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Book Review: Fashioning Criminal Justice - A Century of Criminal Justice: Perspectives on the Development of Canadian Law, by Martin L. Friedland

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BOOK REVIEW

FASHIONING CRIMINAL JUSTICE

A Century of Criminal Justice: Perspectives on the Development of Canadian Law. By Martin L. Friedland. Toronto: Carswell and Co. Ltd. 1984.

*Reviewed by Celia K. Wells**

"Criminal justice" can mean all things to all people. It is a strange term. It does not have the cold neutrality of "civil procedure" or "legal system." The normative ideal is suggested but not revealed in the phrase itself; criminal justice for whom, through what and why? In its broad sense, criminal justice encompasses theories of punishment. In recent years, the retributive rationale has been reincarnated. While rehabilitation kept a grip on penal philosophy, the persuasion of deterrence maintained its hold on criminal lawyers. However, new rights-based, retributive theories have swept into both areas of contemporary scholarship.[1] One result has been something of a revival of theorizing about criminal law.[2] Criminal justice is often used in a narrow sense to denote the *system* by which offenders are processed, their protection during police investigation and their rights during trial. Herbert Packer's seminal essay introducing his brilliant analytic framework, the "crime control" and "due process" models of criminal justice,[3] still provides the starting point for most discussions. Recently, sociologists of crime have developed the idea that the police themselves inevitably become involved in criminal or illegitimate activity through the roles they are required to assume.[4]

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[1] See, for example, Gross, *A Theory of Criminal Justice* (1979); van der Haag, *Punishing Criminals* (1975); von Hirsch, *Doing Justice* (1976); O'Donnell *et al.*, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform* (1977) and Singer, *Just Deserts: Sentencing Based on Equality and Deserts* (1979).

[2] Fletcher, *The Individualization of Excusing Conditions* (1974), 47 S. Cal. L. Rev. 1269; Fletcher, *Rethinking Criminal Law* (1978); Gross, *supra* note 1. The new theorising is not exclusively retributive-based: see Kelman, *Interpretive Construction and Substantive Criminal Law* (1981), 33 Stan. L. Rev. 591; Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability* (1975), 23 U.C.L.A. L. Rev. 266; Robinson, *Criminal Law Defences* (1982), 82 Col. L. Rev. 199; Robinson, *Imputed Criminal Liability* (1984), 93 Yale L.J. 609.

[3] *The Limits of the Criminal Sanction* (1968) ch. 8.

[4] Box, *Power, Crime and Mystification* (1983) ch. 3 is a useful synthesis.

In this collection of some of his published work of the past six years, Martin Friedland leaves opaque the meaning of criminal justice. There is no preface to the eight essays that include a history of the *Criminal Code* (chapter 1), an account of the impact of pressure groups on the criminal law (chapter 3), a discussion of the legal implications of national security (chapter 5) and the judicial development of a defence of entrapment (chapter 6). Two themes are detectable, if muted. One is the move from a dependence on English law to a greater focus on that of the United States. The chapter on the *Charter of Rights and Freedoms* gives this its final emphasis (chapter 7). A second theme is that there has been less change in the system of criminal justice than is commonly imagined. The final chapter, from which the book takes its title, seems deliberately placed to invite challenge to this thesis. It is an account of three criminal trials which took place in Ontario 100 years ago.

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The opening chapter, on *Wright's Criminal Code*, is a useful reminder that there was nothing god-given about the 1892 *Criminal Code*. It was based on the *Royal Commissioners' Code* which itself was derived from *Stephen's Code*. This, as Friedland shows, was very different from the earlier work by Wright. So much for the idea that the nineteenth century codes "embodied" the common law when two such schemes could be so different. This is especially timely for English lawyers since the United Kingdon Law Commission is currently assessing the work of a committee of academic lawyers who have been working on a draft code. The irony that England still operates through the common law, while the rest of the Commonwealth has had the benefit (using the word in a neutral sense) of codification, is profound. Friedland's research on *Wright's Code* has been converted into a highly interesting essay. Meeting Wright the codifier adds human touches to the Wright J. familiar to criminal lawyers for his judgment in *Sherras* v. *de Rutzen*,[5] and in other well known cases.[6] The paradox is of a man whose radical opinions placed him in close involvement with the Trades Union Congress but whose brilliance as a lawyer ensured him government employment and, later, elevation to the bench. His political and philosophical leanings affected his Code and stand in sharp contrast to Stephen's conservatism. *Wright's Code* is closer to the *Model Penal*

[5] [1895] 1 Q.B. 918, 11 T.L.R. 369.

