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John Barnes

Randal Marlin

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Notes and Comments

John Barnes* and
Randal Marlin**

Radical Criminology and the
Law Reform Commission of
Canada — A Reply to
Professor M. R. Goode

Professor M. R. Goode¹ has recently attacked the criminal law work of the Law Reform Commission of Canada as “profoundly unsatisfactory”² because the Commission has apparently adopted an outmoded theory of the criminal process. He maintains that the approach of the Commission has been vitiated by

. . . what may be loosely called a liberal-positivist ideology, which fails to question the most fundamental bases of the criminal process in a democratic capitalist society and the faiths which underlie them.³

This failing to question or to give written consideration to current criticisms of this ideology has led, in Goode’s view, to “the bankruptcy of the Commission’s philosophical approach”.⁴ This is a serious charge; our purpose is to show that Goode fails to substantiate it.

Goode argues that the Commission accepted a “value-consensus model” of society, a model possessing two major premises:

. . . that there exists in society a fundamental agreement as to the values which the society wishes to, in some way, uphold: and that that consensus is reflected in the law making, law applying and law interpreting practices of political authority”.⁵

By contrast, Goode notes the existence of a “value antagonism”⁶ model according to which society is characterized by conflict rather

*John Barnes, Assistant Professor, Department of Law, Carleton University

**Randal Marlin, Associate Professor, Department of Philosophy, Carleton University

1. M. R. Goode, *Law Reform Commission of Canada — Political Ideology of Criminal Process Reform* (1976), 54 Can. B. Rev. 653

2. *Id.* at 669

3. *Id.* at 655

4. *Id.* at 655

5. *Id.* at 657

6. *Id.* at 664

than consensus with the legal system imposing the values of dominant groups on the less powerful. This model is accepted by “radical criminologists” who deny that there is fundamental agreement as to society’s values and hold instead that “society is characterized by diversity and conflict on a large scale, and that social authority is wielded by and for an economic meritocracy which controls the means of production in the society”.⁷ Law, seen in this light, exists to protect and perpetuate the interests of the dominant groups.

The proper questions to ask, bearing in mind the second model, are: Whose interests are served by existing or proposed laws? What are the class affiliations of those who propose, criticise, legislate and administer the laws?

In Goode’s view, the Commission far too often pronounces on the nature and value of the criminal law in terms that suggest there is little or no dissent. For example, the Commission states that, “[c]rime uncoped with is unjust: to the victim, to potential victims and to all of *us*”,⁸ or, “*We* have, we would contend, a basic right to protect *ourselves* from harm and in particular from the harmful acts of *others*”⁹ — as if there were a clear “we” and “them”. (The emphasis is Goode’s.) Goode contends that “there is no ‘us’ and ‘them’, and . . . the criminal law should not belong to ‘us’ ”.¹⁰

The Commission report, *Our Criminal Law*,¹¹ sees the criminal law as “fundamentally a *moral* system . . . it is a system of applied morality and justice”.¹² To Goode, however, the Commission’s weakness lies in its failure to specify whose morality. “Who, *really* are ‘we’? What, *really*, is the content of ‘our’ consensual morality? Who decides?”.¹³

Goode criticises the Commission for apparently accepting the value-consensus model and for failing to deal with the issues raised by the radical criminologists. He does not openly avow the value antagonism theory, although he might be taken to have implied his

7. *Id.* at 666

8. Law Reform Commission of Canada Report, *Our Criminal Law* (Ottawa: Information Canada, 1976) at 1, quoted by Goode, *id.* at 671

9. Law Reform Commission of Canada, *The Meaning of Guilt (Criminal Law: Strict Liability) (Working Paper #2)* (Ottawa: Information Canada, 1974) at 5, quoted by Goode, *id.* at 671, n. 77

10. *Id.* at 671

11. *Supra*, note 8

12. *Id.* at 16, quoted by Goode, *supra*, note 1 at 671-72

13. Goode, *id.* at 672

acceptance of it, for he maintains both that the Commission's philosophy is "erroneous" and that the value consensus model (which is the way he characterises the Commission's philosophy) contradicts the value antagonism model.¹⁴

An initial reaction to Goode's paper is likely to be surprise that of all commissions such criticisms should be directed at the Law Reform Commission of Canada. The federal commission has consistently drawn on the assistance of sociologists and criminologists who, we must presume, have been familiar with recent writings in their field.¹⁵ The first chairman, Mr. Justice E. P. Hartt, stressed the fragmentation of values in modern society and conceived of law as an instrument of minimum intervention which should promote the peaceful co-existence of different opinions.¹⁶ The Commission has sought actively to accommodate diverse views through extensive public consultation.¹⁷ It has questioned the value-base of the present law at every stage. For example, the Commission has refused to suggest revisions of the law on offences against property until there has been a fundamental consideration of the role of property in Canadian society, indicating awareness of the point of view that the only difference between "theft" and "sharp business practice" is the class of the person involved.¹⁸

Much of the Commission's work, then, is consistent with the findings of the radical criminologists. The latter apparently favour a withering away of law as an instrument of centralized social control. With such a development the Commission is largely in sympathy, since it recommends greater restraint in resort to the criminal sanction which should only be employed in cases of serious wrong and genuine harm.¹⁹

Thus the Commission does not anticipate an entire withering away. It argues, rightly we submit, that there are certain core values, such as freedom from bodily injury, which people agree that the law should be used to protect and has sought to identify these.

