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THE CANADIAN CRIMINAL CODE: PAST, PRESENT, FUTURE?

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This paper is drawn from the chapter on codification of the criminal in my memoirs, *My Life in Crime and Other Academic Adventures* (2007). I describe a study that I completed in 1980 in which I contrast a criminal code prepared in the 1870s by R.S. Wright (later a high court judge) with the code prepared by James Fitzjames Stephen, which subsequently formed the basis of the Canadian Criminal Code and many other codes in the Commonwealth. My study, entitled 'R.S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law', was published in 1981 in the first volume of the *Oxford Journal of Criminal Studies*, which is available on-line and where complete references to the R.S. Wright story can be found. The present paper brings the story up to the present.

I make the point that a criminal code – or indeed, any piece of legislation – reflects the philosophy of its drafter. Further, I show that law reform is affected by a great number of factors apart from the merits of the proposals. Then, as now, a combination of politics, personalities and pressure groups affect the outcome. I also argue that R.S. Wright's more liberal criminal code would have been a better choice for Canada than Stephen's more authoritarian code.

I have also included some of the material from a chapter in the memoirs on the Charter of Rights and Freedoms where I show that the legislative process with all its faults is superior to judicial lawmaking when dealing with complex areas, such as a criminal code. The activism of the Supreme Court of Canada in attempting the reform of the criminal law over the past 25 years has hindered the enactment of a new code and on balance has harmed the administration of justice in Canada. The task of creating a new code for Canada should again be taken up again.

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The Competing Criminal Codes of R.S. Wright and James Fitzjames Stephen¹

At the University of Toronto, deans receive a one-year paid administrative leave at the end of their deanship. I intended to use that year, 1979–80, to complete my project on the machinery of law reform, which I had been working on since 1967. The Donner Canadian Foundation agreed to provide me with research funds, which would help pay for some of my research expenses. I was determined to finish the project, which was continuing to be an albatross around my neck. Three decades on one project seemed excessive.

Judy and I had decided that the family would spend about four months in Israel and the rest of the leave in Cambridge. I brought some of the albatross – in the form of a large number of files – with me to Israel, and other documents were sent to Cambridge to await my arrival there in late December.

We had rented a large apartment on the seafront in Netanya. I had brought material with me on codification of the law, hoping to complete a chapter on the topic, and perhaps others, while in Israel. Sitting on the balcony in our apartment in Netanya overlooking the Mediterranean, I wrote about the history of codification in English law, starting with Jeremy Bentham and his promotion of codification. I touched on the efforts to codify the criminal law in the United States by followers of Bentham, and described the Indian criminal code that was drafted by the great historian Thomas Macaulay and brought into force shortly after the Indian Mutiny of 1857.

Codification of the law, including the criminal law, has not been as prevalent in the common-law systems as in the Continental civil-law systems. One of the main reasons for the common law's historic resistance to codification may be related to the development of and close identification of legal and scientific thought in England in the seventeenth century. The most famous scientist of the time, Sir Francis Bacon, was also one of the most famous jurists, and lawyers were actively involved in the founding of the scientific Royal Society of London and in its work. Lawyers were part of the general intellectual community and were influenced by and, in turn, influenced scientific ideas. The chief justice of England, Sir Matthew Hale, the first major writer on the criminal law in England, was, for example, both a scientist and a lawyer. I see a close relationship, therefore, between the Baconian method of scientific empiricism and the common law's case-by-case method of building general principles from specific instances. Both use the inductive approach. Similarly, one can see a close relationship between the Continental

¹ For references, see M.L. Friedland, *My Life in Crime and Other Academic Adventures* (2007); Friedland, 'R.S. Wright's Model Criminal Code' (1981), 1 *Oxford Journal of Legal Studies* 307, reprinted in Friedland, *A Century of Criminal Justice*, chapter 1 (1984).

Cartesian method of deductive analysis and the concept of codification, which goes from general principles to specific applications.²

In writing the chapter on codification in Israel, I left one footnote blank. It would deal with a criminal code prepared for the island of Jamaica in the 1870s by a future English judge, R.S. Wright, then in his 1930s. I had seen a reference to the code in one source, but did not know anything more about it. I could not find out very much about Wright's code from the sources that were available to me in Israel. I decided to wait until I got to England to fill in the footnote. A professor at the Hebrew University, Yoram Shachar, told me about his experiences at the Public Records Office in London doing research on the history of the Israeli criminal code and urged me to visit the public archives when I got to England. He told me how thrilling the experience was for him. I had never done any archival work. We left Israel's sunshine around Christmas 1979 and arrived at Heathrow to the usual 4 p.m. winter darkness. Shortly after arriving in Cambridge, I went down to the relatively modern Public Records Office at Kew, outside London. One could leave Clare Hall, Cambridge, at about 7:30 in the morning, take a fast train to London, change to a train to Kew, and arrive at the archives at about the time they opened. And one could visit the nearby Kew Gardens when it closed.

