

Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution

D O N S T U A R T *

I. INTRODUCTION

IT IS HIGH TIME TO REASSERT the vision of Senator Jacques Flynn, Minister of Justice in the short-lived government of Prime Minister Joe Clark. In October 1979, he announced an agreement with provincial Attorneys-General to establish a five year Criminal Law Review of all aspects of the criminal justice system. One of its aims was “a thorough review of the *Criminal Code* ... as a matter of priority ... that should encompass both substantive criminal law and criminal procedure.”¹

This paper seeks to make the case that it is time to halt the unremittingly reactive law and order agenda of subsequent Ministers of Justice over the past 20 years and to influence a Minister of Justice to insist on a pro-active and principled review of federal legislation such as the *Criminal Code* and the *Canada Evidence Act*.

This pitch for recodification does not mean an attempt to establish rigid and definitive codes. There will always be a need for judicial interpretation and legislative change by Parliament. But what is urgently needed, in the interests of a justice system deserving of that name, is a measured and principled review of

* Don Stuart is a Professor at the Faculty of Law, Queen's University, Kingston, Ontario. He has been editor-in-chief of the *Criminal Reports* since 1982. His recent publications include *Canadian Criminal Law: A Treatise* (4th ed., 2001) and *Charter Justice in Canadian Criminal Law* (3rd. ed., 2001), both published by Carswell, Toronto.

¹ Canada, Parliament “The Criminal Law in Canadian Society” in White Paper (1982) at 10.

legislative provisions presently in place to ensure that they are comprehensible, consistent and just.

II. VALUES AND ASSUMPTIONS

WOULD-BE CRIMINAL LAW REFORMERS should lay bare their values and assumptions. The perspective here is that of someone who grew up in South Africa under repressive apartheid laws, taught law there, studied in the United Kingdom, and has now been immersed in the Canadian criminal justice context for some 30 years. My practice experience is limited to a year as a Crown counsel in Toronto in the appeal and trial branches.

In my view, there are five aspects of a just criminal justice system.

1. The criminal justice system is all about the presumption of innocence, fair labeling, and just state punishment;
2. Individual rights of accused against the power of the state must be carefully safeguarded before, during, and after trial, and must take precedence over rights of victims;
3. The rule of law and a just adversarial system require the law to be as clear and comprehensible as possible;
4. There are no magic answers about what causes criminal behaviour, how to treat and stop it, and how to predict dangerousness;² and,
5. The criminal sanction is a blunderbuss power which must be used with restraint, with prison as a last resort.

III. LURE OF LAW AND ORDER POLITICS

THE ABOVE ASSUMPTIONS WERE LARGELY reflected in a broad criminal policy document entitled *The Criminal Law in Canadian Society* released by the then Minister of Justice, The Hon. Jean Chretien in August 1982. But since that time Ministers of Justice have embraced the expediency of law and order politics. For 20 years there have been constant and widespread calls for toughening the criminal law, especially as it relates to issues of violence against women and

² Even psychologists responsible for an influential and now widely used method of assessment in Canada, relied on for parole decisions and in dangerous offender applications, acknowledge that "No one claims that its use will guarantee fairness, accuracy and absence of bias in each and every case." D. Christopher, *The Violence Prediction Scheme: Assessing Dangerousness in High Risk Men* (Toronto: University of Toronto Press, 1994) at 65.

children, crime by youth, and organised crime. Voices favouring restraint have been largely drowned out. Instead there are pleas for "zero tolerance" and concern that criminals have too many rights at the expense of victims.

In Canada and elsewhere politicians of all stripes have been unable to resist the political expediency of pandering to the perceived need to toughen penal responses. There are no votes in being soft on crime. The only issue is how tough you want to be. Stockwell Day, the leader of the Canadian Alliance, campaigned, in a quiet rural area with minimal crime problems,³ for no or reduced parole. He does not reveal how hard it is to get parole or how Canadians would be safer if more violent criminals were released from prison straight into the community. No prospective president of the United States would dare to oppose the death penalty in that jurisdiction.

A. The Liberal Agenda

The current and previous Liberal governments have had little interest in any notion of recodification. Under the watch of energetic Justice Minister Allan Rock, there was an increasing flood of legislative reforms to toughen the criminal justice system. He was largely content to listen and respond to the *ad hoc* pleas of victims associations, women's groups, police, and crown attorneys, asking that the government counteract Supreme Court of Canada rulings, respond more punitively to particular problems, and remedy various law enforcement concerns.

No better evidence of the law and order agenda can be offered than the wide array of government bills that received royal assent on 25 April 1997, two days before Parliament was dissolved for a federal election. Bill C-18 enacted a large number of procedural amendments to the *Criminal Code* and other statutes, almost all favouring the Crown. Bill C-27 extended existing prohibitions of child prostitution, criminal harassment, and female genital mutilation, and took aim at child sex tourism outside Canada's borders. Bill C-47 made it much harder for defence counsel to receive disclosure of medical and counselling records of complainants in sex crime cases. Bill C-55 declared new measures to deal with "high risk" offenders even after the expiry of a warrant. Finally, Bill C-95 produced twenty detailed amendments to address organised crime.

The current Minister of Justice, Anne McLellan, indicated on 3 April 1998 that recodification was not on her list of priorities:

[It] is not my intention to undertake a comprehensive recodification of the General Part of the *Criminal Code*. Given the limitations of resources and public priorities, I intend to focus our energies on a limited number of issues of public concern and importance within the General Part. I will be starting consultations in the near future on

³ R. Mickleburgh, "Day Unveils Law-and-Order Message" *The Globe and Mail* (19 July 2000) A4.

possible reforms to the law of self-defence, provocation and the defence of property, keeping in mind the recommendations for reform made in the Ratushny Report.⁴

The Ratushny Report of 1997⁵ was a judicial inquiry to review cases of women under incarceration for homicide offences. The purpose of the report was to determine whether women who had been in abusive relationships had received the full benefit of current judicial sensitivity to the defence of self-defence. It also recommended major changes to the law of self-defence and homicide laws.

The Minister did undertake a consultation process on these matters⁶ but no bill has been forthcoming. In the meantime, although she has clearly been less wedded to the legislative solution than her predecessor, the minister has had sufficient resolve to continue with a law and order agenda. This agenda included *Code* amendments to secure more rights for victims, a DNA bank, a proposed new Youth Crime bill, a wide omnibus *Criminal Code* amendment bill, and an extraordinary bill, Bill C-24, to widen the anti-crime legislation and provide immunity to police officers who commit crimes.

B. Anti-gang Measures⁷

Compelling evidence of the law and order feeding frenzy and its dangers comes from an examination of the two recent federal legislative initiatives to respond to organised crime.

