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François Lareau
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A BRIEF

SUBMITTED TO THE HOUSE OF COMMONS

STANDING COMMITTEE ON JUSTICE AND THE SOLICITOR GENERAL

WITH RESPECT TO THE

RECODIFICATION OF THE CRIMINAL LAW

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BIOGRAPHICAL NOTE

I was called to the bar in Saskatchewan in 1982 and worked there as a lawyer for eight years, specializing in criminal, family and Charter work. In 1991, I entered the U.B.C. LL.M. program and through it have followed my interest in criminal law and its role in society. My master's thesis is on the public debate that occurred around Bill C-49 and the underlying theories of criminal law which played a major role in the debate. I am teaching at Kwantlen College in the Faculty of Criminology and hoping to join the Law Society of British Columbia soon. In addition to my work as a lawyer, I have worked for the Elizabeth Fry Society of Saskatchewan and the National Action Committee on the Status of Women on criminal justice issues. Other involvements include leading roles in development of a Charter case for equal treatment of female offenders in Saskatchewan and with LEAF Saskatchewan's steering and legal committees. As a result of my work with LEAF, EFRY and NAC, I have had the opportunity to participate in several national conferences in which women have considered the relationship between ourselves and the criminal law.

I. INTRODUCTION

This brief is an invitation to reflect on the values and assumptions underlying the momentum toward recodification of the Criminal Code. It should not be assumed that recodification is a cost-free exercise in the pursuit of uncontroversial values such as consistency and accessibility. To attempt to capture the general principles of criminal law in a code without serious reflection on (a) the social goals of criminal law, and (b) whose interests are being served and who will pay the price, is dangerous. It risks the entrenchment of rules which were developed without consideration of diverse perspectives, particularly those of women and aboriginal peoples.(1)

In this brief I will sketch out some theoretical aspects of what codification means for criminal law and some current criminal law and social issues. I will consider some of the dangers that codification carries with it, and whether these have affected the discussions on criminal law reform. I will consider the reasons advanced in favour of codification and argue that the codification currently proposed is premised so narrowly that its effect will be to forestall resolution of social problems through criminal law. I suggest, in addition, that this codification does not address problems within the criminal justice system, both those which are currently recognized and those which we can be confident will arise in the future.

II. WHAT IS CODIFICATION AND WHY SHOULD WE DO IT?

Codification has a long history. The many agendas behind it might include those of Dracon, whose systematic compilation of Greek law resulted in an appreciation of the severity of the law which in turn led to its moderation,(2) and Moses, who, some hold, sought simple clear rules to help his divided people live harmoniously together. In 1800, it was reported in the British Parliament that the public records of the House were in danger of "Erasure, Alteration, and Embezzlement,... daily perishing by Damp, (and) ... a continual Risk of Destruction by Fire," (3) and thus codification was necessary to preserve the law. Many 18th- and 19th-century

codifiers believed that the natural or divine law would be better revealed in a proper code.[4] Jeremy Bentham, who coined the word codification, believed, on the other hand, that a rationalized law would provide everyone with easy access to a more predictable law and thus further his principle of the maximization of happiness for the greatest number.[5] It was of fundamental importance to Bentham as well as other codifiers that the discretion of judges be reduced. The purpose behind Canada's first Criminal Code, however, probably had as much to do with the political unity of the country and juristic conditions in the colonies as either a belief in natural law or in reform of the law.[6] Certainly, a magnanimous imperialism was behind much of the actual 19th-century British codifications, it being the most efficient way to transfer British justice to the colonies.

What then is meant by codification? There are two streams of thought: One, that it is merely a compilation and consolidation of laws; the other that it is a total structuring, or restructuring, of criminal law along theoretical principles universal to all of criminal law. Consolidation of laws suits the agendas of political unification and colonialism whereas reconstruction is necessary to reflect the demands of divine, natural or rationalized law. The Canadian recodification proposals are part of this latter approach.[7] The project aims to separate criminal law into two parts: the general and the special. The special part will define the individual offences while the general part will articulate all principles of culpability and excuse which will apply across the board to all offences and offenders. Not only would the general part entrench such undisputed principles as the principle that a person should not be punished for mere status, but current proposals suggest that it will do much more, setting out and categorizing exhaustively all mental elements, all duties which could give rise to criminal liability, and all defences available to accused persons.

III. THE RATIONALE FOR CANADA'S RECODIFICATION:

The framework document, *Toward a General Part*, calls for recodification of the Criminal Code because the existing one is incomplete, confusing, poorly organized, overly specific, too hard to read, not manageable for the user and not accessible to the general public. It reiterates a complaint from the Law Reform Commission that the Code's "logic is not apparent - only a specialist can find his way in it." It notes that many important matters of public policy, or values, are not found in it, but in centuries of case law, and finally that some Code

provisions do not comply with the Charter. The authors suggest the following goals:

1. All general rules should be contained in the Code.
2. The Code should be more rational, logical and better organized.
3. Some rules should be stated more generally than they are now.
4. Social values should be articulated and enshrined in the Code.
5. The Code should comply with the Charter.

The first three goals might appear as systemic, internal goals for criminal law, while the last two relating to the Charter and social values deal with the relationship of criminal law to society. The extent to which those social values that might be enshrined have been examined and have obtained consensus must be considered, as must the the systemic goals, which, too, can have important social repercussions.

Before considering the meaning and the possible impact of meeting these goals (see below at Part VI), it is worth noting that their priority appears to have been inverted over the last two decades in criminal reform. Although Charter compliance is a relatively recent goal, the others have always been a part of the recodification discussions, though, it is submitted, with a markedly different emphasis. Contrast the above goals with those proposed by the Law Reform Commission of Canada(LRC) in 1976 in *Criminal Law, Towards a Codification*:

1. Criminal law ought to be flexible so that it can be constantly adapted to changing social needs and avoid the hardships that applying the letter of the law can cause.
2. Criminal law ought to be reasonably predictable.
3. Criminal law ought to be accessible in order to fulfill its informative function.
4. Criminal law ought to be certain so that its scope is not arbitrary.
5. Criminal law ought to come to grips with real problems and genuine concerns to become a dynamic force for progress.[8]

In the latter list we see a recognition that criminal law hasn't met social needs but that it should strive to, in a goal-oriented, or purposive fashion. The systemic values of accessibility, predictability, and certainty, which are closely related to one another, are not primary but are placed in a tension with the value of flexibility.

Flexibility recognizes that criminal law can assist in solutions to social problems and that social problems will change and that law must adapt.

Similarly, in *Our Criminal Law* in 1976, the LRC saw criminal law reform as taking place in the context of larger social reform. The lofty aspirations of criminal law reform, the achievement of humanity, freedom and justice, required that criminal law be restricted to sanction only those who seriously interfered with the rights of others and to do so only with restraint. The LRC argued that criminal law should deal with "wrongful acts seriously threatening and infringing fundamental social values"[9] and thus, a goal of restraint was introduced into the discussion.

