west central Florida for having sexual intercourse with 21-year-old Elissa Alvarez. The couple received complaints from fellow beach-goers after Caballero was found fondling and having sex with Alvarez in the middle of the afternoon. Police stated that the sex act, which reportedly lasted 25 minutes, was witnessed by a four-year-old child and was videotaped by another witness. "I've lived here since 1978 and I go to the beaches, and I've never seen anything like this," the female witness who videotaped the couple said to reporters. As previously reported by **IBTimes UK**, the woman contacted police after the two began to have sex again after taking a dip and a nap. "They laid on the beach and passed out for hours. We thought they were dead," she said. "But when they woke up, they cuddled for a while — then they started into the same thing they did before." The child's mother reportedly asked Caballero to stop, to which he responded confrontationally, Assistant State Attorney Anthony Dafonseca said. Dafonseca said that Caballero's reaction to the mother was factored into the sentence requested. "His judgment was pretty poor," he added. Reuters reported the convicted man previously served nearly eight years in prison for cocaine trafficking. Caballero, who faced as much as 15 years in prison for his latest conviction, and Alvarez were both found guilty of lewd or lascivious exhibition in front of a child, a second-degree felony. Dafonseca said Alvarez was sentenced to time served and is no longer in custody. The couple must both register as sex offenders, Reuters reported.

6. Facebook profile/timeline

Imagine a criminal justice professional, e.g., a police officer, defence attorney, prosecutor, judge, parole officer, etc. Think of his/her personality. Or think of an existing criminal justice professional (real or fictional) you all know.

Identify which theoretical model, i.e., Due Process or Crime Control, he/she is enrolled in.

Build her/his Facebook profile and timeline. The profile should include the information usually posted on Facebook, e.g. favourite music groups, favourite songs, movies, actors, TV shows, etc. You also need to post something on the What's on your mind? section. Additionally, your Criminal Justice professional must become a fan of two existing groups representing his/her views on Criminal Justice. Your chosen Criminal Justice professional has to send a friend request to two other people who you believe your chosen professional would be friends with. You will then present the Facebook profile to the whole class.

Class 3 September 28

Statute of limitations

Read the following articles and focus on the lack of statute of limitations in Canada for indictable offences.

Regan Acquitted

Gerald Regan waited silently for his moment of truth in a Halifax courtroom late last week. He licked his thin lips nervously, an eyelid twitched and his chest rose and fell with shallow breaths as he sat staring at the jury while the clerk read out the eight sex-related charges against the former Nova Scotia premier and ex-federal cabinet minister. Regan hardly reacted when the jury foreman said "not guilty" to the first charge. But the third time he heard those words, the lanky 70-year-old leaned forward expectantly in his chair. He started to stand, after learning he was cleared of the seventh count. And, after the foreman said "not guilty" for the eighth and last time, Regan was upright, fiercely hugging his wife, Carole, perhaps confident, for the first time in five years, that he will remain a free man for the rest of his days. "We are," he told reporters after emerging from the courtroom clutching his wife's hand, "tremendously relieved by the verdict."

It took the jury just eight hours to clear him of the charges - a surprisingly short time for a case that began so publicly in 1993 when the RCMP acknowledged they were investigating allegations of "sexual misconduct" by Regan. His new life cannot begin just yet: he has to be back in court on Feb. 19 to face another charge of indecent assault. And, of course, the Crown could also try to appeal last week's acquittal. But Regan's lawyer, Edward Greenspan - who has always contended that his client was the victim of an unfounded witch-hunt - said the Crown should take its lead from the jury's "loud, clear verdict" and say: "Let's forget about it." He may have a point: clearing Regan on all eight counts of rape, attempted rape, indecent assault and unlawful confinement, involving three women, seemed a stinging indictment of the police investigation that led to the charges. And the verdict was another huge setback for the provincial Public Prosecutions Service, already under fire for its controversial handling of a number of recent high-profile cases.

None of them, though, had the drama of the Regan trial. Greenspan, during his summation, told the jury that the case they had just witnessed "was not a Hollywood story." But he, more than anyone, knew this was a tale that had everything: the tawdry spectacle of a once-powerful man now humbled; the anguish and humiliation of his long-suffering spouse; the public pain of his three middle-aged accusers, repeatedly driven to tears by Greenspan's incessant grilling; and the open animosity between the flamboyant defence lawyer and Adrian Reid, the brooding Crown prosecutor.

There was also drama outside of the courtroom. After the 10 jurors - two were excused during the course of the trial - began their deliberations at precisely 2:25 p.m. last Thursday, a new flood of allegations against Regan appeared in the media. The RCMP's five-year investigation originally turned up 22 women who claimed the ex-premier had assaulted them. Ultimately, the police only felt confident enough to lay 18 charges involving 13 complainants. And last April, when Associate Chief Justice Michael MacDonald threw out charges relating to nine of the women, he slapped a publication ban on their evidence. But it expired once the jurors were sequestered in their Halifax hotel room. Among the previously banned evidence: a legislative page who said Regan assaulted her in his office in 1977, family babysitters who said he indecently assaulted them decades ago, and a reporter who claims he attacked her in his hotel room when she arrived to conduct an interview.

Greenspan, worried that the news would somehow be leaked to the jurors, was already talking mistrial as everyone awaited the verdict. Instead, the case stayed exactly where he wanted it - focused on hard-to-prove, decades-old allegations brought by accusers of varying credibility. The ringing question for the jury was: did the Crown prove its case beyond a reasonable doubt? As the hours passed and the jurors periodically asked the judge for guidance on points of law, it was clear they had their reservations.

The first complainant to take the stand during the trial was a white-haired, primly dressed, 56-year-old grandmother. Speaking quietly, she told of being a 14-year-old virgin who knew nothing about sex when Regan gave her a lift from Halifax to Windsor, where they both lived, one summer day in 1956. As she told it, the strapping 28-year-old lawyer and sports broadcaster pulled off the highway into a deserted gravel pit, locked the car doors and brutally raped her. "He told me that it wouldn't always be like this," she said, in barely audible words, "that some day I would enjoy it."

