1982

Criminal Law -- Statutory Interpretation -- Use of Parliamentary Debates -- Comparison of Roles of Judge and Historian -- Homicide -- Provenance of the Code Sections on Homicide -- Codification of General Principles of the Common Law

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of Canadian programming would be lost".\(^{28}\) As regards regulatory needs:

\ldots\ regulation is feasible only when the regulatory body has complete control over all the instruments of broadcasting. The CRTC would have no control at all over the nature and content of the US programming carried by satellites [if such signals were allowed].\(^{29}\)

And, lastly, there is the developmental concern: "\ldots\ the widespread reception and delivery of US satellite services would inhibit or delay the carriage of Canadian services on Canadian satellites \ldots\."\(^{30}\) Assuming that the broadcasting policy as expressed in the Act remains valid, and assuming that a truly Canadian broadcasting system is still a worthwhile goal, then satellite broadcasts must be amenable to federal regulation.

One additional point needs to be made about the Shellbird case. At the heart of the case and of Shellbird's actions lies a double standard which is found all too often in the regulation of broadcasting in Canada. The fact is that while television watchers in most major urban centres in the country have access to literally dozens of Canadian and American stations (including PBS) those in remote regions usually have a limited range of alternative viewing. At the time of the charge, Shellbird was providing only five channels to its subscribers. The distribution of the PBS signal was an attempt to widen the choice of programmes at relatively little expense. However, the goal of greater selection in programming should not be achieved by misguided judicial reasoning; this can only serve to render the Broadcasting Act impotent. Rather, the solution is to ensure equality of access to all types of programming across the country through fair and effective regulation.

R. P. SAUNDERS*

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CRIMINAL LAW — STATUTORY INTERPRETATION — USE OF PARLIAMENTARY DEBATES — COMPARISON OF ROLES OF JUDGE AND HISTORIAN — HOMICIDE — PROVENANCE OF THE CODE SECTIONS ON HOMICIDE — CODIFICATION OF GENERAL PRINCIPLES OF THE COMMON LAW.—Vasil had been living with a woman (G) and her two children by a previous union. On the night of the crime, he had left a party without G because he was very upset with her. After driving the babysitter home, he went

\(^{28}\) Ibid.

\(^{29}\) Ibid., at pp. 18-19.

\(^{30}\) Ibid., at p. 19.

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to the basement and opened a can of barbecue fluid. He poured this fluid over the contents of a freezer and a refrigerator so that the food would be spoiled. He also decided to show his displeasure with G by throwing lighted matches on the living-room rug. He denied pouring barbecue fluid on the rug but expert evidence suggested that he had done so. A fire destroyed the house causing the death of G’s two children. The trial judge instructed the jury on section 212(c) and, inferentially, section 205. Vasil was convicted of murder. The Court of Appeal of Ontario had ordered a new trial because the trial judge had erred in his direction to the jury on the partial defence of intoxication.1 A unanimous Supreme Court of Canada2 dismissed a Crown appeal from that decision. In strict terms, the ratio decidendi of Vasil relates to the intoxication defence but the case’s greatest significance is its discussion of section 212(c) of the Canadian Criminal Code3 which provides:

Culpable homicide is murder . . .

(c) where a person, for an unlawful object does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

Vasil is only the third time in its history that the Supreme Court has examined section 212(c).4 The judgment was written by Mr. Justice Lamer, the court’s newest judge and a former member of the Law Reform Commission of Canada. His Lordship’s judgment is welcomed as making some sense of section 212(c). While we might applaud the result, his method of arriving there is less an occasion for celebration. The writing style is convoluted and his choice of authorities is eccentric. The Vasil decision may be a cryptogram but it does make some very important observations on the law of murder. In the process of doing so, Lamer J. also makes a contribution to the burgeoning case law on statutory interpretation, a topic sadly neglected by our legal writers and law schools.

Statutory Interpretation — The Use of Parliamentary Debates

In keeping with his law reform background, Lamer J. is mildly reformist in deciding that, in interpreting the Code, he should look at the 1892 parliamentary debates on the Criminal Code Bill although he warns us that it is not “usually advisable” to refer to Hansard.5 The courts are increasingly ignoring or implicitly distinguishing the Read-
er's Digest\(^6\) decision and taking a peep at Hansard. The Supreme Court of Canada might rationalise its reference to the Minister's remarks in the House of Commons as a special case because the Criminal Code is a basic document rather like a constitution statute. Lamer J. does not spell out for us the "unusual" circumstances when judges would be allowed to pierce the legislative veil and look at the "true" intentions of the policy-makers. Perhaps if Lamer J. had provided us with some policy he might have said that we could examine the remarks of the Government sponsor of a Bill only and we certainly should not go ferreting about among the more irrelevant remarks of an opposition back-bencher who had some untutored views on the Great Measure.

The rule against the use of Hansard has always seemed a trifle hypocritical because the courts often do indirectly what they profess is legally impossible by a direct route. Before I am accused of a terminal case of naïveté, let me hastily add that I am fully aware that the courts (and indeed much of human society) operate on that basis.\(^7\) On the question of statutory interpretation, the judicial hypocrisy was a little more obvious than usual because the courts have frequently resorted to the rather inexact methods afforded by the classic rules of statutory interpretation such as the Mischief Rule when they have asked themselves: "What mischief or defect in the common law did this Act hope to eradicate?" Instead of looking at the Debates, the judges have made guesses, admittedly educated ones, in the hope of divining the true intention of Parliament. Similar arguments could be made for the use of the Golden Rule and all those other canons of interpretation which are not really much better than rather obvious props for judicial decision-making. Late in the twentieth century, when all of us have embraced at least some of the ideas of Karl Llewellyn\(^8\) and the other Legal Realists, I am always surprised by the shock experienced by new law students if it is suggested to them that judges sometimes have a gut-feeling as to the decision they wish to make and then seek out an ex post facto rationalisation in the cases or, in this context, the legislative intent of the measure under discussion. This realistic and pragmatic quality of the judicial mind has become so much of the thinking layperson's attitude toward the law that we find a cartoon in The New Yorker where a judge, in replying to counsel's objection to the reception of evidence, says "yes, it is hearsay but it is great hearsay".

Lamer J.'s hesitant reference to Hansard is understandable. On the one hand, some argue that the legislature's role is discrete and the


\(^7\) Willis, Statute Interpretation in a Nutshell (1938), 38 Can. Bar Rev. 1.

\(^8\) Twining, Karl Llewellyn and the Realist Tradition (1975).
courts have no right to overrule or mess with legislation; judges merely interpret the law and should not look behind the words of the statute. In support of this view, the argument proceeds that the meaning of the words of a statute should be treated as self-evident. Courts should not take notice of legislators' attempts to explain or distort the intent of the drafter who has worked under the specific instructions of the Cabinet or a particular Minister. On the other hand, those who want judges to read Hansard say that legislative drafting is an inexact science and the words of an Act can be ambiguous and can be made even more so by the meddling and amendments which are inflicted on the Bill when discussed on the floor of the House. Of course wholesale use of Hansard can lead to the absurd situation where courts are so intent on discovering the legislators' intent by looking at their debates, that the judges only look at the actual words of the Act as a last resort in statutory interpretation.9

One suspects that the Canadian courts, which have, until now, been rather conservative in statutory interpretation, will expand the "unusual" occasions for reading Hansard. Lamer J. decided to examine the 1892 Parliamentary Debates when Sir John Thompson, the Minister of Justice, discussed section 174 (now section 212) of the Criminal Code Bill. Lamer J. sought confirmation that that section had been taken directly from the English Draft Code of 1879; he also referred to the Report of the Commissioners which had been published to explain the Draft Code (and was quoted by Thompson). His Lordship could be commended for his historical scholarship but I would suggest that it did not go far enough.

