CANADA'S EXPERIENCE WITH CONSTITUTIONALISM AND CRIMINAL JUSTICE

This essay examines how the enactment of a constitutional bill of rights, the 1982 Canadian Charter of Rights and Freedoms (the Charter), has changed the Canadian criminal justice system. For example it has required the use of search warrants and right to counsel warnings at the pain of exclusion of evidence; mandated prosecutorial disclosure to the accused and has invalidated broad felony murder offences and restrictive intoxication and duress defences. Constitutionalism has affected both the procedure and substance of Canadian criminal law. At the same time, however, parts of the criminal justice system have not been restrained or improved by constitutionalism. They include a lack of universal recording of interrogations, a lack of mandatory identification procedures designed to minimise the risk of mis-identifications, decreased availability of bail, too easy acceptance of guilty pleas, and the increased use of mandatory sentences. The Legislature has often abdicated the law reform responsibilities to the Judiciary under the Charter and the Judiciary generally only responds to the worst abuses of power. Bills of rights enforced by the courts can play an important role in promoting constitutionalism, but they need to be supported by legislative reforms and civil society engagement including a free and critical press.

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I. Introduction

1 Since the addition of the Canadian Charter of Rights and Freedoms[1] ("Charter") to Canada's constitution in 1982, criminal justice in Canada has become thoroughly constitutionalised. As demonstrated

* This essay is dedicated to the author's mentor and colleague Martin L Friedland who has done much throughout his long and illustrious career to promote moderate and restrained constitutionalism in the Canadian criminal justice system.

1 Part 1 of the Constitution Act 1982 being schedule B to the Canada Act 1982 (c 11) (UK).

throughout this essay, the Charter has significantly influenced all stages of the criminal process. At the threat of exclusion of evidence, police must now obtain judicial warrants before they search homes or seize bodily samples. Similarly, they must provide those detained or arrested with a form of *Miranda*[2] warning about their right to consult a lawyer. Prosecutors must disclose all relevant and non-privileged evidence to the accused before trial. Judges must enforce both the procedural and substantive protections of the Charter. Reverse onuses and even evidential burdens must be justified by the Government as a proportionate limit on the presumption of innocence. The Supreme Court of Canada has invalidated murder offences that do not require proof that the accused had subjective knowledge that the victim was likely to die. It has also invalidated restrictions on the intoxication and duress defences. The court has struck down a mandatory minimum sentence of seven years' imprisonment for importing narcotics and held that it would now be unconstitutional to impose or extradite a fugitive to face the death penalty.

2 This impact of the Charter on criminal justice may strike some as inspiring, but it may also strike others as a warning sign of the unsettling effects of the genie of rights on criminal justice. There is some truth to arguments that Canada has gone farther than its southern neighbour the US in the constitutionalisation of criminal justice.[3] An examination of the Canadian cases may suggest to some observers that Canadian courts have lost a sense of balance in reconciling the interests of the accused, society and victims.[4] At the same time, those who look at Canada as an example of due process rights gone wild should appreciate that most Charter arguments made by the accused are rejected. The Canadian approach to constitutionalism and criminal justice balances competing interests. The courts have not only recognised the rights of the accused, but also the State's interests in crime control and the rights of victims and potential victims of crime.

3 The main argument in this essay is that the Canadian experience is more ambiguous than it may at first appear. Those who wish to reform their criminal justice system towards greater respect for constitutionalism should look to Canada not simply as a source of rights friendly precedents, but also as a warning of the difficulties of truly reforming criminal justice systems. Constitutionalism requires more

2 *Miranda v Arizona* 384 US 436 (1966).

3 See, *eg*, Robert Harvie & Hamar Foster, "Ties that Bind? The Supreme Court of Canada, American Jurisprudence and the Continued Revision of the Canadian Criminal Law under the Charter" (1990) 28 Osgoode Hall LJ 729. See also Martin L Friedland, *My Life in Crime and Other Academic Adventures* (Toronto: University of Toronto Press, 2007) ch 18.

4 For a defence of the need for such balances see Melanie Chng, "Modernising the Criminal Justice Framework" (2011) 23 SAcLJ 23 at 29 and 51.

than a bill of rights enforced by the courts. It requires a wide-spread belief in the courts, government, civil society and the media about the need to justify the use of the criminal sanction, to reform the criminal law and to be restrained in its use. The decisions of courts are important, but as Herbert Packer recognised many years ago, they will wax and wane with the times.[5] Moreover, judicial decisions that enforce due process rights of the accused will not restrain the State's expansion of the criminal sanction.[6] Even though the Canadian courts have rejected strict dichotomies between procedural and substantive justice and have reformed some of the most draconian excesses of the substance of Canadian criminal law, the Canadian government today is determined to toughen the criminal justice system and to use the moral authority and outrage of victims of crimes as a substitute for evidence-based criminal justice policy-making.[7] The Law Reform Commission has been abolished and there is little interest in the media and civil society about restraint and reform in the criminal justice system. Canada's criminal justice system remains constitutionalised in a formal sense, but the spirit of restrained and moderate constitutionalism is not healthy in Canada today.

II. Starting points and false starts

4 Context is critical to understanding comparative law. Canada had a criminal justice system that was subject to few constitutional constraints before the Charter. With the exception of involuntary confessions, Canadian courts accepted all improperly obtained evidence in a criminal trial until s 24(2) of the 1982 Charter mandated the exclusion of unconstitutionally obtained evidence if its admission would bring the administration of justice into disrepute. The Supreme Court of Canada refused to enforce the 1960 Canadian Bill of Rights, through the exclusion of evidence.[8] The Canadian Bill of Rights was a statutory bill of rights that only applied to the federal government. Unlike the subsequent Charter, it could be amended by ordinary legislation and contained no enforcement provisions. Defence lawyers and civil liberties groups successfully lobbied for a mandatory rule in s 24(2) of the Charter that evidence shall be excluded if its admission would bring the administration of justice into disrepute.

5 Herbert Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968).

6 William Stuntz, *The Collapse of the American Criminal Justice System* (Cambridge: Harvard University Press, 2011).

7 Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999).

8 *R v Hogan* [1975] 2 SCR 575.

