

## Reflections on Criminal Justice Reform in Canada

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A little over a month ago, Kent Roach asked me if I would give a talk at a proposed symposium, discussing my involvement in criminal justice reform over the past decades — fast approaching six decades — and reflecting on what I have learned and where we should go from here. I said I would be happy to do so — *reflecting* is what professors emeriti do.

I'll skip over my doctoral thesis, *Double Jeopardy*,<sup>1</sup> which was published in 1969, except to assure my academic colleagues and other doctrinal writers that such work continues to play an important role in the development of the law.

I also won't dwell on my three true-crime books that demonstrate the frailty of the criminal process — one of Kent's principal fields of interest. These books were part of a growing movement to make the public, legislators, and the actors in the criminal justice system aware of the danger of wrongful convictions. In *The Trials of Israel Lipski*, published in 1984, I examined a trial that took place in the east end of London in 1887. In the preface, I state:<sup>2</sup>

The story will place one trial in the context of the social, political and economic conditions of the time. A trial may in theory be an objective pursuit of truth, but in practice there are many subjective factors which influence the course of events. Justice may in theory be blind, but in practice she has altogether too human a perspective.

In the final chapter of the book, I added:<sup>3</sup> 'The case shows the inherent fallibility of the trial process and the constant danger of

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1. (Oxford University Press, 1969).
2. (Macmillan London, 1984), at pp. 11-12.
3. *Ibid.*, at p. 204.

error. Society should think twice before shifting the balance too far in favour of the prosecution.’ I made the same points in my two later true-crime murder books,<sup>4</sup> one of which, *The Case of Valentine Shortis*, Kent assisted me with as a summer research assistant.

My reflection: individual case studies, like these and the judicial inquiries into individual cases, such as *Marshall*,<sup>5</sup> *Milgaard*<sup>6</sup> and *Morin*,<sup>7</sup> are important in giving us an understanding of the criminal process and helping us guard against wrongful convictions. The Supreme Court of Canada now routinely recognizes the danger of wrongful convictions.<sup>8</sup>

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I’ll turn from individual case studies to studies involving a large number of cases, which I used in my very first book, *Detention before Trial*, published in 1965.<sup>9</sup>

That project is still relevant today.<sup>10</sup> I took about 6,000 cases in the Toronto magistrates’ courts — all the cases tried over a six-month period in 1962-1963 and studied how the bail system was working. It wasn’t working well. The study concluded with the statement<sup>11</sup> that ‘the release practices before trial which exist for cases tried in the Toronto Magistrates’ Courts operate in an ineffective, inequitable, and inconsistent manner.’ My recommendations — which included reducing reliance on cash bail, giving the police greater power to release accused persons, and using release without conditions as the first choice before moving step-by-step to more restrictive alternatives — were supported by the influential Ouimet

4. *The Case of Valentine Shortis: A True Story of Crime and Politics in Canada* (University of Toronto Press, 1986); *The Death of Old Man Rice: A True Story of Criminal Justice in America* (University of Toronto Press, 1994).

5. Nova Scotia, Royal Commission on the Donald Marshall, Jr., Prosecution, *Commissioners’ Report* (1989).

6. *Milgaard*, [1992] 1 S.C.R. 866, 71 C.C.C. (3d) 260, 12 C.R. (4th) 289 (S.C.C.).

7. Ontario, The Commission on Proceedings Involving Guy Paul Morin, *Report* (1998) (Commissioner: Fred Kaufman), available online.

8. See, e.g., *United States v. Burns*, [2001] 1 S.C.R. 283, 151 C.C.C. (3d) 97, 39 C.R. (5th) 205 (S.C.C.).

9. (University of Toronto Press, 1965).

10. On June 1, 2017, two days after my talk was given, the Supreme Court of Canada released an excellent unanimous decision on detention before trial, relying heavily on *Detention before Trial*: see *R. v. Antic* (2017), 347 C.C.C. (3d) 231, 2017 CarswellOnt 8134, 2017 CarswellOnt 8135 (S.C.C.). It will help improve bail practices.