The judicial process is essentially an historical one. The trial judge uses evidence to draw inferences. His method is the same as that of the historian although usually the judge's standard of proof is higher or more selective than that of the writer of history.10 For instance, the historian Fawn Brodie satisfied herself as to Jefferson's paternity of his slave Sally Hemming's children by methods which would never satisfy a judge who was asked to award support to the Hemmings offspring.11 The historian could be satisfied with much less but then he or she is not making a decision which would condemn some person to penal servitude or which would impose severe financial burdens on the unsuccessful party. Courts no longer take a very literal-minded and slavish adherence to case-precedent; instead, the courts examine the facts of the present case, with the creative use of precedent, some reference to the social milieu of the present litigation

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9 See Dickerson, The Interpretation and Application of Statutes (1975) and Corry, The Use of Legislative History in the Interpretation of Statutes (1954), 32 Can. Bar Rev. 689.
10 E.g., Lerner (ed.), Evidence and Inference (1958), particularly pp. 19-72.
and the peculiar circumstances of the parties, and in the process, the judges are writing or re-writing the history of the law. If the courts are resorting to the social or economic data of something like a Brandeis brief, the historical analogy becomes even more obvious.\(^{12}\)

In recent years, the appellate courts have become more conscious of the need to examine historically some of the background of statutes and case law. In Beaver v. R.\(^{13}\) Fauteux J. neglected to do so when he failed to recognize that in the nineteenth century the accused could not give evidence. In contrast, we find Lord Diplock in Hyam v. D.P.P.\(^{14}\) arguing against a stringent rule of constructive or objective mens rea in homicide because he pointed out that objective mens rea only made sense if the accused could not give evidence. Before 1898, the only way to find guilt was by implying it from the facts presented by the prosecution and the surrounding circumstances. The Ontario Court of Appeal in R. v. Tennant and Naccarato\(^{15}\) made the same point. In Vasil, we are interested in the historical origins of sections 205 and 212(c).

**Sections 205, 212 and 213 of the Criminal Code and their Origins — The Search for Malice Aforethought**

In the last decade, section 212(c) has received a great deal of attention. Why? Is it because the prosecution thinks it is easier to obtain convictions under that provision? Is the prosecution trying to convert factual manslaughters into legal murders? Why is section 213 so infrequently used, particularly when one examines the facts of some of the section 212(c) cases and realizes that the prosecution could have sought a conviction under section 213? We seem determined to broaden the categories of murder. Society finds it necessary — perhaps on some denunciatory theory — to label Vasil as a murderer rather than merely find him guilty of manslaughter or arson.

Before we examine section 212, it is necessary to examine the enigmatic section 205 which was given undue attention by Lamer J. Section 205 is a grab-bag of definitions which has little cohesion and absolutely no pretense to comprehensiveness. It defines homicide, tells us that homicide can be culpable or non-culpable, and that culpable homicide is murder, manslaughter or infanticide. Sub-section 6 tells us that causing death by perjurious evidence is not homicide. Sub-section 5 is the one of greatest interest and it is an inexplicable mixture of manslaughter (and, perhaps, murder):

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15 R. v. Tennant and Naccarato (1975), 23 C.C.C. (2d) 80 (Ont. C.A.).
A person commits culpable homicide when he causes the death of a human being
(a) by means of an unlawful act,
(b) by criminal negligence,
(c) by causing that human being, by threats or fear of violence or by deception, to
do anything that causes his death, or
(d) by wilfully frightening that human being, in the case of a child or sick person.

Lamer J. rather grandiosely described this sub-section as containing "within its four corners... all possible forms"\(^{16}\) of culpable homicide which, in definitional terms, is about as useful as telling us that the alphabet contains all of Shakespeare's plays. Section 205(5) is useless, or at least, a mess. In future we would hope that courts will ignore its provisions and instead find the definition of murder and its constituent elements of actus reus and mens rea in section 212 or section 213. Using section 205 to define murder makes only a little more sense than looking at section 214 which, I submit, contains no definition of the crime. Section 205 appears to be a drafting error which we inherit not only from the English Draft Code but also from Stephen's Digest.\(^{17}\)

As stated earlier, Lamer J. showed some creativity in seeking the meaning of the relevant Code sections in their antecedents but the search was only skin-deep. When it came to differentiating murder from manslaughter, he relied upon the ingredient of malice aforethought despite the fact that the drafters of the Code consciously discarded that mischievous term. Furthermore, the learned judge cited as authorities on the topic of malice, the first editions of Halsbury\(^{18}\) and Kenny\(^{19}\) which do not exactly contain the essence of modern scholarship on the criminal law and offer even less on the history of the subject. Canada has had a Code for ninety years and yet its judges have consistently treated the law of crime as if it were common law. The drafters of the Code are partly to blame because they failed to include general principles in their formulation. Furthermore the common law offered very little definition of the mens rea of murder until some nineteenth century codifiers attempted to extricate the law of murder from the unhelpful case-law and a morass of statutes.

In 1869, the new Dominion, following the lead of England eight years earlier, passed Acts consolidating the criminal law.\(^{20}\) The aim

\(^{16}\) Supra, footnote 2, at p. 107.


\(^{19}\) Kenny, Outlines of Criminal Law (1st ed., 1902).

\(^{20}\) 32 & 33 Vict., cc. 18-28 (Can.).
was to make the law more intelligible and more accessible but the nearest we approach a definition of murder is the negative definition in section 7 which described "excusable homicide" as occurring where a person "kills another by misfortune, or in his own defence, or in any other manner without felony". This should not surprise us because the law of murder is essentially judge-made or jury-made. The statutory literature on murder, from the thirteenth century to the middle of the nineteenth century, did not define the crime but only described the circumstances under which the benefit of clergy did not apply. So we find statutes from Edward I to Edward VI which exclude killings from a general pardon. The common ingredient in all these was "malice prepensed".21 If the killer showed a clear (prior) intention to kill, had waited in ambush or poisoned the victim, then the court, and the jury, would have no difficulty. The books of authority such as Staundforde22 in the seventeenth century, usually assumed that everybody knew the meaning of malice prepense as embracing all those killings which were not excusable or justifiable. In the same century, the proliferation of weapons and increase in violence prompted the passage of the Statute of Stabbing23 which provided that: "Every person . . . which . . . shall stab or thrust any person or persons that hath not then any weapon drawn, or that hath not then first stricken the party, which shall so stab or thrust so as the person so stabbed or thrust shall thereof die . . . although it cannot be proved that the same was done of malice aforethought . . . shall be excluded from the benefit of clergy, and suffer death as in case of wilful murder." This statute was too widely drawn and within sixty years, the courts were ignoring it by saying that the Statute was only a declaration of the common law but they offered no refinement of the phrase "malice aforethought".

The problem which we know as felony-murder was not easily solved. The judges had no statute to help them and the authorities were quite unscientific in trying to formulate rules. For instance, Lambard had said that "if a thief do kill a man whom he never saw before and whom he intended to rob only, it is murder in the judgment of the law, which implyeth a former malicious disposition in him rather to kill the man than not to have his money from him".24 Stephen, who did not like the automatic felony-murder rule, commented that the rule of Lambard was quite satisfactory if the thief intended to kill but was not as satisfactory if the killing was unintentional but was only the "improbable effect of minor violence". He also said: "The law can hardly be justified in 'presupposing' that a

22 Staundforde, Pleas of the Crown (1607), p. 19A.
23 1604, 2 James I, c. 8.
24 Lambard, Eirenarcha (1610), p. 224.
thief 'carrieth that malicious mind that he will achieve his purpose though it be with the death of him against whom it is directed', from the fact that he trips a man up in order to rob him and happens to kill him.'

Coke has always been given exaggerated respect as a legal authority. In truth, his formulation of murder is messy. He defined malice as a killing done *sedato animo* (which suggested premeditation). At another place he described implied malice as a killing "without any provocation" (which does not suggest any preconceived scheme). He seemed to confuse motive and intention. Coke's most celebrated instance of murder was: "So if one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off without any evil intent in him, this is *per infortunium*, for it was not unlawful to shoot at the wild fowl; but if he had shot at a cock or hen, or any tame fowl of another man's, and the arrow by mischance had killed a man, this had been murder, for the act was unlawful." Stephen was quite justified in finding this doctrine "astonishing" and unsupported by precedent.

In treatises on the criminal law and its history, there is a remarkable lack of any history of the substantive law and how the rules of the criminal law developed. Instead, writers take "criminal law" to mean the history of punishment and penal methods. Why? The common law defined crime and was unchangeable but merely evolving. At least this was true of homicide; every one, judges and juries, were taken to know the difference between murder and an accidental or justifiable killing. The law relating to theft had been thought to be similarly immutable but socio-economic factors gave the law some stimulus for reform. While methods of dishonesty might change, the same was not true of homicide—a corpse was a corpse. Another factor was the criminal trial, as we know it, which is less than a century old. Accused persons did not generally have a right to counsel until 1836 (and universal legal aid is much more recent). Until 1898 in England and 1896 in Canada (which was after the passage of the Criminal Code), the accused was not allowed to give evidence on oath at his own trial. This state of affairs meant that the verdict of guilt was, for centuries, arrived at without the help of defence counsel and without the explanations which the accused could make to explain his actions as innocent or at least ambiguous. Before then, the trials were very short and the reports were limited to a recital of the indictment.

