LIVING IN OUR MIDST: THE CO-EXISTENCE OF DEVIANCE, THREAT AND PUBLIC SAFETY

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Public perception of the threat to public safety resulting from the existence in the community of "dangerous", "violent" or "high risk" persons appears to be increasing. This is evidenced by the media attention given to incidents of harm resulting from the behaviour of such persons and the involvement of various special interest groups with the issue. "Official" responses range from the promotion and support of community education programs to procedural reforms for application by social control agents, including the implementation of "risk assessment" strategies and legislative reforms, the most recent in Canada being Bill C-55.[1]

While the current preoccupation of the media, citizen groups and various government agencies with the identification and control of dangerous persons appears to signal an unusual or "growing" problem, this is not a new issue. In fact, it could be argued that this problem has always been at the centre of the debate concerning the balance between individual and collective rights in democratic societies.

This issue has taken on a particular twist recently with the focus on the release of "violent offenders" into the community. Various adjustments have been made to the assessment and release programs of the federal and provincial corrections and conditional release systems in an attempt to label such persons and provide increased administrative controls over them. The designation of persons as dangerous or high risk offenders, the detention of such persons for indeterminate periods and the attempt to improve cross-jurisdictional communications about such persons are examples which immediately come to mind. As well, law enforcement agencies have struggled with the "demand" being placed on them by citizens' groups to provide public notice of the release or relocation into their community of persons designated as violent or high risk. A particular focus is placed on sex offenders.

A number of questions emerge from this situation. In Canadian society, what is the relationship between the public's need to know and the individual's right to privacy? Under what circumstances can it be said that the completion of a sentence resulting from a conviction for an offense as defined in law is not sufficient recompense to society and further penalties imposed by the state directly or indirectly

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[1] *An Act to Amend the Criminal Code (high risk offenders), the Corrections and Conditional Release Act, the Criminal Records Act, the Prison and Reformatories Act and the Department of the Solicitor General Act*, S.C. 1997, c. 17. It proposes to toughen the rules on parole review and supervision of dangerous offenders, and add "certain sex offenders" as a category in the high risk offender group.

are justified? Is the state ever justified in releasing from its control persons known to be unable to control their behaviour, thereby risking harm to others? Is the sanctioning power of the state, when exercised by its agencies (police, courts, corrections, etc.), properly used to prevent future behaviour, or is it only legitimized by the proven existence of sanctionable behaviour? What is the public's right to an assurance of safety and security? How far can the citizenry go in attempts to protect itself from possible harm resulting from the behaviour of specific individuals?

Background to the Problem

In one sense, this problem is illustrative of the desire to organize human affairs into categories of good and evil. Defining and constraining the "bad" has been fundamental to both secular philosophy and religious dogma. It is what law is about and what many social institutions exist to address.

Some social institutions have been given the task of defining the "good" and others have been made responsible for the education and development of individual personalities in keeping with those definitions. Generally, the government has been given the task of identifying the "bad" and providing the means to isolate and neutralize it. In many ways, "dangerousness" is perceived by both citizens and social control agents as a confrontation between the good and bad in the absence of effective institutional constraints. For example, what is to be done with dangerous persons after they have "served their time" and are no longer required to submit to confinement or supervision?

Related to this is the problem of de-institutionalization, especially as practised by the mental health agencies of government. Integration of persons suffering from various mental disorders into the community has become a preferred strategy in many jurisdictions. The concern is that this results in the release or placement into the community of persons who are dysfunctional or "dangerous". Some of these persons commit criminal offenses, are confined in correctional settings to complete their sentence, and then are released into the community, allegedly more dangerous than before confinement.[2]

This issue is also reflective of the public's general concern about the credibility of the agencies charged with the administration of justice. The effectiveness and integrity of police, the ability of the "adversarial process" to protect the interests of

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[2]A number of social scientists have made the assertion that prison "creates criminals". More notably, two of the most influential correctional reviews in Canadian history based many of their recommendations on this point. They were the *Report of the Canadian Committee on Corrections: Toward Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 31 March 1969); Standing Committee on Justice and Legal Affairs, *Report to Parliament by the Sub-Committee on the Penitentiary System in Canada* (Ottawa: Ministry of Supply and Services, 1977) (Chair: M. MacGuigan).

citizens, the apparent disparities in the sentencing patterns of the courts, the effectiveness of correctional programs and the intelligence of the conditional release process have all come into serious question in recent years. The average citizen is now likely to expect that decisions made in the justice system will increase the threat to public safety, not reduce it. Thus we find the call for apparently extraordinary measures to "pick up the slack" where the agencies of the justice system have failed or no longer have jurisdiction.