However, by 1987, in a release entitled *A Proposed New Criminal Code, "Evolutionary not Revolutionary"* the reasons for codification were reduced to a critique of the present code as being "outdated, incoherent, inconsistent, incomplete, overly complicated, sometimes illogical and [using] language that is not familiar to ordinary people." Although it still promised "justice, humanity and freedom," these ideals were not translated into anything meaningful, which is not surprising given their high level of abstraction, and that the issues of social reform had, by and large, disappeared from the discussion.[10]

Accordingly, in the introduction to Report 30, the initial recodification document, while the LRC says that its starting point was a view that criminal law should be restricted to deal only with serious violations of important values - "real crimes" - the basic rationale for the change was reduced to the systemic values cited in the framework document: the present Code is illogical, incoherent, inconsistent, overly complicated, hard to understand, and, a case of inaccessibility in a new guise, hard to obey. [11]

Thus, while the social goals of criminal law reform have not been completely eliminated, their numbers and their priority would appear to have decreased in favour of goals internal to criminal law itself.

IV. A MORE DEFINED SOCIAL ROLE FOR CRIMINAL LAW?

At the same time that goals for the recodification project were being considered, the broader purposes and means of criminal law were being discussed, and these

presumably would supply the values to be enshrined in the reformed law. In 1969, the Ouimet Commission suggested that the ultimate goal of criminal law was the protection of society, and this could best be met through rehabilitation of offenders. It thus saw the criminal law reaction of arrest, trial and sentence as having a forward social thrust of preventing crime in the future.[12] In 1974, the LRC considered what was needed to achieve protection of society by asking the question what is, or should be, crime? It is worth noting that the LRC did not provide an answer that went beyond our common conceptions of criminal law. The LRC suggested that "the average man" had an intuitive feeling for what crime was. It looked to criminal law to define what crime is and ought to be and concluded:

> ..in our criminal law there is a broad distinction which can't be pressed too far but which rests on an underlying reality. On the one hand, there exists a small group of really serious crimes like murder, robbery and rape—crimes of great antiquity and just the sort of crimes we should *expect* to find in any criminal law. These are the crimes originally defined by judges fashioning the common law, and now located in our Criminal Code; and all of them, of course, are federal crimes.[13]

Thus, here the LRC adopted an intuitive approach to crime definition that depended on notions of historical morality. It suggested that the justification for punishment lies in the natural law of basic human rights:

> [We have] a basic right to protect ourselves from harm and in particular from the harmful acts of others. One way of getting this protection is to use the law to forbid such acts and punish those committing them. And whether we punish to deter, to reform, to lock up offenders where they can do no harm, or to denounce the wrongfulness of the act committed—this self-protection is in our view the overall aim and general purpose of the criminal law.[14]

Unfortunately, the LRC did not press its question further and put content into what kinds of protection criminal law should attempt to provide. It assumed that such a value as the safeguarding of people's physical integrity had already been satisfactorily met within the criminal law as it existed.

The LRC continued its analysis further in its report to parliament entitled *Our Criminal Law*, [15] delivered in 1976, an era characterized by downcast times in criminology, when hope for rehabilitation was dashed by the depressing aphorism, "nothing works." [16] (The failure of groups like the Ouimet Commission to notice that treatment and punishment might be incompatible aims no doubt contributed to this apparent failure of the correctional system to correct.) In this document, the LRC acknowledged that criminal law did not prevent crime through deterrence or rehabilitation, because it achieved neither of them. Nevertheless, the Commission maintained, if somewhat nervously, that criminal law was still useful as a medium for expression of social values. [17] Crime was defined as conduct that was "seriously contrary to our values." And criminal process was necessary because our "human condition requires us to act...to do nothing is tantamount to condoning [crime] and saying [it] is all right." [18] It noted, but ever so briefly, that criminal law impacted differently on the poor and the rich,[19] and that the value of protecting property interests was not clear in all circumstances. Social injustice might play a part in producing the conditions for some property offences. [20]

Thus, although the protection of society remained the constant purpose of criminal law, the rationale for punishment was redefined from the protection of society through curing or deterring offenders to the protection of society through ideological expression of morality. The LRC sought to uphold a system whose usefulness had been seriously undermined. But while the LRC talked about the importance of values and questioned the existing hierarchy of values implicit in our law as well as the way in which the criminal law worked differently for different people, it managed no more than broad generalizations: terms such as "serious," "common standards" and "decency." Whether the criminal law achieved the "protection of society" even in expressive terms was not considered.

For example, in the Report to Parliament on Sexual Offences,[21] the LRC complained of inconsistency, outmoded and archaic language, and a gender bias against men in the existing provisions. While the Commission stated that "no individual should be forced to submit to a sexual act to which he or she has not consented," and did recommend the abolition of the spousal immunity from charges of rape, it clearly questioned the intrusion of criminal law into the domestic situation:

> Lastly, is it the business of the criminal law to meddle with a question which is by its very nature strictly private and which might better be settled by

> other means and processes than those of criminal justice..?[22]

The protection of matters considered to be "private" was completely inconsistent with a value of protecting women's sexual autonomy. As long as gender-neutral language was employed, however, this was not apparent.

In 1982, as part of the general review of criminal law, the Canadian government published *The Criminal Law in Canadian Society*, in which it proposed to provide a context for the review. The government articulated the following purpose for criminal law:

> ...to contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society.[23]

While the Law Reform Commission's report and working paper tended to assert a unity of purpose among Canadians--if only *we* could get it right—implying that a consensus already existed about the purpose of criminal law, the government document was aware that a problem of consensus existed. It went so far as to acknowledge a class basis might exist to what we think of as crime. [24]

The problem of consensus disappeared, however, in the report of the Canadian Sentencing Commission in 1988.[25] Its thesis placed the function of criminal law not in a social context, but a legal one. While accepting the purpose of the criminal law to contribute to a just, peaceful and safe society, it saw the means to do that in the fundamental purpose of sentencing which, it said, was "to preserve the authority of and promote respect for the law through the imposition of just sanctions." [26] Thus, the Sentencing Commission saw the debate as one of legitimation not through consensus about what the law should do but through internal consistency and rationality of the law itself.

In response to the recommendations of the Sentencing Commission, a parliamentary joint committee of Justice and the Solicitor-General was formed. The Committee consulted widely with many interested parties, including women's groups, victims' groups and native groups. It considered the social context of the criminal law and its

recommendations reflected a concern with practical social and criminal law problems. It called for accountability from offenders but widened the possibilities for achieving it to include acknowledgement of the harm done, reparations to be made, and reconciliation between victims and offenders. It suggested new purposes for criminal law that emphasized the social aspects of criminal offences, rather than the legal ones. In its report to Parliament, *Taking Responsibility*, it did not assume a social consensus on either the purpose of the criminal law, or its ability to achieve its ends. Rather, it called for one.[27]

Thus two themes have emerged in recent Canadian criminal law discussions: one taking a "legal" approach and the other a "social" approach. The work of the LRC, the Canadian Government and the Sentencing Commission took some note of social dissension and the possibility of competing values but opted to maintain the existing legal framework. On the other hand, the Daubney Committee admitted of conditions which called for new values to be received into the criminal law and recognized that some members of society were not receiving the protection of the criminal law. Its recommendations reflect recognition of those problems and the beginning of an attempt to alter the existing framework of criminal law. However, the proposal for recodification appears to have taken nothing from the social approach. It simply has not looked at the actual conditions of people living in Canada and how they are affected by criminal law, or how recodification might affect them. Despite protestations to the contrary, the project of recodification is presented as law repair in a vacuum.