26 Co. Inst. III, 50.
28 The best short discussion of this is found in Lewis, *A Draft Code of Criminal Law and Procedure* (1879), pp. xxxiv *et seq.*
and the few remarks which the judge made to the jury. Appeals in
criminal cases did not become routine until this century; it is hardly
surprising that the jurisprudence of criminal law was so poverty-
stricken.

Even a speculative thinker such as Francis Bacon limited his
remarks on the criminal law to the statement that: "All crimes have
their conception in a corrupt intent, and have their consummation
and issuing in some particular act." At another place, he spoke of killing
"with malice" and gave no further explanation but concentrated on
the punishments and forfeitures which would apply to various kinds of
homicide.29 One gains the impression that liability was a given; it
was only a matter of proving it by the confession of the accused.
Another cultured lawyer, Lord Kames, wrote a history of the criminal
law in which he urged lawyers to avoid the "little arts of chicane" and
instead to pry into "the secret recesses of the human heart" and seek
the "abstract reason of all laws". Did he unlock the mysteries of mens
rea? No. Instead, he developed the judicial hunch theory of crime:
"we feel that he is guilty; and we also feel that he ought to be punished
for his guilt."30 Instead of talking about mens rea, he discussed
revenge. In examining homicide, he was more interested in the rela-
tive heinousness of the modus operandi than in laying down firm legal
rules.

We find a more legalistic approach in the works of Chief Justice
Hale who defined murder as a killing with malice aforethought. He
defined express malice as "a deliberate intention of doing some
corporal harm to the person of another". The deliberation "must arise
from external circumstances discovering that inward intention, as
lying in wait, menacings antecedent, former grudges. . .".31 This
definition echoed the medieval notion of secret homicides being so
heinous that they were not pardonable by benefit of clergy. Hale also
defined murder as being committed with implied malice — a killing
without provocation, the death of an officer of justice in the execution
of his duty and, finally, in the following circumstances: If A came to
rob B in his house, or upon the highway, or otherwise without any
precedent intention of killing him, yet A kills B. This last case does
not sound like a death caused by some weird or unforeseen event but a
direct killing in the heat of the moment.

Hawkins, another treatise writer, thought that the criminal law
was just and adapted to the human good. Malice was a "formed
design of doing mischief" which showed the "heart to be pervertly

29 The Maxims of the Law, Regula XV in Montagu (ed.), The Works of Francis
Bacon (1844), pp. 238, 247.
30 Kames, Historical Law Tracts (2nd ed., 1761), p. xi.
wicked". Murder could be committed indirectly by "wilfully and deliberately doing a thing which apparently endangers another's life". Malice was implied in "the execution of an unlawful action, principally intended for some other purpose". This is close to section 212(c), although in another passage in his rather confusing presentation, Hawkins referred to the unlawful action as being an intention to commit another felony.

So far, these legal authorities, which have continued to be quoted until this century, offer no rational system of general principles. At the end of the eighteenth century, under the influence of Beccaria and Montesquieu, critical voices were heard. Sollom Emlyn, an editor of Hale and of the *State Trials*, differed from Hawkins and disapproved of a punishment system which did not differentiate cases where the guilt was "manifest and apparent" from those where the liability of the accused was more ambiguous. He also complained of the "multiplicity and voluminousness" of the law and the resulting "clashings and inconsistencies" and yet a blind veneration for English law made reform impossible.

The next fifty years were preoccupied with campaigns against harsh punishments which did not apportion the sentence to the guilt. There was no "distribution of justice", in Eden's view, and a crime should be punished according to "its abstract nature and turpitude". He considered it wrong for the lawgiver "to assume the divine attribute of animadverting on the fact, only according to the internal malice of the intention". Eden was a penal reformer rather than a theoretician of the criminal law but the contrast between the rational man of the Enlightenment and the narrowly legal view is seen in a dialogue between a commonsensible English gentleman (who suggested that everyone knew murder when he saw it) and a lawyer (who tells us very little but delivered a short sermon on the fairness of criminal procedure). The gentleman defined an act of homicide as "either murder, or it is not so", and added: "The intention of the killer is the criterion; and the malignity of that intention is in the nature of a single controverted fact, subjected to enquiry, and capable of strict proof." The lawyer replied: "Every crime hath its proper degree of enormity, variable as the mind of the criminal; but you misapply the property of the crime to the act on which the crime is founded. That act, in itself, and abstractly considered, is a simple consequence of the attributes of matter; unfortunate indeed and piti-

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32 Hawkins, A Treatise of the Pleas of the Crown (1716), pp. 78, 80.
able, but neither culpable nor punishable, until it be proved to have cooperated with a mischievous intent. When that proof is given, then, and not before, it becomes criminal, under the appellation of murder."

Eden was interested in proportionate punishment and this should have led to classification of offences but his attempt to make categories of homicide was not very successful. He did warn against placing much reliance on Coke's fowl-arrow example because "every circumstance weigheth something in the scale of justice". He referred to the infinite variety of constructive crime and deplored its existence as contrary to "political liberty": "that external, unconnected circumstances should regulate the nature and enormity of crimes, that the intention should be transferred to the accident which results from it, are positions, which, in their present extent, have ever seemed to me most preposterous and innatural". The intent of the accused should only be collected from the actual circumstances. Eden offered his own formulation for constructive crime: "If an action unlawful in itself be done deliberately, and with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue against or beside the original intention of the party, it will be murder. But if such mischievous intention doth not appear, which is matter of fact and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter." He had the very avant-garde notion that crimes should be classed according to the "actual mischief done to society" partly because "the internal malignity of mankind is not within the cognizance of human tribunals".

Although he did not make great advances in the definition of mens rea, Eden was an important influence. He was not only a penal reformer but also advocated the repeal of obsolete laws and suggested that an independent commission should draft declaratory Acts "comprehending all the descriptions and degrees of each crime, with their proportionate punishments".

So far, the history of the criminal law has been portrayed as the history of punishment with little thought given to general principles and the extent of knowledge about the mens rea of murder being limited to the phrase malice prepense. The pre-occupation with punishment may not be very useful in the search for criminal law

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36 Ibid., pp. 205-206.
37 Ibid., p. 227
38 Ibid., p. 228.
39 Ibid., p. 229.
40 Ibid., p. 329. Blackstone had the same idea in his Commentaries, vol. IV, ch. 1. Also see Dagge, Considerations on Criminal Law (1722).
principles, but the reformers and legislators had a proper sense of priority because the first urgent task was to curtail the number of crimes which carried a mandatory death sentence. Eden, for instance, influenced by Beccaria, argued that “when the laws are good, those, who deserve punishment, rarely escape the arm of Justice”. Unfortunately, the laws were so out of line with popular sentiment that judicial discretion and the royal prerogative of mercy had to be used extravagantly to see something like justice done.

Madan and Paley were the important conservative voices who opposed Eden’s views. Madan devoted no attention to the principles of the criminal law. He was not interested in proportionality of punishment. If law prescribed hanging, the only one way to prevent crime was strict enforcement of the death penalty. He criticised the use of judicial discretion which led to leniency but he was in favour of executive clemency so long as it was strictly limited to convictions arising from perverse jury verdicts, legal doubts arising from “vague wording of a statute or a doubtful construction” or cases where “the offence, though within the letter of the law, is not within its apparent meaning and intent”. These instances would be rare because, in Madan’s view, the law was certain. Paley was primarily interested in punishment and his criteria for severity had very little relation to the definition of the crime but he was prepared to see definitional information built into the system after the guilt-determination stage. These factors included “the facility with which [the crime] can be committed, the difficulty of its detection and the danger it presents to the community”. This convinced him that it was better to have many capital offences which could occasionally be subject to commutation and mercy rather than a very few where capital punishment would invariably be inflicted.

