Editorial

THIRTY YEARS OF ALAN MEWETT'S EDITORIALS

In his 30 years as the editor of this journal, Alan Mewett wrote many editorials. Written quickly (in more than 10 minutes I hope!), the ideas expressed in these short essays nevertheless were far-sighted and contained much enduring wisdom. As Chief Justice Lamer indicates in his preface, many of them have influenced judicial decisions. Others have been adopted in legislation and conventional wisdom. Taken together, the editorials amount to yet another book written by Professor Mewett.¹ They reveal much about the man: his commitment to fundamental principles such as privacy, his appreciation of many sides of an issue, his candour, and his vibrant intellectual curiosity. Written in an elegant and witty style, the editorials are also a pleasure to read and now to review.

Alan Mewett defies easy political categorization and this may explain why he remains a perennial favourite of generations of all types of law students. Writing amid the tumult of the student demonstrations of the 1960s, he warned long-haired rabble rousers that they should be “mature and sensible” and not expect “favoured treatment merely because their motives in their eyes, are good”.² Even in the 1980s, he had doubts about legalizing the distribution of depictions of explicit sex, not in order to enforce “private morality”, but because of concerns about discouraging “casual sexual encounters” which in the age of AIDS could result in death.³ He frequently criticized media sensationalism of criminal cases and distinguished the public’s and the accused’s right to open proceedings from the media’s interest in selling more papers.⁴ He prudently warned lawyers not to discuss their cases in the media and to leave the commentary to others.⁵

². “Civil Disobedience” (1968), 11 C.L.Q. 1.
The conservative unease with public permissiveness is less than half the story. It was matched by a vigorous and principled defence of privacy. His consistent philosophy is perhaps best summed up by his 1971 declaration: “I do not care in the slightest what two adults (however they are defined) do in private, or what they read or what they smoke.” He sided with Hart in his debates with Devlin over whether the criminal law should be used to enforce conventional morality. Moreover, Mewett could detect the enforcement of morality a mile away. In one of his most humorous editorials, he argued that gambling offences should be repealed because they were “drafted with all the precision of a Roundhead’s fanaticism to inculcate a belief that any form of gambling that might be enjoyable — particularly three-card monte which I assume springs directly from Lucifer — is evil and wicked.” For Mewett, the criminal law was a “very heavy-handed monte” of protecting people from themselves. He was sceptical about criminalizing failures to rescue or even fails to use seat belts. For reasons perfectly understandable to those who know him, Professor Mewett worried that the next step in protecting people from themselves would be “the prohibition of alcohol” or the “banning of tobacco.”

The defence of privacy had a more serious side. Only five years after the 1969 abortion law was enacted as a liberal reform, he criticized it for many of the same reasons that led the Supreme Court to declare it unconstitutional 14 years later. He recognized that the interpretation of the law was “as varied as the number of hospitals with committees. Each doctor has his own idea of what might endanger a female’s life or health.” Moreover, he argued that “the right of a woman to obtain an abortion on demand must inevitably come.” He criticized Parliament’s attempt to re-criminalize abortion after the court’s decision as “fundamentally flawed” because it assumed that “a woman does not control her own body if she is pregnant because the state has an interest in the foetus.” He also expressed concerns that courts would manipulate their definition of consent in order to disapprove of “private sexual relations that most of us find unacceptable.”

Just as his conservatism was matched by a liberal defence of privacy, many of his editorials stressed the need for a balance between the competing values of criminal justice. Detention before trial was necessary, but should be in “decent detention facilities, divorced entirely from any connotation of punishment, permitting an accused all reasonable rights, except that of going free.” It should be permissible to draw adverse inferences from the accused’s silence, but the accused should be protected from cross-examination about prior convictions or bad character.

Writing in 1970, Professor Mewett worried that the “enforcement of the criminal law” in the United States was becoming “mired in an intricacy of rules and procedures that render much of it nugatory.” But the same time, however, he defended the jury’s ability to consider “unfairness, sympathy, dislike of harsh laws, disapproval of police or prosecution tactics” in their verdicts. Before law reform proposals that culminated in s. 24(2) of the Charter, he supported the exclusion of evidence obtained through flagrant illegals. He celebrated the Supreme Court’s activism in striking down felony murder laws, but also approved of its restraint in not applying the same principles to regulatory offences. He eschewed doctrinaire positions and sought careful and contextual balances of compelling interests.

My dominant impression when reading the editorials is how often they were well ahead of their time. In 1970, he suggested that “regional differences” in sentencing may be “both explicable and proper,” something that the Supreme Court endorsed a quarter of century later. Twenty years before it occurred, he called for the codification of sentencing principles.