1. Bill C-95

In 1997 the *Criminal Code* was amended⁸ to include a wide variety of anti-gang measures. The immediate context was the eve of a federal election and the perceived need to respond to a plea by the Quebec Attorney-General and Quebec mayors for measures to address a violent and protracted fight between two biker gangs: the Hell's Angels and the Rock Machine. That strife, focused in Quebec, had led to bombings and some thirty deaths. One bomb blast killed an innocent passer-by, a young boy. Members of the public were understandably outraged and frightened.

⁴ Letter from A. McLellan to D. Stuart (3 April 1998).

⁵ Canada, *Self-Defence Review Final Report* (Ottawa: 1997).

⁶ *Reforming Criminal Code Defences: Provocation, Self-defence and Defence of Property* (1998).

⁷ See further D. Stuart, "Politically Expedient But Potentially Unjust Criminal Legislation Against Gangs", (1998) 69 *Intl. Rev. of Penal Law* 245. This was a much-expanded version of a paper of like name first published in (1997) 2 *Can. Crim. L.R.* 207; M. Mann, "Outlawing the Outlaws: Importing RICO's Notion of Criminal Enterprise into Canada to Combat Organized Crime" (1999) 24 *Queen's L.J.* 451.

⁸ S.C. 1997, c.23.

The federal Minister of Justice and the Solicitor General of Canada described the new Bill C-95 as “tough new measures to target criminal gang activity” which had been developed through “extensive consultations with police across Canada”⁹ and a two-day national forum. That forum, held in Ottawa on 27–28 September 1996, had brought together “police, representatives from provincial and federal governments, the legal community, private industry, and academics.” The purpose of the forum had been to “examine the increasingly complex problem of organized crime in Canada, and to recommend integrated, effective measures to address it.” Consideration of whether any measures were necessary was thus a question not on the agenda. This is typical of the current sham of government consultation. The fix is in before opinion is sought and opinion is far too often sought from those of like mind.

The centerpiece of this legislation, explained the ministers, was a new offence of “participation in a criminal organization.” This criminalised mere membership in a criminal organisation and laid the groundwork for the targeted use of new investigative tools to be directed against criminal organisations. These included special peace bonds, new powers to seize proceeds of crime including access to income tax information, a new possession of explosives offence, tougher and consecutive sentencing provisions, greater powers to resort to electronic surveillance and a new reverse onus bail provision for those charged under the new offences. Bill C-95 was extremely complex, consisting of over fifty pages of detailed *Criminal Code* amendments. It passed with all party consent through Parliament in a day with no meaningful committee review, for example, of the extensive police powers which read like a police wish list. No evidence of real need was ever published.

The new crime in s.467.1(1) of participation in a criminal organisation or “gangsterism” as the media now calls it, extends criminal responsibility beyond the already wide net for accessories or conspirators. Under s.467.1(2) there must be a mandatory consecutive sentence and double criminality for a participant in a criminal organisation who is a party to an offence committed in association with that organisation. The major flaw is that it is *not* narrowly targeted and sets up a potentially severe and unjust law of guilt by association for those acting in loose groups of five or more.

The linchpin is the definition of “criminal organization” inserted into the *Criminal Code* definition, section 2.

“Criminal organization” means any group, association or other body consisting of five or more persons, whether formally or informally organized,

⁹ Department of Justice, News Release, “Federal Government Introduces National Anti-gang Measures” (17 April 1997).

(a) having as one of its primary activities the commission of an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, and

(b) any or all of the members of which engage in or have, within the preceding five years, engaged in the commission of a series of such offences.

This definition extends far beyond a cohesive gang committed to violence. This legislation does not just reach such broadly structured gangs as the Mafia, the Hell's Angels¹⁰ or the Triads. It could certainly be applied to low level members of a highly organised gang, to those only very loosely associated in crime and to those who have never been violent. Only one of the group has to have committed a series of offences within five years. There is no requirement of gang continuity.

Consider the following hypothetical example of drugs distribution in a Toronto. A buys a quantity of drugs from a high level drug dealer. Rather than attempt to sell the drugs himself, he approaches friends, B and C, and acquaintances, D and E, with an offer of easy money. A is the only one with a criminal record of three offences within the last three years—selling marihuana and two break-and-entries. A arranges for the five to meet in a park to split up the cache. The meeting takes place but B and D do not attend. A subsequently meets with them separately. Under Bill C-95 this is a criminal organisation. It does not matter that there was no meeting of the minds required for the crime of conspiracy or that this was not an ongoing or structured group. The possible application of Bill C-95's array of strong new measures to such a group came at the time of a major Commission Report documenting systemic racism against black youths in Toronto,¹¹ particularly in the enforcement of drugs laws, which adds another dimension if the five individuals are black.

At its widest, the complex new crime of participation in organised crime is committed by proof of

1. An association with an informal group of five or more;
2. Knowledge that at least one of the group has been committing serious crimes within the last five years; and
3. Being a party to an indictable offence in association with the group.

¹⁰ In *Brown v. Durham Regional Police Department* (1996), 106 C.C.C. (3d) 302 (Ont. C.J. C.D.), a civil action against the police in which the Court heard detailed evidence about motorcycle gangs in Canada, Ferguson J. noted that "the evidence showed that even organized clubs like the Hell's Angels chapters appear to operate more as a brokerage of criminals than as a cohesive vertical hierarchy of criminal activity" at 317.

¹¹ Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Ontario: 1995).

Section 467.1 has breathtaking scope and could surely be applied to most people engaged in criminal conduct. It could certainly be applied to each of the above-described temporary group of drugs traffickers.¹² It is expressly a form of guilt by association long shunned by common law jurisdictions, which normally require proof by the state of an individual act with personal fault relating to that act or a shared purpose. Being party to an offence does require proof of some individual act and personal fault. However, this could merely be that required for liability as an accessory, rather than as a perpetrator, and could include anyone assisting another to commit a crime, such as driving the getaway vehicle or even merely providing it.

The new Canadian anti-gang provision is unlike the Italian *associazione di tipo mafioso*,¹³ which criminalizes membership in certain criminal associations. It is also distinguishable from the French *association de malfaiteurs*,¹⁴ which penalises group preparation equally to the completed offence.

The Canadian scheme appears to be a much wider version of the United States *Racketeering Influenced and Corrupt Organizations Act*¹⁵ ("RICO"). Passed in 1970 as a weapon against organised crime, RICO requires proof of an "enterprise"¹⁶ and a connected "pattern of racketeering activity."¹⁷ Although the RICO net is itself notoriously wide, there is, in contrast to the Canadian model, a requirement of an ongoing structure of persons associated in time and purpose, organized for consensual decision-making.¹⁸

¹² R. Gordon, "Criminal Business Organizations, Street Gangs and "Wanna-be Groups:" A Vancouver Perspective" (2000) *Can. J. of Crim.* 39 distinguishes the highly organized for-profit crime business, organized street gangs, and the "wanna-be" unorganized groups which are typically young offenders.

