The Explosive Combination of Forcible Confinement and Constructive Murder: What Are Its Proper Confines?

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I. INTRODUCTION
Willis calls the constructive murder doctrine "savage law;"¹ Hogan says that it never had any useful purpose other than "to satisfy a primitive instinct for revenge."² Common law courts have evinced a consistent policy to restrict the scope of the doctrine, now culminating in some jurisdictions in its final abrogation.³ By the time of its enactment in 1892, the constructive murder pro-

¹ Comment, Rowe v. The King (1951), 29 Can. B. Rev. 784 at 796.
³ See notes 30 to 37, infra.
vision in the Canadian Criminal Code was already anomalous. But it has been significantly expanded by subsequent amendments to the legislation, thereby creating a general regime of criminal responsibility for accidental or negligent deaths caused during the commission of specified offences that has been subjected to universal criticism. The pre-1975 regime was Draconian, permitting no flexibility to deal with circumstances where the risk of death or grievous bodily harm was comparatively insubstantial. As repugnant as this regime was, there remained, at least arguably, some coherence to the denominated underlying offences. In 1975, there was added to the provision a reference to forcible confinement as an offence during the commission of which one could be constructively responsible for consequential death. Forcible confinement, in its present form, is the equivalent of the tort of false imprisonment. It was the subject of only three reported cases in Canada between 1869 and 1975 and was the basis of only two prosecutions in England in 1978. Notwithstanding its innocuous status as a principal offence, forcible confinement has now serv-

4 The present provision reads as follows:
213. Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or an offence mentioned in section 52 (sabotage), 76 (piratical acts), 76.1 (hijacking an aircraft), 132 or subsection 133(1) or sections 134 to 136 (escape or rescue from prison or lawful custody), section 246 (assaulting a peace officer), section 246.1 (sexual assault), 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm), 246.3 (aggravated assault), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if
(a) he means to cause bodily harm for the purpose of
   (i) facilitating the commission of the offence, or
   (ii) facilitating his flight after committing or attempting to commit the offence,
   and the death ensues from the bodily harm;
(b) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (a), and the death ensues therefrom;
(c) he wilfully stops, by any means, the breath of a human being for a purpose mentioned in paragraph (a), and the death ensues therefrom; or
(d) he uses a weapon or has it upon his person
   (i) during or at the time he commits or attempts to commit the offence, or
   (ii) during or at the time of his flight after committing or attempting to commit the offence,
   and the death ensues as a consequence.
R.S.C. 1970, c. C-34, s. 213, as am. by S.C. 1974-75-76, c. 93, s. 13 and S.C. 1980-81-82-83, c. 125, s. 15.


6 Criminal Code, R.S.C. 1970, c. C-34:
247(2) Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of an indictable offence and is liable to imprisonment for five years.


8 Criminal Law Revision Committee, Fourteenth Report, Offences Against the Person (1980), c. 7844, at 98. There were twelve prosecutions in 1977.
Forcible Confinement and Constructive Murder

ed as an underlying element in at least five murder convictions in Canada in the past several years.

This situation has come about primarily through a legislative amendment process that has been shockingly careless. As well, this unfortunate combination of provisions has been exploited by resourceful, if not overzealous prosecutors and the process has been concluded with the co-operation of dishearteningly positivistic courts. In the end one finds the determination of responsibility for murder operating in much the same fashion as a Rube Goldberg device, where the accused need only have the intention to trip the lever setting the ball in motion, his ultimate fate depending upon the combination of sprockets and chains, springs, levers and burning wicks built into the machine by its designer. In this case, however, the designer, Parliament, has been negligent; the ostensible brakes on the device, the courts, have deferred from that role and instead have retired to the end of the line, where they pass sentence if the ball eventually drops through the trap door. Control of the process is thus vested in broad prosecutorial discretion to charge anything from manslaughter to first degree murder where death ensues while the victim is confined. Moreover, the courts have no discretion at the sentencing stage as first degree and second degree murder are punishable by mandatory life imprisonment with mandatory minimum periods before parole eligibility. The consequence of this combination of Parliamentary failure, prosecutorial zeal and judicial deference is a radical departure from general subjective principles of criminal responsibility, marked by a frightening insensitivity to the results in particular cases.

Furthermore, the ubiquitous nature of confinement as an incidental element of other offences, and the likelihood of confinement occurring in circumstances involving a significantly lower risk of personal violence than would be normal in a hostage-taking, jeopardize whatever symmetry or rationality may otherwise be found in the scheme of our homicide provisions. It is a measure of how positivistic our system of criminal justice has become that the previous point, an aversion to unduly harsh consequences for an individual accused and a departure from general principles of mens rea, would be unlikely to prevail if it were not for the coincidence of this second point, the perceived threat to the rationality of the system. And even this latter argument has not often met with favour in the courts.

One example will suffice to demonstrate the problems raised by this unfortunate combination of provisions. In *R. v. Dollan and Newstead*, the two accused were fleeing from the police. In need of another vehicle, they approached the isolated Kehoe farmhouse during the early morning hours. Dollan entered with a gun, telling Mrs. Kehoe to lie on the floor. She did not do so but instead ran into the bedroom with her husband and locked the door. Dollan order them to come out and attempted to kick the door down but failed. He then fired his shot-gun through the bedroom door, injuring both of the Kehoes, Mr. Kehoe seriously. Mrs. Kehoe then came out of the bedroom because Dollan said he would shoot her grandchildren, who were staying with them. Mrs. Kehoe and the grandchildren were tied up in the living room and Mr. Kehoe was bound in the bedroom. The accused stole a truck, some money

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and a weapon and left, returning to the house to rebind Mrs. Kehoe and the
grandchildren who had managed to free themselves. Mr. Kehoe later died
from the shot fired through the bedroom door. Dollan was convicted of first
degree murder and sentenced to life imprisonment without parole eligibility
for twenty-five years without there being any issue of his intention or
recklessness in causing death or grievous bodily harm. Neither was there any
issue of planning and deliberation. In the end the principal issue was a choice
between competing theories of the defence and the prosecution on the issue of
confinement; the defence argued that the confinement did not commence until
the ropes were applied while the Crown contended that it began before the
fatal shot was fired. Any reasonable person would doubtless wonder that
criminal responsibility bearing the ultimate penal sanction could turn upon a
consideration so patently irrelevant to the causing of Mr. Kehoe's death. Yet
that is the state of our Canadian law of homicide.

This article will trace the statutory evolution of both constructive murder
and forcible confinement. The process by which this unlikely but explosive
combination of provisions has resulted raised serious doubts as to the capacity
or the will of Parliament to enact rational criminal law. An inquiry will also be
made into the elements of the offence of forcible confinement, which has been
little known as an offence in Canada. Because of the way in which the
post-1975 provisions have been exploited by prosecutors and applied by
courts, the consequences are far-reaching. It will be argued that it is possible,
consistent with the legislation as enacted, to bring this combination of provi-
sions within reasonable confines. The arguments to accomplish this limitation
will be outlined. It should be noted at the outset that they lead to a conclusion
that all four cases resulting in murder convictions based on constructive
murder/forcible confinement have been wrongly decided.

II. CONSTRUCTIVE MURDER

The concept of attributing responsibility for murder to an accused person
who neither intended to cause death nor acted recklessly is anomalous in the
general context of criminal law, and ought to be especially so in the case of the
ultimate crime, murder. Although it has always been conceived as exceptional
to the general regime of murder, constructive responsibility has a long history
in the law of homicide and the Canadian Criminal Code has had such a provi-
sion since it was first enacted in 1892. Since that time, the section has
undergone several changes, resulting in a more severe regime than either the
original enactment or the common law rule. The consequence is that in
specified circumstances, in which the Code stipulates potentially minimal
physical requirements, one may be found guilty of murder notwithstanding a
mental state which amounts to ordinary negligence or even to blameless in-
adverence, that is, a pure accident. This is a doctrine which is out of step with
contemporary criminal law and which is very difficult to justify as achieving
any rational objective. Before proceeding to consider Canadian statutory
developments, it would be useful to examine the rule as developed at common
law.

10 S.C. 1892, c. 29, s. 228.
A. The Common Law Felony-Murder Rule

The utility of examining the common law development is twofold: first, it exposes the background against which the original Canadian Code provision was developed; and, second, it will show how the common law has evolved recently to confine the application of the doctrine, while Canadian statute law has gone conspicuously in the opposite direction.

At common law, the status of felony-murder has always been controversial, as to both its scope and its underlying premises. One recent judicial consideration of the rule gave rise to the observation that "the existence and scope of the felony-murder doctrine have perplexed generations of law students, commentators, and jurists in the United States and England." Professor Moreland says the doctrine, which he calls "fundamentally unsound," is traceable to the work of Bracton in the thirteenth century. Judicial recognition is generally attributed to sixteenth-century cases, but the status or reach of the principle which emerged from those cases is by no means clear. In the seventeenth century Lord Coke wrote that all killing which resulted from an unlawful act was murder, but Sir Fitzjames Stephen called this a "monstrous doctrine" which "rested upon little or no authority." In the eighteenth century Foster formulated a mitigated version of Coke's doctrine to the effect that the underlying act must be a felony, but this too was said by Stephen to be "entirely arbitrary." Given the range of offences which were treated as felonies in the eighteenth century, Foster's formulation was still an extreme departure from the general notion of malice aforethought as the mental element of murder. The reach of the constructive doctrine is evidenced by his qualified reiteration of Coke's illustration:

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

Thus, in Foster's view, if A intended only to kill the hen it would be manslaughter if he accidentally killed a person, but it would be murder if he had intended to steal the hen.

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12 Moreland, Law of Homicide (1952), at 42.
14 Third Institute, at 56. Coke offers the illustration of a person, meaning to shoot the hen of another, killing a man by mischance. Such a case would, according to Coke, be murder.
17 Supra note 15, at 75. Stephen admits, however, that Foster was preceded in his views by Hale and Holt; Moreland, supra note 12, at 42, points out that this view was reiterated by Blackstone, Hawkins and East. For a defence of Foster, although not of the rule, see Turner, The Mental Element in Crimes at Common Law (1936), 6 Camb. L.J. 31, at 41-43 and 55.
18 Foster, supra note 16, at 258.
Whether or not Stephen is correct in his criticism of Foster’s precedents, the latter’s formulation came to be the basis of the felony-murder rule, and Stephen admits that he himself accepted it and acted upon it. It became the basis of the rule not so much in the sense that it was mechanically applied, but as a point of reference from which judges and juries through the nineteenth century sought to move away in an effort to mitigate its harsh effects. Not surprisingly, the most sympathetic circumstances arose in the context of a consensual, non-violent crime: abortion. The nineteenth-century development was such that by 1898, Bigham J. would instruct a jury in a case of abortion resulting in death, “If you should be of the opinion that the prisoner could not, as a reasonable man, expect death to result, you can find a verdict of manslaughter.” By 1902 Professor Kenny concluded that there was a “modern trend” to limit the rule and in 1914 Stroud could write, “in the few cases where it has been possible in recent years to apply the doctrine . . . it has been deliberately and almost invariably departed from, under high judicial authority.”

The perceived gains of the nineteenth century were partly undone in 1920 with the decision of the House of Lords in Beard’s Case, where it was said that a person could be convicted of murder if death resulted from an act of violence committed in the course of a felony of violence. This formulation involves a different standard from the view which prevailed in the early part of the century, that the felonious act had to be one likely to cause death. On the other hand it contained, in theory at least, two important qualifiers on the traditional view as styled by Foster: both the felony itself and the act causing death had to be violent. The Beard “test” continued to be the rule in England until 1957, when constructive malice was abolished by the Homicide Act, 1957. This abolition was undertaken on the recommendation of the Royal Commission on Capital Punishment which concluded:

19 Stephen, supra note 15, at 57 and n. 3.
20 R. v. Whitmarsh (1898), 62 J.P. 711. This case, along with other nineteenth-century developments, is discussed in Turner, supra note 17, at 55-60.
21 Outlines of Criminal Law (1st ed., 1902) at 137.
22 Stroud, Mens Rea (1914) at 183. One illustration of the artificial base of the doctrine can be seen in a case discussed by Stroud, in which a burglar broke into a house and fatally injured himself when he fell into the basement. The jury was instructed that he could be found guilty of felony-suicide. As Stroud comments: “One can hardly conceive a better reductio ad absurdum.” Id. at 169.
23 Director of Public Prosecutions v. Beard, [1920] A.C. 479. For a criticism of the House of Lords’ decision see Turner, supra note 17. Professor Turner says the decision “nullified all the progress in improving the law of murder which has been achieved during the past century” and prevented “the further logical and humane development of the law of homicide.” Id. at 64 and 65.
24 In one post-Beard case, the Court of Criminal Appeals held that the use of a loaded firearm in order to frighten the victim into submission was by itself a violent act, hence it was no response to say that the trigger was squeezed inadvertently. R. v. Jarmain (1945), 31 Cr. App. R. 39, [1946] 1 K.B. 74.
26 5 & 6 Eliz. 2, c. 11, s. 1(1), the marginal note of which reads: “Abolition of ‘constructive malice’”.

