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Law Reform Commission  
of Canada

Commission de réforme du droit  
du Canada

# REPORT

## **our criminal procedure**

# 32

Canada

REPORT 32

OUR  
CRIMINAL  
PROCEDURE

Available by mail free of charge from:

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© Law Reform Commission of Canada 1988  
Catalogue No. J31-55/1988  
ISBN 0-662-55736-0

REPORT  
ON  
OUR  
CRIMINAL  
PROCEDURE

July, 1987

The Honourable Ray Hnatyshyn, P.C., M.P.,  
Minister of Justice  
and Attorney General of Canada,  
Ottawa, Canada

Dear Mr. Minister:

In accordance with the provisions of section 16 of the *Law Reform Commission Act*,  
we have the honour to submit herewith this Report undertaken by the Commission on  
criminal procedure.

Yours respectfully,



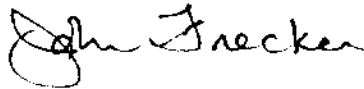
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# I.

## Introduction

A veil of mystery surrounds the criminal process. Although mystery protects the system from a close examination of its defects, a recognition exists that our processes are far from perfect. The veil should be lifted.

Canadian procedural law has arrived in the late twentieth century in a somewhat dishevelled state. Its appearance is the consequence of incremental accretion and slow evolution over centuries. Occasionally developments have occurred in a careful, balanced manner while at other times fragmented, piecemeal change has taken place in response to the necessities, pragmatic or otherwise, of the moment. The result is labyrinthine complexity and often baffling incoherence. It is very nearly impossible for an ordinary citizen to obtain a clear, complete picture of the inner workings of our criminal justice system. In part, this state of affairs can be attributed to the unusual nature of criminal procedure.

On the one hand, criminal procedure provides the machinery for implementing the substantive criminal law, which, however comprehensive and just, would be useless without it.<sup>1</sup> On the other hand, as anyone who has attempted to justify the use, by the state, of coercive power against free and autonomous individuals knows, it is also a species of political and moral philosophy.<sup>2</sup>

For those with a degree of technical knowledge, obtaining an understanding of the process is difficult, but not impossible. Procedural law is capable of providing a map of the irregular terrain of the entire process. The individual's progress, from the moment of suspicion, interrogation, or arrest, through to trial, may be plotted chronologically through the procedural rules governing each stage of the process.

Procedural law can also be analysed in a different manner. If one examines the procedural rules that define the jurisdictional competence and authority of the leading players in the criminal justice system (the police, prosecutors, defence counsel, judges, as well as the other actors) the contours of the process are placed in higher relief. Unfortunately, the state of the law itself poses a significant barrier to easily conducting this kind of examination.

Our laws of criminal procedure are not readily accessible and, where they can be located, the language of the statute or the holdings of the case-law are often dense and impenetrable. The level of detail can be daunting and bewildering. At the same time

1. See Celia Hampton, *Criminal Procedure*, 3rd ed. (London: Sweet & Maxwell, 1982).

2. See George P. Fletcher, *Rethinking Criminal Law* (Toronto: Little, Brown and Co., 1978).

the law governing the process often appears to be at cross-purposes. By turns, procedural law may evince a frightening tendency to disregard individual rights or an excessive tenderness toward accused persons. Consistency, uniformity, philosophical coherence and even pragmatism are not presently general attributes of our criminal procedure. Herein lies the task of the law reformer.

This Report attempts to explain and rationalize the Law Reform Commission of Canada's work, both past and present, in the area of criminal procedure. Although it expresses the philosophical approach of the Law Reform Commission it is not intended to be a philosophical treatise. Rather, this document's intended use is as an aid to assist policy makers, law reformers and parliamentarians in the task of modifying, altering or reforming laws pertaining to criminal procedure. It does not attempt the resolution of ancient and enduring philosophical disputes.

As one would expect, it is the Commission's voice and not the voice of others that is to be heard here. Other attempts have been made from time to time to state general principles of application to criminal law or criminal procedure. For example, in 1969 the Ouimet Committee in its *Report of the Canadian Committee on Corrections*<sup>3</sup> relied on certain basic principles contending they were descriptive of the proper scope and function of the criminal and correctional processes. Similarly, in 1982 the Government of Canada issued a policy statement entitled *The Criminal Law in Canadian Society*<sup>4</sup> which contained a statement of principles which were intended to be of application to both substantive criminal law and criminal procedure. These documents, as well as others, have influenced the thinking of the Commission on this subject. Indeed, many of the principles found in these sources have played a role in the development of the principles contained in this Report. Also important to this endeavour has been the Commission's 1976 Report, *Our Criminal Law*<sup>5</sup>, which contains a clear statement of the Commission's general orientation to the area of substantive criminal law. That Report provided the foundation for the Commission's proposed Code of Substantive Criminal Law, which was recently published as Report 31, *Recodifying Criminal Law — A Revised and Enlarged Edition of Report 30*.<sup>6</sup>

In essence Report 32 represents a distillation of the Commission's distinctive approach to the reform of criminal procedure over the last fifteen years. The principles found within inform and are reflected in the rules of procedure that we have devised. They constitute the bedrock upon which our new Code of Criminal Procedure is to be erected.

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3. *Report of the Canadian Committee on Corrections: Toward Unity: Criminal Justice and Corrections* (Ottawa: Information Canada, 1969) (Chair: R. Ouimet).

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

5. Law Reform Commission of Canada [hereinafter LRCC], *Our Criminal Law* [Report 3] (Ottawa: Information Canada, 1976) [hereinafter Report 3].

6. LRCC, *Recodifying Criminal Law — A Revised and Enlarged Edition of Report 30* [Report 31] (Ottawa: LRCC, 1988).

## II.

### The Role of General Principles in the Work of the Law Reform Commission of Canada on the Law of Criminal Procedure

From the time of its inception the Law Reform Commission of Canada has been engaged in a dialectic involving constant struggle to identify and enunciate the important process values which must obtain if a society — a vibrant one stressing pluralism and diversity, as Canada's does — is to thrive. If one closely examines the Commission's work over time the search for guiding principles and values is evident throughout. Thus, in our Report 3 one finds a consideration of the proper role and purposes of the criminal law. In that Report we found that the role of the criminal law was essentially to affirm and bolster fundamental social values. But, at the same time, we discovered that this role was being badly played.

Ultimately, we concluded that the criminal law had to be reshaped. The key to its effective reformulation was the concept of *restraint*. The Report concluded that the criminal law should be reserved for "real crimes;" criminal liability should be restricted to wrongful conduct; criminal trials in turn should be reserved for really serious cases; and the use of imprisonment in turn should be restricted in the manner suggested in our work pertaining to sentencing and imprisonment.

Our proposed "Evidence Code"<sup>7</sup> was devoted to ridding our laws of evidence of technicality and arbitrariness. At the same time it recognized that technical rules are sometimes necessary in order to secure fairness and consistency. This Code commences with an enumeration of general principles and proceeds from there to set out in detail the rules that follow logically from those principles.

Virtually all of the various subjects which have captured the attention of the Commission over the years evince the same fidelity to principle and conscientious endeavour to articulate the nature of governing values. However, this is our first attempt to set out, in one place, a comprehensive set of general principles governing the law of criminal procedure.

We are the first to recognize that this statement of general principles is long overdue. We are also aware that some might think that what we offer now must, by reason of its late arrival, be an elaborate after-the-fact rationalisation rather than a true reflection of an operative governing philosophy. We believe that a careful reading of our work will reveal such criticisms to be wide of the mark. The absence of an explicit,

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7. See LRCC, *Evidence* [Report 1] (Ottawa: Information Canada, 1975).

comprehensive statement of general principles should not be taken to mean that the Commission acted without reference to principles or even that it acted inconsistently in terms of such principles when formulating policy in the past. Fidelity to principle is apparent and characterizes all of our work in the field of criminal procedure.

But were we consistent? And did we identify and purport to act upon matters which ought not to have been included in a harmonized and integrated statement of governing principles? These are ultimately matters upon which the reader must reach an independent and informed judgement. We believe that our proposals for reform have been cast in the light of identifiable governing principles and that there is, within the body of our work, an impressive general consistency. We hope to demonstrate this in the portions of this work entitled “The Principles Explained” and “Our Principles Illustrated.”

Our concern to distill and enunciate general principles of criminal procedure was well-stated in our Report on *Questioning Suspects*:

In approaching the reform of the criminal law we are quite aware that the process of doing justice in our system of government is an approximation of social values, what they are and what they ought to be. The process of legislative reform is a self-conscious attempt to introduce a greater measure of clarity and precision in that approximation. This exercise necessarily defies unanimity but disagreement on particular questions need not imply discord on fundamental postulates of principle. The translation of principles into specific provisions of law opens the scope for disagreement, as does the particularity of the principles involved, but, apart from discrepancy on discrete points in substantive policy, it should be the first task of participants in the process of law reform to define collectively their field of vision and the manner in which they propose to approach it. This implies a process of deduction, commencing with principles of general application and progressing through increasingly particular interpretations of those principles until, by a dialectical process of argument and choice, recommendations for legislative reform can be made.<sup>8</sup>

What this describes, in other words, is a process of reasoning in law reform. It is a process that is quite inimical to the *ad hoc* model of law reform, which commonly distorts the need for systematic and principled law reform by allowing, often unconsciously, for inconsistency in the law.<sup>9</sup>

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8. LRCC, *Questioning Suspects* [Report 23] (Ottawa: Supply and Services Canada, 1984) at 9 [hereinafter Report 23].

9. See Patrick Healy, “The Cause of Legislative Reform in Canadian Criminal Law” (1984), unpublished Master’s Thesis, University of Toronto Faculty of Law at 144.

### III.

## The Role of Criminal Procedure

But how does society set about proving its case and punishing the guilty? Here is the rub: for justice and liberty depend not so much on the definition of the crime as on the nature of the process, administrative as well as judicial, designed to bring the alleged offender to justice.<sup>10</sup>

The rules of the criminal law which serve to protect and promote basic values can only live by application. The process of reform implies an examination not only of the rules themselves, but the operation of the rules.<sup>11</sup> It is the practical operation of these rules — our rules of criminal procedure — that affects the daily lives of Canadians. Without just and effective rules of procedure, the best rules of substance are reduced to shadows.<sup>12</sup>

#### A. The Meaning of “Procedure”

The term “procedure” is largely a neutral or value-free term which connotes simply a particular course of action, or in terms of legal proceedings, the manner of proceeding in any action.<sup>13</sup> Legal procedure thus may be viewed simply as a mode of conducting legal business. At a minimum it sets out the series of actions, that is to say, the lawful requisites which must be performed in order to validly administer justice within the state.

Canadian legal procedure however does not claim to be completely neutral or value-free. Legal procedure is a concept or a mechanism which has evolved in Canada in such a way as to mean more than simply regular procedure. “Due procedure” implies procedural fairness, a concept our Constitution now amplifies with its reference, in section 7 of the *Canadian Charter of Rights and Freedoms*,<sup>14</sup> to “fundamental justice.” Thus, Canadian procedural law has as its principal objective and basic orientation the construction of a just method for the disposition of a dispute which has

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10. See Leslie Scarman, “Foreword” in J.A. Coutts, ed., *The Accused: A Comparative Study* (London: Stevens & Sons, 1966) at vii.

11. See LRCC, *First Annual Report 1971-72* (Ottawa: Information Canada, 1972).

12. See LRCC, *Second Annual Report 1972-73* (Ottawa: Information Canada, 1973).

13. Portions of this Chapter derive from S. Cohen, “Criminal Procedure and the Canadian Charter of Rights and Freedoms” in V. Del Buono, ed., *Criminal Procedure in Canada* (Toronto: Butterworths, 1982) 1.

14. Part I of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11. [hereinafter *Charter*].

come before a court of law. (A "just disposition" in this context means a result which has been arrived at in a manner that is fair, and perceived to be so, by all parties to the dispute.)

Criminal statutes not only define crimes; they also set out the procedures for conducting investigations and establishing guilt or innocence. In doing so they define the limits of freedom. Procedural law, since it performs this regulatory function, is notable for its emphasis on detail and technicality. Therefore, it is not accidental that our processes are ponderous, slow-moving and technical. This is not to say that our systems cannot be improved or that they are beyond reform. Nevertheless, procedural law, to the extent that it will be regarded as effective law from the point of view of promoting just and equitable resolutions of disputes, must to some extent forever remain "technical" law.

## B. Technicality as a Characteristic of Procedural Law

It is technical law, perhaps more than any other feature of the law, which brings out the ire of the layman. To the uninformed, the occasionally drastic legal results (such as an acquittal or the quashing of a charge) which occur due to an official's failure to adhere to the technical procedural requirements of the law must often appear incomprehensible. Larger purposes, such as the vindication of the integrity of the judicial process, that are characteristically pursued in the granting of a procedural remedy or sanction, will often be invisible to the lay observer who is reacting naturally to the necessarily incomplete reportage of the facts of a given case.

It is in the nature of law that it requires interpretation and thus engenders litigation, for often the positions taken by the parties in relation to the law governing a particular dispute will be technical in nature. Technicality, especially in relation to criminal statutes, should never be condemned in the abstract, for where the matter is criminal, the liberty of the subject is involved. Laws which protect accused persons protect society as a whole. The law should never be indifferent to the safeguards which surround a person facing a criminal charge. Note, however, that technical law does not merely favour the interests of the accused person within the criminal process; it can safeguard the interests of the state as well. For example, our breathalyser statutes are replete with technical rules to assist in the prosecution of impaired driving offences. Such rules bypass the traditional means for proving impairment (for example, the direct testimony of witnesses concerning manner of driving, demeanour, physical co-ordination, speech, etc.) and substitute certificate evidence of the results of scientific tests in their stead. Technical law in this regard is a faster, more precise and more efficient method for conducting such prosecutions. (But note also that where the law permits technical methods the means of challenge in such prosecutions will also be technical in nature.)