¹³ In the 1987 show trial of alleged Sicilian Mafia members in Palermo, Italy, 344 were convicted and sentenced to a total of 2665 years in prison. By 1989 only 60 persons remained in prison: see J.-P. Brodeur, "Organized Crime: Trends in the Literature," a report to the Departments of Justice and the Solicitor General (May 1966) at 28–29.

¹⁴ There are so few prosecutions that the crime is not listed in the French Department of Justice statistics. Brodeur, *ibid.* at 28.

¹⁵ 18 U.S.C. ss. 1961–1968.

¹⁶ Under s. 1961(4) an "enterprise" may be "any individual, partnership, corporation, association, or other legal entity, or any union or group of individuals associated in fact although not a legal entity."

¹⁷ A wide list of federal and state offences are enumerated as predicate offences ranging from murder to mail fraud: s.1961.

¹⁸ See C. Blakesley, *The Criminal Justice System Facing The Challenge of Organized Crime: Section II. The Special Part*, at p.14 of an unpublished explanatory note written in preparation for The XVIth International Congress of Penal Law, held in Budapest, Hungary, 5–11 September 1999.

It has been suggested¹⁹ that a proper definition of organised crime should embrace the elements of corruption, violence, sophistication, continuity, structure, discipline, ideology, multiple enterprises, involvement in legitimate enterprises and a "bonding" ritual.

It was and is highly unlikely that this blunderbuss set of laws will solve the problem of biker violence. The legislation, although politically expedient, should not survive *Charter* challenge.²⁰ It is bad law and could prove drastically counterproductive even with the most organised of gangs. It was not necessary. Canada has very strong laws against group criminality, murder, bombing, illegal drugs, proceeds of crime and Canada's police services have wide powers respecting seizure, the authorisation of electronic surveillance and few limits on undercover operations.

Professor Christopher Blakesley recently reviewed several national studies, presented at an international conference in Alexandria, Egypt from 8-12 November 1997, as to the dangers of adopting ill-considered criminal legislation on organized crime and concluded as follows:

It is easy to fall into the trap: politicians gain popularity and votes by looking "tough on crime," especially organised crime. They become even more popular when they are able to say bad things about courts that try to rectify the constitutional problems created by bad laws. Sadly, often the news media exacerbate the problem by pandering to public fear and appetite for salacious material. Outcries from interest groups are shrill, raising the cost to anyone who wishes to promote reasoned and constitutional laws. This all creates an atmosphere that tends to ignore the larger picture and which may actually hurt the battle against crime, while damaging human rights and democracy.²¹

2. *The Fiasco of the Manitoba Warriors Trial*²²

That the new anti-gang measures were dangerously ill conceived and will be counterproductive is clear since their invocation in the recent trial of the Manitoba Warriors. In October 1998, police and prosecutors threw the new book at

¹⁹ M. Maltz, "Defining Organized Crime," in *Handbook of Organized Crime in the United States* (1994) 26.

²⁰ Possible challenges are over breadth or vagueness based on s.7, double punishment contrary to s. 11(h) and disproportionate punishment contrary to ss.7 and 12. See further *supra* note 7, and M. Maltz, *ibid.* Such challenges were, however, rejected in *R. v. Carrier*, Qu.S.C., January 30, 2001, not yet reported (per Beaulieu J.).

²¹ "General Report. The Criminal Justice System Facing the Challenge of Organised Crime," (1998) 69 *Incl. R. of Penal Law* 4.

²² The major sources for this account are the judgment of Krindle J. in *R. v. Pangman* (2000) 32 C.R. (5th) 272 (Man.Q.B.) dismissing the application for a change of venue, a C.B.C. Magazine program "The Indian Courthouse" (15 November 1999), and "Gang-related Charges Dropped Against Alleged Warriors", *Globe and Mail* (8 July 2000) [hereinafter *Gang-related Charges*]. I am also indebted to Professor C. Harvey of the Faculty of Law, University of Manitoba, who allowed me to examine his meticulous compilation of Winnipeg press clippings.

35 accused. This was to be a show trial of the Federal anti-gang legislation. Most were charged with drug and weapon possessions and the new participation in a criminal organisation offence involving the Manitoba Warriors—a predominantly Aboriginal street gang. Of those charged all but two were Aboriginal. The Crown proceeded by direct indictment to bypass any preliminary hearings.

The media hype and complexity escalated to such an extent that the Manitoba government constructed a high security courthouse in an old mustard-seed cleaning plant. The normal courts were said to be not large enough nor sufficiently secure. One judge was designated to hear all applications for bail. He dismissed them all. Review applications also failed. The new reverse onus bail provision for organised crime may have contributed to this extraordinary detention. The Remand Centre conditions were severe with contact visits tightly limited.²³

The security-driven design of the special courthouse must be seen to be believed.²⁴ The design is suitable for a trial of urban terrorists rather than a young street gang. Nine inch metal walls separate lawyer's interview rooms from the space occupied by the accused clients. In the courtroom, 35 boxes for accused are in three rows separated from each other by thick glass and inaccessible to defence lawyers. The accused were chained to the floor. The public were confined to 37 seats in an upstairs room behind glass in a gallery specifically located such that there was no direct view of the witnesses or the jury.

After 20 months of pre-trial motions and guilty pleas, only 15 accused remained. Finally, outside counsel were employed to reach a final plea bargain. As part of the deal the participation in a criminal organisation charges were withdrawn. In all, 32 pleaded guilty to charges including trafficking in cocaine in Winnipeg hotels. Two were acquitted and one accused's case is ongoing.²⁵ Only two guilty pleas were entered at an early stage to the participation in a criminal organisation charges, and those only involved minor participants. Factoring in pre-trial custody prison sentences, a total of 170 years have been imposed, the longest being four and one half years for cocaine trafficking.²⁶

The cost of building the courthouse was \$3.7 million and the additional costs of this trial have been estimated at well over \$7 million. The money spent on the special measures taken in this case would have been far better spent on crime prevention programmes targeted at Aboriginal peoples and general police

²³ M. McIntyre, "Face to Face Visits set for Remand Centre" *Winnipeg Free Press* (6 April 2000) A3.

²⁴ I toured the special courthouse on Friday, 12 October 2000. I am grateful for the access provided by Manitoba Government Services.

²⁵ This accused was recently released on bail, *Winnipeg Free Press* (22 July 2000).

