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Is It Time to Overhaul the *Criminal Code of Canada?*

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The Need for a Revised Code: Contested Claims

As the centrepiece of Canadian criminal justice policy, the Criminal Code of Canada should be clear, cogent, and contemporary.

Does the current version meet these criteria? Several critics say "no." In one of his regular columns in the *Ottawa Citizen*, Dan Gardner describes the *Code* as "a huge, rambling, confused mess" in need of "the mother of all spring cleanings" (October 19, 2011).The Department of Justice heard similar concerns at a roundtable in 2002 when experts were reported to be "unanimous that the primary goal of criminal law policy...should be...an attempt to rein in the ever-expanding girth of the *Criminal Code.*"

The *Criminal Code of Canada*

Enacted by the Macdonald Government in 1892 as one of the first codifications of criminal law in the common law world, the *Criminal Code of Canada* remains the key piece of federal legislation regarding criminal behavior and its punishment. Since 1955, the *Code* has ensured that all criminal offences are defined in
statutory form (judge-made "common law" offences are no longer permitted.) While common law *defences* are still available in Canada, provisions in the *Code* also regulate the major ones. As such, the *Code* remains an indispensible guide for Canadians in determining where their liberty ends and where state prohibition begins.

Writing in 1989, Desmond H. Brown observed that "the *Code* of today is still recognizably [Macdonald's Attorney General Sir John] Thompson's work, albeit amended and adapted to meet society's changing needs" (151). Such amendments have occasionally been part of a package of reforms (such as Trudeau's 1969 *Act* which decriminalized homosexuality and permitted regulated abortions) but more often they have taken the form of piecemeal insertions and deletions, adding offences whenever politically necessary. While the *Code* has been frequently amended and occasionally "consolidated" (as it was in 1985), it has rarely been subjected to a systematic review and revision. Over its 120-year history, the *Code* has seen only one major, full-scale, substantial revision (1955), and even that revision left much unchanged.

Roundtable participants suggested that "'the criminal net is being cast too wide' and that the criminal justice system is 'the pot into which we dump every social problem,'" and that "[p]oliticians must resist the temptation to create a new offence every time there is a crisis" (Justice Canada 2002, *Report of Minister's Roundtable on Criminal Law* quoted in Hughes 2010, 119).

Lawyer Bob Tarantino, of the national law firm Heenan Blaikie LLP, states that the inevitable result is "obsolete laws," which may add to the *Code's* "charm" but may also be "dangerous" (2007, 101, 12-13). While obsolete laws are likely to be under-enforced, their existence may cause citizens to refrain from otherwise legal behaviour. When charges *are* laid under these sections, moreover, justice officials use them primarily for questionable strategic reasons, as discussed below.

But is there empirical evidence to support the critics' concerns about *Criminal Code* bloat? In March 2012, Department of Justice researchers Nicole Crutcher and Albert Brews reported the results of their survey of "infrequently used" sections of the *Code* (RB12-02E). Their goal was to address "anecdotal reports" that "the *Code* may be out of date and may benefit from being revised in its entirety and being modernized" (Crutcher and Brews 2012, 1). They found that, over the ten-year period of study (1996-2006), only five *Criminal Code* offences have had no charges laid, while another 32 have been charged 1-10 times. Crutcher and Brews conclude that a mere 37 "unused" and "infrequently used" offences do not warrant sweeping attempts to revise and cull the *Criminal Code* (3, 4), especially because some of these offences are simply rare rather than obsolete ("sabotage" and "hijacking," for example). Compared to the multitude of *Criminal Code* offences, most of which are the subject of hundreds and sometimes thousands of charges per year, the presence of only 37 rarely used offences makes reform sound considerably less pressing. (Although, as we suggest below, even a few obsolete offences can cause enough mischief to warrant removal).

Although this study remains an internal work product of the Department of Justice, available to citizens only under a Freedom of Information request (as we have done), it received significant public attention. In particular, Dean Beeby's *Canadian Press* article presented the study as providing "no compelling reason to overhaul the [*C]ode* at present" (October 21, 2012). The article was widely syndicated (*Montreal Gazette*, October 22, 2012; *Vancouver Sun*, October 22, 2012; it remains online at *Maclean's* and *The Huffington Post*).