V. TODAY'S CRIMINAL JUSTICE CONTEXT

Before asking how recodification might affect the current problems and stresses in criminal law and in the use of criminal law in society, it is useful to identify what some of those problems and stresses are. To do so comprehensively is beyond the scope of this presentation. However, I will highlight some of the more obvious ones in order to give some context to the arguments that follow, and to the thesis that criminal law reform must be conceived in light of our present social arrangements and aspirations.

There are several groups who presently find themselves at odds with criminal law, among them women, First Nations peoples and victims. The Parliamentary report *War against women*, the forthcoming report of the

task force on violence against women, numerous provincial studies, popular and scholarly writing, and even jurisprudence at the level of the Supreme Court of Canada [28], recognize that criminal law has long held traditions of ignoring the protection of women and of failing to understand that there is more than one perspective on many criminal law issues. Similarly, many reports have documented the dissonance that exists between First Nations peoples and the criminal justice system, including the criminal law itself. [29] Numerous others sources have documented and discussed the cultural clash which occurs between aboriginal peoples and the criminal law system, and how the history of the treatment of aboriginal peoples has exacerbated that cultural clash. Victims, many of whom are women and aboriginal, have raised issues with mixed success, seeking more consideration for victims in the criminal process, more input from victims into criminal procedures and some measure of compensation for their injuries. [30]

Growing awareness about the sometimes-irreversible damage that can be done to the environment and to whole populations will soon raise important questions about the scope of criminal negligence. Analogous to domestic abuse, which was until recently considered a "private matter" and not one in which the criminal law would become involved, breaches of health and safety standards, often considered as "regulatory matters" are being seen as criminal as people consider the magnitude of serious personal injury that is occasioned by them.

As for the criminal justice system itself, we see an expensive, ever-expanding system achieving dubious success. Attempts to curtail its inexorable growth have rarely acheived success. Programs such as diversion from the criminal process through mediation, bail reform and bail supervision, community service and fine option programs and the Young Offenders Act have not reduced the numbers of people involved with the system, leading J.S. Mohr, a Canadian legal scholar, to the conclusion that we are addicted to criminal law, as a social response.[31]

Another failure appears to be in the ability of criminal law to convey messages about social values. Some criminologists argue that crime is so prevalent in our society that there is no way that we could ever process it all. The post-*Askov* experience in Ontario where several thousand accused persons had their charges dismissed because the courts could not process them in a reasonable amount of time indicates that this might be true.[32]

These stresses raise crucial questions about the role of criminal law in society and about who it serves and protects, what interests are valued, who is exempted from criminal liability, and why. In the discussion below, I will consider some examples of how women in particular are affected by the goals of recodification, and where possible, indicate some of the questions that must be answered before this reform proceeds.

VI. SOME PROBLEMS WITH RECODIFICATION

In this part, I will consider the goals suggested in the framework document as set out above in Part III, and examine some of the underlying problems with them.

1. "All general rules should be contained in the Code."

There are three aspects to this goal: one is the notion that rules exist, the second is that they should be "general," and the third is that they should be contained in the Code.

Rules and Principles

Implicit, and even explicit, in every argument for codification is the assumption that there are general rules which could be located in a general part. Many arguments highlight the question of the present location of the rules, i.e. are they in the case law or in specific offences,[33] and thus bypass the important question of whether, indeed, there are such rules, and if there are, whether they are a good thing to keep. If our criminal law is, or should be, organized on the lines of fundamental principles which can be formulated in advance, then it is reasonable to suggest that they be grouped together, but as will be argued below the extent to which general rules should underlie or form an important part of our law is debatable, as is the question of whether or not they already do.

The existence of underlying basic principles or a "deep structure" of criminal law has been the subject of debate since the proposals for codification began.[34] Each side has had its proponents. While Blackstone asserted an internal logic to law, Bentham denied it existed, but asserted it should.[35] Lord Devlin declared in the 1940s that if our law were not logical at the root it would not endure, while Lord Salisbury in 1889 argued that it was basically irrational. [36] Similarly, while Mr. Justice Dickson accepted an underlying *a priori* principle in *Sault Ste. Marie*, Lord Atkins soundly

rejected any possibility in *P.A.T.A.*[37] According to George Fletcher, a noted American criminal law theorist, the main activity of criminal law theoreticians for the last 100 years has been the "quest for the general part."[38] A skeptical or economically minded person might suggest that if the general principles are that elusive then we may as well call off the search and concentrate on the more pressing concrete problems that criminal law presents. Nicola Lacey, an English criminal law scholar, suggests that we are more likely engaged in an after-the-fact act of rationalization when we look for general principles. She describes the lawyer looking at criminal law: "And when she looks [at criminal law] she looks for rationality and coherence."[39] Similarly, we tend to regard historically evolved institutions and social customs and even law not so much the result of human invention but as natural.[40]

A major problem in the search for basic principles is the way in which it ties us to the past, or the dominant perception of the past.[41] It is from the study of existing law and our description of it that we produce the norms which we want our present law to conform to. As George Fletcher puts it, (though not in criticism of it) the normative aspects of criminal law theory are sought to be derived from its descriptive aspects.[42] We look to criminal law to find out what criminal law is, and therefore should be. In other words, the tail wags the dog.

On the other hand, postulating principles or a structure to criminal law does not necessarily cause problems, but it very much depends on the purpose for which it is done. If the process provides us with a vocabulary with which to communicate various ideas more easily or provides a guide to help us comprehend a large body of rules or if it is to help ourselves understand the rules themselves, then it is useful. If, on the other hand, it is to accord an "essence" to something that has no essence, then it is ill-conceived and counter-productive because it fools us about the nature of law itself and creates unnecessary constraints on the use of criminal law. If we remove the *a priori* quality ascribed to basic principles and replace it with a relativity that looks to the context to determine the content of the principle, then we have obviously changed the nature of what we are searching for and the use to which the basic principles can be put. Their function would change from rule to guideline and the argument about their existence would become somewhat irrelevant.

Generality

Canada's codification is, quite purposefully, an exercise in theory, standing in stark contrast to the traditions of English common law, which typically favoured practical solutions over theoretically correct answers. We might ask whether the theoretical primacy of the codification approach is really preferable to case law method. Involved in the act of theorizing is a shift from the material world to the ideal. The complexity and the multiple perspectives which might be contained in a concrete problem are simplified and reduced in the abstract world of theory, and in the process, one risks a loss of grounding and precision. Many commentators [43] have warned that overarching "grand theories" tend to hide rather than to clarify as in order to account for all circumstances covered, theory must choose the dominant theme, and thus take on the bias and the particular philosophical stance of that theme. The generalization necessary for theoretical statements ignores what doesn't fit or is unpopular and stifles the voices of those whose experience is not common to the standard. It defeats the meaning of any true consensus by simply denying that there is any other viewpoint. It treats people as homogenous.

The many instances in criminal law where the test of the "reasonable man" is employed provide examples of this kind of abstraction, and the instances are growing where the real content of this standard, not only reasonable but male, and probably Anglo-Saxon, literate, gainfully employed, heterosexual and able-bodied, is being revealed as biased in favour of people who have those qualities, and against those who don't.