5 The Charter with its emphasis on rights and remedies responded to a growing rights consciousness in Canadian society. Although supported by the vast majority at the time, Canada's invocation of martial law to respond to two terrorist kidnappings in Quebec in 1970 was soon viewed by many as an overreaction. It resulted in almost 500 innocent people being temporarily detained without access to prompt judicial review. Many Canadians were also concerned with press stories throughout the 1970s about police abuses, such as the strip searches of all the women found in a crowded bar in a 1974 drug raid using writs of assistance that had long been constitutionally prohibited in the US. There were also commissions of inquiry into illegal police behaviour, including the theft of documents and the destruction of property, in an attempt to respond to terrorist violence in Quebec.[9] Canadians were familiar with *Miranda* rights and the exclusionary rule from American television and movies. Many Canadians were concerned that they did not have the same rights as their American neighbours. The generous approach of Canadian courts to interpreting the Charter in the late 1980s reflected a political culture that was receptive to rights claims and the criticisms that the courts had received for their restrictive approach to the earlier Canadian Bill of Rights.

III. Abolition of the death penalty

6 Although Canada resisted due process claims before the Charter, it repealed the death penalty. The last executions in Canada took place by hanging in 1962, a year after Parliament voted to restrict the use of the death penalty to planned and deliberate murder and the murder of police officers. In 1966, Parliament further restricted the death penalty to the killing of police officers. In 1976, Parliamentarians voted 131 to 124 to repeal the death penalty in a free vote. A few months later, the Supreme Court of Canada in a case commenced before the repeal unanimously decided that mandatory capital punishment for the murder of police officers was not arbitrary or excessive and did not violate the right against cruel and unusual punishment under the Canadian Bill of Rights. Chief Justice Laskin upheld the Canadian death penalty on the basis that it was available in a much narrower range of cases than in the US. He noted, however, that Parliament was free to repeal capital punishment.[10] In 1987 another free vote on reinstating capital punishment was rejected in Parliament in a close

9 For accounts of civil society outrage at police abuses and support for a Charter see Alan Borovoy, *When Freedoms Collide: The Case for our Civil Liberties* (Toronto: Key Porter, 2002).

10 *R v Miller* [1977] 2 SCR 680.

vote. Canadian political culture – not court decisions – effectively abolished the death penalty.[11]

IV. Quick starts under the Charter

7 The 1982 Charter contained many due process rights such as a s 8 right against unreasonable searches and seizures, a s 9 right against arbitrary detention and the rights under s 10 not only to retain a lawyer but to be informed of that right. These rights and the mandatory exclusionary rule in s 24(2) of the Charter were almost dropped from the Charter in an attempt to win the support of provincial governments for asking the UK Parliament to add the Charter to Canada's constitution. When the provincial governments did not consent to such proposals, these rights were added to the Charter after civil liberties and groups of defence lawyers successfully argued before a parliamentary committee that the Charter could not prevent rights abuses without them.[12] The lesson here is that constitutionalism must be nurtured by civil society. This does not necessarily mean that there must be mass popular support. In Canada, a small number of well-informed and articulate groups including a strong defence bar and civil liberties organisations were critical in ensuring that the Charter provided meaningful and not mere paper protections for the accused.

8 Canada's experience with the Charter also got off to a fast start because of support from the Judiciary. The Supreme Court of Canada had been widely and sometimes pointedly criticised by legal academics for its failure to enforce the Canadian Bill of Rights. The court was determined to avoid this experience under the Charter. Chief Justice Brian Dickson paid special attention to academic work.[13] The court also included Antonio Lamer and Gerard LaForest who had both worked with the Law Reform Commission of Canada in producing a plan for reforms to ensure greater restraint, fairness and clarity in the criminal law, criminal procedure and evidence law.[14] The first woman appointed to the court, Bertha Wilson, had a very liberal view that stressed the rights of individuals and the need for the State to provide ample

11 For arguments that popular support and legislative action was necessary to make real many controversial decisions under the American Bill of Rights see Gerald Rosenberg, *The Hollow Hope* (Chicago: University of Chicago Press, 2nd Ed, 2008).

12 The drafting of the Canadian Charter of Rights and Freedoms is described in greater detail in Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at pp 42–48.

13 Robert Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003) at pp 213–217.

14 Martin L Friedland, *My Life in Crime and Other Academic Adventures* (Toronto: University of Toronto Press, 2007) ch 11.

justification of the necessity for any restrictions on those rights.[15] Although Parliament ignored reform proposals by the Law Reform Commission, the Supreme Court did not.[16] The lesson here is that courts can play a critical role in fostering respect for constitutionalism in criminal justice, but they need ideas and support from the larger political and legal environment.

V. Balanced constitutionalism

A. Search and seizure, judicial-legislative dialogue and exclusion of evidence

9 One of the Supreme Court's first Charter decisions borrowed liberally from American constitutional law to create a strong presumption that a judicial warrant was required for any state invasion of a reasonable expectation of privacy except in cases of exigent circumstances.[17] Courts invalidated writs of assistance and illegal seizures of bodily substances for DNA testing on a similar basis. The court's jurisprudence on search and seizure was, however, balanced by two factors. One was that Canadian courts did not automatically exclude unconstitutionally seized evidence. In the first 20 years of the Charter, courts were especially cautious about excluding evidence such as guns and drugs obtained through unconstitutional seizures. The second factor is that Parliament was able to reply to most decisions striking down warrantless searches with legislation providing for new forms of warrants to authorise such searches. These include telewarrants and warrants to obtain DNA material. Dialogue[18] or interaction between courts and Parliament has been an important factor in achieving balanced constitutionalism in Canadian criminal justice.

B. Broadly interpreted rights but acceptance of reasonable limits on rights

10 Balanced constitutionalism in Canada is achieved not just through the ability of Parliament to enact legislation in response to

15 Kent Roach, "Justice Bertha Wilson: A Classically Liberal Judge" (2008) 41 SCLR (2d) 193.

16 M L Friedland, "Criminal Justice in Canada Revisited" (2004) 48 *Criminal Law Quarterly* 419.

17 *Hunter v Southam* [1984] 2 SCR 145.

18 The literature on dialogue between courts and legislatures is vast. See "Symposium" (2007) 45 Osgoode Hall LJ 1. For some of the author's own work see Kent Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80 Can Bar Rev 481 and Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue?* (Toronto: Irwin Law, 2001).