²⁶ *Winnipeg Free Press* (27 June 2000).

investigative deployment. This show trial is a monument to state folly, both in terms of the expedient passage of the anti-gang laws and their use in Manitoba. Roland Penner, a former Attorney-General for Manitoba, has described it as "politically motivated, expensive and constitutionally invalid."²⁷ Professor David Deutscher suggests it was "too complex, with too many accused and too many charges to have a chance of success."²⁸

Only the most avid and self-congratulatory prosecutor could pronounce this trial as a success and a vindication of the anti-gang measures.²⁹ In terms of organised crime this street gang was, as even the crown counsel put it, "in the junior leagues." Having endured this extraordinary use of state power, the Manitoba Warriors has been given notoriety which may lead to a more cohesive group in the future. As suggested by defence counsel Richard Peck, "[t]his has given them identity, empowerment and a sense of belonging denied to them by society at large."³⁰ Current membership according to police figures is 1560 in 1999 as compared to 1575 in 1997.³¹

Prosecutors should have treated this case as a routine drugs conspiracy trial with discretion exercised to target only the major participants. The trial judge should have granted severance for lesser participants far earlier than the date at which it was clear the trial had unravelled.³² At worst this was overarching state action based on false stereotypes that these Aboriginal people were dangerous to themselves and everyone else.

Repression is a matter of degree. In 1968 in South Africa there was a treason trial with accused in similarly special cubicles. A large group of young black men had been recruited in what is now Namibia to rescue their brothers in South Africa. They set out on foot with guns and, many kilometres later, were spotted by army helicopters as they crossed the border into South Africa. They were arrested and charged with terrorism. Since they clearly intended the overthrow of the government, they were found guilty. All were convicted. Some were sentenced to death and executed.

²⁷ Gang-related Charges, *supra* note 22.

²⁸ *Ibid.*

²⁹ "Fontaine Made Fool of Himself" *Winnipeg Free Press* (12 July 2000). The remarks are attributed to Crown Attorney Bob Morrison at the final sentence hearing and were directed against remarks of Phil Fontaine, then National Chief of the Assembly of First Nations, who had been critical of the process as racist.

³⁰ *Winnipeg Free Press* (13 July 2000).

³¹ *Winnipeg Free Press* (7 July 2000).

³² *Winnipeg Free Press* (17 May 2000).

3. Bill C-24

The political cycle started again on the eve of another federal election. On 12 September 2000, a Montreal crime reporter was shot several times the day after he had published an exposé of organised crime. By 14 September 2000, a Quebec minister, Serge Menard, was calling for new and clearer organized crime laws to prohibit mere membership in criminal gangs like the Hell's Angels and the Rock Machine and to allow the use of the notwithstanding clause to trump any *Charter* claim of freedom of association. It is stunning that this initiative came from a province in which the invocation of the *War Measures Act* in 1970 and the banning of the F.L.Q. led to the arrests of hundreds of innocent Quebecois. Canada does not need laws of guilt by association or any overriding of *Charter* rights. Biker violence in Quebec and elsewhere may well require considerably more police investigative resources to gather evidence but no new laws are needed or likely to be effective.³³

On the eve of the election, a Parliamentary Sub-committee on Organised Crime held in camera hearings and released a hastily drafted report.³⁴ It makes 18 recommendations that would result in 12 major amendments to toughen existing gang legislation. There was therefore inexorable political momentum to make our anti-gang laws worse. During the 2000 federal election all politicians agreed that something more needed to be done.

Bill C-24 which passed third reading in June, 2001, proceeded rapidly through a committee hearing. It contains 70 printed pages of complicated amendments to the *Criminal Code* and other Federal statutes. The *Proceeds of Crime Act*, referring to money laundering, has been substantially widened to embrace the seizure, freezing and confiscation of proceeds of most indictable offences rather than the 40 previously listed as "enterprise crimes." There are new offences to single out intimidation against people in the justice system including witnesses, jurors, prosecutors, guards, judges and politicians. Here I will focus on two other parts of the bill: the widening of anti-gang provisions and powers given to police officers to commit crimes.

i. Wider anti-gang laws

Under Bill C-24 the new definition of a criminal organisation will be found in s.467.1 as follows:

"criminal organization" means a group, however organized, that is composed of three or more persons and that has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit,

³³ See also K. Roach, "Panicking over Criminal Organizations: We Don't Need Another Offence" (2000) 44 *Crim.L.Q.* 1.

³⁴ Canada, Sub-committee on Organised Crime of the Standing Committee on Justice and Human Rights, "Combating Organised Crime" (October 2000).

by the group or by any of the persons who constitute the group. It does not include a group of persons that forms randomly for the immediate commission of a single offence.

Under the same section:

“serious offence” means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation.

The Department of Justice Backgrounder *Highlights of the Organized Crime Bill* released on its Website on 5 April 2001 (“Backgrounder”) explains that a new definition of criminal organization was drafted to respond to concerns expressed by police and prosecutors that the current definition was “too complex and too narrow in scope.” Ironically by this time convictions had been registered in Quebec under the new “gangsterism” laws against members of the Hell’s Angels and Rock Machine.³⁵ The Department of Justice nevertheless pressed on with the broadening of the existing definition in three ways by:

1. reducing the number of people required to constitute a criminal organization from 5 to 3;
2. removing the requirement that at least one of the members be involved in committing crimes for the organization within the past 5 years; and
3. extending the scope of offences which define criminal organizations, previously limited to indictable offences punishable by five years or more, to all serious crimes.

The bill removes the feeble limits on the definition of organized crime previously in place. To speak of a criminal organization of three seems laughable until we remember the huge scope of State power this definition will authorise. The Backgrounder explains that the inclusion of serious offences is to include “signature” crimes such as prostitution or gambling. This glosses over the reality that prostitution, *per se*, is not a crime. The power to add a list of crimes by regulation unreviewable by Parliament is the antithesis of democracy or the rule of law. The new definition does add one limit. It excludes a group formed “randomly for the immediate commission of a single offence.” This is a welcome recognition of the need for continuity but it is very weak protection and is unlikely to exclude loose collectives to distribute drugs to others, involving multiple offences.

³⁵ Leclerc et al., per Sansfacon J.C.Q.

The Backgrounder also stresses that what is made criminal, subject to consecutive penalties is “knowing participation” in activities that further the organizations objectives. Here the Backgrounder is shockingly misleading. When the three new offence definitions the Bill creates are examined,³⁶ it is clear that these elements of knowledge and participation are so comprised as to be a sham:

Participation in activities of criminal organization

467.11(1) Every person who, for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence under this or any other Act of Parliament, knowingly, by act or omission, participates in or contributes to any activity of the criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Prosecution

(2) In a prosecution for an offence under subsection (1), it is not necessary for the prosecutor to prove that

- (a) the criminal organization actually facilitated or committed an indictable offence;
- (b) the participation or contribution of the accused actually enhanced the ability of the criminal organization to facilitate or commit an indictable offence;
- (c) the accused knew the specific nature of any indictable offence that may have been facilitated or committed by the criminal organization; or
- (d) the accused knew the identity of any of the persons who constitute the criminal organization.

