

**Remarks of the Rt. Hon. Beverley McLachlin, P.C.
Chief Justice of Canada**

Michael Hill, Q.C. Recognition Lecture

**Vancouver, British Columbia
June 22, 2007**

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**TWENTY YEARS OF CRIMINAL JUSTICE REFORM:
FINDING THE BALANCE**

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Bonjour, good afternoon distinguished members of the judiciary, members of the bar, members of the academy, ladies and gentlemen. C'est un grand plaisir d'être parmi vous cet après-midi pour prononcer un discours en l'honneur de Michael Hill. It is my great pleasure and honour to speak to you this afternoon, and deliver the Michael Hill, Q.C. Recognition Lecture. Michael Hill was a leading advocate of the criminal bar, known for his painstaking preparation of cases, attention to detail, and vigorous cross-examinations. Many of you here knew Michael Hill as a founding member of the International Society for the Reform of Criminal Law, and President of the Society at the time of his death. He worked with the Society to bring together people involved in criminal justice from around the world, so that we could all learn from one another. I met him in London some years ago, and chatting with him in his home filled with "finds" from all over the world — including a prized Inuit carving — was an experience still vivid in my mind. It is fitting that in honour of Michael Hill, we celebrate 20 years of work by the Society, by reflecting on past achievements in criminal law reform, and asking ourselves what challenges lie ahead.

_____ Today, as we open this gathering of Criminal lawyers and judges from around the world, I would like to invite you to look back with me over the past twenty years in criminal law, and forward

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to the next two decades. My theme can be summed up in one word: balance. The past two decades in the criminal law have been marked by conflicting influences and impulses. The criminal law has struggled, and in considerable measure succeeded, in finding a just balance between them. The challenge for the next two decades will be to continue to maintain that balance, in the face of ever-increasing fears and pressures.

Balance between conflicting impulses is the stuff of the criminal law. Prohibition versus liberty. Punishment versus rehabilitation. Protection of society versus individual justice – these conflicts have characterized the criminal law from the time of Hammurabi and Moses.

Where and how a particular society strikes the balances of the criminal law reflects its peoples' character and values. It follows that as societies change, so does the criminal law. When this Society was founded, the world was a very different place. The Internet was a scientific experiment, Nelson Mandela was a political prisoner, the Soviet Union was struggling to extricate its troops from Afghanistan, globalization was just a word, and the rights revolution epitomized by charters and bills of rights was in its adolescence. The balances the criminal law struck twenty years ago were different than the balances it strikes now, just as the balances that are struck twenty years hence will be different from those of today.

I will first reflect on the factors that have dictated the balances of the criminal law during the past two decades, and then spend a few minutes speculating on the developments that will impact how

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and where we strike our balances in the years to come.

The Past 20 Years

The past twenty years have been marked by four trends. Borrowing on recent scholarly writing, I will, somewhat histrionically, label these trends “revolutions”. They are: the due process-rights revolution; the social sciences revolution; the technological revolution; and the security revolution. Each of these trends has had a profound influence on the criminal law of the past two decades. Together, they explain the balances that the criminal law has struggled to strike in its quest for justice over the past two decades.

First, the due process revolution. The last two decades of criminal law in Canada have been marked by what Professor Kent Roach has called a “due process revolution”.¹ This was spurred by the adoption of the *Canadian Charter of Rights and Freedoms* in 1982. But Canada is not alone in this. Procedural rights have been emphasized by the European Court of Human Rights, South Africa has adopted its Charter of Rights, and the United Kingdom, long the bastion of the unwritten constitution, has introduced a Bill of Rights. The procedures that govern criminal investigations and trials have increasingly become the subject of precise rules, whether legislated or judge-made. The United States had long cherished this tradition. What is new in the past two decades is that countries around the world have more and more been adopting it. An adjunct of this concern for human rights and human dignity has been a more humane approach to sentencing, as witnessed by the growing trend to abolition of the death penalty around the world.

These due-process rights-related changes have affected the way police investigate crime, the manner in which criminal trials are conducted, and sentencing. Let me cite from the Canadian example.

