CANADIAN CRIMINAL JUSTICE, 1892-1992

Martin L. Friedland*

This year is not only the 100th anniversary of the founding of the Law Faculty at the University of New Brunswick, but it is also the 100th anniversary of the enactment of the *Canadian Criminal Code*. The *Criminal Code* received Royal Assent on 9 July 1892 and came into force on 1 July 1893.[1] This paper concerns some of the developments in Canadian criminal justice over the past one hundred years.

When the *1892 Code* was enacted, R.B. Bennett was just about to enter his final year at Dalhousie Law School, having stood first in the "crimes" course in first year. He then practised law in Chatham, New Brunswick before moving out West. A recent biographer[2] notes that R.B. Bennett first made his legal reputation in Calgary at the end of the century with a spectacular jury acquittal in an attempted murder case. The accused was a husband who unquestionably shot his wife's alleged lover. The defence, which the jury accepted, appeared to be the well-known one that the victim "got what he deserved." R.B. Bennett was obviously a very effective criminal lawyer, and so this is another reason why it is fitting to devote this Viscount Bennett lecture to criminal justice. I should point out, however, that this case was apparently the only one involving murder or attempted murder in which Bennett ever appeared.

The *1892 Code* was the product of the efforts of four Maritimers. It was initiated by Sir John Thompson, "The Man From Halifax," as Peter Waite entitled his biography of the then federal Minister of Justice and future Prime Minister.[3] The drafting was done by a New Brunswicker, George Burbridge,[4] the Deputy Minister of Justice in Ottawa, and by his successor as Deputy Minister, a Nova Scotian, Robert Sedgwick.[5] They were assisted by a federal civil servant, Charles Harding Masters.[6] It is to the unknown and unsung Charles Harding Masters,

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*Of the Faculty of Law, University of Toronto. This is a slightly revised version of the text of the Sixteenth Annual Viscount Bennett Memorial Lecture, delivered at the Faculty of Law, University of New Brunswick, 5 November 1992.

[1] *The Criminal Code, 1892*, 55-56 Vict., c. 29 [hereinafter *1892 Code*]. See generally, D.H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: University of Toronto Press, 1989). See R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*] for the present version.

[2] J.H. Gray, *R.B. Bennett: The Calgary Years* (Toronto: University of Toronto Press, 1991) at 54-58.

[3] P.B. Waite, *The Man from Halifax: Sir John Thompson, Prime Minister* (Toronto: University of Toronto Press, 1985).

[4] Brown, *supra*, note 1 at 108.

[5] *Ibid.* at 229.

[6] *Ibid.* at 119, 123. See H.J. Morgan, ed., *The Canadian Men and Women of the Time*, 2d ed. (Toronto: Wm. Briggs, 1912).

another New Brunswicker, who no doubt did most of the work on the *1892 Code*, that I would dedicate this lecture, if a dedication were considered appropriate.

If Charles Harding Masters returned today to a criminal court in New Brunswick or Ontario, what changes would he note? He might be inclined to say that things have not changed significantly in the area of criminal justice in the past 100 years.

We are still using essentially the same *Criminal Code* that he helped draft a century ago, although he would wonder why the present version has the names Martin and Greenspan stamped on the front. Moreover, the courtroom and the courthouse would look about the same, and often it is the very same courtroom that was in use 100 years ago; the accused would, in some cases, be held pending trial in a county jail that predated Confederation; and the sentence might be served in one of the institutions that were in use a century ago, such as Kingston Penitentiary in Ontario or Dorchester Penitentiary in New Brunswick.

However, his guide would explain that things are not as they seem. Dorchester Penitentiary, for example, is at this very moment being renovated so that in 1993 it will provide psychiatric care for severely disordered offenders throughout the Atlantic region.[7] Moreover, he would be told, the *1892 Code* has been frequently amended and was thoroughly revised in 1955.[8] Masters would nevertheless conclude, as he thumbed through the present *Code,* that it still bore the basic character of James Fitzjames Stephen's draft code of 1878,[9] and the Royal Commissioners' *Code* of 1879[10] (primarily the work of Stephen), which formed the basis of the *1892 Code*.