Factors

(3) In determining whether an accused participates in or contributes to any activity of a criminal organization, the Court may consider, among other factors, whether the accused

- (a) uses a name, word, symbol or other representation that identifies, or is associated with, the criminal organization;
- (b) frequently associates with any of the persons who constitute the criminal organization;
- (c) receives any benefit from the criminal organization; or
- (d) repeatedly engages in activities at the instruction of any of the persons who constitute the criminal organization.

Commission of offence for criminal organization

467.12 (1) Every person who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, a criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

³⁶ See also the further definition of criminal organization. Under ss. (2) facilitation of an offence does not require knowledge of a particular offence the commission of which is facilitated, or that an offence actually be committed. Under ss. (3) committing an offence means being a party to it or counselling any person to be a party to it.

Prosecution

(2) In a prosecution for an offence under subsection (1), it is not necessary for the prosecutor to prove that the accused knew the identity of any of the persons who constitute the criminal organization.

Instructing commission of offence for criminal organization

467.13 (1) Every person who is one of the persons who constitute a criminal organization and who knowingly instructs, directly or indirectly, any person to commit an offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, the criminal organization is guilty of an indictable offence and liable to imprisonment for life.

Prosecution

(2) In a prosecution for an offence under subsection (1), it is not necessary for the prosecutor to prove that

- (a) an offence other than the offence under subsection (1) was actually committed;
- (b) the accused instructed a particular person to commit an offence; or
- (c) the accused knew the identity of all of the persons who constitute the criminal organization.

It can be seen that knowledge of the crime to be facilitated or committed or of the identity of the members of the criminal organization is expressly not required to be proved. That is a knowledge requirement that has no real meaning and points to absolute responsibility which is unconstitutional where the liberty interest is at stake.³⁷ So too is it express that no crime need to have been facilitated or committed by the criminally organization or even made more likely. Even the Backgrounder acknowledges the "provisions could target anyone (not just members)." Contrast the focus in conspiracy jurisprudence on a meeting of the minds on a common purpose. As Justice Dickson put it in *Cotroni, Papalia*:³⁸

The word "conspire" derives from two Latin words, *con* and *spirare*, meaning "to breathe together". To conspire is to agree ... There must be evidence beyond a reasonable doubt that the alleged conspirators acted in concert in pursuit of a common goal.³⁹

Hopefully Courts will intervene when the new definition is challenged, as it inevitably will be, on the basis of violation of the act and fault requirements required under section 7 of the *Charter of Rights and Freedoms*. Even if the new laws survive *Charter* challenge the blunderbuss laws will do no credit to the Canadian justice system and will lead instead to injustice.

³⁷ *Reference Re Motor Vehicle Act (British Columbia)* (1985), 48 C.R. (3d) 289 (S.C.C.); *R. v. Pontes* (1995), 41 C.R. (4th) 201 (S.C.C.).

³⁸ *R. v. Cotroni, Papalia* (1979), 45 C.C.C. (2d) 1 (S.C.C.).

³⁹ *Ibid.* at 17-18.

The new three category approach to participation in organized crime is anything but simple and will itself add to the complexity of trials. Quite apart from the Manitoba Warriors prosecution, "gangsterism" trials in Alberta and Quebec are following the pattern of excessive length, complexity and cost. Even prior to this legislation, it was never desirable to have mass trials.

Bill C-24 is very bad legislation and perhaps the ultimate example of the present law and order feeding frenzy by politicians of all stripes. Hopefully there will soon be a Minister of Justice who will have enough vision and clout to put a stop to this seemingly inexorable trend to make our criminal justice system ever more tough and complex.

ii. Police Power to Commit Crimes

In *Campbell and Shirose*⁴⁰ Justice Binnie speaking for the Court held that the police had to abide by the rule of law. The police in had engaged in a reverse sting operation where they had offered to sell drugs. At the time it was not authorised by the *Narcotic Control Act*. The Court ordered a new trial to consider whether there should be a stay as an abuse of process. The Court noted the new *Controlled Drugs and Substances Act* would legalise reverse sting operations in the future and that Parliament could establish public interest immunities for police operations if these were clearly set out.

The Government seized on this opportunity at the behest of police and prosecutors. Bill C-24 establishes in sections 25.1 and 25.2 a complex and wide immunity system which turns on authorisation by state officials. The scheme starts by declaring that the authorisation power is to be exercised by the Solicitor General of Canada or a provincial Attorney General. However that power is to designate police officers or groups of officers on consideration of their general duties rather than any particular investigation and the power can be delegated to a senior official. A designated officer can commit an offence if the officer reasonably believes the offence is reasonable and proportional to the criminal activity being investigated. The only real limit on this authorisation is that it is not to include the intentional or criminally negligent causing of bodily harm, wilful obstruction of justice or conduct that would violate sexual integrity. There are also requirement for after the fact annual reports⁴¹ and notice to victims.⁴²

It is hard to imagine a scheme of police immunity more inimical to the rule of law. The rule of law cannot mean the rule of any law. The police cannot be above the law. The provisions are reminiscent of writs of assistance in force for years in Canada under four Federal Acts whereby a federal judge was required

⁴⁰ *R. v. Campbell* (1999), 24 C.R. (5th) 365 (S.C.C.).

⁴¹ s. 25.3

⁴² s. 25.4

to grant officers writs of assistance on application. These could be used on any occasion and amounted to designated officers carrying walking search warrants for life. They were declared unconstitutional by Justice Martin for the Ontario Court of Appeal in *Noble*⁴³ on the basis that did not comply with the section 8 *Charter* standard of prior authorisation by an official capable of acting judicially. They were replaced by telewarrant powers which require electronic authorisation by justices of the peace. It seems highly unlikely that the new immunity provision, which are much wider than writs, will withstand *Charter* scrutiny by the Supreme Court. Police authorisation to commit crimes must be judged on a fact-specific basis in advance by a judicial officer. Any *ex post facto* review, including emergency situations, should be a matter for courts not police.