Charter decisions, but also because of the ability of the Government to justify reasonable and proportionate limits on all rights under s 1 of the Charter. A good example is the presumption of innocence. The Canadian courts have interpreted the presumption of innocence in a broad and principled way that finds a violation in any circumstances where an accused can be convicted despite a reasonable doubt about guilt. As such, any reverse onus, including those that apply to defences, and any mandatory presumption violates the presumption of innocence in Canada.[19] The balance to this broad understanding of rights, however, is the frequent willingness of the courts to accept that a violation of the golden thread in the criminal law is nevertheless justified under s 1 of the Charter as a reasonable and proportionate restriction on the right. The court has on this basis upheld the reverse onus on the accused to establish the insanity defence and the defence of truth to hate propaganda as well as a mandatory presumption that those who live with prostitutes live off their avails.[20] The court has even imposed some reverse burdens on the accused on its own initiative with respect to new defences of entrapment, officially induced error and extreme intoxication to general intent offences.[21] In an early and famous case, however, the court struck down a reverse onus that required accused found in possession of any amount of narcotics to establish that they did not have the intent to traffic in them. The court recognised that curbing drug trafficking was a legitimate objective for limiting rights. The mandatory presumption and reverse onus was, however, not proportionate because it applied to those who possessed small amounts of illegal drugs for personal use.[22] The courts have also forced Parliament to make exemptions for the medical use of marijuana but stopped short of striking down the offence of possession of marijuana.[23] Balanced constitutionalism can include broad and generous interpretation of rights provided that the court is open to the Government justifying the proportionality and necessity of limitations on those rights. Another lesson is that while courts will respond to exceptional cases unjustly caught in broad drug laws, they are likely to leave issues of decriminalisation and drug policy to the Legislature.

C. Rights for all

11 Another feature of Canada's balanced constitutionalism is that while the focus has been on the rights of the accused, the rights of

19 *R v Whyte* [1988] 2 SCR 3.

20 *R v Whyte* [1988] 2 SCR 3; *R v Chaulk* [1990] 3 SCR 1303; *R v Keegstra* [1990] 3 SCR 697.

21 *R v Mack* [1988] 2 SCR 903; *Levis v Tetreault* [2006] 1 SCR 420; *R v Downey* [1992] 2 SCR 10.

22 *R v Oakes* [1986] 1 SCR 103.

23 *R v Malmo Levine* [2003] 3 SCR 571.

others affected by the criminal process have also been recognised. Canadian law before the Charter severely restricted press freedoms when they were in potential conflict with fair trial rights. The press has a right under the Charter to intervene to challenge publication bans imposed by criminal courts and courts now must attempt to reconcile free expression and fair trial rights in a balanced manner.[24] The lesson here is that constitutionalism will not thrive without a free press. The media in Canada has been especially important in investigating wrongful convictions and it will be suggested below that the official recognition of wrongful convictions has had a profound influence on Canadian law.

12 The media is not the only third party that has rights affected by the criminal process. Complainants and victims have also claimed rights in the criminal process. The Charter does not provide explicit protection for victims' rights, but the court has recognised that complainants in sexual assault cases have constitutionally protected privacy interests. These rights, like free press rights, must be reconciled with the rights of the accused. Conflicts between the accused's right to a fair trial and the complainant's right to privacy have been the source of several important constitutional conflicts between the courts and legislatures. In one case, the Supreme Court recognised that complainants had a privacy interest in not being questioned about their prior sexual conduct in sexual assault trials but that Parliament had acted disproportionately in creating categorical restrictions on the admissibility of such conduct in so-called "rape shield" legislation.[25] Women's groups and parliamentarians were concerned that this decision would make it even more difficult for women to report sexual assaults. For a time, serious consideration was given to re-enacting the law for a renewable five-year period notwithstanding the legal rights of the accused. The use of the override under s 33 of the Charter is the ultimate safety valve in Canadian constitutionalism[26] but Canada's federal Parliament has never used the override. What Parliament did do was to enact a new and broad sexual assault offence that stressed that "no means no", required a reasonable basis for the accused's mistaken belief in consent and introduced a less categorical restriction on the admissibility of the complainant's prior sexual conduct that also applied to the complainant's prior sexual conduct with the accused as well as others. This new law was challenged by accused under the Charter, but upheld by the Supreme Court.[27]

24 *Dagenais v CBC* [1994] 3 SCR 835; *R v Mentuk* [2001] 3 SCR 442.

25 *R v Seaboyer* [1991] 2 SCR 577.

26 This somewhat unique provision allows legislatures to enact laws notwithstanding fundamental freedoms, legal or equality rights for a renewable five-year period and it was placed in the Canadian Charter of Rights and Freedoms because of concerns by some that without it, society would have to accept unreasonable judicial interpretations of the Charter. See Robert J Sharpe & Kent Roach, *The Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 5th Ed, 2013) ch 5.

27 *R v Darrach* [2000] 2 SCR 443.

A similar story unfolded when the Supreme Court balanced privacy and fair trial interests with respect to the accused's access to the complainants' medical and other therapeutic records. Parliament was not satisfied with the balance struck by the court and enacted new legislation that restricted the accused's access to such records both when they were held by third parties such as rape crisis centres and by the State. This new law was challenged but also upheld by the court under the Charter.[28] Constitutionalism is not simply a matter of recognising the rights of the accused but also the rights of the victim. Moreover, courts and legislatures can disagree and interact about the appropriate balance between competing rights in the criminal process.

13 There are other examples of balanced constitutionalism that recognise both the rights of the accused and victims. The court has recently decided that judges must reconcile and balance the rights of a complainant who for religious reasons wishes to testify while wearing a *niqab* and the right of the accused to a fair trial which in some cases may require unveiling to allow judges and juries to make credibility determinations.[29] The Supreme Court in a 4:3 decision upheld a law punishing the wilful promotion of hatred against an identifiable group in part because of the importance of disapproving of speech that expresses racist and religious hatred. The court also upheld the reverse onus on the accused to establish a defence of truth to hateful statements.[30] The Supreme Court has even upheld the offence of defamatory libel. As in the hate speech case, however, it stressed that the Prosecutor must prove a high degree of subjective fault and that this requirement makes the limit of the offence on freedom of expression reasonable and proportionate.[31] Perhaps because of these high fault standards, hate speech and defamatory libel offences are rarely prosecuted in Canada. Constitutionalism does not require an absolutist approach to freedom of expression, but it does require the State to justify the necessity of limits on speech and for prosecutors to be responsible in the use of offences that target speech.