One look at the Colonial Office records relating to the R.S. Wright code for Jamaica showed that the story was worth more than one footnote. It was not just a code for Jamaica that was being developed by Wright for the Colonial office, but a code to be considered for adoption by all the colonies, including the self-governing colonies. If the code was successful – many thought – it could be adopted in England. Neither code was, however, adopted in England. It still does not have what one would call a Criminal Code. I argue in my paper that if Stephen's code had not made its appearance when it did, Wright's code would probably have formed the basis for the English criminal code today.

Moreover – the documents showed – the noted jurist James Fitzjames Stephen had been involved in reviewing Wright's code for the Colonial Office, and it was during that review that Stephen decided to draft his own code. There were therefore a number of competing codes in the latter part of the nineteenth century, including Wright's and Stephen's codes. It was Stephen's code, via the Criminal Code Commission – the Blackburn Commission – on which Stephen was a member, that was adopted in Canada in 1892 and in most other Commonwealth countries.

Digging through the archival records was a wonderful experience. Every file tells a story. The Colonial Office adopted the practice of having the most junior person comment first on an issue, with the next most junior person commenting next, and so on, in much the same way, I understand, that the Supreme Court of Canada discusses how a case will be decided. There were also records in the files of the Lord Chancellor's office and in various libraries, particularly the Cambridge University Library. The footnote grew into a paragraph, and then into a short article, which I thought might be suitable for the *Criminal Law Review*, and eventually into an article with over 300 footnotes. Perhaps others have had the same experience in which a footnote takes over the paper. The article was accepted by Professor Patrick Atiyah for publication in 1981 in the first volume of the new *Oxford Journal of Legal Studies*.

² See my paper delivered on the occasion of the 100th anniversary of the Royal Society of Canada: 'A Century of Criminal Justice' (1982), 20 *Transactions of the Royal Society of Canada* 285.

‘R.S. Wright’s Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law’ is my favourite article and had a profound effect on my subsequent career. My interest in Justice Stephen led to my interest in the Lipski case³, which in turn led me to the Shortis⁴ and Old Man Rice⁵ cases. The R.S. Wright article was the first time I used a narrative approach for academic purposes, as I also did later for the three true-crime books. And it was primarily the true crime books, I believe, which influenced the committee choosing the person to write the history of the University of Toronto to select me to write it. So the article had a major effect on my subsequent career. I am now trying to write a novel, so the narrative approach continues.

The R.S. Wright article opened my eyes to the obvious, that is, that a code reflects the philosophy and views of its drafter. Here we had two very different codes representing the differing philosophical and jurisprudential positions of the two drafters. I had been studying and teaching criminal law for twenty years and had accepted our criminal code – which was essentially Stephen’s code – as more or less inevitable. But now I had two different models to compare and came to appreciate why many scholars in various fields like taking two or more models to analyse a problem.

An understanding of Wright’s left-wing liberal code placed Stephen’s more authoritarian code in its proper perspective. Wright was in many respects a radical, supporting land nationalization – ‘To restore the Land to the People and the People to the Land’ – as well as advocating the abolition of the House of Lords. He promoted women’s rights and played an active role in the growing labour movement, the latter causing him to wish – like Bentham – to curtail the power of a conservative judiciary to develop the law. His involvement with the Trades Union Congress may have stemmed from earlier work he did on the Truck System, a system which required workers to shop at the company store. He urged the TUC to become more involved in politics. The Labour party subsequently grew out of that movement. When Wright was appointed to the superior court in 1890, he at first declined the knighthood that automatically went with the office, but at the urging of other judges eventually accepted it. His radical ideas prevented his elevation to a higher court, even though he has always been regarded as one of England’s finest judges.

Stephen, by contrast, was very conservative, was opposed to the universal franchise, wanted the law to enforce morality, and trusted the judges to develop the law. Disraeli once said that Stephen would have made an excellent leader of the Conservative Party. I have Spy prints from *Vanity Fair* on my office wall of the two judges, hanging uncomfortably beside each other. The caption under Stephen’s picture is ‘The Criminal Code,’ and under Wright’s, ‘He declined a Knighthood, but thought better of it.’

Here are several examples from the two competing codes of how their different philosophies played out in the drafting of specific sections. Take the political offence of sedition, where their differences are clear. Wright allowed the citizen wide scope to criticize government policy, limiting a seditious purpose to ‘a purpose to excite any of Her Majesty’s subjects to the

³ *The Trials of Israel Lipski: A True Story of a Victorian Murder in the East End of London* (1984).