Beeby's article is misleading because its source – the Crutcher and Brews study – is flawed. The study's methodology is open to two main criticisms:

1. It defines "criminal offence" too broadly, grouping distinguishable offences together in order to count "charges laid"; and

2. It focuses exclusively on "charges laid" (instead of convictions secured at law) as the measure of offence utility.

For these reasons, the study systematically underestimates the prevalence of obsolete or outdated offences, and fails to confront the criticisms that have been levelled against the *Code*. The *Code*, therefore, is more open to criticism than Crutcher and Brews' methodology can discern.

The Minimizing Effect of Grouping Distinguishable Offences

In 2007, Tarantino published *Under Arrest: Canadian Laws You Won't Believe*, a lively account of absurd Canadian laws. While he did not focus exclusively on criminal law, Tarantino's book is littered with *Code*-based offences that do indeed invite disbelief. These include provisions that make it a crime to sell comic books, advertise Viagra, fraudulently practise witchcraft, or publish a blasphemous libel. As well, law scholar Jula Hughes notes that "[i]f we actually enforced all criminal law, including prohibitions against issuing Zellers points (s. 427 of the *Criminal Code*), cheating on the LSAT (s.404) and waterskiing by night (s.250), we would indeed have a police state" (Hughes 2010, 125).

None of the provisions highlighted by Tarantino and Hughes appears in Crutcher and Brews' list of 37 unused or infrequently charged offences, suggesting that each of them must have been charged more than 10 times in the decade surveyed. This is incorrect. Our own review of reported judicial decisions and search of press accounts (using *FACTIVA* and *Canadian Newsstand*) showed only a single occasion of the comic book prohibition being prosecuted (discussed below) and zero prosecutions related to blasphemous libel between 1977-2012. Since a pursuit of either charge would engage Charter concerns (both potentially run afoul of the freedom of expression guarantee), regular prosecution – more than one per year – would have attracted at least some press coverage and judicial attention. In our view, it is more likely that Crutcher and Brews' definition of "*Criminal Code* offence" minimizes the number of infrequently used sections by going too far in grouping offences together.

A degree of grouping is understandable. Some offences span multiple sections of the *Code*, and exist as part of an overall scheme (the murder/manslaughter/infanticide sections, for example, work together as part of an overall "homicide" set of provisions).

Other sections contain a number of very different and discrete offences. Grouping may therefore combine several primary sections or discrete sub-sections of a single primary section. While this sometimes makes sense, it can also lead to difficulties. Determining what constitutes a single offence for the purpose of empirical study requires careful judgment and Crutcher and Brews have provided very little information about how they construct offences. They make one oblique mention of grouping offences with their punishment (if in a separate section) but they otherwise provide no explanation for how offences are delineated and grouped (Crutcher and Brews 2012, 2).

Grouping Primary Sections

Combining primary sections – the main section numbers of the *Code* (excluding sub-sections) – into more general "groups of offences" may explain why blasphemous libel, prohibited by s. 296 of the *Code,* does not appear on Crutcher and Brews' list of unused offences. S. 296 reads as follows:

> Everyone who publishes a blasphemous libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. No person shall be convicted of an offence under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion upon a religious subject.

As the *Martin's Annual Criminal Code* annotation to this section notes, "[t]his rather archaic section, if used, would, in all likelihood, be challenged under the Charter" (2011, 623). It is offensive to at least three fundamental freedoms (expression, belief, and conscience) and its weak defences ("good faith" and "decent language") are clearly inadequate to protect it from Charter scrutiny. Its survival in the *Criminal Code* is largely due to the fact that the last known prosecution was in 1935 (Tarantino 2007, 111-114). No prosecutor today would proceed with a charge that is so obviously constitutionally infirm.

It is therefore surprising that the blasphemous libel provision (s. 296) does not appear on Crutcher and Brews' list of unused sections. However, if Crutcher and Brews grouped it with the more general criminal libel provisions (ss. 297-317), then these combined sections would surely result in more than 10 charges in the study period. (A precise number is not publically available because Statistics Canada combines the charge data even more bluntly than Crutcher and Brews, coding a multitude of offences as "other *Criminal Code* offences.")