28 *R v Mills* [1999] 3 SCR 668.

29 *R v NS* 2012 SCC 72.

30 *R v Keegstra* [1990] 3 SCR 697. Two years later, however, the court struck down an offence of spreading false news when it was used to prosecute a person who denied the Holocaust: *R v Zundel* [1992] 2 SCR 731.

31 *R v Lucas* [1998] 1 SCR 439. The court has reformed the common law of libel to better reflect freedom of expression by introducing fair and reasonable comment defences: *Grant v Torstar Corp* [2009] 3 SCR 640.

VI. Substantive constitutionalism

A. Judicial invalidation of felony murder and restrictive defences

14 When the Charter was first enacted it was commonly thought that its legal rights and in particular s 7 of the Charter only protected procedural rights to a fair trial. This prediction, as well the simple dichotomy between procedural and substantive justice, was soon proven wrong. The Supreme Court struck down an offence that prohibited abortions outside of hospitals and without approval of a hospital committee on combined procedural and substantive grounds. Some judges stressed the differing standards and different availability of abortions under the law. Others followed a more American approach by stressing a woman's freedom to end her pregnancy at least in the first trimester.[32]

15 The court took a more overtly substantive approach in other early cases. Building on common law presumptions against the use of absolute or no-fault liability, it held that a person could not be imprisoned for no-fault offences under the Charter. Legislatures could still use absolute liability but not to impose imprisonment.[33] The Supreme Court also invalidated constructive or felony murder offences on the basis that the special stigma and mandatory sentence of life imprisonment that accompanies a murder conviction should not be imposed in the absence of proof that an accused knew that death was likely to occur.[34] This meant that accused who accidentally killed someone while committing a serious crime could only be convicted of manslaughter and not murder. Parliament responded by providing that manslaughter and many other crimes committed with firearms would be punished by a mandatory four years imprisonment and the Supreme Court subsequently upheld that penalty under the Charter.[35] The lesson here is that constitutionalism cannot easily be limited to procedural fairness and should influence some of the substance of the criminal law. That said, Parliament remains in the driver's seat in defining most of the substance of the criminal law. For example, the courts allow objective negligence liability for all but the most serious offences of murder,[36] attempted murder[37] and war crimes.[38] At the same, they have also

32 *R v Morgentaler* [1988] 1 SCR 30.
33 Reference *Re BC Motor Vehicle Act* [1985] 2 SCR 486 and *R v Pontes* [1995] 3 SCR 44.
34 *R v Martineau* [1990] 2 SCR 633.
35 *R v Morrisey* [2000] 2 SCR 90. This holding has been important because the increased use of mandatory minimum sentences in recent legislation has generally required sentences of four years imprisonment or less.
36 *R v Martineau* [1990] 2 SCR 633.
37 *R v Logan* [1990] 2 SCR 713.
38 *R v Finta* [1994] 1 SCR 701.

stressed that the prosecutor must establish a marked departure from reasonable standards in order to distinguish negligence used to impose criminal liability from that used to determine civil liability between individuals. This has meant, for example, that momentary lapses of attention from driving will not generally be branded as criminal even if they are negligent for the purpose of tort law.[39] Balanced constitutionalism can defer to the State, but it also recognises that the State has particular obligations to be procedurally and substantively fair when punishing individuals.

16 Constitutional concerns about the substantive fairness of criminal law also influences defences to crime. The Supreme Court's first constitutional foray into defences was not well received. In *R v Daviault*,[40] the court held that the common law prohibition of the intoxication defence for crimes of general or basic intent such as assault violated the Charter. A majority of the court expressed concerns that the common law could punish those who acted in a physically involuntary manner because of extreme intoxication and that it substituted the fault of becoming intoxicated for the fault required by a particular crime. The court thought it was being cautious by requiring the accused to establish the new extreme intoxication defence on a balance of probabilities and with expert evidence. It also indicated that if Parliament was concerned with social protection it could enact new offences that recognised that the accused was intoxicated. Parliament was not impressed at the thought of intoxicated people being acquitted of sexual assault or assault. It soon enacted a new law that deprived the accused of the new defence in cases of personal violence in part because of expert testimony that the court's idea that extreme intoxication could produce involuntary behaviour was scientifically flawed. The Supreme Court has yet to decide whether this new law is constitutional, but lower courts have generally upheld it. The lesson here is that law reform by the courts can be risky and controversial. Moreover, legislatures and law reform commissions can gather more expert evidence than the courts and perhaps better prepare the public to accept controversial law reform that appears to be soft on crime.

17 Parliament can make broad and categorical rules that are unfair when applied in particular cases. Canada's legislated duress defence is particularly restrictive and harsh towards accused persons who may face serious threats. It requires that a person be threatened with immediate death or bodily harm from a person who is present with the accused. Even when the accused has a gun to his or her head, Parliament has excluded a long list of offences from duress including robbery and arson. In 2001, the Supreme Court held that the requirement that the

39 *R v Beatty* [2008] 1 SCR 49; *R v Roy* 2012 SCC 26.
40 [1994] 3 SCR 63.

threat be immediate and from a person present was unconstitutional when applied to a woman who imported drugs into Canada because of threats to her mother in her homeland.[41] The court stressed that a person should not be punished for responding to threats that no reasonable person in the same circumstances could resist. This principle may eventually result in the invalidation of categorical restrictions that make duress unavailable for many serious crimes. If this occurs, the restrictive statutory defence will be completely replaced by a more flexible common law duress defence. The lesson here is that legislatures may be inclined to draw broad and categorical rules whereas courts must deal with the consequences of imposing those rules in individual cases perhaps never foreseen by the Legislature. Mandatory sentences raise similar issues. Balanced constitutionalism requires that codified criminal law be made more sensitive to judicial concerns about the harsh effects of rules in exceptional cases.

