

SOME THOUGHTS ON THE CRIMINAL LAW AND THE FUTURE*

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To talk in terms of the future in relation to any institution in our society today requires a kind of optimistic arrogance which I think could well be considered inappropriate in an amateur philosopher, ex-criminal lawyer, and temporarily retired judge. I can justify the attempt—if at all—only on the basis of my present association with a formal body devoted to reform of the law and its processes, and on the fact also that I am looking for assistance as to both the direction to be taken and the priorities to be given by that body in their efforts to develop a criminal justice system responsive to contemporary ideology and designed to play its appropriate role, together with other social and political institutions, in a changing world.

I intend to set out in a rather impressionistic way a series of selected issues associated with predictions for the future in general and with the criminal law process and the courts in particular in the hope that these and other related matters might form the basis for subsequent discussion.

Before proceeding to the criminal law *per se*, I should like to comment in a very general way upon the nature of *any* inquiry into the future. Generally, such a project is fraught with the purpose of influencing present actions in order to make preferred futures more likely; for what we decide upon today on the basis of projected needs or fears will largely circumscribe the possibilities of tomorrow. For example, if we build a big new penitentiary which embodies our conventional wisdom on penology, we are committed to a resource of which we shall have to make the best use we can for perhaps the next one hundred years. In this way we create an environment which contains the future, and in the future we may be unable to make new choices by the continuing

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need to justify the past. Futuristic thinking, then, often becomes a projection of past trends and present problems into the future, and a controlling of these trends and problems in terms of what is desired in the present. Thus, prediction is not a neutral activity; it is a personal, value-laden exercise. Such a process of projection is often basically one of magnification: the future will inevitably contain more cars, more people, more crime. And the implications of such an approach are obvious: we must increase the scale of contemporary measures for coping with such factors: more speedways, more institutions, more police. In this way we *provide for* the future in the narrow sense of the expression; we exclude the unforeseeable which is the essence of the future.

It is possible to suggest another way of looking at and *preparing for* tomorrow. This other approach would stress both the limitations of future-thinking itself and the basic need to develop mechanisms for adjusting to change which imply new values, new ways of doing things. Some would call the first approach functional, the second utopian. Yet the awesome probabilities associated with present technological and scientific advance make the first approach outmoded, even reactionary, when dealing with the near future. The fundamental fact of today is that we need new ways of doing things. To paraphrase one of our most renowned academics, we must not try to cope with the totally new situation of today with yesterday's tools—yesterday's concepts; equally, we must not exercise yesterday's consciousness.

It is, however, one thing to foresee a problem; it is quite another to respond rapidly and appropriately. The most significant feature of the phenomenon of change in our society is the rate at which it occurs. As Alvin Toffler has stated, ". . . the rate of change has *implications* quite apart from, and sometimes more important than, the directions of change".¹ The *implications* concern, of course, our ability to adapt. This is a new dimension of the problem of forecasting; since we apparently lack the initiative and resources to make the necessary changes to cope adequately with problems that arise or to fashion the results we want, we are desperately in need of new insights into the handling of the social disruptions that are the probable consequence of our inability to respond humanly enough and, above all, quickly enough.

As I see it, uncertainty, unrest, and some degree at least of social disruption are inevitable vehicles for entering the future. Unfortunately, rapid change, coupled with a fundamental fear of the unknown, by giving rise to a sense of insecurity, may reduce our threshold of tolerance for disorder and dissent. Certainly we have witnessed much evidence of this today in the unqualified cries

¹ Future Shock (1970), p. 3.

for "law and order". What will be necessary will be the creation of mechanisms which will allow for the resolution of disputes without the conflicts involved flaring into open violence. I use the term "mechanisms" to avoid the connotation of "institutions". This avoidance is crucial to my delineation of state functions. A basic problem today is our over-reliance on institutions of the state to solve problems; too often, and unjustifiably, we demand that the law alone provide the answers to problems of human living.

My point is that in the future the thrust of the law should not be to suppress dissent and disorder, but rather to provide a milieu which will allow and encourage inevitable conflicts to be worked out and resolved within a framework of basic norms substantially shared by all members of the society. This would mean that the current myth that the so-called "expert" is the only one who can investigate and resolve conflict must be refuted and that those directly involved in conflict must be given the opportunity to articulate their own solutions. Otherwise the present dangerous trend to polarity will continue and the criminal law will come to be looked upon as a device for imposing the will of one group upon another. When this occurs, the whole legal process loses credibility; inevitably then the tempo of law enforcement would have to be dramatically accelerated, to a level far beyond that which is acceptable in a democratic society, in order to produce a tolerable conformity to the law.