During cross-examination, Greenspan expounded *his* theory - that her story existed only in the imagination of a desperate woman, from a family that has long been obsessed with Regan. She has never been able to find the gravel pit again, he stressed. The reason, said Greenspan: the woman had trumped up the rape allegation to explain an out-of-wedlock child she had in 1960 - at the age of 18 - by a local hockey player. Greenspan had intriguing ammunition to bolster his case: after Regan became premier of Nova Scotia in 1970, the woman's mother spread rumors that Regan had actually fathered the child. And the complainant's sister later publicly confronted the politician, claiming that she was actually the progeny of Regan and the woman she always believed to be her sister.

Regan's second accuser was also 56 and a grandmother. She told of being a 14-year-old who accepted a lift from Regan at a Windsor skating rink in 1956. According to her story, Regan pulled the car into a wooded area, then tried unsuccessfully to rape her in the backseat. But the defence forcefully attacked her testimony: given the parallels between her testimony and the first complainant's, Greenspan suggested to the jury that the two - who were friends - had simply made the stories up. And he seemed to destroy her credibility by demonstrating to the jury how her allegations had evolved and grown more serious in the years after the police first questioned her in 1993.

The third complainant, who said Regan assaulted her in August, 1969, was much harder to discredit. By then, Regan was leader of the provincial Liberal party and the official opposition, and the accuser was an 18-year-old girl Friday working at party headquarters. One lunch hour, she claimed, Regan asked her to bring a steno pad into his office. She walked in, eyes lowered. When she looked up, she testified, Regan was standing before her with a grin on his face and his erect penis protruding from his unzipped fly. Her next memory was of suddenly being on the floor as Regan tried to pull off her panties. He ejaculated on the carpet, she said, then tossed her $20 for her dress, which he had ripped. The next morning, she testified, she was fired.

A gripping story - even if Greenspan made much of the fact that the woman had previously lied under oath by not admitting that she had falsified school documents some 30 years ago so she could enter Grade 10. Her credibility seemed bolstered by the testimony of now-retired Halifax

policeman David Rent and his wife, Linda, who had lived next door to the complainant's family and told the court of hearing the same story of assault from her that she would, many years later, repeat to the RCMP.

But it was a short-lived victory. Later, in answer to a question from the jurors, MacDonald told them that the policeman's testimony did not, in fact, confirm the assault had taken place. And, by that point, the jury had already witnessed the trial's defining moment - Regan's own appearance on the witness stand. He testified that he did not know two of the complainants and barely remembered the third, and that he and his wife, Carole - they married on Nov. 17, 1956, in Ottawa - had been on their honeymoon when one of the assaults was supposed to have occurred. (Greenspan also introduced old newspaper clippings and memorabilia to back up the claim.)

Later, basking in the not-guilty verdict, Greenspan speculated that humanizing his client by putting him on the witness stand - while his wife and four of his six children sat together in the courtroom - likely helped sway the jury. So, perhaps, did his emotional final speech, in which the attorney asked the jurors to acquit his client and "set him free with his wife and children." When Greenspan finished, Regan and his entire family were in tears - just as they were at the end of the trial after the string of not-guilty verdicts. "We just want to go home and maybe have a drink and something to eat," an elated Regan said. Then, he left the courthouse, his remaining legal problems - for the moment, at least - put aside.

Flamboyance and Victory

Everybody - even those who don't personally know Edward Greenspan - seems to call him simply "Eddie." And, to the eye, there is a warm, cuddly quality to the short, plump, cigar-chomping Toronto lawyer who, during lunch breaks from the Gerald Regan trial, could be glimpsed getting his fix of takeout at the nearby A&W outlet. But the cuddliness disappears when he steps into the courtroom. There, Greenspan shows the toughness that has made him the dean of Canadian criminal defence lawyers. Since taking Regan's case, Greenspan, 54, has threatened to ask Crown prosecutor Adrian Reid to "step outside" over remarks he made during a preliminary hearing. His in-your-face style of questioning reduced middle-aged sexual abuse complainants to tears on the witness stand - and his heartrending call to acquit his client did the same to one female juror. In the end, Greenspan turned the Regan case into a convincing courtroom victory - showing the talents that he has demonstrated with stunning regularity since graduating from Toronto's Osgoode Hall Law School (now part of York University) 30 years ago.

His cases have been varied. Once, he represented Kellie Everts, a 28-year-old burlesque queen charged with presenting an indecent performance. But Everts, who claimed to be a stripper for God, said God had told her that sex was beautiful and urged her to do her act as a method of preaching. "What if God really does talk to her?" Greenspan asked the judge. "Do you want to gamble that she's not telling the truth?" Everts was subsequently acquitted.

Along with the wins, there have been high-profile losses. Greenspan was reportedly paid $1.3 million for his unsuccessful defence of Ontario millionaire Helmuth Buxbaum, convicted in 1986 for hiring a hit man to kill his wife. More often than not, though, the workaholic lawyer

with the encyclopedic memory of legal cases leaves the courtroom victorious. His last big case in Atlantic Canada was his defence of former provincial tourism minister Roland Thornhill, who faced 17 fraud-related charges. After the judge dismissed 14 of the charges, the rest were withdrawn by Nova Scotia's Public Prosecutions Service - the same opponents Greenspan faced in the Regan trial. "I'm feeling pretty damn good," he said after his most recent victory. And, as usual, he had every right to.

Maclean's December 28, 1998.

Regan a victim of matriarchal justice

GEORGE JONAS
National Post

Now that political show trials have gone out of fashion in Moscow, Ottawa has stepped into the breach. In a 5-4 split decision, the Supreme Court of Canada ruled last Thursday that the Crown may proceed against former Nova Scotia premier Gerald Regan on seven counts of alleged sexual offences.