⁴ *The Case of Valentine Shortis: A True Story of Crime and Politics in Canada* (1986).

⁵ *The Death of Old Man Rice: A True Story of Criminal Justice in America* (1994).

obtaining by force or other unlawful means of an alteration in the laws or in the form of government.’ Stephen’s code, however, allowed far less scope for free speech. In Stephen’s code, sedition included an intention to bring the government of the United Kingdom or any part of it into ‘hatred or contempt,’ or ‘to raise discontent or disaffection amongst Her Majesty’s subjects.’ There was no requirement in Stephen’s code that the change had to be caused by ‘force or other unlawful mean’. Stephen wanted to control the proletariat. Wright wanted to encourage them to complain.

There is also a pronounced cleavage, if that is the appropriate word, on law and morality. Stephen – who had written a book, *Liberty, Equality, Fraternity*,⁶ opposing John Stuart Mill’s liberal approach to the enforcement of morality – would punish buggery or bestiality with a possible penalty of penal servitude for life, and with a *minimum* penalty of ten years’ imprisonment. Wright’s code treated those offences as ‘public nuisances.’

Attempted suicide, to give another example, constituted an offense in Stephen’s code, but not in Wright’s. Wright followed Mill, stating, ‘it may be added to usual arguments based on the absence of injury to any other person, that to impose a punishment for the attempt would be merely to supply an additional motive for taking care to ensure the success of the attempt.’ He did not, however, permit a person to assist another to take his own life.

Further, Wright’s abortion section was also more liberal than the section drafted by Stephen, who would permit an abortion only where the act was ‘reasonably necessary ... for the preservation of the life of the mother.’ The Criminal Code Commissioners would have limited it even further to the preservation of the life of the mother at the time of the birth of the child. Wright, however, provided that ‘any act which is done in good faith and without negligence for the purposes of medical or surgical treatment of a pregnant woman is justifiable, although it cause or be intended to cause miscarriage or abortion, or premature delivery, or the death of the child.’ As an aside, it should be mentioned that Wright supported other ‘women’s rights’ issues, such as female education. He was a member of the newly founded Girton College, Cambridge for over 20 years and gave his total Oriel College fellowship money – three hundred pounds a year – to Girton College.

They also differed on how they viewed the growing labour movement and what role the judiciary should play in controlling it. Wright’s support of the labour movement clearly influenced his view of the offence of common-law conspiracy, which he would have restricted to a conspiracy to commit a ‘crime,’ that is, an offence punishable on indictment. Stephen would have punished conspiracies to commit offences punishable on summary conviction and most probably conspiracies to engage in some conduct which was not itself subject to a criminal penalty. The one thing that I knew about Wright before learning about his role in drafting a criminal code – apart from a vague recollection that he had written a book with Frederick Pollock on possession⁷ – was that he had written a book on conspiracy that is still used today, *The Law of Conspiracies and Agreements*,⁸ but I had not known that he had written it to try to

⁶ J.F. Stephen, *Liberty, Equality, Fraternity*, 2nd ed., (1974, reproduced with an introduction and notes by R.J. White, 1967).

⁷ Frederick Pollock and R.S. Wright, *An Essay on Possession in the Common Law* (1888).

⁸ R.S. Wright, *The Law of Criminal Conspiracies and Agreements* (1873).

discourage judges from continuing to use the law of conspiracy to curtail strikes and picketing by unions. Wright wrote: ‘There appear to be great theoretical objections to any general rule that agreement may make punishable that which ought not to be punished in the absence of agreement.’ A similar distrust of judges by Wright resulted in his elimination of common law offences. Stephen – like the 1892 Canadian criminal code – allowed the judges to develop new offences – so-called common law offences. One of the reasons that Stephen’s criminal code was not enacted in England is because labour was opposed to it. If the anti-labour clauses in Stephen’s code were not removed, labour argued, ‘then the Bill should be stoutly resisted and fought, clause by clause, at every stage, so as to insure postponement, and prevent such clauses becoming the law of the land.’ In 1881 the Trades Union Congress passed a unanimous resolution that ‘no code would be satisfactory which does not repeal the law of conspiracy and secure the right of public meeting.’

Wright and Stephen did not agree on how elaborate a code should be. Stephen wanted to leave greater scope to the judges than Wright, who would have provided greater detail. Wright stated: ‘If a particular provision, although not absolutely necessary, is yet right and not such as to be obvious, so that a judge who has to supply it without much time for consideration is likely to be puzzled in its absence, it ought to be supplied for him.’