B. The need for both judicial and legislative criminal law reform

18 Although it was not prepared to accept the Supreme Court's new defence of extreme intoxication at least in cases of violence, Parliament has allowed the courts to reform the defence of duress and even to abolish felony or constructive murder. Such reforms were proposed by the Law Reform Commission of Canada, but Parliament showed little interest in them. Parliament amends the Criminal Code multiple times every year but under governments of all political stripes remains reluctant to engage in reforms that may appear to be soft on crime. In theory, many of the reforms to criminal law, criminal procedure and the laws of evidence that have been achieved by Canadian courts under the Charter could have been achieved by legislative reform. M L Friedland who played an important role in reforming bail law in the early 1970s has expressed concerns that the Supreme Court has taken over the role of criminal law reform in the Charter era. Professor Friedland is certainly right that the court has stepped into this role and that in an ideal world it would be better exercised by Parliament. That said, the reality is that Parliament has shown little interest in criminal law reform even though it amends the Criminal Code multiple times each year often in an attempt to toughen it and respond to well-publicised crimes.[42] It is difficult today for elected

41 *R v Ruzic* [2001] 1 SCR 687.

42 One possible exception would be recent reforms that have simplified and liberalised self-defence and defence of property. At the same time, these reforms were politically popular because they essentially authorised the private punishment of those who were reasonably perceived to be threatening people with force or invading or stealing property. See Kent Roach, "A Preliminary Assessment of the New Self-defence and Defence of Property Provisions" (2012) 16 *Canadian Criminal Law Review* 275.

legislators to be associated with any measure that may make it more difficult to prosecute and convict the accused. The Supreme Court has stepped into the law reform vacuum on matters such as disclosure to the accused and the reform of overly broad murder offences, overly restrictive defences and harsh mandatory penalties. Nevertheless, the court remains a captive of the cases brought to it and generally only reforms the worst excesses of the law. Substantive constitutionalism ideally would be embraced by a legislature prepared to reform the criminal law. At the same time, courts have a legitimate role to play in law reform, especially reforms that may be prompted by the harsh effects of categorical legislative rules in individual cases.

C. Recognising the harms of the criminal law

19 One attempt to use the courts to reform the criminal law was a Charter challenge to the offence of possession of small amounts of marijuana for personal use. The court rejected this challenge and dismissed the idea that Parliament could only enact criminal laws in response to proven harms.[43] This case demonstrates the limitations of the court as a vehicle for root and branch law reform. The court would have been aware that a Bill was before Parliament at the time that would have decriminalised marijuana possession and made it only a regulatory infraction. This Bill, however, was not a priority of the then Liberal government and the Conservative government elected in 2006 has shown no interest in such law reform. The lesson here is that electoral politics affects the criminal law. In many western democracies there is a move towards "governing through crime".[44] Crime has become a focal point of politics even while crime has generally declined with aging populations. Politicians are attracted to toughening crime laws because, with the erosion of the welfare state and the globalisation of many other economic issues, criminal law remains one of the few areas of shrinking domestic sovereignty. Some politicians are expressing impatience at the restraints that constitutionalism places on their populist and punitive agenda. One need only think of British Prime Minister David Cameron's emotional confession that the thought of prisoners voting makes him "sick in the stomach"[45] or Canadian Public Safety Minister Vic Toews' argument that critics of a bill to strengthen surveillance powers "can either stand with us or the child pornographers".[46] The emotional

43 *R v Malmo Levine* [2003] 3 SCR 571.

44 Jonathan Simon, *Governing Through Crime* (New York: Oxford University Press, 1997).

45 "Cameron Vows to Defy Europe on Prisoner Voting" *The Telegraph* (24 May 2012) <http://www.telegraph.co.uk/news/politics/9285408/Cameron-vows-to-defy-Europe-on-prisoner-voting.html> (accessed 1 October 2013).

46 Hansard (13 February 2012) <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=1&DocId=5380035> (accessed 1 October 2013).

rhetoric employed by these politicians may have deep roots in Lord Devlin's controversial defence of the role of disgust in the criminal law.[47] Nevertheless, they produce an overheated environment where the public will be encouraged to have contempt for constitutionalism in criminal justice.

20 Although the court refused to invalidate marijuana possession laws, it opened up a new avenue to challenge criminal laws under s 7 of the Charter on the basis that the harms inflicted by a particular criminal law are grossly disproportionate to the benefits achieved by the law. This new and potentially robust form of substantive constitutional review has been used by the Supreme Court to require a reluctant Minister of Health to issue an exemption from drug laws to allow a safe injection site to operate on Vancouver's downtown eastside. The court stressed that its decision was limited to this one site and based on evidence that the site saved lives of addicts by allowing them to use clean needles while also not increasing crime in what already is a high crime area.[48] The Supreme Court will soon decide another appeal where lower courts have held that criminal offences that prohibit using any place for the purposes of prostitution cause more harms by not allowing street prostitutes to work in safer indoor environments than it achieves in benefits in curbing nuisances. The Court of Appeal that struck this law down hinted that Parliament could constitutionally prohibit large brothels that would cause a nuisance. It also left the existing broad offence in force for a year to give Parliament an opportunity to enact a better tailored offence.[49] These cases recognise that even though criminal law often attempts to prevent harms, it also causes harms and it invites courts to engage in an evidence-based weighing of these competing harms. The Legislature may be in a better position than the courts to engage in such a balancing, but as suggested above, legislatures in western democracies seem less interested in evidence-based criminal justice policy and the Canadian courts are starting to fill this gap.