### C. The Comprehensiveness of Rules of Procedure

While the laws of criminal procedure are heavily rule-laden and detailed, it would be impossible (and certainly undesirable) for the law to be totally comprehensive in coverage. Therefore, while our pre-trial and trial processes all reflect an overriding concern to provide fundamentally just and fair methods for dealing with suspects and accused persons, substantial discretionary authority remains and has been entrusted to state officials — police officers, prosecutors and judges. On the other hand, while discretion has been granted, Parliament has not left the exercise of this discretionary activity entirely unsupervised. Supervision, together with an institutionally entrenched scepticism, or perhaps better put, caution or wariness, causes the burden to be cast upon the state where questions arise concerning the discharge of official functions.<sup>15</sup> These features are foremost among the guarantors of a just and regular process.

### D. The Distinction between Matters of Procedure and Substance

Much as procedural law strives to inject fairness into our system of law it is ultimately unable to effect the substance or content of the law itself. This distinction, between matters of procedure and matters of substance, is an important one.

Substantive law creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain, whereas procedural law is the vehicle providing the means and instruments by which those ends are attained. It regulates the conduct of Courts and litigants in respect of the litigation itself whereas substantive law determines their conduct and relations in respect of the matters litigated.<sup>16</sup>

Substantive law reflects the legislature's posture with regard to a particular social policy issue. It is the substantive law which mirrors the decision to label certain activity as criminal. The substantive law, for example, provides that pornography, or prostitution, are matters which should be regulated or condemned by the criminal law. By contrast, procedural law provides the surrounding rules regulating the inquiry (whether at the police investigatory stage or at trial) into whether a violation of the substantive law has occurred.

While procedural law *simpliciter* is unable to control the content of substantive legislation, constitutional law is potentially able to do so.<sup>17</sup> Where the Constitution contains express provisions, as ours does, protecting fundamental freedoms or legal rights, it may be wielded in such a manner as to prevent an invasion of the liberty of

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15. The foremost example of institutional scepticism is the presumption of innocence which governs criminal cases. It leads to the burden of proving guilt beyond a reasonable doubt being shouldered by the prosecution.

16. See *Sutt v. Sutt* (1968), [1969] 1 O.R. 169 at 175 (C.A.) per Schroeder J.A.

17. The interrelationship between substance, procedure and the Constitution is explored in *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)* (1985), [1985] 2 S.C.R. 486; 23 C.C.C. (3d) 289.



the individual by government or its agencies. This holds true regardless of whether the violation of the right or freedom has been accommodated by either the substantive or the procedural law. A law may be substantively flawed but enforced by impeccably fair procedural standards. Thus, for example, it is conceivable that full, fair hearing rights might be accorded an individual accused of violating South Africa's Apartheid laws. On the other hand, a valid substantive law, such as one prohibiting impaired driving, might be prosecuted under unfair procedural rules. Such would be the case, for example, where an accused person is denied the assistance of counsel during his trial.

## IV.

### Truth, Justice and the Protection of Society in Procedural Law

#### A. Introduction

Every system of criminal justice must wrestle with the problem of striking an appropriate balance in its procedural laws and indeed, there are substantial differences among systems. An examination of such differences is not the proper subject of this work. In our view, it is the wisdom of the Canadian system of criminal procedure that it takes into account three interrelated concerns: the pursuit of truth, respect for human dignity (a notion which is broad enough to encompass the protection of society and the preservation of peace), and protection against the risk of convicting innocent persons. Moreover, one can safely state that these concerns are reasonably well respected within our present system, subject to certain tensions and disputes at various points as to their application. Of course, it is the Commission's mandate and indeed, the central purpose of the Criminal Code Review<sup>18</sup> exercise to present proposals for the refinement and betterment of the existing system.

#### B. Truth and Justice

A major objective of the criminal process is the bringing of alleged offenders to justice. This is clearly the aim of all systems of criminal procedure. "Bringing alleged offenders to justice" involves a process for fairly determining their guilt or innocence. Since the process is oriented towards the detection, apprehension and ultimate conviction of those who have committed criminal acts it is not surprising to find that a great deal of procedural criminal law involves an articulation of the nature and limits of police powers. But criminal procedure is broader than the law of police powers.

The procedural part of the criminal law is concerned with the methods by which the state, through its officials and institutions, reacts to a violation of the prohibitions of the criminal law. Criminal procedure therefore encompasses such matters as police powers, but it also is concerned with other matters such as bail, legal representation, collection and presentation of evidence, judicial conduct, trial procedures and appeals.

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18. The Criminal Code Review is a joint endeavour of the Commission, the Department of Justice and the Ministry of the Solicitor General (including the involvement of the provinces) that has been established in order to integrate efforts to comprehensively revise and reform Canada's substantive and procedural criminal laws.

Therefore within procedural criminal law the statutory definition of the roles assigned to prosecutors, defence counsel, and judges is undertaken together with the definition of the role of the police.

Once a criminal act has been committed there is a variety of possible responses to it. As we noted in our Working Paper on *Criminal Procedure: Control of the Process*:

Society responds to crime in many ways. The method that most readily comes to mind is the traditional prosecution in which the trial plays the central role. The majority of criminal incidents, however, do not result in trials. The commission or suspected commission of an offence does not automatically bring into operation the trial or any other standard, predetermined procedure. The mode of reaction to an offence will depend on a multitude of factors, including the decisions made by the various actors in the process: victim, offender, police, justices of the peace, prosecutors, judges, correctional authorities and others. A thorough understanding of crime and of our reaction to it demands an appreciation of all the factors that determine the methods of dealing with crime and criminals.<sup>19</sup>

When we state that legal procedure sets out the series of actions to be performed by public officials in the administration of the criminal justice system, or, that it articulates the lawful requisites and limits necessary to validly administer justice within the state, we are talking about those rules which exist for processing suspects and accused persons from the earliest moment in the process, that is to say, from the point of suspicion, through to the trial, sentencing or appeal. Moreover, we are speaking not merely in terms of the role and responsibilities of police, but we are referring also to the myriad legal obligations which have been placed upon other actors in the system as well.

The regulation of the process for bringing alleged offenders to justice after investigation and charge — the procedure leading to the conviction of those who have committed criminal acts and the acquittal of those who have not — is sometimes referred to as the pursuit of truth in the criminal process. Indeed, no one would deny that the criminal trial process is intimately concerned with the discovery of truth. But truth must find its place in the context of a larger concern to do justice. Prejudice, innuendo, opinion and speculation are viewed by our system as poor handmaidens in the cause of justice.<sup>20</sup> Hence, the criminal trial is not held at large and for this reason not every piece of damning prejudice is received into evidence. “Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much.”<sup>21</sup>

The truth is one thing; the law has regard for other values as well. A whole network of procedural and evidentiary rules exists to regulate and modulate the workings of the criminal justice system and thus secure the end of fundamental justice. The manner in which Canadian criminal process pursues its purposes is therefore best described as a qualified search for truth. It may, however, be the *best* method of securing the truth, since the process is ultimately a human one. Even judges, who are

19. LRCC, *Criminal Procedure: Control of the Process* [Working Paper 15] (Ottawa: Information Canada, 1976) at 1.

20. See Stanley Cohen, *Due Process of Law* (Toronto: Carswell, 1977) at 282.

21. See *Pearse v. Pearse* (1846), 1 De G. & Sm. 12 at 28-29, 63 E.R. 957 per Knight-Bruce V.C.

individuals well-schooled in the task of disregarding extraneous matter, may fall victim to the overwhelming effects of irrelevant and prejudicial material. Therefore the rules of evidence prohibit the introduction of such evidence *ab initio*. This constitutes a kind of admonition to counsel not to adduce or proffer such evidence in proof or disproof of an issue. Also, it should be remembered that rules of evidence are framed with an eye cast to the needs of the process as a whole. Thus, an accused person cannot elicit his own previous self-serving statement in his defence, and the prosecution is relieved of the burden of having to counter such evidence. By the same token other rules secure fairness for the accused by precluding the prosecution from bringing prejudicial and misleading evidence forward.

Canadians are not prepared to trample on all other interests in the search for truth. This is evident in our commitment to the preservation of fundamental rights which is explicit in the Legal Rights provisions of the *Charter*. With the introduction of the *Charter* the historically recognized, fundamental concern of the criminal process for human dignity and privacy has been reaffirmed.

"The common law is haunted by the ghost of the innocent man convicted."<sup>22</sup> Our procedural system counters this fear through its articulation of the presumption of innocence. This presumption maintains that an accused person is presumed to be innocent until proven guilty and results in the placement of the burden of proof on the prosecution to prove its case against an accused beyond a reasonable doubt. While the presumption, together with certain rules of evidence, may be seen as attempts to improve fact-finding accuracy (and therefore to lead to a high quality of truth) the extent to which their application also may lead to the acquittal of some accused persons who are factually guilty may cause some to view them as barriers to the search for truth. There is an inherent tension between the dual purposes of convicting the guilty and acquitting the innocent. Thus, "the more we want to prevent errors in the direction of convicting the innocent, the more we run the risk of acquitting the guilty."<sup>23</sup>

### C. Procedural Rules and the Protection of Society

Our oft-stated belief is that a primary concern of the criminal law is the maintenance and protection of important values. If one accepts this premise it emerges that the elimination of crime, while important, must often be subordinate to these larger purposes. The repression of crime cannot be viewed as an ultimate, self-sustaining goal, an end in itself. Rather it is only one method for pursuing the higher goal of maximizing freedom in a democratic state.<sup>24</sup>

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22. Judge Learned Hand.

23. See Mirjan Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study", (1972-73) 121 U. of Pa. L. Rev. 506 at 576.

24. See LRCC, *Fifth Annual Report 1975-76* (Ottawa: Minister of Supply and Services Canada, 1976).

The protection of society entails the protection of citizens from the harmful behaviour of others. Laws are necessary to define unacceptable acts and protect people from the harm caused by such acts. Lawlessness is the seed of societal disintegration. If everyone felt free to resort to violence, theft, or fraud, social life would become intolerable. Basic values must also be protected if our society is to retain its integrity. However, too much regulation in the name of protection can exact a price; one which we, as a society, may be unwilling to pay. If Canadians came to think it right that the state should regulate the most minute details of daily life, such as where to live, what work to do and how to dress, our society would be debased and transformed.

Coping with crime is a twin-edged sword. Crime uncoped with is unjust; to the victim, and indeed, to all members of society. Crime improperly responded to is also unjust.

The use of state authority involves the wielding of power, an endeavour which always carries with it the possibility of its abuse. It is the task of justice to keep a balance.<sup>25</sup>

In order to safeguard freedom it is sometimes necessary to limit it, through prohibitions. However, if human dignity, freedom and justice are among the major values which the criminal law enshrines, we must carefully assess the way in which the law is enforced in order to ensure that our law and practices respect and do not undermine these values.

How then does procedural law accomplish the task of protecting society and preserving the peace? The substantive law does so simply through the creation of prohibitions and penalties. Forms of action which threaten society or seriously disrupt social tranquillity are simply labelled as criminal misconduct and proscribed by statute. Procedural law is less direct.

The regulation of police powers is a major component of procedural criminal law. "Regulation" should be understood in its positive sense of "authorization" as well as in its negative sense of "limitation." Thus procedural law should be seen not merely as placing restrictions or limitations on a police officer's ability, say, to use force in the course of an arrest, but also as authorizing the resort to force by the police, where necessary.

In the context of police powers procedural law protects society and preserves the peace since it regulates the formal ways in which the police enforce the law, keep the peace, investigate crime, apprehend offenders and generally serve the public. Procedural law has a second major component — the regulation of the trial process. Here too, it serves to protect the public, but in a more diffuse manner.

It is comparatively easy to grasp the relationship of procedural law to the protection of society in an area such as bail. The law of bail governs the release of

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25. See Report 3 at 1.

arrested and detained persons who have been accused of crime. Present statutory provisions applicable to the pre-trial release of accused persons stipulate that detention may be justified where it is shown to be “necessary in the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or an interference with the administration of justice.”<sup>26</sup>

Other procedural rules regulating the pre-trial or trial processes have a more obscure, but nevertheless real, relationship to the protection of society. The difficulty in understanding how rules pertaining to the judge’s conduct of trial, to the prosecutor’s professional responsibilities, or to the defence counsel’s role and responsibility protect society, disappears if one recognizes that society is composed of the individuals within it and that the procedural laws which guarantee fairness to those charged with crime are laws which guarantee fair treatment to us all. Procedural law protects society precisely because it seeks to protect the individual from unjust prosecution and unjustified punishment.

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26. See *Criminal Code*, R.S.C. 1970, c. C-34, s. 457(7)(b) [hereinafter *Code*].

## V.

### Conflict and Compromise in the Criminal Process

It has been observed that, “although a society is a cooperative venture for mutual advantage, it is typically marked by a conflict as well as an identity of interests.”<sup>27</sup> So too with the criminal process. Criminal procedure is problematical because the nature of what is just and unjust is often in dispute. Nevertheless, despite this general disagreement we may still say that we have a shared appreciation of justice. That is, we have an appreciation of the need for and a preparedness to affirm a characteristic set of principles for assigning basic rights and duties and for determining “the proper distribution of the benefits and burdens of social cooperation.”<sup>28</sup>

While we believe that there exists an intuitive recognition of the “primacy of justice”<sup>29</sup> — that is, of the centrality of “justice” in any discussion of the attributes of civilized criminal procedure — the term itself does not seem to have any settled meaning. Equating justice with fairness is of limited utility, as this merely begs the larger question of “fairness for whom?” Indeed, the term may equally be employed in arguments favouring greater protection of individual rights or in those urging greater powers of crime control.<sup>30</sup>

It bears repeating that justice (or fairness) is not the sole preserve of the accused person in the criminal process. It has been said that “[i]t is as much in the public interest that a guilty person should be convicted as it is that an innocent person should be acquitted.”<sup>31</sup> However, for reasons which follow, such a bald statement cannot be accepted at face value.