The case against the former premier has a convoluted and troubling history. No woman ever came forward to accuse him. In July, 1993, a political opponent, relying on some information obtained from a CBC-TV show that never aired, filed a complaint with the RCMP. In October the same year, before any charges were laid, the RCMP publicly revealed that Mr. Regan was being investigated for sexual assault.

Revealing such information before laying a charge is against RCMP policy and practice. This became the first of many irregularities in the subsequent investigation and prosecution of the ex-premier. They included a Crown attorney named Susan Potts contemplating "judge shopping" a practice the Supreme Court later called "offensive" and "unacceptable." It also included the prosecution team "homogenizing" its functions with the police and conducting a series of pre-charge interviews with complainants. A Nova Scotia Supreme Court trial judge, Mr. Justice Michael Macdonald, eventually found that at least some of these interviews were designed "to have reluctant complainants change their minds and come forward to lay charges." Even though Ms. Potts was no longer on the Crown's team by the time the Crown preferred an indictment against Mr. Regan, the trial judge felt the prosecution had become tainted. In April, 1998, he employed a Charter remedy for abuse of process to stay nine of 18 charges against the ex-premier. Mr. Regan went on trial on the remaining nine counts. Defended by the criminal lawyer Eddie Greenspan and his associate Marie Henein, he was acquitted of all charges by a jury on Dec 18.

The Crown appealed Mr. Justice Macdonald's decision to stay nine charges against Mr. Regan. The judge called the charges minor, which they no doubt were, not just compared to charges of rape, attempted rape, and forcible confinement of which the jury had acquitted the ex-premier, but in absolute terms They consisted of allegations of Dr. Regan -- a 60s-style Liberal politician -

- stealing a kiss or "copping a feel" some 24 to 34 years earlier. At the time they occurred (assuming they did) people would have viewed them as churlish rather than criminal.

Societal attitudes change. The same strong-arm tactics on ice that in the days of a Gordie Howe or Bobby Hull were unremarkable, might draw a criminal charge of assault today. One may regard this as progress (as Greenspan pointed out in court), but it would still be nonsensical to charge Gordie Howe with assault today on the evidence of a 20-year-old hockey video.

The quality of the Crown's evidence was illustrated by one complainant, who first recollected only a stolen kiss in 1969. Later she became "99.9%" sure that Mr. Regan also touched her breast over her clothes. It was such 99.9% certainties that the prosecution was proposing to turn into 100% criminal convictions.

In spite of this, in a split (2 to 1) decision, the Nova Scotia Court of Appeal had reinstated the nine charges. Two of them were subsequently dismissed by the prosecution. What the Supreme Court's majority dismissed last Thursday was Mr. Regan's appeal from the Nova Scotia Court of Appeal's judgment.

There was no disagreement between the majority and the minority of the court that the police and the prosecution had abused the process to a "troubling" extent. The dispute was over how much abuse should the process take in a good cause.

"[S]ociety has a strong interest in having the matter adjudicated," wrote Mr. Justice LeBel for the majority, "in order to convey the message that if such assaults are committed they will not be tolerated, and that young women must be protected from such abuse.

"I conclude that, based on the evidence of judge shopping, pre-charge Crown interviews, the improper police announcement the cumulative effect of these actions, while troubling in some respects, does not rise to the level of abuse of process which would offend the community's sense of decency and fair play."

But the abuse clearly offended the sense of decency and fair play of six Canadian judges. It caused the trial judge to throw out nine charges, and five justices (in two appeal courts) sided with him. For the dissenters, Mr. Justice Binnie wrote: "It was [the trial judge's] view, after an 18-day hearing, that Crown prosecutors had manifested such a lack of objectivity in seeking the conviction of a prominent politician 'at all costs' as to taint the integrity of the administration of justice in Nova Scotia. We ought to defer to his actual conclusions, in my opinion."

The majority insisted that the removal of Ms. Potts from the prosecutions team cured all possible defects. This was puzzling in the face of a well-established legal precept, annunciated (among others) by former Ontario Chief Justice Charles Dubbin, that the "executive is indivisible" -- e.g., removing a cop from a police investigation for tampering with evidence won't cleanse the evidence.

Torn between its distaste for some of Ms. Potts' tactics, and admiration for the same tactics bolstering feminist policy objectives -- the prosecution team under Crown Potts parleyed four

charges of sexual misdeeds, as recommended by the initial director of public prosecutions, into 18 charges against a prominent male defendant -- the majority seemed to waver between wanting to see Ms. Potts disbarred and receiving an Order of Canada. This gave the court's reasons for judgment a somewhat split personality.

A SEXUAL ALLEGATION REDUCES ANY MAN TO A TERRORIST SUSPECT

Ultimately there were two differences between the court's majority and minority. The first was that the majority (Chief Justice McLachlin and Justices L'Heureux-Dubé, Gonthier, Bastarache and LeBel) preferred policy to fairness, while the dissenters (Justices Iacobucci, Major, Binnie and Arbour) favoured fairness over policy. Wrote Mr. Justice LeBel: "Victims of sexual assault must be encouraged to trust the system and bring allegations to light." Responded Mr. Justice Binnie: "The appellant [Mr. Regan] was deprived of the institutional protection to which he was, and is, entitled."

The second difference lay in the two factions' understanding of "societal interest." The dissenters felt society itself had an interest in fairness; the majority saw fairness as being of interest only to the accused.

Between the lines of the majority's reasons was the unmistakable message that the matriarchy means business; that a feminist justice system cares mainly about empowering women, and that in Canada's gender wars an allegation of a sexual nature by any woman, no matter how minor, unsupported, or distant in time, reduces any man to a terrorist suspect, an unlawful combatant, to whom the Geneva conventions no longer apply.

