
4-1-1964

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Citation Information

Eisenberg, J. A.. "Book Review: The Function of the Criminal Law in 1962, by J. D. Morton." *Osgoode Hall Law Journal* 3.1 (1964) : 137-142.

DOI: <https://doi.org/10.60082/2817-5069.2625>

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol3/iss1/14>

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Book Reviews

The Function of the Criminal Law in 1962. BY J. D. MORTON, TORONTO: C. B. C. Publications (1962). Pp. 54. (\$1.75 Cloth-bound, \$1.00 Paper-bound.)

Shakespeare has written that all the world is a stage, Wittgenstein has tried to turn philosophy into word games and Oscar Wilde has noted that nature imitates art, not art nature. Now J. Desmond Morton continues the assault on our naive notions of reality and tells us that criminal trials are modern morality plays. But where his predecessors had little or no insight into behavioural psychology, Morton now informs us, more than a generation after Watson's major work, and more than two generations after Pavlov's, the legal profession knew all about it since time immemorial.

In a lucid, imaginative, forceful and stimulating publication of lectures originally presented over the C.B.C. entitled *The Function of Criminal Law in 1962*, Professor Morton examines criminal law "to discover its *actual* contemporary function." He claims that this function is essentially an educational one, directed not so much at the criminal element in society as at the public at large. The vehicle used for conveying the lessons is the criminal trial, which Morton calls "a contemporary morality play." Criminal trials are staged presentations with all the elements of an awe-inspiring drama. The actors, including Lordships, Lawyers and Larcenists, are appropriately characterized and costumed. The judge is conferred an awesome dignity and power by the impressive robes he wears, the elevated position on the bench he occupies and the formal respect with which he is addressed. And so with the other actors.

To some this may seem melodramatic, unessential or just plain flappedoodle. But Morton sees the dramatic force of the situation underlining with clarity what social behaviour is desirable and what is not. By means of the trial a sense of what ought not to be done is conditioned or reinforced in the public at large. To do this, the sentence or punishment becomes a central feature by which one is able to gauge the seriousness of the crime. For example, in older (and better) times, murder was punishable by hanging, whereas treason was punishable by hanging, drawing and quartering. From this, the ordinary citizen could logically infer that treason was even more frowned upon than murder.

Although Professor Morton admits that his theory is highly speculative he does attempt to show that it is consistent with what he considers to be the essential purpose of criminal law. On the one hand, he disagrees with Sir Patrick Devlin who believes that criminal law reflects the dominant morality of a society and that the criminal

process serves to protect all members of society from sin and corruption. In this view, the law encompasses all human behaviour, including the most personal. Morton also disagrees with the view of the other extreme that in a pluralistic society such as ours there ought to be a mutual toleration of many moralities. However he does agree with the position taken in the Wolfenden Report on Homosexual offences and Prostitution that the function of the criminal law is to preserve public order and *decency* and to protect citizens against injury, exploitation and corruption. It is not the purpose of the law "to save them from sin" but rather "to see them home safely."

If this is so, what function does criminal law serve? Morton examines and rejects the conventional answers to this question. He denies that criminal law is essentially a deterrent, because it would only control conscious wrongdoing, not all criminal acts. Moreover it has not in effect served this purpose because so many convicts are repeaters. As a means of safeguarding the public, criminal law would only be effective if a high proportion of wrongdoers is convicted, and this is clearly not the case. Similarly it is not basically meant to reform since no effective means exists, as the high percentage of repeaters indicates. Nor is its purpose retribution, in the old sense of "vengeance" because this too would require apprehending a high percentage of offenders.

However, criminal law does have a retributive function, in the sense that it serves to exhibit society's displeasure and repudiation of the offense. Punishment, then, becomes the sacrifice of the wrongdoers for the public safety. It is an indispensable part of the demonstration of *values* to the public. In this way, "criminal law is one of the institutions by which *morality* is created or supported." (p. 31)

Thus it is of no great concern that there are many repeaters and that only an estimated one out of five serious criminal offences in the U.S.A. leads to a conviction. For the law does not seek to bring every wrongdoer to justice, and in many cases disallows damaging evidence. Thus rather than strive for absolute justice or seek the whole truth, the criminal process is in fact an excellent dramatic means for educating the non-criminal public.

