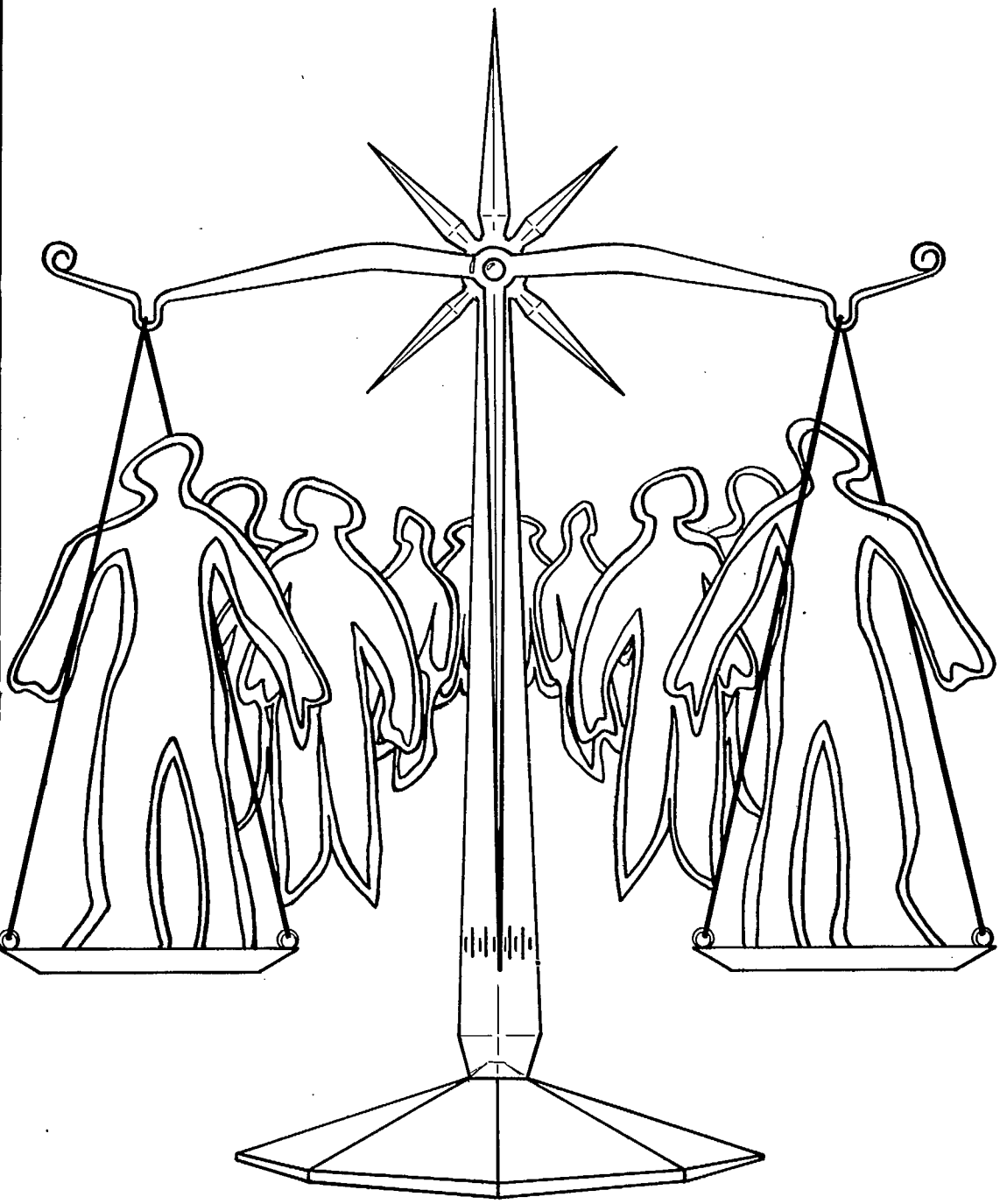
Law Reform Commission of Canada

Commission de réforme du droit du Canada

REPORT

OUR CRIMINAL LAW



The more laws, the more offenders

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Commission de réforme du droit du Canada

March 1976

The Honourable S. R. Basford,
Minister of Justice,
Ottawa, Ontario.

Dear Mr. Minister:

In accordance with the provisions of Section 16 of the *Law Reform Commission Act,* we have the honour to submit herewith the report with our recommendations on the studies undertaken by the Commission on Principles of Criminal Law.

Yours respectfully,

E. Patrick Hartt
Chairman

Antonio Lamer
Vice-Chairman

J. W. Mohr
Commissioner

G. V. La Forest
Commissioner

REPORT

OUR CRIMINAL LAW

Commission

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Table of Contents

I. Coping with Crime

We live today in anxious times. Inflation, unemployment, strikes, pollution, crime—these trouble every free society. But crime falls in a special category. Crime threatens individual security, frightens us personally and makes us fearful for our own survival. Such fear can lead to excess reaction, oppression and injustice. Societies that want freedom, justice and security face few greater challenges than that of how to cope with crime.

Coping with crime is a two-sided problem for a just society. Crime uncoped with is unjust: to the victim, to potential victims and to all of us. Crime wrongly coped with is also unjust: criminal law—the state against the individual—is always on the cutting edge of the abuse of power. Between these two extremes justice must keep a balance.

Balance means rationality. To get to grips with crime rationally, we have to keep our heads, not hit out blindly, and not mistake activity for action. We must avoid being mislead by fears, frustrations or false expectations, however natural they may be.

Fear of crime is natural. Of all the things that frighten us—accidents, diseases, natural disasters—crime has a particular place. It wears a human face. Other things happen, crime is done deliberately. Hijacking, bombing, kidnapping and so on do not just occur, they are planned. And planned increasingly perhaps: at any rate there is a growing sense in Canada and many other countries of crisis about crime. Small wonder crime brings fear.

Crime brings frustration too. Common sense suggests that stopping crime is simple, and yet it seems to keep on rising no matter what we do. Criminology has still not discovered the cause or cure. All it has found is that our present cures work badly. So we end up frustrated with our criminal law for not delivering the goods and not satisfying our expectations.

Expectations are maybe to blame. We expect the law to protect us and reduce the volume of crime, yet, as we know, the vast majority of crimes are not cleared up. For every crime prosecuted there may be ten reported and forty unreported. Reducing this 'dark number' of crime would need more police, better equipment, greater willingness to report incidents and to help the authorities, and also a very different criminal law. The kind of law we have can never guarantee protection—in general it only moves in *after* the event and bolts the door after the horse has escaped. Our criminal law looks to the past. Protection comes from looking to the future.