In Canada, the right to counsel, the right to silence, and the right to be free from unreasonable search and seizure protected by the *Charter* have fundamentally changed how police investigate crime. Prior to the *Charter*, the law in Canada made little room for the notion that relevant evidence should be excluded from a trial because of police misconduct in the manner the evidence was obtained. A trial judge could exclude relevant evidence only if it obtained in a manner that would “shock” the community², or where its probative value was “trifling” and its admission would be “gravely prejudicial” to the accused³ – very high thresholds for exclusion.

The *Charter* changed this rule by stating that evidence should be excluded if its reception would bring the administration of justice into disrepute. Twenty years ago this spring the Supreme Court of Canada in *R. v. Collins*⁴ offered an interpretation of those words, that required the exclusion of improperly obtained evidence if dictated by the fairness of the trial, the seriousness of the *Charter* breach and the relative impact of exclusion on the one hand and admission. This represented a fundamental change in how the criminal justice system dealt with unfair treatment of suspects and accused persons. The pre-*Charter* approach was primarily concerned about crime control – holding evidence admissible except in the rarest and most abusive of cases. The post-*Charter* approach strikes a more equitable balance between the right of the suspects to fair treatment and the state interest in

investigating and prosecuting crime.

The due process revolution also affected the conduct of criminal trials. Again, let me illustrate from the Canadian experience. The most striking change in Canada has been recognition of the right to disclosure in the 1991 decision of *R. v. Stinchcombe*,⁵ which held that the accused is entitled to disclosure of all information relevant to the charges, whether or not the Crown intends to introduce the particular information into evidence, and whether the evidence is inculpatory or exculpatory. The decision in *Stinchcombe* has had a dramatic effect on criminal trials, increasing the resources required for prosecution, while allowing the defence to better test the case against the accused – to better cross-examine witnesses and to challenge police conduct where appropriate.

These are but two examples of the due process-rights revolution in Canada. Other countries have responded to this trend in different ways in keeping with their own traditions. But it has been difficult to ignore this movement. For example, China, with little modern tradition of due process, has dramatically altered its criminal procedures and is working on detailed codes for admission of evidence into civil and criminal codes.

The second revolution to impact the criminal law in the past two decades is the social science revolution. The criminal law's foundational concepts of guilt and responsibility have been reshaped by social science evidence that explains crime as a reflection of society and the individual's genetic and environmental shaping.

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The impact, once again, has been profound. Sentencing no longer looks only at the seriousness of the crime and criminal antecedents, but at the personal background and prognosis for rehabilitation of the convicted person – sometimes to the consternation of a public that may continue to see the criminal law in terms of punishment and retribution. New courts associated with rehabilitation have been established for offenders who suffer from drug addiction or mental illnesses. Special regimes for young offenders and statutory prescriptions pertaining to the sentencing of aboriginal offenders have been adopted. Again, those who view the criminal law exclusively through the prism of guilt or innocence, may be bewildered, occasionally critical. Yet the result, almost all who study the system agree, is not only more humane but more effective justice. Arguably the right balance has been struck.

The third revolution of the past twenty years is the technological revolution. Two aspects of this revolution have impacted the criminal law. First, the informatic-communications revolution has had a profound impact in a variety of ways. More information is available – information that requires consideration at the stages of investigation, trial and sentencing. That information, moreover, may come from anywhere; the law's net is no longer local, but global. Second, scientific advances have vastly increased the arsenal of tools at the hands of investigators and prosecutors. Lie detectors, DNA testing, personality profiling, new uses of old-fashioned fingerprinting to discover intimate details about a person's habits and life – these are but a few of a host of scientific techniques now available.

The technological revolution has its downsides. Investigation of crime is more complicated

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trials are longer. Prickly problems of evidence must be resolved. But on the positive side, it gives us better justice. We are better able to get to the truth – to convict the guilty while avoiding wrongful convictions, and occasionally righting those that have occurred in the past. Finding the right balance between timely investigation and trial procedure on the one hand and dealing with the array of scientific tests available on the other is not easy. But we have struggled to do so, with some modest success.