The political nature of the judgment has been celebrated by those who support the politics. "The Supreme Court has shown a willingness," crowed a Globe and Mail editorial last week, "to make the legal system more responsive to the victims of sexual assault."

I think the willingness the majority of the court has shown is to achieve a policy objective at the expense of procedural fairness. This also seems to be the view of six out of 13 Canadian judges. But, as the old judicial maxim warns, "policy is an unruly horse." Putting policy ahead of procedure can turn a system of justice into a reign of terror.

We're not quite there, but getting close. The chances of a male accused of a sexual offence receiving a fair trial in Canada's matriarchal justice system is better than the chances of a Jew receiving a fair trial in Nazi Germany, but only just. One crucial difference is that, unlike the Third Reich, Canada is not yet monolithic. We still have some common-sense jurors, spirited defence teams and a few dissenting judges.

Discussion questions

1) Why isn’t there a statute of limitations for indictable offences? Do you think there should be one?

2) What are the problems of prosecuting cases that took place decades ago?
3) What are the problems of not prosecuting cases that took place decades ago?
4) Discuss the Gerald Regan case.
5) Do an online search of another Canadian case where a defendant was prosecuted for crimes committed years before the criminal trial. What happened? What were the challenges of the case?
6) Do a web search about the allegations of rape against Bill Cosby in the United States. What happened? What are the legal problems? Can these case be tried now in the United States? Why? Why not?
7) What does George Jonas' mean by matriarchal justice? Discuss his thesis. Do you agree or disagree with his thesis?

Double Jeopardy

1. John robbed a bank and killed a security guard. John was tried for robbery. He was convicted and sentenced. Then he was tried for murder for the killing of the security guard.
2. John went to a bank with a gun. He demanded the teller for all the cash. The teller was scared and handed John $ 6000. He was tried for theft and was acquitted. Then he was tried for possession of a weapon in the bank.
3. John joined a terrorist group in the United States and killed a Canadian citizen on US soil. He was tried and convicted in the United States for murder. He was tried for joining a criminal organization in Canada.
4. John and Paul robbed a bank. They brought only one gun to use. It is not clear whether John or Paul brought the gun. A security guard was killed and a bank teller was injured with the gun. In a first criminal trial for the guard's murder, it was decided that John did not use a weapon at all in the bank. There is a second criminal trial for assault against the bank teller. The Crown wants to introduce circumstantial evidence that John injured the teller with the gun.
5. The defendant has been charged with murder. His situation looks dire, there is circumstantial evidence that places him at the scene of the crime, even though there is no eye witness to the murder. The victim's widow has provided the police with information that the defendant had a fight with the deceased on the night of the murder and threatened

him. She heard this as she passed the open door of his study, and got a good look at the defendant. A few minutes later she heard a gunshot. She immediately rang the police, who arrived five minutes later and questioned the defendant who was found walking nearby. There is no forensic evidence to point to the perpetrator, but the circumstantial evidence is pretty strong. At the trial, under cross examination, the widow is confronted with information that she never revealed to the prosecution - although she previously stated that she arrived home at 8p.m, a few minutes before the gunshot (also heard by a neighbour), in fact she arrived home twenty minutes later. This was confirmed by the automatic toll charged to her account on the freeway near her home. At the end of the day there is reasonable doubt and the defendant is found not guilty. A week later, an informant tells a member of the homicide squad that the former defendant and the widow have been seen in the back row of a movie, kissing and cuddling. The police realize that they have been duped - clearly the widow had a prior relationship with the defendant, and most probably the defendant knew her car had been date stamped on the freeway. The Crown wants to prosecute the defendant again.

6. Robin has been convicted of armed robbery and is now charged, in a second prosecution, with robbery for the same transaction. Suppose that armed robbery carries an eight-year sentence and robbery a five-year sentence.
7. John was prosecuted for the murder of his lover Mary. He was acquitted. Mary's parents filed a torts lawsuit for wrongful death claiming $1,000,000.
8. John, a real estate lawyer, was prosecuted and convicted for fraud. He served three months in prison. After he was released from prison, the Law Society disbarred him for committing fraud in the same transaction for which he was convicted and served time in prison.
9. John, a real estate lawyer, was prosecuted and convicted for fraud. He served three months in prison. After he was released from prison, he applied for a teaching position at a community college. His application was turned down because he had a criminal record.
10. John had an obsessive fixation with his co-worker Betty. He asked her out repeatedly, and she always turned him down. John was furious and threated to kill her if she did not agree to go out with her. Betty called the police. John was charged with criminal harassment, which is defined as intentionally, knowingly, or recklessly harassing another

person through prohibited conduct, which consists of (i) repeatedly following, (ii) repeatedly communicating, or (iii) threatening the victim or any member of their family. At trial John was tried convicted and sentenced for criminal harassment. He is serving two months in prison plus a 6-month probation sentence. John is now prosecuted for uttering threats against Betty, which is punished in section.

11. John hit Paul in the face. John had a cardiac condition and died immediately. John was prosecuted for murder. John was acquitted. At a second trial, John was prosecuted for assaulting Paul.
12. John hit Paul in the face. John had a cardiac condition and died immediately. John was prosecuted for murder. John was acquitted. At a second trial, John was prosecuted for manslaughter.
13. John hit Paul in the face. John had a cardiac condition and died immediately. John was prosecuted for murder. John was acquitted of murder, but the jury found John guilty of manslaughter.
14. John raped Mary. John was prosecuted for sexual assault. John was acquitted. The Crown appealed the acquittal. The Court of Appeals ruled there was a legal error and ordered a new trial.
15. John raped Mary. John was prosecuted for sexual assault. The jurors did not reach a unanimous verdict. The Crown decided to prosecute John again before a new jury.