II. Trying to Control the Future

Looking to the future—admittedly our law does try to do this. It tries by means of sentence and punishment. It seeks to deter potential criminals and rehabilitate the actual offender.

Unfortunately success is doubtful. Deterrence and reform are not wholly effective. Take deterrence. Some criminals are irrationally undeterrable, some just like to gamble, and some consider crime a worthwhile risk because the chance of being caught is slight. Above all, our society has too much respect for freedom and humanity to countenance measures stern enough to make deterrence really bite. Or take reform. It is hard to rehabilitate offenders without being sure what it is to *habilitate* them. And once again our respect for freedom and humanity rules out mind-altering techniques that operate mechanically and by clockwork-orange methods. In short, the very nature of our society prevents our criminal law from fully organizing the future.

Organizing the future though, is not the major function of the criminal law. It has a different, more important role. After all, even if the nature of our free society limits criminal law's impact on crime, we still need criminal law. Even if we cannot control the future, this does not mean we must ignore the present and the past. We still need to do something about wrongful acts: to register our social disapproval, to publicly denounce them and to re-affirm the values violated by them. Criminal law is not geared only to the future; it also serves to throw light on the present—by underlining crucial social values.

III. Criminal Law and Values

Criminal law, then, primarily has to do with values. Naturally, for crime itself is nothing more nor less than conduct seriously contrary to our values. Crimes are acts not only punishable by law but also *meriting* punishment. As Fitzjames Stephen said, the ordinary citizen views crime as an act "forbidden by law and revolting to the moral sentiments of society". Crimes are not just forbidden, they are also wrong.

As such—as wrongful acts—they demand response. Suppose a murder is committed in our midst: we must respond as human beings and as social creatures. First, "no man is an island" and every person's death diminishes all other persons: to do nothing and ignore this fact is to be less than human. Second, murder tramples on our society's basic values about human life: to do nothing is tantamount to condoning it and saying murder is all right. To be fully human and to hold certain values means responding when they are violated. Such violation requires public condemnation, and this is preeminently the job of criminal law.

This job—condemning crime—is not an end in itself. It is part of the larger aim of producing a society fit to live in. Such a society is less one where people are too frightened to commit crimes than one where people have too much respect for one another to commit them. Fostering this kind of personal respect is a major aim of parents, teachers, churches, and all other socializing agents. One such agent, though far less important than the others, is the criminal law. In its own way the criminal law reenforces lessons about our

social values, instills respect for them and expresses disapproval for their violation. This—what some call "general deterrence"—is the moral, educative role of criminal law.

IV. Criminal Law Aspirations

What kind of criminal law, then, should we have? What values should it serve to underline? How far should criminal law be used to underline them? In short, what sort of society do we want to live in?

Criminal law reform is, after all, part of society's general reform. But only one small part, for society's reform means changing far more things than just the criminal law, and many of these changes are not necessarily best produced by using criminal law at all. In itself criminal law never brings about the good society, it just removes some of the more obvious impediments to it and helps provide the framework within which that society can create itself. Criminal law has limited aspirations.

What are these aspirations? Our own particular brand of criminal law in Canada has three major thrusts: towards humanity, freedom and justice. Each thrust works in two opposite directions—both for and against the individual citizen.

1. Humanity

Our criminal law, like any decent law, aims towards humanity. The sort of things prohibited—acts of violence, dishonesty and so on—are acts violating common sense standards of humanity. Murder, rape, robbery and so on conflict with humane and civilized

requirements of mutual respect. But these same standards and requirements apply to the authorities themselves. If criminal law sets limits to what we can do to one another, it also sets limits to what the authorities can do to suspects and to criminals. They cannot for instance torture, maim or blind offenders. More relevant perhaps today, they cannot use surgical or psychological techniques to stop people being criminals. Our criminal law still leaves it to the individual to keep the law and stay out of trouble or else to break the law and pay the penalty. In this it treats him as a person rather than a thing—a human being to be persuaded, not a robot to be reprogrammed. And this is a dictate of humanity.

2. Freedom

Next our criminal law aims at freedom. But freedom comes from two different directions. One is the *special* part of criminal law, consisting of all the different prohibitions that manifest social disapproval of the acts prohibited and aim to keep society free of them. But since all these prohibitions also restrict individual freedom, this restriction is itself kept in check by the *general* part of criminal law and in particular by two common law principles—the presumption of innocence and the principle of non-criminality.

First, the accused is to be presumed innocent. He does not have to prove his innocence. Instead the prosecution has to prove his guilt. Therefore, unless the authorities think they have sufficient evidence against a person, he will stay free of prosecution.

Second, there is a general presumption that an act is not a crime. This springs from the very nature of our common law. The reason is that common law is basically a law of remedies. If I wrong you, you have a remedy against me—to sue or prosecute. Conversely, unless the law provides a remedy, the act is not a legal wrong. At common law then nothing is a crime unless the law specifically says so. Indeed in Canada this has been written into our Criminal Code. In general no one needs to prove his right to do an act. Unless the law forbids it, he is free to do it.

3. Justice

Finally, our criminal law aims at justice. Justice is a large and complex notion. In criminal law it means roughly three different things: (1) that guilt, innocence and sentence should be fairly determined according to the available evidence; (2) that punishment should be appropriate to the offence and the offender; and (3) that like cases should be treated alike and different cases differently.

One specially important aspect of justice is to be found in the doctrine of criminal equality. This doctrine says that a crime is a crime no matter who commits it. It is a crime for a private individual to lay hands on a police officer; it is equally a crime for an officer to lay hands on a citizen, unless the law specifically allows him to. Again, it is a crime for one man to kill another; it is equally a crime for the authorities to kill the killer, unless the law specifically allows this penalty. Under Canadian criminal law, then, all of us are equal unless the law specifically says otherwise.

V. Criminal Law and Reality

Such are the aspirations of the criminal law. Reality is different.

First, the principle of humanity. In this regard theory and practice show a twofold diversion. For one thing there is the matter of the regulatory offence. For another there is the operation of the criminal justice system.