C. The *Charter* and the Supreme Court of Canada

There can be no doubt that the entrenchment of the *Charter of Rights and Freedoms* in 1982, and its interpretation by an activist Court, has provided a balance to political law and order agendas and has established new rights for accused. However, this record should not be exaggerated. The Court also often adopts law and order positions.⁴⁴ A danger under an entrenched *Charter* system is that, where the courts set the *Charter* standard too low, legislatures are unlikely to interfere. Few politicians would dare to be softer on crime than the courts. A serious threat to the Canadian *Charter* is also presented by the recent disdainful "in your face" attitude of Ministers of Justice and Parliament to Supreme Court decisions interpreting *Charter* standards for accused. On at least four recent occasions Parliament has enacted *Criminal Code* amendments to achieve positions already declared unconstitutional by the majority of the Supreme Court of Canada. This has occurred in Parliament's restoration of the power to deny bail "in the public interest,"⁴⁵ its exclusion of the extreme intoxication defence to sexual assault and other general intent crimes,⁴⁶ its adoption of the minority position of the Court in *O'Connor*⁴⁷ respecting very limited access to medical and therapeutic records of complainants in sexual assault cases,⁴⁸ and new dangerous offender provisions which clearly defy previously declared *Charter* stan-

⁴³ *R. v. Noble* (1996), 47 C.R. (4th) 258 (Ont. C.A.).

⁴⁴ Chief Justice Lamer's remarkable record of finding majorities on the Supreme Court for many major re-considerations of the criminal justice system were little celebrated on his retirement as he was widely perceived as too pro accused. Critics overlooked the reality that the Chief Justice was also often pro State: see D. Stuart, "Chief Justice Antonio Lamer: An Extraordinary Judicial Record of Reform of the Canadian Criminal Justice System" (2000) 5 Can. Crim. L.R. 51.

⁴⁵ *Criminal Code*, S.C. 1997, c. 18.

⁴⁶ *Criminal Code*, S.C. 1995, c. 32 at s. 33.1.

⁴⁷ *R. v. O'Connor* (1996), 44 C.R. (4th) 1 (S.C.C.).

⁴⁸ *Criminal Code*, S.C. 1997, c. 30 at ss. 278.1-278.91.

dards.⁴⁹ In the case of these and other amendments to sexual assault laws, there was a subtext in that Parliament expressly asserted in preambles that there are equality rights of complainants to be somehow balanced against entrenched rights of an accused.

With the changed composition of justices on the Court,⁵⁰ there are now unmistakable signs that it too is moving toward a law and order position. In *Ewanchuk*⁵¹ the Court drastically restricted the mistaken belief in consent defence to sexual assault. In *Stone*⁵² a 5–4 majority reversed the onus of proof for the defence of sane automatism, even though the issue of onus had not been raised by any counsel in the case. In *Oicle*⁵³ the Supreme Court, over the sole dissent of Justice Arbour, reinterpreted the voluntary confession rule to authorise a wide range of coercive interrogation techniques.

On the *Charter* front the tide has clearly changed. In *Mills*⁵⁴ a unanimous Court meekly spoke of the need to dialogue with Parliament and upheld Parliament's enactment of the views of the dissenting opinion in *O'Connor* regarding access to medical and other records of complainants in sexual assault cases. In *Mills* the Court also accepted that complainants in sexual assault cases have enforceable equality rights under section 15 of the *Charter* without even attempting to apply its recently established section 15 tests⁵⁵ or exploring the uncertain implications of its ruling.

V. IS RECODIFICATION A HOPELESS CAUSE?

SOME 50 RECODIFICATION STUDIES AND REPORTS of the Law Reform Commission of Canada gather dust on shelves. The Commission was abolished, then

⁴⁹ *Criminal Code*, S.C. 1997, c. 17 at ss. 753.1–761.

⁵⁰ Chief Justice Lamer, and Justices La Forest, Sopinka and Cory, have been replaced by Justices Bastarache, Binnie, Arbour, and LeBel.

⁵¹ *R. v. Ewanchuk* (1999), 22 C.R. (5th) 1 (S.C.C.). For criticism of *Ewanchuk* see D. Stuart, "Ewanchuk: Asserting No Means No at the Expense of Fault and Proportionality Principles" (1999) 22 C.R. (5th) 39.

⁵² *R. v. Stone* (1999), 24 C.R. (5th) 1 (S.C.C.). For criticism of *Stone* see R.J. Delisle, "Stone: Judicial Activism Gone Awry to Presume Guilt" (1999) 24 C.R. (5th) 91 and D. Pacciocco, "Death by Stone-ing: The Demise of the Defence of Simple Automatism" (1999) 26 C.R. (5th) 273. The Court may have already softened its approach in *R. v. Ruzic* (2001), 41 C.R. (5th) 1, in which the Court determined that cases of physical involuntariness and moral involuntariness for defences do not engage a reverse onus.

⁵³ *R. v. Oicle* (2000), 36 C.R. (5th) 129 (S.C.C.).

⁵⁴ *R. v. Mills* (2000), 8 C.R. (4th) 207 (S.C.C.). See D. Stuart, "Mills: Dialogue with Parliament and Equality by Assertion at What Cost?" (2000) 28 C.R. (5th) 275.

⁵⁵ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

reconstituted as the Law Commission, with no mandate to return to recodification of the criminal law. No one is listening to those who have been arguing for some 25 years for a principled review of the justice system. The careful work of the Law Reform Commission appears to have been a considerable waste of time, effort and public resources.

Some 60 judges, academics, and practitioners from across Canada met in Kingston over 6–8 November 1998, for open discussion on the broad theme of “Making Criminal Law Clear and Just.” The conference proceedings and papers were later published⁵⁶ detailing a number of ideas for reform on every aspect of the justice system. There is no indication that any of these ideas have been seriously considered by the Department of Justice. There is an ongoing effort to set up a Task Force to continue this work, but private and governmental funding and support has been hard to find.

So is this flogging a dead horse? There is always hope that there will be another Senator Flynn in the Justice portfolio who will rise above political expediency. Think back to Justice Minister John Turner’s impassioned justification of the *Bail Reform Act* in 1972, on the basis that studies indicated too many poor Canadians were being unnecessarily detained prior to trial because of the widespread use of cash bail. Then there was Solicitor General Warren Almand’s successful campaign in 1976 to abolish the death penalty, despite opinion polls favouring retention.

Eight years of decline in the national crime rate⁵⁷ should be a good time to take stock of where we are, rather than consistently lurching from one punitive position to another.

VI. A CASE FOR RECODIFICATION

A POWERFUL ARGUMENT FOR A PRINCIPLED review can be based solely on the urgent need to make criminal law more clear and accessible. Our *Criminal Code*, which addresses substantive law, procedure and sentencing, has grown enormously to become an unwieldy and inconsistent statute of 841 provisions, many with very complex subsections. At the same time there has been a flood of rulings from the Supreme Court of Canada. Decisions outlining Charter standards have been especially long and complex. At a time when there are major cut-backs for legal aid across the country, there is a real danger that the law is becoming increasingly difficult to discover and less evident in trials. The rule of law demands more.

⁵⁶ D. Stuart, R. Delisle, & A. Manson eds., *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (Scarborough: Carswell, 1999).

⁵⁷ Canada, Centre for Justice Statistics *Juristat* 1999.