Masters knew that Canada had a choice between Stephen's right wing, moralistic, anti-labour, authoritarian code and the left wing, pro-labour, liberal one drafted for the Colonial Office in the 1870s by Mr. Justice R.S. Wright, as he later became. I documented the story of these two competing codes in an article I wrote a number of years ago.[11] Comparing these two models gave me the obvious insight that codes reflect the philosophy of their drafters. The *Criminal Code* we adopted was not inevitable. We had a choice. Therefore, it tells us

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[7]See Correctional Service of Canada, *Let's Talk*, (October 1992) at 8.

[8]S.C. 1953-54, c. 51.

[9]Bill 178, *Criminal Code (Indictable Offences) Bill*, 1878.

[10]*Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences 1879*, C. 2345. The Commission consisted of Lord Blackburn (Chairman), Lush and Barry JJ. and J.F. Stephen, who became a judge during its deliberations.

[11]M.L. Friedland, "R.S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law" (1981) 1 Oxford J. of Legal Studies 307.

something about Canadian society in the 1890s that Stephen's right wing code was the one selected as the foundation of our own *Criminal Code*. Stephen's code was not even enacted in England, in part because of its authoritarian nature. We will return to the question of codification later.

The adversary system, Masters would note, is still the dominant mode of searching for the truth; the rules of evidence are still reasonably familiar; and the experts still give evidence in much the same way as they did a century ago. The subject of the expert testimony, however, differs. For example, there was no fingerprint or D.N.A. or radar or breathalyser evidence then, and there were no automobiles.

However, psychiatric evidence and the test for insanity today and would have a very familiar ring to them.[12] It is unlikely that Mr. Masters or anyone else a century ago spotted the fact that the insanity defence in the *1892 Code* mistakenly used the word "and" rather than "or" in the test of insanity.[13] This made it more difficult for an accused to prove insanity because both heads of the M'Naghten test would have to be satisfied, not just one of the heads. The accused would have to show that he did not know the nature and quality of his act *and* that he did not know it was wrong. The "and" continued until 1931 when the Ontario Court of Appeal pointed out that it was clearly a drafting error.[14] How many people were wrongly hanged between 1892 and 1931 because of this drafting error we will never know.

Looking around the courtroom, Masters would think that crime by youth was no longer a problem in Canada, until he was told that an Act had been passed in 1908 to set up a separate court system for juvenile delinquents.[15] He would correctly note that a separate system of military justice still exists for all but the most serious offences. He would be told that military justice survived a *Bill of Rights* attack in 1980[16] and, although the system was wounded in very recent

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[12]This is the conclusion I drew from my study of an 1895 Quebec murder case, *The Case of Valentine Shortis: A True Story of Crime and Politics in Canada* (Toronto: University of Toronto Press, 1986) [hereinafter *Valentine Shortis*].

[13]*Ibid.* at 38-41.

[14]*R.* v. *Cracknell* (1931), 56 C.C.C. 190 (Ont. C.A.).

[15]See W.G. West, "Juvenile Delinquency and Juvenile Justice in Canada" in J. Gladstone *et al.*, eds, *Criminology: A Reader's Guide* (Toronto: Centre of Criminology, 1991) at 258ff.

[16]*R.* v. *MacKay* (1980), 54 C.C.C. (2d) 129 (S.C.C.).

Charter of Rights[17] cases, those within the military system were able to regroup, have new legislation enacted, and survive.[18]

Masters would certainly not be surprised to see accused persons entering the witness box in their own defence. The *1892 Code* brought about this major change. However, even before that, an accused could usually give an unsworn statement from the prisoner's dock.[19]

Nor would he be surprised at the sentences imposed by the courts, although he would be puzzled by the number of cases in which both the Crown and the defence seemed to agree upon a sentence for a lesser included offence. The practice would be described as "plea negotiation" by those who approved of the practice and as "plea bargaining" by those who did not. Apart from capital and corporal punishment, which no longer exist, the sentences imposed today are not too different than they were in his day. He would not be aware that since his day we have seen the rise and fall of the rehabilitative ideal.[20] Canada, however, did not go overboard as did the United States with indeterminate sentencing. The American reaction to the rehabilitative ideal of adopting fixed, rigid sentencing, with little discretion and the elimination of parole, never gained as powerful a foothold in Canada.[21] Canadians still rely for the most part on the discretion of the trial judge, with guidance from Courts of Appeal. Parole has not been and is not likely to be abolished in Canada.