In the recent case of *R. v. Lavallee*,[44] the Supreme Court of Canada considered the content of "reasonable apprehension" and "reasonable force" as applied to self-defence. In *Lavallee*, the accused was a woman who had shot and killed her common-law spouse in the back of the head. The circumstances were that Ms. Lavallee had been repeatedly and seriously beaten by the deceased, and on this particular occasion he had found her hiding in fear of him in a closet in their home. He had handed her the gun and threatened to kill her after their company had left if she didn't kill him first. The Court considered the effect of the requirement that case law had read into the self-defence provisions that one must apprehend imminent danger in order that the apprehension be reasonable. Wilson J. noted that the reason behind this was to deny the protection of self-defence to those who are motivated by revenge rather than actual fear. However, she noted that while the imminence requirement makes sense

in the "paradigmatic case of a one-time bar-room brawl between two men of equal size and strength," but the assumptions behind it do not make sense in the case of women who are battered by their spouses. She said:

> The requirement in *Whynot* that a battered woman wait until the physical assault is "underway" before her apprehensions can be validated in law would, in the words of an American court, be tantamount to sentencing her to "murder by installment": *State v. Gallegos*, 719 P.2d 1268 at p. 1271 (1986) (N.M.)[45]

Thus until *Lavallee*, we have had a generalized interpretation of what reasonableness means in the context of self-defence which has required women to conform to expectations of what men can do to defend themselves. In the case of battered women, this has worked a great injustice, in effect denying the realities of many women, who live in constant fear and abuse and who are unable to escape for a variety of *bona fide* reasons.

Similarly, in *R.v. Hill*, [46] a case dealing with the use of provocation as a partial defence to murder, the Supreme Court of Canada held unanimously that the question of how a "reasonable person" might act in reaction to some provocative act or comment, had to be considered from the point of view of a reasonable person of the same age and sex as the accused.

Codified rules

As illustrated by the *Lavallee* decision, referred to above, it is possible that the jurisprudential trend is for generalized rules to become less general and more specific, dependent on the context of an offence for content. At least for now, it would appear that this trend might work to increase courts' understanding of the people who come before them, and become aware of biases that have existed in the past, whereas codification will prevent that evolution from occurring.

2. "The Code should be more rational, logical and better organized."

Philosophy of codification

The philosophical stance of a general part to criminal law is analogous to that of "natural law," both agreeing, as a matter of belief, that the source of criminal law exists in some way apart from human

invention. In natural law, that source is nature or the divine, and in codification, it is rationalism applied to history.[47]

Many of today's codifiers would, just as Bentham did, denounce natural law, which relies on either divine law or laws of nature, and argue that codification has nothing whatever to do with natural law, and that they are opposites. Indeed, they may argue that recodification is the triumph of rationality over nature, or rationality over religious dogma. And while it is true that the primary frame of reference in each approach is different, they share two important similarities: they both rely on an external source to say what the law is or should be, and secondly, to the extent that codification comprehends and depends upon historical notions of criminal law, it incorporates into criminal law the very precepts and notions from nature or divine sources that have formed it historically.[48] Thus, the natural or divine law is just as influential in a codified law as an uncodified law, it is only less apparent. It has moved into the background or basic assumptions of the law. *Someone's* notions of morality and "human nature" underlie every bit of our criminal law. It may well be that we are a long way from having it otherwise, but we would be wise to recognize that we are essentially preserving the status quo and driving underground the morality and philosophy of human nature that presently informs our criminal law system, not only in specific offences, but also in the so-called general principles, the construction of defences and even the procedure and process of the law.

An example of the use of an external framework is evident in the decision of Mr. Justice Dickson in *R v. City of Sault Ste. Marie,* [49] a decision often referred to in Canadian recodification discourses. In this decision, Mr. Justice Dickson in effect denied Parliament the power to say what could be and what could not be a crime. At issue was a "strict liability" offence that had penal consequences. He stated:

> In the present appeal, the Court is concerned with offences .... which are not criminal *in any real sense*, but are prohibited in the public interest ... Although enforced as penal laws through the utilization of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. They relate to such every day matters as traffic infractions, sales of impure food, violations of liquor laws, and the like. In this

> appeal we are concerned with pollution... In the case of *true crimes* there is a presumption that a person should not be held liable for the wrongfulness of his act if that act is without *mens rea*... (Emphasis added)[50]

Thus, the Court held that an offence was not a crime unless it contained a contained a requirement of voluntariness, and thus contributed to the notion of an essence of criminality that lay beyond the reach of the legislature.

The external criteria that Dickson J. is describing appears to be ancient or historical: that which has been criminal continues to be criminal. However, his position has not always been accepted. In fact, it marked a significant departure from the prevailing view of criminal law. Some forty years earlier, Lord Atkin in *Proprietary Articles Trade Association v. A.G. of Canada* [51] articulated a more pragmatic view of criminal law. He said:

> Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality— unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argrument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.[52]

We need to carefully examine the repercussions of a choice of Dickson J.'s position over Lord Atkins. If criminal law has a "nature" of its own, whatever that "nature" is perceived to be controls what we do with criminal law. This approach will require that new law be subject to vetting according to the normative ideals that we have discerned in criminal law tradition. We allow criminal law to be transformed from a construction of our making to an entirely new phenomenon, independent of our aspirations.

Logic and ordering

One might be tempted to ask who but an expert would be looking in the Criminal Code for "logic." [53] An ordinary member of the public would presumably want to look in the Code to find out what behavior is prohibited by it, and although the Code might be poorly organized, a proper consolidation and a good index might solve the problem of accessibility. As far as being hard to read, it compares favourably to the Income Tax Act and much provincial personal property security and land titles legislation, the former if not the latter epitomizing legislative logic and systematization.

However, the issue is put too simply: it is not a question of simply finding offences, or defences or even principles, it is really a question of classification and taxonomy, and this has important consequences for how we view the seriousness of the things described as crimes and how we will treat them. For instance, do we want to think about crimes in terms of their results, the risk involved and to whom it accrues, or in terms of the intention of the accused? Should offences resulting in death and personal injury be logically grouped together separate from offences resulting in loss of property? Should different ground rules apply to property offences than to personal injury offences? Should the victim's fear or vulnerability be a criteria for grouping offences together? The way in which any of these questions are answered is not free from controversy, for underlying each are important value choices, and once the decision is made, then many other things will flow from it. If intention is the primary criterion, rather than result, then serious harms committed negligently will not be regarded as seriously as trivial harms committed intentionally, and we have to ask if this is what we want.

Many commentators have complained that the present code is incomplete because it lacks general principles. However, many citizens might have a more valid complaint in that the Code is only a partial listing of offences. This point also illustrates the problem of taxonomy and values. By keeping the Criminal Code restricted to traditional crimes, "all those things that you would expect to see",[54] are we not saying implicitly that these are worse than any others? And are we not holding on to old values which have become hopelessly out of date? If we think in terms of harm, or even morality, it is not possible to compare, for instance, most instances of theft

under $1000 with income tax evasion which probably involves much more. The thief causes less harm, is more likely to be caught, and is more likely indigent, whereas the tax evader breaches a trust upon which our entire taxation system depends. Similarly, one might question a comparison between an assault and repeated breaches of industrial safety regulations which have the potential to result in not just one but many deaths. Yet the assault is a crime while the breaches are not necessarily. Our classification system has predetermined the question of harm and the seriousness of the consequences.