The Problem

The problem of how to assure the highest possible order of public safety while providing reasonable guarantees of individual liberties can be organized into levels of concern moving from the philosophical to the pragmatic.

At the philosophical level, the problem can be defined in terms of the difficulty of deciding what constitutes freedom and responsibility within a democracy. What is owing to the individual and to the collective with regard to those concepts? If freedom is attendant on some measure of corresponding capacity to exercise responsibility, then how are we to respond to those who are evidently unable or unwilling to exercise responsibility in their public affairs? Is it justifiable for the collective to limit the freedom of other persons based on their apparent lack of capacity to exercise responsibility even if they have not been convicted of any offense in law or, having been convicted, have satisfied the penalty as prescribed by law?

At the pragmatic level, the problem has both political and professional dimensions. Government, by definition, has a mandate and a duty to provide for the safety of the citizens within its jurisdiction. Governments may succeed or fail based, to a large extent, on the degree to which the citizens perceive themselves to be secure in the mundane aspects of their daily lives. This responsibility translates into a political need to provide assurances that matters of safety and security have priority in public policy and public expenditures. In the political sense, the assurance of public safety may be a more important and consuming issue than guarantees of private freedom. This tension is well known to legislators and agents of government responsible for social control.

From the perspective of those professional agencies responsible for keeping the peace, defending the accused, confining the convicted or treating personality disorders, the problem translates into demands for procedural clarity. Confusion with regard to the exercise of professional discretion in assuring a satisfactory balance between public safety and individual liberty often results in tragedy or, at the very least, public dissatisfaction.

Jurisdictional Impediments to Resolution

In the public mind, tragic events resulting from a deliberate act by a person who is or has been placed within the jurisdiction of social control agents (e.g. "has a record", is on parole, was recently released from an institution, etc.) are evidence of a failure by the social control system to carry out its responsibilities. Such "breakdowns" often result in public inquiries. In recent years, public inquiries into welfare, child-care, law enforcement and correctional systems have been occurring in Canada on an almost continuous basis.[3]

All of these inquiries, to one degree or another, focus on the dichotomy between public safety and private rights. In almost all cases, the findings demonstrate "gaps" in the ability of social control agents to assure public safety either because their responsibilities are not clearly delineated or because they do not or cannot successfully interface with other social control agencies. As persons move from the jurisdiction of one agency to another (police to courts, courts to corrections, corrections to parole, etc.), problems of information transfer or commitments to differing priorities may result in loss of contact or attention to the "client". Sometimes the client is an offender or threatening person who needs structure and supervision, and sometimes the client is a specific individual citizen placed at risk because of the existence of such persons.

In democratic societies, coercive systems of social control usually are required to "show cause" before they can act coercively towards a person. Interventions of the state which are arbitrary or exploratory to the inconvenience or detriment of the individual are usually disallowed and, if discovered, are themselves subject to sanctioning. A common complaint of police agencies in Canada is that the show cause rules are sufficiently stringent to thwart investigations and hinder successful prosecutions. Tempering the ability of social control agents to act arbitrarily is a responsibility of the state in protecting the interests of the individual citizen.

As a general rule, showing cause must be based on reasonable probabilities that an offense has been committed or that a threat to commit an offense exists. Evidence in support of the probability is necessary. However, a constraint is placed on the state agent when a proposed intervention is based wholly on a prediction of future behaviour. This is the case especially when the individual is not already subject to a court order or convicted of an offense and the prediction is based on an assessment of the personality (tendency toward violence, abuse, etc.).

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[3]The Oppal Commission on policing (British Columbia, *Closing the Gap: Policing and the Community: The Report* (Victoria: The Oppal Commission, 1994)) and the Gove commission on child-care (British Columbia, *Report of the Gove Inquiry into Child Protection* by T.J. Gove (Victoria: The Gove Inquiry, 1995)) are two recent examples in the Province of British Columbia.