11. At p. 172.

Committee<sup>12</sup> that reported in 1969 and found their way into federal legislation in 1971.<sup>13</sup>

Not only did this study influence the bail system, it also helped bring about a new system of legal aid in Ontario. In 1963, I had been asked by the Joint Committee on Legal Aid — a joint committee of the Ontario Government and the Law Society of Upper Canada — ‘to survey the extensive literature on legal aid in England and the United States and also to ascertain if any meaningful statistics existed with respect to legal aid and the need for legal aid in Ontario.’<sup>14</sup> Fortunately, I had collected statistics in my bail study on the use of counsel in criminal cases. It showed that in 1963 ‘only about 10 per cent of persons charged in Ontario — about 1500 persons in total — received any form of legal aid in criminal matters.’<sup>15</sup>

Further, my work on bail led to a later empirical study, which I conducted for the Ouimet Committee, of the functioning and facilities of magistrates’ courts across the country.<sup>16</sup> The Ouimet Report was a significant step in helping to raise the status and dignity of magistrates’ courts across Canada.

So in each case — bail, legal aid, and the status of magistrates’ courts — empirical studies influenced policy decisions. I was sure that the use of such studies would increase in Canadian law schools. It never happened. From time to time a law professor would engage in an empirical study, but never on a sustained basis. And centres of criminology would at times engage in empirical work. The Centre of Criminology and Sociolegal Studies at the University of Toronto, for example, continues to do valuable work. Meanwhile in medicine the effectiveness of the health care system is constantly being investigated for effectiveness.

Unfortunately, the bail system I described over 50 years ago still operates in an ‘ineffective, inequitable, and inconsistent manner.’<sup>17</sup> A number of recent studies have shown that large numbers of persons are being held in custody pending trial. In fact, the numbers have been rising. The police are not using their power to release to the extent they

12. *Report of the Canadian Committee on Corrections (Toward Unity: Criminal Justice and Corrections)* (1969) (Chair: Roger Ouimet).

13. The *Bail Reform Act*, passed in 1971, came into force in 1972.

14. See *My Life in Crime*, chapter 7.

15. *Ibid.*

16. See *My Life in Crime*, chapter 8. See M.L. Friedland, ‘Magistrates’ Courts: Functioning and Facilities’ (1968), 11 *Criminal Law Quarterly* 52; M.L. Friedland, ‘The Provincial Court and the Criminal Law’ (2003), 48 *Criminal Law Quarterly* 15.

17. See Martin Friedland, ‘The *Bail Reform Act* Revisited’ (2012), 16 *Canadian Criminal Law Review* 315.

should; justices of the peace are risk averse and routinely require sureties coupled with conditions that make it difficult for an accused to be released; and a growing number of reverse-onus provisions in the *Criminal Code* have a harmful impact on release practices. There is little uniformity across the country or even within each province.

In the case of justices of the peace in Ontario, I wonder why they are handling the important issue of bail and provincial court judges are conducting preliminary hearings. Shouldn't it be the other way around?

So, on reflection, we need continuing empirical investigations of the criminal justice system and an expert body to keep on top of problems as they begin to become apparent.

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I had also been closely involved with the Government of Ontario's Committee on Securities Legislation that reported in 1965 — commonly referred to as the Kimber Committee.<sup>18</sup> This was an effective committee that brought in a report that resulted in legislation on insider trading, disclosure, takeover bids and a range of other issues. It formed the backbone of the present system of securities regulation in Canada.

The work on securities regulation demonstrated to me that one does not have to rely heavily on the criminal law to control undesirable conduct. This was also brought home to me in a project that I was involved in for the Canadian Institute for Advanced Research in the late 1980s, where we studied the use of various techniques for controlling conduct.<sup>19</sup> I worked with Michael Trebilcock and Kent Roach on a study of traffic safety.<sup>20</sup> At the same time, Tony Doob and Neil Brooks were studying compliance with the tax system.<sup>21</sup> The number of prosecutions in each field was, however, radically different. There were over a million prosecutions a year involving automobiles in Ontario, yet there were only about 300 prosecutions for income tax matters in all of Canada.