We must constantly remind ourselves that, fundamentally, it is the vindication of the basic rights of all Canadian citizens which justifies our entire legal order. In our developing democratic society laws must be regarded as something more than an authoritative ordering of social relations. Rather, they should properly be looked upon as the ever-changing attempts by the state, through the rule-making power, to balance conflicting values in order to maximize the potential for all to live in the manner they choose free from unwarranted interference by the state or otherwise. In a free, pluralistic society every citizen should be free to adopt his own ethic, choose his own life style, and live his own life, provided that he does not fall below a minimum standard of acceptable public order.

Traditionally the criminal law and its enforcement machinery have been principally directed toward interests related to the economic, proprietary, and purported moral values espoused by the dominant group in the particular society. We now have what may be a unique opportunity to relate the social control exercised through the criminal law to the protection of what I shall call "basic human values"—those values concerned with individual dignity and acceptable universal standards of the quality of life. These new criteria may affect changes in our present thinking on

many matters; for example, although the concept of punishment is to many becoming unacceptable in the traditional context of the criminal law, it may in the future have a significant role to play in the enforcement of minimum standards of conduct.

We are constantly being told that there is a "crisis" in values confronting the criminal law today. This is almost certainly so, but it is not a situation unique to our age. Each age has its unique problems which tend to call for unique solutions to meet them. Picturing the contemporary situation as a crisis may adversely colour our approach to its problems. It is important that we facilitate an appreciation of the process of finding solutions by recognizing that this so-called "crisis" condition is the very stuff of the social order and that no solutions-for-all-time can be formulated or applied.

Paul Tillich, the renowned theologian, has defined "law" as "the attempt to impose what belonged to a special time on all times". In other words, law tends to deal in absolutes. In this context it has been said that "the search for certainty is an inarticulate premise underlying man's development of systems of law". Law tends to address its audience at any one time in terms of values for all times. The mistake is to ground the authority of the law on this tendency. Traditionally we have talked in terms of morality and the criminal law, and the argument has centred on whether morals and law are or should be co-extensive. "Morality", however, implies a static state of being and it is therefore an unfortunate term to use at the centre of controversy. The situation of the law in the twentieth century is similar to that of the Christian church faced with the great social changes of the eighteenth and nineteenth centuries in which the church lost some of its position of authority and its power to influence the direction of change because of its unhappy habit of defending every position, however untenable, until forced to surrender it. Tillich comments that: "The price paid by the static supranaturalistic answer to our question has been the loss of a determining influence on the changing world of the last centuries."

The influence of the church and family in modern society has waned and to a considerable extent the law has been called upon to fill this vacuum. Will the law make the same mistake by fighting a desperate rear-guard action before the onslaught of new values or will it form the stage where the social drama is worked out? Will it provide the form of the action, or will the action take its own course outside the law, outside the courtroom? For it is a fact that we must face that, if the conflicts are not worked out in the courtroom or through some related legal mechanism, they will be settled in the streets, where irresponsible force becomes the ultimate judge of values and norms.

It is apparent that we have not yet really begun to grapple with problems of ultimate values even while we recognize that the real issues of the day are the problems of definition of the relations between groups and between man and the state. Throughout his history man has lived with certain concepts of freedom and dignity which he steadfastly asserted in the face of would-be oppressors and an intractable environment. In the past men lived in a society, an economy and, above all, an environment that were difficult to alter. That, however, is not the situation today. Today man has the capability of changing the society, the economy, and the physical environment. In such an era of absolute technology, freedom and dignity must take on new meanings or become meaningless. The behavioural psychologist, B. F. Skinner, has made a significant assault on the concept of an autonomous man, the source of our concepts of freedom and dignity. In a recent book entitled, appropriately enough, *Beyond Freedom and Dignity*,² he argues for a "technology of human behaviour" that would elicit desired responses by manipulating the environment. In the future he envisages, "It should be possible to design a world in which behaviour likely to be punished seldom or never occurs". The attractions of his approach cannot be denied; it is in many ways an elaboration of the familiar attitude that if we wish to remove the threat of violence from our midst, we must attack the conditions which give rise to violent behaviour. Skinner's approach holds out the possibility of an effective, fast solution. He says that the real issue is the effectiveness of techniques of control: "We shall not solve the problems of alcoholism and juvenile delinquency by increasing a sense of responsibility. It is the environment which is 'responsible' for the objectionable behaviour and it is the environment, not some attribute of the individual, which must be changed." Although it is difficult to change human behaviour directly (and the failure of our criminal justice system to "rehabilitate" offenders attests to this fact), the environment (that is, social conditions [conditioners]) can be manipulated and, indeed, "changes in the environment of the individual have quick and dramatic effects". We may well ask whether we should want to live in such a world. To Skinner this question is irrelevant. The problem, he says, is "to design a world which will be liked not by people as they now are but by those who live in it. 'I wouldn't like it' is the complaint of the individualist who puts forth his own susceptibilities to reinforcement as established values". It may be that we should give greater heed to "the complaint of the individualist" in our thinking about the possibilities for tomorrow. We must not confuse dialogue by adopting the newspeak which translates the term "values" by "reinforcing effects" (this is really a type of sophisticated one-upman-