Wright’s code in particular differed from Stephen’s in the way it dealt with the mental element in crime. Like the American Law Institute’s first-rate Model Penal Code,⁹ which has been adopted by most American states, Wright’s code set out for each offence the mental state required for each element of the offence and defined each mental state in an introductory section. Stephen opposed this view, taking the position that one should leave it to the judges to develop the requisite mental state for each element through judicial decisions. Stephen trusted judges. From his experience with the labour movement, Wright did not. In any case, Wright argued, it made sense to set out and define the mental element for each offence. ‘A code without general definitions of general elements,’ Wright stated in answer to Stephen’s view, ‘would miss the greatest advantage of codification.’ As a result of adopting Stephen’s code, the present Canadian Criminal Code generally leaves it to the judiciary to work out what the accused’s mental state should be. Most criminal-law courses in Canada today spend perhaps half the year figuring out what the judges have been saying about the mental state for various offences. This is a waste of time for law students and a waste of time for judges. It often requires numerous appeals to the Supreme Court of Canada to work out the mental state for an element of a crime, when it could have been done more directly and effectively through legislation.

Here is one more example of the difference between the two codes, that is, the law of attempts. These provisions reflect the drafter’s view of the purpose of punishment. Stephen believed that one of the purposes of punishment was to permit vengeance by society. ‘Vengeance, Stephen stated, ‘affects, and ought to affect, the amount of punishment.’ Stephen’s code, like the Canadian criminal code, provides a lesser punishment for an attempt than for the completed offence – half the potential penalty. Less vengeance is needed for an attempt. Wright, however, believed that the purpose of punishment is deterrence – of the wrongdoer and of society – and as a result would punish the attempt in the same manner as the completed crime.

⁹ American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes* (1985); see generally, Markus Dubber, *Criminal Law: Model Penal Code* (2002).

One can also see this playing out in the question of attempting the impossible – one of the criminal law teachers' favourite topics. Wright's desire to deter persons from engaging in criminal conduct also led him to provide for convictions in cases of impossibility, including cases where the crime was not possible 'by reason of the absence of the person or thing.' Stephen took the opposite view and provided that 'an act done with intent to commit an offence, the commission of which in the manner proposed was, in fact, impossible, is not an attempt to commit that offence. So Stephen would not convict, for example, for attempting to steal from an empty pocket.

What happened to the Codes?

Stephen's draft code – which was revised by a royal commission, the Blackburn Commission, of which Stephen was a member – became the dominant code in the colonies, being adopted in Canada, New Zealand, and Australia. Wright's code of criminal law and another code on procedure were both rejected in Jamaica, although adopted in several other colonies in the Caribbean. Wright's code was then enacted in the Gold Coast and was supposed to be the code for other British colonies in Africa, but the chief justice of Northern Nigeria favoured a code based on the Stephen model that had recently been enacted in Queensland, Australia. The Northern Nigerian code was then adopted by Southern Nigeria, swept up the east coast of British Africa, and then continued over to Cyprus and Palestine.

To make matters worse for Wright's code, one of Stephen's sons, H.L. Stephen – a barrister without much legal business – asked the Colonial Office in the year 1900 if he could revise and bring Wright's code up-to-date. The permanent officials thought that it would be a mistake, but the colonial secretary selected Stephen to do it. He undertook the work for only £100, a paltry sum compared to the £1500 his father had received over 20 years earlier. The younger Stephen emasculated Wright's code, eliminating, for example, the mental element provisions. That was the death knell for Wright's code.

Stephen's code was not, however, enacted in England. There were a number of reasons often advanced for this, such as the extensive changes it made to the law, the lack of parliamentary time to deal with the subject, and the change of government in 1880. My study added several more reasons. One was, as we have seen, organized labour's strong reservations about the code. Another was the approach favoured by Wright and the Statute Law Committee in the 1880s for a more gradual approach to codification in England.

Further, there was serious concern about the quality of Stephen's work shared by a number of influential people. Parliamentary draftsmen were not impressed with Stephen's code, and were of the opinion that Wright's code was the better one. The leading parliamentary draftsman in England, Sir Courtenay Ilbert, stated in the year 1900 that 'The Commissioners' Code, notwithstanding the high authority of its framers, especially of the late Sir James Fitzjames Stephen, was found on examination to require material alterations both in form and in substance, and this is probably the reason why it was not carried further in Parliament.' In a review of Stephen's legislative work shortly after he died in 1894, Ilbert wrote in the *Law Quarterly Review* that 'whenever the work of codifying the English criminal law is again taken seriously in

hand, it is doubtful whether the admirable Penal Code which Mr. Justice Wright drew for Jamaica would not afford a better foundation to build upon than either the Indian Penal Code or the [Commissioners'] Bill of 1879.'