VII. Procedural constitutionalism: Wrongful convictions, disclosure and the death penalty

21 Canadian courts have been more receptive than Canadian legislatures to evidence, both from Canada and other democracies, that most criminal justice systems at times convict innocent people. In 1991, the Supreme Court of Canada recognised in *R v Stinchcombe*[50] that the accused should have a broad constitutional right to the disclosure of all

47 Lord Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965).
48 *Canada v PHS Community Service* [2011] 3 SCR 134.
49 *Canada v Bedford* 2012 ONCA 186.
50 [1991] 3 SCR 326.

relevant and non-privileged evidence held by the prosecutor at an early stage of criminal proceedings. The court noted that a commission of inquiry had concluded two years earlier that a failure to disclose inconsistent witness statements had played an important role in the wrongful conviction of a 17-year-old Aboriginal man, Donald Marshall Jr, for a murder that he did not commit. The commission had recommended that Parliament provide the accused with disclosure rights in the Criminal Code. Parliament had not acted on the commission's recommendation, but the court did. The new disclosure right is broader than similar rights in American constitutional law which only applies to material that the prosecutor recognises as exculpatory. The Canadian disclosure right has significantly changed the practice of criminal law in Canada. It has not only given the accused additional protections against wrongful convictions, but has also facilitated a fairer and earlier process of plea negotiations. That said, this decision has not solved Canada's wrongful conviction problem and a number of cases have recently been revealed where innocent accused nevertheless pled guilty to escape harsher punishment after eyewitnesses mistakenly identified them[51] or after state expert witnesses provided testimony that children had died from foul play, testimony that was later discredited by other experts.[52] Constitutionalism requires reforms to lessen the risk of wrongful convictions but also acceptance that the risk of wrongful convictions can never be fully eliminated in any system administered by humans.[53]

22 The Supreme Court recognised its own fallibility and that of all criminal justice systems when it decided in the *United States of America v Burns and Rafay*[54] that the demonstrated risk of wrongful convictions in all countries meant it would no longer be constitutional to extradite a fugitive without assurances that the death penalty would not be applied. The court examined the work of the Criminal Cases Review Commission in referring cases back to the English courts where the

51 *R v Hannemayer* 2008 ONCA 580. For arguments that Canadian courts could have been even more active with respect to innocence based issues see Kent Roach, "The Protection of Innocence under Section 7 of the Charter" (2006) 34 SCLR (2d) 249.

52 In a series of cases, mothers and fathers pled guilty to manslaughter or infanticide of their children when faced with expert testimony from a now discredited pathologist that the children had been shaken or suffocated. A public inquiry was subsequently held into the pathology service and, in many cases, the prosecutors have consented to both the admission of new evidence and the overturning of the convictions. See generally Kent Roach, "More Procedure and Concerns About Innocence but Less Justice? Remedies for Wrongful Convictions in the United States and Canada" in *Wrongful Convictions and Miscarriages of Justice* (R Huff & M Killias eds) (New York: Routledge, 2013) at pp 297–303.

53 Martin L Friedland, *My Life in Crime and Other Academic Adventures* (Toronto: University of Toronto Press, 2007) chs 20 and 22; Kent Roach "Wrongful Convictions in Canada" (2012) 80 *University of Cincinnati Law Review* 1465.

54 [2001] 1 SCR 283.

conviction was quashed even though the accused had been executed. It also examined the rise of DNA exonerations in the US while wisely warning that DNA will only be available in a minority of criminal cases. The court also admitted that Canada's own experience with wrongful convictions demonstrated that innocent people could be convicted even after a fair trial. The court's epiphany in this regard forced it to depart from its own decision ten years earlier that it would be constitutional to extradite a person to face the death penalty. *R v Stinchcombe* on disclosure and *United States of America v Burns and Rafay* on the death penalty are arguably the two most important cases decided under the Charter. They indicate that a criminal justice system committed to constitutionalism must be willing to confront its inevitable mistakes and to learn from them.

23 A recognition of the inevitability of wrongful convictions has implications for the death penalty. A decision to reinstate the death penalty in Canada would run afoul of the court's ruling in *United States of America v Burns and Rafay* but could be achieved if Parliament was prepared to legislate notwithstanding the Charter.[55] The use of the override would have to be renewed after five years, thus requiring a government that used the override to be re-elected. Balanced constitutionalism can allow legislatures to make important decisions and even reverse court decisions, but subject to the signals and safeguards of anti-majoritarian judicial decisions and requirements that governments be required to justify their decisions to the populace.

VIII. Failed constitutionalism

A. Plea bargains

24 As mentioned above, the Canadian courts have in recent years reversed wrongful convictions of innocent people that stem not from trials, but from guilty pleas. Why would innocent people ever plead guilty? In some cases, guilty pleas may result from mental disorders[56] but in many other cases they may result from rational decisions by the accused to accept what appears to be overwhelming evidence and to benefit from the healthy sentence discount given to accused who plead

55 Canada's Conservative government has stated that it does not plan to reinstate the death penalty despite public opinion polls that suggest that a majority of Canadians and a larger majority of its own supporters believe that the death penalty is appropriate in some cases: "Majority of Canadians Support Death Penalty" *Toronto Star* (8 February 2012) <http://www.thestar.com/news/canada/politics/article/1127764--majority-of-canadians-support-return-of-death-penalty-poll-finds> (accessed 1 October 2013).

56 *R v Marshall* 2005 QCCA 852 (guilty pleas to sexual assaults by a mentally disabled accused overturned in light of exonerating DNA evidence).

guilty. As a very experienced criminal law judge explained in one case in which an innocent person pled guilty after being wrongly identified by an eyewitness and received a two as opposed to a six-year sentence: "[T]he court cannot ignore the terrible dilemma facing the appellant … The justice system held out to the appellant a powerful inducement that by pleading guilty he would not receive a penitentiary sentence."[57]

25 Unfortunately, the Canadian system has not yet learned from these mistakes. It only requires the minimal standard of an operating mind as a precondition for acceptance of a guilty plea.[58] In general, criminal justice systems need to better accommodate the vulnerabilities of those with mental disabilities and disorders that fall short of the complete break with reality often required for the insanity defence. The acceptance of a guilty plea is still left to judicial discretion and the Criminal Code only requires judges to determine that a guilty plea is made knowingly and voluntarily and not that there is a factual basis for the plea. Most criminal cases are resolved by guilty pleas, but more effort needs to be devoted to ensuring the fairness and accuracy of the guilty plea process. Adversarial systems may have something to learn from inquisitorial systems both in respect of their concerns about the accuracy of verdicts and their more relaxed approach to the finality of verdicts. A critical component of constitutionalism is recognising that the criminal justice system is fallible. In particular, it may not always be safe to rely on the willingness of the accused to plead guilty especially when that guilty plea is often accompanied by a significant sentencing discount. True constitutionalism requires some system of checks and balances for the vast majority of cases in which accused plead guilty. It is not sufficient to respect constitutional rights in only the small minority of cases that actually go to a full trial.