Take first the regulatory offence. In principle the criminal law's concern is with seriously wrongful acts violating common standards of decency and humanity. In practice only a minority of criminal offences fall under this heading. The majority, which total more than 20,000, are not necessarily wrong in themselves but prohibited for expediency. Such acts have to do with commerce, trade, industry and other matters which must be regulated in the general interest of society; and criminal prohibition is a well-tried and useful method of regulation. The regulatory offence, therefore, is here to stay. Nor have we any objection to it. What we do object to is diluting criminal law's basic message by jumbling together wrongful acts and acts merely prohibited for convenience. Once treat the regulatory sector as seriously as the Criminal Code, and we may end up thinking real crimes no more important than mere regulatory offences. The two must be distinguished, as we recommend later in this report.

Next, take the operation of the criminal justice system. In theory the law aims to promote humanity. In practice it is frequently itself inhuman. Canada, it has been shown, is one of the

harshest Western countries when it comes to use of prison sentences. Many of the terms imposed are far too long, half the people in prison should never be there, and so many are in gaol that those few needing real care and attention cannot get it. Indeed the whole system resembles a vast machine sucking people in one end, spewing them out the other and then sucking them back in again—a self-generating mechanism, certainly not a human process.

Next, the principle of freedom. In theory, one aspect of this freedom is that no act is a crime unless the law specifically says so. In practice this is vastly weakened by the sheer volume of the criminal law: 700 Criminal Code sections, 20,000 federal offences, and 20,000 in provincial law not to mention the welter of municipal laws. No one can possibly know all these sections and offences. Yet since ignorance of law is no excuse, the citizen can never be sure he is not breaking the law. Worse still, 70% of federal offences are offences of strict liability and need no proof of fault; prove the act and conviction follows automatically. In fact the outcome often depends simply on whether or not there is a prosecution—in short on administrative discretion.

Or take the presumption of innocence. Again, in theory the prosecution must prove guilt. In reality the defendant often fights under a handicap—appearances, his clothes, his way of speaking, his very presence in the dock, all tell against him.

Finally, the principle of justice. Here again reality falls short of aspiration. In theory crimes are crimes and punished equally no matter who commits them. In practice the penalty often depends, not on the nature of the crime, but on the person who commits it. Our prison population, for example, contains a quite unrepresentative proportion of poor, of disadvantaged and of native offenders. The richer you are, the better your chance of getting away with something. Is it that rich men make the laws and so what rich men do is not a crime but simply shrewd business practice? Or is it that position and wealth protect the rich against intervention? Certainly more poor than rich are prosecuted even on a proportional reckoning. Or is it that those who can afford expensive lawyers have better hope of being acquitted? For all the respect we pay to justice and equality, we still have one law for the rich and another for the poor.

Worst of all, our picture of the criminal justice system bears little resemblance to reality. Supposedly it is a system designed to try defendants, assess their criminal liability on the evidence and determine the proper penalty in the light of all the circumstances; in real life trials are a comparative rarity, the vast majority of defendants plead guilty and the real work of the system takes place behind closed doors, between the crown attorney and the defendant's lawyer at the plea-bargaining table. Theoretically we demonstrate our public disapproval of certain types of conduct; in practice all we do is process an interminable series of recurring cases along the dreary assembly line of dime-store justice. Judges, crown attorneys, defence lawyers, police and all concerned in the operation of the system grow daily more disillusioned and discouraged. Small wonder many think our criminal law a hollow mockery.

VI. Reshaping Criminal Law

Our criminal law must be reshaped. For this we need three things: full awareness of the limits to the criminal law role, true understanding of the nature of that role and firm determination to make law play that role.

1. A Limited Role

No question but the role of criminal law is strictly limited. For one thing there are crimes that it can hardly touch. By no means all offences stem from wrongful preference of self-interest. Some arise from boredom, some from frustration, some maybe from a need for identity, and some from social injustice. In this last category fall some property offences, which are, in part at least, a product of the unjust distribution of property in our society: some cases of theft may well be criminal in a legal rather than a social sense. Such "crimes" call not for criminal law and punishment, but rather for some genuine social reform.

But even crimes outside this category, crimes which may be dealt with without reforming society itself, can only be partly dealt with by the criminal law. Transgressions of important values, family disputes and other conflicts arising from group living are all unfortunately natural and to be expected. Expecting them, however, we have to take precautions: we have to see that parents, families, schools, churches, local communities and all other socializing agen-

cies do their job of teaching and instilling fundamental values. Too often when these abandon their responsibilities, the cry is heard for law to do the task. The truth is, however, that theirs is the primary responsibility. Criminal law is but a last resort.

2. The Role of Criminal Law

Criminal law, then, comes in by way of last resort. As such, it provides, as argued earlier, a necessary response to wrongful behaviour. Not that the business of the criminal law is simply retribution. That notion is too complex morally and philosophically to provide a justification for the criminal law. Besides, making sin reap its own reward is no fit enterprise for mere mortal men and women. Like Blackstone we prefer to leave this to "the Supreme Being".

Nor is the business of the criminal law the enforcement of morality. Though wrong behaviour is the target, its wrongfulness or immorality is only a necessary condition, not a sufficient one. First, no one can *make* another person moral. The criminal law certainly cannot. Indeed the state and its legal institutions cannot really handle morality. Second, not all individual behaviour concerns the law. The state has no place in some activities of the nation. Its place concerns activities harmful to other individuals and to society itself.

Not that the function of the criminal law is to protect from harm in any direct and simple way. Much as we might like to think that it protects society through deterrence and rehabilitation, the efficacy of both these methods is problematical. Besides, desirable as it may be, mere protection from harm is not what we want of criminal law. After all, mere non-commission of crimes will not wholly satisfy. To satisfy, the non-commission must result from the view that crimes should not be committed. In short, we want a society where people think they *ought* not to be criminals.

In truth, the criminal law is fundamentally a *moral* system. It may be crude, it may have faults, it may be rough and ready, but basically it is a system of applied morality and justice. It serves to underline those values necessary, or else important, to society. When acts occur that seriously transgress essential values, like the sanctity of life, society must speak out and reaffirm those values. This is the true role of criminal law.

3. Letting Criminal Law Play its Role

Criminal law, then, serves to affirm fundamental values. In practice it does so to a poor and limited extent. If criminal law is ever to play its proper role in practice, we need to bring practice back into alignment with our underlying picture of the nature and function of that law. Theory and reality must match.