I. -(1) Where a person kills another in the course or futherance of some other offence, the killing shall not amount to murder unless done with the same
107. We have no doubt that, as a matter of general principle, persons ought not be punished for consequences of their acts which they did not intend or foresee. The doctrine of constructive malice clearly infringes this principle and in our view it ought to be abolished. 27

The Commission, in 1949, viewed the pre-Beard doctrine as being limited to cases in which the felonious act was likely to cause death, thereby coming within the traditional view of murder in any event. The post-Beard state of the law was characterized as "uncertain." 28

In the United States, 29 the doctrine has been taken to significantly greater lengths at common law than has been the case in England, going so far at one point as to convict a person of murder when a third party was shot and killed by police officers who pursued the accused from the scene of a robbery. 30 In a second Pennsylvania case, the accused was convicted of murder when a co-conspirator accidentally killed himself during the commission of the felony of arson. 31 These cases, in a decision typical of a general trend to reduce the reach of the felony-murder doctrine in America, have subsequently been overruled by the Pennsylvania Supreme Court which acknowledged that the rule had been subjected to harsh criticism, "most of it thoroughly warranted." 32 The Court undertook a comprehensive review of the rule and, while denying that it was necessary to abolish it in the instant case, made considerable effort to

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28 1949-53, Cmd. 8932 (1953), at 40. The Commissioners undertook a thorough review of the existing law in England and reached the following conclusion:
85. So far as we are aware, the doctrine that any killing in the course of the commission of any felony is murder has never been expressly overruled by the courts; and judicial witnesses gave it as their opinion that in strict theory this was probably still the law. They hastened to add, however, that in practice it had been dead for many years, and that if the killing was unintentional a modern Judge would direct the jury to bring in a verdict of manslaughter unless the felony was one involving violence. But although it may be accepted that the old rule in its full rigour is no longer in practice applied by courts, it is not easy to formulate accurately the scope of the rule as it is now applied. . . . While we cannot speak with certainty, a reasonable conclusion seems to be that a person is now guilty of murder only if the act from which death results in the course or in furtherance of such a felony is an act of violence (at 31-32).
31 Commonwealth v. Bolish, 113 A.2d 464 (Pa. Sup. Ct. 1955). See comment by Morris, The Felon's Responsibility for the Lethal Acts of Others (1956), 105 U. Pa. L. Rev. 50. These cases were reconsidered by the Pennsylvania court in Commonwealth v. Redline, 137 A.2d 472 (Pa. Sup. Ct. 1958) and, although the Court did not overrule them, it was clear that there was no intention to further extend the doctrine, this time to a situation where a co-felon was killed by pursuing police officers.
demonstrate its shaky underlying foundation, concluding that it ought not to be extended beyond the bounds it had always known. The movement to restrain the common law rule was such in the United States that by 1959 the American Law Institute could list seven limitations which had been judicially imposed.\(^3\) Professor Perkins wrote in 1969 that American courts apply the doctrine “where the law requires, but they do so grudgingly and tend to restrict its application where circumstances permit.”\(^4\) The momentum has continued over the past decade with the general recognition that the felony must be itself inherently dangerous to human life.\(^5\) In Massachusetts it has recently been held that the prosecution must prove the defendant’s “conscious disregard of the risk to human life.”\(^6\) The logical conclusion of this judicial trend to restrict the scope of felony-murder has recently been reached in Michigan, where the Supreme Court has now abrogated the rule entirely from the common law of that state.

Whatever reasons can be gleaned from the dubious origin of the felony-murder rule to explain its existence, those reasons no longer exist today. Indeed, most states, including our own, have recognized the harshness and inequity of the rule as is evidenced by the numerous restrictions placed on it. The felony-murder doctrine is unnecessary and in many cases unjust in that it violates the basic premise of individual moral culpability upon which our criminal law is based.\(^7\)

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\(^3\) Model Penal Code, Tentative Draft No. 9 (1959), at 37.


\(^6\) Commonwealth v. Matchett, 436 N.E.2d 400 (1982); Commonwealth v. Moran, 442 N.E.2d 399 (1982). See also State v. Millette, 299 A.2d 150 (N.H. Sup. Ct. 1972) holding that allegation and proof of malice were necessary in any murder prosecution, including where death was caused during the commission of a felony, in this instance abortion.

\(^7\) People v. Aaron, supra note 11, at 328. For comments on People v. Aaron, see Common-law Felony Murder Doctrine Judicially Abolished in Michigan (1982), 60 Wash. U. L.Q. 1197; Comment (1982), 59 U. Det. J. Urb. L. 428; Comment, Michigan Supreme Court Uproots the Felony Murder Rule (1981), 50 U.M.K.C.L. Rev. 112; Comment, Demise of the Felony Murder Doctrine in Michigan (1981), 28 Wayne L. Rev. 215; Annotation, Judicial Abrogation of Felony-Murder Doctrine (1982), 13 A.L.R. 4th 1226. The California Supreme Court has recently reconsidered the felony-murder doctrine. Because first-degree felony-murder for certain underlying offences is provided for by statute, the Court did not feel it had the same jurisdiction to abrogate the doctrine as did the Michigan Court in Aaron. In People v. Dillon, 194 Cal. Rptr. 390 (1983), the Court declined to override the legislation, but stated clearly that it held "no brief" for the felony-murder rule (at 402). The Court went on to hold that the first-degree felony-murder rule violates the State constitution's "cruel and unusual punishment" provision by providing for a sentence of life imprisonment (with eligibility for parole). As for the likelihood that the second-degree felony-murder rule will be judicially abrogated (it is not statutory in California), Chief Justice Bird said in a concurring opinion: "In view of the criticisms that this Court and others have leveled against the rule over the past decade, the time seems to be at hand for doing away with that portion of the "barbaric" anachronism which we are responsible for creating." (at 424).

The Appeal Division of the Nova Scotia Supreme Court has recently rejected an argument that the constructive murder provisions of the Criminal Code violate ss. 11(d) and 7 of the Canadian Charter of Rights and Freedoms: Bezanson v. The Queen (unreported, Dec. 6, 1983). A similar argument will be made to the P.E.I. Supreme Court in Laviollette v. The Queen, to be heard in early 1984.
In Australia, the various states have a mix of common law and statutory felony-murder regimes. The present common law rule is said by Professor Colin Howard to be narrower in scope than the statutory regimes. Professor Howard details developments under the common law regimes that show that there exists at least a potential for further restriction of the law. He adds that this is a disparity which he says is likely to increase rather than diminish due to "the erosion of the felony-murder rule which is always possible at common law." \(^{38}\)

Thus, it can be seen that the Canadian constructive murder provision was enacted in 1892 against a backdrop of English case law tending increasingly to restrict the operation of felony-murder, and that it has been subsequently cast in a still more dubious light by the undeniable tendency of common law courts to confine the doctrine and ultimately to abrogate it.

B. The Canadian Statutory Regime

The Canadian Criminal Code of 1892 was the culmination of a half-century of proposals to codify the criminal law of England.\(^{39}\) What has come to be known as the constructive murder provision in the Canadian Code was taken, with only minor changes, directly from the Draft Code prepared by the English Criminal Code Commission of 1878-79.\(^{40}\) The pre-eminent force behind the English Draft Code was Sir Fitzjames Stephen who, by his own admission, had "been led by circumstances to consider this matter more frequently and in greater detail than any previous writer upon it."\(^{41}\) The 1879 Commissioners' Report was produced in the space of seven months and was basically a reiteration of an 1878 draft bill that Stephen had personally written.\(^{42}\) It is curious that the Draft Code contained a constructive murder

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\(^{40}\) C. 2345 (1879). The provision appeared in the 1879 Draft Code as s. 175. The only change in the wording of s. 228 of the Canadian Criminal Code was the substitution of "injury" for "violence" in the phrase "and death ensues from such injury" in S.C. 1892, c. 29, s. 228(a):

228. Culpable homicide is also murder in each of the following cases, whether the offender means or not death to ensue, or knows or not that death is likely to ensue:

(a) If he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in this section mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury; or

(b) If he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effects thereof; or

(c) If he by any means wilfully stops the breath of any person for either of the purposes aforesaid, and death ensues from such stopping of the breath.

2. The following are the offences in this section referred to: Treason and the other offences mentioned in Part IV of this Act, piracy and offences deemed to be piracy, escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, rape, forcible abduction, robbery, burglary, arson.

\(^{41}\) See Radzinowicz, *Sir James Fitzjames Stephen 1829-1894 and His Contribution to the Development of Criminal Law*, [1957] Seldon Society Lectures at 20-22. The other members of the Commission were Lord Blackburn, Lush L.J. and Barry J.

provision at all because neither of Stephen's proposed bills of 1874 or 1878 contained such a provision and constructive malice had been generally out of favour with predecessor Commissions studying the criminal law. Moreover, Stephen himself was in the vanguard of scholarly and, later, judicial efforts to restrict the scope of the doctrine. As seen above, he was critical of Foster's rule as being "cruel and monstrous." In 1874 he argued that there ought to be a restriction of the rule to cases where the felonious act was itself dangerous to life. After his appointment to the bench, he gave a jury instruction in R. v. Serné which is the leading example of late nineteenth-century judicial reform of the rule. The case involved a death resulting from an incident of arson and Stephen addressed the felony-murder charge in this way:

In my opinion the definition of the law which makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed . . . . I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony, which caused death, should be murder.

This is the instruction which led a report to the Royal Commission on Capital Punishment to comment that, given Serné and its contemporaries, "it might have been thought . . . that the doctrine would gradually wither away." It was at least perceived as an illustration of a judicial tendency to exclude cases of accidental and unforeseeable death from the constructive murder doctrine.

It is difficult to reconcile these expressions of opposition to felony-murder with the inclusion of section 228 in the Draft Code. Stephen states in his History that a comparison of section 228 with the previous common law view demonstrates "the extent to which the commissioners proposed to contract the [common law] definition." No doubt it does constitute a reduction in scope of Foster's view that any death caused during the commission of a felony is murder. It does so in two ways: first, by specifying underlying offences, and second, by specifying three types of conduct causing death. However, it must be emphasized that the provision only contracts the common law rule and does not eliminate it. In light of the exclusion of felony-murder from Stephen's earlier drafts and his general opposition to the doctrine, it is likely that something arose in the deliberations of the 1879 Commission which either changed his view or which caused the other Commissioners to prevail.

The explanation can probably be traced to the efforts of the Commission to deal with a specific hard case, known as "the Fordingbridge murder." In that case the accused attempted to ravish a victim, described by the author of the Commissioners' Report as "an innocent girl on her way to church," and,

43 Hooper, supra note 5, at 74.
44 Testimony before the Select Committee appointed in 1874 to consider the proposed bill: Minutes of Evidence, 3 et seq. See Wechsler and Michael, A Rationale of the Law of Homicide: I (1937), 37 Colum. L. Rev. 701, at 703.
45 R. v. Serné and Goldfinch (1887), 16 Cox C.C. 311, at 313. Upon this direction the jury acquitted, although subsequently the accused were prosecuted successfully for arson. See Stroud, supra note 22, at 178.
46 Report, supra note 27, Appendix 7(b) at 386.
47 Id. at 30.
48 Supra note 15, at 83.
while dragging her off toward the woods, stuffed her shawl in her mouth to prevent her from crying out, thereby causing her death from suffocation. The defence of the accused to a charge of intentional murder would, according to Stephen, be that he could not have intended to cause death as that would frustrate his purpose which was to rape the girl. The Report comments, "and we believe there are few who would not think the law defective if such an offence was not murder."50 In his History, Stephen says that calling such an act murder would be "in harmony with the common standard of moral feeling" and that the provision accomplishes its purpose of describing "in perfectly unambiguous language all the worst and most dangerous cases of homicide."51

In light of the provision as it appeared in the Draft Code, with two subsections devoted expressly to stopping the breath of a victim and the administration of stupefying things, it is quite likely that the inclusion of section 228 in the Criminal Code can be explained as "the Fordingbridge murder" section, designed to mollify the sense of revulsion of the Commissioners that an accused could explain his lack of intention to kill by pleading his intention to rape. An accused person who did not intend to have sexual intercourse with the victim but who attacked her maliciously and caused her to suffocate would be guilty of murder.