My reflection: What does the Canada Revenue Agency know that the police do not? Another reflection is that it is wise to show restraint in the use of criminal sanctions and to look for alternative techniques,

18. See *My Life in Crime*, chapter 9.

19. See *My Life in Crime*, chapter 23.

20. Martin Friedland, Michael Trebilcock and Kent Roach, 'Regulating Traffic Safety' in M.L. Friedland, ed., *Securing Compliance: Seven Case Studies* (University of Toronto Press, 1990) chapter 4.

21. Neil Brooks and Anthony Doob, 'Tax Evasion: Searching for a Theory of Compliant Behaviour' in M.L. Friedland, ed., *Securing Compliance: Seven Case Studies* (University of Toronto Press, 1990) chapter 3.

such as greater use of administrative sanctions, for gaining compliance. There should be increased use of diversion, the continued use of judicial discretion, and a reduction, if not the complete elimination, of mandatory sentences.

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My involvement in the 1960s with various bodies that dealt with issues of public policy led to my interest in the machinery of law reform. England had brought in a Law Commission in 1965 and I spent much of my sabbatical in 1970 studying the English Law Commission. When I returned to Canada, I was invited to Ottawa to talk to members of the department of justice about what I had learned and subsequently prepared a detailed memorandum for the department.<sup>22</sup>

I argued that a 'Commission will necessarily become involved in studying the administration of criminal justice in Canada, primarily a provincial matter, because the administration of justice is directly related to the federal interest in criminal law and procedure.' 'There is,' I said, 'a clear need for reassessment and constant review [of] Criminal Law, Criminal Procedure, and Evidence' and pointed out that the Ouimet Committee had barely touched on substantive criminal law. A new federal Law Reform Commission could undertake these tasks.

I stated: 'The quality and acceptability of the work produced by the Commission will be greatly enhanced by engaging in empirical studies of the operation of the laws being examined. There is a danger that unless this is built into the planning and budgeting of the Commission, the Commissioners will not have the inclination, the time or the funds to engage in these studies.'

The Liberal Government did establish a Commission in 1970. Justice Minister John Turner told the House of Commons that the first task of the commission would be a complete rewriting of the *Criminal Code*.<sup>23</sup> I was fortunate to be named one of the commissioners. Unfortunately, there was no mention in the legislation about doing empirical work on the administration of criminal justice and the budget was not sufficient to engage in such work. Over the twenty-year life of the Commission — it was closed down by Mulroney's Conservative Government in 1992 for budgetary reasons<sup>24</sup> — the Commission did not engage in serious empirical work in the criminal justice area, although it produced

22. See *My Life in Crime*, chapters 10 and 11.

23. *Ibid.*

24. A new federal body, called the Law Commission, was set up in 1997 by the

excellent reports in many areas of criminal law, criminal procedure, evidence law, and sentencing.<sup>25</sup>

A criminal law reform commission should be re-established. It should be given a continuing mandate to study the actual functioning of the criminal justice system. It should work closely with Statistics Canada and with the provinces and consult widely. The commission should work with the government to bring in parts of a new Code from time-to-time. There are so many controversial provisions in any criminal code that it is difficult to gain approval of a complete code at one time by a legislative body.<sup>26</sup>

So, on reflection, a gradual approach is desirable. In the mid-1980s, the government brought in some good provisions on sentencing, based in part on the report of the Canadian Sentencing Commission<sup>27</sup> — changes that have helped keep the rate of imprisonment in Canada far below that of the United States. The next important step, in my view, is to enact a new general part, followed by a new code of evidence and then a code of procedure. Enacting a new general part would simplify and clarify the law in many complex areas. It would also spell out more clearly what the mental state should be for each element of an offence. Well-thought-out provisions in all of these broad areas 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.