The criminal process must ultimately be viewed as a human process; one carrying with it significant economic costs. Crime itself ultimately must be regarded as a human or social problem. Typically, a society’s ability to redress or treat such problems is constrained by practical concerns such as economic efficiency and effectiveness. Justice does not operate in the abstract. It must live in the real world. For this reason we do not assert that it is better for *any number* of guilty to go free rather than have one innocent person punished. By the same token, a well-known legal maxim does affirm that it is better that ten guilty men should go free than one innocent man be convicted.

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27. See John Rawls, *A Theory of Justice* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1971) at 4.

28. *Ibid.* at 5.

29. *Ibid.* at 4.

30. See A.J. Ashworth, “Concepts of Criminal Justice” [1979] *Crim. L.R.* 412 at 419.

31. See U.K., Criminal Law Revision Committee, *Eleventh Report — Evidence (General)* (London: H.M.S.O., 1972) at 16.

This maxim indicates a weighting in our system towards the protection of the accused. It reflects an insistence "that the liberty of an innocent individual should not be sacrificed in order to increase the efficiency of crime control — more particularly that a rule or procedure should be opposed if it secures greater crime control by increasing the probability that innocent persons will be convicted."<sup>32</sup>

Rules of procedure could in fact be so designed as to increase the likelihood of convicting the innocent as well as the guilty. Indeed, there are some who openly advocate striking the balance in this way.<sup>33</sup> Such a view is sometimes ascribed to those utilitarians who believe that it would be justifiable to punish an innocent person if a greater social good might conceivably be served by so doing. But even if our system were based upon strictly utilitarian principles, assessments of utility would differ among individuals. "[T]here is no reason to expect individuals who make such an expected value calculation to converge upon the identical set of procedures."<sup>34</sup> Some persons may even think it sufficiently important that guilty people be punished that they would be willing to run some increased risks of being punished themselves in order to accomplish this objective.<sup>35</sup>

Economic costs and efficiency are obvious concerns in any society confronted with the task of distributing scarce resources. Crime costs money and conceivably its efficient repression may save money. However, some believe that purely utilitarian or economic approaches to procedure have the effect of ignoring or at least downgrading rights.<sup>36</sup> Values other than economic costs are involved. If it may be said that there is a "right" not to be convicted if innocent, our procedural systems must take pains to avoid erroneous results. Procedures must not only be scrupulously fair to those accused of crime but they must also be perceived to be fair. "A process might be less expensive than another but unacceptable because distinctly less fair."<sup>37</sup>

Fairness in criminal procedure itself is a value that is perceived to be worthwhile independently of the outcome of the proceeding or the economic cost involved. "There might be values such as dignity, fairness, and participation served by legal procedures even though they do not increase the accuracy of decisions."<sup>38</sup> A process or procedure which commands public respect for the integrity of the judicial system is to be preferred over one not possessing such attributes. This is true even if both entail the same economic costs and are equally effective in avoiding erroneous results or in promoting desired objectives, such as the deterrence of crime.<sup>39</sup>

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32. See Ashworth, *supra*, note 30 at 416.

33. See Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) at 97.

34. *Ibid.*

35. *Ibid.*

36. See Ronald Dworkin, "Principle, Policy, Procedure" in C.F.H. Tapper, ed., *Crime, Proof and Punishment* (London: Butterworths, 1981) 193.

37. See Michael Bayles, "Principles for Legal Procedure" (1986) 5 *Law and Philosophy* 33 at 44. This excellent article has been influential in the structure and articulation of portions of this Report.

38. *Ibid.* at 51.

39. *Ibid.*



The task of fashioning a more perfect system of procedural justice entails an appreciation of the nature of the conflict among the values involved. Resolution must be achieved through accommodation, but this is not to be accomplished within the criminal process by weighting the components equally. While the process is one calling for a balancing of competing interests, appropriate allowances must be made to ensure that due regard is given to important values. By the same token, discussions of cost implications cannot be eschewed. Costs will always be a factor, whatever the system. "[T]he cost of increased crime and punishment resulting from placing the burden of proof on the prosecution is the price [one pays for avoiding] the moral harm in punishing the innocent."<sup>40</sup>

Furthermore, it does not necessarily follow from the fact that each citizen has a right not to be convicted if innocent, that, regardless of costs, he or she has a right to the most accurate procedures possible to test guilt or innocence.<sup>41</sup> But if people are not, in this sense, entitled to the most accurate trials possible they are entitled to "procedures that put a proper valuation on moral harm in the calculations that fix the risk of injustice that they will run, and the related and practically more important right to equal treatment with respect to that evaluation."<sup>42</sup>

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40. *Ibid.* at 48.

41. Dworkin, *supra*, note 36 at 193-194, offers the hypothetical example of a twenty-five-person jury rendering marginally more accurate verdicts than the present twelve-member jury, but at greatly increased cost.

42. *Ibid.* at 214.

## VI.

### Why Is There a Need for General Principles of Criminal Procedure?

Exactly what is comprehended by the term “principle” is not beyond dispute. The distinction between a “principle” and a “rule” is a question which has a long and highly-charged history, particularly in the area of the philosophy of adjudication. There is no pretense in this paper to the resolution of this dispute.

For present purposes we accept the view that rules apply in an all-or-nothing way.<sup>43</sup> Thus, if a rule applies to a question it determines the resolution of that question. Principles, by contrast, are less strong. They do not necessarily determine a question, even when relevant. Principles can conflict and must be weighed and balanced against one another. Rules, because of their unequivocal character are not weighed or balanced in the evaluation of a problem.<sup>44</sup>

Whether one accepts these distinctions between rules and principles is unimportant so long as it is recognized that the essential features of the principles which we offer are that they are of a more general character than rules, they can potentially conflict and where they do so, they must be weighed and balanced against one another.

Clearly the endeavour of formulating principles which serve the ends of procedural justice is a difficult and complex one. While the process is one which requires the balancing of one set of interests against another, the difficulty cannot simply be resolved by means of a formula which declares that we should simply “strike the right balance” between the interests of the individual and the interests of the community as a whole<sup>45</sup> or between crime control and the protection of the rights of the accused.<sup>46</sup> This merely restates the problem. The challenge is to produce a more refined and sophisticated statement of competing principles and the method of their application in the hope that this will lead to the discovery of the proper equilibrium. Perhaps the dynamic of this process is so fluid and so elastic that approximations in the calculations to be made are all that can realistically be achieved. But we are hopeful that the Commission’s conception of and approach to general principles will yield a greater degree of precision and consistency than obtains at present.

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43. See Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 24.

44. This articulation of the distinction between rules and principles largely follows the encapsulation which is found in Bayles, *supra*, note 37 at 35-36.

45. See Dworkin, *supra*, note 36 at 194.

46. See LRCC, *supra*, note 19 at 30.

Principles, when effective, place limits on action and where action is guided by known principles a measure of certainty may be perceived by those affected. Principled action is the antithesis of arbitrary action.

General principles to guide law reform are necessary because, in order for law to operate effectively in an enlightened democratic society it must command the respect of those affected by it. Public acceptance of the rule of law<sup>47</sup> is critical to the functioning of democracy. There can be no acceptance without understanding and no real understanding without rational justification.

Thus, the first task of the law reformer is the undertaking of reasoned, critical analysis. To progress beyond mere tinkering and to avoid the incoherence which results from *ad hoc*, *ex post facto* forays into the arena of reform, this endeavour must be at once fundamental and philosophical, principled and value-oriented. Anything less ultimately will not prove to be sufficiently responsive or justifiable in intellectual, moral or even political terms. The definition of operating premises concerning the elemental requisites of procedural law is necessary in order to assure coherence in the determination of policy.

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47. The seminal work on the rule of law is Albert V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed., (London: MacMillan, 1959). For more recent comment see Joseph Raz, "The Rule of Law and Its Virtue" (1977) 93 L.Q. Rev. 195; and H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1.

## VII.

### The Place of the Constitution in the Articulation of General Principles of Criminal Procedure

The effort to comprehensively revise our rules of criminal procedure can only be regarded as a worthwhile endeavour if a coherent approach is adopted; one which is respectful of and comprehends the need to protect society, but at the same time seeks to vigorously enforce the limits of governmental power as mandated by the *Charter* and by our tradition of civil liberties.

Our purpose in this exercise is to justify basic procedural principles. It is not our purpose to gainsay the Constitution. Principles which are contained in the Constitution are taken as justified. This does not mean that, in some cases, when amplifying or expanding upon the potential reach of such principles an extra measure of justification is unnecessary.

If there is any one part of our law which comes close to being canonical in nature it is the Constitution. In asserting that it plays a pre-eminent role in the development of general principles of criminal procedure we do not seek to foreclose all argument pertaining to the nature or content of such general principles. However, there can be scant disagreement with the proposition that the Constitution should be the well-spring for many of our principles. Just as clearly, it must be recognized that basic principles of criminal procedure may also derive from sources other than the Constitution.

The burden shouldered by general principles is that they should be of positive assistance to policy makers and law reformers in moving from the general to the particular. In formulating such principles the issue becomes whether they possess utility and are justifiable, not merely whether they are constitutionally required.

It is here that the virtues of rationality and intelligibility become apparent. "[T]he more rational the procedures for ascertaining the truth and arriving at decisions, the more rational parties will assent to the outcomes. That is, if people can understand the process and the reasons for a decision, they are more likely to accept it as settling their dispute."<sup>48</sup>

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48. See Bayles, *supra*, note 37 at 55. In addition to intelligibility, Bayles argues that legal procedures should be governed by principles of costs (both economic and moral), peacefulness, voluntariness, timeliness and repose.

## VIII.

### General Principles of Criminal Procedure

What then, are the principles which collectively have activated our efforts at law reform in the field of criminal procedure?

As stated, justice is central and is to be accorded primacy. Our principles reflect this orientation. In our view, *procedural justice within the Canadian state should possess these basic attributes: fairness, efficiency, clarity, restraint, accountability, participation, and protection.* Expressed as principles, they read:

1. *The Principle of Fairness: Procedures Should Be Fair;*
2. *The Principle of Efficiency: Procedures Should Be Efficient;*
3. *The Principle of Clarity: Procedures Should Be Clear and Understandable;*
4. *The Principle of Restraint: Where Procedures Intrude on Freedom They Should Be Used with Restraint;*
5. *The Principle of Accountability: Those Exercising Procedural Power or Authority Should Be Accountable for Its Use;*
6. *The Principle of Participation: Procedures Should Provide for the Meaningful Participation of Citizens;*
7. *The Principle of Protection: Procedures Should Enhance the Protection of Society.*

#### A. The Principles Explained

##### 1. The Principle of Fairness

Procedures should be fair and should be perceived to be so by those affected by them. This enhances their acceptability. Since in the criminal process the interests of the state and those of the individual are juxtaposed and often in conflict, fairness requires the neutrality and impartiality of those accorded important decision-making functions. No one should be the judge in his own case. Bias must not be tolerated.

A fair process is a deliberate process. Although “justice delayed is justice denied” at crucial junctures throughout the process care, solemnity and deliberation must prevail lest the “rush to justice” becomes the path to injustice.

In addition, fairness requires that those suspected of or charged with crime should possess adequate information to understand the nature of their potential jeopardy and the substance of the allegations that are made against them.

There can be no fairness where authorized procedures permit human dignity to be assailed for insufficient cause. The criminal law not only sets limits on what individuals can do to one another, it also limits what the authorities can do to suspects and accused persons. Our procedures must comport with civilized standards and the dictates of humanity.

Fairness also requires that procedures be egalitarian in treatment or application. Individuals in similar circumstances should be treated similarly. No class of individuals should be above or beyond the law.

Finally, fairness demands remedial processes when rights are violated. Indeed, entitlement to a remedy has been a feature of our legal system for hundreds of years and is expressed in the maxim: *Ubi jus, ibi remedium* — where there is a right, there is a remedy. More starkly, where no remedy exists there is, realistically, no right. A major function of much procedural law is the provision of means for vindicating rights.

## 2. The Principle of Efficiency

Efficiency is a form of economy. Inefficient conduct lacks focus, is prone to error and, in consequence, is costly. Costs, when one speaks of the criminal process, should not be viewed solely in monetary terms. Process costs can also be assessed in human or moral terms.

As a general rule efficiency is to be preferred to inefficiency, although, in the pursuit of higher values some inefficiency may be tolerated, or even preferred, to a single-minded or blind adherence to efficiency. Indeed, blind adherence to efficiency may be productive of injustice.

Efficient processes are timely processes. “Timeliness is a mean between the extremes of haste and dilatoriness.”<sup>49</sup> Excessive delay is the enemy of justice and left unchecked may wreak havoc on the trial process. Deliberate speed or expeditious justice is preferable.

Efficiency is linked to another principle, that of clarity. If those charged with administering justice within the state have a clear understanding of the nature and scope of the powers with which they have been entrusted the possibility of error in the exercise of those powers should be reduced and correlative benefits should accrue in terms of the efficiency of the system.