[6] *R.* v. *Pittwood* (1902), 19 T.L.R. 37, 15 Digest 797 and *R.* v. *Button* [1900] 2 Q.B. 597, 19 Cox C. C. 568.

Code and to the form now recommended for Canada, that is, it employs general definitions of the mental elements required for crime. Stephen tended, of course, not in the opposite direction, which would have been to be specific in relation to each offence, but in no direction at all, which was to leave those matters undefined.

Friedland missed an opportunity in not following this with a critical assessment of the Law Reform Commission's recent work on remodelling the *Criminal Code*. The impact of his insight into what might have been would have been greater if placed in conjunction with a vision of how it might now be. Instead, there is a short chapter on "Criminal Justice and the Constitutional Division of Power." The orientation of this descriptive piece is constitutional rather than criminal, but, again, it underlines the contingent nature of the system of law and criminal justice.[7] Giving the criminal law jurisdiction to the Federal Parliament was seen to be important as a "symbol of nationhood,"[8] although viewed with modern eyes it is hard to see that the United States has suffered a loss of nationhood through the grant of criminal law power to the State legislatures. In any case, what Friedland fails to emphasize is the sheer volume of provincial legislation in Canada that carries with it enforcement by criminal sanction.[9] It has been estimated that in Federal statutes, excluding the *Criminal Code*, there are 3,582 criminal offences and 14,120 criminal regulations, while in the province of Alberta, which was assumed to be a typical province in this respect, there are 4,420 provincial offences and 14,120 regulations.[10]

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The focus switches abruptly to the United States when the impact of the Charter is considered. This is one part of the book in which issues associated with the narrower conception of criminal justice are discussed. Friedland foresees a danger that the Canadian courts may imitate the Supreme Court of the United States and use the Constitution to impose minimum standards on state institutions: "not only should the Charter not replace Parliament in the development of the criminal law; it should not infringe on the normal role of the Courts in

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[7] Friedland goes as far as the nineteenth century. For earlier, see Edwards, *The Advent of English (Not French) Criminal Law and Procedure into Canada - A Close Call in 1774* (1984), 26 Crim. L.Q. 464.

[8] Friedland, *A Century of Criminal Justice* at 48.

[9] That is "by fine, penalty or imprisonment"; see s. 92(13) *British North America Act*, 1867.

[10] Law Reform Commission of Canada, *Studies in Strict Liability* (1974) at 56.

developing the law."[11] It seems a touch complacent to be reassured that Canada will be different in this regard merely because it has Federal criminal jurisdiction. Friedland does not make the connection between this fear and the observation that the Canadian courts are citing American cases with increasing frequency.

In the conclusion to his survey of criminal justice decisions under the Charter Friedland is complimentary of the judicial record so far: "[they] seem prepared to travel beyond the 'frozen concepts' doctrine which has characterized the interpretation of the Bill of Rights and onto the more fertile plain of Lord Sankey's 'living tree' concept, in which the Canadian Constitution is capable of growth and expansion within its normal limits."[12] This is altogether too sanguine in view of the standard of reasoning in some cases. In one example, a case discussed by Friedland, the reasoning itself is hard to find. In considering whether the exclusion of mistake as a defence to unlawful sexual intercourse with a girl under fourteen[13] offended section seven of the Charter, the Ontario Court of Appeal said in *R.* v. *Stevens*:[14]

> Assuming, without in any way deciding the question, that s. 7 of the Charter permits judicial review of the substantive content of legislation, we are all of the view that, insofar as this case is concerned, s. 7 does not have the effect of invalidating s. 146 of the Criminal Code . . .[15]

Although Friedland quotes this paragraph, he does not indicate that it is the sole repository of the Court's "reasons".

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Sandwiched between these essays on the Constitution are three chapters on particular aspects of law reform. "Pressure Groups and the Criminal Law," the oldest piece in the collection, provides a general background to the specific study of gun control in Canada that it precedes. The cultural (legal and otherwise) links with England are evident here. With an analogous Parliamentary system, pressure group politics play a similar, if not identical, role, especially when compared with the United States where party loyalty is less evident. The homicide level in Canada is also more comparable with that in England, but gun ownership is of course a far more commonly accepted phenomenon. Friedland's comparative sweeps across North America and over to

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[11] *Supra* note 8, at 208.

[12] *Id.* at 231 (footnotes omitted).

[13] S. 146(1) *Criminal Code.*

[14] (1983) C.C.C. (3d) 198, 145 D.L.R. (3d) 563.