A particular stumbling block to principled reform may be the conservatism of the legal profession. G.K. Chesterton's remark pertaining to juries seems equally applicable in this context:

And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives and policemen, is not that they are wicked (some of them are good), not that they are stupid, several of them are quite intelligent, it is simply that they have got quite used to it.⁵⁸

Leading counsel and judges, having worked so hard to become expert in their stock and trade, may simply resist having rules and principles changed so that their special expertise is no longer so special. Criminal law must be easily understandable by the average counsel and judges and not just the most expert.

A need for principled review is not just a pitch for clarity in the law. A Minister of Justice should also have a passion for justice. Now that interests of victims have been better accommodated in the justice system, it is time to address again whether the criminal law is just to accused persons. Discriminatory realities have recently been laid bare by the National Council of Welfare's Report on *Justice and the Poor*.⁵⁹ This report, which should be prescribed reading for all politicians and judges, concludes that

Canada's criminal justice system is anything but just. Wealthy businessmen easily pay fines for offences that endanger the lives of their workers while vagrants are imprisoned for stealing a bottle of wine. Although there is no evidence that young people from poor families commit more crimes or more serious offences than youths whose parents are well off, the majority of young people who are arrested and whose lives are damaged by contacts with the criminal justice system are from low-income backgrounds. Most affected by this intolerable discrimination are the poorest of the poor, Aboriginal people.⁶⁰

How can the federal and Ontario governments blithely ignore the finding of the Committee on Systemic Racism,⁶¹ that the pre-trial rate of detention in Toronto for black persons charged with drugs trafficking is 27 times higher than that for white accused?

⁵⁸ G.K. Chesterton, "Twelve Wise Men" in *Tremendous Trifles* 12th ed. (London: Methuen, 1930) 50.

⁵⁹ Spring 2000.

⁶⁰ *Ibid.* at 120.

⁶¹ *Supra* note 11.

VII. RECODIFICATION SUGGESTIONS

THE RECODIFICATION PROPOSAL MAY PERHAPS be best justified by pointing to constructive suggestions for change.

A. Substantive Law

The case for inclusion of a General Part into the *Criminal Code* has been made by the Law Reform Commission,⁶² a C.B.A. Task Force,⁶³ a Justice and Legal Affairs Committee,⁶⁴ and law teachers.⁶⁵

The case seems self-evident because basic substantive principles are missing from the *Criminal Code*—the document most accessible to Canadians. Although our courts, and the Supreme Court of Canada in particular, have tried hard to provide guidance, there is now considerable inconsistency and unworldly complexity in the law. On the key requirement of fault, trial judges have little or conflicting guidance on whether to apply a subjective or objective test, or on the meaning of such concepts as intent, recklessness and criminal negligence. Judges have no basis for determining the test for common offences such as wilful obstruction⁶⁶ or how to distinguish dangerous driving from criminal negligence. Modern criminal codes in other jurisdictions all have clear fault standards and definitions.

The defence of self-defence is likely one of the most commonly raised. Since 1892 Canadian courts have struggled with excessively convoluted *Criminal Code* sections 34, 35 and 37, based on Sir James Stephen's questionable assumption that it is wise to distinguish in advance between fatal and non-fatal self-defence cases and to have a tougher rule for an initial aggressor. Threats to third parties, even close family members, have been only indirectly included in

⁶² See especially the Law Reform Commission of Canada, *Report 31: Recodifying Criminal Law* (1987).

⁶³ Canadian Bar Association Criminal Recodification Task Force, *Principles of Criminal Liability* (Ottawa, 1992).

⁶⁴ *First Principles: Recodifying the General Part of the Criminal Code of Canada* (February 1993).

⁶⁵ See most recently D. Stuart, "A Case for a General Part" in *Towards a Clear and Just Criminal Law*, *supra* note 56. I propose and try to justify a draft *Code* building on previous Canadian proposals and those in the United Kingdom, Australia and New Zealand.

⁶⁶ Proof of intent was required in *R. v. Kirkham* (1998), 17 C.R. (5th) 250 (Sask.Q.B.) and *R. v. Murray* (2000), 34 C.R. (5th) 290 (Ont.S.C.) but in *R. v. Gunn* (1997), 6 C.R. (5th) 405 (Alta. C.A.) it was held that the offence of wilful obstruction of police officer required proof of a general, not specific, intent and could be committed recklessly.

section 37, a provision respecting prevention of harm. The courts have struggled with little success to simplify matters for themselves and juries. Given the complexity of directions in the law on self-defence, they are frequently appealed and not infrequently result in new trials.

For many years writers and the Law Commission have called for simplification of the law of self-defence. In *McIntosh*⁶⁷ Chief Justice Lamer commented for the majority that:

...ss.34 and 35 of the *Criminal Code* are highly technical, excessively detailed provisions deserving of much criticism. These provisions overlap, and are internally inconsistent in certain respects. Moreover, their relationship to s.37 ... is unclear. It is to be expected that trial judges may encounter difficulties in explaining the provisions to a jury, and that jurors may find them confusing. The case at bar demonstrates this. During counsel's objections to his charge on ss.34 and 35, the trial judge commented? Well, it seems to me these sections of the *Criminal Code* are unbelievably confusing? I agree with this observation.⁶⁸

That Ministers of Justice and Attorneys-General have not moved years ago on this obvious need is perhaps the best illustration of how political criminal law reform has become.

A focus on general principles may also point to inconsistencies such as unfair labeling. Consider the highly sensitive area of sexual assault laws. The reconsideration of our *Criminal Code* starting in 1982 to reform the laws to better take into account the position of victims, disproportionately women and children, was long overdue, as was the attempt to have our *Criminal Code* reflect the "no means no" philosophy. However in my opinion⁶⁹ a lack of attention to fundamental fault and proportionality principles by our Parliament and now our highest court⁷⁰ has led to potentially repressive sexual assault laws which criminalises under the one label of sexual assault the rapist, the deliberate sexual predator, those who do not meet a new standard of reasonableness, unwanted touching of all types, and now those who misperceived, whether or not this arose in an ambiguous situation or through drunkenness. Some of this complaint reflects the downside to Canada having replaced the distinction between rape and indecent assault with the single category of sexual assault. A well-intended reform appears to have backfired. It was an effort to avoid the preoccupation with whether there was penetration and instead to focus on the violence of the attack. As a result, rape has been unwittingly trivialised. Attempted or actual penetration is surely a more serious offence than sexual

⁶⁷ *R. v. McIntosh* (1995) 36 C.R. (4th) 171 (S.C.C.).

⁶⁸ *Ibid.* at 180.

⁶⁹ See Stuart, *supra* note 51.

⁷⁰ See especially *Ewanchuk*, *supra* note 51.

touching and this needs to be reflected in a separate offence category with higher penalties.