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Chretien Liberals, but it was not primarily interested in criminal law and, in any event, was gutted by Harper's Conservatives in 2006: *Ibid.*

25. *Ibid.*

26. Both England and the United States federal government tried to produce new criminal codes in the 1960s, without success. See *My Life in Crime*, chapter 17, 'Codification of the Criminal Law.' The Law Commission in England started working on a new 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, again 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. There is a comparable story in the United States. In 1966, the Lyndon 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 an excellent *Final Report on a Proposed New Federal Criminal Code* in 1971. It could not, however, make it through Congress — it was not right-wing enough for President Nixon. Over the years, various subsequent attempts have been made, without success, to have a new federal code enacted.

27. Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987).

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One reason why a new *Criminal Code* was not enacted in Canada in the 1980s was because the *Canadian Charter of Rights and Freedoms* came into effect in 1982 and took the steam out of the movement for legislative reform. 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 had 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'.<sup>28</sup>

The enactment of the Charter, although in most respects important and valuable for the country, held back the development of the criminal law. At the very time the Departments of Justice and Solicitor General and the Law Reform Commission of Canada were attempting to expedite the development of a new code of criminal law and procedure, the Supreme Court of Canada took the initiative to reform the criminal law, forcing the government to react to what the Supreme Court was actively doing. The former chair of the Commission, Antonio Lamer, had been appointed to the Supreme Court in 1980 and appeared to want to do through the Supreme Court what he had been frustrated in trying to do through the Commission.<sup>29</sup>

If the Supreme Court had been somewhat less aggressive and had instead did more to encourage Parliament to produce a new *Criminal Code*, it is quite possible that Canada would now have a well-thought-out, balanced code.

The fault has to be equally shared by Parliament, which allowed — and perhaps even encouraged — the initiative to be taken by the Supreme Court by not continuing to pursue the legislative agenda vigorously. There are in most cases few votes to be gained in changing the criminal law, unless the legislation promotes a law-and-order agenda.

Moreover, it would have been better for the courts to use ordinary principles of criminal law to decide most criminal justice issues, rather than to turn many of these issues into Charter issues. Even abuse of process has now been constitutionalized.

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I prefer that change in the criminal law come through legislation, if

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28. See *My Life in Crime*, chapter 18, 'The Charter'.

29. *Ibid.* at p. 291.

that route is possible. Parliament has better institutional competence to deal with broad fields of law. Let me touch on some of the advantages. Through the parliamentary committee system, for example, the legislature will have available a better system of consultation than the judiciary has and, unlike the judiciary, such committees can produce interim reports and draft legislation for comment. Legislative bodies can collect social and economic data more effectively than a court. With a comprehensive legislative bill, one section can 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 prospective and not retrospective, applying only to future cases, whereas court decisions are normally both prospective and retrospective. Whatever the problem with interpreting legislation, legislation speaks with one voice. Supreme Court judgments are often lengthy, with multiple opinions, and sometimes require further clarifying judgments by the Court because of matters overlooked in the earlier judgment. It is also important to note that legislation can be changed by Parliament, whereas court decisions which rely on the Charter become part of the Constitution and tend to limit what Parliament can do, although a measure of so-called 'dialogue' often takes place between the two bodies.

Another major difference between courts and legislatures is that courts, unlike legislatures, do not like drawing fixed lines, but normally try to determine on which side of an imaginary line a case falls. A court-developed imaginary line usually requires trial judges to examine a large number of factors to determine the outcome of the case before them. This requires lengthy arguments by counsel and careful consideration by judges. It also brings about appeals. Court cases, whether trials or appeals, are costly. Supreme Court of Canada cases often involve many interveners. The vast majority of applications for leave to appeal to the Supreme Court of Canada are not granted leave, so relying on the judiciary for the development of the law is often hit and miss. Using the judicial process to develop the law also uses up valuable resources. A roomful of lawyers does not come cheap.