The Movement for Reform

Romilly is best remembered for his campaign to reduce the number of capital offences. He struggled for more than twenty years to reform the criminal law but did not live to see the wholesale changes to the scheme of punishments which were guided through Parliament by Macintosh and Peel. Romilly had an instinct for the reform of the substantive law but saw the barbarity of criminal punishments as a first priority. He admired Beccaria’s treatise but he questioned the Italian’s preoccupation “that crimes are to be measured by the injury they do to the State, without regard to the malignity of the will”. In an 1810 Parliamentary speech, he called for “a vigilant

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41 On Beccaria, Madan and many other penal theorists, see Heath, Eighteenth Century Penal Theory (1963).
and enlightened Police, rational rules of Evidence, clear and un-
ambiguous Laws, and punishments proportioned to the Offender’s
guilt”, 43 and he felt that the laws would be more certain if “embodied
in formal Statutes”. He shared with Beccaria a distrust of judicial
discretion and, on this point, differed widely from his influential
protagonist, Paley, who argued that capital punishment should apply
to many crimes and the judges could decide the small proportion of
criminals who should be hanged, depending on the “general character
or the peculiar aggravations” of their crimes. In his reply, Romilly
struck a blow for legal certainty and the Rule of Law:

The general character of a crime cannot be considered as one of those circum-
stances which it is impossible to enumerate or define beforehand, or even which
cannot be ascertained with that exactness which is requisite in legal description;
and yet it is upon the supposed existence of circumstances easy to be noted after
the crime has been committed, but impossible to be beforehand defined, that the
writer’s defence of this system is principally founded. 44

The tenor of these remarks suggests that Romilly would have
welcomed reform of the substantive law but such was not attempted
for another seventy years. Even after the Peel Acts were passed, a
model indictment shows how the law of murder remained uninforma-
tive. The accused was alleged to have “feloniously, wilfully and of
his malice aforethought did kill and murder, against the peace of our
said lord the King, his crown and dignity”. 45

Everyone interested in the reform of substantive criminal law
was influenced by Jeremy Bentham who abhorred the common law
and advocated codification. He wanted the law clearly defined. He
castigated legal fictions including constructive crime. He wanted the
subjective circumstances taken into account in the determination of
guilt. 46 The first codes of criminal law in the English language were
drafted by Edward Livingston in Louisiana and Thomas Babington
Macaulay in India. Both were cultured men for whom law was not a
total preoccupation. They were both strongly influenced by Beccaria,
Eden, Bentham and the British Parliamentary Committees which
sought to investigate and reform the criminal law at the beginning of
the nineteenth century. Both Codes were highly prized for their
brilliance and originality but criticised for being too literary and
impractical. They were considered good because they minimised

43 Ibid., pp. 127-128.
44 Ibid., pp. 156-157. He said in the same speech: “Unless our Criminal Code is
avowedly to be founded, in its different parts, upon the most inconsistent and discordant
principles, we ought either to abolish capital punishments in the instances which have
been pointed out, or to appoint them in a great many cases in which they do not now
exist.”
45 A Barrister, An Alphabetical Arrangement of Mr. Peel’s Acts (1830), p. 149.
46 E.g., Codification Proposal in Bowring (ed.), The Works of Jeremy Bentham
ambiguity and discarded obsolete law but lawyers disapproved because they were too novel. Livingston’s Code did not become law in Louisiana but served as a model for the criminal law of other parts of the United States. Macaulay’s Code had to wait more than twenty years for acceptance and it too would probably have failed if it had had to seek a majority vote from a constituent assembly. Both were harshly critical of English criminal law. Livingston railed against the “disgusting tautology of the English statutes”.47 He was no kinder to the common law: “the English nation have submitted to the legislation of its courts, and seen their fellow subjects hanged for constructive felonies... with a patience that would be astonishing, even if their written laws had sanctioned the butchery.”48 In its place would be a Code which would “no longer be a piece of fretwork exhibiting the passions of its several authors, their fears, their caprices, or the carelessness and inattention with which legislators in all ages and in every country have, at times, endangered the lives, the liberties, and fortunes of the people, by inconsistent provisions, cruel or disproportioned punishments, and a legislation, weak and wavering, because guided by no principle, or by one that was continually changing, and therefore could seldom be right”.49 Instead, Livingston’s Code was “addressing the people in the language of reason, and inviting them to obey the laws, by showing that they are framed on the great principle of utility”!50 Instead, penal laws should be in plain language “clearly and unequivocally expressed, that they may neither be misunderstood nor perverted, they should be so concise so as to be remembered with ease, and all technical phrases or words they contain, should be clearly defined”.51 Livingston did not include a General Part which described the underlying principles of the criminal law. Once again, it seems that mens rea was not considered important at the beginning of the nineteenth century, partly because the intent of the accused was only indirectly examined because the accused could not give evidence on oath. In the context of homicide however, did Livingston live up to his promise of plain language and a lack of ambiguity? He defined “negligent homicide in the performance of unlawful acts” and the punishment depended upon the risk taken and means used but also upon the quality of the unlawful act—the more serious the offence, the higher the punishment. The mens rea definition of this offence was:

48 Ibid., p. 13.
49 Ibid., p. 11.
50 Ibid., p. 175.
51 Ibid., p. 84.
...the homicide must have been done in the attempt to offer the injury or commit the offences...that is to say, must have been the consequence of some act done for the purpose of offering or committing such other injury or offence. If the act which caused the death had no connexion with the injury intended to be offered or committed, it does not come within the definition.\textsuperscript{52}

Livingston admitted that, after all had been done to give "precise limits to the definitions of crimes", there was much to be left to the "discernment of the judge" because so much depended upon the "ever-varying...and the inscrutable workings of the perpetrator's mind".\textsuperscript{53} Nevertheless, he hoped that every word in the new Code would be carefully weighed and "the most clear and explicit" meaning would be given to it with a minimum reference to external material.

Livingston limited murder to intentional killing (and the definition must be read in the light of the description of negligent homicide already given):

Murder is homicide, inflicted with a premeditated design, unaccompanied by any of the circumstances, which, according to the previous provision of this chapter, do not justify, excuse or bring it within some one of the descriptions of homicide hereinbefore defined.\textsuperscript{54}

Macaulay shared many of Livingston's sentiments. He asked: "How long may a penal code at once too sanguinary and too lenient, half written in blood like Draco's, and half undefined and loose, as the common law of a tribe of savages, be the curse and disgrace of the country?"\textsuperscript{55} He thought the most striking feature of his Code was "the manner in which the mental circumstances involved in a criminal act are carefully distinguished and made use of".\textsuperscript{56}

Stephen described the Indian Penal Code as "the criminal law of England freed from all technicalities and superfluities"\textsuperscript{57} and that it was "practically impossible to misunderstand"\textsuperscript{58} it, but he felt that the weakest part of the work was the section on homicide. The general principles of the Code did not contain full definitions of \textit{mens rea} except for a definition of "voluntarily": "a person is said to cause an effect 'voluntarily' when he causes it by means whereby he intended

\textsuperscript{52} Ibid., p. 308.
\textsuperscript{53} Ibid., p. 306.
\textsuperscript{54} Ibid., vol. II, p. 147. In his commentary on the Code, Livingston said: "What is \textit{malice aforethought}? Is there any malice that is aforethought? What is \textit{express malice}? When shall it be \textit{implied}? Thus we find that there is scarcely a word in the description of a crime so important to be known, that will not raise at least a doubt in the mind of a man of common understanding." Ibid., vol. I, p. 305. (Emphasis in original.)
\textsuperscript{56} Quoted, \textit{ibid.}, p. 457.
\textsuperscript{58} \textit{Ibid.}, p. 303.
to cause it, or by means which at the time of employing these means he knew or had reason to believe to be likely to cause it".59

Murder was defined as including acts done:
1. With the intention to cause death.
2. With the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused.
3. With the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.
4. If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, and commits such act without any excuse for incurring the risk of causing death or such injury.60

Stephen suggested that murder could more economically be defined as "whoever voluntarily causes the death of any person is guilty of murder" but he did not follow his own advice either in his Digest or in the English Draft Code (or inferentially in the Canadian Code).61

On the other hand, one of the most perceptive commentators considered that Macaulay had taken the greatest pains over the section on voluntary culpable homicide and said that "it remains a monument" to the Benthamite form of analysis (e.g., the distinction between intention and motive).62 The wording of those sections was not

59 Whitley Stokes, The Anglo-Indian Codes (1887), Act xiv of 1860, s. 39.
60 Ibid., s. 300. The Code also contained, in s. 299, a general definition of culpable homicide: "Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death. . . ."
61 Op. cit., footnote 57, p. 314. Stephen also said of the General Explanations Part of the Indian Penal Code: "The idea by which the whole Code is pervaded . . . is that every one who had anything to do with the administration of the Code will do his utmost to misunderstand it and evade its provisions; this object the authors of the Code have done their utmost to defeat by anticipating all imaginable excuses for refusing to accept the real meaning of its provisions and providing against them beforehand. Ibid., at p. 305.

In terms of the style of Code drafting, he also said: "Human language is not so constructed that it is possible to prevent people from misunderstanding it if they are determined to do so, and over-definition for that purpose is like the attempt to rid a house of dust by mere sweeping. You make more dust than you remove. If too fine a point is put upon language you suggest a still greater refinement in quibbling." Ibid., at p. 306.
62 Eric Stokes, The English Utilitarians and India (1959), p. 232. In an 1835 Minute for the Council of India, Macaulay had said: "I would resist the very beginning of an evil which has tainted the legislation of every great society. I am firmly convinced that the style of laws is of scarcely less importance than their substance. . . . Why it has been so much the fashion in various parts of the world to darken by gibberish, by tautology, by circumlocution, that meaning which ought to be transparent as words can make it. . . ." Quoted, ibid., p. 159.

