INTERPRETING THE *CRIMINAL CODE*: HOW NEUTRAL CAN IT BE? A COMMENT ON *R.* v. *MCCRAW*

*Ruth Sullivan**

I. INTRODUCTION

The accused in *R.*v. *McCraw*[1] was charged with violating paragraph 243.4(1)(a) of the *Criminal Code*[2] which makes it an offence to knowingly convey to any person a threat to cause death or serious bodily harm.[3] The charges against Mr McCraw arose out of three letters he wrote and sent to the three complainants in the case. Each letter described various acts Mr McCraw would perform and have performed on him if he were to have sexual intercourse with the complainant and each ended with Mr McCraw asserting that he would have sexual intercourse with the complainant - even if he had to rape her, even if it took him until the day he died.

The accused admitted that he wrote and sent the letters to the complainants. He even admitted that the content of the letters was "immature" and "disgusting". But this, of course, was not the issue. The issue was whether the letters amounted to or contained a "threat. . .to cause. . .serious bodily harm" within the meaning of the section.

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* Faculty of Law, University of Ottawa.

[1] (November 8, 1988) (Ont. Dist. Ct) [unreported] (hereinafter *McCraw*].

[2] Originally the threatening provision was found in R.S.C. 1970, c. C-34, s. 331. Under the *Criminal Code*, R.S.C. 1985, c. C-46 the provision was moved to s. 373. The *Revised Statutes of Canada, 1985* were not proclaimed until December 12, 1988, however. Meanwhile s. 54 of the *Criminal Law Amendment Act, 1985*, S.C. 1985, c. C-19 repealed s. 331 of the *Criminal Code* and s. 39 of the same *Act* enacted an identical provision as s. 243.4. The *Criminal Law Amendment Act, 1985*, R.S.C. 1985 (1st Supp.), c. 27, s. 38 added s. 264.1 which is identical to s. 373 (and s. 243.4) and s. 53 repealed R.S.C. 1985, c. C-46, s. 373.

[3] Section 243.4(1) (now s. 264.1(1)) states that:

Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat

(a)
to cause death or serious bodily harm to any person;
(b)
to burn, destroy or damage real or personal property; or
(c)
to kill, poison or injure an animal or bird that is the property of any person.

To reach a conclusion in the case, Judge Flanigan had to make a number of decisions. He had to determine the meaning of "threat to cause. . .serious bodily harm" as these words are used in the statute. He had to determine the type and extent of the harm, if any, that was threatened in the letters written by the accused. Finally, he had to decide whether the words of the section, as interpreted, applied to the words of the letter, when properly understood. In other words, Judge Flanigan was called upon to interpret both the legislation (what range of threats did Parliament intend to criminalize?) and the letter (what did the accused mean by "rape"?) before he could address the bottom line of the case (was this a threat within the meaning of the *Act*?).

In interpreting the language of the statute Judge Flanigan focussed on the words "serious bodily harm". He accepted defence counsel's argument that this language is not broad enough to include psychological or emotional harm, but refers exclusively to visible physical injuries like broken bones and torn muscle — the sort of harm produced by strangling, stabbing, shooting and the like.[4] As for the accused's threat of "rape", this was understood to refer to non-consensual sexual intercourse that could be, but is not necessarily, accompanied by harm of the relevant sort.[5] The question then became whether a threat to have non-consensual sexual intercourse which could be accomplished without inflicting broken bones or torn muscle was good enough. In Judge Flanigan's view, it was not. He found that, in order to fall within the section, the words used by the accused must *necessarily* threaten serious bodily harm and the words used here did not.[6]

Judge Flanigan's judgment ends with the following observation:

> In my view, regrettably, this person is no more, in the Court's view, than a creep, but that does not of itself require the Court to bend the law to convict him where no such conviction, in this Court's view, is sustainable by law. The accused will therefore be acquitted.[7]

In these final sentences Judge Flanigan implies that he had no choice but to acquit the defendant, that he was obliged by law — quite against his inclination — to reach the conclusion he did. These sentences are a model of classic judicial rhetoric. Judge Flanigan makes it clear that he does not like the defendant by calling him "a creep". This emphasizes the moral repugnance he feels for what the defendant has done and suggests that emotionally and psychologically he is on the complainants' side. This allegiance is reinforced by the

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[4] *Supra*, note 1 at 3.

[5] *Ibid.* at 4-5.

[6] *Ibid.* at 6-7.

[7] *Ibid.* at 9. I have quoted the final sentences of Judge Flanigan's reasons for acquittal. However, this was not the end of the matter for Mr McCraw. Judge Flanigan went on to consider whether he ought to order the accused to enter into a peace bond pursuant to s. 745 of the *Code*. In the end such an order was made.

regret he expresses at the fact that the defendant is merely a creep and not a criminal who might legitimately be sent to jail. Law is depicted in the sentence as a self-contained entity over which a judge of integrity has little or no control. To convict, Judge Flanigan would have "to bend the law", that is, to twist or distort it, in effect to cheat, for a conviction is simply not "sustainable by law". Even the references in the sentence to the judge's own point of view help create an impression of judicial choicelessness in the face of the law. In the opinion of Judge Flanigan the man, as evoked by the words "in *my* view", the defendant is a creep. However, in the opinion of Judge Flanigan the judge, as evoked by the words "the *Court's* view", there is nothing to be done about it.