² (1971).

ship); we must rather promote discussion in terms of what is acceptable and what is not acceptable so that our understanding (and hence tolerance) of one another as human beings (and not clinical organisms) may be broadened. We need to swell the fund of social knowledge in this way rather than dismiss as insane, deviant, or misprogrammed automatons those who speak out.

In the future, the law will have to cope with the new ways of controlling so-called "deviant" behaviour; these methods are referred to as the wave of the future and are derived from recent scientific discoveries in neurology, pharmacology, and psychology. History has taught us to be vigilant against the arbitrary use of conventional police power exercised in the name of "law and order"; tomorrow there may be an even more urgent need to protect ourselves from the new breed of mind controllers with PhDs in the behavioural sciences. "Who is to save us from our saviours?" may be an enquiry even more legitimate tomorrow than it obviously is today. A recent session of the American Association for the Advancement of Science was told that "remote surveillance and control of criminals—through chemicals and electronic transmitters buried in their flesh—will soon replace prisons". It is obvious that the consideration of such methods makes essential a whole new concept of control. As Skinner has made clear, "People are indeed controlled by fetters, handcuffs, straitjackets, and the walls of jails and concentration camps, but what may be called behavioural control . . . is a very different thing." Yet theorists of methods of correction are saying that: "We should abandon prisons and find new types of institutions in which to hold offenders." What we need to think most earnestly about is not new institutions but new values to control the use of techniques. Man is just beginning to feel and see the effects of his unrestrained exploitation of his natural environment through the power of technology. If a "technology of human behaviour" is a logical (and some would say necessary) extension of this power, the question of defining techniques in terms of human values can no longer be avoided. We have, in the prospect of remote-controlled and monitored humanity, a very concrete instance of the need to which I referred of formulating new meanings for such expressions as "freedom and dignity".

The criminal law is, above all, concerned with the control of human behaviour. It is the crudest and harshest instrument that society has for this purpose. It is not by coincidence that it is insistent upon the so-called humanistic concept of man, as able to act voluntarily and freely. The irony in this concept, which Skinner is quick to point out, is that it supports the most rigid form of control—blame, attribution and punishment—and as a result is the major obstacle in the formulation of alternatives. The jail and

the manacle are stark reminders of the price we pay for the illusion that man could act otherwise of his own free will. Besides, says Skinner, we are inconsistent. "Except when physically restrained, a person is least free or dignified when he is under threat of punishment." And, "We attribute no goodness at all to those who behave well only under constant supervision by a punitive agent such as the police."

These are valid criticisms of our present way of doing things. And it is becoming clearer and clearer that the methods of the past are inappropriate for a society which is engaged in a search for new values to make life bearable, if not meaningful, in a totally new and evolving social milieu.

In the context of crime control itself, the future is often viewed with considerable apprehension. The ultimate description of "the city of the future" has been provided by the President's Commission on the Causes and Prevention of Violence in its nightmare vision of a nation rapidly being transformed into an armed camp of 200 million people living in fear, with sanitized corridors patrolled by armoured cars and the fortresses of the affluent protected from the brutal society of the city core. It is a picture of a distorted reality of the main trends of modern life: the highspeed automobile cutting swaths through the urban environment and leaving pollution and disruption in its wake, hastening the flight to the suburbs which further isolates people from themselves and the problems of city life, which in turn feeds the psychological need for protection against the dangers of an environment seemingly dominated by malevolent influences. If there is any validity to this dismal prediction, then obviously a large void is being created. To respond in panic by using the machinery of the criminal law to fill this void and expecting organized law enforcement agencies to keep the situation "under control" is both wrong and inadequate. Once again we must look for a new concept of "control". Will the police develop into a para-military force operating above and in defiance of ineffectual laws, or will we develop community-oriented groups of citizens with enhanced, but carefully controlled, powers working with other responsible groups and citizens toward common goals? This is an important question which raises many of the basic issues in terms of the need for a sense of community and some minimum level of common goals. No open society can retain its character as such or even preserve its liberal aspirations for very long, when large groups within the community are locked in violent combat, and when extreme applications of force are being brought to bear on one element of the population by another. This is true whatever the "legal justification" for the imposition of the force. The institution of law has always rested upon a minimal consensus about how disputes and conflicts will be resolved in

society. Again, what is actually involved is a debate over basic values, and we must be careful lest the extended use of the criminal law may be actually arming one side in the debate with a crude but effective weapon with which to enforce its will.