Arrest and detention scenarios

1. A police officer is investigating the theft of some laptop computers from Northern Ontario College. She believes that Katie, a part-time student may know the identity of the offender. Katie does not seem to want to cooperate with the investigation. So, the police officer arrests her.
2. A police officer arrests Fred because he posted on Facebook that he wants to punch his friend Barney in the face because Barney is sleeping with Fred's girlfriend.
3. A police officer arrests Fred because he posted on Facebook that he wants to kill his friend Barney because Barney is sleeping with Fred's girlfriend.

4. A police officer arrests Fred because he is about to kill Barney. The police officer does a frisk search, and finds a gun. He takes the gun as evidence.
5. A police officer arrests Bob because he has a hunch that Bob has killed Tom. The police officer does a frisk search, and finds a gun. He takes the gun as evidence.
6. Vanessa is accused of committing fraud in her mortgage loan application. She received a summons to appear in court on March 2. On March 2 she has a test at school; and she completely forgot about her court trial. The police showed up in school and arrested Vanessa.
7. Melissa has just committed trespassing, which is a crime punished only summarily. A police officer arrests Melissa.
8. A police officer believes that Peter has raped Mary. He arrests Peter.
9. Kevin told a police officer that he saw Peter rape Mary. The police officer arrests Peter.
10. Kevin told a police officer that his dad had told him that Peter raped Mary. The police officer arrests Peter.
11. Kevin told a police officer that Peter had raped Mary. The police officer is sure Kevin is lying because he knows that Kevin hates Peter. The police officer arrests Kevin.

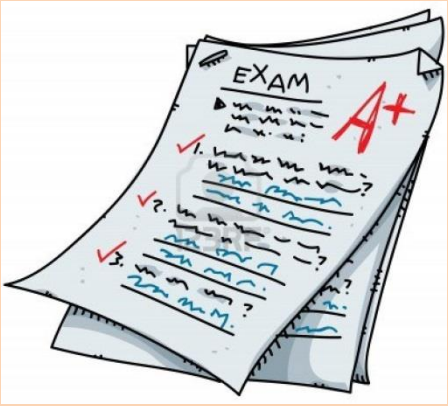
Class 4 October 5

Preparation for presentations

Review for Test

Class 5 October 19

Test



Class 6 October 26

Trial Outline

Right to a speedy trial

Read the following Supreme Court cases

R. v. Askov [1990] 2 S.C.R. 1199

Appellants were charged with conspiracy to commit extortion in November 1983. A, H and M were also charged with several related offences and detained in custody for almost six months before being released on recognizances. G was released on a recognizance shortly after his arrest. All counsel agreed on a date early in July 1984 for the preliminary hearing, but it could not be completed until September. A trial was then set for the first available date, in October 1985. The case could not be heard during that session, and was put over for trial to September 1986, almost two years after the preliminary hearing. When the trial finally began, appellants moved to stay the proceedings on the ground that the trial had been unreasonably delayed. The trial judge found that the major part of the delay following appellants' committal stemmed from institutional problems and granted the stay. The Court of Appeal found: (1) no misconduct on the part of the Crown; (2) no indication of any objection by the appellants to any of the adjournments; and (3) no evidence of any actual prejudice to the appellants. It accordingly set aside the stay and directed that the trial proceed.

Held: The appeal should be allowed and a stay of proceedings directed.

Per Dickson C.J. and La Forest, L'Heureux-Dube, Gonthier and Cory JJ.: Under s. 11(b) of the Charter, any person charged with an offence has the right to be tried within a reasonable time and this right, like other specific s. 11 guarantees, is primarily concerned with an aspect of fundamental justice guaranteed by s. 7. The primary aim of s. 11(b) is to protect the individual's rights and to protect fundamental justice for the accused. A community or societal interest, however, is implicit in the section in that it ensures, first, that law breakers are brought to trial and dealt with according to the law and, second, that those on trial are treated fairly and justly. A quick resolution of the charges also has important practical benefits, since memories fade with time, and witnesses may move, become ill or die. Victims, too, have a special interest in having criminal trials take place within a reasonable time, and all members of the community are entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. The failure of the justice system to do so inevitably leads to community frustration with the judicial system and eventually to a feeling of contempt for court procedures.

The court should consider a number of factors in determining whether the delay in bringing the accused to trial has been unreasonable: (1) the length of the delay; (2) the explanation for the delay; (3) waiver; and (4) prejudice to the accused. The longer the delay, the more difficult it should be for a court to excuse it, and very lengthy delays may be such that they cannot be justified for any reason. Delays attributable to the Crown will weigh in favour of the accused. Complex cases, however, will justify delays longer than those acceptable in simple cases. Systemic or institutional delays will also weigh against the Crown. When considering delays occasioned by inadequate institutional resources, the question of how long a delay is too long may be resolved by comparing the questioned jurisdiction to others in the country. The comparison of similar and thus comparable districts must always be made with the better

districts, not the worst. The comparison need not be too precise or exact; rather, it should look to the appropriate ranges of delay in determining what is a reasonable limit. In all cases it will be incumbent upon the Crown to show that the institutional delay in question is justifiable. Certain actions of the accused, on the other hand, will justify delays. A waiver by the accused of his rights will justify delay, but the waiver must be informed, unequivocal and freely given to be valid.

Here, the delay of almost two years following the preliminary hearing was clearly excessive and unreasonable. The Crown did not show that the delay did not prejudice the appellants, and nothing in the case was so complex or inherently difficult as to justify a lengthy delay. This trial was to be heard in a judicial district notorious for the time required to obtain a trial date and figures from comparable districts demonstrate that the situation there is unreasonable and intolerable.