The fourth revolution that has marked criminal law in recent decades is the security revolution, or to use the more common phrase, the rise of the law and order agenda. This is the belief that to deter crime and maintain security, we need tougher laws and longer sentences. It is often accompanied by a suspicion of judges, who are seen as too lenient, and consequently by a demand for less judicial discretion in sentencing. Another, more positive ramification, is a heightened emphasis on victims' rights.

The causes of this development are complex. In Canada, it is difficult to explain empirically, since the trend lines on violent crime have been either stable or in slight decline in recent years. Perhaps it is fed by the sense of vulnerability individuals feel as their community becomes more diverse and more alien, their world more global and prone to random terror. Perhaps it is heightened by the constant flow of “fear” stories on the 6 o'clock news every night. Perhaps, in part, it is a reaction to the revolution of due process and rights and the influence of liberal social science on the criminal law. Whatever its source, it is real and cannot be ignored. Parliamentarians have responded

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by suggesting more minimum sentences and imposing sterner treatment, in some situations, for youths convicted of serious crimes. Less judicial discretion; more law. But more order? The jury is still out. We may debate where the balance should be struck. But it seems clear that balancing there is. The liberal thrust of the first three revolutions – the due process revolution, the social science revolution and the technological revolution – is itself being balanced against a counter-revolution -- the security revolution.

Before leaving the past, let me offer this overall snapshot of the last twenty years in criminal law. The epoch has been marked by conflicting trends and developments. In the grand tradition of the criminal law, compromises have been made, balances have been struck. We may argue about whether precisely the right balance has been struck in a particular situation on a particular country. On the whole, however, I would contend that the criminal law has striven to retain the best of what the due process, social science and technological revolutions offered, while remaining true to its ancient values.

The Next 20 Years

This brings us to the next twenty years. Will the balance that has sustained the criminal law in the past two decades be maintained in the two to come? No one can say. But let me hazard a more modest prediction: maintaining the balance will be even more difficult in the years to come than it has been in the past.

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Two factors will contribute to this difficulty: first, the ever-burgeoning impact of globalization; and second, the continuing impact of terrorism on our world and on our psyches. These factors, as current events attest, are interrelated.

First, globalization. Globalization has many ramifications. It is not only about expanding markets and expanding wealth, as Thomas Friedman would have it. It is about how we use and distribute scarce world resources. It is about expectations, met for some, denied to thousands. It is about increased disparity between the rich and the poor; about the movements of populations on a scale henceforth unknown in human history; about increasingly diverse societies in which people of different races, creeds and values find themselves living together in an increasingly crowded world. It is about sudden – in terms of the span of human history -- destabilisations.

These changes cannot but impact on the criminal law. They make the lessons we have learned in the past two decades about the importance of human rights and dignity in criminal law and criminal process more important than ever. But they also will feed the feelings of fear, frustration and helplessness that fuel crime on the one hand and the demand for more security on the other. Maintaining the balance will not be easy.

Second, terrorism. And, may I add, the fear of terrorism. Terrorism is not new. Just over twenty years ago, over 300 people perished when the Air India flight from Canada was downed by a terrorist-planted bomb. What is newer, and will increasingly impact on the criminal law in the

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decades to come, is the widespread fear of terrorism. September 11, 2001, indeed changed our world – the world as we perceive it. Perceptions demand responses. And responses that impact on the criminal law and the balances it strikes.

The Court on which I sit has already been engaged in the resultant call for rebalancing. In the 2002 *Suresh* case, the Supreme Court of Canada affirmed that governments need the legal tools to effectively meet the challenge of terrorism, but warned that it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to liberty, the rule of law, and the principles of fundamental justice. Yet the Court also has recognized the reality that terrorism must be fought. In *Charkaoui*, in dealing with the investigative hearing provisions of the *Anti-Terrorism Act*, it stated: “The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so.”

How, you ask, does this implicate the criminal law? It implicates the criminal law because terrorism is at base, criminal activity. Stripped of ideology, it is *the* unique and terrible criminal law phenomenon of the 21st century. People killing and harming other people without the legal authorization the law exceptionally allows (as in war or lawful execution) is crime, pure and simple. A rose is a rose by any name, to quote Shakespeare. So is crime.