Stephen's code is in some respects clumsily constructed. Here are two examples of confusing provisions in Stephen's code that Canadian lawyers – including me until I did the R.S. Wright study – take for granted, but are not as good as Wright's comparable provisions. One is that Stephen broke offences down into indictable and non-indictable – that is, according to the procedure for trying the offence. This has caused confusion because – without getting too technical – perhaps the majority of indictable offences today (minor theft, for example) cannot be tried by indictment. Most first year law students have difficulty in understanding the categories. It would have been better to classify offences according to the seriousness of the crime. Wright kept the distinction, as the Americans have, between felonies and misdemeanours, stating with respect to felonies: 'It seems inexpedient to throw away a term which already carries associations of grave reprobation.'

A further example of unnecessary confusion is Stephen's introduction of the term 'homicide' into murder and manslaughter cases. Read any charge to the jury in a murder case and you will understand how difficult it is for the jury to grasp what the judge is saying. The judge explains at length the meaning of homicide and then says what is not murder, and then says what the offence of murder consists of. By this time the jury is thoroughly confused. Wright, by contrast, defined murder directly without reference to homicide. The use of the word 'homicide' is not necessary in a criminal trial.

In the concluding part of my article I ask: 'What conclusions can be drawn from the story of Wright's Jamaica Code?' My answer: 'Perhaps it is simply the obvious one that law reform is affected by a great number of factors apart from the merits of the proposals. Then, as now, a combination of politics, personalities and pressure groups affected the outcome.'

I ended the article by commenting on the fact that a biography of Stephen written by his brother Leslie Stephen does not mention Wright. Moreover, the less-than-enthusiastic entry for Wright in the *Dictionary of National Biography*, of which Leslie Stephen was the founding editor, was written by another of James Fitzjames's sons, Herbert, and again does not mention Wright's work on codification. I end the paper by stating: 'It almost seems as if the Stephen family tried to eliminate Wright from the history of the codification of the criminal law.'

My article helped right the balance, but I had the chance to go further. I was asked if I would do a piece on R.S. Wright for the new *Dictionary of National Biography*. I was, however, in the middle of the University of Toronto history and did not want to be diverted. I felt that I could not do the article without a lot more work on Wright's involvement in the labour movement, which I consider probably more important to society than his work on codification. He played a key role on behalf of the Trades Union Congress in drafting legislation affected labour.¹⁰ I sent the DNB a copy of my article, which they must have known about already, and asked them to pass it on to the person whom they selected to do the entry. Fortunately, they chose Peter Glazebrook, who already knew my article well, having been one of the three people I

¹⁰ See, in particular, footnote 125 of my R.S. Wright article.

thanked in a footnote for reading the paper and making helpful comments. The new entry is now out. Glazebrook has given Wright the credit he justly deserves – at least in the area of criminal law.

The time and effort spent on the R.S. Wright article meant that I did not come home from my sabbatical with a draft of the book on the process of law reform I had hoped to complete. I thought that perhaps a collection of essays on law reform would be a good substitute. The problem was that I could not decide what papers to use. I must have had dozens of possible titles for the collection, but nothing seemed right. In the end, Carswell agreed in late 1982 to publish a book of essays on the criminal law, which came out in 1984 under the title, *A Century of Criminal Justice: Perspectives on the Development of Canadian Law*. The R.S. Wright article was the lead article.

Once again, I had gotten out of the academic quicksand alive. I sent a copy of the book to Don Rickerd of the Donner Canadian Foundation, which had been supporting my research, thanking him for his support and for the flexibility that the foundation gave me in pursuing my research, although I am not sure they knew what I had been doing. Most projects that I have worked on and for which I have received funding end up deviating substantially from what I said that I would do. This is probably inevitable in research. One idea leads to another. It would be a mistake to limit where the evidence takes you. I have spoken to scientists about this and they tell me it happens all the time in scientific research. So perhaps we should not feel too guilty for changing the direction of one's research in mid-funding stream. Nothing is more demoralizing than carrying on with a project that has lost its intellectual interest for you. I recall one conversation with my Cambridge supervisor Glanville Williams, one of the common-law world's most prolific and important scholars, who pointed to some filing cabinets in his office and said they contained his abandoned projects.