3. "Some rules should be stated more generally than they are now."

It has been argued that present rules are too specific, particularly in the definition given to the mental requirements of offences.[55] It is suggested that the so-called mental element of offences should be separately considered from the physical offences, thus avoiding the prolixity of adverbs which presently describe how actions are to be done to constitute offences. The general proposal is the general part should define several levels of "mens rea" which correspond roughly to purposefully, knowingly, recklessly, and negligently, and that these four adverbs would then be used to define all offences. However, we should remember that the concept of mens rea, the so-called mental element of the offence, is only a tool for understanding and talking about the way in which a person did something. It is not an end in itself, and its separation from the physical element is arbitrary. After all, people do as they think and think as they do at an infinite number of levels of consciousness, and it has long been recognized that knowing the state of another's mind is almost an impossibility. It can only be arrived at inferentially and indirectly. But rather than trying to become more specific about the way in which things are not to be done, recodification leads us to higher levels of generalizations which then become rules about law, not about behavior.

An example of how this categorization can defeat the purpose of criminal law is found in offences which deal with inherently dangerous activities. If we characterize the mental attitude in which a dangerous activity is carried out in the same way as a nondangerous activity, we ignore the difference that increased danger makes.[56] If we equate the carelessness in handling a loaded gun with carelessness about the state of one's bank account when writing a cheque we arrive at the anomolous result of expecting the same degree of attention in the two cases, when we would obviously want a higher degree of attention

in the first case, even though one might still say the mental attitude in each is carelessness. If we define carelessness as a univocal word, however, we invite the argument that carelessness in handling a firearm is similar, for criminal law purposes, as what becomes *mere* carelessness about the state of one's bank account. If we must retain the arbitrary and artificial distinction between mind and body, and it is not altogether clear why we should, it would seem infinitely more appropriate to examine the mental elements of each offence in terms of the different ways it is possible to commit the offences, rather than try to generalize, across the board, different, abstracted states of mind. A similar argument that deals with the concept of "negligent sexual assault" will be discussed below.

4. "Social values should be articulated and enshrined in the Code."

The authors of the framework document argue that case law rather than legislation contains a great number of social values. However, they suggest that legislatively enshrined values are more current and therefore to be preferred over the values of case law. There are two superficial problems with this argument: first, one of the arguments for recodification is that the code should contain that which is now inaccessible because it is in case law. Thus, the authors argue for the contradictory position of less reliance on case law, while entrenching it in a code. Secondly, can we assume that legislation will stay "contemporary" or "reflect current social values"? One of the proponents of the recodification argues, in effect, just the opposite when he makes the often-repeated comment: "To wander through the present Code is to stare into the face of the ghosts of all the social evils thought, at one time, to threaten the very fabric of Canadian society." [57] It is a favourite commonplace that the Code has not changed substantially since it was first enacted. (Although clearly there have been important amendments to the substantive and procedural law, evident, for example, if one looks to the several revisions that have been made with respect to, for instance, sexual offences and prostitution.) In fact, codification may have the effect of complicating an amendment process and reducing the ability of future legislators to introduce amendments. A new provision will not only have to properly address a social problem but will also have to do so within the existing framework provided by the Code, as discussed above.

If recodification does not merely adopt those out-of-date values which it purports to reject and if the recodification project squarely raised debate on important values there would be merit in the argument. However, as discussed above, the only values which seem to be on the table now are directed exclusively to the criminal law as a system not as a response to social problems.

Thus, consistency, coherence, rationality, manageability and accessibility are cited, rather than values which reflect views or perspectives on contemporary problems. While consistency and the others are not without importance, they present several problems as they are manifested in the recodification.

It is important that the role of these systemic values be recognized for what they are. They do not refer to the realm of social activity in which we locate criminal activity; these values are normative only of law itself. They must therefore remain secondary to the major goals of the criminal law. They cannot be the primary goals of any legal project because they do not exist independently but depend entirely on the way in which matters are initially conceived for their validity.

Taking consistency as an example, apparent inconsistencies can be misleading. They can arise because an initial treatment was wrong, or because there is no proper basis to compare the two situations. To simply eliminate the inconsistency without resolving it is to sweep dirt under the carpet. While internal consistency and logic in criminal law are necessary for the law's legitimacy, the pragmatic approach would not privilege them over context, and would recognize that even consistency can be conceived in different ways in different contexts.

An example of how consistency can be drawn differently depending upon the underlying values can be illustrated in two decisions of the SCC. In *Lavallee*,[58] it was recognized that gender is relevant to an assessment of what is reasonable in the test for self-defence. This can be seen as an improvement in that until then the test had not been neutral in its application, but had depended upon a generalization that fit the male experience of violence rather than the female experience. The net result in *Lavallee* was that women became entitled to defend themselves and preserve their lives and physical safety in a greater number of circumstances than before. The change in the rule promoted the value of the protection of women from aggression.

Contrast this interpretation of reasonableness with that in *R. v. Hill* (59) a case in which a 16 year-old male person killed an older male who had made a sexual advance towards him. The teen-ager's defence to a charge of murder was that he was provoked into killing the deceased because of the sexual advance. The defence of provocation to a charge of murder first requires an assessment of whether an "ordinary person" would have lost control in the circumstances. The majority in *Hill* held that such features as sex, age and race should be ascribed to this hypothetical ordinary person, so that in this case, when considering what an "ordinary person" might have done in the accused's shoes, the jury would be entitled to consider an ordinary 16-year old male. In other words, "ordinariness" which is not dissimilar from the concept of "reasonableness" should be given meaning according to the sex and age of the accused. Arguably, this is the same result as was achieved in *Lavallee*, and the two decisions can be said to be consistent. However, when put into a social context, the two tests contradict one another in a fundamental way. The test as interpreted in *Lavallee* will work to allow women to protect themselves, and thus the law will increase the protection afforded women, whereas the test in *Hill* will more likely allow men to invoke a defence of provocation in cases where women are killed, because men are many times more likely to kill women and rely on a provocation defence than the other way around. Thus *Hill* will work to reduce the law's protection of women. If the paramount value is the protection of women, then the two decisions are inconsistent rather than consistent with one another.

Another problem that arises from pursuing these internal values is the effect it will have on primary values. If all law is a reflection of social values, and if all law must be consistent, then all social values must be consistent, too. This presents us, then, with a hierarchy of values which is absolute and pre-determined, and which may lead to results we don't want. For instance, there may be cases where a value such as one person's freedom of speech may be seen to be more important another person's peace of mind. In other cases, such as with hate literature, not. I do not dismiss the idea that it may be possible to create a hierarchy of values which could obtain general agreement, but it seems unlikely at this point that we can, and we certainly shouldn't assume that we have it now. We would have to reopen the discussion that the LRC was initiating in the early 1970s and ensure that the viewpoints of all groups were included in the attainment of this consensus. Given the difficulty of achieving constitutional consensus, it is doubtful that we could move to quick resolution on actual social values.

5. "The Code should comply with the Charter."

