

"MARTIN'S CRIMINAL CODE"

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Society today is locked in a confused moral puzzle about the direction and purpose of the criminal law. Should abortions be prohibited by the State? Should the death penalty be reintroduced? Is the welfare state conferring "rights" on people who don't deserve them, and whose morals are being corrupted by a government that buys votes by giving something for nothing? What about the Charter of Rights - Canada's largest unexploded time bomb? Are our judges too soft? Too hard? There is plenty of debate, there are plenty of fervent opinions. No sign of a national consensus is anywhere in sight.

All of this is, of course, the result of a complete misapprehension on the part of the public of the purpose of the Criminal Law, and the way in which it operates, and is designed to operate.

"If all of us were to receive our just deserts, who would 'scape whipping?" asks Hamlet. Since we are none of us perfect, and most of us don't want to be whipped, the basic starting points of the criminal law are the indisputable facts that:

1. Certain types of behaviour (murder, theft, assault, perjury, for example) are socially disruptive.
2. Persons who indulge in them tend to make the victims, as well as right thinking members of society (who, but for their social conscience, might well have wanted to do the same), very mad at them indeed.
3. Victims, and right thinking members of society, are therefore likely to take punitive measures against persons whom they think have been guilty of these actions, unless they can be persuaded not to.
4. In the course of so doing, victims and right thinking members of society are likely to do a great deal of harm by:
 - Excessively injuring the wrongdoer, so that he becomes thereafter useless as a contributing member of society;
 - Punishing innocent persons wrongly suspected of crime;
 - Punishing the relatives and family of the wrongdoer, who again may be entirely innocent.

A major purpose of the criminal law, therefore, is to deter these self righteous victims and other right thinking members of society from tearing society to pieces in their excessive zeal to stamp out crime.

Doing so imposes a difficult task on the political authority. It cannot, of course, appear to be on the side of the criminal. Its technique, therefore, is to limit the power of private revenge, by giving the appearance of creating an even more efficient system of revenge on the part of Her Majesty. The criminal law can from this point of view therefore in fact be regarded as an "elaborate system to prevent unnecessary punishment from taking place".

Some parts of the process are reasonably simple. Once it is known that the Law intends to punish the criminal, and the criminal alone, the idea of a vendetta against the relatives and family of the wrongdoer begins to lose its appeal with the public. Similarly, once the public is made aware of the extreme need to prevent innocent persons from punishment, they well may be able to be persuaded that only those persons who can be proved to have committed a defined offence to the satisfaction beyond

reasonable doubt of a jury of fellow citizens selected without bias, should be punished. "It is better that ten guilty men should go free rather than one innocent person should be punished" - and they certainly do, time and time again. How else do lawyers earn their fees?

However, once the criminal has been proved to an independent judge and jury to have committed the offence, the residue remains, and something has to be done, visibly and obviously, to satisfy the 'victims of violence' that the state is doing a better job of punishment than they could. Hence our present, and perennial, debate on capital punishment - the answer to which is, that if it is needed to convince criminals that the law is not toothless, and to convince the public that the law carries sufficient teeth to make it unnecessary to organize vigilante squads, we'll have to have it again, hopefully in highly restricted conditions. Otherwise, we'll see a breakdown of law and order - created, not just by the 'bad guys', but also by the good ones!

The important thing to remember is that punishment by the state is the alternative to far more drastic punishment by the lynch mob. Our modern prison system was not derived from the idea of making it unpleasant for people to "be inside", but from the "cities of refuge" of Biblical times, and the sanctuary afforded by pagan temples. Here, the person with blood on his or her hands, whether shed innocently or otherwise, could stay in safety with religious protection against the victim or his relatives, at least until guilt was clearly established. The perpetrator stayed until tempers had cooled, compensation had possibly been paid, and the heat was off, after which he would be able to go back home.

In setting criminal punishment today, this concept of answering the question "how angry is the public" is a much more key element than is generally acknowledged. So the public is frequently hoodwinked by the apparent fierceness of sentences, which are mitigated, often unbeknownst to the public (whose memory is pretty short, anyhow), by mandatory remission, parole, day visits, rehabilitation programs, and so on. Again, this is not necessarily wrong - these activities are in fact probably the best things that can be done in order to restore the offender to become more useful in society in the future - but the public has a feeling of being cheated if what is happening becomes too obvious. Its rightly incurred wrath is not appeased when some offender is seen apparently to "get away with it" from an "over soft legal system."

What about capital punishment? In my opinion, it may have to be reinstated, not because of the murderers, but because of the public, inflamed, often enough, by unrealistic crime fiction on T.V. The difficulty is that the most dangerous variety of murderer is often enough on the borderline of insanity, and so actually more likely than his fellows not to be punishable under the present law (another loophole that the law has created!) The more typical murderer is someone who loses control as a result of drink, drugs, or an intolerable family situation, often coupled with an abusive upbringing. He may well have been convicted because he had a second rate lawyer working on his case, legal aid funds were insufficient to provide a first rate defence, a key witness could not be found, or expert evidence afforded. It is quite possible that he either does not remember now what happened, or is very sorry that it did.

What about some other offences - the abortion controversy, for instance? It seems to me that here, we have the same problem that we have with Sunday opening laws, gambling, prostitution, prohibition - and perhaps also the non-smokers' lobby. We have passed laws to suit our hypocrisies rather than our actual convictions. We have banned things that everyone else should not do, but we sometimes wouldn't mind doing ourselves. Morality, though, and legality are two quite different things. The State should only make those things illegal which are quite obviously ruinous to the social fabric. Churches can quite correctly point out to their members that the world will be a much nicer place if they observed much higher standards - the man with two coats giving one to the person with none, for instance - but making this compulsory is not the job of the state. Christianity, if it includes giving one's shirt away to a person who has already taken one's coat, is completely unjust. To make it the law of the

land is therefore to enshrine injustice in the law. We have far too much of this already in our modern welfare state.

The purpose of the criminal law is to use force to compel the necessary behaviour patterns in all citizens that enable society to exist. Today, we use it to control a hundred and one irrelevant matters, and to shake money out of the pockets of the taxpayers for every worthy and unworthy cause a vote-buying government can dream up. Some people evidently imagine that by enforcing a perfect code of laws, Canada can be transformed into Paradise. Forget it! I respect the do-gooders of the world, when they do good at their own sacrifice and expense. But I would respect our Prime Minister a hundred times more if he took ten dollars out of his own pocket for Rick Hansen, than when he hands over a million of taxpayers' money, that costs him nothing. Law today is being grossly abused, and consequently made to look asinine. People who would impose higher standards on themselves, and lower ones on the rest of the community, would make an immense contribution to a happier society!

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