Ross, a judge and a fellow Commission with Macaulay quoted Bentham on the nature of Codes: "... aptitude for notoriety in respect of its contents, conciseness and clearness in respect of its language, compactness in respect of its form, completeness in
vague in the sense of style but they appear strange because they contain so few words which a lawyer would recognise as denoting *mens rea*. Yet in his explanatory notes on the Code, Macaulay, who had so little sympathy with common law, found it difficult to avoid the conventional language of the English lawyer. For instance, in explaining his disapproval of constructive homicide, he said: "... to punish a man whose negligence has produced some evil which he never contemplated, as if he had produced the same evil knowingly and with deliberate malice, is a course which, ... no jurist has ever recommended in theory, and which we are confident that no society would tolerate in practice." He hoped that the Code would be self-sufficient but had to admit that in distinguishing between acts which were almost certain to cause death and acts which caused death "only under very extraordinary circumstances", the legislature could not frame a law but had to trust to the courts’ consideration of the evidence. Very strong evidence of liability was needed where the possibility of death seemed remote. Macaulay wanted to be rational but when it came to marginal cases, he hoped he could rely on the courts’ common sense and fairness. In homicide cases, where the initial act was in itself innocent, he thought it "barbarous and absurd" to punish a person for "bad consequences, which no human wisdom could have foreseen". He specifically refuted Blackstone’s assertion that it was murder to administer abortifacients to a woman so that she died. Instead, Macaulay hoped that the following would be adopted in the application of his Penal Code (although we might well ask what Code provisions would lead us to his conclusions):

If A kills Z by administering abortives to her, with the knowledge that these abortives are likely to cause her death, he is guilty of voluntary culpable homicide, which will be voluntary culpable homicide by consent, if Z agreed to run the risk, and murder if Z did not so agree. If A causes miscarriage to Z, not intending to cause Z’s death, nor thinking it likely that he shall cause Z’s death, but so rashly or negligently as to cause her death, A is guilty of culpable homicide not voluntary, and will be liable to the punishment provided for the causing of miscarriage, increased by imprisonment for a term not exceeding two years. Lastly, if A took such precautions that there was no reasonable probability that Z’s death would be caused, and if the medicine were rendered deadly by some accident which no
human sagacity could have foreseen, or by some peculiarity in Z's constitution such as there was no ground whatever to expect, A will be liable to no punishment whatever on account of her death, but will of course be liable to the punishment provided for causing miscarriage. 66

In further explanation, Macaulay remarked that to punish "as a murderer every man who, while committing a heinous offence, causes death by pure misadventure is a course which evidently adds nothing to the security of human life. . . . The only good effect which such punishment can produce will be to deter people from committing any of those offences which turn into murders what are in themselves mere accidents. It is in fact an addition to the punishment of those offences, and it is an addition made in the very worst way". 67

The Canadian Criminal Code was drafted by Robert Sedgewick, Deputy Minister of Justice and George Burbidge of the Exchequer Court but the great lobbyist for codification was James Gowan and his correspondence often mentioned the English Draft Code and Stephen, referred to Livingston but never mentioned Macaulay. 68 He did not like Livingston's effort and perhaps put Macaulay's draft in the same category as too "literary". Gowan was also in touch with another codifier, R.S. Wright, who is best remembered nowadays as an English High Court judge and an author of a book on conspiracy. He prepared a code for the Colonial Office in 1874 which was somewhat revised by Stephen. 69 This code was enacted in Jamaica but never became law because it did not receive Colonial Office approval. When Stephen was asked by the Colonial Office to revise the 1874 Code of Wright, he objected to general definitions relating to the mental element of crime. Wright, in reply, argued that a "code without general definitions of general elements would miss the greatest advantage of codification". 70 It is very difficult to understand why Stephen omitted general principles. Gowan was fully aware of this obvious deficiency in the 1892 Canadian Criminal Code. One gathers that they were omitted because the Government was in a hurry to pass a Code and thought that an imperfect code was better than none. Would Wright's draft have been an improvement? He made an attempt at General Principles as shown in the definition of "intent":

66 Ibid., pp. 668-669.
67 Ibid., pp. 670-671.
70 Quoted, ibid., at p. 315.
If a person do an act for the purpose of thereby causing or contributing to cause an event, he intends to cause that event within the meaning of this Code although either in fact or in his belief, or both in fact and also in his belief, the act is unlikely to cause or to contribute to cause the event.\textsuperscript{71}

This provision had a double-edged quality. On the one hand it seemed to be subjective because it referred to ‘‘his belief’’ although one should not place too much store in this because very little thought was given in the nineteenth century, not even by jurists of the calibre of Wright, to the subjective-objective dichotomy. On the other hand, this sub-section seemed to negate foreseeability based on the knowledge or intent of the accused.\textsuperscript{72} One could almost say that this sub-section was a codification of the so-called presumption that a man intends the natural and probable consequences of his acts, or perhaps that was the meaning of the next sub-section:

If a person do an act voluntarily, believing that it will probably cause or contribute to cause an event, he intends to cause that event within the meaning of this Code although he does not do the act for the purpose of causing or contributing to cause the event.\textsuperscript{73}

Then the following seemed to corroborate the recognition of the presumption of intention, and yet, at the start, qualified the whole situation by reference to the actor using “reasonable caution and observation”:

If a person do an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, or that there would be great risk of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that event, until it is shown that he believed that the act would probably not cause or contribute to cause the event.\textsuperscript{74}

The homicide sections were very disappointing. Manslaughter was defined as ‘‘whoever causes the death of another person by any unlawful harm’’.\textsuperscript{75} If the harm were negligently caused, then it was

\textsuperscript{71} Jamaica Law 36 of 1879, s. 10(i). Also notice the problematic s. 40(1): “A person shall not be punished for any act which by reason of ignorance or mistake of fact in good faith he believes to be lawful.” There was also s. 40(ii) which referred to ignorance of law.

\textsuperscript{72} Wright, following Macaulay’s example, clothed his Code with illustrations. Illustration to s. 10(i) was: “A discharges a gun for the purpose of shooting B, and actually hits him. It is immaterial that B was at such a distance or in such a situation that the shot would most probably miss B.”

\textsuperscript{73} \textit{Ibid.}, s. 10(ii). The illustration given was: “A, for the purpose of causing the miscarriage of B, administers to her a medicine which he knows to be dangerous to life. It is immaterial that he earnestly desires to avoid causing B’s death and uses every precaution to avoid causing it.”

\textsuperscript{74} \textit{Ibid.}, s. 10 (iii). The illustration given was: “A discharges a gun among a crowd of persons and one of them is shot. A must be presumed to have intended to cause harm unless he can show that he had such ground for believing that harm would not be caused that his act was merely negligent.”

\textsuperscript{75} \textit{Ibid.}, s. 121.
only the lesser crime of manslaughter by negligence. Murder was defined as "whoever intentionally causes the death of another person by any unlawful harm". No illustrations were given to assist us in construing these sections.

The English criminal law was still awaiting codification when Wright prepared his code in 1874. In forty years of effort by Romilly, Mackintosh, Peel and Brougham, nothing had been achieved but the appointment of many Commissions and Parliamentary Committees to consolidate, digest and codify the law. Starting in 1833, there were Commissions which had various mandates ranging from weeding out legal bric-a-brac all the way to codification schemes. The Benthamites (such as Austin and Amos) wanted root-and-branch codification while others wanted merely consolidation with minimal changes to the existing law. The lawyers in the House did not want change and, between 1833 and 1861, defeated the work of fourteen Commission reports, and the codification and consolidation schemes of three Lord Chancellors. A Royal Commission was established in 1834 and in the next seven years made six reports which commented on the law and prepared a digest of the criminal law. The legal philosopher Austin served on the first two and the law academic Amos served on the first four. Unfortunately these six reports, amounting to more than 700 pages, received little attention. A few pieces of patchwork legislation were passed but an overall consolidation or codification was not achieved. They found the law inaccessible, inaccurate and unwieldy. Because the law was scattered through ancient books of authority and untrustworthy law reports, the Commissioners dis-

76 Ibid., s. 120. Lewis' Draft Code is even less known than Wright's version. S. 412 provided that "the jury shall, in determining whether or not such intent existed on the part of the person charged with such offence, take into consideration whether, when the act to which such intent is relevant was done or omitted, such accused person was in fact incapable, from any cause whatsoever, of forming such intent, and shall find accordingly". Lewis' Code does not include a full range of General Principles. The murder provisions describe the crime of murder as occurring when a person "intentionally commits any unlawful act from which the death of any person results having, at the time such act was committed, the express intention, formed deliberately, . . . unlawfully to cause death either of the person whose death is caused, or of any other person whatsoever". (S. 506.) Lewis said that he wanted to limit murder to killing in cold blood and to exclude constructive murder but he gave a very wide interpretation to "unlawful Act" but one presumes that that phrase should be severely narrowed by phrases such as "intentionally" and "deliberately". Op. cit., footnote 28.