Further Follow-up in Canada

My interest in codification continued over the following years. During the 1980s, there was an attempt by the federal government to expedite the development of a new criminal code, which had been the principal work of the Law Reform Commission of Canada. The Law Reform Commission of Canada, which had been established in 1971, had been publishing many excellent studies, but a new code still seemed far off. I have a chapter on the Commission¹¹ in my memoirs, which I do not have the time to go into in this talk. Progress had been slow and in October 1979, when the Clark government was in office, federal and provincial ministers responsible for the various aspects of the criminal justice system in Canada met in Ottawa and unanimously agreed that 'a thorough review of the Criminal Code should be undertaken as a matter of priority' and that 'the review should encompass both substantive criminal law and criminal procedures.' This 'comprehensive and accelerated review' was centred in the Department of Justice, which worked closely with the solicitor general's department and the Law Reform Commission. I was heavily involved in that review. During the 1980s I did work for all three bodies, as well as preparing a paper on the structure of sentencing from an historical

¹¹ *My Life in Crime*, chapter 11.

perspective for the Canadian Sentencing Commission, which had been set up in 1985 and issued a fine report in 1987. The process of codification was gaining momentum.

An excellent document emerged from the Department of Justice in 1982, *The Criminal Law in Canadian Society*. This was primarily the work of Jack Macdonald, a non-legal member of the department. There was a lot of activity in the Department of Justice and other departments, as well as in the Law Reform Commission, and the government announced that a code would be ready for the one hundredth anniversary of the enactment of the first code in 1892. When I delivered a lecture at a conference at the University of New Brunswick devoted to the centenary of the 1892 code, I pointed out the obvious: the deadline had passed without the appearance of a new code.¹²

Moreover, in late February 1992, the Conservative's federal minister of finance, Don Mazankowski, 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. The chances of a new code therefore decreased even more. The Law Reform Commission was resurrected in 1997 by the Liberals with a new name, the Law Commission, and with a new mandate that did not include the production of a new criminal code. In any event, the commission was effectively closed down in 2006 by the Conservative government withdrawing its funding.

In the spring of 1992 a subcommittee of the Standing Committee on Justice and the Solicitor General conducted hearings on the general part of the code. That year I gave a seminar at the law school on the reform of the criminal law. Its objective was to generate a brief to be presented to the committee. Each student prepared a paper on one of the topics contained in the general part, which formed the basis of the brief. The seminar was similar to the law-review seminars I had given in the early 1980s, which were designed to produce a special issue of the law review on a given topic. I did one in 1983 on the general part of the Criminal Code which was very successful. Two of the papers published in the law review (an article by Ed Morgan on necessity¹³ and one by Paul Schabas on drunkenness¹⁴) have been cited by the Supreme Court of Canada. I appeared before the subcommittee in June 1992 with two students from the seminar. The students' brief was well received – the chair referred to the 'excellent' document – but nothing came of the committee's work.

I made the suggestion to the subcommittee that it would be desirable to enact the Criminal Code in stages, starting with the general part of the code. The problem with putting a whole code before Parliament as a package, I argued, is that it is not likely to be enacted. There are many controversial issues in any criminal code: police powers, abortion, 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.

¹² Friedland, 'Canadian Criminal Justice', 1892-1992 (1993), 42 *University of New Brunswick Law Review* 175.

¹³ E.M. Morgan, 'The Defence of Necessity: Justification or Excuse' (1984), 42 *University of Toronto Faculty of Law Review* 165.

¹⁴ P.B. Schabas, 'Intoxication and Culpability: Towards an Offence of Criminal Intoxication' (1984), 42 *University of Toronto Faculty of Law Review* 147.

This happened in the United States when the federal government tried to bring in a new federal criminal code. In 1966 the Johnson administration established through Congress a powerful National Commission on Reform of Federal Criminal Laws. The commission, under the chairmanship of the governor of California, Edmund G. Brown, produced a *Final Report on a Proposed New Federal Criminal Code* in 1971.¹⁵ It could not make it through Congress – it was not right wing enough for President Nixon – although various subsequent attempts have been made over the years to have a new federal code enacted. In 1990 I participated in an international conference in Washington designed by the Society for the Reform of the Criminal Law to put pressure on governments, including the American government, to develop new criminal codes. I discussed codification in the Commonwealth, drawing of course on my R.S. Wright paper.¹⁶ There is still no new U.S. Federal Criminal Code.

The Law Commission in England started working on a new criminal code in 1968, but a code has still not been produced. The project was turned over to a group of legal academics in the 1980s, without great success. In the early 1990s, England decided that a more gradual approach was needed, and since then the Law Commission and the government have been chipping away at the task by bringing in separate parts of a new code. Much has been accomplished. In July 2002 the government produced a white paper, *Justice for All*,¹⁷ in which it stated its intention to codify the criminal law.

In my view, a gradual process is the best approach for the Canadian government to follow. In the mid-1990s the government brought in some good sections on sentencing, based in part on the report of the sentencing commission. The next important step is to enact a new general part, followed by a code of procedure, and then a new code of evidence. It is important to have a new criminal code for the sake of the effectiveness of the criminal-justice system. Well-thought-out provisions in all of these broad areas – as we will see in the next section – will cut down on the complexity and therefore the length of trials and will play a significant role in improving the administration of criminal justice in Canada.