Finally, the authors of the framework document suggest that the Code does not conform to the Charter. However, the provisions of the Charter which might play a part in the interpretation and vetting of the Code have not been conclusively determined. Certainly, there have been Supreme Court Decisions which have invalidated various criminal provisions, such as several reverse-onus clauses, but, the approach of the Supreme Court does not necessarily then mandate wholesale dismissal of all reverse-onus clauses in all situations.

In this regard, the decision of the Supreme Court of Canada in *Reference re B.C. Motor Vehicle Act* [60] is instructive. In this decision, the Court considered the content of the phrase, "principles of fundamental justice." The Court decided that a provision which made possible a person's imprisonment for something over which the person had no knowledge or notice was contrary to the principles of fundamental justice. However, the Court took care to say that it was not articulating a general rule that should be applied in all circumstances. It said that the principles of fundamental justice should be determined in specific instances according to the context in which they occur. It rejected a further *a priori* structuring of the meaning of s. 7.

This philosophy of a contexual approach contrasts to one which employs ideas of an essence of criminal law. It is a practical one which recognizes that even fundamental values might change or conflict with each other from time to time and in different circumstances, and that, therefore, while we can discern useful purposes for criminal law, and important values which should not lightly be dismissed, we are unable to always predict what values or purposes should take precedence in advance of a real problem. While a contextual approach will give weight to guidelines and a hierarchy of values, it will avoid enshrining them as fixed or absolute. Properly directed, it will consider all the interests and perspectives that are involved. Fundamental justice becomes, then, not a body of rules but a statement of purpose for the kind of world we want to live in.

If we adopt this approach in relation to the interpretation of s. 7, that principles are neither carved in stone nor awaiting revelation, but are contingent upon

context, we retain them as reminders to care about notions of justice and fairness and the concept remains useful and responsive to evolving notions of justice and fairness. Our understanding of what is meant by the Charter's fundamental justice is then that our normative views of the law are not dictated by what our normative views have been, but what we think they ought to be in the context of today. And it ought to be clear that the legislators and people of Canada can play a major role in putting forth principles and values as guidelines for use in judicial determination, much as was done in the recent amendment to the rape-shield provisions of the Code, Bill C-49.

VII. A CASE STUDY

A useful case study for the arguments presented here is in the debate that occurred over the passing of Bill C-49. The purpose of the legislation was to combat stereotypical ideas about women as the targets of sexual assault in the trial process. As part of a series of amendments, it counters the notion of women as deceitful in matters of sex, and of a two-fold view of women as either good or evil depending upon their sexual activities. It also affects the definition of consent in sexual matters, specifying certain ways in which it may not be simply presumed. It was somewhat unique among bills in that it received the unanimous support of all parties in Parliament. It was generally welcomed by women and women's groups, having been drafted after a consultation process that met with women of many different races and conditions.

However, although it has become law, it was vehemently challenged in the public debate on several grounds. It was argued, for instance, that the bill's aim fell outside the scope of the criminal law, that it did not recognize the essential biological nature of men and women, and that it did not conform with abstract principles attributed to criminal law and to justice. That the discussion ranged as it did indicates the degree to which we lack consensus on the purpose of criminal law and on the values which should be primarily reflected in it, but my purpose here will be to take a closer look at how the framework of abstract principles might operate to defeat this law if we persist with recodification as presently conceived, or if the Supreme Court of Canada adopts the approach behind the codification.

It was argued that both the circumscription of the use of sexual history of the primary witness as well as the change in the law relating to a mistaken belief in

consent were bad as being contrary to the principles of justice. Alan Brudner, a Canadian legal scholar, was one of several who argued that the requirement that an accused have taken "all reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting" probably violates the Charter of Rights and Freedoms.(61) He suggested that this section of the bill creates a crime which is committed through negligence rather than intention or recklessness and that "negligent" sexual assault or "unintentional" sexual assault should not attract either the same stigma or penalty as a matter of law as intentional sexual assault. His argument is based on decisions from the SCC which found invalid the constructive and felony murder provisions because of s. 7 of the Charter. In these decisions, the Court dealt with the mens rea necessary to constitute murder, saying that anything less than intention to cause death could not be enough to constitute murder because of the stigma and penalty attached to the offence of murder. Brudner's argument seeks to generalize this particular application of s. 7 to sexual assault offences, arguing that intentional sexual assault has, and presumably, should have, a greater stigma and punishment than sexual assault committed negligently, which has only just become illegal with the passage of Bill C-49. In order to avoid a breach of this principle it would be necessary to redraft Bill C-49, distinguishing two offences: one that is committed intentionally, where a person means to commit not only the actions of sexual assault, but means to do it without consent, and the other where a person simply doesn't pay attention or sufficient attention to whether or not he has consent. The latter offence would be a lesser and included offence in intentional sexual assault and carry less stigma and a lower maximum penalty. Brudner concluded by saying negligent sexual assault would not be a "real crime" but only a "public-welfare offence" because no real crime can have a mens rea that is only negligence.

His argument is objectionable because it confirms the idea that it is possible, for instance, to rape someone negligently, which doesn't compute with the real-life experience of sexual intercourse. It is hard to imagine rape occurring as a result of an oversight. He arrives at this result, however, by the way in which he constructs the problem, dividing a single act into two discrete parts: an act and an omission, and considering each part separately. His argument leaves us with the suggestion that it is not the action here that is problematic or criminal, but only the failure to obtain consent. As a consequence, we are allowed to conceptualize this matter as a simple "failure to be careful," or negligence, and then comparisons can be made with other offences for

consistency as to how "negligence" is to be treated by the criminal law, and in this case, a fairly heinous matter is reduced to a "public-welfare" offence.

There is no question that Brudner's argument follows traditonal criminal methodology of breaking offences down into elements and then examining each for the requisite physical component and mental component. However, in this case, the process leads us to an anomolous result, and sends a very odd message to those who would want to be protected from sexual assault and, as well, to those who recklessly engage in sexual aggression. If this approach is solidified into law as a general principle, it will be a message that Parliament would be unable to change.

If on the other hand we do not separate out the elements of this offence in an abstract way, we would, if confronted with the paradigm problem of a person who engages in sexual aggression with a non-consenting person, but who claims to have been mistaken about consent, characterize the aggression not as negligently committed but, at the very least, as recklessly committed, thereby sending quite a different message.

This choice to treat an offence differently than other offences, as I suggest we should do in this example, will ultimately depend on the primacy we accord different values. If we insist that offences are to be viewed as structurally analogous on an abstract level, then we are according only secondary importance to the value that the offence aims to protect. In the negligent sexual assault argument, we would be raising a methodological value over the value of protecting women, even though the methodological value might be termed a basic principle of criminal law. The dangerous thing about the way the argument is made, then, is that it does not present us with the real value decision that is being made. That is hidden in the assumptions and beliefs that have gone into the formation of what is now called a general principle. The issue is identified as being in the relation between the bill and an abstract idea of what criminal law is, i.e. pure and unbiased.

VIII. A SUMMARY OF PROBLEMS

Change in the criminal law is generally approached with some caution, as any change in law, particularly criminal law, may produce unexpected change elsewhere in the system. Any change can be predicted to stimulate a great deal of litigation which has a social cost

associated with it, and it is entirely possible for new legislation to produce an effect directly opposed to that which was intended. [62]

Although benefits can be derived from a recodification project, such as an analysis of the treatment of voluntary intoxication in criminal law and an improvement of some legal fictions which have been stretched too far, there are significant dangers inherent in the project which go beyond the general cautions that apply to change in the criminal law.