The objection to permitting an intention to rape as a defence to murder is understandable. However, the drafters went further than to state a policy prohibiting such a defence in cases where the jury could otherwise conclude from the circumstances that the accused intended to cause death or grievous bodily harm. Instead of leaving the initial inquiry with the jury and hence putting the burden on the prosecution to prove the culpable mental state of the accused, the Code provision effectively created an irrebuttable presumption that in certain circumstances the accused would have a priori the intent to cause death because he undertook the dangerous enterprise of the underlying offence. In styling the issue so broadly the Commissioners went beyond what was necessary to meet the case cited by Stephen. The contrast between the general regime of intentional murder and the constructive murder section caused Professor Turner to remark that the sections were "clumsily drafted."52 His analysis of the resulting "confusion of mutually repugnant principles" is that it could have been prevented by "a clearer recollection of the distinction between evidence and law."53 This criticism treats the provision not as a public policy against certain defences, nor as a separate definition of murder characterized by its repugnance to a common moral standard, but as a predetermination of defined situations in which the risks are such that the legislature can fix the intention of the accused based on the existence of prescribed factors. This might be seen as a form of "enterprise liability," whereby the Legislature presumes malice or an equivalent mental state given certain objective circumstances which infer culpability in relation to consequential death. What Professor Turner perceives in the contradiction of subjective and objective principles in the homicide provisions is an attempt by the Commissioners, and later the legislature, to substitute their view for that of the jury on the issue of the accused's guilty intent. In light of the approach of the Commissioners in working back from a hard case to drafting Code provisions,

50 Report, id.
51 Supra note 15, at 84.
53 Id. at 533.
his criticism is an accurate one. The initial lack of underlying principle is unforetable, not so much because of the danger which the 1892 provision posed but because the draft Code thus furnished a precarious base, a base upon which subsequent amendments to the constructive murder provision have built in such a fashion as to expand it geometrically beyond the scope of the facts of the Fordingbridge murder.

While the 1892 provision was, in theory, a regime of constructive intention, it did not in fact expand by a great degree the basic regime of intentional murder. Subsection (a) required an intention to inflict grievous bodily injury, prompting Stephen to comment that he was not sure that it added anything of importance to the intentional murder provision. Subsection (c) required the willful stopping of breath and subsection (b), in prescribing the administration of a stupefying thing, focused upon an act in which the risk of death was by definition very high and where it would have to be proven that the accused had mens rea in relation to the administration of the drug. But subsection (a) was amended in 1953 to drop the reference to “grievous” bodily harm, so that the accused need now intend only to cause “bodily harm.” The change is significant in light of Stephen’s view that subsection (a) added nothing to intentional murder. It was not, however, debated by Parliament, nor was it apparently deliberated by the Royal Commission established to revise the Code. A subsequent explanation by Senator Hayden has been characterized as “thoroughly unconvincing.” In any event, it is likely that subsections (b) and (c) are now subsumed by the overbroad provisions of the amended subsection (a).

Still more consequential is the addition in 1947 of subsection (d), adding a fourth type of death-causing conduct, this time:

(d) if he uses or has upon his person any weapon during or at the time of the commission or attempted commission by him of any of the offences in this section mentioned or the flight of the offender upon the commission or attempted commission thereof, and death ensues as a consequence of its use.

Like the initial introduction of the constructive murder provision, this amendment was undertaken to respond to a specific case, in this instance R. v. Hughes, in which the Supreme Court of Canada held that the accidental discharge of a firearm during the commission of a robbery did not come within the pre-1947 regime. This amendment too was undertaken without Parliamentary deliberation and the consequence is described by John Willis as “savage and incoherent.” As bad as the 1947 amendment may have been, the section was made still more draconian in the 1955 Revision of the Code when the words “of its use” were dropped from subsection (d), again without any ex-

54 Supra note 15, at 83.
55 S.C. 1953-54, c. 51, s. 202. For comments on the amendments to the provision see Hooper, supra note 5, at 74-77; Stuart, supra note 5, at 216-19; Burns and Reid, supra note 5, at 83-87.
56 Hooper, supra note 5, at 74.
57 Stuart, supra note 5, at 218.
58 S.C. 1947, c. 55, s. 7.
60 Supra note 1, at 793. Willis argues that the amendment should be repealed.
Forcible Confinement and Constructive Murder

By this modification the constructive murder provision, at least where death was caused by a weapon, was expanded to encompass the most purely accidental of killings. There could no longer be said to be any controls on the operation of the provision to prescribe at least some minimal relation between the intention of the accused and the ensuing death.

After the 1955 amendment the only hope that the provision would not exceed all imaginable limits lay in the prescience of Parliament in the specification of underlying offences. It could at least have been hoped that the list of offences would be restricted to those in which malicious disregard for the life of a victim was inherent in the offence itself. However, the futility of such a hope was already underscored by the existence in the provision since 1892 of a number of offences which are not inherently dangerous to human life, notably treason and arson, to name only two. Moreover, there was nothing in the Parliamentary treatment of the provision prior to 1955 to encourage one to believe that the existing list of underlying offences would be reconsidered, although that was not to say that it might not be expanded.

In 1975 Parliament again amended section 213, this time to add references to sabotage and hijacking as underlying offences. Again there was little discussion in Parliamentary Committee of the change. The only statement was that of Mr. Fox, who moved the amendment before the Standing Committee on Justice and Legal Affairs, where he commented:

The basic purpose of this amendment is to add reference to Section 76 [sabotage] and 76.1 [hijacking] to the provisions of the Criminal Code, that is Section 213 which deals with constructive murder.

There were no questions on the amendment and it was passed without further discussion. Neither was there recognition of the added reference to attempted rape.

Similarly, there was no discussion of the introduction for the first time of specific references to the underlying offences to accord by number with substantive prohibitions in the Code. Prior to 1975, the underlying offences were listed by name only. Each accorded with a substantive provision by the same name, with two exceptions: burglary and forcible abduction. The issue of what was meant by the reference to burglary came before the Supreme Court in R. v. Popovic and occasioned a major exercise in statutory interpretation by Pigeon J. The conclusion of the majority of the Court was that “burglary” in section 213 did not refer to the modern offence of breaking and entering. Although the matter was not raised in Committee discussion it is likely that the

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62 Standing Comm. on Justice and Legal Affairs, Proceedings, 1974-76, 33:15. The added reference to sabotage is in s. 52, not in s. 76 as indicated by Mr. Fox.
63 Likely added because rape was the only one of the thirteen underlying offences in s. 213 which had an independent attempt provision. Attempts to commit the other substantive offences would be covered by the opening words of s. 213. Note that there is no longer an offence of attempted rape, as s. 143 has been repealed by S.C. 1980-81-82-83, c. 125, s. 6.
concordance of the references in section 213 with specific Code provisions was designed to clarify the issue raised in *Popovic*.

In listing the offences by section number, forcible confinement was named for the first time as an underlying offence. Prior to 1975, the reference was to forcible abduction, but there was no such offence in the Code. The new reference is to "...[s.247 (kidnapping or forcible confinement)]..." Given the obscurity of the reference to "forcible abduction" as it appeared prior to 1975, it would have appeared unlikely that Parliament would be moved to amend it. It may be that the drafter who was asked to clear up the confusion found in *Popovic* did not consider the disparity between kidnapping and forcible confinement and automatically accorded the previous reference to forcible abduction with all offences in section 247. Without the benefit of a more complete explanation by Mr. Fox, the change in the provision is presumably inadvertent.

In the 1879 Draft Code, from which the original constructive murder provision was adopted, there were three offences of abduction: abduction of a woman against her will, abduction of a woman under twenty-one against parents' will, and abduction of a girl under sixteen. Therefore, if one is seeking to determine the original framers' intent it could hardly be said that forcible confinement was contemplated by the reference to forcible abduction. Even if one were to assume the relevant point in time to be 1892, when offences of forcible confinement and kidnapping were adopted into the Code from Canadian legislation, a strong case could not be made for equating forcible abduction with forcible confinement. At best forcible abduction might have been argued to mean kidnapping. The French version of the *Criminal Code* prior to 1975 used the word "rapt" in section 213 as a counterpart to "forcible abduction" in the English version. The dictionary, *Petit Robert*, defines "rapt" as "Enlèvement illégal (d'une personne)... Kidnapping (ou kidnappage)." The learned commentator Irénée Lagarde makes the following criticism of the French version of kidnapping in section 247, which is translated as "enlèvement":

*Version française du mot "kidnapping":*
Le législateur a traduit le mot "kidnapping" par enlèvement. Il semble qu'il aurait fallu le traduire par "rapt".  

Blackstone in his *Commentaries on the Laws of England* dealt with two offences against persons which constituted "infringements of their natural liberty." The first of these was false imprisonment, which he equated to "a mere civil injury." The second offence, that of kidnapping, was described as "the forcible abduction or stealing away of a man, woman or child." Finally, as a matter of an understanding of the words as used in their ordinary sense, confinement and abduction are certainly not synonymous; if anything they are inconsistent and probably contradictory.

Whatever the intended scope of forcible abduction in the pre-1975 version of section 213, there was apparently never a murder prosecution based on the provision. The latest change, however, has not passed the attention of Crown...
prosecutors, as there have since been at least four prosecutions in which a murder conviction has been based upon an intention to commit forcible confinement.

Thus we have the appalling evolution of our present constructive murder provision. Introduced to meet concerns regarding the probability of obtaining a conviction in a single hard case, it has been subjected to a series of undeliberated amendments which have invariably expanded the scope of the doctrine, some of these amendments being patently inadvertent. With the introduction of forcible confinement as an underlying offence we are now faced with the prospect of seeing an irrational, but at least initially confined, exception swallow the rule.

III. FORCIBLE CONFINEMENT

As the so-called "forcible" confinement provision now appears in the Criminal Code it can be stripped down to the following: "every one who, without lawful authority, confines ... another person ..." It will be immediately apparent that this provision bears a strong resemblance to the tort of false imprisonment. Prima facie it covers any restraint of liberty, and the mental element is remarkably elusive. There is no question of there being a requirement of force, hence the "forcible" adjective is without meaning. The inclusion of such a prohibition in the Criminal Code raises problems on several levels. First, by proscribing "confinement" we criminalize in a single provision conduct which could include anything from sending a child to his room to the most odious hostage-taking. Second, by prohibiting conduct which may occur in circumstances where the accused has no malicious intention toward the victim we introduce difficult analytical problems for triers of fact. Finally, and most significantly, the inclusion of forcible confinement as an underlying offence in the constructive murder provision opens up great potential for prosecutorial abuse and seriously undermines whatever measure of rationality the homicide provisions may have had before the 1975 amendment. Before discussing how forcible confinement and constructive murder operate in combination it is important to understand the history and the elements of the underlying offence.

A. Statutory Development

At common law, false imprisonment is both a crime and a tort. Blackstone says:

We are next to consider the violation of the right of personal liberty. This is effected by the injury of false imprisonment, for which the law has not only decreed a punishment, as a heinous public crime, but has also given a private reparation to the party .... To constitute the injury of false imprisonment there are two points requisite; (1) the detention of the person; and, (2) the unlawfulness of such detention.68

The related offence of kidnapping is considered to be an aggravated form of forcible confinement.69 In Canada, forcible confinement and kidnapping were

67 Barr ing a defence under s. 43 of the Criminal Code.
68 3 Bl. Comm. at 127.
first made offences in federal legislation in 1869. That provision, which was
carried forward in essentially the same form in the 1892 Criminal Code, had a
similar format to the present section 247, but the offence of forcible confine-
ment was significantly different from its present styling. It was incorporated
into a single provision called "kidnapping":

264. Everyone is guilty of an indictable offence and liable to seven years' im-
prisonment who, without lawful authority, forcibly seizes and confines or im-
prisons any other person within Canada, or kidnaps any other person with inten-
t—
(a.) to cause such other person to be secretly confined or imprisoned in Canada
against his will; or
(b.) to cause such other person to be unlawfully sent or transported out of Canada
against his will; or
(c.) to cause such other person to be sold or captured as a slave, or in any way held
to service against his will.70

It will be seen that the provision includes three separate offences: (i) to for-
cibly seize and confine, (ii) to forcibly seize and imprison, and (iii) to kidnap.
A literal reading of the provision would imply that the required intent referred
to in (a), (b) or (c) had to be proven in relation to any of these offences. The
issue of whether it was necessary to allege the specified intentions for confine-
ment as well as for kidnapping arose in an 1872 case, Cornwall v. The Queen,71
in which the accused had been charged with both offences but the intent was
only alleged for the kidnapping. The conviction for the confinement was
reversed, with the divided appeal court holding two to one that the specified
intents had to be proved. It is not surprising to find disagreement on the point
as it is arguable that subsection (a) is redundant while (b) and (c) are inconsis-
tent with the notion of confinement.

