

OUR JUSTICE SYSTEM ENCOURAGES INCORRIGIBLES.

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ONE of the hallmarks of being a Canadian is fortitude in times of adversity.

Our forebears had it in spades, particularly in times before justice became a government bureaucracy. Kenney's Outlines of Criminal Law reports that "In 1811 Mr. Purcell, of County Cork, a septuagenarian, was knighted for killing four burglars with a carving knife."

Today, a law-abiding old man nearing eighty – even a worthy descendant of Purcell – would be arrested, charged with second-degree murder, denied bail, remanded for psychiatric assessment and encouraged, ultimately, to be abjectly remorseful in pleading guilty to a plea-bargained charge of manslaughter.

Enacted in 1892, and from time to time amended to keep abreast of the increasing complexity of society and criminal behaviour, the Criminal Code of Canada constitutes our paramount rules of conduct that delineate and maintain right over wrong.

The Criminal Code is a tangible and affirmative expression of our federal government's constitutional duty "to make laws for the peace, order and good government of Canada," particularly criminal law. Each province has a concomitant constitutional responsibility for the administration of justice including enforcement of the Criminal Code through adequate policing and prosecution.

It is the paramount duty of our governments – federal and provincial – to ensure the inviolability of our homes and workplaces, and our safety in public places.

In the beginning Canada's criminal law was crystal clear. Once the presumption of innocence had been rebutted by evidence of guilt beyond a reasonable doubt, a convicted criminal was sentenced to a term of imprisonment that reflected the circumstances of the crime he had committed, his record of prior convictions and any mitigating circumstances. A repeating burglar, bank robber, or drug dealer faced the prospect of sentences of increasing severity, as much as a doubling of each prior sentence. Justice was hardnosed and purposely protective of law-abiding citizens.

Today, the sentencing of criminals is a mollifying exercise largely concerned with causes of crime and avoidance of lengthy sentences that might jeopardize the transformation of a felon into a born-again good neighbour and block-watch member.

Let me illustrate how crime in Canada became a low-risk occupation.

Introduction of parole

The Parole Act, 1959

An enshrinement of the theory that early release from jail is absolutely essential to achieving rehabilitation of convicts – even though it involves a high risk to their victims and the community. Paroling of convicts is a function of the National Parole Board, a bureaucratic quasi-judicial body that too frequently and without compunction neuters penitentiary sentences imposed by trial judges.

Changes to the Criminal Code

1969, suspended sentence, including probation

– previously restricted to first offenders – given general application regardless of prior convictions.

1972, conditional or absolute discharge, available to offenders without prior convictions where the offence is without a minimum penalty and has a maximum sentence less than 14 years. A discharge ends the proceedings one step short of a conviction and sentencing.

1972, The Bail Reform Act, introduced release of accused persons on a written undertaking to appear in court; a process that virtually eliminated often-unattainable “cash” bail. The Act initiated the concept of release on arrest; the use of summons rather than warrants for arrest; limited the grounds for detention, and placed an onus on the crown to establish a basis for detention.

1976, capital punishment – repealed after fourteen years of commutation of death sentences.

1977, preventive detention of habitual criminals, essentially a three-strikes law – repealed and replaced by a narrower dangerous-offender designation.

1995, conditional sentence, a jail sentence of less than two years, to be “served in the community” under conditions identical to probation.

Establishment of provincial courts

In the late 60’s and early 70’s the provinces ushered in provincial courts in place of the old system of magistrates courts. Out with practical, commonsense law-and-order magistrates. In with independent judges drawn from the ranks of lawyers – elitist professionals increasingly inclined to anything-but-jail sentencing.

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During my time as a judge in the criminal division of British Columbia’s provincial court, beginning with a brief stint in 1972 and then continuing from 1975 to 2001, I witnessed – and experienced – a Machiavellian deviation of our justice system from its historic constitutional obligation to shield us from crime, to a new orthodoxy based upon a visionary falsehood that imprisonment is a bar to rehabilitation. To perpetuate itself this new orthodoxy spirits an ever-increasing number of convicts back into our communities to serve sentences. Without the hindrance of barbwire and bars, too many continue to commit crimes.

The essence of this new orthodoxy was stated, chillingly and cold-bloodedly, in the House of Commons on Oct. 7, 1971, by then Solicitor General Jean Paul Goyer: “From now on, we have decided to stress the rehabilitation of individuals rather than the protection of society.”

We have been betrayed. Our True North is slowly becoming “fortress Canada” and we are expected to accept the unthinkable as normal: barred windows, multiple locking devices, security systems and security guards, all formerly the accoutrements of jails. It is a terrible metaphor: decent citizens behind bars while rogues they fear prowl about on probation or while serving sentences in the community.

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