Further, it is difficult for the judicial process to handle some of the issues that require attention. Classification of offences, electing the mode of trial, and preliminary hearings are example of areas of criminal law which will normally evade review by the Supreme Court because they do not involve constitutional issues.

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

procedural areas that could have been, and in most cases were being, developed through the legislative route — would have created fewer problems in the administration of criminal justice than having the rules developed by the courts. The *Askov*<sup>30</sup> and *Jordan*<sup>31</sup> cases, for example, might not have been necessary if Parliament had enacted speedy trial laws. Most American jurisdictions have time limits that, with good cause, can be departed from.<sup>32</sup> Moreover, Parliament would likely not have said that a stay was the *only* remedy available for unreasonable delay. To have a complete stay will often give the accused too great an advantage.<sup>33</sup>

The Law Reform Commission of Canada had been interested in the issue of delay. In 1977, with Antonio Lamer as chair, the Commission had issued a report on various aspects of criminal procedure, including provisions on Trial within a Reasonable Time.<sup>34</sup> Federal legislation was, in fact, later introduced by the minister of justice, Mark MacGuigan, in 1984,<sup>35</sup> but Parliament was dissolved in July 9, 1984 and the new government of Prime Minister Mulroney never re-introduced the legislation. The courts then took up the challenge.<sup>36</sup>

30. *R. v. Askov*, [1990] 2 S.C.R. 1199, 59 C.C.C. (3d) 449, 79 C.R. (3d) 273 (S.C.C.).

31. *R. v. Jordan*, [2016] 1 S.C.R. 631, 335 C.C.C. (3d) 403, 29 C.R. (7th) 235 (S.C.C.).

32. See generally, Michael Code, *Trial Within a Reasonable Time: A Short History of Recent Controversies Surrounding Speedy Trial Rights in Canada and the United States* (Toronto: Carswell, 1992).

33. The British House of Lords, in a 2003 decision, refused to adopt the remedy used in the *Askov* case: *Attorney General's Reference No 2 of 2001*, [2003] UKHL 68 (U.K. H.L.).

34. Code, *Trial Within a Reasonable Time* at pp. 74-82 and Appendix 1.

35. *Ibid.* at p. 79 and Appendix 2.

36. The Law Reform Commission of Canada continued to work on the topic and was, in fact, developing a Working Paper on delay at the time *Askov* was decided in 1990: 'Trial within a reasonable time: a working paper prepared for the Law Reform Commission of Canada', completed after *Askov* was decided and released by the Government of Canada in 1994, after the Law Reform Commission had been closed down. The Working Paper accepted *Askov*, but commented (at p. 5): 'It is the role of Parliament to advance and enhance constitutional rights through legislative standards which the *Charter*, by its very nature, can provide only in general terms.' It adopted the statement of Chief Justice Brian Dickson in the search and seizure case of *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145, (*sub nom. Hunter v. Southam Inc.*) 14 C.C.C. (3d) 97, 41 C.R. (3d) 97 (S.C.C.) at p. 169: 'While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements.'

So, on reflection, I continue to urge the creation of an expert body to help guide the development of the criminal law. I think any new body should be restricted to criminal law in the widest sense, encompassing substantive offences, criminal procedure, evidence, sentencing, corrections and police practices. The criminal justice system is an integrated system and should be studied as a system, whether or not legislative power over parts of the system fall within provincial jurisdiction.

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It is also important for each province to have greater coordination amongst the actors in the justice system, as recommended by an Ontario committee, the Criminal Justice Review Committee, which reported in 1999. The committee, whose report I helped draft, had been established in 1997 by the Attorney General of Ontario ‘to review the operation of the criminal justice system in Ontario and recommend measures to combat delay and inefficiency.’<sup>37</sup>

The report has been used in the development of criminal justice policy within Ontario, but has not had much impact outside Ontario. Only an executive summary of the report exists online. Yet there were valuable recommendations on a range of issues such as Crown charge screening, Crown disclosure, case-flow management, preliminary inquiries, pre-hearing conferences, and co-operation and co-ordination. The report recommended the establishment of a provincial criminal justice co-ordinating committee and local criminal justice co-ordinating committees. On reflection, the report should be dusted off and given new life. And there should be — as discussed earlier — a federal law reform shelf to put it on.