Grouping primary sections of the *Code* may also explain the absence of s. 365 from Crutcher and Brews' list of unused sections. S. 365 of the *Code* states that

> Every one who fraudulently pretends to exercise or to use any kind of witchcraft, sorcery, enchantment or conjuration is guilty of an offence punishable on summary conviction.

Detective Constable James Turnbull is reported by the *Toronto Star* as saying that the "charge of pretending to practise witchcraft is so rare he doesn't remember Toronto police ever laying it" (November 28, 2012). S. 365 is not included in Crutcher and Brews' list of infrequently used sections, presumably because they grouped these charges with the more general fraud provisions found in Part X of the *Code* or with the "false pretence" provisions found in ss. 361-364. In 2006 alone – the last year of Crutcher and Brews' study – there were over 15,000 fraud charges according to Statistics Canada. Lumping the witchcraft offence with the more general fraud provisions would easily allow it to be overlooked in Crutcher and Brews' identification of infrequently used offences.

Grouping Sub-sections

Crutcher and Brews also combined several sub-sections of the *same* primary section I nto a single offence. There is no other way to explain why crimes such as selling comic books or advertising Viagra do not appear in their list of unused or infrequently used sections. The comic-book crime appears in sub-section 163(1)(b), which reads

> Every one commits an offence who makes, prints, publishes, distributes, sells or has in his possession for the purposes of publication, distribution or circulation a crime comic.

By virtue of s.163(7), a crime comic includes any book that shows in pictures a crime, real or fictitious, being committed – making the sale of virtually every issue of *Batman* or *Spiderman* a criminal offence in Canada. Similarly, advertising Viagra is covered by sub-section 163(2)(d), which makes it a criminal offence to advertise products "represented as a method for restoring sexual virility."

Regular prosecution of either "crime" would, of course, draw considerable attention (Tarantino 2007, 28). These offences are not on Crutcher and Brews' list of infrequently used sections, we suspect, because their study treated s.163 as a single criminal offence and thus combined all s.163 charges together. This would significantly increase the number of charges found, since s.163 contains a variety of offences, including the general restriction on obscenity, found in sub-sections 163(2)(a) and (b), which prohibit obscene written material, photographs, "disgusting objects and indecent shows." Sub-sections 2(a) and (b) alone generate over 10 charges per decade (an educated estimate would put the number in the hundreds) and thus the *entire* section 163 would be classified as frequently used according to Crutcher and Brews' methods.

Without conducting a full review of the *Code* and compiling a defensible list of discrete offences, it is impossible to know how many "embedded" sub-sections, like the ones in s.163, Crutcher and Brews missed – especially since embedding appears to be widely used in the *Code*. Counting only the main section numbers (what we have called "primary" sections), the original 1892 *Code* had 983 sections in 311 pages.

In contrast, the 2011 statute contains 849 sections in 947 pages (there are some differences in page formatting, and it is difficult to extract word counts from the documents; a laborious word-by-word approach would produce a more reliable statistic). As a rough measure, today's *Code* contains 13 percent fewer sections in about 300 percent more pages. This suggests that the bloat primarily takes the form of increasing the size and scope of existing sections by adding sub-sections. If this is correct, then the problematic merging seen in the case of s.163 will be a growing problem in future measurements of the *Code's* effectiveness

The Cumulative Effect of Grouping Errors

Both kinds of merging – combining several primary sections or all the sub-sections of one primary section – can obscure the very provisions that attract the attention and concern of critics. Just as the obsolete crime comics provision in s. 163(1)(b) is hidden in the broader category of all s. 163 charges, so the obsolete "blasphemous libel" provision (s. 296) disappears when merged with the general libel sections 297-317, and the equally obsolete witchcraft provision (s.365) escapes notice in a wider group of false pretence offences (ss. 361-364). Both kinds of merging mean that the offences that critics ridicule and that might justify revising the *Code* simply vanish.

Counting Charges and Convictions

Crutcher and Brews imply that their 37 unused and infrequently charged provisions should remain in the *Code* because it is not worth the effort to repeal so few of the *Code's* multitude of offences. If we are correct, however, the real number of obsolete offences is much higher. Perhaps they also think that even the rare charges that *are* brought under some of these sections indicate a modicum of usefulness.