1. The general part involves imposing normative standards on all offences, no matter how inherently different they are. It entrenches a view of formal equality among offenders and victims which does not reflect reality, and most importantly, it reifies the categories with which or in which we "do" criminal law, even though they may be sadly out-of-date. It confuses principles with the values they are meant to represent. The agenda for the recodification of internal coherence creates a superstructure or matrix that is self-, not socially referential, and incorporates certain social assumptions, e.g. that there is a link between a strong penal law and safety. The categories and boundaries of problems are defined before the problems are considered. Relevance and consistency are put in absolute terms. Several authors have shown how, in law, the control of these initial parameters predicts the outcome. [63] They cite examples from Canadian jurisprudence where these parameters have defeated either "emerging" interests, such as those of women, or favoured, for instance, commercial interests over personal security interests. As long as our society is in flux and there exist groups and individuals who struggle for recognition of their distinct rights and interests, we can be sure that their interests will be defeated by the way in which we set up the problems, not merely by the way in which we answer them.

2. The recodification does not, in any way, address Canada's diversity. While it might be seen as a blend of the English and French traditions in that it incorporates mostly English law and procedure but does so according to the tradition of codification belonging primarily to French law, it in no way contemplates or accomodates First Nations customs, and we lose immeasurably by this failure. Before recodifiying, thought should be given, for instance, to the moral view of the Cree [64] that it is better to admit one's guilt than plead not guilty, and how completely antithetical this idea is to our present-day criminal procedure. That one is encouraged by the system to deny one's guilt is surely counter-productive. We

should consider whether victim-offender reconciliation, which might encourage guilty pleas in appropriate situations, should not receive a far higher priority than it presently does.

Secondly, we must be cognizant of the present drive towards a system of aboriginal justice, and we need to ask ourselves how it will be possible to have two systems co-exist fairly if their approaches to guilt and punishment are as diametrically opposed as they appear today to be. Would it not be better to consider how the prevailing system might benefit from the ideals and values incorporated in aboriginal systems instead of increasing the rigidity with which it is manoeuvered?

Thirdly, we have not begun to consider how cultural differences might affect the substantive law in the definition of offences and defences, and whether they should make a difference. The "reasonable person" tests which are peppered throughout criminal law have been criticized as meaning a white, Anglo-Saxon male of at least middle-class means, reasonably educated, heterosexual and without disabilities of any sort.

3. The recodification can reduce the impetus for important change by removing rather than resolving anomalies. As Thomas Kuhn has described, paradigmatic changes occur when the anomalies of an existing circumstances increase.[65] If we remove the anomalies by changing our reference points from behavior to the law itself, we reduce the likelihood that we can respond to social problems unless the solutions fit into the existing framework. The process of criminal law reform which responds, one hopes, to real social problems, including the problems which criminal law itself creates, will be narrowly confined if a hierarchy of principles are allowed to take precedence over valid social aims. An approach which favours context will be lost. The criminal law response to social problems will remain predicated on a framework of punishment, and programs such as diversion through mediation, victim-offender reconciliation and rehabilitation will be stymied by the contradiction between their purposes and the punishment-oriented model. It will prevent us from taking a more holistic view of criminal law and criminal offenders.

4. Another danger is that there is an illusion of progress associated with any action. We feel we are doing something and we are distracted from the harder problems which were referred to above, not to mention the expenditures of time and money that are involved with it.

5. One of the promises of recodification is that ordinary people will have greater access to the law. However, it may well do just the opposite, and in fact promote the power of "experts" to interpret the law—so, say, as to avoid any inconsistency from entering it—and to vet changes to it. Because the "purity" of the law will become an issue, the power of elected representatives will be reduced.

6. Although judicial discretion is a source of complaint from many directions, [66] increasing the amount of legislation may not actually reduce it. Recodification will require interpretation of new rules, which were formerly only principles, and thus persuasive rather than binding, and as Twining and Miers put it, rule interpretation invokes "conditions of doubt." The more rules we have the more discretion will necessarily be employed in their interpretation.

IX. CONCLUSION

The impetus for the recodification of Canadian criminal law does not appear to have come from "public pressure" for a more understandable criminal law. It is not due to complaints about jury instructions being so complicated that the guilty were acquitted or the innocent were convicted. We should ask who is to be served by a recodification and who has participated in the consultation on it. If this is a philosophical exercise, or a project that has created its own need and empire, or a thoughtful boon to first-year law students and litigious defence lawyers, the cost clearly outweighs any advantages it might have, as the project is presently conceived.

We have not achieved perfection in criminal law. Although judicial discretion has not served women or other disadvantaged groups well historically, the tendency of the present codification is to take what judicial discretion has given us in the past and serve it back to us. Conversion of principles into rules will only harness us to our present imperfections. The conditions of doubt will increase in the criminal trial, and the ultimate purpose of the criminal law will be buried and lost in our misplaced concentration on the secondary business of the law itself.

FOOTNOTES

1. The fact that this major initiative has not had much input from women and native groups might in itself be cause for concern. The Law Reform Commission, which, with others, has championed the promise of recodification did not have on-going or extensive dialogue with either group, and to the extent that they did, it tended to relate to specialized issues rather than fundamentals. The Commission did not look at the issue of aboriginal justice until 1990, and still then did not consider how recodification might affect aboriginal peoples or the move to a separate aboriginal justice system. [Law Reform Commission of Canada, *Aboriginal Justice* (Ottawa:Supply and Services Canada,1991)] Similarly, the Commission did not investigate how or even whether criminal law might affect women differently than men. It is of note that matters of criminal law most important to women, such as sexual assault, prostitution and pornography, were left completely out of Reports 30 and 31, which contained the Commission's proposals for recodification; they were reserved, as it were, to a later date. Articles which confront the protection women are accorded by the criminal law include Lorenne Clark, "Feminist Perspectives on Violence Against Women and Children: Psychological, Social Service and Criminal Justice Concerns" (1989/90), 3 *Can.J.Women & L.* 420; R.M. Mohr, "Sentencing as a Gendered Process: Results of a Consultation" (1990), 32 *Can. J. Crim.* 479; *Women and Criminal Justice Issues: Workshop Proceedings*, Pat File, ed. (Ottawa: National Association of Women and the Law, 1987).

2. Kathleen Freeman, "Legal Code and Procedure" in J.C. Smith and D.N. Weisstub *The Western Idea of Law*, (Toronto: Butterworths, 1983) at p. 296.

3. Desmond H. Brown, *Genesis of the Criminal Code of 1892*, (Toronto: University of Toronto Press, 1989) at p.14.

4. Sanford Kadish, "The Model Penal Code's Historical Antecedents" (1988) 19 *Rutgers Law Journal* 525.

5. *Ibid*, p. 522.

6. J.W. Mohr, "Criminal Law: Is There a Legal or a Social Logic Left for its Renewal?" *Crime Justice and Codification* (Toronto: Carswell, 1986) at p. 31.