R. *v.* Morin [1992] 1 S.C.R. 771:

On January 9, 1988 the accused was charged with impaired driving and with operating a motor vehicle while having a blood alcohol level which exceeded the legal limit. She was released from custody that same day on a promise to appear. When she appeared in Provincial Court on February 23, her counsel explicitly requested "the earliest possible trial date". The trial was set for March 28, 1989. In response to a query from counsel as to whether this was "the earliest date", the presiding justice answered a simple "yes". On her scheduled trial date the accused brought a motion to stay the proceedings pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*, arguing that the 14[frac12]-month delay in bringing her to trial infringed her right to be tried within a reasonable time under s. 11(*b*) of the *Charter*. The motion was dismissed and the accused was convicted on the "over 80" charge. A stay was entered with respect to the impaired driving charge for unrelated reasons. On appeal, the summary conviction appeal court also stayed the "over 80" charge on the basis that the accused had not been tried within a reasonable time. The Court of Appeal allowed the Crown's appeal and restored the conviction.

Held (Lamer C.J. dissenting): The appeal should be dismissed.

Per La Forest, Sopinka, Stevenson and Iacobucci JJ.: The primary purpose of s. 11(*b*) is the protection of the individual rights of accused persons: (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial. The right to security of the person is protected by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

A secondary interest of society as a whole has also been recognized by this Court. This interest is most obvious when it parallels that of the accused: society as a whole has an interest in seeing that citizens who are accused of crimes are treated humanely and fairly. There is, as well, a societal interest that is by its very nature adverse to the interests of the accused: there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with

according to the law.

The general approach to a determination of whether the s. 11(*b*) right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which inevitably lead to delay. The factors to be considered are: (1) the length of the delay; (2) waiver of time periods; (3) the reasons for the delay, including (a) inherent time requirements of the case, (b) actions of the accused, (c) actions of the Crown, (d) limits on institutional resources and (e) other reasons for delay; and (4) prejudice to the accused. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial.

An inquiry into unreasonable delay is triggered by an application under s. 24(1) of the *Charter*. While the applicant has the legal burden of establishing a *Charter* violation, an evidentiary burden of putting forth evidence or argument on particular factors will shift depending on the circumstances of each case. A case will only be decided by reference to the burden of proof if the court cannot come to a determinate conclusion on the facts presented to it. An inquiry into unreasonable delay should only be undertaken if the period is of sufficient length to raise an issue as to its reasonableness. A shorter period of delay will raise the issue if the applicant shows prejudice, as for example if the accused was in custody. If by agreement or conduct the accused has waived any part of this time period, the length of the period of delay will be reduced accordingly.

All offences have certain inherent time requirements which inevitably lead to delay. As well as the complexity of a case, all cases are subject to certain intake requirements and some cases must pass through a preliminary inquiry before reaching trial. The court will also need to consider whether the actions of either the accused or the Crown have led to delay. These latter two factors do not assign "blame" but simply provide a convenient mechanism by which the conduct of the parties may be examined.

In considering the explanation for delay, account must be taken of the limits of institutional resources. Institutional delay runs from the time the parties are ready for trial and continues until the system can accommodate the proceedings. The weight to be given to this factor must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay. There is a point in time after which the Court will no longer tolerate delay which results from resource limitations. An administrative guideline may be used to assess the acceptable period of time to be allotted to this factor. This guideline is neither a limitation period nor a fixed ceiling on delay. It must not be applied in mechanical fashion but must yield to other factors when required.

It is appropriate for this Court to suggest a guideline of between 8 and 10 months for institutional delay in Provincial Courts. A guideline with respect to institutional delay after committal for trial in the range of 6 to 8 months was suggested in *R. v. Askov*, [1990] 2 S.C.R. 1199, and is still apposite. The application of the guideline will be influenced by the presence or absence of prejudice. The greater the prejudice, the shorter the acceptable period of institutional delay. These guidelines are intended for the guidance of trial courts generally, and will no doubt require

adjustment by trial courts to take into account local conditions. They will also need to be adjusted from time to time to reflect changing circumstances. The court of appeal in each province will play a supervisory role in seeking to achieve uniformity subject to the necessity of taking into account the special conditions of different regions in the province. The application of these guidelines is subject to review by this Court to ensure that the right to trial within a reasonable time is being respected.

Prejudice may be inferred from the length of the delay. The longer the delay, the more likely that such an inference will be drawn. In circumstances in which prejudice is not inferred and is not proved, the basis for the enforcement of the right is seriously undermined. The purpose of the right is to expedite trials and minimize prejudice and not to avoid trials on the merits. Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that must be considered.

In this case the delay of 14[frac12] months is sufficient to raise the issue of reasonableness. Since the parties appeared to be prepared for trial from some time in March 1988 and the trial was not held until March 1989, an institutional delay of about 12 months was involved. In the jurisdiction in which this case arose, a period in the order of 10 months would not be unreasonable for systemic delay given the rapidly changing local conditions. The accused led no evidence of prejudice and little or no prejudice is inferred from the delay as the accused appeared to be content with the pace of litigation. In view of the strain on institutional resources and the absence of any significant prejudice to the accused, the delay in this case was not unreasonable. This conclusion is reached without the necessity of relying on the burden of proof.

Per McLachlin J.: The task of a judge in deciding whether proceedings against the accused should be stayed is to balance the societal interest in seeing that persons charged with offences are brought to trial against the accused's interest in prompt adjudication. The first step is to determine whether a *prima facie* case for unreasonable delay has been made out. Here such matters as length of delay, waiver and the reasons for the delay fall to be considered. If the *prima facie* case is made out, the court must proceed to a closer consideration of the accused's right to a trial within a reasonable time, and the question of whether it outweighs the conflicting societal interest. While the interest of society in bringing those charged with criminal offences to trial is of constant importance, the interest of the accused varies with the circumstances, and is usually measured by the fourth factor -- prejudice to the accused's interests in security and a fair trial. In this case the accused was able to establish a *prima facie* case, but failed to show that protection of her interest in a prompt trial or the ancillary public interest in prompt justice outweighed the public interest in bringing her to trial.