He would be surprised about the so-called "golden thread" of the *Woolmington* case.[22] In 1892, the onus of proving defences that related to the accused's mental state – for example, accident and drunkenness – was on the accused. In 1935, the House of Lords changed the law and held that the onus of disproving these defences was on the Crown, subject to statutory exceptions. The presumption of innocence has now been constitutionalized in Canada under section 11(d) of the *Charter* and most of the reverse onus provisions in the *Criminal Code* have been eliminated.

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

[18]*R.* v. *Généreux* (1992), 70 C.C.C. (3d) 1 (S.C.C.); *R.* v. *Forster* (1992), 70 C.C.C. (3d) 59 (S.C.C.).

[19]See, for example, *R.* v. *Rogers* (1888), 1 B.C.L.R. (part 2) 119 (Q.B.), Crease J.

[20]See the influential article by F. Allen, "Criminal Justice, Legal Values and the Rehabilitative Ideal" (1959) 50 J. Crim. L.C. & P.S. 226.

[21]See generally, the author's background study for the Canadian Sentencing Commission, "Sentencing Structure in Canada: Historical Perspectives" (Ottawa: Department of Justice, 1988); The Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Queen's Printer, 1987).

[22][1935] A.C. 462 (H.L.).

Masters would note that the lawyers he saw in the criminal courts still practised either alone or with one or two other lawyers, as virtually all lawyers did in his day. He would perhaps not realize that while this still tends to be the pattern for criminal lawyers, there are now law firms in Canada with four or five hundred lawyers.

No doubt he would be surprised at the number of women in the legal profession. For the past few years, half of the incoming class at the University of Toronto Law School, and I believe at most other Canadian law schools, is female. In 1892, there were no female lawyers, judges or jurors in Canada. In the turn-of-the-century New York murder case about which I have just finished writing, women were even excluded from hearing the jury's verdict in a murder case because it was feared they might make an emotional scene.

Unfortunately, there were as many female victims in the 19th century as there are today. In my study of the *Lipski* case in London, England in 1887, I noted that the victims of all the murder cases in London in the three years previous to the *Lipski* case were women.[23] Today, as in 1892, there are still far more female homicide victims than there are female homicide offenders.[24] A recent study in Ontario showed that from 1974-1990 in Ontario, 417 women were killed by their spouses, compared with 141 men.[25] Homicide in such cases is often the end result of a series of violent incidents. Thus, homicide is some measure of the extent of violence against women. In 1892, spousal violence cases were probably rarely prosecuted, while today charges are frequently brought. The result is a large increase in the prosecution of family violence cases.

What Mr. Masters would not grasp by his appearance in court is what is taking place outside the courtroom. There has been a major increase in the number of criminal charges, in the proliferation of correctional institutions, and in the growth of police forces.

The volume, *Historical Statistics of Canada*,[26] shows that the population of Canada grew less than four fold between 1891 and 1959, and yet the number of convictions for indictable offences grew twenty fold in that period. One can see this clearly in New Brunswick. It is hard to believe that in 1892 there were only 74 indictable offence convictions for persons 16 years of age and over for all of

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[23]M.L. Friedland, *The Trials of Israel Lipski: A True Story of a Victorian Murder in the East End of London* (London: Macmillan, 1984) at 25.

[24]See M. Daly & M. Wilson, *Homicide* (New York: Aldine de Gruyter, 1988) at 169.

[25]M. Crawford and R. Gartner, *Women Killing: Intimate Femicide in Ontario, 1974-1990* (Toronto: Women We Honour Action Committee, 1992) at 34.

[26]M.C. Urquhart & K.A.H. Buckley, *Historical Statistics of Canada* (Toronto: Macmillan, 1965) at 634.

New Brunswick. The population of those 16 and over doubled by 1960, but the convictions for indictable offences increased from 74 to 1,350, again an almost twenty-fold increase.