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<sup>49</sup> *Ibid.*

### 3. The Principle of Clarity

Clear rules promote understanding. Clarity is one of the underpinnings of the rule of law. The rule of law primarily serves the basic intuition that the law must be capable of guiding the behaviour of its subjects. Human behaviour cannot be guided by law unless it is discoverable, open, clear and relatively stable. Ambiguity, vagueness and imprecision diminish the law's ability to perform this role.

Clear rules of procedure within the criminal process establish the parameters of permissible behaviour, not only for the individual, but for state officials as well. Both the citizen and the police officer benefit from a clearer understanding of their respective rights, responsibilities and obligations in any official encounter. Clarity defines and protects the interests of all parties to the process.

Simplicity is often, although not always, an attribute of clarity. Complexity and technicality are often productive of confusion and, where uncalled for, are to be avoided. It is the nature and quality of the processes which count, not their quantity. For this reason the comprehensiveness of laws should be balanced against the resulting complexity. Often, in terms of law, more will mean worse, and less, better.<sup>50</sup>

Clarity, certainty and precision should not preclude flexibility and discretion at crucial junctures throughout the process. However, discretionary authority does not carry with it the right to its arbitrary exercise.

If clarity breeds understanding and ultimately affects and guides behaviour, a degree of predictability is introduced into the process. Clear, precise, well-understood rules should engender consistency and uniformity (in a word, regularity) in the application of laws.

Finality, also should, ideally, be an attribute of the principle of clarity. If disputes are capable of constant relitigation — if files are never closed — uncertainty, to say nothing of expense, mounting anxiety, or anger, results. Clear procedures should set firm limits on action.

### 4. The Principle of Restraint

Restraint signifies a minimum of interference. "The basic purposes of the criminal law should be carried out with no more interference with the freedom of individuals than is necessary."<sup>51</sup> Effective procedures necessarily often involve inconvenience to citizens and intrusions into the otherwise inviolate domains of privacy and dignity.

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50. See Report 3 at 17.

51. See *Report of the Canadian Committee on Corrections*, *supra*, note 3 at 11.

Restraint requires that intrusions upon liberty only be permitted where authorized by law and, even then, only to the extent necessary in the circumstances.

Restraint is characteristic of the responsible exercise of power. "Society should receive the maximum protection from criminals that is consistent with the freedom of those to be protected, at the same time inflicting no more harm on the offender than is necessary."<sup>52</sup> "An acceptance of the need for such limitations is the essence of the rule of law in a free and democratic society."<sup>53</sup>

Restraint is not to be confused with leniency or laxity.<sup>54</sup> Restraint, properly understood, implies "the need to examine carefully the appropriateness, the necessity, and the efficacy of employing the [substantive] criminal law [or procedural powers], rather than these other, less intrusive, less coercive means of dealing with particular social problems."<sup>55</sup>

## 5. The Principle of Accountability

Accountability is the mechanism for ensuring conformity to standards of action. The rule of law creates conditions whereby the law becomes capable of guiding human action. In order to effectively guide action the law must nevertheless allow and, indeed, provide for the generous, judicious exercise of discretion. Accountability within a system dedicated to the preservation of the rule of law entails the supervision of conformity to law and the provision of effective remedies in cases of deviation from it.<sup>56</sup>

Those exercising substantial procedural power or discretionary authority must be answerable for its use. Like all public officers those administering the criminal law must be accountable for their decisions and the effects of them. Accountability provides a vehicle for preventing or, at least controlling, the abuse of state power. As previously mentioned, discretionary power does not carry with it the right to its arbitrary exercise. "[A]ny person alleging illegal or improper treatment by an official within the criminal justice system should have ready access to a fair investigative and remedial procedure."<sup>57</sup>

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52. *Ibid.*

53. See Report 23 at 8.

54. See Government of Canada, *supra*, note 4 at 49.

55. *Ibid.* at 41.

56. See Raz, *supra*, note 47 at 202.

57. See Government of Canada, *supra*, note 4 at 65-66.



## 6. The Principle of Participation

Participation comprehends the values inherent in involvement and consensus. In any system of laws, particularly one dealing with crimes, it is of fundamental importance to involve the citizen in a positive way. The opportunity for a citizen to “have his day in court” or for an aggrieved citizen to take his case to court (especially where a public official has declined to take up the matter) promotes public acceptance of the criminal process.

Participation reinforces and demonstrates the integrity of basic democratic values. Early criminal procedure, described by many as “barbarous,”<sup>58</sup> made little allowance for this principle. At common law the accused was actually precluded from taking the stand in his own defence. The participation of counsel on his behalf in felony trials did not occur until the mid-nineteenth century and the right to appeal against conviction is largely a twentieth-century development.

Where the litigants have a measure of control over the processes which ultimately are to determine their rights and obligations (as they do under the adversary system) the acceptability to them of the decisions rendered by that process is enhanced. “One value underlying the principle is participation in decisions that significantly affect one’s life. One reasonably desires to at least be heard, to have one’s say, before decisions affecting one are made. Being permitted to participate also evidences others’ respect, that one is to be considered seriously.”<sup>59</sup>

Openness is a corollary of participation. Citizens can only participate meaningfully and effectively in proceedings that are important to them, where they have knowledge of and access to those proceedings. Open processes also serve the principle of accountability. Public scrutiny of official behaviour is a democratic safeguard which can only be effectively employed where the process is an open one.

## 7. The Principle of Protection

The protection and maintenance of basic or fundamental values is the primary concern of the criminal law. The criminal law contributes “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.”<sup>60</sup> The inclusion of the offender as an individual or member within society entitled to full protection is an important element of this principle.<sup>61</sup>

58. See for example, Hampton, *supra*, note 1 at 1.

59. See Bayles, *supra*, note 37 at 54.

60. See Government of Canada, *supra*, note 4 at 57.

61. See *Report of the Canadian Committee on Corrections*, *supra*, note 3 at 11.

As noted, procedural law protects society and preserves the peace since it regulates the formal ways in which the police enforce the law, keep the peace, investigate crime, apprehend offenders and generally serve the public. Procedural law also protects society through the manner in which it regulates the trial process.

## B. The Application of Principles to Policy

It is hardly novel to suggest that the key to proper policy development in the criminal process involves the striking of an appropriate balance between the interests of the community in bringing offenders to justice and the rights and liberties of the individuals. This is a vibrant theme; a refrain sounded repeatedly, particularly in the literature of the past quarter century.<sup>62</sup> However, without more, this contention cannot be regarded as other than a harmless axiom, one bereft of organizing virtue.

Principles, if they are to guide policy formation, must conform, at least initially, to some notion of hierarchy. Some principle (or principles) should have a prior or presumptive claim to the attention of the policy maker. All of the principles need not be ranked, but a recognition of inclination or "bias" toward certain of them, if it exists, is important to the initial ordering of policy priorities.

Criminal procedure undeniably inclines toward the protection of rights and liberties. The presumption of innocence, the Crown's burden of proof in a criminal trial, the right to silence, and the right to make full answer and defence all bear testimony to this fact. They are indicia of what we have elsewhere referred to as the "primacy of justice." If there is any dispute as to the veracity of this assertion the introduction of the *Charter* stands as an overwhelming rejoinder. The legal rights provisions of the *Charter*, in particular, speak directly to the subject of criminal procedure.

For this reason the principle of fairness, encompassing as it does the notion of the vindication of rights, including constitutional rights, must for purposes of policy formulation be regarded as *primus inter pares*. But here, again, we must recognize that fairness does not work inevitably and solely to the advantage of only one side in the criminal process. Fairness does, indeed, mean that an individual, if a suspect, is entitled to know and be made aware of his or her rights in order to exercise or decline to exercise them. But fairness also has application to the police or the prosecutor. "Both suspect and police officer should know where they stand, and the rules should

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62. See *Report of the Canadian Committee on Corrections*, *supra*, note 3; Government of Canada, *supra*, note 4; U.K., *Report of the Royal Commission on the Police* (London: H.M.S.O., 1962); U.K., *Report of the Royal Commission on Criminal Procedure* (London: H.M.S.O., 1981, Chair: Sir Cyril Philips); Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford, Calif.: Stanford University Press, 1968); U.S. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in the Free Society: A Report* (Washington: G.P.O., 1967).

be framed and promulgated in such a way as to enhance general awareness of them.”<sup>63</sup> In this regard fairness is linked in an important way to the principles of clarity and accountability. Also, fairness, depending upon circumstances and context, may encompass or comprehend the position within the process of the victim or witness, or even, the concerned but not directly involved citizen.

Placing fairness first merely begins — does not end — the process. Lending presumptive weight to a principle serves to focus the initial discussion of policy alternatives but it can hardly be said to determine the issues. Ultimately “our main social institutions always possess a plurality of features which can only be understood as a compromise between partly discrepant principles.”<sup>64</sup> Presumptive weighting also implies that in instances of genuine equivalence, or where doubt exists, the policy maker should choose that option which more closely adheres to or furthers the principle which has been so endowed.

Fairness has a claim to priority, but within our scheme fairness remains but one as among several competing principles. Subject to what has been said, these principles should not be given any absolute ranking as amongst each other. What is necessary, rather, is a recognition that different principles become relevant at different points and in different ways in any consideration of the propriety of policy options for modifying procedural rules within the criminal process.

While some principles, for example fairness and efficiency, can be expected to be at play in almost any question of policy formulation others will have more limited application. The principle of participation, for example, will have its greatest effects in relation to policy issues affecting the trial process. It is here that citizen involvement in such issues as private prosecution, community service orders or victim impact statements arises. By contrast, as regards procedural rules affecting police powers, this principle’s role in the formulation of policy will be minimal or possibly even non-existent. (This is not to suggest, however, that mechanisms allowing for citizen involvement in processes directly bearing on police powers do not exist elsewhere, for clearly they do exist. Civil actions and complaints under human rights and ombudsman statutes are but a few of these.)

Fairness, like all of the principles, ultimately will derive its strength, or be diminished, by virtue of the context in which it is considered. Thus in 1969 when the reality of Canadian penal methods was such that much unnecessary pre-trial detention was occurring and many accused persons were held for long periods in primitive, cramped and unsanitary living conditions,<sup>65</sup> fairness demanded the dramatic restructuring of our bail laws. In 1969, it was necessary to observe that “[p]re-trial detention to obtain pleas of guilty or to inflict punishment on a person whose guilt is not established is indefensible.”<sup>66</sup> Today, when one examines, for purposes of reform, our bail laws in

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63. See U.K., *Report of the Royal Commission on Criminal Procedure*, *ibid.* at 20.

64. See H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968) at 10.

65. See *Report of the Canadian Committee on Corrections*, *supra*, note 3 at 101.

66. *Ibid.* at 99.

the context of their enlightened transformation under the *Bail Reform Act*,<sup>67</sup> we find a different confluence of principles. Fairness, ever important, for the most part finds due expression in the legislation and it is now the more pressing and immediate concerns of efficiency and clarity that inspire reform.

### C. Our Principles Illustrated

In many, if not most instances, the application of principles to policy involves a process of weighing and balancing competing interests. Chosen policies ordinarily reflect the complex interaction of several principles rather than the naked affirmation of a single concern, such as fairness. Therefore, we cannot usually illustrate our principles in action simply by stating "the following are examples of the fairness principle." Rather, what we are able to provide are illustrations of where one or another of our principles *predominates* or is controlling in the ultimate choice of policy. While the subheadings employed in the ensuing discussion are shorthand references to single principles, the examples provided typically are policy proposals which reflect (within a limited context) the predominance of a particular principle over other competing principles, or are instances where the principle together with one or more other principles has controlled the ultimate determination of policy.

One further caveat: often the proposals contained in a given Working Paper or Report will simultaneously serve more than one policy objective. A recommendation may, for example, further the end of fairness for victims of crime and, in so doing, it may also serve to enhance the efficiency of the system. Therefore the reader should expect to encounter the occasional reference to the same illustration or example under two (or more) different headings.

Many of the illustrations which follow derive from our work in the area of police powers. This is due to the fact that until recent years this area has been the primary preoccupation of our work in criminal procedure. We have published either Working Papers or Reports on virtually all of the subjects falling within the police powers area. More recently however, our work has begun to concentrate on the trial and appeal process.

#### 1. Fairness

In Report 22 on *Disclosure by the Prosecution*<sup>68</sup> the Commission suggested that the traditional notion of disclosure as a largely voluntary and discretionary procedure be replaced by a legislative scheme that would afford judicially enforceable rights to the accused.

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67. R.S.C. 1970 (2nd Supp.), c. 2.

68. LRCC, *Disclosure by the Prosecution* [Report 22] (Ottawa: Minister of Supply and Services Canada, 1984) [hereinafter Report 22].

The recommendations advanced in Report 22 (at 1-2) proceed upon the premise that statutory rules on pre-trial disclosure would promote “the interests of fairness to the extent that disclosure allows the accused a more enlightened appreciation of the case he has to meet and of his options in meeting it; the risk of surprise would also be minimized, if not eliminated, by disclosure.”

Under the Commission’s scheme the accused is entitled, before being called upon to elect the mode of trial or to plead to the charge to receive much information that presently depends upon the goodwill of the prosecutor or the negotiating skills of counsel.<sup>69</sup>

The scheme contemplates relaxation of the rules where the public interest would be better served by late disclosure. This could conceivably occur where there is a need to prevent an interference with the administration of justice (for example, in cases where the safety of a witness would be imperilled by early disclosure). In such cases the judge may make an order permitting delayed disclosure.<sup>70</sup>

The proposals contained in Report 23 also reflect a concern for fairness. In that Report the Commission advocated legislative standards as the means for regulating the power to interrogate suspects. Such structuring is required in order to better define the limits of permissible official intrusion upon private interests. Shifting the focus of judicial enquiry at trial from proof of the voluntariness of a confession to an assessment of compliance with the requirements of statute should substantially clarify the law. Also, both the citizen and the police officer benefit from a clearer statement of their respective rights and obligations.