If terrorism is crime, it follows that the balances the criminal law has struggled with in the past remain applicable to it. We must take care that in our fight against terrorism, we do not abandon the

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criminal law's concern for due process, human rights and dignity – concerns that have made great gain in the past two decades. We must ensure that the rule of the arbitrary and expedient does not trump the rule of law. It is due process and the respect for human rights that distinguishes the rule of terror from the rule of law. If we give up on due process and human rights we lose the war on terror.

Still, responding to terrorism, may require rejigging the balances that the criminal law has traditionally struck. To this end, governments may use rhetoric, diversionary arrangements and secrecy. These may not be evil in and of themselves. But we should be alert that if we are not attentive, they may obscure the fact that what is at stake are issues with which the criminal law has long and properly wrestled.

On the front of rhetoric, I agree with the comments made after the bombings in London on July 7, 2005, by Ken Macdonald, Q.C., Britain's Director of Public Prosecutions:

London is not a battlefield. Those innocents who were murdered...were not victims of war. And the men who killed them were not, as in their vanity they claimed on their ludicrous videos, 'soldiers'. They were deluded, narcissistic inadequates. They were criminals.... The fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws, and the winning of justice for those damaged by their infringement.⁶

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On the front of diversionary mechanisms — creating special regimes to deal with terrorism outside the normal process of the criminal law — we should remain alert, as I believe we are in Canada, that by whatever name, detention and punishment are the domain of the criminal law, and that consequently the traditional balances which are the criminal law's perennial struggle retain their place here. The power of states to detain people should never be allowed to slip beyond the control of the law. Special measures may be required, to be sure. But they should always be subject to legal justification. Otherwise we sacrifice not only the values that underlie the criminal law, but the rule of law itself.

Finally, on the front of secrecy, we must, while accepting that not everything can be disclosed, insist that secrecy be kept to the limits of what is truly necessary, and that where security concerns do not permit disclosure of evidence, substitutes for traditional legal scrutiny be found insofar as this can be done. Secret information should remain secret only as long as this is necessary, and internal review and oversight mechanisms should be used where possible to provide substitutes for the transparency of the usual disclosure, as the Arar Commission recently recommended.

Conclusion

I have spoken about the balances the criminal law facilitates and requires, past and present. Speaking for my country, I stand confident that the balances the criminal law has struck over the past two decades have been defensible balances that incorporated the best of the new while preserving the values of the past. Whether future pundits will be able to say the same twenty years from now

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remains to be seen.

Earlier this month, news agencies around the world told the story of a Polish man who had awoken after 19 years in a coma. A railway worker, Jan Grzebski, had been injured in 1988 while attaching two railway carriages. Having slept through the collapse of European communism, he awoke to find that his old world had been swept away, and that a new one had taken its place. When he visited a supermarket, he was shocked, remembering that at the time of his injury, there had been nothing to buy but mustard and vinegar.⁷

If we were to fall asleep today and wake twenty years from now, would we find the shelves of our legal supermarket well-stocked with the principles that imbue the criminal law of today? Would we find due process and the concurrent goods of liberty and human dignity on the shelves? Would we find the displays of judicial staples enriched by new findings in social science, mental health, and technology, of which we could not have dreamt? Or, in a reversal of Mr. Grzebski's experience, would we find the shelves bare, with little on offer but strife, intolerance and disorder?

The answer depends on how we balance the values that the criminal law mediates. It is my hope that this conference assists us in understanding how to do this in a just and responsible way. Thank you for allowing me to be a small part of that process.

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1. Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (1999) at 51
2. *R. v. Rothman*, [1981] 1 S.C.R. 640
3. *R. v. Wray* [1971] S.C.R. 272
4. [1987] 1 S.C.R. 265
5. [1991] 3 S.C.R. 326
6. "There is no war on terror in the UK, says DPP," Lucy Banneman, *The Times*, 24 January 2007.
7. "Man wakes after 19 years in coma to find radically altered Poland," online: CBC <<http://www.cbc.ca/cp/Oddities/070603/K060306AU.html>>.