To bring about this match of theory and reality we have to realize the reason for the gulf between them. The reason can be found in one word: *overkill.* To start with, we have too much criminal law. Naïve belief that every problem can be solved by "having a law against it" has proliferated statutes, regulations and offences. Allied with an emphasis on deterrence and efficiency, this helped to spawn in Canada, as elsewhere, myriads of strict liability offences, where fault becomes irrelevant to guilt. In consequence we have too many acts qualifying as crimes, too many criminal charges, too many criminal cases in our courts, too many people in our prisons. Plea-bargaining—a travesty of justice—becomes essential. Too much law, too many offences and too many cases—they threaten the whole criminal justice system with collapse.

For this the remedy is *restraint.* We must keep regulatory offences in their proper place and confine "real" criminal law to its own proper job. That job is that of acting as an instrument of last resort for reaffirming values. Keep criminal law to this and there is some hope that it will do it well and that the criminal justice system will make a more useful contribution to society. Meanwhile this puts the prime duty for teaching values back where it belongs—on families, schools, churches and other socializing agencies and possibly on other legal processes. No need, then, when these have failed to shoulder their responsibilities, to fruitlessly pin all our hopes on criminal law. Law cannot do it all, nor should we ask it to.

What law can do, it must do well. But here restraint is vital. What counts is not the number of bodies processed through the system, but rather the nature of those processes. The key is quality, not quantity. To get this quality we have to use restraint: restraint in making criminal laws and criminal offences, in burdening people with criminal liability, in processing conflicts through the criminal courts, and finally in our use of our penalty of last resort, imprisonment. In all these matters more means worse and less means better.

VII. Restraint in Criminal Law

Restraint is vital to the health of criminal law. After all, every time we have a law against something, we do so at a cost. That cost is four-fold. Offenders pay through being prosecuted, convicted, punished. Other individuals pay through having their freedom restricted. We all pay through having to foot the bill for law enforcement. Finally society pays, in some cases, by wrongly thinking criminal law has solved the problem and by consequently not getting properly to grips with it. So criminal law must be confined to matters where this fourfold price is justified—in short to matters where criminal law can have some worthwhile impacts. And this affects the scope of criminal law, the meaning of guilt, the use of the trial process and the principles of sentencing.

1. Scope of Criminal Law

If criminal law's function is to reaffirm fundamental values, then it must concern itself with "real crimes" only and not with the plethora of "regulatory offences" found throughout our laws. Our Criminal Code should contain only such acts as are not only punishable but also *wrong*—acts contravening fundamental values. All other offences must remain outside the Code.

Nor is this classification a mere formality. It is not just calling some offences "crimes" and putting them in the Code and calling others "violations" or some other name and putting them somewhere else. Rather, it means dealing with the two under two distinct

régimes. Real crimes need a criminal régime, violations a non-criminal régime.

The criminal régime bears three basic features. First, conviction of a crime carries *stigma*: the offender is condemned for doing wrong. Second, the inquiry into guilt or innocence is a serious, solemn matter—the sort of trial quite out of place for minor offences and for violations. Third, only real crimes deserve the pre-eminently shameful punishment of imprisonment; prison should be excluded from the list of penalties prescribed for violations. Stigma, the possibility of solemn trial, imprisonment—these are the hallmarks of the criminal régime. They have to be reserved for real crimes.

But what should count as real crimes? A detailed answer would require much further work, in fact a detailed consideration of the content of the whole special part of criminal law. Here we can only indicate the way to go about determining that content.

To count as a real crime an act must be morally wrong. But this, as we said earlier, is but a necessary condition and not a sufficient one. Not all wrongful acts should qualify as real crimes. The real criminal law should be confined to wrongful acts seriously threatening and infringing fundamental social values. These values fall into two kinds. Some are essential generally to the very existence of society. Some are essential to the existence of our own particular society as it is.

Generally, essential values are those without which social life would be impossible. Society is after all a co-operative enterprise. Its members must have some give and take, must respect each other's needs and vulnerabilities, and must enjoy some mutual trust and reliance. In other words they must prefer order to anarchy, peace to violence, and honesty to deceit. All social life, therefore, commits its members to such values as the sanctity of life, the inviolability of the person, the virtue of truth and the necessity of order. Transgressions of these essential values are crimes of violence, crimes of fraud and crimes against peace, order and good government. These are the major candidates for inclusion in the code of real crimes.

Besides these generally essential values, most societies hold certain other values: for example, we in Canada set high value on individual liberty. This is by no means necessary for social life, for many societies have existed without it: and an unfree society is still a society. But not a society we would want to live in. For us no society would suffice without a measure of freedom, justice, tolerance, human dignity and equality. Transgressions of these important values are crimes like false imprisonment, interfering with justice, hate propaganda. These form the second category of real crimes.

One matter, though, deserves special mention—the value we set on private ownership. No society today allows unbridled free enterprise and private ownership. But no society today completely abolishes them. All societies compromise. Canada, like most Western countries, finds its compromise close to the private ownership end of the spectrum. Hence the place traditionally given in our criminal law to property offences. Our paradigm of crime is *theft.*

Sometimes, however, paradigms need changing. Pollution, depletion of resources, poverty, unemployment, inflation, race conflicts, terrorism, alienation—all these throw doubts on the adequacy of our older criminal law paradigm.

We must chart the proper place of property offences in our law. What is the interest to be protected—ownership, possession or personal space? What relevance has it to peace, order and good government? How should we weigh ownership as against human dignity? How should we rate property as compared with persons? These questions call for fundamental reappraisal, not only of our law but of the role of property in our society. Meanwhile we aim to do two things. Immediately we plan to improve and simplify the present law on property offences. Later we hope to initiate more general consideration of the basic problem and so foster debate across the country—in schools, colleges and universities, in churches, societies and community associations, in police forces, prisons and indeed all contexts where there is concern with social justice. That way we may eventually achieve a general consensus on ownership.

But ownership is a special problem. The general situation is that we in Canada share, as do most other societies, certain basic

values. And the proper scope of criminal law concerns contraventions of these basic values. All other offences, which we term "regulatory", must be excluded from the Criminal Code, should involve no stigma, and should not be punishable by imprisonment, except in two special circumstances. The first is where breach of a regulation amounts not only to a regulatory offence but also to a real crime: for example, deliberate and intentional breach of weights and measures regulations could, if done to serious extent, amount to fraud, and as such would merit imprisonment. The second is where a fine or other order imposed for breach of regulation is wilfully disregarded: here too the act goes beyond mere violation and becomes contumacy, and as such deserves imprisonment.