Moreover, fairness finds expression in the scheme’s enforcement mechanism — the exclusion of evidence.<sup>71</sup> The remedy of exclusion is an exceptional device which

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69. Under the scheme the accused is entitled “(a) to receive a copy of his criminal record; (b) to receive a copy of any relevant statement made by him to a person in authority and recorded in writing ...; (c) to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, to receive copies thereof; (d) to receive a copy of any relevant statement made by a person whom the prosecutor proposes to call as a witness and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness; (e) to inspect the electronic recording of any relevant statement by a person whom the prosecutor proposes to call as a witness; (f) to receive, where his request demonstrates the relevance of such information, a copy of the criminal record of any victim or proposed witness; and (g) to receive, where known to the police officer or prosecutor in charge of the investigation, and not protected from disclosure by law, the name and address of any other person who could be called as a witness, or other details enabling the person to be identified.” Report 22 at 13-14.

70. *Ibid.* at 14.

71. It is the policy of the common law to exclude relevant and reliable evidence in circumstances where the determination of truth should be subordinated to protection of ulterior values. This is also clearly the law’s policy where constitutional rights have been infringed. So too with statutory law, in some circumstances. One such case is the *Criminal Code*’s exclusionary rule governing the reception of evidence where a violation of privacy in communication has occurred as a result of unlawful electronic surveillance. The exclusion of evidence for reasons unrelated to relevance or reliability is, in essence, an exception of the orthodox view of litigation as a mechanism for ascertaining the truth of specific allegations. The premise which underlies this notion is that exclusion, putatively at the expense of truth, is the cost paid for the protection of higher interests. See Report 23 at 20-21.

serves the objective of promoting the public interest in the fair administration of justice.<sup>72</sup>

The proposition that procedures should be fair and perceived to be so by those affected by them should not be confined in its application to the principal adversaries in the system — the police, the prosecutor and the accused. Anyone affected by the operation of procedural rules has a right to expect fairness. Thus, we sought to ensure the fair and sensitive treatment of victims of crime by our legal system through a redesign of the procedures governing the retention or disposal of things seized in the course of a criminal investigation. Our Report on *Disposition of Seized Property* proposed a comprehensive scheme which, while reducing the costs incurred in the administration of justice, immunizes victims of crime against further victimization through the unnecessary detention of their property.<sup>73</sup>

Fairness to victims is also one of the major themes of Working Paper 52 on *Private Prosecutions*.<sup>74</sup> Under our system the victim of crime is entitled to initiate and, subject to the intervention rights of the Attorney General, to personally conduct his or her own case or to have a lawyer or agent provide representation.<sup>75</sup>

Notwithstanding the fact that our criminal prosecution system is administered by a complement of professional public prosecutors who conduct, in the name of the state, the vast bulk of criminal prosecutions, situations will inevitably arise where the public prosecutor declines to pursue a case. The reasons behind such decisions may well be legitimate and understandable in the context of the exercise of an official discretion but the victim/complainant nevertheless may not wish to accept that decision. The Working Paper endeavours to ensure that an aggrieved individual not feel shut out of the criminal justice system.

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72. Report 23 (at 22) proposes a qualified rule of exclusion; one predicated upon a presumption of inadmissibility that can only be dislodged by proof of compliance with prescribed rules, or by proof that the admission of evidence obtained in contravention of those rules would not bring the administration of justice into disrepute.

73. LRCC, *Disposition of Seized Property* [Report 27] (Ottawa: LRCC, 1986). In this Report, we set out an effective, streamlined, accessible procedure which enables any victim of crime whose property has been detained by the police or the Crown for evidentiary or other purposes to apply to a judge for restoration of the property — assuming it has not already been voluntarily returned. This application procedure favours the dispossessed property owner since it places the onus on the Crown to establish, to the satisfaction of the Court, legitimate reasons for withholding restoration of the property. The proposals provide, where possible, for evidentiary alternatives to the production of the actual thing seized to be used as proof at trial. Therefore, the presiding judge is empowered to order an accurate record of the thing(s) seized to be made, either by affidavit, photograph, videotape, or other means.

74. LRCC, *Private Prosecutions* [Working Paper 52] (Ottawa: LRCC, 1986) [hereinafter Working Paper 52].

75. *Ibid.*, see especially Recommendation 6 at 31.

The Commission concluded that an expanded role for the citizen in private prosecutions should be expressly recognized in the *Code* and that the formal aspects of it ought to be directly incorporated into the rules of criminal procedure.<sup>76</sup>

Another illustration of the fairness principle is to be found in our work pertaining to conditions of pre-trial detention as they relate to the right to make full answer and defence.

The international community has recently begun to study the subject of the pre-trial detention of persons accused of crime. A number of evolving instruments seek to ensure that persons in pre-trial custody shall be accorded appropriate and humane treatment subject, of course, to the necessity to impose conditions and restrictions required for the maintenance of security and order in the place of custody. (This is the nature of the evolving United Nations "Draft Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.")<sup>77</sup> Consistent with this, the Commission, in a forthcoming Working Paper on *Compelling Appearance, Interim Release and Pre-trial Detention*, will offer concrete proposals detailing how our concurrence with evolving international standards can be given specific statutory expression within the procedural criminal law. As mentioned, our particular focus will be on the need to better facilitate the right of detainees to make full answer and defence.<sup>78</sup>

This same Working Paper on *Compelling Appearance, Interim Release and Pre-trial Detention* is also concerned with the possible inequitable treatment of witnesses within the criminal process. Presently, to deal with the problem of the recalcitrant or uncooperative witness, the *Code* unsatisfactorily provides various means to compel attendance and, where necessary, allows for the detention of the witness.

The existing *Code* release provisions arguably violate the equality guarantees of the *Charter* since, in some instances, they treat witnesses more harshly than accused

76. Therefore, it was recommended that the private prosecutor should, subject to the overriding right of the Attorney General to supervise all prosecutions, enjoy the same rights as the public prosecutor in carrying his case forward (including the same rights of appeal). These recommendations differ from the present state of the law which provides full latitude to the private prosecutor only in minor (i.e., summary conviction) matters. *Ibid.* at 27-31.
77. United Nations, "Draft Body Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment" in *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, E/CN. 4/1296 (Geneva, 1978) at 17.
78. Specifically, the Working Paper recommends that a person in pre-trial custody
  1. shall be informed without unreasonable delay of his or her rights;
  2. shall be given a copy of the warrant of remand or committal, or other document which is the authority for detention;
  3. shall (a) be afforded reasonable opportunities to consult with counsel; (b) be allowed to send confidential written messages to counsel and to have messages forwarded without delay; and (c) be permitted to meet with counsel in sight, but not within hearing, of peace officers or other persons in authority;
  4. shall be given a reasonable opportunity to see and communicate with family and friends and in appropriate cases, with consular or diplomatic officials;
  5. shall have the right to be examined by an independent physician upon his request, or upon that of family or of counsel;
  6. shall have reasonable access to legal or other relevant material.

persons.<sup>79</sup> The Working Paper therefore concludes that a revised scheme of interim release must, at a minimum, provide material witnesses with treatment equal to that accorded accused persons. Thus, to take just one example, the present *Code* provisions provide that a justice ordering detention of an accused person must give reasons for making the order but impose no similar obligation on the justice to justify detention when incarcerating a witness. Clearly, this must be modified. Any scheme of interim release must ensure that reasons be given to all those whose liberty is compromised.

## 2. Efficiency

A well-known legal maxim declares that “justice delayed is justice denied.” Questions of fairness aside, delayed justice is also inefficient.

Save for a few minor exceptions, there are no limitation periods governing the prosecution of criminal offences. Yet, to promote efficiency the law ought to accord some formal recognition to the vice of delay. A typical means for doing so is through the enactment of limitation periods. In Working Paper 54 on *Classification of Offences* we proposed “that no proceedings in respect of a crime punishable by two years or less imprisonment be *instituted* more than one year after the time when the subject-matter of the proceedings arose and the identity of the offender has been ascertained by investigators.”<sup>80</sup>

Under the present law there are absolutely no limitation periods governing the period between the laying of a charge and the commencement of trial. This makes Canadian criminal procedure substantially different from other systems of criminal procedure. In a forthcoming Working Paper on the trial process we will be recommending the enactment of limitation periods pertaining to the period between charge and trial. These limitation periods, which when breached could have the effect of terminating a proceeding, would be regarded as presumptive periods and the courts would possess a restricted ability to extend time.<sup>81</sup>

While statutory limitation periods initially appear as a beguilingly simple remedy to the problem of inefficiency or delay in the administration of justice we recognize that, in truth, time limitation legislation is not a panacea. Delay, if it is to be significantly alleviated as a feature of our court and trial processes, must be attacked on several fronts, not all of which are legislative. There is a significant political dimension which spans both federal and provincial fields of responsibility. Furthermore,

79. For example, the Court when dealing with an arrested witness has only two options available to it — either a release on a traditional recognizance (that is, with or without sureties) or detention. There are no provisions similar to those applicable to release decisions concerning accused persons which allow for an undertaking with conditions or any graduated “ladder” principle to assist in the determination of the issue of release.

80. LRCC, *Classification of Offences* [Working Paper 54] (Ottawa: LRCC, 1986) at 45 [hereinafter Working Paper 54].

81. Under our scheme, when extending time, a court could also provide remedies (such as an order expediting trial and costs) to an affected party in defined circumstances outlined in the *Code*.



the problem of resource allocation, or economic commitment, is ultimately crucial to the success of any reform effort. In short, time limit legislation cannot reduce delays in the administration of criminal justice unless complementary action is taken to address the factors that contribute to the root causes of delay.

Delays at trial can often also be traced to the inefficiencies of the pre-trial process. In a forthcoming Working Paper on the trial process we will be exploring several mechanisms that assist in expediting and simplifying the ultimate trial of a criminal case. These procedures shift the “centre of gravity” of the criminal process. They promote the early resolution of contentious issues that have traditionally, but needlessly, been left until much later in the process. Consequently they promote a fuller understanding of the case to be met by each party. If implemented, these procedures can reduce complications, delay and expense at trial and possibly even eliminate the need to go to trial. Three particular procedural mechanisms are analysed: pre-hearing conferences (to promote the sharing of information between parties and the achievement of consensus on non-contentious issues), pre-trial motions and motions to be made at the outset of trial (both of which are designed to assist in the resolution of contested issues before the trial proceeds).

Inefficiency must be addressed in imaginative ways. Modern solutions are required. In two separate Reports<sup>82</sup> the Commission has attempted to bring the criminal law more completely into the twentieth century through the introduction of telewarrants. In essence, the telewarrant adapts the procedures for issuing warrants (whether to conduct a search or effect an arrest) to current telecommunications technology. Under the Commission’s proposals, rather than requiring the personal appearance of the officer before a justice of the peace when applying for a warrant, a police officer may, in some circumstances, submit his application by telephone. These recommendations are designed to improve the efficiency of peace officers who, often at great inconvenience, are obliged to travel considerable distances to obtain the necessary authorization to perform their duties under law. While personal attendance remains the preferred method

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82. See LRCC, *Writs of Assistance and Telewarrants* [Report 19] (Ottawa: Minister of Supply and Services Canada, 1983) at 77 [hereinafter Report 19]; and *Arrest* [Report 29] (Ottawa: LRCC, 1986) at 32 [hereinafter Report 29].

for obtaining warrants the Commission endorses the optional use of telewarrants where personal attendance is impracticable.<sup>83</sup>

As noted, the Commission's proposals in Report 22 and Report 23 were prompted by considerations of fairness but a concern to improve efficiency is also manifest. Efficiency under a scheme of mandatory pre-trial disclosure would be increased simply by the reduction of delay in eliciting information of direct relevance to the preparation and resolution of the case.<sup>84</sup> Comprehensive disclosure is also productive of efficiency because when the parties are more fully apprised of the case to be met an acceleration in the disposition of charges should occur since more admissions, committals by consent, informed guilty pleas or withdrawals by the Crown will appear as a result.<sup>85</sup>

In the area of police interrogation the investigatory process could be rendered more efficient if better methods and mechanisms were created for ensuring that the most accurate, thorough record possible of a statement and the circumstances in which

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83. Although the telewarrant is designed to enhance efficiency in the investigative process, a number of safeguards have been built into the process in order to ensure that it remains procedurally fair. The Commission's telewarrant procedures contain the following safeguards:

1. The information submitted in support of an application for a warrant is taken on oath and is to be recorded verbatim.
2. The issuing justice is obliged to file a certified transcript of the application and the original warrant with the clerk of the court as soon as practicable.
3. The telewarrant could not be used, in the case of a search, to conduct a surreptitious entry, search or seizure upon private premises. A copy of the telewarrant must be presented to the occupier before entry or as soon thereafter as possible; in the case of unoccupied premises, a copy of the telewarrant must be left suitably and prominently affixed within the premises.
4. The telewarrant document should contain a notice advising that the search was conducted pursuant to a warrant issued by telephone or other means of telecommunication; also, the notice should specify the address of the clerk of the court where the information used to obtain the warrant and the original search warrant itself are on file.
5. In the case of a search, police officers are required both to conduct their search and file a report with the clerk of the court within three days of the telewarrant's issuance.
6. In the case of a search, should the search subsequently be challenged, the failure to produce the requisite record of the application or the original warrant constitute *prima facie* proof that the search or seizure was not authorized by warrant. See Report 19 at 106-107.
7. In the case of an arrest, a justice shall not issue a warrant unless he has reasonable grounds to believe that issuance is necessary in order "(a) to ensure that the person will appear in court; (b) to conduct investigative procedures authorized by statute; (c) to prevent interference with the administration of justice; (d) to prevent the continuation or repetition of a criminal offence; or (e) to ensure the protection or safety of the public." See Report 29 at 28.