The Effect of the Charter on Codification in Canada

The Charter has been important in many areas of the law, such as aboriginal rights, equality rights, and electoral rights. But in my view, it has been a mixed blessing in the area of criminal justice. The Charter came into force in 1983 at the very time that the Department of Justice, the solicitor general's department, and the Law Reform Commission of Canada were diligently attempting to expedite the development of a new code of criminal law and procedure. The Supreme Court of Canada, however, seized the initiative to reform the criminal law, forcing the government to react to what the Supreme Court was actively doing. If the Supreme Court had not been as pro-active as it was, it is likely that Canada would now have a well-thought-out,

¹⁵ United States, *Final Report of the National Commission on Reform of Federal Criminal Laws (proposed New Federal Criminal Code)* (1971).

¹⁶ Friedland, 'Codification in the Commonwealth: Earlier Efforts' (1990), 2 *Criminal Law Forum* 145.

¹⁷ U.K., H.C., *Justice for All*, Cm. 5563 (2002).

balanced code, not unlike the 1962 American Law Institute's Model Penal Code, which, with various changes, has been adopted by the majority of states in the United States.

The Supreme Court of Canada's overly ambitious approach to reforming the criminal law has held back rational development of the law through the legislative route. It would, in my view, have been preferable for the Supreme Court to have been more deferential to the legislative process and to have encouraged Parliament to take the lead. This is not a question of legitimacy, but of institutional competency. The criminal law, like the tax system, requires a view of the whole structure, and can be done more effectively by legislation than by a case by case method.

In the chapter in my memoirs on the Charter I outline in detail why legislation is usually preferable in the criminal law area. Perhaps my earlier active involvement with legislative solutions in areas such as bail, legal aid, securities regulation, and gun control influenced my view. There are clear advantages in using the legislative route. In the memoirs, I mention, for example, the role of parliamentary committees, the wide powers of consultation, the use of interim reports and the possibility of draft legislation. Legislation permits one section of a criminal code to be placed in the context of other provisions, and trade-offs can be made to keep a proper balance in the system. Moreover, legislation is almost always prospective and not retrospective, applying only to future cases, whereas court decisions – the Askov case on delay and decisions on reasonable doubt are examples – are normally both prospective and retrospective, giving some accused persons unwarranted windfalls. Moreover, Supreme Court judges do not speak with one voice and many judgments often necessitate further clarifying judgments. Supreme Court judgments are usually difficult for the non-lawyer – and even the lawyer – to read and understand.

Legislation also has the advantage of not being cast in stone. It can more easily be changed than a decision based on the Charter – which requires the use of the notwithstanding clause or a constitutional amendment to be changed, or eventually wearing down the Supreme Court by a number of further attempts at change through what is called a 'dialogue'. Constitutionalizing issues hinders change and experimentation.

More and more areas of the law are becoming constitutionalized, particularly under the vague phrase 'fundamental justice' in section 7. In the *O'Connor* decision in 1995¹⁸, the Supreme Court even held that section 7 encompassed abuse-of- process cases. Thus, areas that were traditionally part of ordinary criminal law, such as entrapment and aspects of double jeopardy, would now seem to have been constitutionalized under fundamental justice. One can also see this happening in the law of evidence.

I am particularly concerned about the fact that courts, unlike legislatures, do not normally draw fixed lines, but try to determine on which side of an imaginary line a case falls. A court-developed imaginary line normally requires a trial judge to examine a large number of factors to determine an issue in a case before the judge, often resulting in long legal arguments both before and during the trial. Look at most Supreme Court of Canada decisions – both Charter and non-Charter cases – and you will see that a decision at trial normally requires that a host of factors be taken into account by the trial judge in deciding an issue. This uses up judicial and legal

¹⁸ *R. v. O'Connor*, [1995] 4 S.C.R. 411.

resources, as do arguments with interveners on appeal. The courts have turned many issues that could better be handled as matters of fact into matters of law. Legal aid funds are then not available for other cases. The judiciary has been complaining about long criminal trials. To a considerable extent, the judiciary created the problem.

The activism of the United States Supreme Court in the 1960s and 1970s no doubt became a role model for Canada's Supreme Court. One of the court's first Charter decisions, *Hunter v. Southam*,¹⁹ delivered in 1984, adopted an American-style approach to search and seizure. The U.S. Supreme Court, as is well known, had been active in those decades in developing the criminal law, although as Robert Harvie and Hamar Foster have shown,²⁰ it was less aggressive than the Supreme Court of Canada became. It is important to recognize as well that the U.S. Supreme Court had been forced to play an active role because in the United States criminal law is, for the most part, a state responsibility, and only the Supreme Court could impose minimum standards on a system that cried out for standards. But in Canada the constitution gives the federal government exclusive legislative authority over criminal law and procedure. The legislative route was open in Canada and, as I have already stressed, the structure was in place for developing a new comprehensive code.