In any event, the same provision was initially enacted into the 1892 Code.
In a number of amendments to the Code in 1900, the forcible confinement
provision was separated from the kidnapping provision so that the specified
intentions were no longer requisite for confinement.72 It ought to be noted that
the same punishment, a maximum term of seven years, was retained for both
offences, giving rise to an implication that there was no Parliamentary inten-
tion to create a lesser offence. Given the ambiguous relationship between the
act of confinement and the previously stipulated intentions, it would not be
surprising if the change were perceived as merely editorial. Unhappily, one is
left to speculate as to the intention of Parliament in modifying the provision as
there was no debate during clause-by-clause study.73

Whatever the purpose of the 1900 amendment may have been it was clearly
a more legitimate procedure than the next modification of section 264, which
was not passed by Parliament but was accomplished by the Commissioners of
the 1906 Revised Statutes of Canada. The 1900 amendment was worded "forc-
cibly seizes and confines or imprisons." After the 1906 Revision it read "forc-
cibly seizes or confines or imprisons."74 The mandate of the Commissioners in

70 S.C. 1869, c. 20, s. 69.
71 Supra note 7.
72 S.C. 1900, c. 46, s. 3.
73 Can. H. of C. Deb., May 7, 1900, at 4719.
74 R.S.C. 1906, c. 146, s. 297(b).
revising the statutes was to make such alterations in the language as were re-
quise in order to provide a uniform mode of expression or to make minor amendments to bring out more clearly what they deemed to be the intention of Parliament. The Commissioners could hardly have considered the 1906 version to be grammatically superior to its predecessor as it was clearly a retrograde step in terms of style. As for bringing out more clearly the intention of Parliament, the 1900 amendment was unambiguous, making it an offence to forcibly seize and confine or imprison another. The result of this alteration, which must have been a clerical error, was to convert what was formerly a serious offence against the person requiring forcible seizure and confinement into a considerably more tenuous prohibition equivalent to false imprisonment. The punishment remained seven years until, in 1909, the maximum penalty for both kidnapping and "forcible" confinement was increased to twenty-five years. The provision remained unchanged until the 1953 re-enactment, when it was re-ordered to impose a grammatically improved version of the post-1906 provision with its superfluous "or," so that the section now reads "confines, imprisons or forcibly seizes." It is likely that the drafter who spotted the stylistic problem also recognized a seeming disparity between the offences in the two subsections, which disparity arose solely as a result of the substitution of "or" and "and" in the 1906 Revision. Unfortunately, instead of going back to examine the Canadian legislative origins of the provision he must have referred to the English common law and concluded that these were the old offences of kidnapping and false imprisonment. Had he referred to the predecessor sections in the Criminal Code and before that under federal legislation, he would have found that false imprisonment had never been an offence under Canadian legislation and that the most recent enactment of Parliament had provided for two offences which were not kidnapping and false imprisonment but which in fact were kidnapping and what might popularly be called hostage-taking.

As a consequence of this unhappy process we now have a legislative scheme which proscribes one of the most odious of crimes, hostage-taking, with a five year maximum punishment, while we attach the same consequence to a simple false imprisonment. Because it is generally possible for the prosecution to combine a forcible confinement charge with other offences, such as extortion or a firearms offence, the problem seemingly caused by such a low maximum punishment for hostage-taking is not so repugnant. Moreover, an element of asportation would permit a charge of kidnapping. The more serious concern is with the lower end of the spectrum, false imprisonment, especially as it underlies the constructive murder provision.

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75 An Act Respecting the Revised Statutes of Canada, S.C. 1903, c. 61, s. 3.
76 In R. v. Lenton, supra note 7, the Ontario Court of Appeal affirmed a conviction where the victim had been confined but not seized. The Court concluded that the provision was worded "in the alternative," which is not surprising given the abundance of "or"'s in the section.
77 S.C. 1909, c. 9, s. 2. On the matter of the continued use of the qualifier "forcible" in relation to the confinement, see R. v. Gourgon and Knowles (1979), 19 C.R. (3d) 272 (B.C.C.A.), where MacFarlane J.A. observed (at 279): "While it may be unimportant for the purposes of this appeal, I think it was error to treat the confinement involved in ss. 214(3) and 247(2) as meaning forcible confinement."
B. The Elements of the Offence

The mental element of an offence which is so simply styled as "everyone who confines" ought not, in a sophisticated system of criminal jurisprudence, to be difficult to articulate. Being a criminal prohibition which is not of a regulatory or public welfare character, one says instinctively that the mental component is mens rea in relation to each of the physical elements of the crime. And the physical element is simply defined as total restraint of liberty.

Two issues then remain: first, what is mens rea, and, second, how does one determine whether the accused had it? Neither of these issues will be any more easily resolved in the context of a prohibited act which is not necessarily morally wrong, or malum in se, and which may occur in circumstances in which the purpose of the accused is, by any standard, innocent.

Dealing with the issue of what constitutes mens rea, it is best to begin in a negative sense by excluding negligent conduct. As was said by the Supreme Court of Canada in R. v. Sault Ste. Marie:

Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction.

To exclude negligence is to deny a conviction based on an objective assessment of what the accused should have done or known in the circumstances. Recklessness is, by definition, advertent or conscious. It consists of acting in spite of a subjective awareness of risk. So a successful prosecution must show

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80 R. v. City of Sault Ste. Marie [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353, at 1303 (S.C.R.), 357 (C.C.C.): "In the case of true crimes there is a presumption that a person should not be held liable for the wrongfulness of his act if that act is without mens rea."

81 Bird v. Jones (1845), 115 E.R. 668. For a recent application of "total physical restraint" in a forcible confinement prosecution, see R. v. Locke (1981), 63 C.C.C. (2d) 473 (Ont. Co. Ct.).

The requirement of "total physical restraint" does not mean, however, that the victim must be stationary. See Wade v. Egan (1935), 64 C.C.C. 21 (Man. C.A.) (moving train); R. v. Macquarie (1875), 13 S.C.R. (N.S.W.) 264 (cast adrift in boat); McDaniel v. State, 166 S.W.2d 138 (Tex. Cr. App. 1942) (moving vehicle); R. v. Lesley (1860), Bell 220 (on board ship).


that the accused intended or was reckless as to each element of the offence. In the case of confinement there are at least two separate elements: the act which is said to cause the confinement, and the consequences, being the restraint of the victim. In the event that consent should be an issue, there would be a third element, in this case a circumstance. With respect to the first two elements, the act and the consequence, and the circumstance of consent should it be an issue, the burden is on the prosecution to prove beyond a reasonable doubt that the accused had the requisite mens rea; that is, that he intended or was reckless with regard to each element.

This raises the issue of how the Crown is to prove the subjective state of mind of an accused person. In a rare case it is possible to prove mens rea by examining what the defendant says. In the absence of a confession, the trier of facts must assess the acts of the accused in the circumstances to determine whether he acted intentionally or recklessly. On the evidence of objective circumstances, an inference may be drawn that the requisite mens rea was present. Such an inference, that a person intends the natural and probable consequence of his acts, is not a presumption but merely a common sense conclusion based on all of the evidence and bearing in mind that the accused is entitled to the benefit of any doubt. As was said by Denning L.J. in *Hosegood v. Hosegood*:

> When people say that a man must be taken to intend the natural consequences of his acts, they fall into error: there is no 'must' about it: it is only 'may.' The presumption of intention is not a proposition of law but a proposition of ordinary good sense. It means this: that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. But, while that is an inference which may be drawn, it is not one which must be drawn. If on all the facts of the case it is not the correct inference, then it should not be drawn.

The inference is a useful device as a means of justifying how a judge or a jury can convict an accused person without direct evidence as to his subjective mental state. So long as it is treated as an inference and not a presumption it is relatively harmless as a way of explaining to a jury that they need not have such direct evidence. Relatively harmless, that is, until a jury is confronted with a charge involving both an act and a consequence, and the accused gives evidence that conflicts with the inference that he intended the consequence. In the sense that murder involves a consequence apart from the act causing it, the

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It may be argued that the defence of consent has not been incorporated into the *Criminal Code*. Note that the assault provision expressly provides a defence of consent [section 244(1)(a)] while there is no similar expression in section 247(2). However, it could still be contended that section 7(3) has preserved this defence.

There are not many cases dealing with consent as a defence to a criminal prosecution for false imprisonment. See *R. v. Hugo* (unreported judgment of the Montreal Court of Sessions, Morier J., Feb. 10, 1983) where the accused R.C.M.P. officer was acquitted on charges of forcible confinement and kidnapping because of a good faith, although mistaken, belief in the consent of the victim. See also *People v. Cohoon*, 42 N.E. 2d 969 (Ill. App. 1942).

parallel to false imprisonment is useful.\textsuperscript{87} In a 1957 murder trial Devlin J. instructed the jury as follows:

The act is proved and you are dealing with intent — whether it was done with the intention of murder. Intention is something that exists in a man's mind. Apart from his own evidence it can only be proved from inferences that can be drawn from his acts, but his own evidence must be welcome. A man, after all, knows his own mind and if he goes in the witness box and tells you what is in his own mind, and you think he might be telling the truth, you would have the best evidence available on what was in his own mind.\textsuperscript{88}

This instruction strikes a fair balance between the need not to undermine the presumption of innocence and the necessity of informing jurors that they are free to draw conclusions contrary to the accused, notwithstanding his explanation. As Martin J.A. said in \textit{R. v. Buzzanga and Durocher}, "[t]he appellants' evidence as to their state of mind is not, of course, conclusive."\textsuperscript{89}

The danger of invoking the standard instruction on the inference of intent in a prosecution for forcible confinement where the accused has an alternate explanation can be seen in the case of \textit{R. v. Farrant}.\textsuperscript{90} Rolan Farrant had been going with Shannon Russell for four years. He was seventeen and she sixteen. After breaking off their relationship, they met at a party. Farrant was drinking beer and smoking marijuana. He spoke to Shannon for about five minutes. Shannon left the party before 10 with some of her friends. Farrant saw her leave but continued talking with his friends for a short time when he decided that he wanted to talk to Shannon. He went home and called her but she said that she did not want to see him as her friends were there. He said that he was coming over and mentioned that he was bringing a gun. The accused did not bring the rifle into the house the first time he entered, leaving it in his truck. When Shannon refused to talk to him he ordered the others out of the house. When they refused, he went to the truck and brought in the gun, a loaded .303 with a clip containing ten shells, and commanded the others to leave. When they tried to take Shannon with them he said: "She stays." The only evidence of what happened after that point is the testimony of the accused. Shannon was sitting on the living-room couch, crying and becoming hysterical. The accused tried to talk to her but when he made no progress he took the gun to the kitchen and left it there, believing that it might be the gun which was upsetting her. After another minute of trying to talk to her, without success, he walked back to the kitchen and picked up the gun. He returned to the living-room and

\textsuperscript{87} Professor Turner was of the view that homicide, assault and false imprisonment are different from other common law crimes in that they cause difficulties in determining foresight as to consequences. \textit{The Mental Element in Crimes at Common Law} (1936), 6 Camb. L.J. 31, at 37.

\textsuperscript{88} \textit{R. v. Adams}, [1957] Crim. L.R. 365. Quoted in Carter, \textit{Annotation: The Intention to Commit an Offence} (1967), 1 C.R.N.S. 299, at 302. This passage was recently quoted in \textit{R. v. Buzzanga and Durocher} (1979), 49 C.C.C. (2d) 369 (Ont. C.A.) at 387 where Martin J.A. commented: "The accused's testimony, if he gives evidence as to what was in his mind, is important material to be weighed with the other evidence in determining whether the necessary intent has been established." This case involved a prosecution for wilfully promoting hatred against an identifiable group, a statutory offence which seems a likely candidate to add to Turner's exclusive list of common law crimes.

\textsuperscript{89} \textit{Id.}

Forcible Confinement and Constructive Murder

"just stood there for a minute and the next thing I knew the gun goes off." Shannon was killed by that shot; the accused called the operator within moments and told her to call the police, saying that he had just killed his girlfriend. The accused then fired a second shot, apparently in an attempt to commit suicide; there was evidence of powder burns beside his ear and of a slight injury to the inside of the ear.