But what if those charges almost never lead to conviction? In that case, the offences are useful only to prosecutors, but perhaps in ways and for reasons that count against keeping them in the *Code*. In focussing only on charges and ignoring convictions, Crutcher and Brews misunderstand the concerns that animate proponents of a revised *Code*. From the perspective of the critics, the occasional or infrequent charging of an obscure or out-of-date provision can be part of the problem, especially when conviction is no longer a meaningful prospect.

In his oft-cited article, "The Pathological Politics of Criminal Law", the late Harvard law professor William Stuntz identified the "political economy" of criminal justice actors, suggesting legislators and prosecutors have powerful incentives to expand criminal liability (2001, 530-532). Expanding the number of crimes and mixing-and-matching the elements necessary to prove crimes gives prosecutors the flexibility and discretion to achieve cheaper and quicker prosecutions and plea agreements. For example, the prospect of a summary witchcraft conviction can be used to induce a plea bargain on more plausible fraud offences (see R. v. Gomez pg. 7). In other words, the persistence of obsolete offences facilitates "overcharging" – where many charges (under multiple provisions directed at similar behaviour) are levelled at an accused to enhance the state's position in plea negotiations while giving the prosecutors maximum flexibility throughout the proceedings.

Overall, the justice system has little incentive to remove provisions since that may restrict or limit prosecutorial choice. The potential for obscure and arcane provisions to be abused in charging decisions is precisely what motivates advocates to reform the *Code*.

Tarantino, for example, notes that the blasphemous libel provision might have a chilling effect on speech. He suggests that the magazine *Western Standard* could have left itself open to criminal liability when it reprinted the Danish cartoons depicting Mohammed in a negative light (2007, 111). With respect to the prohibition against crime comics, the single modern instance of its prosecution is illustrative. In 1987, charges under s. 163(1)(b) were laid against a Calgary comic store suspected of selling sexually explicit materials. Police seized over 90 comics (Tarantino 2007, 28). Once it was clear that the more serious obscenity charges could be substantiated, the crime comic charge was dropped. Given that the crime comic and blasphemous libel provisions are unlikely to survive a constitutional challenge, their continued existence in the *Code* should be reconsidered, particularly if they are being used primarily to expedite administration, to arrive at more severe plea outcomes, or to inhibit otherwise legal behaviour.

The Case for Measuring Convictions

For these reasons, a more complete survey of the *Code* should include the number of *convictions* as an additional measure of usefulness to complement the raw charges statistic. Crutcher and Brews note that they chose court data over police data because "it represents a later stage in the justice system" and includes only cases "in which a suspect has already been caught" (2012, 1). For charges to be laid, a prosecutor must have determined that there is a reasonable likelihood of a conviction (otherwise they are obligated to *not* lay the charge).

R. v. Gomez

The notable case of Gustavo Valencia Gomez illustrates the potential for obscure provisions to facilitate overcharging for strategic purposes. On November 27, 2012, the Toronto Police Service charged Gomez with four *Criminal Code* offences: three common ones (fraud, false pretences, and possession of the proceeds of crime) and the aforementioned offence of fraudulently practising witchcraft. According to media accounts, Gomez was clearly involved in disreputable behaviour. He had told a Brampton woman that she was under a "curse" that only he could cure through rituals involving "bloodstained eggs, worms and black coal" at the cost of $14,000 (*Toronto Star,* November 28, 2012). In this case, the charge of witchcraft is a strategically useful complement to the potentially more serious indictable offences of fraud and false pretences.

Even when, as in Gomez's case, an accused is clearly guilty of other significant offences, the use of obsolete charges for strategic reasons is open to question. It is all the more troubling to think that a case too weak to substantiate an outright fraud charge may still constitute a crime simply because it involves witchcraft. It makes no sense to single out witchcraft from other confidence tricks. Canadians might be better served by the clear, generally applicable fraud provision, and a revised *Code* should rely on it exclusively.

Given Crutcher and Brews' preference for court data later in the process, convictions should provide an even better metric for usefulness than charges, especially since the usage of the offence would have been sanctioned by a judicial authority instead of simply being useful to the prosecutor in pursuing charges.