Having comprehensive legislative, rather than judicial, solutions to search and seizure, entrapment, double jeopardy, disclosure, hearsay, and speedy trial procedures – to mention only a few areas that could have been, and in most cases were being, developed through the legislative route – would have created fewer problems for the administration of criminal justice than having the rules developed by the courts. The *Askov* case,²¹ – which continues to cast its shadow over criminal justice, for example, might not have been necessary if Parliament had enacted speedy trial laws, as was attempted, without success, in 1984. Most American jurisdictions have time limits that, with good cause, can be departed from. A comprehensive legislative scheme could help ensure compliance by a whole series of intermediary orders, preventing delay long before the time is reached for the draconian retrospective stay of proceedings after the unreasonable delay has already occurred.

The fault has to be equally shared by Parliament, which allowed – and perhaps even encouraged – the initiative to be seized by the Supreme Court by not continuing to pursue the legislative agenda aggressively. There are few votes to be gained in changing the criminal law, unless the legislation promotes a law-and-order agenda. Every contentious provision, particularly those involving law and morality, such as abortion and homosexual conduct, will alienate a significant number of voters, whatever the government decides to do. Better to have that anger directed at the courts, the government of the day might think.

Many of the members of the Supreme Court of Canada during the 1980s appeared eager to use the courts to develop the criminal law. It is understandable. Most of us would have been

¹⁹ [1984] 2 S.C.R. 145.

²⁰ Robert Harvie and Hamar Foster, 'Ties That Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law under the Charter' (1990), 28 *Osgoode Hall Law Journal* 729; and Harvie and Foster, 'Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law under the Charter' (1992), 24 *Ottawa Law Review* 39.

²¹ *R. v. Askov*, [1990] 2 S.C.R.1119.

tempted to do so if given the chance. Individually the judgments are good. It is the cumulative effect of extensive law-making by the judiciary in the criminal law area that concerns me.

The interpretation in the mid 1980s of two Charter sections in particular – sections 1 and 7 – were primarily responsible for the shift in the development of criminal justice from parliament to the courts. The interpretation of section 7 in the 1985 *BC Motor Vehicle Act* case²² broadened the scope of rights that would be protected, while the interpretation of section 1 in the 1986 *Oakes* case²³ put a significant burden on the government to justify any limitation of rights – a decision, I should add, made without the benefit of a full discussion of the issue by counsel in the case. I have gone into these decision in more detail in the chapter in my memoirs. Chief Justice Antonio Lamer clearly wanted to make new law in the *BC Motor Vehicle Act* case. He had been the vice-president and then the president of the Law Reform Commission of Canada throughout the 1970s – we served together in my brief time on the Commission – and he had become frustrated by the lack of progress in bringing forward and implementing the commission’s recommendations. The Motor Vehicle case, he later told the *Lawyers Weekly* was ‘his most satisfying moment’ on the court. The meaning of fundamental justice is very vague and gives the courts great scope for its use. ‘The principles of fundamental justice,’ Justice Lamer wrote in his judgment, ‘are to be found in the basic tenets and principles, not only of our judicial process, but also of other components of our legal system. One third of Don Stuart’s book, *Charter Justice* is devoted to section 7. Chief Justice Brian Dickson’s decision in *Oakes* was also not a surprise. At a talk at Dalhousie’s faculty of law shortly after the Charter was enacted, he stated: ‘When the occasion cries out for new law, let us dare to make it.’ Bob Sharpe and Kent Roach state in their book on Dickson that ‘he was determined to play a leading role in defining the scope and impact of the charter generally.’²⁴

The federal government should again take the initiative and take up the task of producing a new code of criminal law, procedure, and evidence. Furthermore, the Supreme Court should encourage the government to do so. Parliament could start with the general part, where politics may not be as important as in other parts of the code. The law of evidence should also be a high priority. Every political party has an interest in justice not being complicated, expensive, and delayed. A well-developed code, sensitive to the decisions of the Court, would likely survive Charter challenges. The Court would probably respect the choices made by Parliament as part of a comprehensive criminal code.

²² *Reference re: Section 94(2) of the BC Motor Vehicle Act*, [1985] 2 S.C.R. 486.

²³ *R. v. Oakes*, [1986] 1 S.C.R. 103.

²⁴ Robert Sharpe and Kent Roach, *Brian Dickson: A Judge’s Journey* (2003).