The hesitation to take action based on predictions of future behaviour is built into the principles of social control for several reasons. One has to do with the lack of confidence in the human capacity to make reasonably accurate predictions about future events, especially involving the behaviour of human beings. It is likely that the state agency in Canada which has worked hardest to identify means of predicting future behaviour is the federal corrections system. Various kinds of risk assessment tests and strategies have been introduced over the years. The obvious reason for this is the public and professional concern about releasing into the community persons who have been convicted of a crime and institutionalized as a result. While various devices for assessing risk seem to represent an improvement over guessing, the primary finding has been that some strategies work better for predicting behaviour under controlled circumstances than others. No method to date, however, has generated significant confidence in the reliability of predictions when an individual is exercising free will within the general population.[4]

Interestingly, while there is a general lack of confidence in the predictive power of current behavioral assessment techniques, there remains a continuing adherence to the belief in the ability of human beings to change their behaviour. This is combined with a strong commitment to various rehabilitation and reintegration strategies as applied to both criminal offenders and persons suffering mental or emotional disorders with or without attendant criminality. The general rule is that "we don't give up on people". Coupled with that is the view that human beings deserve the opportunity, on completion of a sentence or as an aspect of treatment, to demonstrate that they are able to function as responsible citizens without being continually faced with condemnation for their past mistakes.

Another reason for resisting action based on predictions of future behaviour is ideological. It has to do with the idea that personal freedom is essential to our understanding of a functional democracy. Any type of action on the part of the state which diminishes personal freedom is suspect. The idea that the state may guess what a person is going to do and act to prevent it (no matter how educated the guess) is generally considered abhorrent to the spirit of justice. The potential for abuse, given the considerable power resting with the decision-maker, is obvious. Ironically, it might be predicted that persons or agencies holding such power are likely to abuse it. There is a considerable literature which addresses this problem in studies of law enforcement, mental health, correctional systems and the professions of psychology and psychiatry.[5]

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[4]See *e.g.* R.J. Menzies, "Mental Disorder and Crime in Canada" in *Canadian Criminology*, M.A. Jackson and C.T. Griffiths eds., 2d ed. (Toronto: Harcourt Brace, 1995) 61.

[5]See *e.g.* E. Freidson, *Professional Powers: A Study of the Institutionalization of Formal Knowledge* (Chicago: University of Chicago Press, 1986).

Finally, it is difficult to develop procedures which allow an agent or agency to act on predictions of future behaviour because of the lack of support for such practices in Canadian law. The state cannot criminally sanction a citizen without proof that a prohibited act occurred in which the citizen was deliberately involved. In Canadian law, the state may not punish or delimit the freedom of someone who *may* commit an offense. Since 1982, the *Charter of Rights and Freedoms* has solidified this principle.[6]

It must be acknowledged that the law makes provision for detaining persons for assessment in order to determine whether or not they are capable of exercising free will without threat to themselves or the community. In addition, the law currently provides that offenders convicted of certain serious offenses may be denied statutory release and detained until the end of their sentences. The provisions of Bill C-55 would enhance the capacity of the justice system to provide controls for persons found to be dangerous offenders, especially sex offenders. The conditions under which these various provisions apply are limited and somewhat clouded by the lack of trust in the general ability of the state to exercise such power responsibly. There is a worry that such measures may become Draconian.[7] These procedures and proposals remain the focus of considerable debate.

Principles for Resolving the Issue

So what does this have to do with the original issue, namely, the perceived need to increase public safety through the identification and control of persons who are deemed violent or dangerous?

It means that, given the principles of philosophy and law at work in the Canadian experience, this issue can only be legitimately addressed through sanctions applied on

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[6]Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[7]In 1978, the legislature of British Columbia passed the *Heroin Treatment Act*, R.S.B.C. 1978, c. 24. This legislation, and the proposed regulations in support of it (*A Plan for the Treatment and rehabilitation of Heroin Users in British Columbia: Report of the Alcohol and Drug Commission* (Victoria: Alcohol and Drug Commission, 1977)), triggered significant debate in the province. It had resulted from a growing concern in British Columbia that drug trafficking and addiction were reaching a point beyond the capacity of law enforcement or other social agencies to control. Additionally, serious economic effects were being demonstrated, particularly with regard to the use of heroin. The *Heroin Treatment Plan* proposed a system for referral, detention, assessment and treatment of persons suspected of heroin (and related substances) abuse. It allowed for detention merely on suspicion and persons could be detained on the report of anyone in the community. These provisions were eventually seen to be in clear violation of fundamental assumptions about the legitimate power of the state even in the face of apparent impotence in dealing with a serious social problem. The *Heroin Treatment Plan* authorized by the *Heroin Treatment Act* was eventually scrapped.

the basis of past, proven behaviour. It is possible, as Bill C-55 proposes, to expand sanctions for certain kinds of offenses on the grounds that it is a legitimate purpose of punishment to intervene with convicted citizens in a manner which is intended to prevent further similar offenses being committed by themselves or others. In this writer's opinion, proposals such as found in Bill C-55 act to legitimize crime prevention as a purpose of punishment.