As well, the police forces have kept growing. While I do not know the figure for the growth of police forces from 1892 to 1960, I do know that between 1962 and 1991 police forces in Canada grew from 26,000 officers to 56,000, or from one officer per 584 persons in 1962 to today's figure of one officer per 356 persons.[27] Most of this growth has been in patrol policing.[28] A key question is whether the growth in policing is because of the growth in crime or whether it is, at least in part, the other way around: the more police, the more crime that is found.

Much of the offence increase is for conduct that was not criminalized in 1892. As previously mentioned, there were no automobiles in 1892. Today, it has been estimated that perhaps 40% of court time is taken up with impaired driving cases.[29] A recent British document estimated that road traffic offences occupy between 50 and 70% of Magistrates' court time.[30] It is unfortunate that the automobile came along at the very time that there was a shift in policing strategy from inspection and compliance to apprehension and the deterrence model of policing. If traffic safety regulation had originally been oriented towards compliance rather than deterrence, we might have concentrated on other techniques, such as licensing and rewards, rather than criminal prosecutions, just as we do not rely primarily on criminal prosecutions for the regulation of, for example, railways or the collection of income tax.[31]

Another growth industry that looms very large today, but was not in existence in 1892, is the control of narcotics. This crime was introduced by the *Opium Act* in 1908.[32] It is not surprising that the growth in policing has resulted in the

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[27]Canadian Centre for Justice Statistics, *Police Personnel and Expenditures in Canada* (Ottawa: Statistics Canada, 1992).

[28]See R.V. Ericson, *Reproducing Order: A Study of Police Patrol Work* (Toronto: University of Toronto Press, 1982) at 5.

[29]See K. Jobson and G. Ferguson, "Toward a Revised Sentencing Structure for Canada" (1987) 66 Can. Bar Rev. 1 at 43, note 133.

[30]Department of Transport, *Road Traffic Law Review Report* (London: Her Majesty's Stationery Office, 1988) at 25.

[31]This point is developed in M. Friedland, M. Trebilcock & K. Roach, *Regulating Traffic Safety* (Toronto: University of Toronto Press, 1990).

[32]*An Act to prohibit the importation, manufacture and sale of Opium for other than medicinal purposes*, S.C. 1908, c. 50. See C.N. Mitchell, "Narcotics: A Case Study in Criminal Law Creation" in J. Gladstone *et al.*, eds, *Criminology: A Reader's Guide* (Toronto: Centre of Criminology, 1991) at 177; B.K. Alexander, *Peaceful Measures: Canada's Way Out of the 'War on Drugs'* (Toronto: University of Toronto Press, 1990).

growth of prosecutions for motor vehicle and narcotics offences. They occur in places which can be easily observed by patrol policing and, as previously mentioned, the growth of policing has been primarily in patrols.

The Law Reform Commission of Canada advocated restraint in the criminal justice system. A surprisingly large proportion of the population today has been convicted of non-driving offences.[33] Overuse of the criminal law makes the fear of a conviction a less potent force in society. We should certainly pay more than lip-service to the important concept of restraint.

The result of this increase in criminal charges has meant a major growth in the number of courtrooms, judges and prosecutors and a significant degree of overcrowding and delay in the courts. It is not just the number of cases that have caused congestion, but the length of the individual trials. My book on Valentine Shortis, who was tried for murder in Quebec in 1895, makes the point that the 29 day trial in that case was the longest murder trial ever held in Canada up till then, and was possibly the longest in the British Empire.[34] Today, many preliminary hearings last longer than 29 days. We should continue to examine carefully techniques for cutting down the length of trials and eliminating undue delay. Eliminating the preliminary hearing, for example, but requiring full judicially supervised pre-trial disclosure, is a step worth careful consideration.

The Supreme Court of Canada has been vigorously giving substance to s. 11(b) of the *Charter*, which provides that a person charged with an offence has the right to be "tried within a reasonable time." In the well-known *Askov* case,[35] the Court not only held that the delay in that case was unreasonable, which it clearly was, but went on to say that "a period of delay in a range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable."

As a result of *Askov*, between October 1990, and September 1991, over 47,000 charges were stayed or withdrawn in Ontario alone. In the subsequent Supreme Court case of *Morin*[36] the Court modified its approach, and upheld a delay of over 14 months in an impaired driving case. In all of these cases the Supreme Court[37] has followed the American approach that "dismissal must remain ... the

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[33]T. Gabor, *Everybody Does It: Crime and the General Public* (Toronto: University of Toronto Press, forthcoming).