Is this depiction accurate? Were Judge Flanigan's answers to the questions posed by this case somehow dictated by law so that in truth he had no choice?

There is a sense in which a claim of this sort is merely silly. Obviously the judge had a choice. He had several decisions to make, which might have gone either way, and the particular way he chose to resolve them determined the findings of fact and law which in turn determined the outcome. However, the purpose of Judge Flanigan's sentence, I suspect, is not to deny that he had choices to make, but rather to deny that the results were governed or in any way influenced by his personal views or perspective. Especially in a case that deals with the difficult subject of rape, Judge Flanigan is anxious to assure his audience that in making the necessary findings of fact and of law he used legal method and materials to reach a legally sound result. In this sense the outcome was determined by the law as opposed to the Judge.

Implicit in these final sentences is the claim that there is a legally sound way to interpret legal texts that is not reducible to personal preference or politics,[8] that a judge with integrity can achieve neutrality even in cases where his emotional and moral inclinations are engaged. In my view, this claim to neutrality is untenable: there is no legally sound way to interpret legal texts that is not ultimately reducible to politics. However, it does not follow from this view that there is no legally sound way to interpret legal texts or that judicial integrity is an empty or unimportant concept. Some interpretive efforts are better than others not only because they produce a better outcome from a political point of view, but because they are more persuasive from a technical point of view. It is the technical aspect of interpretation that I wish to focus on in this comment.

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[8] The term "personal preference" is here used interchangeably with "political preference" or "politics". This is apt when speaking of the decision of a judge in which the judge's expression of personal preference takes the form of a binding judgment that fixes relationships of power among persons and between persons and the state.

The interpretation and application of statutes involves choice because the language in which statutory provisions are written is often, if not always, indeterminate.[9] In so far as the reference of statutory language is not dictated by the text, it must be chosen by the reader. While some choices are obvious in the sense that everyone in the room or the community or the country would choose in the same way,[10] others call for difficult, unobvious choices of the sort Judge Flanigan had to make.

Over the years the courts have developed techniques to assist with the difficult choices. I do not suggest that these techniques determine or control the outcomes of cases, especially cases raising issues that are divisive or controversial. As the realists persuasively demonstrated some fifty years ago, the so called "rules" of statutory interpretation are easily manipulated by competent users.[11] I do suggest, however, that when used with integrity the rules of statutory interpretation limit the range of acceptable outcomes; they impose a certain discipline on judicial creativity; above all, they help to define the nature of the choices facing a judge in particular cases and to indicate the type of reasons that may be invoked to justify the outcome.

This last is an important point. If political choice is indeed unavoidable in the way I have suggested here, what can we legitimately demand of judges? Does it make sense to complain that judges are not neutral but choose in accordance with their personal values and perspective if there is no way of avoiding such choice? I would suggest that what can and should be demanded of judges is explicit deferential choice. This means, first, that judges must identify and acknowledge the choices to be made in disposing of matters before them. Second, judges must do the work of interpretation. That is, a good faith effort must be made to understand the meaning and purpose of statutory

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[9] Michael Moore argues persuasively that all language is indeterminate: *see* M.S. Moore, *The Semantics of Judging* (1981) 54 S. CAL. L. REV. 151. The extent to which statutory language is indeterminate and the implications of possible degrees of indeterminacy are widely debated topics in current academic literature. The flavour of this debate is well captured in a recent exchange between Brian Langille and Allan Hutchinson in the McGILL LAW JOURNAL: *see* B. Langille, *Revolution Without Foundation: The Grammar of Scepticism and Law* (1988) 33 McGILL L.J. 451 and A.C. Hutchinson, *That's Just the Way It Is: Langille on Law* (1988) 34 McGILL L.J. 145.

[10] Obvious choices are not problematic. Some would not call them choices at all. It appears that the key difference between Hart and Fuller , between the so-called positivists or formalists on the one hand and the anti-positivists or functionalists on the other boils down to how to characterize properly easy cases and what goes on in solving them: is the judge bound by the words to choose as she does or is it a real choice the free aspect of which is disguised by the fact that everyone in the audience (more or less) would make the same choice in the circumstances.

[11] The best known statement of the realist insight is Llewellyn's: *see* K.N. Llewellyn, THE COMMON LAW TRADITION (Boston: Little, Brown, 1960) at 521-28. *See also* the Canadian classic by J. Willis, *Statute Interpretation in a Nutshell* (1938) 16 CAN. BAR REV. 1.

provisions using appropriate legal techniques. Appropriate techniques are those which attempt in so far as possible to capture the actual intent behind a given legislative initiative. Third, judges must acknowledge and accept responsibility for the personal or political dimension inherent in the choices actually made. To the extent that "the law" does not determine outcomes, because the language of the law is indeterminate and because the rules of statutory interpretation are manipulable, judges unavoidably must choose on the basis of personal values and perspective. The judicial preference here must be acknowledged and in so far as possible justified by relating the judge's personal values and perspective to community values and beliefs.[12]

From this point of view Judge Flanigan's judgment in the *McCraw* case is inadequate for several reasons. Although the choices to be made are identified and acknowledged, the work of interpretation is not done well and the political aspect of the decision is denied rather than justified. More particularly, in interpreting the threatening language contained in the letters, Judge Flanigan ignores the first principle of all interpretation, which is to read the words to be interpreted in context. In interpreting the language used to define the offence of uttering threats, he fails to consider the legislative history of the section creating the offence and the purpose the legislature sought to achieve when it recently amended the section. And finally, in applying the language of the statute to the language of the letter, he uses the strict construction rule of interpretation to thwart the apparent purpose of the section. I shall argue below that the strict construction rule hinders rather than helps judicial efforts to understand the actual intent behind legislative initiatives and for this reason is not an appropriate technique of statutory interpretation. In any event the rule cannot be relied on to defeat the apparent social purpose of a statutory provision, even a provision of the *Criminal Code*.