After a preliminary hearing Farrant was charged with second degree murder. Throughout the course of the trial the issue was as to the intention of the accused to cause death or grievous bodily harm as required to establish murder under section 212(a). After the close of evidence and before the jury charge the Crown raised the issue of constructive murder during the commission of an offence, the offence being forcible confinement. To prove the confinement the Crown relied primarily on evidence which the accused himself had given. Crown counsel admitted that she had not intended to rely on section 213(d) until she heard the evidence of the accused. Below is the exchange on the cross-examination of Farrant which is alleged to have shown his intent to forcibly confine Shannon:

Q But you wanted to go over and she didn’t want to see you?
A I wanted to talk to her and she didn’t want to talk to me right then.
Q You decided that you were going to take the rifle and you were going to go over there and you were going to make her talk to you whether she wanted to stay or not, isn’t that true?
A I wouldn’t quite say it that way, no.
Q You wouldn’t quite say it that way?
A No I wouldn’t.
Q That’s essentially true, isn’t it?
A It would be essentially, but it’s not the way I would think, no.
Q You’ve already agreed that you were going to make her talk to you, right?
A After that phone call, yes.
Q You were going to make her talk to you using that rifle?
A Well, if it was necessary I guess because I brought it there, that would be true.

The jury was instructed that it should assess the evidence bearing in mind "the presumption that [a] man intends the natural consequences of his actions;" and "... that one basic inference is that everyone is presumed to intent [sic] the natural consequences of his or her actions." In the Supreme Court, Dickson J. concluded that there was no error as the jury was told elsewhere in the instruction that the proposition was an inference which the jury might draw but that they were free to draw others. That tends to simplify the issue as being one of inference vs. presumption. It fails to treat the special problem of intention as to consequences which are separate from the act and it tends to ignore the value of the testimony of the accused. The effect which the instruction had upon the jury can be seen in the three questions which they sent out after retiring to deliberate:
(i) Is his physical presence without immediate possession of the weapon grounds for confinement?

(ii) Can confinement again commence when possession of a weapon is regained?

(iii) What is the definition of intent?

It is apparent from these questions that the jury was more concerned with the presence of the gun than they were with the subjective intention of the accused. The jurors evidently broke the transaction down into three phases: (i) the initial possession of the weapon; (ii) the period during which the weapon was in the kitchen; and, (iii) the time when the gun was brought back to the living room. Everything focused on the weapon. The gun constituted the restraint on Shannon’s liberty and it indicated Farrant’s intention to confine her. In response to the third question, the definition of intent, Maher J. observed that he had already covered the issue of intent to commit the confinement but went on to make the following comments:

But intent, whether it be the intent to attempt to confine or to confine, or the intent to cause death or bodily harm, you usually determine that intent from an examination of the circumstances. Intent usually is what did a man say, what did a man do, and then you draw inferences from that bearing in mind that one basic inference is that everyone is presumed to intend the natural consequences of his or her actions. If I do a certain thing, whether it be throwing a book on the floor or pointing a gun at somebody and firing it, it is natural to assume that I intended the results of what would happen; that the book would fall on the floor and probably maybe fall apart. If I intended to shoot at a person with a gun, probably I intended to kill or to do bodily harm that would cause death.

The jury deliberated for six hours before returning a verdict of guilty of second degree murder. This case illustrates three points regarding the problem of forcible confinement and its combined operation with constructive murder: (i) that an evidentiary aid like the common sense inference that natural consequences of acts are intended can overwhelm the process which it is designed to facilitate; (ii) that it is essential to consider independently the mental state of the accused in relation to acts and consequences; and (iii) that, even if Farrant did intend to clear Shannon’s friends out of the house and to keep her there to talk, the offence thereby committed is completely inappropriate as an underlying element of constructive murder.

This final comment is a reaction to an offence which can occur in circumstances where the accused’s ultimate intentions are non-malicious. This characteristic of forcible confinement has led to some curious analyses of the relevant guilty mind in prosecutions for forcible confinement, suggesting perhaps a defence of good faith. Because of the unusual nature of an offence which proscribes conduct which may not be morally offensive even if intended, it is arguably not enough to simply state a general formulation of mens rea and apply it mechanically to the physical elements of the crime. If the mental element is approached in its standard format, then every intentional or reckless confinement, not expressly excused, would constitute a criminal offence. This is the view which Canadian commentators, dealing briefly with the provision in the abstract, have taken. Lagarde says that a director of a mental hospital who accepts a patient without complying with the legal formalities would be guilty, as would be a police officer who arrests without justification. He also cites the curious case of a father who confines his pregnant daughter in the
Mewitt and Manning appear to be in agreement, using the illustration of a prison warden who confines a person under a defective warrant of committal. Presumably there is no reason why this analysis of subsection 247(2) could not lead to a charge of first degree murder for both the warden and the guard firing the shot (perhaps all of the prison employees would be parties to the offence) if a prisoner, having been confined under a faulty warrant, were accidentally shot during confinement. Whatever the proper academic analysis of liability in such circumstances, there is evidence that experienced trial judges, when faced with a defendant who has committed a confinement for purposes which are at worst morally indifferent, decline to impose a criminal sanction.

In *R. v. Elder*, the accused was a prisoner in an institution. He was charged with forcibly confining an employee during what the trial judge described as “an insurrection.” The victim was the only employee on duty in the segregation area at the time of the outbreak; the accused put a towel over the victim’s head and led him to another part of the prison. He was subsequently moved twice, spending most of the time in a dorm where someone brought him a mattress. He was released after a period of a few hours. The accused testified that it was his intention to protect the victim and take him to “a safe place.” Geatros Dist. Ct. J. accepted this evidence and concluded that he could not convict the accused of either kidnapping or forcible confinement. He rejected what he understood to be the Crown’s contention, that the latter offence was one of strict liability, holding that:

There can be no doubt that something more must be proved – “some blameworthy condition of the mind” or “at least an intention to do a wrong or to break the law” – than merely that the accused did the prohibited act.

He concluded that the accused’s avowed purpose of protecting the confinee negativated the element of *mens rea*, and accordingly an acquittal was entered.

Another case which occasioned a comment on the innocent intent of the accused is *R. v. Cunningham and Ritchie*, where the crew of a cruise vessel apprehended a youth who had been throwing stones at the ship, and who had broken one of the windows in the process and doubtless caused some discomfort to the passengers. The boy was captured and brought aboard, after which he was taken to the wheelhouse and asked to lie on the floor. His ankles were loosely bound with a piece of rope. The confinement lasted one and a half hours while the vessel sailed back to Winnipeg, where the boy was turned over to the police. Although the principal analysis of the judgment of Jewers Co. Ct. J. was on the issue of justification, he concluded that even if the accused had exceeded their authority by using excessive force, they would not be criminally liable since they had proceeded in good faith with a legitimate purpose. He commented:

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91 *Supra* note 65, at 676.
92 *Criminal Law* (1978), at 480.
94 *Id.* at 128.
95 (1979), 49 C.C.C. (2d) 390 (Man. Co. Ct.).
The accused, of course, cannot be found criminally liable unless it can be established not only that they committed the act with which they are charged but that they did so with guilty intent.  

If one had to choose between justification and absence of mens rea as the ratio of this decision then logically it should be the latter, since the issue of justification would only be relevant once the requisite elements of the offence had been established.

In neither Cunningham and Ritchie nor Elder is it clear what is meant by the element of "guilty intent." One possible analysis is that a requirement of "wrongful purpose," or at least a defence of good faith, is being read into the provision. If that is so, it would appear to conflict with the traditional view in criminal law that motive is irrelevant to a determination of criminal liability. An illustration often put forward in support of this view is that a man who breaks into a house to steal money to buy Christmas presents for his children is just as guilty as a man who steals to finance a heroin habit. In Lewis v. The Queen the observation that motive was legally irrelevant was prefaced with the comment that the Court had accepted "the term 'motive' in a criminal law sense as meaning 'ulterior intention'." In this way motive is defined as irrelevant intention. As is admitted by Glanville Williams, whose definition was accepted as a starting point in Lewis:

If the foregoing definition of motive is accepted, it becomes tautologous to say that motive is irrelevant to legal responsibility. For as soon as the word "motive" is uttered, it is impliedly asserted to be irrelevant to responsibility.

As Williams has made clear elsewhere the distinction between motive and intent is not a scientific one. Instead it is only a convenience for lawyers who, having determined what intent is relevant, employ such terminological apparatus to exclude the rest. Says Williams:

Although the verbal distinction between "intention" and "motive" is convenient, it must be realised that the remoter intention called motive is still an intention.

The reference to the exclusion of motive is ultimately a circular analysis, bringing one back to the issue of what intention is relevant in order to establish the "blameworthy condition of mind" or "guilty intent" sought by Geatros Dist. Ct. J. and Jewers Co. Ct. J. in their analyses. Because of the morally indifferent nature of an act like confinement, which could be committed playfully or even, as in the Elder case, to help the victim, one intuitively wants to treat it differently from offences which are malum in se.

Some American courts, faced with factual circumstances in which they have evidently felt some sympathy for the defendant, have introduced what might be considered as a "good motive" exception. In a 1933 case the Pennsylvania Supreme Court was faced with an appeal from a conviction for false imprisonment after a district attorney, a detective and a constable were pros-

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96 Id. at 399.
97 Fletcher, Rethinking Criminal Law, supra note 29, at 452.
98 [1979] 2 S.C.R. 821 at 832, 47 C.C.C. (2d) 24 at 34.
100 The Mental Element in Crime (1965).
101 Id. at 14.
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The trial judge had told the jury that "[m]otive is not a factor in the correct determination of the guilt or innocence of the defendants." The Supreme Court quashed the convictions and ordered a new trial, with the observation that:

"The motives, good faith, and purpose of the defendants are legitimate matters of defense to be considered by the jury in passing upon the false imprisonment indictments, as they negative the idea of criminality."

The same point has since been adopted by a Georgia appeals court, again in a case involving a police officer, and more recently by the Supreme Court of Minnesota, this time in a much less plausible set of circumstances. In State v. Hembd, the complainant was walking home from a tavern when, according to her, she was approached from behind by the defendant, who grabbed her coat and told her he wanted to talk to her over a cup of coffee. Her screams were overheard by local residents, who testified that they saw the defendant force her into his car. The defendant's story was that he observed the woman walking on the street crying. She told him that she had attempted to commit suicide six times in the past and that she was about to do it again, whereupon he undertook to force her into the car to take her to the police station. The Supreme Court held that it was an error for the trial court not to instruct the jury that good motive is a defence to a charge of false imprisonment, stating the matter as follows:

"There can be no doubt that a bona fide attempt to prevent a suicide is not a crime in any jurisdiction, even where it involves the detention, against her will, of the person planning to kill herself. Had defendant seized complainant as she was about to leap from a building, and had he kept her locked in a safe place until the authorities arrived, it is clear that a conviction for the crime of false imprisonment could not be sustained."

What these cases illustrate is, on the one hand, the resistance of the criminal law process to prohibiting confinements that are not morally offensive per se, at least in terms of the intentions of the accused, and, on the other hand, the difficult choices which are imposed upon triers of fact when they are asked to decide which confinements can, although intended, be excused by the good motives of the accused. A "good faith" defence involves difficult value choices which introduce into criminal law an element of uncertainty, so that a person could be convicted or acquitted not on a jury finding as to his subjective state of mind but on an objective determination of the "goodness" of his motive. The task of triers of fact is greatly complicated when they are asked to decide whether one can approach a would-be suicide on the street and force her into an automobile, ostensibly for her own preservation. The Criminal Code presently provides defences for parents and school teachers to use.

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103 Id. at 338. See Aston, Motive as an Essential Element to the Crime of False Imprisonment (1934), 38 Dick. L. Rev. 184.
105 232 N.W.2d 872 (1975).
106 Id. at 878.
reasonable discipline,\textsuperscript{107} for surgeons to perform operations without consent,\textsuperscript{108} for masters of ships to impose reasonable discipline,\textsuperscript{109} and for police officers and private citizens to make arrests under prescribed circumstances.\textsuperscript{110} While it is not beyond the scope of the common law to introduce new defences to crimes,\textsuperscript{111} a general notion of "good motive" seems excessive as a reaction to an anomalous prohibition which, by without more proscribing every intentional confinement, invites the invention of such defences. This development manifests not the need for a general defence of good motive in criminal law but instead the tenuous status of false imprisonment as a criminal prohibition. It would be far better to abolish the provision entirely or to prescribe particular wrongful purposes than to proceed with a loose search for a "blameworthy state of mind."\textsuperscript{112}

To sum up the discussion of the requisite elements of forcible confinement, the prosecution must prove that the accused either intentionally or recklessly committed acts which were sufficient to totally restrain the victim and that he intended, or was reckless with regard to, the consequent confinement. It is particularly important that triers of fact be alert not to casually draw inferences against the accused without fully weighing an alternative explanation of his mental state, especially with respect to circumstances (consent) or consequences (confinement).