Crutcher and Brews do not provide data on convictions, but we can glean some insight by running their results through databases of reported judgments. For this task, we used LawSource, Quicklaw, and the Nadan-Davis Sentencing Digests to search for convictions under specified *Code* provisions. While all three databases have a very wide scope, they are not comprehensive since they comprise *reported* decisions only (some routine judgments are made orally and some written decisions are not collected in commercial legal databases). A conviction may have been bestowed in an unreported decision but we consider this unlikely for two reasons. The novelty of using a lesser-known provision would attract the attention of the commercial legal reporters, and a conviction would likely be the subject of an appeal, which is always reported. Still, we note this as a limitation in our methodology. Table 1 combines Crutcher and Brews' 32 infrequently used offences and the number of charges they reported with our results regarding convictions.

Table 1 Charges and convictions of infrequently used offences

Offence Section of the *CCC*	*Criminal Code Designation*	Offence type*	Max sentence	# charges proceeded to court	# convictions within period (1996-2006)
52	Sabotage	I	10 yrs	10	0
318	Advocating genocide	I	5 yrs	10	0
370	Counterfeit proclamation	I	5 yrs	10	0
377	Damaging documents	I	5 yrs	10	0
394	Fraud in relation to valuable minerals	I	5 yrs	8	1[1]
390	Fraudulent receipts under Bank Act	I	2 yrs	8	0
415	Offences in relation to wreck	H	2 yrs (if indictable)	8	0
420	Military stores	H	5 yrs (if indictable)	8	0
429**	*Wilfully causing an event to occur*			8	
124	Selling or purchasing office	I	5 yrs	7	0
292	Procuring feigned marriage	I	5 yrs	7	0

1. R v. McLaughlin [1997] O.C.J. 4719. The Supreme Court case regarding a conviction on these grounds (*R v. Laba* [1994] 3 S.C.R. 965) occurs before Crutcher and Brews' period of study.

Offence Section of the *CCC*	*Criminal Code* Designation	Offence type*	Max sentence	# charges proceeded to court	# convictions within period (1996-2006)
382	Fraudulent manipulation of stock exchange transactions	I	10 yrs	7	1[2]
413	Falsely claiming royal warrant	S		7	0
422	Criminal breach of contract	H	5 yrs (if indictable)	7	0
339	Taking possession of drift timber	I	5 yrs	6	0
402	Trader failing to keep accounts	I	2 yrs	6	0
410	Other offences in relation to trademarks	H	2 yrs (or summary)	6	0
455	Clipping and uttering clipped coin	I	14 yrs	6	0
184.5	*Interception of radio-based telephone communications*	I	5 yrs	6	0
51	*Intimidating Parliament or legislature*	I	14 yrs	5	0
62	*Offences in relation to military forces*	I	5 yrs	5	0
438	Interfering with saving of wrecked vessel	H	5 yrs (if indictable)	5	0
193.1	Disclosure of information received from interception of radio-based telephone communications	I	2 yrs	5	0
50	Assisting alien enemy to leave Canada, or omitting to prevent treason	I	14 yrs	4	0
371	Telegram [or cablegram or radio message] in false name	I	5 yrs	3	0
56	Offences in relation to members of the RCMP	S		2	0
71	Duelling	I	2 yrs	2	0
134	Misleading justice	S		2	0
288	Supplying noxious things	I	2 yrs	2	0
451	Having clippings	I	5 yrs	2	0
459	Conveying instruments for coining out of mint	I	14 yrs	2	0
394.1	Possession of stolen or fraudulently obtained valuable materials	I	5 yrs	2	0

2. R v. Kronis (1997), 1997 CarswellOnt 1081, Watt J. (Ont. Gen. Div.).

*I = Indictable; H = Hybrid; S = Summary offence

** S. 429 is not really an offence. Instead, this provision is intended to help prosecute S. XI offences.

Of Crutcher and Brews' 32 infrequently used offences, we found only two ("Fraud in Relation to Valuable Minerals" and "Fraudulent Manipulation of Stock Exchange Transactions") that had any convictions secured at law in the same period. Using convictions as the benchmark of an offence's utility, therefore, another 30 offences fall into the "unused" ategory and should be revised -– especially since virtually all the charges were resolved by acquittals, or, more likely, by plea agreements or convictions on other charges. The lack of convictions on the more serious offences (which may rightfully belong in the *Code*) suggests that the prohibited behaviour is perhaps better handled through other duplicative sections. In sum, the lack of convictions supports the notion that these underused provisions owe their existence more to their usefulness as prosecutorial bargaining chips than as legitimate charges in their own right.