B. Police Powers

Many important areas of police power, such as the power to detain for questioning, remain uncertain and are left for courts to decide after the event, under the uncertain common law ancillary powers doctrine adopted by the Supreme Court in *Godoy*.⁷¹ On the other hand it seems extraordinary that it was only on 14 February 1999 that it became clear that the police have the power to enter premises to investigate a disconnected 911 call for public safety or life preservation reasons, and only because the Court in *Godoy* so ruled. The citizen and the police officer, who must often make decisions on the spur of the moment, are entitled to clear guidelines. There are gaps in police powers that ought to be filled after full debate as to what the powers should be. As argued by former Chief Justice Brian Dickson in his dissenting opinion in *Dedman*,⁷² police powers should be limited to those expressly declared by legislation.

Existing statutory powers such as those relating to arrest,⁷³ bail,⁷⁴ and search warrants⁷⁵ are extraordinarily complex and should be radically simplified and clarified.

C. Trial and Appeal Procedure⁷⁶

The growth of the hybrid category of offence triable at the option of the Crown by way of summary conviction or on indictment has increasingly resulted in the downloading of criminal trials to already overworked provincial judges. In 1999 in Ontario there were 550,000 criminal cases in the Provincial Courts⁷⁷ and only 4,500 in the Superior Division.⁷⁸ As a result of crown electing down, many

⁷¹ *R. v. Godoy* (1999), 21 C.R. (5th) 205 (S.C.C.).

⁷² *R. v. Dedman* (1985), 46 C.R. (3d) 193 (S.C.C.).

⁷³ Respecting arrest and other police powers see the detailed proposals of T. Quigley, "Principled Reform of Criminal Procedure" in *Towards a Clear and Just Criminal Law*, *supra* note 56 at 253-421.

⁷⁴ See G. Trotter, "Bail in Canada: Reflections on Reform" in *Towards a Clear and Just Criminal Law*, *supra* note 56 at 406-421.

⁷⁵ R. Pomerance, "Criminal Code Search Warrants: A Plea for a New Generic Warrant" in *Towards a Clear and Just Criminal Law*, *supra* note 56 at 382-405, points to the proliferation of various search warrant powers and proposes a generic warrant.

⁷⁶ See further the detailed list of recommendation of Quigley, *supra* note 73.

⁷⁷ Speech of Chief Justice Brian Lennox of Ontario Court of Justice (10 January 2000), on Opening of Courts of Ontario.

⁷⁸ Speech of Chief Justice Patrick LeSarge of Ontario Superior Court (10 January 2000), on Opening of Courts of Ontario.

accused are denied the right to choose a preliminary inquiry and a jury trial. This practice is an assault on the fundamental notion of trial by jury—at least for serious offences. It is high time to get over concerns of judicial status and political powers of appointment and start to move towards a Unified Criminal Court as was recently adopted in Nunavut. The present two-tier trial structure lacks coherence and causes confusion, cost and delay as former Attorney-General of Ontario Ian Scott recognised several years ago. There should also be an autonomous Youth Court with full powers to sentence. The current time and resource-wasting option of application to transfer to adult court should be abolished.

Further, some appeal options are lacking (e.g. for sexual assault complainants concerning access to therapeutic records). Appeal powers in general need to be made more coherent and functional.

D. Evidence

Many of the common law rules of evidence, and other statutory rules derived from them, can only be justified as historical accidents. The legal profession has been resistant to moves to codify evidence rules. However this is one of the most practical and important of subjects and it is unacceptable that basic principles are in such disarray.⁷⁹ The *Canada Evidence Act* needs to become more comprehensive to make the law accessible.

Consider the issue of the admissibility of bad character evidence in the form of pattern evidence which arises in many abuse and sexual assault cases. Courts are still debating the probative value of similar fact evidence and whether it is properly admissible as a matter of propensity.⁸⁰ Some trial judges now routinely let in pattern evidence, others resist. Appeal Courts, including the Supreme Court of Canada, are inconsistent.

So too, the long established law relating to cross-examination of adverse or hostile witnesses or on prior statements could be much simplified.⁸¹

E. Sentencing

There were major *Criminal Code* amendments in Bill C-41 respecting sentencing and expounding on the need for restraint. However, drafting of the Bill was so loose that there is in practice little uniformity of approach. Parliament itself

⁷⁹ See also R.J. Delisle, "A Comprehensive Statement of Evidence Rules" in *Towards a Clear and Just Criminal Law*, *supra* note 56 at 1-61 but compare D. Pacciocco, "The Case Against Legislated Text in Matters of Proof" in *Towards a Clear and Just Criminal Law*, *supra* note 56 at 62-74. Pacciocco however seems inconsistent in favouring a General Part.

⁸⁰ See most recently Doherty J.A. for the Ontario Court of Appeal in *R. v. Batte* (2000) 34 C.R. (5th) 263 (Ont.C.A.).

⁸¹ See Delisle, *supra* note 79.

has continued with a cascade of *ad hoc* amendments to Bill C-41 which toughen existing sanctions. Most of these amendments have been responses to tragic cases sensationalised in the media. As a result, we have increased penalties for impaired drivers, multiple murders and soon for home invasions and criminal harassment. This haphazard approach on so central a matter as sentencing does not credit a system of justice.

“Restorative justice” is the current watchword but it means quite different things to different proponents.⁸² The movement for restorative justice is no panacea and cannot properly address the need to punish fairly those committing serious offences.

The biggest problem in sentencing is that there is no monitoring of, or accurate information about, the use or efficacy of particular sentencing options. Calls to establish a permanent Sentencing Commission to address such concerns should not continue to go unheeded.⁸³

VII. CONCLUSION

RECODIFICATION CAN ONLY OCCUR with the full support of the Federal Government and a fully committed Minister of Justice. A Task Force or Forces should be established⁸⁴ with a balanced membership of respected experts, resources for open consultation and a timetable for tabling bills in Parliament. The Department of Justice Backgrounder to the latest anti-gang bill boasts of \$584 million the R.C.M.P. received in 2000 for organized crime enforcement and an additional \$200 million allocated in 2001. Perhaps \$7 million—less than 1 per cent of that budget—could be found or re-allocated to such a Task Force.

⁸² See B. Archibald, “A Comprehensive Canadian Approach to Restorative Justice: The Prospects for Structuring Fair Alternative Measures” in *Towards a Clear and Just Criminal Law*, *supra* note 56 at 520-540.

⁸³ See A. Manson “The Reform of Sentencing in Canada” in *Towards a Clear and Just Criminal Law*, *supra* note 56 at 493.

⁸⁴ See the careful analysis of reform vehicles by G. Ferguson, “From Jeremy Bentham to Anne McLellan: Lessons on Criminal Law Codification” in *Towards a Clear and Just Criminal Law*, *supra* note 56 at 212-218.