IV. RESTRICTING THE EXPLOSIVE COMBINATION

Parliament's treatment of both the forcible confinement and the constructive murder provisions has been appallingly careless. The major amendment to the forcible confinement provision was accomplished not by Parliament but by the revisers of the statutes in 1906. The undeliberated amendments to the constructive murder provision were enacted in such an unexplained and sometimes inexplicable fashion that they too may have been clerical errors. The combined effect of the two is, without more, repugnant as a departure from general principles of criminal responsibility. But when the two are taken together with the classification provision categorizing this type of murder as first degree, and the punishment provisions providing a mandatory life sentence without parole eligibility for twenty-five years, the result is still more Draconian. Beyond the objectionable prospect of such a harsh sanction for the

\textsuperscript{107} R.S.C. 1970, c. C-34, s. 43.
\textsuperscript{108} Id., s. 45.
\textsuperscript{109} Id., s. 44.
\textsuperscript{110} Id., ss. 449 and 450. There is a good faith defence, limited to specific purposes, in the sedition provisions. See, s. 61.
\textsuperscript{112} The two Canadian cases, Elder, supra note 93, and Cunningham and Ritchie, supra note 95, can both be justified on other grounds. In Cunningham and Ritchie, Jewers Co. Ct. J., furnished the alternative analysis of justification to arrest under s. 449(2)(b) of the Criminal Code. In Elder a preferable analysis would be that the motive of assisting the victim to safety was evidence that the accused had no intent to confine him but merely to help, with the victim being free to depart at will. That is not the same thing as saying that an intent to confine for the purpose of assisting the victim falls short of some requisite "blameworthy state of mind." The analysis of motive as relevant evidence of, but not essential to, the \textit{mens rea} is set out by the Supreme Court of Canada in Lewis v. The Queen, supra note 98.
individual accused, there is also inherent in such a scheme a potential for abusive prosecutions since there is vested in prosecutors a discretion to convert what would otherwise be manslaughter, second degree murder, or even non-culpable homicide into first degree murder by relying upon a fortuitous or incidental element of confinement.

This problem arises in three different circumstances:

A. where confinement is an incidental element of another underlying offence in s. 213 which is classified as second degree murder, the prime example being robbery;
B. where confinement is an incidental element of an assault causing death, which situation would otherwise be prosecuted only as intent murder; and,
C. where confinement is intended but in circumstances bearing considerably less moral opprobrium than a hostage-taking.

It will be submitted that in each of these cases courts have a duty to enforce the policy of the homicide provisions, to prevent prosecutorial abuse, and to adhere to some rational basis of criminal responsibility for murder. There is nothing incompatible among these three objectives but, unfortunately, Canadian courts in a purported exercise of deference to Parliament have for the most part declined to do any more than to mechanically apply the provisions and drop the accused through a trap-door. In so doing, what the courts have done in effect is to defer not to Parliament but to prosecutors. Typical of this extreme positivism is the majority judgment of the Supreme Court in \( R. \text{ v. Farrant,} \) where Dickson J. declined to consider what policy might underlie this combination of provisions:

> The rule may seem harsh but it is not the function of this Court to consider the policy of legislation validly enacted. So long as the section continues in our Criminal Code it must be given effect in accordance with its terms.\(^{113}\)

Given the seriousness of the consequences for the accused, and especially against a backdrop of Parliamentary carelessness in drafting the legislation, such a slavish and mechanical conception of the role of courts in the criminal justice process is disheartening. Moreover, it misses the mark in its purported respect for the will of the legislature. In each of the three circumstances set out above the courts can achieve, not defeat, the policy of the Criminal Code by playing a more thoughtful role and declining to respond in knee-jerk fashion to prosecutorial claims.

A. Confinement Incidental to Another Underlying Offence

Opportunities to enforce the scheme of the homicide provisions where confinement is incidental to robbery have recently been declined by the British Columbia and Ontario Courts of Appeal, with leave to appeal to the Supreme Court of Canada being refused in the latter instance. In \( R. \text{ v. Gourgon and Knowles,}^{114}\) the two accused were charged with first degree murder. They drove to the home of a former co-worker about 5 A.M.; broke into the residence and wakened the occupants, who were the deceased, his wife and his mother-in-law. The three were taken to the living-room at knife-point where the keys to a hotel and the combination to the hotel safe were taken from the

\(^{113}\) Supra note 90, at 340 (N.R.), 291 (C.R.).

victims. He and his wife were then taken to the bedroom where they were bound at both the wrists and the ankles. The mother-in-law was tied up in the living-room. Without warning the accused attacked her. The victim and his wife freed themselves and came running from the bedroom. The victim was stabbed and killed in the ensuing struggle. Anderson J. (as he then was) declined to put first degree murder to the jury on any basis other than planning and deliberation, responding to the argument that there could be a conviction of first degree based on forcible confinement by saying, "It [Parliament] did not intend that whenever the fact of forcible confinement existed, no matter how incidental or temporary, and death ensued, there should be a conviction for first degree murder." The jury acquitted of first degree murder but convicted of second degree. On appeal to the British Columbia Court of Appeal the ruling of Anderson J. was reversed, although no new trial was ordered for discretionary reasons. McFarlane J.A. disapproved of the reasoning of the trial judge, saying:

Nothing is expressed or implied in those sections about the purpose of the confinement. Neither is there anything in the history of the legislation to suggest a limitation of that nature to be placed upon the word "confinement". The interpretation that confinement for the one purpose of robbery is excluded cannot be supported. I think the jury should have been instructed that, if they decided that Gourgon did murder the victim, that murder was first degree if the jury also found that the victim's death was caused by Gourgon while he was confining or attempting to confine any one or more of the three occupants of the residence,116

The Ontario Court of Appeal has recently adopted these views in Dollan and Newstead.117 There seems little doubt, and indeed it was the theory of the Crown, that the purpose of the accused in coming to the residence was to obtain a vehicle. The two accused stayed at the Kehoe home only long enough to steal a truck, a .303 rifle, some ammunition and a wallet. In the course of the transaction, Dollan fired a fatal shot through the bedroom door and bound the occupants of the household. Defence counsel argued that the prosecution could not rely upon the incidental element of confinement to support a charge of first degree murder, but Dupont J. rejected the point and in this he was upheld by the Ontario Court of Appeal, where Zuber J.A. gave reasons, quoting from the British Columbia decision to conclude:

With respect, I agree with these words of McFarlane J.A. It is of no consequence that the unlawful confinement may be incidental to the commission of some other crime as long as there has been an unlawful confinement contrary to s. 247 of the Criminal Code. The jury was correctly instructed on this issue and on this point the appellant Dollan must fail.118

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115 Id. at 324-25. As a concluding note to his judgment, Anderson J. made the following plea for legislative action (at 331):

In conclusion, I wish to draw the attention of the Crown to the serious inadequacies to be found in s. 214(5) of the Code. Criminal laws should, as far as possible, be clearly and simply stated so that those laws may be enforced in a uniform manner and with certainty and consistency. I would ask, therefore, that my remarks and these reasons be made known to the Minister of Justice so that he may consider such amendments to s. 214(5) as may be required.

117 Supra note 9.
118 Id. at 245.
The objection to these two decisions is that they decline to apply the classification mechanism of the Criminal Code and, in doing so, undermine one of the few deliberate policy choices which Parliament has made regarding the law of homicide. In 1961, Parliament for the first time introduced a distinction between murder which was punishable by death and that which was punishable by life imprisonment. The scheme classified as capital murder that which was planned and deliberate, that which caused the death of a policeman or a prison employee, and constructive murder committed during any of the underlying offences. A 1967 amendment made murder capital only when the death of a policeman or a prison employee resulted, thereby treating all constructive murder as non-capital. This essential scheme continued until 1976, when the first degree/second degree classification was introduced and capital punishment was abolished. The punishment for both first and second degree murder is life imprisonment, the crucial distinction being a parole ineligibility period of twenty-five years for the former and ten years for the latter. Classified as first degree are murders resulting in the death of a policeman or prison employee, murder which is planned and deliberate, and murder caused during the commission of selected offences from the constructive murder provision. For the first time, then, Parliament distinguished among the underlying offences of the constructive murder provision. It is unlikely that this was a mere casual triage, being a classification resulting from an agonizing fifteen-year debate over the abolition of capital punishment. In this context it is a fair assumption that the distinction is not inadvertent.

The resulting scheme classifies murder committed during sexual assaults, hijacking, kidnapping and forcible confinement as first degree, with all other types of murder being second degree. Into this residual category would fall murder committed during the course of robbery, piracy, arson, sabotage, breaking and entering, treason and escape from custody. If it is true that Parliament perceives the constructive murder provision as an ex ante determination of circumstances in which the accused ought to contemplate the likelihood of a resulting death, the 1976 differentiation among the underlying offences makes sense because those crimes which are classified as first degree involve by definition personal violence against a target victim. At least that is true of sexual assaults, kidnapping and forcible confinement in its classic form as a hostage-taking. Hijacking is less categorically an offence of personal violence but it may have been included because of the close association between it and kidnapping in the 1975 amendments. It is also more like the first degree group in terms of the likelihood of personal violence which might be reasonably contemplated than it is like the residual offences which are essen-

119 S.C. 1960-61, c. 44, s. 2 (becoming s. 206 of Criminal Code).
120 S.C. 1960-61, c. 44, s. 1 (becoming s. 202A of Criminal Code).
121 S.C. 1967-68, c. 15, s. 1 (replacing the former s. 202A of Code).
122 There was an amendment in 1973 but it did not affect the existing classification. Murders of policemen and prison employees continued to be punishable by death, and other murders by life imprisonment with a minimum of ten years required to be served before being eligible for parole. S.C. 1973-74, c. 38, ss. 2 and 3.
123 S.C. 1974-75-76, c. 105, s. 4. There has been a further amendment to s. 214 to accord with the amendments to sexual offence legislation: S.C. 1980-81-82-83, c. 125, s. 16.
tially crimes against property, which have potential for personal violence but which do not by definition require such violence.

It is unconvincing, therefore, to simply respond as did McFarlane J.A. in Gourgon and Knowles that "nothing is expressed or implied in those sections" 124 to justify a different treatment where the confinement is incidental to an offence which would otherwise be classified as second degree. To decline to characterize a murder as being committed either during robbery or during forcible confinement is to ignore the obvious policy of Parliament in devising a scheme whereby certain murders, including those committed in the course of a forcible confinement, are first degree while others are second degree. Surely it cannot be said that nothing is implied by a provision, enacted in the context of a protracted debate over the abolition of capital punishment, when the designation of the section is "Classification of Murder" (emphasis added). The language of the section is that of a virtual command:

214. (1) Murder is first degree murder or second degree murder.
(5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person
(a) while committing or attempting to commit an offence under section 76.1 (hijacking aircraft) or 247 (kidnapping and forcible confinement);
...
(7) All murder that is not first degree murder is second degree murder. (Emphases added.)

Can it be said that Parliament imposed a regime of classification of murder yet intended that the most incidental element of restraint would suffice to characterize a killing as being one occurring in the course of forcible confinement? To so argue is to undermine the entire classification function. Gourgon and Dollan were committing robberies. Parliament classifies murder committed in the course of robbery as second degree. Yet due to an incidental element of confinement, the murder is transformed into first degree. Practically all robbery involves a confinement, which also has the potential of being an incidental or even a constituent element of other offences in section 213. Hence, notwithstanding the classification of murders committed in the course of robbery, piracy, sabotage, arson, etc., as second degree, the Crown can obtain a first degree conviction by relying upon an element of confinement, although such confinement may be only fortuitous or incidental. Two of these offences, robbery and piracy, would appear by their very nature to import an aspect of confinement. To avoid a virtual countermanding of the classification scheme by enthusiastic Crown counsel, it seems imperative that courts should not accept first degree charges where the only basis for first degree murder is confinement as an incidental aspect of another offence.