2. The Meaning of Guilt

Real crimes consist of seriously wrongful acts, and anyone sent to prison or otherwise punished for a real crime is being stigmatized for wrongdoing. Justice, therefore, demands that he should have *meant* to do the act forbidden: he must have acted purposely, recklessly or knowingly. Justice requires more than that he simply did the act. For real crimes, therefore, strict liability is out.

But strict liability is also out for regulatory offences. Here too, despite the absence of stigma and imprisonment, penalties are imposed for breach of law. In this case, though, the breach is a failure to comply with standards of care necessary for safety, health and welfare. In short, the regulatory offence is really one of negligence. As such, it should, we recommend, admit of a defence of due diligence. Not that we are insensitive to fears expressed by administrators responsible for enforcing regulatory legislation, but we believe the onus is on those in favour of retaining strict liability to make out a case for its retention—a case moreover based not on speculation but experience. Since such a case has not been made out, we recommend that regulatory offences should admit of a defence of due diligence to be established by the defendant. This should at least be tried as a temporary measure with a limited number of offences by way of experiment to allow the results to be monitored. Such a defence would allow him to exonerate himself by showing that he used all reasonable care. It would also call upon him to explain

himself and show what happened. This would be fair, expedient and practicable—fair to the morally blameless, expedient for the public scrutiny of standards of care, and practicable if recent legislation is our guide: many recent statutes now include due diligence defences. For these reasons strict liability should be excluded in principle not only from the criminal, but also from the regulatory régime.

Our criminal and regulatory law could of course be differently grounded. It could be based on some such concept as dangerousness. Those who inflict or threaten serious harm to others, whether purposely, recklessly, carelessly or simply through mistake or accident, could all be lumped together as dangerous, and investigated to find the causes and the remedies. No doubt this could work. Indeed in some ways it might work better than the criminal law we have. All the same, it means disregarding the distinctions usually drawn between intentional and unintentional, deliberate and accidental, careful and careless, and so on—distinctions at the heart of personal relations. "Even a dog", said Holmes, "can tell the difference between being kicked and being stumbled over". Our criminal law too sees this difference, and must keep on seeing it if it is to remain a law for persons. To do so it must harness itself to personal fault—the moral notion of guilt. And this must stay the basis of our criminal and regulatory law.

3. The Criminal Trial

If criminal law has to do with affirming fundamental values, the criminal trial is *par excellence* the place where this is done. The trial is not just directed at the offender in the dock nor even at potential offenders outside. On the contrary, it is a public demonstration to denounce the crime and re-affirm the values it infringed. It is, as Morton aptly showed, a sort of morality play for all of us. The trial is a kind of public theatre in the round.

As such, the solemn trial is appropriate only for real crimes. Whether X robbed Y or murdered Z is a paradigm case of something fit for this species of morality play. Whether A's weights were out of line or B's food incorrectly labelled needs careful public investigation but is clearly not the stuff for solemn public ritual. The full treatment, then, should be reserved for real crimes.

More than this, it should be reserved for serious instances of real crimes. Not all instances of the same real crime are equally serious. A thug's attack on an elderly woman is far worse than the face slap a girl may give her boyfriend, though both constitute assaults in law. Where actual harm is slight, where the offender and the victim live in some permanent relationship, and where the offence is symptomatic of a conflict resulting naturally from group living, here if possible we do better to divert the conflict outside the normal criminal process. For one thing, such cases are too slight to warrant the solemnity of trial. For another, they mostly need, if anything, not public re-affirmation of values, but rather a means of helping the parties find their way to a better, more positive, more fruitful relationship. This can best be done by diversionary methods on the lines of those tried in East York and now elsewhere in Canada.

If full trials in the traditional mode are excluded for regulatory offences and for lesser real crimes, there is more hope that real crimes can have real trials, where guilt and innocence depend on facts and evidence and not on deals and bargains struck between the parties and based on quite different factors. A decent criminal justice system has no place for such plea-bargains.

4. Principles of Sentencing

Remove all regulatory offences from the criminal régime, divert less serious real crimes outside the traditional system and there still remains a hard core of real crimes needing traditional trials and serious punishments. Here too we need restraint. For one thing, the cost of criminal law to the offender, the taxpayer and all of us—must always be kept as low as possible. For another, the danger with all punishments is simply that familiarity breeds contempt. The harsher the punishment, the slower we should be to use it. This applies especially to punishments of last resort.

The major punishment of last resort is prison. This is today the ultimate weapon of the criminal law. As such it must be used sparingly. We would restrict it to three kinds of cases: (1) for offenders too dangerous to leave at large; (2) for offenders for

which, as things are now, no other adequate denunciation presently exists: and (3) for offenders wilfully refusing to submit to other punishments. For these three cases prison is the penalty of last resort.

Restricting our use of imprisonment will allow more scope for other types of penalties. One penalty our system should use more extensively is the restitution order. To compel offenders to make restitution to their victims is one of the most fruitful types of punishment. It brings home to the offender the wrong he has done his victim, it meets the real needs of the victim himself, and it satisfies society's sense of justice and the desire to see that the offender is not profiting at the expense of his victim's suffering. Restitution has a vital place in any decent criminal justice system.

Equally vital is a second kind of reparation. Although one victim of a crime is the individual who is wronged, another victim is society whose values have been threatened and infringed. Society too has a claim to reparation—a claim not satisfied by "payment in the hard coinage of imprisonment". The claim is better met by more creative penalties like community service orders compelling the offender to do something positive to make up for the wrong he has done society.

Positive penalties like restitution and community service orders should be increasingly substituted for the negative and uncreative warehousing of prison.

VIII. Conclusion

We summarize our criminal law philosophy as follows:

Man is a social being who has to live in a society. Society means co-operation, a common life, a sharing of fundamental values. To hold a value sincerely, a person must react when it is violated. To share a fundamental value genuinely, society too must react publicly when it is violated, condemn the violation and take steps to reaffirm the value. One way of doing this is by the criminal law.

Criminal law operates at three different stages. At the law-making stage it denounces and prohibits certain actions. At the trial stage it condemns in solemn ritual those who commit them. And at the punishment stage it penalizes the offenders. This, not mere deterrence and rehabilitation, is what we get from criminal law—an indirect protection through bolstering our basic values.

But criminal law is not the only means of bolstering values. Nor is it necessarily always the best means. The fact is, criminal law is a blunt and costly instrument—blunt because it cannot have the human sensitivity of institutions like the family, the school, the church or the community, and costly since it imposes suffering, loss of liberty and great expense.