84. Non-disclosure or late disclosure can result in an uninformed election or plea which may later require rectification through a re-election or change of plea. Protraction of the case is an inevitable result in such circumstances. Also, failure to disclose, whether in whole or in part, can impair the accused's ability to prepare his defence fully. Moreover, delay is rife in the criminal courts due at least partially, to the fact that the preliminary inquiry (and the opportunity of cross-examination which it presents) is commonly exploited as a mechanism for disclosure. To the extent that non-disclosure provokes investigative (that is, lengthy and protracted) cross-examination during preliminary inquiries, in circumstances where disclosure would obviate the need for it, the case for increased efficiency through mandatory disclosure is clear. See Report 22 at 15-16.

85. *Ibid.* at 16. Similarly, a judge with knowledge that the defence has had disclosure from the Crown will be in a surer position to make rulings, for example, on amendments, severance or particulars, and more generally to urge counsel to expedite proceedings by admissions or other means.

it was made is compiled.<sup>86</sup> For this reason the Commission has advocated the use of electronic recording technologies in the taking of confessions or statements.<sup>87</sup> Improved quality in the recording of a statement also has several beneficial corollary effects on the process which augment its efficiency.<sup>88</sup>

Finally, the enlightened transformation of our bail laws under the *Bail Reform Act* has resulted in a legislative scheme in which, for the most part, fairness finds due expression. It is therefore not surprising that presently the more pressing and immediate needs of improved efficiency have captured centre stage in our reform endeavours.

In most respects the policies embodied in the present *Code* concerning compelling appearance and interim release are enlightened and sensible. Nevertheless, the overall scheme is unnecessarily complex, difficult to understand, and awkward to apply. As a result, it suffers from a lack of clarity with resulting inefficiencies.

For example, inefficiency is evident where three different documents, or forms of documents, must be used when a single one would suffice. The present appearance notice, promise to appear or recognizance (documents issued by the arresting peace officer or officer in charge, as the case may be) could easily be consolidated into one form of documentary notice called an appearance notice.

Another form of inefficiency which finds complex expression in the present legislation results when different grades of peace officers<sup>89</sup> and different levels of

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86. For this reason Report 23 proposes that police officers who participate in the questioning of a suspect should, as soon as possible, and to the fullest extent possible, make a record of all questions put and statements made.

87. *Ibid.* at 17-19.

88. First, almost all doubt about the accuracy of the record and the content of the statement at issue disappears. Second, the margin for doubt concerning the actual circumstances at the time the statement was made is reduced. Third, the general employment of electronic recording techniques should reduce the length and frequency of *voir dire*s. (Theoretically, electronic recording should even increase the incidence of admissions of voluntariness and waivers of the *voir dire*.) Fourth, a corresponding increase in guilty pleas is to be expected. Fifth, a resulting reduction in the amount of time spent by officers giving evidence in court should occur. And finally, there should be a reduction in the incidence of allegations of police misconduct. *Ibid.* at 18-19.

89. With regard to the police, this so-called "ladder principle" works on two axioms: first, the competence to authorize the release of a person suspected or accused of crime is vested in progressively senior officers of the police or the judiciary depending upon the gravity of the alleged offence; second, for each decision made with respect to arrest, detention or release there is generally scope for review at a higher level of authority. The manner in which these principles have been given effect in the allocation of competence over matters of interim release defies easy summary or rationalization. For present purposes, suffice it to say that the arresting officer has certain powers of interim release that can be exercised "on the street" depending upon the nature of the offence involved. Where the offence is of a more serious nature the criminal suspect must be taken into the police station and the issue of release must be determined by a more senior officer (designated in the *Code* as the "officer in charge") or the suspect must await consideration of release by a judicial officer within twenty-four hours.

judges<sup>90</sup> are given differing release powers. The Commission in its forthcoming Working Paper on *Compelling Appearance* has therefore recommended the removal of the existing distinction between the release powers of arresting officers and officers in charge. Also, with respect to the jurisdiction of judges, the Commission has proposed that the provincial courts be given plenary jurisdiction over all matters of interim release, including those matters now exclusively reserved for a superior court judge under section 457.7 of the *Code*.

### 3. Clarity

Clarity should always be a principal concern in law reform. It bears an intimate relationship to the principle of restraint since *defining* the limits of permissible state intrusion also *clarifies* the limits of official power. Thus, for example, when seeking through legislation to restrain the resort to and exercise of police powers, ideally a clarification of the respective rights and obligations of the citizen and the police in any investigative encounter should also occur.

Our work in the area of police powers and procedure rests on the fundamental premise that fixed, clear and reasonable limits must be placed on the investigative powers of the police. There is no point in the criminal process where a greater potential for disparity between state and individual power and resources exists than at the investigatory stage. This is particularly the case where a criminal suspect has been arrested or detained. In the absence of clear and comprehensive rules — that is, wherever gaps exist in the law — enormous opportunity for oppression and intimidation arises. One striking instance involving the failure to comprehensively regulate criminal investigations involves the obtaining by police of forensic evidence.<sup>91</sup>

Investigative techniques beyond simple interrogation, “frisk” searches and the like, for the most part, have not been the subject of clear statutory regulation in this country. No uniform policy is readily discernible. No rational and comprehensive code is in place to deal with questions such as when investigative procedures may be used, how they should be performed, or what the rights and obligations of prospective subjects are. Yet the nature of the investigative procedures which are gathered under the umbrella of “forensic evidence” are potentially more intimate than the classic or traditionally recognized investigatory procedures of interrogation or search and seizure.

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90. Insofar as the judiciary is concerned the ladder principle operates so as to preclude provincial court judges from determining issues of release with respect to a select list of offences found in section 457.7 of the *Code* (the most important or prevalent of which is murder) notwithstanding the fact that they are charged with administering the *Bail Reform Act* with regard to all other offences. (The provincial court judge may determine the issue of release where the charge is one of attempted murder or manslaughter but, under the present *Code* provisions, may not exercise authority on the question of bail where the charge is murder *simpliciter*.)

91. Closely related to this topic are such matters as questioning suspects and search and seizure, matters which have been addressed in separate Commission Reports. See LRCC, *Obtaining Forensic Evidence* [Report 25] (Ottawa: LRCC, 1985) [hereinafter Report 25]; Report 23; and *Search and Seizure* [Report 24] (Ottawa: Minister of Supply and Services Canada, 1984) [hereinafter Report 24].

Specifically, they involve procedures that utilize the person's body or mind as the source of incriminatory evidence.<sup>92</sup>

The proposals in our Report 25 promote clarity by indicating precisely which investigative procedures should normally be available only where authorized by judicial order (Rec. 4) and which procedures should be subject to outright prohibition (Rec. 2).<sup>93</sup>

The Commission's proposals for the reclassification of offences also mark a clarification of and an improvement in our procedural law.

Working Paper 54 concludes that the present system of classifying offences is not systematic and does not classify criminal misconduct in any meaningful way. Ideally, when processing an accused person who has been charged with the commission of an offence, the nature of the offence should operate as a reliable guide to ascertaining the applicable procedural rules. Unfortunately the present *Code* classification scheme is obscure, confusing and complicated, and does not operate in this fashion.<sup>94</sup> Under the present *Code* arrangements many procedures apply differentially to offences within the same class. In fact, our classification rules are riddled with exceptions and anomalies.

Working Paper 54 establishes a framework to indicate how a crime falling within a particular classification will be dealt with at various stages of the criminal process. Within this framework, once one is able to situate a crime within a class one is able to identify more easily the procedures that apply to that crime from the moment of arrest through to possible disposition upon conviction.

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92. Under the general rubric of "investigative procedures in respect of the person" one encounters such procedures as: lineups and showups; "strip searches"; searches of the person for concealed or foreign objects by means of X-rays, the probing of body cavities; fingerprinting; the removal of hair, blood, saliva or other body substance samples for laboratory analysis; the administration of various drugs or substances (for example, "truth drugs", emetics, enemas); physical performance tests (that is, tests for assessing alcohol- or drug-induced impairment); the taking of breath samples; polygraph examination; psychiatric examination; hypnosis and so on. See Report 25 at 2.

93. *Ibid.* at 36-39. The Report recommends that the issuance of a judicial order (where one is required) should be permitted "only where (a) the subject of the proposed procedure has been charged with an offence punishable with imprisonment for five years or more; (b) there are reasonable grounds to believe that the carrying out of the proposed procedure will provide probative evidence of, or relating to, the offence with which the subject has been charged; and (c) there is no less intrusive means practicable for obtaining the evidence to which the proposed procedure is directed." (Rec. 5)

94. The present *Code* provisions governing trial by jury demonstrate how the present system is needlessly complex and could be measurably improved if relatively simple alterations were to occur. For example, trial by jury is only possible in relation to indictable offences. However, not all indictable offences carry an entitlement to trial by jury. (Those listed in s. 483 of the *Code* may only be tried before a provincial court judge sitting alone.) Some indictable offences (indeed a majority of them) link trial by jury to the exercise of an election by an accused person. Still other indictable offences (listed in s. 427 of the *Code*) make trial by jury mandatory and require the trial to take place before a superior court judge sitting with the jury. Our scheme proposes that every person charged with a crime punishable by more than two years imprisonment (section 483 offences will not reside within this class) should have a right to trial by jury.

The present *Code* contains sixty-five hybrid offences.<sup>95</sup> These crimes offend the clarity principle because of their deliberately ambiguous, ultimately uncertain nature. For example, mischief in relation to data (*Code*, s. 387(5)) and theft or forgery, etc. of a credit card (*Code*, s. 301.1) are both serious offences when prosecuted on indictment. Each carries liability to a ten-year maximum sentence, if a person is convicted. The maximum penalty available where the same offence is prosecuted by summary conviction procedure is six months imprisonment. Logically, if Parliament wishes a higher penalty or a more stringent procedure to apply when particular aggravating circumstances exist, then it should clearly and precisely define the crime in such a manner as to make those aggravating circumstances necessary elements of the offence. At present where these offences are involved one single, general definition of misconduct applies regardless of whether the prosecution is by summary conviction or upon indictment.

These peculiar hybrid offences interfere with the systemic integrity of any classification system.<sup>96</sup> To rectify this the Commission has proposed that all crimes enacted by Parliament should bear only one classification and that no crime should be designated as or possess the characteristics of a Crown option, dual procedure or hybrid crime.

#### 4. Restraint

The practice of restraint entails limitations on official power. Intrusions on liberty may be permitted where expressly authorized by law but only to the extent necessary in the circumstances. Writs of assistance, which until recently were provided for under four statutes — the *Customs Act*, the *Excise Act*, the *Narcotic Control Act* and the *Food and Drugs Act*<sup>97</sup> — have been found by the Supreme Court of Canada to be “constitutionally inadequate”<sup>98</sup> and are, in the opinion of the Commission, contrary to the principle of restraint. Report 19 (at 35) asserts that “a statutory regime which exempts the State from justifying its use of intrusive search powers before the event, and which confers powers of search and seizure unbounded by limitations as to the use of force, unbounded by time, unbounded by place, and unbounded by requirements of

95. These crimes may be prosecuted either upon indictment or by summary conviction procedure at the discretion of the Attorney General, or his agent. At present the court exercises no supervisory jurisdiction over this prosecutorial discretion and no criteria to guide its use are set out in the *Code*. They are sometimes referred to as dual procedure or Crown option offences.

96. Hybrid offences contribute to uncertainty and confusion inasmuch as an individual cannot know the nature of his jeopardy or the procedural implications of the charge until some considerable time has passed after the laying of the charge. In order to ensure a greater measure of certainty the courts, in the absence of statutory guidance, have been required to clarify, for procedural purposes, the nature of an offence (i.e. is it summary or indictable?) during the period prior to the prosecutor's election. For example, until relatively recent times it was uncertain whether an individual charged with a hybrid offence had to submit to fingerprinting upon arrest or subsequent to it in the period before the prosecutor had formally indicated his election: See e.g., *R. v. Toor* (1973), 11 C.C.C. (2d) 312 (B.C.S.C.).

97. The *Custom Act*, R.S.C. 1970, c. C-40; the *Excise Act*, R.S.C. 1970, c. E-12; the *Food and Drugs Act*, R.S.C. 1970, c. N-1, the *Narcotic Control Act*, R.S.C. 1970, c. F-27.

98. See *R. v. Hamill* (1987), [1987] 1 R.C.S. 301 at 307.

reasonable belief is necessarily antithetical to our common-law traditions and our constitutional aspirations.”<sup>99</sup> For these reasons, amongst others, the Commission has recommended the abolition of writs of assistance.<sup>100</sup>

Our proposals concerning the writ seek to curb or restrain judicial as well as police authority. Judges would no longer be entitled to issue what is, in effect, a blank cheque to the police. Of course, at the same time the police would no longer be entitled to rely upon the blanket authority of this extraordinary judicial warrant.

Restraint and accountability are linked. The restraint principle declares that where procedures intrude on freedom they should be used with restraint whereas the principle of accountability goes on to hold that once intrusions on freedom are authorized by law those exercising procedural power or authority should be accountable for their use. These interests converge when considering the subject of electronic surveillance.