[34]*Valentine Shortis*, *supra*, note 12 at 31-32.

[35]*R.* v. *Askov* (1990), 59 C.C.C. (3d) 449 (S.C.C.).

[36]See *R.* v. *Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.) [hereinafter *Morin*].

[37]*Rahey* v. *The Queen* (1987), 33 C.C.C. (3d) 289 (S.C.C.).

only possible remedy."[38] I think Justice La Forest was right in his dissent that other remedies such as expediting the trial should also be available.[39]

Another reason for the congestion of the courts is the growth of legal aid throughout Canada. Ontario introduced its legal aid plan in 1967 and today this excellent system, allowing legally aided persons to select their own counsel, is costing the province of Ontario over 300 million dollars a year. One way of controlling costs is to introduce a public defender system as one of the accused's options. This approach is being experimented with in Ontario today in certain non-criminal areas. I believe that it should be expanded to criminal cases. The accused could be given a choice between a public defender and his or her own choice of counsel. Given a choice, many accused persons would choose to have a public defender handle their cases.

A further growth industry since 1892 is the appeal of criminal cases. There were then relatively few criminal cases appealed because the *1892 Code* required that appeals must either be "reserved" by the trial judge for the opinion of the Court of Appeal or have the consent of both the Attorney General and the Court of Appeal.[40] So, it is not surprising that there were relatively few appeals reported in the volume of the Canadian Criminal Cases (C.C.C.) that dealt with cases decided in the 1890s.[41] There were only two reserved criminal cases to the Supreme Court of New Brunswick reported in the C.C.C.s in these early years. It was not until 1923 that the *1892 Code* was amended to provide for a general right of appeal from a conviction, without the leave of the trial judge.[42] There were then no appeals by the Crown from an acquittal. Appeals from acquittals in indictable cases were not introduced in Canada until 1930.[43]

In contrast to the position in Canada, appeals by prosecutors from acquittals are generally not permitted in the United States or in England. In my opinion, we should be less willing to order a new trial following an acquittal. A new trial should only be ordered following an acquittal if the error was "on the whole case

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[38]See *Strunk* v. *U.S.* (1973), 412 U.S. 343 at 440 (U.S.S.C.) Burger C.J.; *Barker* v. *Wingo* (1972), 407 U.S. 514 at 522 (U.S.S.C) Powell J.

[39]See M.L. Friedland, "Controlling the Administrators of Criminal Justice" (1989) 31 Crim. L. Q. 280 at 304-07; M.A. Code, *Trial Within a Reasonable Time* (Scarborough: Carswell, 1992).

[40]See M.L. Friedland, *Double Jeopardy* (Oxford: Oxford University Press, 1969) at 229-30.

[41](1898), 1 C.C.C. dealt with cases from 1895 to 1898.

[42]S.C. 1923, c. 41, s. 9.

[43]S.C. 1930, c. 11, s. 28; *Double Jeopardy, supra,* note 40 at 281.

a probable explanation of the verdict of the jury."[44] Such a test would cut down on the number of cases in which the Crown would choose to appeal an acquittal.

Mr. Masters could not fail to observe another significant change from his day, that is, the large numbers of visible minority and aboriginal persons caught up in the criminal justice system. The Manitoba Justice Inquiry in 1991 showed the extraordinary number of aboriginal persons in custody in Manitoba.[45] In 1989, Aboriginal persons made up 56% of the population of all correctional institutions in Manitoba, federal and provincial. Yet, Aboriginal people make up less than 12% of Manitoba's population. Prior to the Second World War, the Inquiry found that the Aboriginal prison population was no greater than the Aboriginal representation in the population. I assume that this would also be the case in 1892, leaving aside incarceration following the Riel rebellion in the North West.

The Marshall Inquiry in Nova Scotia had equally disturbing figures for Blacks and Aboriginals.[46] Ontario has just set up an inquiry into race relations and the criminal justice system and no doubt they will find a similar pattern of over-representation. We will all be carefully looking for the solutions that will emerge from the Ontario Inquiry.[47] Just as in the 1960s and 70s society strove to make the accused's poverty an irrelevancy, in the 1990s we should strive to make the accused's race and ethnic origin irrelevant.