II. Rape in context

As noted above, to reach a conclusion in this case one of the things Judge Flanigan had to do was determine the import of the threat to rape contained in the letters sent to the complainants. This threat is problematic and calls for interpretation because "rape" is a vague term; that is, the range of events to which it can refer is wide and varied. Some rapists strangle or stab their victims in the course of

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[12] By community values and beliefs I mean values and beliefs that are recognized by the community as expressing an intelligible point of view. They need not be shared by all persons or even a majority of persons in the community but they must be examples of what "counts" as a value or belief within the community. Examples relevant to the *McCraw* case might be the idea that persons should be free to say whatever they like in a democracy and the idea that women should be free of the unwanted sexual attentions of men.

forcing sex on them, while others merely threaten violence or other unwanted consequences if the victim does not cooperate.

This potential problem disappears if one accepts the Crown's suggestion that all rapes inflict serious psychological, emotional and physical damage on the victim, that the act of rape as commonly understood always involves a seriously harmful violation of the victim's bodily integrity.[13] However, this suggestion is rejected by the Judge. In his view, the absence of consent that occurs in rape cannot in itself transform the physically harmless activity of sexual intercourse into something physically harmful. Serious physical harm occurs in rape, he finds, only if the rapist also stabs or strangles his victim or otherwise wounds her in some tangible way.[14]

Having reached this conclusion, Judge Flanigan must come to an understanding of what the accused meant to threaten when he used the words "even if I have to rape you". His approach to this problem is, in my view, technically unsound. Instead of looking at the word "rape" in the context of the letters and the circumstances under which they were sent, the Judge removes the word "rape" from its linguistic and factual setting to the genteel world of court rooms and legal dictionaries. In this world threatening letters are referred to as "exhibits", "fuck" and "fucking" become "sexual intercourse" and "rape" becomes "non-consensual sexual intercourse".

This disregard for context is evident in the way the Judge deals with the facts of the case at the very beginning of the judgment. We are told that the letters were typed and that they are almost identical, suggesting impersonality — as in a form letter. We are told that each contains a sexual fantasy. We are not told that the complainants are addressed in these letters by name, that the accused boasts personal knowledge of them, that he describes getting an erection every time he sees them, that he claims to masturbate nightly thinking of them or that he alludes to their individual features like breast size. In rehearsing these details the defendant asserts an actual knowledge of and a longstanding intimacy with the complainants. He claims to have an ongoing relationship with them in which he is in complete control.

The Judge also displays a disturbing lack of interest in the details of the so called "fantasy" set out in the letters. After all, it is *this* the accused insists he will accomplish, even if he has to rape. He wants to lick and suck the complainants' toes, legs and vagina; he wants to force his penis into their mouth, vagina and anus; he wants to "shoot" his sperm all over their face. These desires are described using the conventional language of pornography, a language of power and control. The fantasy ends with the words "I am going to fuck you even if I have to rape you. Even if it takes me till the day I die." The

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[13] *Supra*, note 1 at 1-2.
[14] *Ibid.* at 7.

defendant's fantasy is an assertion of total physical domination of the complainants and his threat is to do whatever is necessary to achieve that domination.

When the words "even if I have to rape you" are looked at in the linguistic and factual context in which they were written and sent, they seem to my ear to threaten the use of physical force — extreme force if necessary, the sort that does serious bodily harm. The fact that one or more of the complainants might succeed in avoiding physical violence through submission to the defendant's demands doesn't alter the fact that such violence has in fact been threatened.

III. The Legislative History of Section 243.4

Judge Flanigan's next job was to determine the meaning of the words "threat to cause death or serious bodily harm" as these words are used in section 243.4 of the *Code*. The Judge does not find the word "threat" problematic. This term has been used by the legislature since the offence of uttering threats was first created and it is reasonably well understood.[15] The problem lies with the expression "serious bodily harm". Although the Judge makes no explicit finding, it is clear from his judgment that he accepts the view that the harm referred to here must consist of tangible physical damage to the body as opposed to the mind. In other words, emotional or psychological damage will not suffice.

In support of this interpretation the Judge points out that the words "serious bodily harm" are linked to and coloured by the word "death" in the section. He also refers briefly to the legislative history of the section. Prior to a recent amendment it was an offence to threaten "to cause death or *injury* to any person". Under the amended version the offence consists in threatening "to cause death or *serious bodily harm*". In the Judge's view, this change in wording was meant to narrow the scope of the section. However, a more careful and thorough review of the section's legislative history suggests a very different explanation for this particular change.