Classification is not a new function for Canadian courts; they need only draw on their experience under the division of powers in constitutional law. When murder committed during the commission of a robbery carries a consequence less than half as severe as the consequence for murder committed during a forcible confinement, it is unconvincing to deny that the courts have a duty to characterize the murder so as to eliminate incidental aspects. To hold that it matters not whether an element is incidental or essential is an unlikely way to perform a classification function. For courts to decline to classify

124 Supra note 121.
murders as being committed either in the course of robbery or in the course of forcible confinement is to abdicate responsibility for ensuring that the will of Parliament is enforced and to concede to the Crown a broad discretion to prosecute as first degree murder cases where the accused may never have contemplated a confinement and where he may realistically have estimated the risks of personal violence to be relatively low, relative that is to what he ought to have foreseen as the risks had he contemplated a hostage-taking. Therefore it can be seen that some sense can be imposed on the disarray of the homicide provisions by requiring courts to do what is their obvious function under the classification provision: to classify.\(^{125}\)

There is in the judgment of the Supreme Court of Canada in \textit{R. v. Farrant}\(^{126}\) a parallel abdication of the classification function. In that case the Crown had charged second degree murder but, after the close of evidence, because of certain responses given by the accused on cross-examination, the prosecutrix requested the trial judge to instruct the jury on constructive murder committed during forcible confinement. The jury was so instructed and the accused was convicted. The Saskatchewan Court of Appeal\(^{127}\) quashed the conviction and ordered a new trial, holding that the Crown could not rely on forcible confinement after charging second degree murder. The Supreme Court of Canada allowed an appeal by the Crown. The majority of the Court, in an opinion by Dickson J., held that the classification provision is “subservient” to the definition sections:

\begin{quote}
Section 214, however, is not the section which sets out the elements of the offence of murder. This is done in ss. 212 and 213. Section 214 does not create a distinct and independent substantive offence of first degree constructive murder pursuant to forcible confinement. The section is subservient to ss. 212 and 213; it classifies for sentencing purposes, the offences in s. 212 and s. 213 as either first or second degree murder. . . . The primary and essential determination for a jury to make is whether murder has been committed, either under s. 212 or, where the evidence warrants it, under s. 213. Considerations of the distinctions between first and second degree murder are irrelevant in making this preliminary determination. Once the offence has been found, it is then classified.\(^{128}\)
\end{quote}

This holding demonstrates a fundamental misperception of the homicide provisions of the \textit{Criminal Code}. There is no offence of murder created in section 212 or section 213 of the Code. One could no more be convicted of murder

\(^{125}\) An illustration of the scope of discretion given the prosecutor by failing to restrict first degree charges to true confinements and of the anomalous results produced thereby can be seen in the case of \textit{R. v. McKinnon} (conviction of first degree murder before Dechene J. and jury, Alta. S.C., Oct. 29, 1977, unreported). McKinnon and his accomplice Meyer broke into a church sacristy for the purpose of committing a robbery. Meyer tied up the caretaker with materials found on the premises. In the course of the robbery, Meyer called McKinnon by name within hearing distance of the caretaker, so McKinnon decided to shoot the victim. Both Meyer and McKinnon were charged with first degree murder, but Meyer pleaded guilty to second degree and testified for the Crown. The jury was instructed on planning and deliberation as well as forcible confinement as theories to support the first degree charge against McKinnon. The accused argued that the confinement was not part of the common enterprise and that Meyer had acted on his own. An appeal to the Alberta Court of Appeal was dismissed (September 14, 1979, unreported), and leave to appeal to the Supreme Court of Canada was denied (1980), 35 N.R. 178.

\(^{126}\) \textit{Supra} note 90.

\(^{127}\) \textit{Id.}

\(^{128}\) \textit{Id.} at 351-52 (N.R.), 301-302 (C.R.).
contrary to these sections than one could be convicted of homicide contrary to section 205 or of infanticide contrary to section 216. Section 212 and 213 are definition provisions, not offences. The homicide scheme of the *Criminal Code* does not provide for an offence of "murder," only first degree murder or second degree murder. The offence of second degree murder is proscribed by section 218 and the classification provision is just as vital as are the definition sections in reaching a determination of guilt or innocence. Section 214 classifies murder committed in the course of forcible confinement as first degree; there is no such offence as second degree murder where the Crown relies on the constructive murder provision and forcible confinement is the underlying offence. Neither does there exist an offence of second degree murder where a policeman or a prison guard is the victim. If the majority in *Farrant* is correct then the Crown has a discretion to charge second degree murder where a policeman is murdered as that classification is phrased in identical terms to the classification of forcible confinement/constructive murder. When the matter is looked at in this light it becomes evident that the courts have truly reneged on their duty to enforce the classification scheme. The problem is not a complicated one. It simply involves starting with the offence-creating section 218 and working through both the definition sections and the classification section to determine if the offence charge has been proved. In this way the courts would do only what Dickson J. claimed they were doing in *Farrant*: give effect to the *Criminal Code* "in accordance with its terms." They would also take a step toward controlling prosecutorial abuse. The contrast between the virtual prosecutorial ignorance of forcible confinement prior to 1975

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129 The indictment against Farrant charged that he "did commit second degree murder on the person of Shannon Russell, contrary to Section 218(1) of the Criminal Code" [emphasis added].

130 In *Farrant*, Dickson J. points out that the language of the French version of s. 214(5) is "much less" imperative than the English version which says: "Murder is first degree" when constructive murder based on forcible confinement is alleged. The French version of subsection (5) reads: "Est assimile au meurtre au premier degré." It is true that the French version is less categorical than the English, as the French approximately translated means "is likened to" or is "identified with." However, when the French version of subsection (5) is read in the context of the whole provision it can hardly be argued that the situations specified in the subsection could lead to second degree charges. Subsections (1) and (7) are set out as follows:

214. (1) Il existe deux catégories de meurtres: ceux du premier degré et ceux de deuxième degré.

(7) Les meurtres qui n’appartiennent pas à la catégorie des meurtres au premier degré sont des meurtres au deuxième degré.

It is difficult to imagine that Parliament would set up a scheme entitled "Classification" with two categories A and B; then enumerate specific instances, including X, which are "likened to" A; then direct that situations not "belonging to" A are B; and still leave open the possibility that X belongs to category B.


131 *Supra* note 113.

132 *Supra* text at note 7.
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and its invocation as a foundation for a charge of murder, normally first degree, at least four times in the past several years is itself evidence of the disingenuous use to which it has been put.

B. Confinement Incidental to Assault Causing Death

Even if courts will enforce the classification scheme, thereby preventing the conversion of robbery/second degree murder into confinement/first degree murder, there remain two major problems arising from this unhappy, explosive combination. The first of these is the potential for prosecutors to rely on confinement in what would otherwise be an assault/homicide. Take as an example a domestic quarrel in the "confines" of the family kitchen or an assault in a dead-end alley. If the victim dies and the prosecution is having difficulty proving intention or recklessness, the process could be short-circuited by alleging that the death occurred during a confinement, ergo first degree murder. If we assume that the victim was not being held in any fashion other than what could be said to be incidental to the assault, the question is whether there are any devices which a court might employ to prevent the conversion of a typical homicide into first degree murder, which conversion would be accomplished without an inquiry into either planning and deliberation or intent. If the example of the courts in applying section 213 has not been encouraging, the judicial treatment of section 212(c) may provide some inspiration. The Ontario Court of Appeal has recognized the need to "prevent section 212(c) from overflowing its banks and making murder of almost every unlawful homicide." Accordingly, a requirement has been grafted on to the provision that there be an unlawful object distinct from the immediate object of the act causing death. Subsequently, the Supreme Court of Canada, in a judgment recognizing the evolution of the criminal law and "even more so the attitudes of all of those administering it," has introduced the additional stipulation that the unlawful object be an indictable offence requiring mens rea. What these two glosses on section 212(c) manifest is a judicial resistance to deviate from the norm of intentional or reckless homicide as murder. Moreover, the requirement of a separate object responds to a concern that the imposition of objective liability not be premised upon a factor which is included in the act causing death.

The courts in California have had to deal with similar issues in the context of felony-murder, which continues to survive in that state through the com-

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132 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.

134 R. v. DeWolfe (1976), 13 O.R. (2d) 302 at 308, 31 C.C.C. (2d) 23 at 29 per Zuber J.A. There is some indication in the judgment of Zuber J.A. that the Court would have been willing to further confine the section in line with R. v. Blackmore (1967), 1 C.R.N.S. 286, 53 M.P.R. 141 (N.S.C.A.) and Downey v. The Queen, [1971] N.F.L.R. 97, but felt constrained by the judgment of the Supreme Court of Canada in Graves v. The King (1913), 47 S.C.R. 568, 21 C.C.C. 44.


mon law\textsuperscript{137} as second degree murder, with the added judicial requirement that the felony be inherently dangerous. In \textit{People v. Ireland}, the accused was found guilty of second degree murder of his wife, the killing having occurred during what the prosecution claimed to be the crime of assault with a deadly weapon. The Supreme Court rejected the position that the underlying felony could be an integral part of the homicide itself, calling such tactics "bootstrapping":

To allow such use of the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault — a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law. We therefore hold that a second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offence included \textit{in fact} within the offence charged.\textsuperscript{138}

A similar approach is of long-standing in New York.\textsuperscript{139} Thus it is likely that a successful argument could be made, based on Canadian experience with section 212(c) and the principles developed in the New York and California courts, to prevent the circumvention of the principal murder provisions through reliance upon a confinement which is in reality part of the homicide itself.

C. Confinement Not Intended as Hostage-Taking

The final problem, perhaps more remote in that one would rarely expect a prosecutor to be so ruthless as to resort to the forcible confinement provision in such circumstances, occurs when the accused in fact does intend to restrain the victim, the confinement is separate from the homicidal act, no other offence is present to permit characterization of the confinement as secondary or incidental, but the accused does not commit the confinement in such a way as to come within the implicit risk-taking criterion of the constructive murder provision. One such case might be Mewitt and Manning’s example of the prison warden who confines a prisoner under a defective warrant of commit-tal.\textsuperscript{140} Apart from a “good faith”\textsuperscript{141} defence to the underlying confinement,

\textsuperscript{137} But see \textit{People v. Ramos}, supra note 37.

\textsuperscript{138} 450 P.2d 580, at 590 (1969). See also \textit{People v. Sears} 465 P.2d. 847 (Cal. Sup. Ct. 1970). The \textit{Ireland} rule was developed under the common law second degree murder. \textit{Sears}, on the other hand, involved application of a statutory first degree murder which is predicated upon six enumerated underlying offences, one of which is burglary. The felonious intent requisite for burglary in the \textit{Sears} case was alleged to consist of the intent, at the time of entry, to commit an assault. The Court rejected the reliance upon the assault, itself an integral part of the homicidal act, as also constituting a critical element of the underlying felony.

\textsuperscript{139} As long ago as 1906 the New York courts were applying the same principle, that the felony be separate from the homicidal act; for example, \textit{People v. Huter}, 184 N.Y. 237 at 244 (Ct. App. 1906):

In order, therefore, to constitute murder in the first degree by the unintentional killing of another while engaged in the commission of a felony, we think that while the violence may constitute a part of the homicide, yet the other elements constituting the felony in which he is engaged must be so distinct from that of the homicide as not to be an ingredient of the homicide, indictable therewith or convictable thereunder.

\textsuperscript{140} Supra note 92.

\textsuperscript{141} Supra, text at notes 91-112. Consider also an application of subsection 25(2) of the \textit{Criminal Code}. 
there would be no reason on an application of the *Criminal Code* why an accidental discharge of a guard’s firearm would not amount to first degree murder. A second such instance, and a troubling one, is the case of *R. v. Farrant*.\(^{142}\) Supposing Farrant did intend to bring the gun into the house to make Shannon’s friends leave and to keep them from taking her out, and that he did want to make her stay to talk with him, an accidental discharge of the gun in such circumstances ought not to come within the policy of the constructive murder provision. If there is any rationale for constructive murder it is that the degree of contemplation of violence resulting in death is so great in certain prescribed circumstances that Parliament can determine *a priori* the accused’s mental state. One can imagine a forcible confinement in the style of a hostage-taking, where a victim is forcibly imprisoned or held for ransom or other gain, being accepted as equivalent to a kidnapping or hijacking, which offences happen to be the counterparts of forcible confinement in the classification of murder. That a difference in degree exists among confinements was observed by the Commentators to the American Model Penal Code:

> First, the entire range of misconduct based on unlawful confinement of another must not be lumped together in one undifferentiated offence for purposes of grading. The person who physically restrains another on a public street in order to drive a point home is guilty of wrongful interference with the other’s personal liberty, but a rational penal code must distinguish such conduct from prolonged confinement and isolation from the protection of the law. Even such instances of more serious misbehavior, such as locking another in a closet for several hours, should be treated differently from abduction for ransom.\(^{143}\)

To treat as murder a killing which occurs accidentally or negligently during a confinement initiated to drive home a point on a public street and to equate it with killing during the course of a prolonged imprisonment for ransom would be to deny the existence of any policy underlying constructive murder. To fail to distinguish would be to apply the letter of the law to defeat its spirit. Especially when the gravity of the consequence is considered, there is a very persuasive argument that courts ought not to treat every unlawful confinement as a suitable basis for constructive murder.\(^{144}\)

The suggestion that Courts ought to differentiate between major and minor confinements for purposes of applying the constructive murder doctrine may at first seem to propose a new and radical role for courts. But there is a precedent, and it is particularly apt. Courts in the United States, faced with some especially harsh implications of kidnapping laws, have undertaken to mitigate these effects by restricting the application of the law to more serious incidents. Kidnapping was at common law only a misdemeanour, and it was not among the most serious offences when first enacted in legislation.