The expenditure of effort and resources to develop and implement improved techniques to reduce criminal activity is generally rationalized by the belief either that crime rates are unacceptably high or that crime is increasing at an excessive rate. But, paradoxically, the need for crime waves may become greater in the future if the agents of law enforcement adopt the pattern of outfitting themselves with increasingly more sophisticated—and expensive—instruments of modern technology, thus becoming even more removed from the people they are supposed to serve for such sophistication in prevention and detection would, of course, have a massively inhibiting effect on all contacts between citizens. Again, we are faced squarely with the question of what we really want. We may partly welcome uneven and incomplete law enforcement because we may feel that the rules passed by the legislature are not the best of all possible rules. Standards may lie too harsh or may miss the point; the penal or correctional process may not achieve any of the goals established for it. Should prostitution be illegal? Should marijuana be indulged in? Is gambling reprehensible? Is abortion a crime? Those questions can be debated and discussed with less passion in large part because we know state intervention to be irregular and inconsistent. Absolute enforcement is only desirable when the society is absolutely confident that the rules it has passed should be observed. Even if we could envisage the perfect society, would we want it?

In preparing for the future, we need to know, among other things, with what kinds of human and social problems the criminal law is dealing, which of these are amenable to a formal resolution through the criminal-law process, and how many of these could be dealt with effectively by alternate mechanisms.

Over twenty-five years ago Dr. Mannheim, writing of the post-war period in a book entitled *Criminal Justice and Social Reconstruction*,³ set out two basic propositions that, in my opinion, are perfectly valid today. He said that:

. . . any attempt to reconstruct the criminal law has to face at least two basic problems:

1. We have to make up our minds as to what we regard as *the most important values* in a reconstructed world;
2. We have to decide whether these values should be *protected by the means at the disposal of the criminal law*, or whether their protection should be left to agencies of a different character.

The first point involves a reconsideration of our *system of values*; the second makes necessary a new demarcation of the *scope of the criminal law*.

³ (1947).

These propositions are relatively easy to state, but their application to a particular society at a particular economic level and to the cultural attitudes and conditions which exist in that society is much harder to define. Clearly, the never-ending search for an acceptable hierarchy of conflicting values cannot be an exercise of pure reason alone, but should include in its concerns an abatement of differences involving non-rational values and emotional aspirations. We must find some common ground between the situation in which force is allowed to settle conflicts among groups whose aspirations and values are incompatible, and that in which the so-called universal values and norms are stated so vaguely that everyone is free to interpret them in their own fashion.

Regardless of the historical role played by legal processes, contemporary laws must serve the needs of society as the members of that society see those needs. In this sense it is obvious that law reform is not exclusively a legal topic—and it is absolutely essential today that citizens individually and collectively become involved in the discussion of values and play a part in determining for what types of conduct the criminal sanction should be invoked.

A brief mention of the role of the courts would be appropriate here. Unquestionably a certain measure of respect for the law and the machinery of justice is essential to a stable democratic society—and the focus of this attention from the point of view of most citizens must be on the operation of the courts. I see an urgent need to clarify the role to be played constitutionally by the judiciary and the courts in this country.

The true responsibility of the courts concerning the relation between the individual and the state must be made obvious to the citizen. At the present time there exists a serious question as to the jurisdiction of the superior courts in criminal matters and their power to preserve the integrity of their own process; these matters in particular cast a considerable cloud over the exercise by the superior courts of their historic role as "primary guardian of the rights of the individual". If this is not the role that the courts are to play in our society, the situation must be clarified so that the responsibility may properly be placed where in fact it does belong. If, on the other hand, the proper role of the courts is that of guardian, then they must be given unequivocally the authority which will allow them to carry it out. In my opinion the judge of the future must assume increasing responsibilities for the protection of the fundamental rights of individuals and groups in our society. But, first the division of responsibility and the relationship between the courts and the executive and legislative branches of government must be clarified. At the very least, the courts must insist upon their right to protect the judicial process from the stigma of illegal or unfair police or administrative processes; that is, the

courts must have the right and the power to maintain the integrity of their own processes. Nothing less will suffice.