The offence set out in section 243.4 of the *Code* can be traced back to section 15 of the *Offences Against the Person Act*, a federal statute first enacted in 1869.[16] As the Supreme Court of Canada points out in *R.* v. *Nabis*,[17] this statute supplanted several provincial statutes that had been enacted to deal with offences against the person, and it created a uniform law for Canada in the area. Section 15 defined the offence of uttering threats against persons in the following way:

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[15] *See Offences Against the Person Act, 1869*, S.C. 1869, c. 20, s. 15.

[16] S.C. 1869, c. 20, s. 15.

[17] (1974), [1975] 2 S.C.R. 485, 18 C.C.C. (2d) 144 [hereinafter *Nabis* cited to S.C.R.].

> Whosoever maliciously sends, delivers, or utters, or directly or indirectly causes to be received. . .any letter or writing threatening to kill or murder any person, is guilty of felony and shall be liable to be imprisoned. . .for any term not exceeding ten years and not less than two years. . . .

This was carried forward into the *Criminal Code* of 1892 without material change.[18] It will be noted that, originally, to come within the section the harm threatened had to be the death of a person; a threat of mere injury would not suffice.

In the 1953-54 revision of the *Code* important changes were made. First, the offence of uttering threats against persons was expanded to bring it in line with an array of offences having to do with threats to damage property. Before 1954 it was an offence to send a writing that threatened to destroy a store of grain, for example, or to injure a pet bird or dog; threats to injure persons, on the other hand, could be written and sent with impunity.[19] In the revised version of the *Code* this anomaly was removed by defining the offence of uttering threats against persons to include threats of injury as well as death. The new section read as follows:

> 316. (1) Every one commits an offence who sends, delivers, utters or directly or indirectly causes any person to receive
> (a) a letter or writing that he knows contains a threat to cause death or injury to any person; or
> (b) a letter or writing that he knows contains a threat
> (i) to burn, destroy or damage real or personal property, or
> (ii) to kill, maim, wound, poison or injure an animal or bird that is the property of any person.
>
> (2) Every one who commits an offence under para.(a) of ss.(1) is guilty of an indictable offence and is liable to imprisonment for ten years.
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> (3) Every one who commits an offence under para.(b) of ss.(1) is guilty of
> (a) an indictable offence and is liable to imprisonment for two years, or
> (b) an offence punishable on summary conviction.[20]

In the amended version, a parallelism is established between uttering threats against persons and uttering them against property while the greater seriousness of the former is reflected in the larger maximum punishment fixed for such threats.

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[18] S.C. 1892, c. 29, s. 233.

[19] *See* the *Criminal Code, 1892*, R.S.C. 1927, c. 36, s. 516 which made it an indictable offence to send a letter or writing knowing it to contain a threat to "burn or destroy any building, or any rick or stack of grain, hay or straw or other agricultural produce. . ." and s. 537 which made it a summary conviction offence to send a letter or writing knowing it to contain a threat to "kill, maim, wound, poison or injure any dog, bird, beast, or other animal. . .kept for any lawful purpose".

[20] S.C. 1953-54, c. 51.

There is a second feature of the 1954 amendment that should be noticed. Before 1954 the offence of uttering threats against persons had always appeared in statutes defining offences against the person or in the part of the *Code* dealing with such offences. In the 1953-54 *Code*, however, the offence was moved to the part of the *Code* dealing with property offences and placed under the title "Forgery and Offences Resembling Forgery". Under this title was grouped a series of offences having to do with forging, falsifying and misrepresenting the authority of documents or registers; counterfeiting official marks or stamps; and abusing media of communication by sending false messages.[21] The unifying thread of these sections appears to be concern for the integrity of society's means of communicating and storing information. While there may be some superficial similarity between abusing the mails by sending false messages and abusing them by sending threats, this placement of the threat offences in the overall scheme of the *Code* was nonetheless peculiar.

In 1961 the offence of threatening persons was again amended and expanded, this time to include threats made through more sophisticated media of communication like telephone and radio. Under the 1961 version any one who "by letter, telegram, telephone, cable, radio or otherwise" knowingly caused someone to "receive a threat to cause death or injury to any person" was guilty of an indictable offence and liable to ten years imprisonment.[22] The language of the 1961 amendment quickly gave rise to litigation focussed on the word "otherwise", the issue being whether this word was broad enough to cover threats of death or injury that were made orally and face to face. This issue was definitively resolved in 1974 with the decision of the Supreme Court of Canada in *R.* v. *Nabis*.[23] The majority in the *Nabis* case concluded that threats of this sort were not covered by the section.

So things remained until Parliament enacted the *Criminal Law Amendment Act, 1985*.[24] That *Act* repealed the existing offence of threatening and enacted the following provision:

> 39. The said Act [the *Criminal Code*] is further amended by adding thereto, immediately preceding section 244 thereof, the following section:
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> "243.4 (1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat
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> (a) to cause death or serious bodily harm to any person;
>
> (b) to burn, destroy or damage real or personal property; or

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[21] *See* S.C. 1953-54, c. 51, ss. 309-321.
[22] S.C. 1960-61, c. 43, s. 10.
[23] *Supra*, note 17.
[24] S.C. 1985, c. 10, ss. 39, 51.

(c) to kill, poison or injure an animal or bird that is the property of any person.

(2) Every one who commits an offence under para.(1)(a) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years.