Per Gonthier J.: The reasons of Sopinka J. were concurred in. As underlined by McLachlin J., the decision as to whether a stay should be granted must rest on a balancing of the prejudice suffered by the accused and the societal interest in bringing the accused to trial. In this case the prejudice to the accused which can be inferred was minimal and is outweighed by the societal interest in bringing her to trial.

Discussion questions

1) Summarize and analyze the two Supreme Court cases dealing with speedy trials.
2) What was the impact of Askov?
3) What was the impact of Morin?
4) Why is it important to have speedy trials?
5) What are the consequences for defendants if they have to wait long periods of time to begin their trials?
6) What are the consequences for prosecutors if they have to wait long periods of time to begin a criminal trial?
7) Discuss the speedy trial right in the United States (6th Amendment). How does it differ from the Charter right in Canada?

Right to a Public (Open) Trial

1) Do members of the public have a right to attend criminal trials in Canada? Is this right absolute? If not, what are the limitations?
2) What is exclusion? How does it work?
3) Do members of the media have a right to attend criminal trials in Canada? Do they have the right to publish everything they hear in the trial?
4) Should criminal trials be televised? Why or why not? What are the pros and cons of televising criminal trials?
5) What about criminal trials and the rights of media outlets in the United States?
6) What are the negative consequences, if any, of public criminal trials?
7) What are publication bans?

Class 7 November 2

Evidence

Watch the following video clips and identify instances where there are grounds for objections.

Class 8

November 9

Search and seizure

Scenarios

1. Julian had a fight with his wife over Brooke Shields. So, she kicks him out. Julian packs up some of his stuff and crashes at his friend's house. The following morning, Julian goes out for a walk. While he is out, the police officer asks Alejandro (Julian's friend) if they can search Julian's stuff. Alejandro says he does not mind. He adds that he does think that Julian would mind. The police officers search Julian's stuff and they find a prohibited weapon.
2. The police obtained a search warrant for a gun at Bert's house. The warrant is legal and complies with all requirements. The police do the search at Bert's house. They did not find the gun, but they found some prohibited narcotics hidden under Bert's mattress. They seized the narcotics as evidence.
3. The police obtained a search warrant for a gun at Bert's house. The warrant is legal and complies with all requirements. The police do the search at Bert's house. They did not find the gun, but they saw some prohibited narcotics on the kitchen's table. They seized the narcotics as evidence.
4. A police officer stops Valerie and demands a breath sample because he suspects that she has just committed an impaired driving offence.
5. The police see James standing at a bus stop on a downtown street, in an area where there is extensive drug dealing. The officers ask James if they can look in his bag and he says yes. They open the bag and find drugs.
6. After Tyler checks out of a hotel, the cops ask the manager to turn over the contents of the trash can, where they find notes planning a murder.
7. A student tells the principal that Julia, another student, is selling drugs on school grounds. The principal opens Julia's locker with a master key, finds drugs, and calls the cops.
8. The police let Sarah's ex-boyfriend into her house to search for drugs. He finds marijuana in her desk drawer, which he gives to the police.

9. Chris is stopped for going 52 in a 45 mph zone (with no other reason). The police search the backseat of his car and find a gun.
10. Ray is seen shoplifting at the mall. Police chase him home and arrest him down the street from his house. They search the house without a warrant and find a lot of stolen car stereos.
11. The cops get a tip from an informant that Juan has counterfeit money. The police get a warrant, and find the money right where the informant said it would be.
12. The police suspect Tiffany is receiving stolen goods. They go to her house and ask her roommate if they can search the house. Her roommate says yes, and the police find stolen items in Tiffany's dresser.
13. Ontario's Safe Street Act (1999) gives police the authority to arrest aggressive panhandlers and squeegee kids without a warrant. Do you think this law violates the rights of Canadians not to be arbitrarily detained or arrested?

Restorative Justice

Discussion Questions

- What crimes should be susceptible of being addressed through restorative justice?
- Would you include sexual assault offenses?
- Who should refer a case to RJ? For what offenses?
- What social actors should be present in the restorative justice processes?
- Would you set certain standards for the RJ process or would you let the community, offenders and victims decide in each case?
- What should be the requirements for referrals to RJ?
- One of the main problems in the RJ programs across Canada is discrimination. What specific measures can you think of to deal with this problem?

Halloween scenario

You are hired to give opinion on what to do with this case.

- Would you advise that the girls be formally charged or referred to Restorative Justice? Other?
- Suppose your opinion is to refer to RJ. You have to help the mediator prepare for mediation. What is the outline of the mediation? What are the main steps? Who should attend? Why?
- What are the main issues that the girls can raise? What can they argue? What are their reasons for the behaviour?
- What are the main issues that Larry David may raise? How does he feel? What is his wife's position?
- Can you outline the content of a possible reparation plan?

Class 9 November 16

Sentencing

Sentencing scenarios

Scenario 1

Fred Cooper persuaded his 18 year old son, Simon, to rob a liquor store. Fred carried a gun. They stole $180 from the store and when they ran away, they were arrested. Fred has sexually and physically abused his son for over a decade. He also abused his wife, who had committed suicide a few weeks before this robbery.

Fred Cooper and his son were only convicted for the robbery. Fred Cooper was never prosecuted for sexual abuse or any other crime.

344. Every person who commits robbery is guilty of an indictable offence and liable (a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and (b) in any other case, to imprisonment for life.

Scenario 2

George, sessional lecturer, who has a crush on Lindsay Lohan, recently wrote a letter to her confessing his love. Last Tuesday George travelled to Ottawa to give a presentation on Criminal Justice at Carleton University. While he was giving the talk, he thought he saw Lindsay Lohan in the audience. So, he stopped his talk immediately, walked up to her, and kissed her passionately. The woman, who bears only a slight resemblance to Lindsay Lohan, pushed him off and called 911 from her cell phone. George was arrested, prosecuted, and convicted him for sexual assault. His case was tried as an indictable offence.