Moreover, there should be greater coordination in each province amongst the three levels of courts: provincial, superior, and court of appeal. In my 1995 study for the Canadian Judicial Council, *A Place Apart: Judicial Independence and Accountability in Canada*,<sup>38</sup> I devote a chapter to the establishment of Boards of Judicial Management in each province. At present, the responsibility for the administration of the court system lies mainly with the Attorney-General, with judges having responsibility for the assigning of cases.

On further reflection, I continue to ask: Would it not be better to

37. *Report of the Criminal Justice Review Committee*, at p. 1. The committee was jointly chaired by Senior Superior Court Judge Hugh Locke, Senior Provincial Court Judge John Evans, and Assistant Deputy Attorney-General of Ontario, Murray Siegel and included Michael Moldaver, then on the Ontario Court of Appeal.

38. Chapter 9.

have greater coordination amongst levels of courts. Establishing Boards of Judicial Management in each province has the potential for providing better, more accountable, court administration by clearly assigning responsibility for court administration in one place and creates a mechanism for the three levels of courts to work together and bring together in one body representatives of the government and the public and those most knowledgeable about the court system, the judges themselves.

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Let me say more about the reform of the law of evidence. I believe that a legislative statement of the principles of evidence is clearly required.<sup>39</sup> How should this be developed? There were a number of attempts to enact federal legislation in the 1980s, without success. The Law Reform Commission of Canada had produced a code of evidence law in 1975. It might have developed some traction, but at about the same time the Law Reform Commission of Ontario was producing a statement of principles of evidence. There was a stalemate. In 1977, therefore, a federal-provincial task force was created under the umbrella of the Uniform Law Conference of Canada to develop a uniform statement of the rules of evidence to be adopted across Canada. There were a number of attempts to enact federal legislation in the 1980s, without success. Ontario, for one, had lost interest.

The Supreme Court of Canada, therefore, continues to be the body to develop the law of evidence in Canada. Not surprisingly, it uses a case-by-case method — the normal multi-factorial method discussed above. The approach clearly slows down court proceedings — often requiring hours, or even days, to argue a point of evidence at trial. As the 2008 Patrick Lesage/Michael Code Report on large and complex cases stated, evidence issues have played ‘a significant role in transforming the modern criminal trial from the short efficient examination of guilt or innocence that existed in the 1970s, to the long complex process’ that is found in Canada today.<sup>40</sup>

We should examine carefully the system for implementing changes in the law of evidence used in the American federal system. There, the principles of evidence are developed by the Federal Judicial Conference — a body similar to the Canadian Judicial Council — are passed on to Congress by the United States Supreme Court under

39. This section is drawn from Martin Friedland, ‘Developing the Law of Evidence: a Proposal’ (2011), 16 *Canadian Criminal Law Review* 36.

40. *Report of the Review of Large and Complex Criminal Case Procedures* (Ontario Ministry of the Attorney General, 2008).

its rule-making power, and become law if not rejected by Congress.<sup>41</sup>

On further reflection, our Canadian Judicial Council and the Supreme Court of Canada could play similar roles.

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These, then, are some of my reflections on criminal justice reform in Canada.

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41. A strong 15-person committee of the Judicial Conference was appointed in 1965 by Chief Justice Earl Warren, with Edward Cleary, the general editor of *McCormick on Evidence*, as the principal draftsman. Its 1971 report was approved by the Supreme Court in 1972 and sent by the Court to Congress, which passed legislation enacting the rules. The U.S. Supreme Court merely acts as a conduit between the Judicial Conference and Congress. The Federal Rules of Evidence have now been adopted by the majority of American states. See Friedland, "Development of the Law of Evidence", at p. 44.