The methods of modern criminals justify resort to modern surveillance technology notwithstanding the threat to individual privacy posed by such invasive techniques. Nevertheless, the Commission also recognized that this grant of authority cannot be *carte blanche*. Rather it must be statutorily structured and confined.<sup>101</sup>

It is now clear under the present law that the police possess implicit authority to enter private premises covertly in order to install or remove a listening device.<sup>102</sup> Nevertheless, there is still considerable ambiguity concerning the exercise and use of this power. Accordingly, the Commission has recommended in Working Paper 47, *Electronic Surveillance*,<sup>103</sup> that express, limited police authority to enter surreptitiously only be conferred by the statute in carefully delimited circumstances. Under our scheme

99. In Report 24 the Commission advocated a codal arrangement which would make search with warrant the rule and search without warrant the exception. Searches conducted under the authority of a writ of assistance are in every material respect the same as warrantless searches. To make prior authorization procedure meaningful, it is necessary to enable the person authorizing a breach of an individual's privacy, in advance of the search that is to be conducted, to assess the evidence in support of the need for such a search in an entirely neutral and impartial manner. No such prior authorization requirement is embodied in writs of assistance legislation.

100. This comports with the position taken by the Supreme Court of Canada in *Hunter et al. v. Southam Inc.* (1984), [1984] 2 S.C.R. 145; (1984) 11 D.L.R. (4th) 641. In that case the Court held that under s. 8 of the *Charter* (which proscribes unreasonable searches and seizures) an assessment must be made in particular circumstances whether the public's interest in being left alone must yield to the government's interest in intruding on the individual's privacy in order to advance the goal of effective law enforcement. Section 8 of the *Charter* exists in order to prevent unjustified searches. In interpreting s. 8 the Supreme Court of Canada has stated that, where feasible, prior authorization (that is, a warrant granting process) is a pre-condition to a valid search and seizure. A warrantless search, and consequently one conducted under the authority of a writ of assistance, is *prima facie* unreasonable under s. 8 of the *Charter*.

101. Many of the specific proposals serving this objective are discussed within, under the heading of accountability. For present purposes however, our focus should be on those matters which most clearly promote the principle of restraint.

102. This had been a point of considerable controversy prior to recent rulings by the Supreme Court of Canada on the subject. See *Lyons v. R.* (1984), [1984] 2 S.C.R. 633; and *Ref. Pursuant to s. 27(1) of Judicature Act* (1984), [1984] 2 S.C.R. 697.

103. See LRCC, *Electronic Surveillance* [Working Paper 47] (Ottawa: LRCC, 1986) at 48-49 [hereinafter Working Paper 47].

covert entry onto private premises may only occur where the authorizing judge has made an express order to such effect.

To promote restraint and to protect the privacy of individuals, particularly that of unsuspected persons, the Working Paper propounds a scheme which specifically directs the authorizing judge to consider inserting in the order a number of terms and conditions that are designed to ensure that only the conversations of targeted persons will be intercepted and recorded.<sup>104</sup> The concern to protect privacy while not unduly impairing the legitimate needs of law enforcement also surfaces in the law relating to arrest.

An ancient maxim states that "a man's home is his castle," but the recent Supreme Court of Canada decision in *R. v. Landry*<sup>105</sup> has cast doubt on the notion of the inviolability of one's home. It remains important to protect the family dwelling from unnecessary intrusions and the Commission has therefore recommended in Report 29 that, subject to narrow but important exceptions, in the absence of consent, a peace officer may only enter a private dwelling to effect arrest when he is in possession of a warrant for arrest, and believes on reasonable grounds that the person to be arrested is in the private dwelling.<sup>106</sup>

However, the principle of restraint, while important, cannot be taken as an absolute. Swift intervention to protect a person's life should justify a departure from the usual legal requirements and the Commission has recognized this within its proposed arrest regime.

The principle of restraint also finds expression in the Commission's recommendations concerning questioning suspects and obtaining forensic evidence. Report 23 (at 3-4) advocates restraint through the enactment of rules designed to protect the rights of a detained person by requiring that a suspect (that is, a person who is in jeopardy of

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104. *Ibid.* at 38, Recommendation 22. One such term provides "that where it is proposed to intercept communications at a telephone to which the public has a right of access, then any interceptions shall only be on the basis of live monitoring and accompanied by visual surveillance." This mechanism is designed to prevent unjustified interferences with liberty and thus advance the interests of restraint.

105. (1986), [1986] 1 S.C.R. 145; (1986) 65 N.R. 161; (1986) 50 C.R. (3d) 55 (S.C.C.).

106. Report 29 at 39-40, Recommendation 8. Under the proposals, in order to execute the warrant the officer must announce his presence, indicate his identity and make a demand to enter. Also, the officer must wait a reasonable period of time before entry. Furthermore, the peace officer would not need to obtain a warrant before entering a private dwelling if the person to be arrested was committing or was about to commit an offence likely to endanger life. Finally, a peace officer need not comply with the requirement of announcing his presence and demand to enter where there would be a risk to the peace officer or another person in doing so.



prosecution or conviction) be apprised of the right to remain silent before being questioned by a police officer.<sup>107</sup>

The proposals on questioning suspects seek to define and protect not merely the interests of the suspect/accused but the interests of *all* the parties to the process of investigation and prosecution. Constraining agents of the state to act in accordance with prescribed standards serves to protect individual rights and also maximizes accountability in the investigative process. Prosecutors seeking to secure convictions on the basis of confessions obtained in a manner which conforms to known or ascertainable standards are well served by procedural rules which restrain official action in this way.

In a similar vein Report 25 contends that the subject of the police investigation must be properly and comprehensively informed about the investigative procedures contemplated.<sup>108</sup>

Notwithstanding its emphasis on restraint the Report nevertheless recognizes the legitimacy and utility of a significant number of such investigative procedures.<sup>109</sup> In keeping with the restraint principle a number of procedures of a "medical" nature are absolutely prohibited under the scheme because they constitute inherently objectionable methods of criminal investigation due to the intimate nature of the intrusion contemplated.<sup>110</sup>

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107. See also Report 23 at 11-12 and 14. The Commission's proposals exhibit fidelity to the restraint principle in that they limit the ability of a police officer to question a suspect with regard to any offence unless the person is first given a warning as to his right to remain silent and to contact a lawyer. Of particular importance in this area is the clarification of the definition of who is a "suspect." Unless the individual is characterised as a suspect, compliance with procedural rules may not be required since it may be argued that the individual under interrogation does not enjoy a status protected or governed by the rules. The threshold for the application of the Commission's proposed rules is belief that a person has committed an offence. Thus, the proposed rules apply to instances where the officer has the quantum of suspicion that would justify an arrest of the suspect, regardless of whether or not an arrest is made.

108. Report 25 at 42-43, Recommendations 9-12. The police must tell the suspect the reason the procedure is being employed and whether he or she is required by law to submit. In cases where consent is required the subject must be told the nature and purposes of the proposed procedure; whether there are any significant risks to health or safety; that he or she may consult with counsel before submitting; and that consent may be refused or withdrawn at any time. In addition, to provide maximum protection for the privacy and health of the subject the scheme requires that the procedure be conducted with the utmost privacy having regard to the nature of the procedure and that the procedure be administered by a qualified person. An attempt must be made to ensure minimum discomfort in the conduct of any investigative procedure in respect of the person.

109. Indeed, in several instances the Commission advocates explicitly conferring the power to carry out investigative procedures which at present possess a vague or questionable legal status. *Ibid.*, see Recommendation 4 for a complete listing of relevant investigative procedures.

110. *Ibid.* at 36-37, Recommendation 2. The Commission's proposals prohibit absolutely the administration of any substance (such as "truth drugs," emetics or enemas); any surgical procedure that involves the puncturing of human skin or tissue such as the surgical removal of bullets, (but not including the taking of blood samples in narrowly defined circumstances from suspected impaired drivers); any procedure designed to remove the contents of the subject's stomach (such as stomach pumping or gastric lavage); and any procedure designed to produce a pictorial representation of any internal part of the subject that is not exposed to view (such as X-ray, ultrasound, or other such potentially dangerous procedures having a similar purpose).

Some unusual manifestations of the restraint principle are to be found in our proposals concerning public and media access to the criminal process.<sup>111</sup> In advocating a prohibition on automatic publication bans, we sought to restrain the arbitrary power of a party litigant to curtail the right of the media to report upon events at a bail hearing or preliminary inquiry in the absence of a demonstration of the necessity for such a restriction upon the openness of the proceedings.<sup>112</sup> Similarly, in the same paper we sought to curb the judicial power to exclude the public from criminal proceedings on the loose ground of protection of public morals.<sup>113</sup> Both examples demonstrate that the principle of restraint is not confined in operation to the exercise of police authority.

## 5. Accountability

Accountability would be a chimera if those exercising substantial procedural power or discretionary authority were not answerable for its use. The maxim “where there is a right there is a remedy” is no mere slogan.

Indeed, our laws of criminal procedure have long contained mechanisms for responding to breaches of procedural requirements. While these provisions are of a remedial nature they have not always been labelled or regarded as remedies. The granting of an adjournment where a party is taken by surprise is clearly a remedy to the unsuspecting side. The provision of particulars where a pleading discloses insufficient details provides another ready example. So too, with those provisions in Part XXIV of the current *Code* which allow for an order of costs to be made in summary conviction proceedings. Remedies are not some new constitutional innovation. Rather they are part and parcel of the general statutory law of criminal procedure and are to be found in good measure within the common law as well. (Witness, for example, the remedy of exclusion under the law of confessions.)

The Commission has made recommendations concerning the enforcement of various procedural schemes such as *Electronic Surveillance* (Working Paper 47), and investigative powers such as *Questioning Suspects* (Report 23) or *Obtaining Forensic Evidence* (Report 25). The Commission, in a forthcoming Working Paper on *Remedies in Criminal Proceedings*, will provide a more general treatment of the subject of remedies to assist in the enforcement of its proposed rules.

The proposed scheme will attempt to promote compliance with the rules, and where this is not possible, will attempt to restore the parties to the positions they occupied prior to the violation of the rules. The *Remedies* Working Paper proposes that a residual rule should be enacted in order to close any gaps in the system that may remain if the other more specific remedy sections are inapplicable. Also, where judicial

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111. See LRCC, *Public and Media Access to the Criminal Process* [Working Paper 56] (Ottawa: LRCC, 1987) [hereinafter Working Paper 56].

112. *Ibid.* at 45, Recommendation 3.

113. *Ibid.* at 46, Recommendation 4.

balancing of competing factors is required when determining whether the granting of a remedy is appropriate, the proposals cautiously attempt to set the parameters of the discretion or the appropriate tests to be applied. In essence the Working Paper seeks to establish an accountability mechanism and framework for the enforcement of the Commission's proposed rules of criminal procedure.

Perhaps the most well-known and controversial accountability device within our law is the remedy of exclusion of evidence. Our belief, as expressed in a number of Working Papers and Reports, has been that the exclusion of evidence is an exceptional, occasionally appropriate mechanism for enforcing procedural rules. One effective way to supervise the manner of acquiring evidence is to threaten the denial of its use if the evidence is obtained in contravention of procedural standards.

Exclusion of evidence is one of the remedies which we have provided for breaches of our rules governing electronic surveillance. A number of other mechanisms have also been suggested in Working Paper 47 in order to enhance accountability. However, true accountability is difficult to achieve when the power or authority that is conferred is exercised at a secret or *sub rosa* level, as is the case in this area of the law.

One of the twin purposes for which electronic surveillance legislation was enacted in Canada was to protect the privacy of individuals.<sup>114</sup> Therefore offences were created prohibiting the interception of private communications, the disclosure of private communications and the possession of equipment for the purpose of intercepting private communications. At the same time the case had also been demonstrated for allowing the use of electronic surveillance for a second, complementary purpose — the effective investigation of crime by the police.<sup>115</sup> Thus, a scheme for judicial authorization of interceptions was also enacted.

The Commission's study of electronic surveillance (Working Paper 47) seriously questions whether the present legislation actually protects the individual's legitimate expectations of privacy.

Wiretapping and other forms of electronic eavesdropping investigation were always intended to be of an exceptional nature. Since the enactment of Part IV.1 of the *Code*, and particularly since the enactment of the 1977 amendments, concerns have been voiced that electronic eavesdropping has been used with far greater frequency than was originally intended and with far fewer restrictions than was originally envisaged.

The need for enhanced openness and accountability in the electronic surveillance process has become increasingly apparent over the years. Thus, from the standpoint of reform, the Commission approached several of the provisions of the legislation by questioning the justification for secrecy and confidentiality which they entail. By opening up the system and providing judges with necessary direction, information and supervisory powers, and by defining more precisely the rights and duties of the various

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114. *R. v. Welsh and Iannuzzi (No. 6)* (1977), 32 C.C.C. (2d) 363 at 369 (Ont. C.A.).

115. *Ibid.*

participants in the process it was hoped that much of the present suspicion and distrust would be eliminated and that the process as a whole would manifest a greater degree of accountability.<sup>116</sup> Since more information, and hence more accuracy, would be brought into the decision-making process, the ability to supervise that process would be augmented and the privacy of individuals would be better safeguarded.

Open processes generally are regarded as guarantors of responsibility in the exercise of official authority. A number of the Commission's publications reflect this view. Our Working Paper 56, for example, contains numerous recommendations that are designed to promote access to the process and provide channels for obtaining information about it.

The Working Paper 54 proposes that the *Code* should, in general, reflect an orientation (one characterized as a "presumption") in favour of openness. From this flows the belief that all judicial powers should be exercised in public and public access to court documents relating to those proceedings should be allowed unless specifically limited, in defined circumstances.