271. (1) Every one who commits a sexual assault is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Scenario 3

Robert Latimer killed his intellectually and physically disabled 120year old daughter, Tracy, by placing her in a pick up truck and asphyxiating her with exhaust fumes. He killed her so that she would not suffer any longer. He was convicted for second degree murder, which carries a mandatory minimum sentence of life imprisonment with eligibility of parole in ten years.

Scenario 4

Adrian Poffley, 26, from Kitchener, Ontario, was arrested and charged with making a death threat against Michael Jackson. He was accused of sending an email to the courthouse in Santa Maria, California, on Aug. 16, hours before Jackson was to appear there. The note touched off heightened security at the site. Authorities quickly traced the note back to Poffley.

Every one who commits the offence of uttering threats (a) is guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Discussion Questions

- Do you agree with the US Supreme Court decision?
- Would you introduce sentencing guidelines in Canada as in the USA? Should sentencing guidelines be mandatory or advisory?
- What would you change about the Canadian sentencing system?
- What circumstances should the courts consider and what measures could it take with regard to Aboriginal offenders?
- Would you include mandatory minimum sentences?

January 12, 2005

Supreme Court Rules Judges Are Not Bound by Sentencing Rules

By LINDA GREENHOUSE

WASHINGTON, Jan. 12 - The Supreme Court transformed federal criminal sentencing today by restoring to judges much of the discretion that Congress took away 21 years ago when it put sentencing guidelines in place and told judges to follow them. The guidelines, intended to make sentences more uniform, should be treated as merely advisory in order to cure a constitutional deficiency in the system, the court held in an unusual two-part decision produced by two coalitions of justices.

In the first part, five justices declared that the current guidelines system violated defendants' rights to trial by jury by giving judges the power to make factual findings that increased sentences beyond the maximum that the jury's findings alone would support. That portion of the opinion had been widely anticipated, growing directly out of a similar conclusion the same five justices - John Paul Stevens, Antonin Scalia, David H. Souter, Clarence Thomas, and Ruth Bader Ginsburg - reached last June in invalidating the sentencing guidelines system in the state of Washington.

The real question hanging over the case, which the court granted on an expedited basis over the summer and heard in October on the opening day of its new term, was how the justices would solve the problem. So it was the second part of the decision - the remedy - that was the surprise and that, going forward, will shape the continuing debate over sentencing policy. With Justice Ginsburg joining the four justices who dissented from the first part - Stephen G. Breyer, Sandra Day O'Connor, Anthony M. Kennedy, and Chief Justice William H. Rehnquist - a separate coalition said the problem coould be fixed if the guidelines were discretionary rather than mandatory. Judges "must consult" the guidelines and "take them into account," Justice Breyer said for the majority in this portion of the decision. But at the end of the day the guidelines will be advisory only, with sentences to be reviewed on appeal for "reasonableness." Justice Breyer's solution to the problem was not intuitively obvious - in fact, no party in the case had suggested it - and at its heart lay a paradox. In a series of intensely disputed rulings beginning with Apprendi v. New Jersey in 2000, the court has held that under the Sixth Amendment right to trial by jury, judges cannot impose sentences beyond the "prescribed statutory maximum" unless the facts supporting such an increase were found by a jury beyond a reasonable doubt.

The constitutional cloud over federal criminal sentencing therefore derived from the mandatory nature of the guidelines, which instruct judges to consider various facts, like the defendant's leadership role in a criminal enterprise, and to increase sentences accordingly beyond the usual range. But all nine justices agreed that the defendant's Sixth Amendment right is not implicated by a system in which judges simply use their discretion, advised by guidelines but not bound by them. Hence the paradox: the Sixth Amendment's protection vanishes as judges gain more power.

Parole

1. What was the offender convicted for?

2. What are the elements of this offense?

3. Do you agree with the line of questions?

4. Would you have asked different questions? What types of questions?

5. Would you grant parole? Why? Why not?

6. If you decided to grant parole, what conditions would you impose?

7. If you decided to deny parole, what goals would you set for the offender to achieve for the new parole hearing?

8. Do you believe that the parole process is arbitrary?

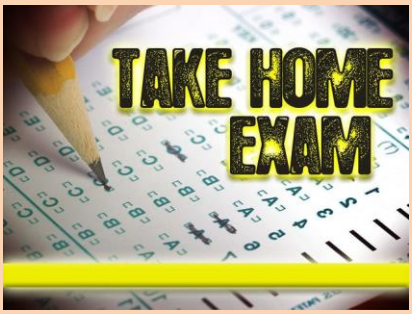
9. Do you favour the appointment of non-Criminal Justice professionals to grant or deny parole? Do you prefer Criminal Justice professionals?

10. Would you have laws or guidelines to regulate the parole hearings? If so, what kind of regulations?

11. Do you think that the government acting through the Criminal Justice system has the right to rehabilitate and change people?

Class 10 November 23

Distribution of final take-home exam



*** TRIGGER WARNINGS**

Some materials in this course may be sensitive. Course materials, including lectures, class activities, hypotheticals, scenarios, examples, court cases, and films shown in class, may have mature content, including violent, sexual, and strong language content. Except for newspaper articles and court cases, all class activities are hypothetical and fictitious. Any resemblance to actual persons, institutions, or events is purely coincidental. The views and opinions expressed in the articles assigned for reading in this course are those of the authors and do not necessarily reflect the position of the course professor. Questions, follow-up questions, examples, and comments made within the context of class activities do not purport to reflect the opinions or views of the course professor. All such articles, comments, questions, examples, and activities are meant solely to facilitate the discussion and study of Law. They are not meant to advocate or promote any crime or unlawful action. Neither are they meant to advance any ideological perspective. Discretion advised before signing up for this course.