77 A good summary of the work of the various Commissions is found in Greaves, The Criminal Law Consolidation and Amendment Acts (1862), pp. vii et seq. Also see Cornish, Crime and Law in Nineteenth Century Britain (1978).

78 Austin, The Province of Jurisprudence Determined (1832).

covered very few principles of law and few "precise rules fitted for general application". They did not agree with the defenders of the common law who admired its flexibility and adaptability; the Commissioners thought these qualities might be appropriate for private law but this was its greatest weakness for the criminal law which was thus made "inaccessible and unintelligible in its rules and boundaries". They also deplored constructive crime:

Impediments to the formation of a uniform and consistent system of criminal statute law sometimes result from the retention of doctrines founded upon ancient notions, which are totally incongruous with the general principles of our jurisprudence. An instance occurs in the law of homicide, according to which a felonious purpose, though it be unwholly unconnected with any design to occasion death, is made, in conjunction with an accidental killing, to constitute the crime of wilful murder. 

They criticised the "scarcity of distinctions defining the gradations of guilt" so that crimes "bearing little moral resemblance to each other, are, by sweeping definitions, frequently classed together without discrimination as to penal consequences". They wanted certainty in drafting and flexibility in degrees of liability. The report did not avoid the use of malice aforethought in defining murder and described "express malice" as where death resulted from a "deliberate intention to kill or do great bodily harm". Implied malice was questioned but recognised:

The killing is also of malice aforethought, wensoever one in committing or attempting to commit any felony with force or violence to the person or dwelling house of any other, or in burning or attempting to burn such dwelling house or in committing or attempting to commit any felony from which danger may ensue to the life of any other person, shall happen to kill any other person.

This provision would have limited application because a lesser offence of involuntary homicide was also defined:

Involuntary homicide which is not by misadventure, includes all cases where, without any intention to kill or do great bodily harm, or wilfully to endanger life, death occurs in any of the following instances:

Where death results from any act of unlawful omission done or omitted with intent to hurt the person of another, whether mischief light on the person intended, or on any other person;

80 First Report from His Majesty's Commissioners on Criminal Law (1834), p. 3.
83 Op. cit., footnote 81, p. xxxiii, art. 14. Art. 12 had defined "voluntary": "The killing of another is voluntary whensoever death results from any act or unlawful omission done or omitted with intent to kill or do great bodily harm to any other person, or whensoever anyone wilfully endangers the life of another by any act or unlawful omission likely to kill, and which does kill any other person." Malice aforethought had been defined, by art. 11, as any killing which was voluntary and not justified, excused or extenuated.
84 Ibid., p. xi, art. 53.
Where death results from any wrong wilfully occasioned to the person of another;

Where death results from any unlawful act or unlawful omission, attended with risk of hurt to the person of another;\(^{85}\)

The Commissioners used the word “malice” almost apologetically. They did not approve Foster’s definition of malice as the “ordinary symptoms of a wicked, depraved and malignant spirit” or “plain indications of a heart regardless of social duty and totally bent upon mischief”.\(^{86}\) They felt that this definition was more an assessment of murder based on facts (or the circumstances of the case) rather than law. The doctrine of implied malice was “very abstruse and technical” so that “a criminal intention, wholly unconnected with any personal injury, in connexion with a purely accidental killing, is in some instances made to constitute the distinction between the higher and lower species of culpable homicide, and in others, to bring an accidental killing within the scope of manslaughter”.\(^{87}\) Instead, they wished to limit implied malice to cases where the accused exposed “life to manifest peril”\(^{88}\) and there was “consciousness on the part of the offender that such peril would ensue”. There was some confusion in their minds as to whether it was a question of legal definition or factual assessment:

These elements are obviously matters of fact, to be decided as facts; they are beyond the reach of definition, and when probability of loss of life from doing the act, the knowledge of that probability on the part of the offender, and his criminal intention to occasion the risk have been determined in fact, the principle of law applies.\(^{89}\)

But they also said:

The limits of the crime would naturally be extended in this as in other cases, by a constructive extension of its rules, and thus constructive or implied malice, or

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\(^{85}\) Ibid., p. xi, art. 67.

\(^{86}\) Ibid., p. xxiii.

\(^{87}\) Ibid., p. xxii.

\(^{88}\) Ibid., p. xxiii. The Commissioners decided to retain the term “malice aforethought”. They seemed a little ambivalent about legislative language. They said that it was “manifestly improper” to use technical language in “declaring to all classes of society the rules which they are bound to obey”. They added “...the employment of terms which have an ordinary and well-understood signification in a technical or constructive sense, differing from their popular meaning, is far more objectionable than the use of terms of act which no popular meaning is attached; in the latter case, the law may be a dead letter to all those who cannot understand its meaning; in the former, the law will probably be misunderstood”. Ibid., pp. xii-xiii. Later, they declared that “elegance of diction” was sometimes sacrificed in their drafting of “abstract propositions and rules” in favour of “plain and even homely language”. Ibid., p. xiii. As stated earlier, the draft of 1839 retained malice aforethought and explained that it had been retained without “any sacrifice in point of perspicuity” and pointed out, in what seems a contradiction that “actual premeditation, or forethought, is the leading characteristic of murder in most of the modern systems of criminal law”. Ibid., p. xxiii.

\(^{89}\) Ibid., p. xxiv.
malice in law, became a test of murder; but as the question how far and to what cases the offence should be extended by construction was of course a question of law, implied malice as the supposed test of the extended crime was also a question of law; or in other words it was a question of law how far the offence should be extended under the pretext of implied malice.

This seeming inconsistency is only skin-deep. The two statements quoted above indicate a sophistication in legal exposition which is all too rare. The Commission was quite correct in thinking that the fact-finder must obviously decide upon the facts of a case but must only do so within a legal framework, that is "wilfully exposing life to danger". If we wanted to convict an accused of murder, even if we are obliged to use the doctrine of implied malice, (and of course we are often required to do so because murderers do not usually kill on close-circuit television or make explicit confessions), we must piece together, from all the circumstances, the degree of culpability—whether it is murder or manslaughter. This was shown in articles 12 and 67 which defined murder and manslaughter respectively. The first section talked about "intent to kill or do great bodily harm" and "wilfully endangering the life of another" or "any act or unlawful omission likely to kill" while article 67 specifically ruled out the intention to "kill or do great bodily harm" and "wilfully" and replaced it with "intent to" or "risk of" hurt to the person of another. This distinction, as set out in articles 12 and 67, was meant to limit the former to life-risking situations. In addition, article 12 contained words which suggested a subjective mens rea with the use of "with intent" and "wilfully", while in article 67 phrases such as "without any intention to kill or do great bodily harm or wilfully to endanger life" were found.

The 1839 Report did not favour Coke's fowl-arrow example because there was no good reason why the trespass to a man's fowl should be "enhanced beyond its intrinsic moment". Or to express it on a broader theoretical basis:

If the predicaments of fact, which constitute crimes, are framed too largely, and if the same penal consequences are applied generally to an extensive class of criminal actions, a wide range of discretion in the application becomes necessary in order to avoid injustice in particular cases; and thus judicial discretion, the exercise of which within defined limits is not only salutary, but necessary, is too largely substituted for legal certainty.

Alas, these good ideas came to naught. The forces of obstruction made codification impossible. The Criminal Law Consolidation and

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90 Ibid., p. xxviii.
91 Art. 17 had provided that it was murder "whether the offender, wilfully putting life in peril, intend mischief to the deceased or any other person in particular, or wilfully do an act, or be guilty of an unlawful omission likely to occasion death, without intending the mischief to light on any person in particular". Ibid., p. xxxiv.
92 Ibid., p. xxviii.
Amendment Acts of 1861 were a consolation prize, an act of frustration by governments which had been able to achieve nothing. Their author was Charles Greaves but he was not happy with this half-measure which suffered further damage by untutored amendments in the House. In the future he wanted established a Board, composed of the ablest lawyers, which would be a combination of a legislative drafting committee and law reform commission. In this way, some general principles might be drafted. Greaves was in correspondence with Gowan and Henry Elzéar Taschereau. His views on codification of the general principles of law did not come to fruition in Canada but the 1861 consolidation was adopted in the 1869 Canadian enactment. Neither of these sets of Acts contained a definition of murder although the 1861 English Act on offences against the person provided that an indictment for murder should set forth, *inter alia*, that "the defendant did feloniously, wilfully and of his malice aforethought kill . . .".