[15] *Id.* at 200 (C.C.C.).

England are extremely valuable and give a context to policy discussion that is frequently lacking in other scholarship. This, combined with his use of historical materials in the chapter on gun control, makes these two chapters powerful.

Friedland deals with the seamier side of law enforcement in chapters on national security and on entrapment. In the first, he discusses both legislative weapons (the *Official Secrets Act* and emergency legislation) and executive armoury (wiretapping). Although he points to the connection between official secrets and access to information — "They deal with the opposite sides of the same coin"[16] — he does not say anything about the interaction of the "leakage" section in the *Official Secrets Act*[17] and the freedom of information legislation.[18] The clash between the two should be loud. One suspects that the silence is deafening through judicious use of prosecutorial discretion in relation to section 4 of the *Official Secrets Act*. Reform of the *U.K. Official Secrets Act* is frustrated partly by the sad truth that governments control legislation and governments like secrecy, but also because its supporters are split by the freedom of information lobby. This group will endorse nothing less than reform of official secrecy *and* the introduction of freedom of information.

This strays a long way from (some ideas of) criminal justice. Wiretapping is used as a surveillance technique both by the Security Services and by the police in the course of criminal law enforcement. Compared with the English judicial endorsement of a system of ministerial warrant,[19] the *Canadian Criminal Code* is bold enough to try to control this method of invasion of privacy. The Code requires judicial authorization as well as retrospective notification. The cynic may doubt that any control of the police in this area is going to be effective, but it is still better to attempt regulation than to ignore the problem. Friedland is not a cynic and regards notification as "a desirable technique for limiting the extent of police wiretapping."[20]

Wiretapping is a form of self-entrapment. Entrapment in the sense of the use of undercover police officers and informers is discussed in Chapter 6. The judicial development of the defence of entrapment contrasts well with the emphasis on legislative reform in the areas of gun control and national security. The essay was written before the decision

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[16] *Supra* note 8, at 132.

[17] Section 4.

[18] *Access to Information and Privacy Acts* S.C. 1980-81-82-83, c. 111.

[19] *Malone* v. *M.P.C.* (No.2), [1979] 2 All E.R. 620, Cr. App. R. 168.

[20] *Supra* note 8, at 154.

in *Amato* v. *R.*[21] which was the first case in which the Supreme Court of Canada dealt directly with entrapment. It is unfortunate that discussion of it is left to an addendum. The chapter presents a skilful synthesis of American authorities, followed by an analysis of the desirability of a completely objective test. In this the rationale of the defence is to control police or government malpractice, unlike a subjective formula, in which the roots of the defence lie in excusing those who had no predisposition to commit crimes. Friedland favours a combination of these approaches:

> [T]he jury should acquit the accused if they are satisfied that the police or their agent's conduct in instigating the crime has gone substantially beyond what is reasonable, having regard to all the circumstances, including, in particular, the accused's pre-existing intent.[22]

There can perhaps be no clearer indication of the change of focus of Canadian law than the presence of entrapment on the judicial agenda.

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For the theme that nothing much has changed there is less support. The account of three murder trials in Ontario a century ago emphasizes the similarities rather than the differences as compared with today's trial process. Certainly, the tenacity with which the system retains the symbolic trappings of wigs and gowns is worrying, if no longer surprising. The innovation of the accused being allowed to give evidence on his own behalf is perhaps underplayed. But it is always salutary to consider whether "progress" is real or illusory. However, it is not possible to assess the claim that it is largely illusory on the basis of an extremely small part of the picture. Criminal justice can be a much broader concept than the trial itself. Friedland implicitly acknowledges this in the rest of the book. This shows, if anything, how wide a sweep it can be said to encompass. It seems strange to have an endpiece that appears almost to disown the rest.

Friedland's work is always skilfully thorough, incorporating the fruits of historical and comparative research. But a collection of essays should be more than the sum of its parts. The fabric of his studies, whether socio-political, legal or historical, is finely woven but the overall vision is obscure. There is no real thread running through this book. His sewing follows an unmarked seam. The garment is unlikely to

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[21] (1982), 69 C.C.C. (2d) 31.

[22] *Supra* note 8, at 196.

reach the fashion pages as much of it has already been on show. Friedland is pragmatic rather than philosophical. He underplays the theoretical foundations of the criminal justice system and the criminal law, confining his focus to historical or doctrinal analysis and policy prescription. The value of this would undoubtedly have been enhanced by an introduction or other means of giving a framework to the individual essays.