Let us return to the question of codification. No doubt, Mr. Masters would ask about plans for a new *Criminal Code* as we are about to enter the 21st century. The embarrassed reply would be something like this. The Law Reform Commission of Canada was established by Parliament in 1971.[48] The then Minister of Justice, John Turner, stated in the House when the Bill was under consideration that "the Commission should have a complete re-writing of the criminal law as one of its first projects."[49] The so-called "young tigers" that were first appointed, and I must acknowledge that I was one of them for a time, contemplated, in their first Research Programme, a new *Criminal Code* containing both criminal law and procedure.[50]

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[44]See *Vallance* v. *The Queen* (1961), 35 A.L.J.R. 182 at 185 (H. C. of Aust.) Dixon C.J.; *supra,* note 41 at 303.

[45]Manitoba, *Public Inquiry into the Administration of Justice and Aboriginal People, Report of the Aboriginal Justice Inquiry of Manitoba,* vols 1 & 2 (Winnipeg: Queen's Printer, 1991).

[46]*Royal Commission Report on the Donald Marshall, Jr., Prosecution* (Halifax: The Commission, 1989).

[47]Order-in-Council dated 1 October 1992: Co-Chairs, D. Cole and M. Gittens.

[48]R.S.C. 1970, c. 23, 1st Supp.

[49]*House of Commons Debates* (23 February 1970) at 3963.

[50]First Research Program of the Law Reform Commission of Canada, March 1972, at 14.

However, progress was slow in spite of an impressive number of excellent working papers and reports, and in 1979 the then Minister of Justice announced a "comprehensive and accelerated review" of the *Criminal Code*.[51] It was to be a collaborative effort involving the Law Reform Commission, the Solicitor General's Department, and the Department of Justice, with the Justice Department taking the lead. However, the predicted time period for completion of the work kept expanding.

It was eventually hoped that the new *Criminal Code* would be completed by 1992, the centenary of the present one, but this is obviously not now possible. So, what will happen? Currently, a Sub-Committee of the Standing Committee on Justice and the Solicitor General are conducting hearings on the General Part of the code.[52] There is still a great amount of basic work to be done on the three other parts: criminal procedure,[53] the substantive offences,[54] and corrections.[55] We will be fortunate to have a new code by the turn of the century.

I hope that the Parliamentary Sub-Committee issues a favourable report on the necessity for a new *Criminal Code*. A new code is certainly needed. For example, one of the major defects in the present one, is that the mental elements for each offence are rarely spelled out. James Fitzjames Stephen is to blame. He wanted to leave those issues to the judiciary. R.S. Wright's code, on the other hand, would have defined the various terms used just as the modern American codes do. The American Law Institute's four categories of purpose, knowledge, recklessness and negligence are sensible. One wonders why the Law Reform Commission wished to invent a different set of mental states, adopting only three categories and leaving out the important concept of "knowledge.[56]

It will be difficult to bring into force a general part dealing with *mens rea* until the substantive offences are re-drafted to incorporate the new categories. If this is not done, we can expect a great debate over the so-called default or residual rule, that is, what mental state should be required if nothing is stated. The Law Reform Commission of Canada wants the default rule to be the very high mental

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[51]See the Tenth Annual Report of the Law Reform Commission of Canada, 1980-81, at 13.

[52]See the Minutes of Proceedings and Evidence of the Sub-Committee on the Recodification of the General Part of the Criminal Code, May 12, 1992 ff.

[53]See the Law Reform Commission of Canada, *Recodifying Criminal Procedure (Report 33)*, vol. 1, (1991) and *Our Criminal Procedure (Report 32)* (1988).

[54]Law Reform Commission of Canada, *Recodifying Criminal Law (Report 31)* (1988).

[55]See the *Report of the Canadian Sentencing Commission* (1987).

[56]Report 31, *Recodifying Criminal Law* at 21ff: see A. Kurke, "The Mental Element" in Minutes of Proceedings and Evidence of the Sub-Committee on the Recodification of the General Part of the Criminal Code, 15 June 1992.

state of "purpose." In contrast, the American Law Institute's Model Penal Code adopted "recklessness" as the residual rule. I anticipate that this important question will loom much larger in the future than it has in the discussions thus far.