Finally, Morton deplores the increasing attempts to turn law courts into clinics. Psychiatrists are not trained to decide on a psychiatric basis whether or not a man ought to be hanged. Nor is it a medical matter to establish the connection between mental disease and legal culpability. To place the courts' total concern on the criminal's welfare is to detract from the educational function of the law.

The outstanding feature of Professor Morton's lectures is its refreshing nature. He has presented a fresh and new approach to a process of vital public concern free of the dead-weight of conventional beliefs and half-apologies. Undeniably, there is some validity to the assertion that the criminal process can and does serve an educational

function—in effect far greater than almost any layman would have suspected before encountering these views. However there is a great difference between the view that the criminal process has educational value and the view that the essential function of the criminal process is a form of moral education.

On the first page, Morton states that his “conclusions . . . will be speculative rather than authoritative.” As a feature of a preliminary hypothesis, some degree of speculativeness is understandable. But even speculation ultimately requires support or confirmation of some sort. And it is in this respect that Morton’s thesis is not compelling. After reading it, the layman may justifiably have some doubts. Why should anyone adopt the view presented? There is very little positive proof supporting it. Are the fruits of such education, which has been going on for so long, apparent? Has crime decreased or is it relatively lower among the non-criminals who attend trials? And if figures were available establishing such a correlation, how could the decrease be shown to be due to education and not to deterrence?

Moreover Professor Morton’s logic is baffling. By showing that criminal law is not really effective as either a deterrent, a safeguard, an instrument of reform or as a means of retribution in the “old” sense, he concludes that these are not the essential functions of the law. But, as a poor man will not abandon a dilapidated shack for the open wilds because its temperature is not a constant 68° F., so it may be that for the most unsettled state, the least effective system of laws is preferable to no law, for any or all of the four conventional reasons.

Nor does it follow, that even if it could be shown that the function of criminal law is none of these, that it creates and supports *morality* as Morton claims. Actually this is a problem which goes back at least as far as Plato. In the *Republic* (and the *Meno*), one of the problems raised is whether morality can be taught. Plato is a bit ambiguous or unclear in his answer in some places, but his view on the matter of drama coincides to some extent with that of Professor Morton. At one point, Plato would have the guardians of the state control dramatic forms, because of the *moral* influence they have on the citizens.

However I doubt that this is a tenable position. I deny that what *could* be taught or conditioned by criminal trials is either conscience or *morality*. As Morton himself states in criticizing Sir Patrick Devlin’s position, “law” and “morality” are not synonymous, for some immoral acts are not illegal and some illegal acts are not immoral. There may be an area of coincidence in which many acts may be both moral and legal or immoral and illegal. But there is an additional dimension in morality not involved in legality. Whereas rules on laws can be conditioned in a passive recipient, MORALITY is much more than an automatic adherence to imperatives. It is moral to refrain from stealing only if one actively realizes that stealing is wrong *per se*. But this is not the case when one refrains from stealing

because negative responses have been conditioned on a subject by a dramatic conveyance of the idea of social repudiation. This does not, of course, rule out the educational function of criminal law, but it is doubtful that it can serve a function of "moral education" (which may even be a contradiction in terms).

Of crucial importance to many of the ideas expressed in the lectures, is the distinction between the terms "function" and "purpose". An analysis of such a distinction may shed light on whether criminologists are justified in wanting to turn courtrooms into clinics. When we refer to the "function" of something we refer to *what* it actually does or *how* it operates. But when we refer to the "purpose" of something we refer to the reason or reasons of its existence or *why* it is doing what it is. In most cases, the purpose is more ultimate than the function, in that a thing functions for a specific purpose. With respect to the law, I believe this to be the case.