Both the Canadian and English provisions were remarkably silent on the subject of murder but were positively prolix on attempted murder and in typical Victorian fashion, gave every conceivable instance of an attempt to murder—by poison, by explosives, setting fire to ships, drowning, suffocating, strangling, shooting or by any other means. Two sections from the Canadian consolidation, one originally passed in 1877 and the other in 1869, will give the general impression:

Section 8:
Every one who, with intent to commit murder, administers or causes to be administered, or to be taken by any person, any poison or other destructive thing, or by any means whatsoever, wounds or causes any grievous bodily harm to any person, is guilty of felony, and liable to imprisonment for life.

Section 11:
Every one who, with intent to commit murder, attempts to administer to, or attempts to cause to be administered to, or to be taken by any person, any poison or other destructive thing, or shoots at any person, or, by drawing a trigger or in any other manner attempts to discharge any kind of loaded arms at any person, or attempts to drown, suffocate or strangle any person, whether any bodily injury is effected or not, is guilty of felony, and is liable to imprisonment for life.

96 1877, 40 Vict., c. 28, s. 1 (Can.) originally 1861, 24 and 25 Vict., c. 100, s. 11 (Eng.).
97 1869, 32 and 33 Vict., c. 20, s. 13 (Can.) originally 1861, 24 and 25 Vict., c. 100, s. 14 (Eng.).
These sections, which are repetitive and contradictory, justified Greaves' dissatisfaction with careless and thoughtless consolidation. One poisoning was a crime where grievous bodily harm was actually caused and in the other, a conviction could be obtained "whether any bodily injury is effected or not". The penalty was the same in both instances.

Taschereau prepared an annotated version of the Canadian consolidation. This scissors-and-paste volume could hardly be called scholarly. The whole section on murder consisted of quotes from Russell on Crime and the Criminal Law Commissioners' Reports. One can almost forgive Lamor J. for making 18th century statements about "malice" in murder when we find that Taschereau approvingly quoted Russell defining malice aforesaid as not merely "in the sense of a principle of malevolence to particulars, but as meaning that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit; a heart regardless of social duty, and deliberately bent upon social mischief".98 In further explanation, again borrowed from Russell, Taschereau even had resort to Coke describing express malice as proceeding from a "sedate deliberate mind and formed design".99 This could be discerned from "external circumstances" such as lying-in-wait and former grudges. Implied malice on the other hand was characterised as non-sedate—killing another upon the sudden without any provocation. The law presumed malice because the attack could not have arisen but from "an abandoned heart". Perhaps the most telling statement (which shows the state of the criminal trial and the lack of protection of the accused in the mid-19th century) was Taschereau's comment that as a general rule "all homicides are presumed to be malicious and of course amounting to murder until the contrary appears from circumstances of alleviation, excuse or justification".100 Malice did not mean hatred or envy and only meant voluntary behaviour so that the accused "need not have contemplated the injury beforehand and need not have intended at any time to take life".101 In a rambling essay, Taschereau quoted from treatises and cases which were inconsistent and lacking any underlying thesis and arrived at the conclusion that malice aforesaid "may be practically defined as not actual malice or actual aforesaid, or any other particular actual state of the mind, but any such combination of wrongful deed and mental culpability as judicial usage has determined to be sufficient to render that murder which else would be only

99 Ibid.
100 Ibid., p. 166.
101 Ibid., p. 175.
manslaughter". This is reminiscent of the judge who said he could not define obscenity but he knew it when he saw it. The need for codification of general principles is obvious in Taschereau's statement that: "If an action, unlawful in itself, be done deliberately, and with the intention of mischief or great bodily harm to particular individuals, or of mischief indiscriminately, fall where it may, and death ensue against or beside the original intention of the party, it will be murder." In support, he cited abortion and arson cases. In some instances, the killing was accidental but it was still murder because the original act was malum in se. Similarly, the killing of a police officer was deemed murder because it was an "outrage wilfully committed in defiance of the justice of the Kingdom". Manslaughter was different because malice was neither express or implied and the act was "imputed to the infirmity of human nature". In retrospect it is difficult to believe that Taschereau criticised the 1892 Canadian Code because it was not a total code which, presumably, would include general principles. Taschereau's lack of systematic thought is even more incredible when we remember that he had been brought up in a civil law tradition.

Is it any wonder that Stephen, fresh from the codification which he had practised as Law Member of the Council of India where he did not experience the obstruction of the common law lawyers, decided that the criminal law would only be rationalised by the private enterprise of the individual drafter. Stephen lacked Macaulay's flair and his drafting was sometimes sloppy. His Code had massive gaps, particularly in relation to general principles. Macaulay was a stylist but Stephen was only a technician. Although they both admired Bentham as the prophet of codification, Stephen was pessimistic and misanthropic while Macaulay was an unabashed Whig who took delight in advocating reform and saw the common law (and its practitioners) as impediments to reform. Despite his call for scientific law-making, Stephen retained an admiration for the common law. Yet, Stephen was not a Philistine, and produced books on criminal law which could be called scholarly and were often supported by historical research. For instance, in an examination of malice, he referred to a statute of Henry VIII which made murder with malice aforethought a non-clergyable offence and pointed out that, with the

102 Ibid., p. 177.
103 Ibid., p. 178.
104 Ibid., p. 185.
105 Ibid., p. 193.
107 1531, 23 Hen. VIII, c. 13.
aim of strengthening royal authority over law and order, the Tudor courts extended malice aforethought to implied malice.

In many ways, Stephen's first book on the criminal law, *General View of the Criminal Law*, was his best.\(^\text{108}\) His examination of the definitional elements of the criminal law are the most intelligent one can encounter in the nineteenth century. For instance, he avoided all that nonsense about *actus reus* and *mens rea* and defined an action as a "combination of certain external motions with certain internal sensations"\(^\text{109}\) and that the sensations which "accompany every action and distinguish it from a mere occurrence are intention and will".\(^\text{110}\) Yet, Stephen soon ran into difficulties because he would have liked the elements of every crime to be "so worded as to denote by the mere literal sense of the words every action intended to be punished, and no other", but unfortunately, morality was a necessary ingredient in the administration of criminal justice because of its "general correspondence with the moral sentiments of the nation".\(^\text{111}\) Therefore he was driven back to the position that it was practically impossible to give a more precise definition to "malice" than "wickedness". At this stage of his career, Stephen was not interested in drafting laws on murder. He felt that the degree of wickedness would depend upon the moral disapprobation which the accused's acts created. The degree of disapproval "would vary as the act was, or was not wrong, as it was or was not accompanied by negligence, as it was or was not likely to cause death".\(^\text{112}\) The judgment of society was a task for "judicial legislation" and in the past it had been "discharged with skill and discretion".\(^\text{113}\) The law threw "upon any persons who commit acts of a particular class the burden of proving that they were not done under the circumstances contemplated by the legislature, but at the same time to permit them to give evidence to that effect".\(^\text{114}\) This is a remarkable statement on two bases. First, it shows that the presumption of innocence and the prosecutorial burden of proof are inventions of (or were resurrected in) the twentieth century. Perhaps *Woolmington v. D.P.P.*\(^\text{115}\) was not stating the very obvious after all. Secondly, Stephen was arguing for a revolutionary change in the law: that the accused should be allowed to tell his version of the charge as a sworn witness on the stand.\(^\text{116}\) If

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\(^\text{109}\) Ibid., p. 75.

\(^\text{110}\) Ibid., p. 76.

\(^\text{111}\) Ibid., p. 82.

\(^\text{112}\) Ibid., p. 115.

\(^\text{113}\) Ibid., p. 116.

\(^\text{114}\) Ibid., p. 83.


\(^\text{116}\) Stephen, *Prisoners as Witnesses* (1886), 20 Nineteenth Century 453.
these factors are remembered in examining section 212(c) of the Canadian Code (which was enacted before the two reforms mentioned) then a strong argument can be made for interpreting that sub-section in a subjective manner. Stephen, in the General View and in the Draft Code was prepared to live with objectivity and constructive crime and yet he must be also remembered as the author of the excellent judgments in Serné¹¹¹⁷ and Tolson¹¹¹⁸ which are classic statements of subjectivity in mens rea.