My suggestion, and I made this suggestion to the Parliamentary Sub-Committee,[57] is that it is desirable to enact the *Criminal Code* in stages, but to consider implementing it as a whole only *after* other parts have been enacted. It is desirable because one wants to see the whole picture first. It is also desirable because if the whole is put forward for enactment at one time it is likely to fail. There are many controversial features of any *Criminal Code*, police powers, abortion, duty to rescue, gun control, and hate literature, to name only a few. Special interest groups will mount campaigns against the provisions that they dislike and it will be difficult to gain acceptance of the package as a whole. We saw this occur last October 26th in relation to the Charlottetown Accord.

Canada is not unique in its frustrating attempt to obtain a new code. England started producing a new *Criminal Code* in 1968 and it has still not been enacted.[58] The Federal Government of the United States started the process in 1966 and they still do not have a new one.[59]

So, my advice is to enact the code in stages, perhaps only implementing parts of it when the later stages have been enacted. As well, the very controversial issues should be left out and the present law on those issues accepted for the time being.

"Will not the new Law Reform Commission save the day," our Mr. Masters would ask. Another embarrassed reply would inform Mr. Masters that this very important institution was abolished in late February, 1992. The federal Minister of Finance, not the Minister of Justice, announced in his budget speech that the Law Reform Commission of Canada, along with a number of other federal agencies, would be eliminated for financial reasons. I knew they were serious when, about a month later, a courier delivered my picture that had been hanging on the wall at the Commission in Ottawa. So, Masters would correctly observe, law reform is back in the hands of the Department of Justice, just as it was in his day.

Let us hope that this is a temporary situation and that the Government will find another vehicle, still somewhat removed from day-to-day politics, to monitor

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[57]Minutes of Proceedings, *ibid.* at 2:14.

[58]See Law Commission, Report No. 15, Third Annual Report, 1967-68 (1968).

[59]See generally, R.L. Gainer, "Report to the Attorney General on Federal Criminal Law Reform" (1989) 1 Crim. Law Forum 99.

and advise on criminal justice. Perhaps the Government should consider implementing the law reform recommendations of the *1969 Report of the Canadian Committee on Corrections*,[60] the Ouimet Report, a first-class document. The Committee recommended that the Government set up a non-governmental committee or council, advisory to the executive branch of government, rather than to any one department. They envisaged a permanent secretariat, a research budget, and interdisciplinary committees on continuing law reform, law enforcement and corrections. Perhaps it could also handle some of the tasks envisaged for the permanent sentencing commission, recommended in 1987 by the Canadian Sentencing Commission.[61]

The one, really significant change in criminal justice since 1892 is the enactment and interpretation of the *Charter*. I am not sure what Masters would think of the *Charter*. My guess is that he might echo Jeremy Bentham's view that a Bill of Rights is "nonsense on stilts."[62] In any event, that would likely have been his view in 1892.

The *Charter*, enacted in 1982, he would be told, has had a very profound effect on the criminal law, much greater than most observers would have thought when it was enacted. In the first few years after its enactment, over 25% of the reported cases in the C.C.C.'s discussed the *Charter*.[63] More recently, the number has risen to about 50%.[64] The percentage is even higher among the reported Supreme Court of Canada cases.

The Supreme Court of Canada has been very active in using the rather vague words in the *Charter* to reform criminal law and procedure. Take s. 7, for example: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." In the *B.C. Motor Vehicle Act* case,[65] in my opinion the most important criminal law *Charter* case decided by the Supreme Court, the Court extended the meaning of "fundamental justice" to include substantive, not just procedural justice. They held that it is a denial of fundamental justice if a statute permits imprisonment for an absolute liability offence. Section 7 has since been used in a number of other significant cases: in *Vaillancourt* to strike down

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[60](Ottawa, 1969) at 430-31.

[61]*Sentencing Reform: A Canadian Approach* (Ottawa: Queen's Printer, 1987) at 437ff.

[62]J. Bentham, *Anarchic Fallacies*.

[63]See M.L. Friedland, "Criminal Justice and the Charter" in Friedland, ed., *A Century of Criminal Justice* (Toronto: Carswell, 1984) at 205.