(3) Every one who commits an offence under para.(1)(b) or (c)

(a) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

The 1985 amendment introduced a number of changes. First, it returned the offence of uttering threats to the part of the *Code* dealing with offences against the person. Uttering threats is now situated immediately before the series of sections dealing with assault. Second, it broadened the scope of the offence to include oral, face to face threats. Under the 1985 version, it is an offence for a person "in any manner" to knowingly utter or convey a threat. Third, it reduced the maximum punishment for the offence of uttering threats against persons. Previously, the maximum punishment was ten years imprisonment, as compared to five for assault. It would be strange if the punishment for uttering a face to face threat to assault a person were ten years imprisonment when the punishment for implementing such a threat were at most five. This potential anomaly was avoided in the new section by lowering the maximum punishment for uttering threats against persons to two years imprisonment. The final change introduced by the 1985 amendment was in the definition of the offence of uttering threats against persons. The words "serious bodily harm" were substituted for the word "injury". The question that interests us here is why this particular substitution was made.

It is possible to think that Parliament adopted this change in wording in order to minimize the danger of criminalizing oral, face to face threats. In other words, because the manner of making prohibited threats was broadened by including oral, face to face threats, as a safeguard the content of the prohibited threats was narrowed to include only those that threaten really serious harm. This appears to be the view of Judge Stortini in *R.* v. *Gingras*,[25] a case relied on by Judge Flanigan; it is certainly Judge Flanigan's view.[26]

There is no denying that the wholesale criminalization of oral, face to face threats effected by the 1985 amendment is problematic. The problem is that threats of this sort are altogether too easy to make. As Beetz J. points out in the *Nabis* case:

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[25] (1986), 16 W.C.B. 398 (Ont. Dist. Ct).

[26] *Supra*, note 1 at 4.

> That the expression of a thought, albeit a sinister one, should of itself constitute a serious crime, regardless of the form it takes, the motives of its author, and its present or probable effects on the victim or on any other individual, seems to me to be contrary to the general economy of our criminal law and also likely to lead to many difficulties, for countless are those who do not weigh their words. . . . Such an offence must almost of necessity be delimited.[27]

While some means of delimiting the new offence is essential, it cannot consist in narrowing the range of prohibited threats to include only threats of truly or necessarily serious harm. This method simply does not work. Threats that "I'll smash your teeth in" or "I'll break every bone in your body" or even that "I'll kill you" constitute the conventional language of angry argument, especially in contexts like hockey games or bar-room disputes. In the *Gingras* case, the accused felt victimized by a Crown Attorney and in a fit of temper threatened to "get" him and to "get my hands on him".[28] In *R.* v.*Leblanc*,[29] the accused threatened to kill a policeman half a dozen times in the course of a drunken tirade because he felt bitter over a previous arrest.[30] On the face of it these are threats of serious bodily harm, yet one cannot really take them seriously. They were meant to express frustration and anger not to frighten and intimidate, and that is how they would be understood by the audience to which they were addressed. In fact, in many contexts the more serious the harm threatened the less seriously the audience would be inclined to take the threat.

If this analysis of the problem with oral, face to face threats is correct, the solution lies in testing not the seriousness of the harm threatened by the accused but rather the seriousness of the threat. To test this, an appreciation of all the circumstances surrounding the making of the threat is essential. The weakness of Judge Flanigan's judgment in this respect has already been noted.

I would suggest that the actual reason for replacing the word "injury" with the words "serious bodily harm" was not to limit the scope of the section but rather to bring its language in line with the terminology used in the sections of the *Code* dealing with assault. In other words, the change in wording was a consequence of moving the offence of threatening to a different and more appropriate part of the *Code*.

Section 244 of the *Code* defines assault in terms of the intentional application of force to another person without that person's consent. Subsequent sections introduce variations on this theme. There is sexual assault, assault with a weapon, and various offences involving the infliction of bodily harm including assault causing bodily harm (para-

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[27] *Supra*, note 17 at 492-93.
[28] *See*, the account of the *Gingras* case in *McCraw*, *supra*, note 1 at 4.
[29] [1988] N.B.J. No. 810, Action no. 49/88/C.A.
[30] *Ibid.* at 2-4.

graph 245.1(1)(b)), unlawfully causing bodily harm (section 245.3) and sexual assault causing bodily harm (subsection 246.2(c)). Subsection 245.1(2) provides that:

> For the purpose of this section and sections 245.3 and 246.2, "bodily harm" means any hurt or injury to the complainant that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature.

Although this definition was not amended so as to apply to section 243.4, it seems obvious that the words "serious bodily harm" appearing in the section are meant to refer to this definition and should be interpreted in its light. This suggests that the word "serious" should be understood to mean "more than merely transient or trifling in nature" and the words "bodily harm" should be taken to apply to "any hurt or injury. . .that interferes with the health or comfort" of a person. This clearly includes harm like pain and emotional trauma for such harms can damage health or comfort as severely as broken bones and torn flesh.