In conclusion, I will return to the thought with which I began: namely, that our actions today to some degree at least fashion the future. The Parliament of Canada has seen fit to enact legislation bringing into being a permanent law reform commission charged with the responsibility of keeping under constant review the federal laws of this country. Unquestionably its work, whether for good or ill, will have a profound effect on the future of the criminal law in this country. We must, I suggest, rethink our whole approach to the use of the criminal sanction; to far too great an extent our present attitudes are based upon a kind of nineteenth-century mythology of what the process ought to be. As we do today in many other areas of our lives, we must start by facing the situation as it really is and not as we envision it to be or should like it to be.

For although awareness of the past and cognizance of historic circumstances are necessary factors to the understanding of the criminal law and process, they are not sufficient conditions for future reform. Present problems are only in part the result of past and present changes in society which call for adjustments in the law; they are also indicative of a need to rethink our values for the future and to fashion meaning in the way we live together in society. This is, of course, an overriding concern of youth and, if in fact we look at the criminal process, we find that a preponderance of young people are caught up in it today: there is a lesson to be learned here, but we seem determined not to draw the obvious conclusion.

We talk a great deal about a Canadian identity, the foreign domination of our natural, economic, industrial, and cultural resources and, although there is still a great deal of confusion in these areas, this concern does express a desire to fashion our future creatively and must, therefore, also be in our minds when we attempt to refashion our criminal law. Although we should learn from every country as much as we can, we cannot forever depend on taking leads from Great Britain or the United States, and we must find our own unique solutions in which we can take pride.

The polarity of which I spoke earlier is often expressed in terms of tough versus soft; of law and order versus bleeding hearts; of punishment versus treatment; and so on. But this is all meaningless rhetoric and emotionalism unless we specify what we expect from the criminal law and its institutions. The essence of the law is not what is written in the books, but what happens on the streets, in the homes, offices and prisons to the people who are there. We have to make up our minds whether we want the police to be predominantly a control agency, even though we know

that more than eighty per cent of the calls to the police are calls for help and not for control; whether we want the police officer to be a peace officer or a law enforcement officer. And this is not a question of tough versus soft since in fact we know that most of the police deaths on duty are the result of traffic accidents and marital disputes and not of what is traditionally thought of as crime.

The same is true for the courts. We cannot conceive of the courts as the scene of a rigorous adversary process and at the same time engage extensively in pre-trial negotiations and plea bargaining. We cannot conceive of the judge as an impartial arbiter and then face him with the *fait accompli* of guilty pleas in seventy per cent of the cases. We cannot charge our prisons with treatment and rehabilitation when they are in fact punitive enterprises. And we cannot expect a rational sentencing policy when we are unable to articulate the purpose or function of the use of the criminal sanction.

Nor can we continue to talk glibly about criminals as if they were a breed apart, when estimates show us that almost half of the population will appear in criminal court at some point in their lives. We either have to confine the traditional criminal process to serious and recalcitrant matters, in which case the majority of problems that now come before the courts would have to be dealt with through other mechanisms, or we shall have to redesign the process to fit the circumstances and needs of tomorrow. It is a sobering thought that the criminal process so often has been used to compensate for the shortcomings of family relations, religious life, and community care and responsibility.

A law reform commission cannot and should not, therefore, devise new values and means either on traditional grounds or on new grounds without making them subject to discussion and debate by the community at large. It is an old but still valid saying that the law is far too important to be left to lawyers, and this is especially true for the criminal law. It is also well known that law is only effective when the people understand it and subscribe to it. Law reform, therefore, must be first and foremost an exploratory venture calling on public discussion before the technical elements of draftsmanship and design come into play.

The solutions will not be easy: anyone who suggests otherwise is either a charlatan or a fool. We must guard against unrealistic idealism and simplistic expediency. It could be argued that the relative stability of social relations on this continent over the last several decades is attributable to the fact that whole segments of our society, designated principally by racial origin, age, sex, and economic or cultural deprivation, accepted something less than that to which they were theoretically entitled. This is no longer the

case. Today, all the citizens in this country, individually and collectively, are quite rightly seeking "their place in the sun". Demand exceeds supply. Expectations have been created which are beyond immediate realization; serious confrontations are to be expected; realignments of political power and economic resources will almost inevitably result. How all this will happen, and the extent of the social disruption involved are matters impossible to predict. One thing is certain, however: they will not be accomplished without serious stress on our legal and judicial processes.