For the sake of consistency, we have subjected three of the grouped sections that Crutcher and Brews miss entirely to the same methodology. The results, presented in table 2, again show no convictions.

Table 2 Blasphemous libel, crime comics, fraudulently practising witchcraft

Offence Section of the *CCC*	Name	Type of offence	Max sentence	# convictions within period (1996-2006)
296	Blasphemous Libel	I	2 yrs	0
163, 164	Crime Comics	H	2 yrs (or Summary)	0
365	Pretending Witchcraft	S		0

The Process of Revision

A systematic review would probably reveal many more offences that have not resulted in a single conviction during the given period.

Compiling such a list would be a challenging but worthwhile endeavour. It would require an initial review of the *Code*, a properly constructed list of offences (as discussed above), and a subsequent search for convictions. The resulting list of offences with zero convictions would provide an initial set of offences that might be suitable for revision or deletion. Some of them, however, may actually be useful. We agree with Crutcher and Brews that some of their 37 unused or infrequently used sections are serious crimes and "likely rarely used as a result of relatively infrequent occurrence rather than obsolescence" (2012, 7). After generating the list, it would then be necessary to distinguish between offences with no convictions because they are outdated and those with low convictions simply because those crimes are rarely committed. As a starting point, however, the list of no-conviction offences would give Canadians a sense of the number of provisions that may no longer be useful – a number likely to be much higher than Crutcher and Brews suggest. Some of the no-conviction offences – such as the crime comics or blasphemous libel provisions – could be removed with little political opposition in an initial round of deletions.

Another round of deletions – eliminating provisions that have already been found to be constitutionally infirm – would similarly involve little risk of controversy or opposition. Provisions relating to "felony murder", for example, remain in the *Code* despite having been found invalid by the Supreme Court of Canada in 1990 (*R. v. Martineau* [1990] 2 S.C.R. 633). Stuart notes that the unconstitutional elements of the offence have been accidentally left with the jury in at least three cases as a result of its continuing presence in the *Code* (2012, 18). This waste of judicial resources could have been easily avoided by even the most cursory edits to the *Code*.

Conclusion: The Path to Revision

In 2002, one participant at the Department of Justice Roundtable said, "the *Code* is in the shape it is today because politicians have abdicated their responsibility to take leadership and left it to judges to decide what the criminal law should be" (2002, 4). On the other hand, Dan Gardner notes that political incentives run against re-organizing the *Code*: "that would be a long slow, difficult process with no political payoff – unlike adding stuff to the *Criminal Code*, which is quick and easy and a great vote-getter" (*Ottawa Citizen,* October 19, 2011). Crutcher and Brews' study only aggravates those incentives by suggesting that the need for reform is not nearly as pressing as critics suggest.

However, the prospects for reform are perhaps not as bleak as Gardner suggests. At the Roundtable, it was noted that comprehensive reform was "unlikely to be achieved all at once but could be accomplished in manageable chunks" (2002, 4). As already mentioned, an initial review and revision of obsolete and infirm offences would be a manageable chunk that could garner considerable consensus. Such an approach would decouple this exercise from any grander revisions of the *Code*. Attempts to reformulate the underlying logic of criminal fault in the *Code* have been mooted for years by legal scholars (Stuart 2009 provides a good summary of these unsuccessful attempts). Such reforms are likely to be controversial and they may undermine efforts to simply streamline the *Code*, which is a worthwhile endeavor in its own right.

Crutcher and Brews state, "It is important to continue to monitor the *Criminal Code* offence sections to ensure the statute is reflective of Canadian society and that the language is up to date" (2012, 7). We agree. Furthermore, we encourage the Government of Canada to conduct a rigorous review of the *Code* so that even a modest pruning proves beneficial to Canadians.

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