Long before judges began to enter the public arena or even recognize the political and social importance of their decisions, he encouraged them to comment on “social and legal issues.” Never one to romanticize his country of origin, he predicted the declining importance of English decisions in Canadian criminal law by arguing in 1977 that it was “not foolish to say that it now does much more harm than good to look to English decisions to resolve Canadian problems.”

At an early stage of their growth, he recognized the importance of the “private police” and the need for them to be regulated lest people be “prejudiced by the exercise of an apparent, but unreal, authority.” He also saw that the public police must become more accountable and would be affected by the growing trend “to question the infallibility of all institu-

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tions". Long before the formation of Ontario's Special Investigations Unit and the Charter-inspired reform of the fleeing-felon rule, he knew it would be difficult to convict police officers and that their defences "necessarily diminish the rights of the victim".26

In 1978, he defended the use of staff legal aid lawyers and warned of exaggerating the accused's ability to select the best lawyer. These arguments would have been controversial among the defence bar when they were written, as indeed they are today when echoed in the 1997 McCamus Task Force on Legal Aid.27

Professor Mewett's far-sightedness also explains the ease with which he adapted to the changes brought on by the Charter. Indeed, by the time the Charter was enacted, he had already predicted many of these changes. In 1975, he foreshadowed the Supreme Court's decision in R. v. Vaillancourt28 and R. v. Martineau29 by arguing that felony murder was not necessary because manslaughter could be punished by life imprisonment.30 Seven years before it was struck down as cruel and unusual punishment, he argued that "the mandatory minimum penalty for importing is a disgrace to any civilized legal system".31 He predicted that under the Charter the police should not be allowed "to poke about in the speculation of finding something" and argued that search powers should only be exercised "after there has been efficient policing".32 He also correctly predicted that the Supreme Court would uphold the burden to prove the insanity defence, but strike down mandatory detention of those found not guilty on the grounds of insanity.33 His arguments that the Charter required derivative use immunity for compelled testimony and in some cases even the revival of the common law privilege of refusing to answer self-incriminatory questions have now received judicial favour.34

He argued for random stops and blood samples to control drunk driving before the courts and legislatures authorized them35 and saw the problem of requiring the police to hold off their breathalyzer demands coming.36 His criticisms of blood warrants have been addressed in new warrants for obtaining DNA samples.37 In 1983, long before the Askov crisis, he warned that "the most awful mess will arise if specific time periods are imposed that do not and cannot take into account" the variable factors contributing to trial delay.38 In 1988, he wrote that the fairness of jury selection, and in particular Crown stand-aside, would and should come under scrutiny, as indeed it has.39

Professor Mewett recognized that criminal justice could no longer be confined to bi-polar disputes between the accused and the state, but was cautious about what it could achieve for groups victimized by crime. At a time when feminist criticisms of the criminal law were just emerging, he recognized the difficulty of securing convictions in sexual cases and argued that more was necessary "to explain the fundamental meaning of an acquittal and that it does not reflect adversely on the victim. More encouragement should be given to rape and indecent assault victims to pursue civil remedies, whether or not the aggressor has been convicted, where a different standard of proof may bring a different result".40 Since that time sexual assault law has been reformed and more cases have found their way into civil courts.41

He defended the controversial Seaboyer42 decision as "workable, fair and sensitive"43 and criticized Bill C-49 on the basis that it penalized "an accused in order to protect values that have nothing to do with the fact-finding process. These values are, indeed, worth protecting and if this is done by education, instruction, there could be no criticism. But nothing is worth sacrificing an accused's right to make full answer and defence".44 On the other hand, he was more sceptical about the relevance of the medical records of rape victims and argued that, at the least, the prosecutor should be able to introduce expert evidence to explain the limited probative value of the results of therapy.45 Similarly, he argued that expert evi-

dence should be allowed to explain how children cope with the trauma of sexual abuse by, for example, suppressing memories of sexual abuse. 48

Many editorials were devoted to the difficult position of child witnesses. He expressed sympathy for attempts to reduce the trauma of testifying through liberalization of the hearsay rule, the use of videotapes and screens. At the same time, however, he realistically recognized that “the child must still give his or her testimony in the daunting atmosphere of the court-room, in the presence of the accused and be subject to examination and cross-examination”. 49 The criminal law must change with the times, but was not a panacea for social ills.

In his 120 some odd editorials in this journal, Alan Mewett set the highest of standards. His editorials remain provocative and stimulating. Although written under the pressures of deadlines and during times of other commitments, they were always thoughtful and scholarly, frequently profound and far-sighted and often entertaining and witty. In short, a perfect reflection of their author.

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