According to the Wolfenden Report and Professor Morton the *purpose* of the criminal law is "to get them home safely" i.e. to achieve a certain form of social stability. However it is the *function* of law either to deter or reform or even educate in order to achieve the desired stability. In effect, the law functions in a specific way to attain an end, and so serves that end.

If this end is not being satisfactorily achieved, then the likely thing to do is to get to the causes or sources of the social instability. One such source lies in the social conditions of certain segments of society, another source is the criminal element, and various potential sources lie in the various groups of the non-criminal elements of society. Of these sources the last is probably the least threatening, and *if* so, it would seem more reasonable to devote our energies to the control of the most serious actual threat. The ideal thing to do is to control each threat as it appears. But conflicts arise, and it is not always possible to educate and to treat at the same time, for one precludes the other. In such a situation the more serious threat should take precedence.

It is true, as Morton points out, that modern psychological treatments are rarely effective in reforming criminals. But since the criminal is one of the direct causes of the instability, our greatest energies must be devoted to the removal of the threat. If it is possible, true rehabilitation would be such a cure, and it must be striven for, unless shown to be impossible. And if we are faced with a choice between a doubtful rehabilitation of a criminal who will eventually be back in society in a few years, and public morality plays presented for a limited audience which would probably remain relatively honest due to satisfactory economic conditions, social pressures and direct threats (e.g. police guards), the former seems the more reasonable. In this way one *function* may be partially scrapped, but the ultimate *purpose* may be thus achieved.

In stating the foregoing, I do not wish to imply that reform of criminals should always take precedence over the education of the public. The principle I wish to stress is that the function contributing most to the ends of society (stability tempered by the dominant values) should be given precedence over other functions, where conflicts exist. The important thing to note is that the law as a means to a social ideal, may have to play a secondary role when and if more effective means are sought. This I believe is the central rationale of the criminologists.

Professor Morton also seems to underestimate the contribution that psychiatrists, and presumably other professionals, can make in the courtroom. He believes that legal notions of insanity are quite different than psychiatric notions, hence medical concepts are often irrelevant. Because of this there is little reason why psychiatrists should make decisions in court. In this regards Morton asks, "Upon what psychiatric basis may he (i.e. the psychiatrist) testify that a person ought to be hanged?" (p. 15). Furthermore the psychiatrist is not qualified to determine questions of legal culpability. It is Morton's belief that this is just *not* the medical man's domain.

Perhaps this may be due to my ignorance of jurisprudence, but I fail to see how the legal concept of criminal responsibility can be independent of essentially non-legal concepts. Surely the questions "Could the accused have done otherwise?" must be answered prior to the determination of legal culpability. To put it positively, an affirmative answer to either of these questions is a *necessary* condition of legal culpability. And it is by no means obvious that a psychiatrist is not more qualified to answer these questions than a judge, lawyer or jury. From this it does not follow that the whole trial is to be dominated by specialists of various types, but the prologue often does belong to this group. And in the prologue, a psychiatrist may tell us if there is to be a play or not.

I found this to be an enlightening and imaginative book, which influences the reader in more ways than he is aware. Professor Morton has shown profound insight into a number of philosophical issues. Beneath the smooth surface of the excellent presentation, a host of problems become apparent. Allusions, direct and indirect are made to the relation of ends and means, the place of the individual in society, the natures of man and morality, the problem of the meaning of concepts said to underlie social existence, as well as many others. It is a reflection of the author's literary and intellectual powers that he has been able to convey his awareness of the complexities of these problems, yet not become entwined in them. For this reason, the unorthodox views come through with a simple clarity, even to the uninitiated audience of laymen. Not only are the concepts so conveyed, but so are the inner forces impelling the author to his position—the forces affecting a person caught up in the drama of the criminal trial.

But by its very nature, the central thesis presented in *The Function of Criminal Law in 1962* has the same virtues and defects as Shakespeare's lines, Wittgenstein's position and Oscar Wilde's aphorism. It stimulates the Mind, it nourishes the Imagination, but it does not convince the Intellect.

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