IV. Strict Construction of Penal Legislation

In *R.* v. *McLaughlin*,[31] Chief Justice Laskin offers a classic formulation of the strict construction rule. He speaks of

> the general rule that in construing criminal statutes they should, where there is uncertainty or ambiguity of meaning, be construed in favour of rather than against an accused. In short, he must be brought fully within the statute and cannot be held guilty of a violation if it is only applicable in part.[32]

Judge Flanigan's most significant error, in my view, consists in the use he makes of this rule in deciding whether the accused's threats of rape were threats of serious bodily harm within the meaning of the section. My criticism here may seem unfair in that the Judge does not actually refer to the strict construction rule in the course of his reasons. He does, however, rely on *R.* v. *Guerrero*[33] for the following proposition: the court must not convict unless the accused has uttered a threat that specifically and unequivocally comes within the terms of the section.[34] This proposition is but a particular application of the general rule set out in the passage above.

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[31] [1980] 2 S.C.R. 331, 113 D.L.R. (3d) 386 [hereinafter *McLaughlin* cited to S.C.R.].

[32] *Ibid.* at 335.

[33] (1988), 64 C.R. (3d) 65, 27 O.A.C. 244 (C.A.).

[34] *Supra*, note 1 at 5-6.

In recent years the strict construction rule has attracted considerable academic and judicial attention.[35] As Madame Justice Wilson points out in a recent case, the rule is "dubious" and "problematic".[36] For one thing, it is inconsistent with section 12 of the federal *Interpretation Act*[37] which provides that "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." In *R. v. Robinson (or Robertson)*,[38] decided in 1951, the Supreme Court of Canada found section 12 to be applicable to penal legislation generally and the *Criminal Code* in particular. The implication of section 12, as understood by the Court, was that any ambiguity in the legislative provision being interpreted should be resolved so as to advance the provision's purpose.[39] This way of resolving doubt or ambiguity leaves little room for the operation of the strict construction rule.

A second difficulty with the strict construction rule is that the circumstances which gave rise to it no longer exist[40] and it is difficult to come up with a modern rationale for the rule. It is arguable that review under the *Charter*[41] and the *Bill of Rights*[42] accomplishes all that the strict construction rule can legitimately accomplish and does so in a superior way. Indeed, I would argue that since the advent of the *Charter* it is no longer legitimate for the courts to apply the strict construction rule to any type of legislation including penal legislation.

There can be no doubt that over the years the rules of statutory interpretation have served the courts as a means to review legislation on ideological grounds.[43] This is not necessarily to say that the courts

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[35] *See* P.-A. Côté, *Interpretation Stricte et Interpretation Liberale*, a paper presented at the National Seminar on Drafting and Statutory Interpetation, August 19-21, 1987; J.C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Statutes* (1985) 71 VA. L. REV. 189: S. Kloepfer, *The Status of Strict Construction in Canadian Criminal Law* (1983) 15 OTTAWA L. REV. 553 and cases cited therein. *See also* E. Tucker, *The Concept of Statutory Rules Requiring Liberal Interpretation According to St. Peter's* (1985) 35 U.T.L.J. 113.

[36] *Fleming* v. *The Queen*, [1986] 1 S.C.R. 415 at 429, 26 D.L.R. (4th) 641 at 651.

[37] R.S.C. 1985, c. I-21, s. 12.

[38] [1951] S.C.R. 522, 100 C.C.C. 1 [hereinafter *Robinson* cited to S.C.R.].

[39] *Ibid.* at 529, 530-32.

[40] As Madame Justice Wilson points out in *R. v. Paré*, [1987] 2 S.C.R. 618 at 630, 60 C.R. (3d) 346 at 368, the strict construction rule evolved in the first place primarily as a means to avoid applying the many eighteenth century statutes imposing the death penalty for trivial crimes.

[41] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[42] *Canadian Bill of Rights*, S.C. 1960, c. 44.

[43] This claim has been copiously documented in respect of American and British law, less so in respect of Canadian law. For a discussion of possible differences between the Canadian and British traditions, *see* R.C.B. Risk, *Lawyers, Courts, and the Rise of the Regulatory State* (1984) 9 DALHOUSIE L.J. 31. *Compare* J.A. Corry, *Administrative Law and the Interpretation of Statutes* (1936) 1 U.T.L.J. 286.

have misused or distorted the rules. Such review is accomplished in a number of ways, including the artful selection and application of rules and reliance on presumptions of legislative intent like the strict construction rule. In the latter case, because the presumptions of intent embody a particular ideological bias, their straightforward application by the courts amounts to review of the substantive policy embodied in the legislation being interpreted.

The ideological bias embodied in the strict construction rule is obvious enough. It favours the freedom of individuals to act and interact with minimal interference from the state. This preference for maximum individual freedom with minimal state interference was the impetus for many of the presumptions of intent developed by the courts in the nineteenth century.[44] By expressing this preference in the form of a presumption concerning the intention of the legislature, the courts were able to pay lip service to the doctrine of Parliamentary sovereignty and at the same time to assert their own will.

To use the rules of statutory interpretation as an indirect form of judicial review is no longer politically acceptable. It is inconsistent with our current understanding of the legitimate role of the courts in a democracy. This role requires courts to discover as best they can the compromise between individual freedom and community interest that has been worked out by the legislature, and then to give effect as best they can to that compromise. The strict construction rule interferes with this effort in two ways. First, it offers a preconceived picture of the compromise, one that is unjustifiably weighted on the side of individual freedom and, second, it inhibits effective implementation of the compromise by seeking to avoid any application that works to the disadvantage of individuals.