Stephen published his Digest in 1877¹¹¹⁹ and looked upon it as a preliminary draft of a code. At that time, he was also involved in the drafting of a Homicide Bill¹²⁰ which was based on the Indian Penal Code. The Bill was introduced in 1872 and 1874. The wording was not identical but very similar to Macaulay’s. The 1872 version defined murder as a death caused:

1. With the intention of causing the death of the person killed.
2. With the intention of causing deadly injury to the person killed.
3. With the intention of causing to the person killed an injury, which the person killing knew to be deadly with respect to him.¹²¹

In the 1874 version, these definitions were broadened and compacted into:

1. With the intention of causing the death of or grievous bodily harm to the person killed or any other person ascertained or unascertained.¹²²

The earlier version had a final clause:¹²³

4. When the act by which death is caused is, to the knowledge of the person who does it, so imminently dangerous, that it must, in all probability, cause death or deadly injury to some person, ascertained or unascertained, and when it is done without any excuse for running the risk of causing such death or grievous bodily harm.¹²⁴

This provision did not make very great changes although it broadened liability by replacing “imminently dangerous” with “grievous bodily harm”. The new version, however, added a proviso which made the law of murder more rigorous:

¹¹¹⁷ R. v. Serné (1887), 16 Cox C.C. 311 (Central Crim. Ct).
¹¹¹⁸ (1889), 23 Q.B.D. 168 (Central Crim. Ct).
¹²⁰ The 1872 Homicide Bill and 1874 Homicide Law Amendment Bill were printed and copies were found in the Public Record Office of London, England. References to the Bills and the Home Office communications mentioned below are to be found in the P.R.O. file H045-9361-33015-HP00421.
¹²¹ Clause 15 of 1872 Bill.
¹²² Clause 26 of 1874 Bill.
¹²³ Supra, footnote 121.
¹²⁴ Supra, footnote 122.
Every person shall be presumed to intend and to know the natural and ordinary consequences of his acts, nor shall this presumption be rebutted only because it appears or is proved that at the time when the act was done the person who did it did not attend to or think of its nature or probable consequences, or that he hoped that those consequences would not follow. . . .

The only other section of the 1874 Bill which need concern us is the one relating to manslaughter and it is a very sensible one. It simply says that if some one intends to do bodily harm or has knowledge that his act will probably cause bodily harm it is only manslaughter if he did not know or foresee that in "all probability" it would cause death or grievous bodily harm.

Neither of these Bills became law. The House of Commons never liked codification but dismissed this particular measure because it preferred to wait for a full codification rather than pass piecemeal legislation. The reaction to the 1874 Bill was very diverse. William Tallack of the Howard Association applauded it because it would stop the hanging of those who were simply convicted on a legal fiction, namely, constructive murder. Some of the High Court judges (whose opinions were sought by the Home Office) were in favour. Lord Coleridge thought it a "most desirable measure". Bramwell J. thought it "very desirable" to have the law "defined in modern, intelligible language, free from the confusion and mischief arising from the use of the word 'malice'." Pollock J., on the other hand, did not approve because it would "disturb a course of law which I believe to be so thoroughly settled for all practical purposes as the subject will in its nature admit of". Amphlett J. agreed and thought it a mistake to describe the law of murder "in the rigid form of an Act of Parliament" and would only cause confusion and difficulty in an area of law where the judges already did substantial justice.

Stephen's talents—shown in his Digest and the Homicide Bills—were recognized and he became a member of the group responsible for drafting the English Draft Code from which the Canadian Criminal Code is adapted. Certainly, our present item of interest, section 212 was taken directly from the English Draft Code, which was completed in 1879.

The English Draft Code had a provision somewhat similar to our present section 205 which described culpable homicide:

Homicide is either culpable or not culpable. Homicide is culpable when it consists in the killing of any person either by an unlawful act or a culpable omission to

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125 Ibid.
126 Supra, footnote 120, letter dated July 14th, 1874.
127 Ibid., letter dated May 3rd, 1874.
128 Ibid., letter dated May 1st, 1874.
129 Ibid., letter dated May 4th, 1874.
perform or observe any legal duty, or by both combined, or by causing a person by threats or fear or violence or by deception to do an act which causes that person's death, or by wilfully frightening a child or sick person. 131

The section then went on to state that culpable homicide could be either murder or manslaughter and all the rest were not culpable. This section is not one of Stephen's better efforts. He may have been attached to it and decided to use it because it was in his Digest.

Finding a justification for section 212(c) is difficult, particularly when section 213 describes felony murder and almost all the situations where the commission of a crime could lead to life-threatening situations. It is equally difficult to understand why Stephen should have adopted the language of section 212(c) when there were much better models in other attempts at codification we have already examined and also in his own writing. 132 On another occasion, it has been argued that there are very few fact-situations which could be imagined as falling under section 212(c). In any case, the wording of that sub-section is, on its face, remarkably constructive. The only explanation can be that Stephen was expressing his beloved moral sentiment of society exemplified in the words "ought to know" and "whether or not. . .".

Lamer J. has tried to make sense of the sub-section and his judgment must be applauded for the overall policy it propounds. The decision would have been even better if he had not suggested that section 205 has any intelligibility or overall purpose. Similarly, as has been more than adequately demonstrated, we can only wish that he had avoided any resort to malice and all its evil works.

In summary, the following points can be made about sections 205 and 212(c) of the Code. It would be a distortion to say that they are all found in Vasil although that decision is one of the most important cases on homicide in recent years. One only wishes that it were not so difficult to decipher. The case inspires the following arguments and observations:

1. Lamer J. was misguided in placing any reliance on section 205. It says nothing of importance. Why should it be referred to at all? Why is it that it only arises in relation to section 212(c)?

2. The "unlawful act" in section 205 should only be applied to manslaughter.

3. Section 212(c) should be scrapped. All the cases which should be murder could find liability in section 212(a) or section 213. The only justification for section 212(c) seems to

131 Ibid., s. 167.
be that the courts want to apply an objective standard and thereby keep the subjectivity of section 212(a) pure. Anyone who should be convicted of murder in circumstances such as *Vasil* would be caught, if at all, under the recklessness ingredient of section 212(a).

4. Lamer J. rightly explodes the nonsense about "unlawful act" and "unlawful object" needing to be present and separate. At least, one hopes this is what he said. He said at one point that it was wrong for the trial judge to tell a jury that "in order to comply with the requirement of an unlawful act so that the homicide be culpable under section 205(5)(a), there must be under section 212(c) an unlawful act causing death and a further unlawful object".\(^{133}\) Yet he also laid down as good law that "when . . . the dangerous act is unlawful, the jury must be told, as the trial Judge did, that there must be the prosecution of a further unlawful object clearly distinct from the immediate object of the dangerous (unlawful) act".\(^{134}\) This confusion is created by the unfortunate reference to section 205(5)(a). If that were ignored and we simply said that anyone who, for an unlawful object, does anything which was inherently dangerous, that is life threatening, then the accused may be convicted of murder even though he hoped it would not cause death. The courts have got themselves into illogical situations by straining to find further unlawful objects. This has had the effect of creating, or threatening to create, misdemeanour-murders. As we have seen, enlightened opinion has been against such constructive murders for 150 years.

6. If we have to retain section 212(c), Lamer J. is correct in saying that the unlawful object must be an indictable (that is serious) offence with *mens rea* although it is difficult to think of inherently dangerous crimes resulting in death which are not adequately covered by section 213. Abortion is a possibility but Macaulay has shown that the only death which should result in a murder conviction would be one arising from recklessness which is already covered by section 212(a).

7. What is Lamer J.'s test for *mens rea* under section 212(c)? Subjective or objective? It seems to be objective and he relies on Martin J.A. in *R. v. Tennant and Naccarato*\(^{135}\) where that judge seems to be saying that he does not want the same test for both section 212(a) and section 212(c) and he talks about

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\(^{133}\) *Supra*, footnote 2, at p. 107.

\(^{134}\) *Ibid.*, at p. 121.

\(^{135}\) *R. v. Tennant and Naccarato*, *supra*, footnote 15.
foresight. Lamer J. does not want to expand constructive murder and he seems to prefer the objective test of the reasonable man but only a mildly objective test, meaning the reasonable man placed in the circumstances of the accused. Yet this is difficult to reconcile with Lamer J.'s remarks on the intoxication defence. The reasonable man is presumably sober but Lamer J. says that drunkenness is "relevant in the determination of the knowledge which the accused had of those circumstances".  

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136 Supra, footnote 2, at p. 121.

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