[64]E.g., 280 out of 535 reported cases in volumes 51-62 of the Canadian Criminal Cases. I am indebted to Alan Baldachin, a student in the Faculty of Law, University of Toronto, for compiling this figure.

[65]*Reference Re Section 94(2) of the Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289 (S.C.C.).

the constructive murder sections,[66] in *Morgentaler* to strike down the abortion legislation,[67] in *Hebert* to give a right to silence,[68] and in *Stinchcombe* to require pre-trial disclosure by the Crown.[69]

No doubt Mr. Masters would observe that the activism of the Supreme Court has a direct correlation with the failure of Parliament to act on the various recommendations of the Law Reform Commission. He would also note that Chief Justice Antonio Lamer was a former President of the Law Reform Commission of Canada and that Justice Gerald La Forest was a member. He would be forgiven for thinking that they would appear to be doing through the Court what they had trouble doing through the Commission.

One unfortunate effect of the Court's activism is to take the impetus away from Parliament to amend the criminal law. This effect is unfortunate, because Parliament should be the primary actor in changing the law. Parliament can, in theory, look at the issue in the context of other contemplated changes, engage in greater consultation, and change the law again if it proves unsatisfactory. When the Court reforms the law through the *Constitution,*[70] it cannot easily be changed by Parliament. The United States Supreme Court was forced to remake criminal law and procedure to achieve minimum standards applicable to the States. But in Canada, jurisdiction over criminal law and procedure is a federal, not a provincial matter, and so can be made uniform across Canada by Parliament.

A cooperative relationship between the Court and Parliament is needed. The Court should nudge and even threaten future action, not act as a substitute for Parliament. In some recent Supreme Court cases one can see more sensitivity to Parliament's primary role. The Court has thrown the drafting of the law back to Parliament. In the *Swain* case,[71] for example, the Supreme Court permitted the law concerning confinement of those found not guilty by reason of insanity to stand for six months until Parliament enacted new legislation.

"Has not the adoption of an American-style *Charter* brought Canada closer to American law," Mr. Masters might question, adding that "counsel do not seem to quote English cases like they did in my day." There is no question Masters is

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[66]*Vaillancourt* v. *The Queen* (1987), 39 C.C.C. (3d) 118 (S.C.C.); *R.* v. *Martineau* (1990), 58 C.C.C. (3d) 353 (S.C.C.); *Sit* v. *The Queen* (1991), 66 C.C.C. (3d) 449 (S.C.C.).

[67]*Morgentaler et al.* v. *The Queen* (1988), 37 C.C.C. (3d) 449 (S.C.C.).

[68]*R.* v. *Hebert* (1990), 57 C.C.C. (3d) 1 (S.C.C.).

[69]*Stinchcombe* v. *The Queen* (1991), 68 C.C.C. (3d) 1 (S.C.C.).

[70]*Constitution Act, 1982,* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[71]*R.* v. *Swain* (1991), 63 C.C.C. (3d) 481 (S.C.C.). See also *R.* v. *Bain* (1992), 69 C.C.C. (3d) 481 (S.C.C.).

right. The Supreme Court, has more or less taken over the American law of search and seizure and the *Miranda* rule relating to the interrogation of suspects.[72] Note the recent change of emphasis in most criminal law casebooks from English to American cases. Further, about 30% of the Supreme Court of Canada criminal cases now cite U.S. cases and in all courts, both civil and criminal, the percentage is increasing. Before the introduction of the *Charter*, less than 3% of all the cases in the Dominion Law Reports cited U.S. cases; now over 10% do so.

My conclusion to this tour of criminal justice over the past century is that although there has been considerable growth in the criminal justice industry and many of the offences have changed, criminal justice today has remained much the same as it was a century ago. The *Charter*, Mr. Masters would correctly observe, has more or less locked us into existing procedures and will ensure that criminal justice, as we know it, will remain in much the same form for the next hundred years.

[72]See A.D. Gold and M. Fuerst, "The Stuff that Dreams are Made of! – Criminal Law and the Charter of Rights" (1992) 24 Ottawa L. Rev. 13; Harvie and Foster, "Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law Under the Charter" (1992) 24 Ottawa L. Rev. 39.