So criminal law must be an instrument of last resort. It must be used as little as possible. The message must not be diluted by overkill—too many laws and offences and charges and trials and prison sentences. Society's ultimate weapon must stay sheathed as

long as possible. The watchword is restraint—restraint applying to the scope of criminal law, to the meaning of criminal guilt, to the use of the criminal trial and to the criminal sentence.

1. Scope of Criminal Law

In re-affirming values criminal law denounces acts considered wrong. Accordingly it has to stick to really wrongful acts. It must not overextend itself and make crimes out of things most people reckon not really wrong or, if wrong, merely trivial. Only those acts thought seriously wrong by our society should count as crimes.

Not all such acts, however, should be crimes. Wrongfulness is a necessary, not a sufficient condition of criminality. Before an act should count as a crime, three further conditions must be fulfilled. First, it must cause harm—to other people, to society or, in special cases, to those needing to be protected from themselves. Second, it must cause harm that is serious both in nature and degree. And third, it must cause harm that is best dealt with through the mechanism of the criminal law. These conditions would confine the criminal law to crimes of violence, dishonesty and other offences traditionally in the centre of the stage. Any other offences, not really wrong but penally prohibited because this is the most convenient way of dealing with them, must stay outside the Criminal Code and qualify merely as quasi-crimes or violations.

2. Meaning of Guilt

In re-affirming values and denouncing crimes, criminal law stigmatizes criminal offenders. It condemns those guilty of wrongdoing. But guilt must rest on real culpability—the wrongdoer must act intentionally or recklessly, or at least negligently. Real criminal law concerns such wrongful acts; regulatory law is the proper place for carelessness and failure to attain requisite standards of diligence.

Unfortunately some real crimes and most regulatory offences rest on strict liability. Of these one can be guilty without intention, recklessness or negligence—in other words quite innocently and unawares. Such "innocent guilt" is unjust, unnecessary and inexpedient. It should in principle be excised from our law and, in the

regulatory sector, replaced by negligence which may be presumed against the defendant but may be rebutted by his making out a defence of due diligence.

In practice, though, we recognize that some people, especially administrators, may have misgivings and doubt whether regulatory law could work with this replacement. To meet this doubt, a limited experiment at least, allowing the due diligence defence for a temporary period, would serve to test its workability. Its workability too could be increased if courts were enabled to determine the truth of the defence with greater speed and informality. That way the discretion now exercised by administrators would be exercised instead by the courts. For such exercise appropriate rules and procedure should be developed.

3. The Criminal Trial

If criminal law is looked upon as primarily reaffirming basic values, this puts more emphasis on the criminal trial. The prime denunciation of acts violating such values comes, not from the Code or even from the offender's punishment, but from the trial itself. Not all offences, though, deserve such trials. Some are not serious enough. Others do not violate basic values.

Some offences are not serious enough. Though contravening basic values, they do so only to a minor extent and so are best dealt with outside the criminal trial. For these we urge more use of the diversionary option.

Other offences do not need the full criminal trial because they do not contravene basic values. For these regulatory offences a quicker, more streamlined, more informal arbitration is appropriate. Responsibility must be assessed, liability established and principles of justice, law and evidence observed, but this can all be done without the solemn ritual and awesome dignity of the traditional criminal trial.

4. Criminal Sentences

As an instrument of moral condemnation and stigmatization, criminal law naturally makes use of certain shameful types of pun-

ishment of which the most important is imprisonment. Regulatory law, which is not concerned with moral condemnation and stigmatization, has no place for imprisonment. Unfortunately 70% of regulatory offences are punishable by imprisonment. This must be changed: prison must in general be excluded from the regulatory sector. It also must be restricted in the real criminal law and only used where necessary—for offenders too dangerous to leave at large, too wilful to submit to other sanctions, or too wrongful to be adequately condemned by non-custodial sentences. In other cases courts should use more positive kinds of penalty.

IX. Implementation

Criminal law, then, is a blunt instrument and also one of last resort. As such it needs to be restricted to its proper target where it is most effective. We must use it with restraint.

Accordingly **we recommand** restraint in four different aspects. First, we should restrict the ambit of the criminal law, decriminalize where criminal prohibition is unnecessary, ineffective or inappropriate, and substitute more positive community-oriented approaches. Second, we should restrict the imputation of criminal responsibility, focus on real personal fault and, as far as practicable, abolish strict liability. Third, we should restrict our use of the full traditional criminal trial, keep the full solemn ritual for graver cases and divert less serious ones outside the ordinary system. Fourth, we should restrict the extent to which we make use of traditional punishments in general and of imprisonment in particular, so as to minimize suffering and expense and at the same time open the door to more creative and imaginative sentences. Prison is not in general an apt means of rehabilitation and half the people in jail should not be there. Jail has a place, however. There are unfortunately cases where rehabilitation is not our prime concern. Imprisonment should be restricted to such cases. **Our basic recommendation,** then, is that in all these four aspects—ambit, responsibility, procedure and sentencing—the watchword must be restraint.

Restraint can be brought about in various ways—partly by legislation, partly by changing practice in the system and partly by a general change in attitude. Such change in attitude and practice

can often take place without legislation. In our working papers on Diversion, Sentencing and Procedure we pointed out how much can be done at administrative and judicial levels to implement our recommendations on diversion. In our Report on Sentencing Guidelines we show how even without legislation courts can use a new approach to sentencing. And in our Pre-Trial Procedure Report we shall detail the possibility of restraint at an administrative level—police and other authorities can use more discretion and restraint in charging, arresting and prosecuting for offences. Much can be done, therefore, without the need for legislation.

The Need for Legislation

Ultimately, however, legislation will be necessary. It will be necessary for specifying new sentencing guidelines, for formalizing the diversionary procedure scheme, for abolishing strict liability, for restricting the ambit of the criminal law and finally for reorganizing the Criminal Code. The first two matters are dealt with elsewhere—in our Report on Sentencing Guidelines and in our future reports on Procedure. The last three matters are dealt with here.