14. *Id.* at 664

15. See list of outside studies, Law Reform Commission of Canada, Fourth Annual Report, 1974-75, *In Sight of Land* (Ottawa: Information Canada, 1975) at 25-27

16. See J. Barnes, *The Law Reform Commission of Canada* (1975), 2 Dalhousie L.J. 62 at 73-74

17. *Id.* at 79-90; Law Reform Commission of Canada, Second Annual Report, 1972-73, *The Worst Form of Tyranny* (Ottawa: Information Canada, 1973) at 11-13

18. *Supra*, note 15 at 11

19. *Supra*, note 8 at 27-35

It is worth recalling in this connection a criticism of radical criminology' made recently by Leon Radzinowicz and J. F. S. King who wrote, referring to the radicals:

They have overstated the heterogeneity of social values, ignoring the large measure of consensus, even among the oppressed, in condemning the theft and violence that make up the bulk of traditional crime. . . . And they have indulged in exaggerated hopes of human nature, been over-optimistic about what society will tolerate, either now or in the future.²⁰

It is obviously difficult to articulate the core values in any other than a general way and this has led to frequent charges of vagueness made against the Commission. But the merit of its work lies in the fact that for the first time an effort has been made to develop a philosophy for the use of the criminal law in Canada, to state what functions it should serve.²¹

In its enquiries, the Commission has taken the optimistic position that consensus should be sought, even if the consensus is merely agreement to differ. It has shunned the recommendation of simple answers, likely only to compound present problems, preferring continual informed debate. It then becomes difficult to see how Goode can accuse the Commission of promoting unitary interests.

The method of law reform used by the Commission is law reform by persuasion or education.²² Realizing that the co-operation and sympathy of the public and of legal officials is needed for the practical implementation of reforms, it has recognized that change of attitudes is more the road to genuine change than mere legislative revision. Such a method involves informed debate to achieve acceptable results.

The constitutional framework of the Canadian criminal process makes discussion and persuasion all the more necessary, since criminal control is a combined federal-provincial venture. The parties must act in co-operation and for this reason common ground must be found.

Assuredly, consensus is not the whole story. The majority, even a very large majority, is not always right. Intellectual leaders have always the duty to speak out against mass prejudices enshrined in the criminal law. But while the Commission might be faulted for

20. *Times Literary Supplement*, September 26, 1975 at 1089

21. See J. Barnes, *Criminal Law Reform; Canadian Style*, [1976] *Crim. L.R.* 299; *supra*, note 8 at 38-40

22. Barnes, *id.* and *supra*, note 16

giving insufficient expression to the limitations on consensus in its published writings, it could hardly be taken to hold a consensus-is-everything philosophy. Such a view would be contradicted by its stress on a two-way educational approach — where the Commission analyzes, evaluates and enters into dialogue with the public. There is no clear consensus on the abortion question, but the Commission has made no recommendation, as yet, to remove abortion provisions from the *Criminal Code*. If consensus, and nothing else, mattered, why should it be necessary to embark on a detailed examination of the question rather than simply recognizing disagreement and automatically recommending decriminalization?

It is noteworthy that Goode himself gives little hint as to his own view of the way in which the legal system should be re-modelled. Indeed, he seems to appeal approvingly to the very consensus model which he attacks (or more frequently reports as having been attacked by others). For in questioning the idea that the criminal law should enforce some morality, he writes:

If there is no minimal social consensus, if there is no reflection of any *possible* common morality in social legal institutional decision making, then enforcement of morality can easily become a façade for the imposition of the will of one social group upon another.²³

Here, it appears, Goode feels that such an imposition would be a bad thing. But why would it be bad? Presumably because the imposed-on group does not share the morality of the imposing group — in other words because there is lack of consensus.

Goode also concludes his commentary with the hope that

. . . some of the issues raised herein will spark further public and academic debate concerning the matter which touches all citizens most closely: the criminal process which should be in place in Canada.²⁴

Why should one have this hope unless one felt — as the Commission plainly feels — that such discussion would promote harmony and agreement?

Goode's technique of argument is to take isolated passages from Commission papers and to identify in these resemblances to the descriptive liberal-positivist or value-consensus theory. He then recites the attacks made on the theory and concludes that the

23. *Supra*, note 1 at 672

24. *Id.* at 674

Commission's work must suffer from the same deficiencies. His technique is to find guilt by association. The argument is a sloppy substitute for more careful and direct analysis of the views and methods of the Commission, a body seeking to articulate the direction in which the law *ought* to go.

Goode's exaggerated criticism of the Commission is marred by a blurring of two distinct questions: (1) the factual question of what and whose interests the law has represented and now represents, and (2) the moral question of what and whose interests the law ought to represent. The answer to the first question may give some insight into the significance of various laws, but it does not by itself answer the second question. Even if it could be shown that the law has always represented the interests of some dominant group, it does not follow that a legal system reflecting a consensus, if attainable, would not be a desideratum. But perhaps the consensus is not attainable. Even so, there is the possibility of a lesser or greater approximation to consensus and of improvements relating to the latter.

If Goode's point about the "bankruptcy" of the Commission's thinking is to be sustained, he has to show something like one of the following: either (1) that no moral consensus in society is possible to any significant extent, and the striving for consensus is misguided, or (2) that by failing to examine the class biases in our inherited legal system the Commission has uncritically accepted a *status quo* and endorsed an unjust system.

Neither of these propositions is given adequate support by Goode. Indeed, the reality of the Commission's philosophy and method of law reform gives support to the contrary.