The *Code* is presently littered with a plethora of bans or limits on the public's ability to attend criminal proceeding or gain access to documents relevant to those proceedings. The policies underlying such restrictions or limitations are unclear and often divergent. Working Paper 56 analyses these restrictions on individual and press freedom as part of an endeavour to rationalize, and where necessary, reform them. A specific example, pertinent to the principle of accountability, is furnished by our recommendations concerning search warrants.

In *MacIntyre*,<sup>117</sup> the Supreme Court of Canada held that search warrant application hearings may be held *in camera* so as to avoid destroying the efficacy of the warrant as an investigatory tool. Search warrants would lose much of their utility if the prospective targets of the search were to know, in advance, that a search of them or their premises was imminent. Our proposals correspond to the position developed by the Supreme Court in *MacIntyre*.

More problematic than the question of access to search warrant hearings is access to documents and the publication or broadcast of their contents. Our Working Paper 56 recommends that warrants and supporting informations generally be examinable so as to encourage greater adherence to legal standards in the authorization of an intrusive

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116. Greater accountability is manifest in a number of the proposals in Working Paper 47. Among these are: 1. Preventing fishing expeditions (Rec. 26-30); 2. Controlling surreptitious entry onto private premises to install or remove devices (Rec. 31-39); 3. Giving more information to targets of interceptions (Rec. 69-70); 4. Decreasing secrecy and enhancing reviewability (Rec. 49-50).

117. *A.-G. N.S. v. MacIntyre* (1982), [1982] 1 S.C.R. 175 [hereinafter *MacIntyre*].

power.<sup>118</sup> Such openness carries with it the prospect that increased public access will actually motivate some peace officers to omit information from their warrant applications which might otherwise be presented. However, we concluded that greater openness would raise the overall level of accountability and hence improve compliance with procedural requirements. It was thought that the loss in a small number of cases of what may be unnecessary detail was not too high a price to pay.

Public access to and publication of a warrant and supporting information after the warrant has been executed is allowed under our scheme even if nothing has been found in the course of the search.<sup>119</sup> As recognized in *MacIntyre*, after the warrant has been executed the interest in effective law enforcement clearly begins to diminish in relation to the public's right to know.

Our scheme permits the court issuing a warrant to obscure matters in the warrant documents, but only in certain narrowly defined circumstances. The issuing court is to possess an ability to delete information which is particularly sensitive, rather than deny access to all of the documents involved. In particular we allow for the obscuring of information which, if disclosed, would reveal the existence of wiretapping activities. Also, the name or characteristics of an informer may be obscured where the person's safety would be threatened if that information were disclosed. This is consistent with the common-law protection afforded police informers.

Finally, we maximize accountability by allowing an issuing justice to deny public access to warrant documents only where disclosure would result in the frustration of an on-going police investigation or a threat to the life or safety of any person. Further, the power to deny access may only be used if the obscuring of matters contained in the document would not be effective in the circumstances.<sup>120</sup>

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118. In *MacIntyre*, the Court was guided by the principle that judicial acts and information relating to those acts presumptively should be accessible and publishable. Our study of search warrant practices conducted for *Police Powers — Search and Seizure in Criminal Law Enforcement* [Working Paper 30] (Ottawa: Minister of Supply and Services Canada, 1983) [hereinafter Working Paper 30] revealed that over fifty per cent of the warrants examined were invalid for failure to properly set out necessary information.

119. After *MacIntyre* was delivered a *Code* provision restricting, upon execution of a search, publication of the contents of warrants and supporting informations was enacted. This provision (s. 443.2) generated considerable controversy and, in some cases, deliberate flouting of the restriction. Ultimately, following certain lower court decisions declaring the *Code* publication ban to be offensive to section 2(b) of the *Charter* (See, *Cdn Newspapers Co. v. (Can. A.-G.) Can.* (1986), 53 C.R. (3d) 203 (Ont. H.C.); *Canadian Newspapers Co. Ltd. v. A.-G. Canada* (1986), 28 C.C.C. (3d) 379 (Man. Q.B.)) the Minister of Justice declared that he would treat the provision as inoperative. As a result of those developments we revisited the issue in our Working Paper 56.

120. However, in order to ensure both accountability and fairness in the administration of justice we have recommended permitting a court to review a decision to obscure matters. This would allow the revelation of information that had been previously obscured if it were necessary in order to make full answer and defence.

## 6. Participation

The principle that rules of procedure should, where feasible, provide for the meaningful participation of citizens in processes affecting them finds expression in Working Paper 52. As noted elsewhere, we concluded that an expanded role for the citizen in private prosecutions should be expressly recognized through the direct incorporation of the formal aspects of that role into the *Code's* rules of criminal procedure. Thus the *Code* should state that the private prosecutor (subject to the overriding right of the Attorney General to supervise all prosecutions), enjoys the same rights as the public prosecutor in carrying his case forward, including the same rights of appeal.<sup>121</sup>

Private prosecutions are typically brought in so-called “minor assault” situations — often where domestic discord is a factor or where neighbours come into conflict with one another. A busy prosecutor may decline to pursue a case for many reasons which a complainant may not wish to accept. Although the public prosecutor may choose not to prosecute these cases, he or she may elect not to intervene to block a privately laid charge if a justice of the peace is prepared to issue process in relation to it. If the right to pursue the matter privately did not exist, some individuals who have *in fact* suffered a wrong would be left without recourse within the criminal justice system.<sup>122</sup>

Our recommendations should be seen as an attempt to reinforce the integrity of basic democratic values. It is of fundamental importance that the citizen or victim not feel shut out of the process. The proposals in Working Paper 52 if implemented would provide, where merited, real opportunities for the citizen to seek justice or to redress a harm that has been suffered.

The principle of participation is also central to the Commission's Working Paper 56. As noted, a presumption of openness in the criminal process is the central axis around which the Commission's proposals have been fashioned.

Openness as a characteristic of society connotes the ability of individuals to learn about the activity of their government, communicate to others what they have learned, and form opinions according to the information that is available. The greater the openness of government and government institutions such as the courts, the greater will be the possibilities for the participation of citizens in the democratic process. Thus,

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121. At present, the private prosecutor may conduct without restriction the trial of any summary conviction offence. However, in order to prosecute through to trial the more serious indictable offences he or she must first obtain a written order of a judge of the court allowing an indictment to be preferred. Also, a private prosecutor has no standing in indictable appeals even though possessing the ability to appeal in summary conviction proceedings.

122. While these proposals stress the principle of participation they do not significantly trench upon the power of the Attorney General to intervene in any prosecution either to carry a case forward, or, to stay the proceedings or withdraw the charges. Neither do they fetter the right of the Attorney General to prefer an indictment directly in the event of a discharge following a preliminary inquiry or in the absence of a preliminary inquiry.

openness in government lies at the heart of the democratic society. Public and media access to the criminal process is one aspect of openness in government generally.

Our approach in Working Paper 56 involved our examining of the various *Code* limitations on the freedom to communicate information about the criminal process in an effort to determine whether they were desirable, consistent and effective. To promote the principle of participation, Working Paper 56 advocates that the *Code* provide, subject to specific limitations, that all criminal proceedings involving the exercise of judicial powers should be conducted in public and that public access to the court documents relating to those proceedings be allowed. Also, all communication about such proceedings should be permitted.<sup>123</sup>

Working Paper 56 goes on to propose the establishment of a principled hierarchy of limitations governing the resort to restrictions on openness. The initial presumption is one of openness. Where complete openness is not possible or desirable, resort might then be had to restrictions on publication. Ultimately, and here only in rare or exceptional cases, if restricting publication proves inadequate to protect the interest involved, general orders of exclusion from the process may be contemplated.

Finally, in order to facilitate access and promote openness the study concludes that electronic media coverage should be permitted in relation to appeals in criminal cases and the use of audio recorders should be permitted in criminal proceedings as a substitute for, or, in addition to, handwritten notes. Complementary to this a national experiment with electronic media coverage of criminal trials should be conducted with a view to studying comprehensively the impact of the presence of video, and still cameras and audio recorders on witnesses, counsel, judges and jurors.

## 7. Protection

Protection is a shorthand reference to the belief that criminal procedure should enhance the protection of society and that the protection and maintenance of basic or fundamental values is a primary concern of the criminal law. Procedural law protects society by regulating the manner in which law is enforced, order is maintained, crime is investigated and the public is served. Obviously, one of the main instruments by which the principle is given expression is the police. Foremost among the powers which are accorded to the police is the power of arrest.

123. Working Paper 56 at 45-46 and 93-94, Recommendations 3 and 5. Other proposals designed to encourage participation through improved access are the following:

1. No automatic publication bans should appear in the *Code*.
2. Where a provision in the *Code* allows a court to limit public access in its discretion, the provision should be drafted as narrowly as possible to give recognition to the specific superordinate interests that it seeks to protect, while intruding as little as possible on the openness of the criminal process. Also where a court has a discretion to limit access it should exercise its powers only where necessary to protect the specific superordinate interests at stake, and in doing so, should confine its order to the duration and scope required by the circumstances.
3. An order excluding the public or imposing a publication ban should, wherever possible, be based on clear evidence of harm and accompanied by reasons.

In Report 29 a number of proposals are advanced which reflect the influence of the principle of protection. Coincidentally, since the practice of restraint is the opposite side of the coin of the exercise of power, the proposals also reflect the influence of the principle of restraint.

An especially difficult balance to strike involves weighing the interest in preserving the sanctity and inviolability of the family dwelling against the necessity to secure the arrest of a fleeing, possibly dangerous, offender. Report 29 (at 53, Rec. 8) recommends that a police officer need not obtain a warrant for entry into a private dwelling if the person to be arrested has been or is engaged in a course of conduct that is likely to endanger life. Also, a peace officer should be allowed to dispense with the requirements to announce his presence and demand to enter where, in so doing, a risk to the peace officer or another person would be created. Incontestably, the need to preserve a person's life justifies such a departure from the usual rules.

Other proposals found in Report 29 also serve a protective function. The Report proposes continuing and in some cases extending the right of a private citizen to arrest, without warrant, a person who, on reasonable grounds it is believed is committing or has just committed a criminal offence; or, a person whom he or she has been told by a peace officer to arrest. This is largely a restatement of the current law. New however, is the proposal to create a rule to govern situations where the police are present on the scene and decide not to make an arrest. In such instances private citizens should be governed by the judgement of trained police officers. The proposed rule is founded on the belief that the dangers inherent in citizen self-help should be controlled where possible. In this way the potential for unnecessary violence or injury can be reduced.<sup>124</sup>

Our recommendations in Report 25 should also aid in the general task of safeguarding society. They potentially enhance the quality of police investigations by introducing a greater measure of forensic certainty into the process. The proposals, if implemented, would expand the arsenal of police investigative powers but are designed to do so only in carefully delimited circumstances.

A final illustration concerns our work on public and media access to the criminal process. Although freedom of expression and open trials are well established notions in Canadian criminal law, there also exist other interests which at discrete points within the criminal process deserve protection, even at the expense of these basic concerns. It will sometimes be of paramount importance to protect the interests of innocent participants in the criminal process such as witnesses or victims of crime. Also, it may, on occasion, serve the broader public interest to protect individuals who are possibly not quite so "innocent." (There is, for example, a long-standing policy in the law to protect the identity of police informers. In addition, it may be necessary to shield the

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124. Report 29 at 25, Recommendation 3. How this recommendation might operate was demonstrated recently in a situation where public demonstrators attempted to arrest women entering the Morgentaler clinic in Toronto. The demonstrators purported to make arrests in the presence of police officers who dissuaded them in their efforts. The officers had concluded that arrests were not legally justified in the circumstances. The Commission proposes that an express provision should declare that where trained officers are present their decisions should prevail.



identity of participants, some of whom may be quite unsavory and incorrigible, simply because revealing the identity of these individuals will pose a danger to life or safety.) Thus, while in our Working Paper 56 we seek to establish a “presumption of openness” insofar as the criminal process is concerned we also advocate the imposition of significant restrictions where necessary to protect superordinate social values if they come into conflict with the general rule.

In the criminal process when we restrict openness and freedom of expression the resulting harm, although difficult to measure, is nevertheless real: information about a criminal proceeding may never reach the public; some salient lesson about our legal system may go unlearned; or, the actions of a public official may go unobserved. On the other hand, when innocent individuals are exposed to the glare of media attention, it is important that we also recognize and protect against the potential psychological pain or difficulty which may be the result.

Thus, despite a general presumption in favour of the openness of criminal proceedings, the Commission in Working Paper 56 has recommended that after a charge is laid no one may publish information serving to identify a confidential informant and, upon application, a court may prohibit publication of information serving to identify a victim or witness where a risk to that person’s safety exists.<sup>125</sup> Also, in certain defined circumstances a general, essentially protective power to exclude the public is contemplated.<sup>126</sup>

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125. Working Paper 56 at 50, Recommendation 7. The Commission also contemplates the use of general publication bans in a limited number of circumstances. The Working Paper recommends that after a charge has been laid in relation to a crime mentioned in section 246.4 of the *Code* no one may publish or broadcast the name of the accused or other information, which serves to identify a complainant or victim of crime (unless that person consents) or a child or young person who is a victim of or a witness in respect of the crime. These provisions, all of which are designed to further the principle of protection, have been tempered by a recommendation that permits a court to terminate a publication ban upon application by the accused where the accused’s right to full answer and defence would be jeopardized by the ban.

126. See *ibid.* at 47-48, Recommendation 6 for a full listing of the exclusion orders proposed. For example, the Commission has proposed that the court possess a power to exclude young persons in attendance at a criminal proceeding when any information is being presented to the court, the knowledge of which would be seriously injurious or seriously prejudicial to them.