Judicial review through the application of common law presumptions of intent is illegitimate because it is inconsistent with the political theory of democracy and the constitutional doctrine of Parliamentary sovereignty. Judicial review under the *Charter* and the *Bill of Rights*, on the other hand, is legitimate because it is mandated by statutory and constitutional instrument. Section 2 of the *Bill of Rights* instructs the courts to avoid interpretations that would entail an infringement of protected rights and freedoms. Section 52 of the *Constitution Act 1982* forbids the courts to give effect to legislation in so far as it is

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[44] The most important of these were the presumption that the legislature does not intend to interfere with individual or common law rights, including property rights, and the presumption that the legislature intends any powers conferred on government bodies and officials to be exercised in accordance with the rule of law. From these very sweeping propositions were evolved more particular presumptions and rules, such as the presumption that the legislature does not intend to expropriate property without compensation. For a discussion, *see* P.-A. Côté, THE INTERPRETATION OF LEGISLATION IN CANADA (Cowansville, Qué.: Les Editions Yvon Blais, 1984) at 351-412.

inconsistent with the *Constitution*, including the *Charter*. These provisions provide a legal basis for judicial review that renders it theoretically and politically acceptable.[45]

I would suggest that these provisions are exhaustive. That is, statutory provisions like section 2 of the *Bill of Rights* and constitutional provisions like section 52 of the *Charter* provide the sole legal basis for judicial review. It follows that any attempt to review for values not alluded to in these provisions would be an illegitimate usurpation of power. This suggestion, if accepted, would not materially reduce the power of the courts to make what they like of legislation or to insist on natural justice in applying it. It would, however, oblige the courts to do their reviewing under the rubric of one of these provisions and this would have certain advantages. It would force the courts to be more explicit when reviewing legislation; judicial interference would have to be justified in terms of one or more of the particular constitutional values set out in these instruments. More importantly, the justification would have to take a more sophisticated form than the simple application of a rule.

Ultimately the chief problem with the strict construction rule is that it is crude. In the context of penal legislation, it asserts an automatic preference for the accused because he or she is the accused regardless of issue or circumstance. By way of contrast, review under the *Bill of Rights* or the *Charter* focusses on specific constitutional values, such as fair warning or presumption of innocence or equal protection.[46] Moreover, the analysis is fact specific and functional. Legislation is read down or narrowed or strictly construed only in so far as necessary to give effect in the circumstances to the particular

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[45] The question of the legitimacy of judicial review under the *Charter* was addressed early on by the Supreme Court of Canada in *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486 at 497, 24 D.L.R. (4th) 536 at 545 where Lamer J. stated that:

> The Attorney-General for Ontario, in his written argument, stated that,
> '. . .the judiciary is neither representative of, nor responsive to the electorate on whose behalf, and under whose authority policies are selected and given effect in the laws of the land.'
> This is an argument which was heard countless times prior to the entrenchment of the Charter but which has, in truth, for better or worse, been settled by the very coming into force of the *Constitution Act, 1982*. It ought not to be forgotten that the historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representative of the people of Canada.

Under the *Charter* "the courts are empowered, indeed required, to measure the content of legislation against the guarantees of the Constitution". *Per* Lamer J. at 496.

[46] *See, e.g., Fleming, supra,* note 36, where instead of applying the strict construction rule the Supreme Court of Canada relied on the presumption of innocence protected by the *Bill of Rights*.

constitutional value.[47] By forcing the courts to go through this kind of analysis one does not avoid the problem of choice but one is more apt to produce what I have called explicit deferential choice.

Despite the problems with the strict construction rule, and despite the clear pronouncement of the Supreme Court of Canada in the *Robinson* case, the rule has not disappeared. It has, however, undergone significant revision in the way it is applied. One clear effect of *Robinson* has been to demote the rule from a presumption to a guideline of last resort. As a presumption, the strict construction rule could be used to help create ambiguity or doubt concerning the scope of a term. As a guideline, it may be invoked only to resolve genuine doubts or ambiguity arising quite independently of the rule.[48] As a guideline of last resort, the strict construction rule may be invoked only when all other means of resolving doubt and ambiguity have failed, including reference to the purpose for which the legislation was enacted.[49]

The importance of this last point is illustrated by a number of cases decided by the Supreme Court of Canada in recent years. The common thread in these cases is the Court's refusal to apply the strict construction rule whenever the purpose underlying the provision being interpreted suggests that the doubt or ambiguity should be resolved against the accused. In *R.* v. *Pare*,[50] for example, the Court rejected the literal and narrower interpretation of the words "while committing" because a broader reading was more consistent with the apparent rationale of the section. In *Paul* v. *R.*,[51] the Court effectively redrafted a section of the *Code* to the disadvantage of the accused to bring it in line with the section's purpose as revealed by its legislative history. In *Lyons* v. *R.*,[52] the majority relied in part on extrinsic evidence to conclude, again to the disadvantage of the accused, that Parliament had meant to interfere with private property rights even though it hadn't said so expressly in its legislation. In *Lightfoot* v. *R.*,[53] after reviewing two competing lines of case law, one adopting an interpretation in favour of the accused and the other against, the Court chose the latter because it better advanced "the laudable social purpose of the legislation".[54]

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[47] *See, e.g., Perka et al.* v. *R.*, [1984] 2 S.C.R. 232, 12 D.L.R. (4th) 1, where the Supreme Court of Canada refused to construe narrowly the *Narcotic Control Act* even though it is penal legislation because in the circumstances the statute had given ample clear warning of what was prohibited and the accused had not unfairly been taken by surprise.