7. Law Reform Commission of Canada, *Recodifying Criminal Law Vol. 1, Report #30* (Ottawa:Supply and Services Canada, 1986) at p. 3. (hereinafter *Report #30.*)

8. Law Reform Commission of Canada, *Criminal Law, Towards a Codification* (Ottawa:Supply and Services Canada, 1976)

9. *Ibid*, p. 20.

10. Law Reform Commission of Canada, *A Proposed New Criminal Code, "Evolutionary not Revolutionary"* Undated release, *circa* 1987.

11. *Report #30*, pp. 1-3.

12. As discussed in *Taking Responsibility, Report of the Standing Committee on Justice and Solicitor-General on its Reveiw of Sentencing, Conditional Release and Related Aspects of Corrections*, D. Daubney, Chair, (Ottawa: Supply and Services, 1988) p. 29-40.

13. Law Reform Commission of Canada, *The Meaning of Guilt, Strict Liability Offences, Working Paper 2* (Ottawa:Supply and Services Canada, 1976) at p.4.

14. *Ibid*, p.5.

15. Law Reform Commission of Canada, *Our Criminal Law, Report to Parliament* (Ottawa:Supply and Services Canada, 1976)

16. See fn. 4.

17. *Our Criminal Law, p.3-5.*

18. *Ibid.*

19. *Ibid*, p. 13

20. *Ibid*, p. 15.

21. Law Reform Commission of Canada, *Sexual Offences, Report #10* (Ottawa:Supply and Services Canada, 1978).

22. *Ibid*, p. 16.

23. Government of Canada, *The Criminal Law in Canadian Society* (Ottawa: Supply and Services, 1982) p. 5

24. *Ibid*, p. 18.

25. *Sentencing Reform, Report of the Canadian Sentencing Commission* (Ottawa:Supply and Services Canada, 1987)

26. *Ibid*, p. 151.

27. *Taking Responsibility, Report of the Standing Committee on Justice and Solicitor-General on its Reveiw of Sentencing, Conditional Release and Related Aspects of Corrections*, D. Daubney, Chair, (Ottawa: Supply and Services, 1988)

28. Articles referred to in fn. 1 document some of the problems. Studies of gender bias in the criminal law include the recent report of the Law Society of B.C, *Gender Equality in the Justice System;* Mona Brown, *Gender Equality in the Courts, Criminal Law,*(Winnipeg: Manitoba Association of Women and the Law, 1990) Documents relating to how the criminal justice system responds to wife battering include *Is Anyone Listening, Report of the British Columbia TAsk Force on Family Violence*, (Victoria: Minister of Women's Equality, 1992) Examples can be found in reasons of Madame Justice Wilson in *R.v. Lavallee, infra* at fn. 44, and reasons of Madame Justice L'Heureux-Dube in *R.v. Seaboyer* (August, 22, 1991, unreported).

29. Examples include *The Report of the Donald Marshall, Jr., Inquiry*, the Manitoba *Aboriginal Justice Inquiry*, at fn. 64.

30. *Report of the Canadian Federal-Provincial Task Force on Justice for Victims of Crime* (Ottawa:Supply and Services Canada, 1983)

31. J.S. Mohr, fn. 6 above.

32. As referred to in "S.C.C. relaxes tight *Askov* pre-trial time limits" *Lawyers' Weekly* April 10, 1992.

33. For example, as in *Toward a New General Part*, p. 8.

34. Patrick Fitzgerald, "Criminal Law, Rationality and Justice" *Crime, Justice and Codification* P. Fitzgerald, ed. (Toronto: Carswell, 1986) at pp. 5-6.

35. J.S. Mohr, fn. 6, at p. 35.

36. Leon Razinowicz and Roger Hood *A History of English Criminal Law* Vol. 5, p. 702.

37. At fns. 49-52, below.

38. George Fletcher, *Rethinking Criminal Law* (Toronto: Little Brown and Co., 1978) at p. 393.

39. Nicola Lacey, Celia Wells and Dick Meure, *Reconstructing Criminal Law* (London: Weidenfeld and Nicolson, 1990) at pp. 4-5.

40. J.S. Smith *The Neurotic Foundations of Social Order* (New York: New York University Press, 1990) at pp. 69, 73, 77-79.

41. For instance, although one can quote Blackstone as an authority for the proposition that negligence forms no part of the criminal law, the law is unsettled on it. The S.C.C. was divided on the issue in *R. v. Tutton* (1989) 69 C.R.(3d) 289 and *R.v. Waite* (1989) 69 C.R.(3d) 323. Nevertheless, some assert this to be a principle of criminal law, such as the authors of the recodification proposal of the Canadian Bar Association, at page 12.

42. Fletcher, p. 394.

43. For example, Carol Smart *Feminism and the Power of Law* (London: Routledge, 1989) p. 68 et seq.

44. *R.v.Lavallee* (1990) 55 C.C.C.(3d)97 (S.C.C.)

45. *Ibid, p. 120.*

46. *R. v. Hill* (1986) 25 C.C.C.(3d) 322.

47. Lord Lloyd of Hampstead, *Introduction to Jurisprudence,* (Toronto: Carswell, 1979) at pp. 86-88.

48. *Ibid.*

49. *R v. City of Sault Ste. Marie,* [1978] 2 S.C.R.1299, 85 D.L.R. (3d) 161, 3 C.R.(3d) 30.

50. *Ibid.* p. 1302 of S.C.R.

51. *Proprietary Articles Trade Association v. A.G. of Canada* [1931] A.C. 310, [1931] 2 D.L.R. 1, [1931] 1 W.W.R. 552. *(P.C.)*

52. *Ibid.* at p. 9 of D.L.R.

53. In *Towards a General Part,* p.8. the authors suggest that for lack of logic, only a specialist can find their way in the present Code.

54. The LRC used this phrase to assist in its definition of what is a crime in the *Meaning of Guilt, p. 4*

55. *Towards a General Part p. 8.*

56. C. Boyle, *Sexual Assault* (Toronto: Carswell, 1984) at p. 86.

57. Vincent del Buono, "Towards a New Criminal Code for Canada" (1986) 28 *Crim. L. Q.* 370 at p. 370.

58. *Lavallee,* fn. 44.

59. *R.v. Hill* fn. 46.

60. *Reference re Section 94(2) B.C. Motor Vehicle Act* (1985), 24 D.L.R.(4th) 536. (S.C.C.)

61. Alan Brudner, " 'I thought she meant yes' isn't good enough," *Globe and Mail*, Toronto, Jan. 27, 1992.

62. An example is s. 142, the first attempt at rape shield legislation, in force between 1975 and 1982, which removed the primary witness's right not to answer questions about her past sexual conduct and moved what had been a collateral issue to a central issue, thus exposing the primary witness to even greater intrusion in the trial process.

63. M.J. Mossman, "Feminism and Legal Method: the Difference it Makes" (1986) 3 *Australian Journal of Law and Society* 30; David Cohen and Alan Hutchison "Of persons and property: the politics of Legal Taxonomy" (1990) 13 *Dalhousie Law Journal* 20.

64. *Report of the Aboriginal Justice Inquiry of Manitoba, Vol. 1, The Justice System and Aboriginal People.* (Winnipeg: Queen's Printer, 1991) pp. 36-39.

65. Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1970)

66. Brudner, fn. 61.