1. Abolishing Strict Liability

Separate scrutiny of each particular offence in the Criminal Code, the federal statutes and the federal regulations would be a herculean task. Instead **we recommend** that a general section be incorporated in the general part of the Criminal Code. **We recommend** that it be drafted on the lines suggested in Working Paper 2, *The Meaning of Guilt* (p. 37) as follows:—

> (1) *every offence in the Criminal Code requires intent or recklessness unless such requirement is expressly excluded by the section creating the offence; and where such requirement is excluded the offence admits of a defence of due diligence;*
>
> (2) *every offence outside the Criminal Code admits of a defence of due diligence, and in the case of any such*

*offence for which intent or recklessness is not specifically required the onus of proof lies on the defendant to establish such defence.**

We stress here two points made earlier. First, this second recommendation might well be brought in after it had been tested for workability in relation to a number of specific offences. Second, determination of the truth or otherwise of the due diligence defence could well be established much more informally than is the case in the standard criminal trial.

2. Restricting the Ambit of the Criminal Law

We recommend that the Code should only prohibit acts generally considered seriously wrongful enough to warrant the intervention of the criminal law. Acts no longer so considered, acts whose wrongfulness is controversial and acts which are pure property offences need special consideration. All three types may eventually need legislation.

In addition to giving careful consideration to the above-mentioned three classes of offence, **we recommend** that in the future our lawmakers also exercise restraint in creating new offences. **We recommend** that this restraint be exercised both as regards "real" crimes and regulatory offences. As guidelines for the exercise of such restraint **we recommend** the following tests of criminality and regulatory offences.

(a) *Tests of Criminality*

To determine whether any act should be a real crime within the Criminal Code we should inquire:

- does the act seriously harm other people?
- does it in some other way so seriously contravene our fundamental values as to be harmful to society?
- are we confident that the enforcement measures necessary for using criminal law against the act will not themselves seriously contravene our fundamental values?

*The defendant would have to prove this on the preponderance or balance of probabilities: see our Code of Evidence (First Report to Parliament).

- given that we can answer "yes" to the above three questions, are we satisfied that criminal law can make a significant contribution in dealing with the problem?

Only if all four questions can be answered affirmatively should an act be prohibited as a criminal offence within the Criminal Code.

(b) *Tests of Regulatory Offences*

Many acts may fail to qualify according to the criminality tests but still present a problem. They may not in isolation cause serious harm or threaten basic values. All the same, their cumulative effect may be deleterious. Such acts may rightfully be discouraged—by education, by tax policies, by administrative measures or indeed by regulatory prohibition. To qualify as a regulatory offence an act should satisfy the following tests:

- is the act a potential source of harm to the community?
- are we satisfied that prohibition will not contravene our basic values regarding what the individual should be free to do?
- are we convinced that enforcing the regulatory prohibition will not do more harm than good? and
- are we sure that the regulatory prohibition will make a significant contribution in dealing with the problem?

Only if all four tests are satisfied should the act be made a regulatory offence. The tests are lighter than the tests of criminality because:

- little stigma is involved in conviction for a regulatory offence; and
- prison should not be in general a permissible penalty for such offences.

In the light of the above-mentioned tests and particularly the test of criminality **we recommend** that special attention be paid to the following three classes of crimes:

(a) *offences which most people do not consider wrong or sufficiently important to count as crime should be removed from the Code.*

An exhaustive list would be outside the scope of this Report. Here we merely suggest the following examples:

- placing bets for consideration (S.187);
- having a motor vehicle equipped with a smokescreen (S.239);
- pretending to practice witchcraft (S.323).

(b) *offences whose wrongfulness and seriousness today is controversial should be carefully reconsidered.*

In the light of present social attitudes, inquiry should be made whether they should be abolished or redefined or whether the law needs strengthening. Again, an exhaustive list would be out of place. We suggest the following examples:

- abortion,
- acts of indencency,
- bigamy and polygamy,
- conspiracy,
- drug offences,
- incest,
- obscenity and pornography,
- unlawful gaming, and
- wilful disobedience to statutes and court orders (SS. 115 and 116).

(c) *The law on property offences should be simplified and also reassessed in the light of a fundamental reappraisal of the role of property in society.* Such simplification this Commission has undertaken as part of its ongoing programme of criminal law reform. Reassessment is a more long-term matter the study of which is presently being considered.

3. Reorganizing the Criminal Code

Our criminal law suffers from at least four defects. It fails to differentiate between real crimes and mere regulatory offences. It descends into excessive detail. It uses a style and form of language that is inappropriate. And it is wedded to a Victorian philosophy which is now inadequate.

(a) *Real Crimes and Regulatory Offences*

In law there is a distinction between criminal offences and civil wrongs. The former are dealt with by the criminal law, the

latter by different branches of the civil law. The distinction between criminal and civil law is particularly important in Canada because of the constitutional provision reserving the creation of criminal law for the federal Parliament.

There is, however, another distinction to which we drew attention in Working Paper 2, *The Meaning of Guilt*. This is a distinction within the criminal law itself. It is the distinction between "real" crimes and mere regulatory offences. The difference between the two is well recognized by ordinary citizens, accepted formerly by criminal jurisprudence and based on logic and common sense. It should be recognized by law. **We therefore recommend** that the Criminal Code be pruned so as to contain only those acts generally considered seriously wrongful and that all other offences be excluded from the Code.

In addition **we recommend** that the distinction be further signalized by generally restricting the stigma of imprisonment to real crimes. **We therefore recommend** that *the Criminal Code should make it clear that no offence outside the Code may be punished by imprisonment. Where a regulatory offence is committed with such deliberate intent as to make the act a "real" crime and warrant imprisonment*—wilful non-compliance with certain income tax provisions, for example, could amount to fraud and merit jail—*prosecution should be brought for the relevant Code crime.* And where a person convicted of a regulatory offence refuses to comply with the sentence or order of the court, this intentional defiance should, as we suggested in Working Paper 6, Fines, constitute a new offence punishable on summary conviction by imprisonment.*

(b) *Excessive Detail*

Restrict the Criminal Code to the relatively short catalogue of "real" crimes and we will have a terse and simple document. At present we have a complex, cumbersome collection of sections, many of which have been added from time to time *ad hoc*. Many are quite unnecessary because they but particularize matters covered by more general sections. Given, for example, a general section on seduction, we have no need for a particular prohibition

*In practice there are several techniques for facilitating this, but in principle our proposal is that really serious, i.e. "criminal", breaches of regulatory law should be designated as crimes in the Code.

against seducing female passengers on board ship. Given a general prohibition of theft, we scarcely require special sections on oysters, cattle and driftwood. And given a general rule against cruelty to animals, we could do without detailed provisions about cattle and cock-fighting. Such excess detail blurs the simplicity, obviousness and directness of the general message of the Code. Common sense and moral principles get replaced by the product of historical accident.