B. Interrogations and identifications

26 Another cause of wrongful convictions is false confessions. As with false guilty pleas, false confessions may be related to mental health and mental disability issues. They may also be a product of the Reid technique of interrogation used in North America. It trains detectives relentlessly to insist on the accused's guilt, and to offer the accused excuses and rationalisations for committing the crime. The Supreme Court of Canada has recognised the reality of false confessions and has stated that the common law voluntariness rule should be applied so as to minimise the risk of courts admitting false confessions. Unfortunately, however, the court was reluctant to use the blunt remedy of exclusion even after the accused had been subject to interrogation for

57 *R v Hanemaayer* 2008 ONCA 580 at [18].
58 *R v Whittle* [1994] 2 SCR 914.

eight hours before he tearfully confessed to a series of arsons in part in an attempt to ensure that his fiancé was not questioned about the crimes. The court was not only reluctant to exclude the confession but also reluctant to prohibit the police from lying to the suspect about the existence of incriminating evidence. The court has also stopped short of requiring interrogations to be videotaped.[59] Subsequent decisions by the court have favoured police interests in conducting interrogations over the risk of false confessions. For example, they have allowed interrogations to continue despite the accused asserting his right to silence 18 times.[60] The court has also ruled that there is no right for a defence lawyer to be present during interrogations.[61] These cases underline that even if the Judiciary is aware of the dangers of false confessions, they may be unwilling or unable to enforce best practices to prevent them. In Canada, only the Legislature can mandate recording of interrogations which could help detect false confessions, especially those that involve "hold back" information that the police advertently or inadvertently reveal to the suspect. Such information can make the confession convincing because it is information that should only be known by the real perpetrator. The lesson is that the optimal regulation of interrogations will result from co-operation between the Judiciary and the Legislature acting in the common cause of constitutionalism.

27 A similar story could be told about the procedures used by the police to obtain eyewitness identifications. The Canadian courts have recognised that mistaken eyewitness identification is a leading cause of wrongful convictions. Rejecting more restrictive English authority, they have allowed the wrongfully convicted to sue police for the negligent conduct of identification procedures.[62] Rejecting their own prior authority and that of American courts, they have prohibited hypnosis-induced identifications because of concerns about the unknown reliability of such identifications.[63] At the same time, there are no legislated or uniform standards to require the police to use best standards in identifications such as the use of sequential photo line-ups presented by a police officer who is not familiar with the case. Only the Legislature can require such reforms. Unfortunately the Canadian Parliament has not acted in this regard. This failure to act is consistent with a pattern of legislative neglect of reforms of the criminal law that might benefit those accused of crimes.

59 *R v Whittle* [1994] 2 SCR 914.
60 *R v Singh* [2007] 3 SCR 405.
61 *R v Sinclair* [2010] 2 SCR 310.
62 *Hill v Hamilton* [2007] 3 SCR 129.
63 *R v Trochym* [2007] 1 SCR 239.

C. Petitioning the Executive for relief for miscarriages of justice

28 The only action taken by the Federal Parliament to respond to the reality of wrongful convictions has been a minor 2002 reform to the procedure that allows a person whose appeals have been exhausted to petition the federal Minister of Justice to order a new trial or a new appeal. These reforms allow the Minister to delegate extensive investigative powers to outside persons. This reform, however, only partially responds to the constitutional problem that the Minister of Justice is an elected official who can reasonably be seen as being in a conflict of interest in deciding whether convictions should be reopened. The federal Minister is most directly in conflict in the minority of cases such as drug and terrorism prosecutions where he or she has ultimate responsibility for prosecutions, but even in the majority of cases prosecuted by his provincial counterparts he is, through his responsibilities over criminal procedure and evidence law, implicated in alleged miscarriages of justice. To be sure, the Minister of Justice has provided some remedies for the wrongly convicted since the 2002 reforms, but almost always in cases where there is very strong evidence of a wrongful conviction. In addition, far less people on a *per capita* basis apply for relief from wrongful convictions in Canada than in England where an independent commission has since 1997 decided whether suspected miscarriages of justice should be referred back to the courts. Even though the English Commission rejects the vast majority of applications it receives, its decisions provide an important and independent fail safe that is lacking in the Canadian system.[64] Six public inquiries in Canada have recommended the creation of an independent commission such as the Criminal Cases Review Commission that operates in England and Wales, but the federal government has refused. Constitutionalism requires criminal justice actors not be asked to be judges in their own cause.

D. Bail

29 More than paper compliance with rights is necessary for true constitutionalism to restrain the criminal justice system. A good

64 Civil society has played an important role in Canada as elsewhere in the form of volunteer groups such as the Association in Defence of the Wrongfully Convicted that provide free legal advocacy for those who claim to have been wrongly convicted. Such volunteer organisations, however, generally only provide services for those convicted of the most serious crimes whereas the Criminal Cases Review Commission in England has referred a much broader range of suspected miscarriages of justice back to the courts. See Kent Roach, "Wrongful Convictions in Canada" (2012) 80 University of Cincinnati Law Rev 1465 at 1474–1475. The Canadian Minister of Justice has referred 13 of 87 applications since 2002, and in all but one case, the reference resulted in either acquittals by the courts or decisions not to prosecute (at 1499–1500).

example of failed constitutionalism is Canada's growing and high number of prisoners who have been denied bail and are in prison awaiting trial. In 2010–2011, there were about 38,000 people imprisoned in Canada and 34% of those people were people who had not been convicted of any offence but rather denied bail.[65] On paper, these accused were presumed innocent under s 11(d) of the Charter and they enjoyed their rights under s 11(e) not to be denied reasonable bail without just cause. But these rights were enjoyed on paper. Canada's remand population of those imprisoned awaiting trial dramatically increased in the 1990s even after the Supreme Court had found that bail should only be denied because of concerns that the accused would not show up for trial or because of a substantial likelihood that if released they would commit another offence or interfere with the administration of justice. The court struck down a third "public interest" ground for denying bail as excessively vague.[66] The restraint of the legislation, however, did not seem to influence the behaviour of justices of the peace who more frequently deny bail. Prosecutors and justices of the peace seem to have become more risk adverse about granting bail in the light of some highly publicised cases of people committing series crimes while on bail. In 1997, Parliament made it easier to deny bail by reintroducing a third ground for the denial of bail relating to the need to maintain confidence in the administration of justice. This ground has been upheld despite warnings by dissenting judges that judges should not cater to the irrational fears of the public.[67] The lesson is that true constitutionalism in the criminal justice must be measured in part through results. More resources in Canada need to be devoted to representing people at bail hearings and to providing bail supervision programmes that will allow people awaiting trial to be monitored in the community.[68] Exclusive attention to the judgments of the highest courts and the text of laws may only result in illusionary constitutionalism if the law in action diverges from the law in the books.