[48] *See Marcotte* v. *Deputy A.G. for Canada* (1974), [1976] 1 S.C.R. 108 at 115, 51 D.L.R. (3d) 259 at 264; *Abbas* v. *R.*, [1984] 2 S.C.R. 526 at 527-28, 14 D.L.R. (4th) 449 at 451.

[49] For further discussion, *see* Côté, *supra*, note 44 at 380-82.

[50] *Supra*, note 40.

[51] [1982] 1 S.C.R. 621, 138 D.L.R. (3d) 455 [hereinafter *Paul* cited to S.C.R.].

[52] [1984] 2 S.C.R. 633, 14 D.L.R. (4th) 482.

[53] [1981] 1 S.C.R. 566, 123 D.L.R. (3d) 104 [hereinafter cited to S.C.R.].

[54] *Ibid.* at 575.

The attitude of the Court in these cases is well expressed in the following passage from the *Paul* case. Counsel for the accused had asked the Court to bear in mind the strict construction rule. The Court acknowledged the rule but went on to state that:

> before applying mechanically and somewhat blindly any rule of construction to the words of the section it is imperative that we closely scrutinize the origin of the [section], its evolution over the years, the evolution of the context in which it had been originally developed and hopefully discover the reasons why it is today with us in its present formulation.[55]

The point being made by the Court is clear. Reliance on the strict construction rule without first attempting to understand the rationale for the provision and its current formulation is not an acceptable interpretive technique.

What, then, is the rationale underlying the offence of uttering threats? Why was this offence first created and later codified by legislatures throughout the Commonwealth? And why has the scope of the offence been steadily expanded by the Parliament of Canada to include first threats to cause injury as well as death, then threats made using any indirect form of communication and finally oral, face to face threats? The rationale here is not difficult to identify. It is to protect persons against a level of fear that would significantly interfere with their freedom of choice and of movement and action.[56] In other words the purpose is to protect the freedom of the individual from interference by other individuals. In a context such as this, even assuming an ideological bias in favour of individual freedom, it is hard to see why the individuals who threaten should automatically be favoured over their individual victims. This paradox arises generally in the interpretation of offences against the person and perhaps explains the lack of success the strict construction rule has encountered in recent years in the Supreme Court of Canada. As Dickson C.J. points out in *Ogg-Moss* v. *R.*,[57] a case in which a defendant charged with assault asked the courts for a broad reading of a defence section:

> One of the key rights of our society is the individual's right to be free from unconsented invasions on his or her physical security or dignity and it is a central purpose of the criminal law to protect members of society from such invasions. . . . [A]ny derogation from this right and this protection ought to be strictly construed.[58]

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[55] *Supra*, note 51 at 635.

[56] For a discussion, *see* Law Reform Commission of Canada, ASSAULT (Working Paper 38) (Ottawa: Minister of Supply and Services, 1984) at 12-13.

[57] [1984] 2 S.C.R. 173, 11 D.L.R. (4th) 549 [hereinafter cited to S.C.R.].

[58] *Ibid.* at 183.

Laskin C.J. made a similar point dissenting in *R.* v. *Biron*[59] when he referred to the "social and legal, and indeed political principle upon which our criminal law is based, namely, the right of the individual to be left alone, to be free of private or public restraint, save as the law provides otherwise".[60]

In construing section 243.4 the courts have to strike a balance. On the one hand, there is the freedom of individuals like Mr McCraw to express contempt and hatred or to indulge a perverse sense of humour in letters and other forms of communication. Freedom of speech and expression is an important community value, quite apart from any constitutional implications. On the other hand, there is the freedom of individuals like the complainants to carry on the ordinary activities of life without having their enjoyment of these activities poisoned by fear. Security of the person is an equally important community value with its own constitutional weight.

The key to this balance, in my view, lies in the level of fear that the accused's threat is likely to generate in the mind of his or her audience. A threat should not be a crime unless it would likely generate the sort of fear that seriously interferes with the ordinary enjoyment of life. For this purpose, threats of a hurt or injury that is merely transient or trifling in character will not suffice. Nor will threats of serious harm that would not normally be taken seriously by the audience to which they are addressed. What is captured by the section are threats of harm that are serious enough, given the way they are made and the harm threatened, to interfere with the victim's conduct of life in a significant way.

V. Conclusion

When one considers the threats delivered by Mr McCraw in light of the purpose of the section as analyzed here, a conviction is certainly "sustainable by law". A threat to use an unspecified degree of violence to force a young woman to submit to the accused's fantasy of total sexual domination is likely to generate a high level of fear in its audience, especially taking into account the factual setting in which the threat was uttered. Unlike the threat in *Gingras*, which was an oral, face to face threat, Mr McCraw's threats were written and were repeated to three different women, all of them in the same vulnerable occupation. It lets the women know that they are being watched and fantasized over and that they are the object of someone's feelings of sexual aggression, although they don't know who that person is. Such threats, to my mind, come well within the intended scope of the section.

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[59] [1976] 2 S.C.R. 56, 59 D.L.R. (3d) 409 [hereinafter cited to S.C.R.].
[60] *Ibid.* at 64.