To regain generality and simplicity, the Code must be re-organized in a more rational framework. Concentration should focus on the general definitions of the obvious basic crimes. Detailed particularities and applications are out of place and should be avoided as far as possible.

(c) *Inappropriate Style*

Our Criminal Code contains no general guiding principles. It nowhere says what criminal law is, what it is for or what it aims to achieve. Instead it consists largely, as we have said, of particular rules of ever increasing detail.

Not that detail serves no purpose. Precision in the definition of offences may promote clarity and certainty. The individual has a right to know clearly what is forbidden. The administrator has a right to know clearly when he can legally intervene. This, it is argued, justifies spelling the details out in black and white.

The argument is not totally convincing. In particular it is not convincing as regards "real" crimes. These are acts generally recognized as seriously and obviously wrong. So general is this recognition and so obvious is their wrongfulness that ignorance of law is not allowed as a defence. Whether or not the accused is familiar with the actual language of the Criminal Code sections on homicide is quite irrelevant on a charge of murder—he knows that it is wrong to kill. The same reasoning applies to all the basic crimes, where criminal law simply underlines our general notions of right and wrong.

This being so, we contend that there is no need for detailed definitions. When it comes to any criminal offence, there are three different classes of conduct. One class consists of acts obviously

wrongful and clearly forbidden by the relevant section. Another consists of acts clearly legitimate and untouched by the section's prohibition. And then there is a third class—those acts which are neither beyond peradventure wrongful nor yet beyond doubt legitimate: they fall into the grey area in between. Curiously it is the acts in this grey area that have given lawyers and legislators all the trouble, for in the interest of certainty and clarity legislation has traditionally concentrated on such marginal cases. This, we contend, is unnecessary in criminal law. Any act falling into the grey area must be an act not clearly recognized in general as obviously and seriously wrong. As such it has no business being forbidden by criminal law. After all, the purpose of the criminal law is to underline, not caricature, our values.

Marginal cases, then, must not be overemphasized. They must not become the tail that wags the dog. Instead we must concentrate on what is obviously criminal. The Criminal Code of the future should be a short, concise and simple statement of the kind of acts condemned by our society. It should be a summary of our basic principles of applied morality.

(d) *Inadequate Philosophy*

Our Criminal Code is largely the product of nineteenth century thought. That century was one of broad consensus and naïve optimism. People in general were agreed on many matters of morality. They also thought that just as every event had its cause, so every problem had its own solution if only we could find it. Hence the simple Benthamite view of human beings as mechanistically rational and motivated solely by the principles of pleasure and pain. Hence too the primitive faith in the effectiveness of deterrence.

Today we realize the inadequacy of those beliefs. There is less consensus now on many different matters—on sex, on religion and many other things. There is less confidence that every problem has a quick solution—problems may be an inevitable feature of the human condition. And there is less faith in the view of man as purely rational and acting in his own self-interest—the darker, irrational and unconscious side of human nature has been rediscovered. Society comes to look more like an open system in which each ele-

ment eventually feeds back and affects every other element and so produces constantly a dynamic interacting equilibrium. And crime is one element in that open system.

This means there are no quick solutions to crime. There are no patent medicines. There is no instant cure. Crime, like the poor, is always with us. As long as human beings remain the sort of creatures they are, they will hold moral values and they will also transgress them. Crime is part of our divided nature. It is here to stay. The problem is to come to terms with it.

To come to terms with crime we must have open minds. We must face up to reality. We must see each criminal trial as a learning opportunity, where the accused, the victim, the other participants and finally all of us can learn a variety of lessons—the way in which the act of the accused was wrong, the way to repair the harm done and the way to reaffirm and rediscover our basic values. Above all we have to learn, by looking at the court-room drama, to avoid projecting our own inadequacies on the defendant as a scapegoat but rather to face up to the evil in ourselves. We have to learn just what we human beings really are.

To do all this requires a more imaginative attitude to criminal law. We must be ready to try new things. We should be willing to experiment by means of pilot projects. Instead of making each new legislated approach apply across the board without prior indication of the outcome, we need to try out different strategies for limited periods in limited areas. Then after careful monitoring we can judge whether to put them into general operation. This needs good feedback. We must improve our gathering and recording of data. Progress—in criminal law as in human affairs—depends on caution, realism and pragmatism. The way ahead is forged step by step.

This change in attitude can only come from paying greater attention to the educational aspect. All too easily we compartmentalize—criminal law in one slot, education in another. Man, however, slots into no compartments and his activities constitute a whole. Accordingly, **we recommend** that government take steps to promote the education of judges, administrators and all of us about the criminal law. First, judges are entitled to—and we have a right that they should receive—programmes of initial and continuing

training on criminal law, criminology and penal philosophy. Second, there is a need for administrative guidelines reaching from the Attorney-General right down to the individual enforcement officer or administrative official in the field, so as to ensure both overall conformity with basic principles and political accountability all along the line. Finally government should promote schemes for educating the citizen on crime and criminal law. Programmes must be devised for schools, for universities, for community colleges and other possible contexts for such education. At present our criminal law enjoys insufficient respect. Older people may be cynically disappointed; younger folk may be bored, contemptuous, disenchanted, alienated. To regain our respect the criminal law must come back into its proper orbit and the criminal trial must become something of meaning to us all. In short we have to make it *our* criminal law. Then, and only then, may we really learn to cope with crime.

Appendix

A. Contributions

A number of people helped and contributed to this report. There were numerous discussions and meetings with Research Personnel on the aims and purposes of the criminal law as well as on our working papers. The Commission gratefully acknowledges all these contributions. We would also like to thank former members of the Commission.

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B. Publications

The report is based on numerous internal and external documents filed in the Archives of the Commission and indicated in our Annual Reports. The following are those that have been published and are available through Information Canada.

Working Papers:

The Meaning of Guilt (#2—1974)
The Principles of Sentencing and Dispositions (#3—1974)
Diversion (#7—1975)
The Limits of Criminal Law (#10—1975)
Mental Disorder in the Criminal Process (#14—1975)

Background Volumes:

Studies on Strict Liability (1974)
Studies on Diversion (The East York Community Law Reform Project) (1975)
Studies on Sentencing (1974)
Sutdies on Obscenity (1976)