E. Prosecutorial and sentencing discretion

30 Canadian courts have been very cautious in reviewing both the exercise of prosecutorial and sentencing discretion under the Charter. Since its 1987 decision striking down a mandatory minimum sentence of seven years' imprisonment as cruel and unusual, the Supreme Court

65 Adult Correctional Statistics in Canada, 2010/2011 <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715-eng.htm#a3> (accessed 1 October 2013).

66 *R v Morales* [1992] 3 SCR 711. The court also upheld a reverse onus that requires the accused charged with drug trafficking and importing to show cause why they should be granted bail.

67 *R v Hall* [2002] 3 SCR 309.

68 Martin L Friedland, "Criminal Justice in Canada Revisited" (2004) 48 *Criminal Law Quarterly* 419 at 437–438.

has rejected every challenge to mandatory sentences and has even suggested that "the choice is Parliament's on the use of minimum sentences".[69] The Government has increased the use of mandatory sentences, often giving the prosecutor a discretion to prosecute a case by way of a summary or indictable procedures, with the former having lower mandatory minimum and maximum penalties than the latter. These developments essentially transfer sentencing discretion from judges whose reasons are public and can be appealed to prosecutors whose decisions are made privately and are very difficult to review.[70] To be sure, prosecutorial discretion is inevitable and can be healthy. Nevertheless, care should be taken not to concentrate too much power in the hands of any one official, especially ones who do not generally provide reasons to justify their decisions.

31 Although it remains lower than that in Australia, the UK and of course the US, Canada's imprisonment rate is starting to increase.[71] The fact that Canada still does not imprison people at the same rate as more punitive democracies cannot be solely attributed to the Charter. The Charter has not stopped Canada from imprisoning many more people than many countries in Western Europe as well as Japan.[72] Nevertheless as Professor Friedland has suggested, the Charter may have played a role in stopping the high penalties for drug offences that fuelled the explosion in the use of imprisonment in the US.[73] Constitutionalism requires restraint in the use of the criminal law. This must ultimately be judged both by the letter of the law, and by the results achieved by the law.

IX. Conclusion

32 Canada's extensive experience with constitutionalism and criminal justice may provide some helpful lessons of both the positive

69 *R v Latimer* [2001] 1 SCR 3 at [88] (upholding mandatory life imprisonment for second degree murder); *R v Morrisey* [2000] 2 SCR 90 and *R v Ferguson* [2008] 1 SCR 96 (upholding a mandatory minimum of four years for various forms of manslaughter with a firearm).

70 The exercise of prosecutorial discretion can be challenged under the Canadian Charter of Rights and Freedoms but the courts have been quite deferential in reviewing prosecutorial decisions. *Krieger v Law Society of Alberta* [2002] 3 SCR 372; *R v Nixon* [2011] 2 SCR 566.

71 Canada imprisons people at a rate of 117 *per* 100,000 population compared to the US's rate of 730 *per* 100,000 population or the UK's rate of 155 *per* 100,000 population. Adult Correctional Statistics in Canada, 2010/2011 <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715-eng.htm#a3> (accessed 1 October 2013).

72 Kent Roach, "A Charter Reality Check: How Relevant is the Charter to the Justness of Our Criminal Justice System?" (2008) 40 SCLR (2d) 717.

73 Martin L Friedland, "Criminal Justice in Canada Revisited" (2004) 48 *Criminal Law Quarterly* 419 at 457–458.

and the negative variety. Constitutionalism cannot be hermetically divided into procedural and substantive categories. Many thought that the Canadian Charter would only guarantee procedural fairness, but the courts have supervised the substantive fairness of criminal laws. This has resulted in the invalidation of harsh laws such as constructive and felony murder and restrictive defences. The courts have, however, focused only on the substance of the more extreme laws.

33. The Legislature in Canada has largely abdicated its law reform role to the courts. The optimal approach to constitutionalism will involve both courts and legislatures and the performance of the Canadian legislature could be improved. A particular danger is the use of punitive and unrestrained criminal laws to achieve partisan and populist political ends. This is a danger that all democracies must struggle to avoid.

34 Once a criminal justice system begins to take rights seriously, many will claim rights. The focus in the text of the Charter is on the rights of the accused, but the media and complainants have also successfully claimed rights. Parliament has been particularly active on questions of victims' rights. It has intervened when in its view the courts have not given enough weight to the rights of victims, particularly complainants in sexual assault cases. Constitutionalism does not grant any institution, either the courts or the Legislature, a permanent veto over the other.

34 An important feature of constitutionalism is recognising and learning from the inevitable mistakes of any criminal justice system. Despite safeguards and best intentions, innocent people have been convicted both in Canada and other criminal justice systems. The Canadian courts have responded by giving the accused a broad right to disclosure of all relevant information held by the State and by prohibiting capital punishment and the extradition of people to face the death penalty. More work, however, needs to be done with respect to other causes of wrongful convictions. The courts have attempted to encourage the recording of interrogations, but have stopped short of requiring it even though such recordings may help detect false confessions. Parliament also has failed to regulate identification procedures to require best practices to counteract the frailties of eyewitness identification. Parliament has refused to appoint an independent commission to investigate claims of wrongful convictions, as is the case in other jurisdictions, most notably England.

35 Bills of rights enforced by independent courts can play an important role in promoting constitutionalism, but they need to be supported by legislative reforms and civil society engagement including a free and critical press. Constitutionalism requires restraint and

humility in the exercise of power and an willingness by those in power to admit they may make mistakes. A society's commitment to constitutionalism will be particularly evident in its criminal justice system.