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\(^{142}\) *Supra* note 90.


\(^{144}\) Another case in which the confinement is likely to have been incidental to other purposes of the accused, but where it was invoked to support, at least in the alternative, a conviction of first degree murder, is *R. v. Kluyne* (1983), 22 Sask. R. 185 (C.A.). In that case, the accused drove the victim sixteen miles to a grain shelter and stabbed him twice. The main issue on appeal involved the defence of provocation to the intent/first degree theory. The jury had been instructed on a forcible confinement/first degree theory as well and, in a throwaway reference in the final paragraph of the judgment, Hall J.A. observed that there was evidence in the testimony of the accused which was capable of supporting a finding of forcible confinement.
However, the dramatic increase in the frequency of kidnappings in the late 1920s and early 1930s, culminating in the Lindbergh tragedy, prompted a wave of sweeping statutory changes in both federal and state jurisdictions. The federal legislation defined kidnapping as occurring when a victim was (i) "unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away by any means whatsoever" and (ii) "held for ransom or reward or otherwise." Punishment was either death or long prison terms. In *Chatwin v. United States*, the Supreme Court noted the "comprehensive language" of the statute and commented:

Were we to sanction a careless concept of the crime of kidnapping or were we to disregard the background and setting of the Act the boundaries of potential liability would be lost in infinity. A loose construction of the statutory language conceivably could lead to the punishment of anyone who induced another to leave his surroundings and do some innocent or illegal act of benefit to the former, state lines subsequently being traversed. The absurdity of such a result, with its attendant likelihood of unfair punishment and blackmail, is sufficient by itself to foreclose that construction.

The New York statute was also drafted in broad terms, one version of which constituted the offence as: "confines" another with intent to "cause him . . . to be confined." In *People v. Levy*, the New York Court of Appeals was faced with an appeal from a kidnapping conviction where two armed men entered the victims' automobile, drove twenty seven city blocks in a time period of twenty minutes, robbed the victims of jewelry and cash, and then departed. The Court of Appeals acknowledged that this would amount to kidnapping in the strict terms of the statute but went on to note the manner in which such a definition could overrun lesser crimes, "notably robbery and rape, and in some circumstances assault," and concluded:

We now overrule [an earlier decision] to limit the application of kidnapping statute to "kidnapping" in the conventional sense in which that term has now come to have acquired meaning.

The California Supreme Court has followed the New York and the Michigan Courts of Appeal, faced with a statute defining kidnapping, in the words of the Court, as to "intentionally confine another person without legal justification or excuse," gave the statute a restricted interpretation to avoid finding it constitutionally void for vagueness. The Court found a literal reading of the legislation to be so open-ended as to confer unlimited discretion upon judges, jurors and, especially, prosecutors:

Discretion thus unbound by fixed standards becomes not discretion in the legal sense of the term, but, rather, naked and arbitrary power. . . A literal reading of

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147 15 N.Y.2d 159 (1965).


the kidnapping statute would permit a prosecutor to aggravate the charges against any assailant, robber, or rapist by charging the literal violation of the kidnapping statute which must inevitably accompany each of those offenses.\textsuperscript{150}

Concluding that criminal statutes cannot be expanded to meet situations beyond the contemplation of the legislature at the time of enactment, even though the particular circumstances might come within the broad wording of the provision, the Michigan court attempted to distinguish true kidnappings from those incidental to the commission of other offences. Among the factors stipulated were: that there be asportation or, as an alternative, secret confinement; that the movement not be incidental to another offence unless the offence involves murder, extortion or taking a hostage; and, that such asportation in the commission of other offences involve an additional danger or threat of danger.\textsuperscript{151} The North Carolina Supreme Court has sought to distinguish incidental from primary kidnapping and to avoid the constitutional problem by “dealing directly with the qualitative risk to which the victim is exposed.”\textsuperscript{152}

In all of these cases the underlying motive of the courts in attempting to restrict the definition of kidnapping was to minimize opportunities for abusive prosecutions. This is not so much a reflection of mistrust of prosecutorial good faith as it is a general resistance to overbroad and overlapping criminal prohibitions. The Drafters of the Model Penal Code stated the problem this way:

The blame cannot be placed exclusively at the door of the prosecutor for choosing to indict for kidnapping. When an especially outrageous crime is committed there will always be public clamor for the extreme penalty which the laws permit, and it is asking too much of public officials and juries to resist such pressures. Rather, it is precisely the obligation of penal legislators to minimize opportunities for such injustice by clearly and rationally restricting discretion to punish. Demands for high penalties, e.g., in aggravated cases of rape, should be satisfied by appropriate provision in the rape legislation itself.\textsuperscript{153}

In addressing the issue of minimizing such discretion the Drafters said that the central problem was to devise a system to discriminate between simple false imprisonment and the more terrifying and dangerous abductions for ransom or other felonious purpose. To attain this goal they stipulate two elements of kidnapping: first, moving the victim a substantial distance or confining him in a place of isolation and second, a further purpose such as obtaining a ransom or committing bodily injury to the victim.\textsuperscript{154} The proposed offence of kidnap-
ping would be a felony in either the first or second degree while the offence of false imprisonment was retained in the Model Code as a misdemeanor.\textsuperscript{155}

The point of examining the American treatment of kidnapping is to show: first, given such serious consequences, courts intuitively desire to distinguish between incidental and “true” kidnappings; second, that concern to prevent overzealous prosecution is a legitimate function for courts; and third, even in the face of sweeping statutory language, absurd results inconsistent with the original intention of the legislation will be eschewed. The parallel is especially useful because of the common features which exist between kidnapping and forcible confinement. Indeed, most of the American legislation treats asportation and confinement as alternative means of committing the same offence. In the end what the American courts have sought to do is not to review the wisdom of the policy of the legislature but rather to seek ways to adhere to that policy and to avoid anomalous results by limiting the literal scope of the legislation.

What, then, should Canadian judges do to restrict the combination of forcible confinement and constructive murder to circumstances that come within the ostensible policy of the constructive murder doctrine, and that also minimize the potential for prosecutorial abuse? Initially, they should seek to distinguish the comparatively harmless restraint of liberty from the “true” hostage-taking.\textsuperscript{156} This approach would emphasize the degree of risk to the victim, thus obtaining a result consistent with the general “enterprise liability”\textsuperscript{157} model of constructive murder and, more particularly, with the counterpart offences of kidnapping and hijacking in section 214(5)(b) of the Criminal Code. Rather than have courts formulate particular intents comparable to those stipulated for these latter offences, a reasonable solution would be to allow prosecutions for first degree murder under the problematic combination only where the circumstances involve risks of personal violence equivalent to those attending a kidnapping or a hijacking. Such an approach would at least avoid the true hard case and prevent the most patently overzealous prosecutions. It would also send a signal to Parliament that the constructive murder/forcible confinement combination has become so explosive that some reasonable limits must be imposed upon its literal terms.

At the beginning of this section, three problems were noted in the combined operation of constructive murder and forcible confinement. All three can be handled in accordance with the will of Parliament given a judicial willingness to play a more responsible role than the mere mechanical and heartless application of what appear to be the terms of the law. The first problem, that of forcible confinement as an incidental element of robbery, can be resolved best by applying the law, including the classification provision. The latter two problems admittedly require some judicial effort to discover the intent of Parliament, but to decline to make such an effort, ostensibly in the cause of judicial modesty and legislative supremacy, is to allow the letter of the law to...
prevail over its spirit, a policy which is startling in the context of a murder charge leading to a mandatory minimum sentence.

V. CONCLUSION

The determination of criminal responsibility, followed by the imposition of a penal sanction, is the archetypal case of state interference with individual liberty. Within the world of criminal law, murder is the ultimate crime, bearing the most serious of penalties. Recognizing the serious consequences for the citizen of a criminal conviction, especially of murder, we have developed general principles of criminal law around the touchstone of subjective responsibility. Moreover, the courts have developed against this backdrop what may be our most fundamental constitutional protection, the presumption of innocence, as well as such principles as the right of an accused person to remain silent and the resolution of interpretative ambiguities in his favour.

But the statutory evolution and the application of the explosive combination of forcible confinement and constructive murder is a tale of undeliberated and careless legislative deviation from the touchstone of subjective responsibility, taken together with troubling judicial positivism in the face of excessive prosecutorial zeal. The story is marked throughout by a cavalier attitude toward the right of the citizen to liberty and an unmistakably vengeful approach to criminal punishment, all premised upon the element of a death caused by the accused. Such crass retribution has no place in a civilized system of criminal justice, especially in the form of a legal fiction which equates accidental death with the most odious planned and deliberate killing.

It may be said that this article amounts to a challenge to the legislative choice of constructive murder as a basis of responsibility. For that no apologies or disclaimers are offered. But that is not the principal message. The major indictment is directed not at the substance of the law but at the process from which it has emerged and by which it is applied. Criticism is directed

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158 The contrast between this would-be deference to Parliament with respect to s. 213 and the judicial activism in restricting the operation of s. 212(c) (supra notes 133-136) is striking. See also the response of the Ontario Court of Appeal to a prosecution for attempted murder where the attempt was said to be during the commission of the offence of breaking and entering; i.e., attempted constructive murder: R. v. Aracio (1981), 34 O.R. (2d) 437, 63 C.C.C. (2d) 309, at 446 (O.R.), 319 (C.C.C.);

While counsel for the Crown argues that the social policy of the legislation is to protect against certain types of crime "where death may ensue," it is surely not social policy to interpret legislation, if it is possible to do otherwise, to lead to what the ordinary person in the street, whom the law is intended to serve, would consider a manifestly absurd result.

Leave to appeal to Supreme Court of Canada was granted December 22, 1981; the appeal was heard November 8, 1983.

159 In The Mental Element of Crime, supra note 100, Glanville Williams wonders whether the abolition of capital punishment may have caused the courts to give a wider scope to the crime of murder than previously (at 100). One might well pose the same question, not just as to the scope of murder but as to the willingness of courts to search for some rational policy in criminal law and to be vigilant as to evidentiary instructions, given the judgment of the majority of the Supreme Court in Farrant. It is difficult to believe that Farrant would not have gotten a new trial if the punishment had been death, especially over a dissent arguing that there had not been an opportunity to respond to the case against him.
initially at Parliament, which has been guilty of appalling neglect in its treatment of both constructive murder and forcible confinement. But it would be facile to dismiss this unhappy state of affairs as being exclusively the work of the legislature. Parliament only enacts laws, and in a hurried and ill-considered fashion. Nor can it be expected that unduly harsh and irrational applications of the law will be avoided simply by thoughtful exercises of prosecutorial discretion. The role of prosecutorial discretion as a mitigating factor is a limited one and, moreover, an argument that prosecutors should be responsible for mitigation of the law is by itself testimony to an overbroad proscription and to a failure of the proper checks in the system. Ultimately, responsibility for the rationality of our system of criminal justice and for safeguarding individual liberty must reside jointly in the courts and in enterprising and articulate defence counsel. It has not been contended that courts can or should override deliberate and constitutionally valid legislative policy; however, short of judicial lawmaking there is much room for sensible and fair administration of criminal justice.

In the case of the explosive combination of constructive murder and forcible confinement these safeguards, judicial vigilance and defence counsels' diligence have failed. Death caused during the course of a robbery has three times been converted into first degree murder by reliance upon an incidental element of confinement. In another case a murder conviction was obtained without deciding the issue of intent to cause death or grievous bodily harm by casting a boy's efforts to talk to his girlfriend as a confinement, all premised upon his possession of a firearm. This article has set out arguments by which criminal defenders can persuade courts that these precedents ought not to be repeated, and by which, in keeping with the intention of Parliament and the rational administration of justice, the explosive combination of constructive murder and forcible confinement can be brought within its proper confines.