However, having done that, can sanctioning based on the principle of crime prevention continue at the completion of the sentence? Given that the original offense was considered serious enough to provide for expansive or extraordinary sanctioning, do citizens have a right to conclude that the offender is to be continually punished for past behaviour through extraordinary measures such as the publishing of public information about the offender on release including the nature of the offense, their residence address and their picture?

The rehabilitation and reintegration into the community of persons whose personal and social circumstances have resulted in deviancy or offensiveness is very difficult. Research makes clear that the placement of persons in coercive settings, either for punishment or treatment, creates the danger of generating additional difficulties for them on release. The process of adjustment back into the community requires as supportive an atmosphere as possible. It would be interesting to know the number of persons who have recidivated because of the community's response to knowledge of their previous crimes. Anecdotal evidence from offenders would suggest that, at the very least, their ability to find employment or gain acceptance to training and education programs was lessened or nullified by such knowledge, forcing, in their view, a return to criminal behaviour. This is such a well-accepted belief about the fate of inmates on release that it has become a common theme in books, plays and movies.

Therefore, it could be argued that the publication of information about an offender on release increases the threat to public safety rather than reducing it. This would appear to be a reasonable assumption whether or not a position is taken in favour of the possibility that an offender can be rehabilitated. It is arguable that in addressing this problem, it might be helpful to rank the values that are most consistently reflected in the expressed desires and expectations of individual citizens. Various authorities have attempted to "model" the way in which persons do this.[8]

Regardless of differences in politics or culture, it would appear that the general ordering of priorities in response to threats is as follows: first, that personal safety is assured (this desire may be transferred to another, such as a child); second, that personal rights be guaranteed to the highest degree possible (that is, that the personal

[8]See *e.g.* B. Hall, *Value Clarification as a Learning Process* (New York: Paulist Press, 1972) and J.M. Pollock, *Ethics in Crime and Justice* (Belmont, Calif.: Wadsworth Publishing Co., 1994).

liberty of the *threatened* person not be impeded); and finally, that the rights of others, including the *threatening* person, be guaranteed to the highest degree possible. It appears clear that, if the first priority is not guaranteed in any particular situation, then the lesser priorities may be sacrificed. Persons may be willing to give up considerable personal freedom to recover safety and to deny the right to others altogether.

This is, in the opinion of this writer, what the debate is all about. When is the threat to personal safety so great that persons are individually or collectively willing to sacrifice their freedom and the freedom of others? It must be conceded that it is not possible to deny freedom to others without denying freedom to yourself. If we support practices which result in an inability of others to live their lives freely, then we have created the conditions for such practices to be applied to ourselves. More significantly, an environment has been created which enhances suspicion and distrust to which all persons are subjected, offenders or not. It is possible to describe circumstances where such decisions have had to be made. Sometimes people act on each other in ways that require responses which place everyone under restrictions. These responses are almost invariably made to improve conditions of personal safety. Wars and natural disasters, as well as criminal events, provide sufficient illustrations.

Two factors are important in responding to this dilemma within law-based democratic societies. The first is that the response should be within the law when acting on values and the second is that the law should not extend itself so far as to distort those values.

With regard to the problem of the high risk or dangerous offender, it seems evident that the criminal justice and mental health systems must continue to increase the resources available for identification and treatment. Persons who have committed serious harm and whose behaviour is repetitive should be placed under severe restrictions while under sentence and under careful monitoring if released.

Given that, the price of attempting to remove all potential threat or risk is simply too high. In part, this is because the view of what constitutes risk may vary and because decisions about what behaviours are so threatening as to require delimiting freedoms within the community may be made on the basis of political concessions to the most vocal or influential pressure groups. As well, the temptation to enhance the ability of the members of the community to act coercively on others through law or policy creates serious problems of accountability. The coercive power of the state, however exercised, should be limited. Persons who are able to interfere with the lives of others should be subject to review themselves. In our culture and legal system, there is a difference between revenge carried out by the citizen and retribution carried out by the state. Some of the possible responses to the perceived threat of a dangerous offender returning to the community foster an atmosphere of

revenge which, among other things, threatens personal safety — the first priority of persons facing a high risk situation.

There is no doubt that the offensiveness of some persons is extreme and that the maladies they suffer may be deeply entrenched. Some of the proposed responses, such as those found in Bill C-55, may assist in improving conditions of safety for some members of the community. These should be carefully reviewed. However, some responses, such as publicly releasing information about persons at the completion of their sentences, have the clear potential to backfire, resulting in increasing conditions of threat both with regard to personal safety and personal liberty.

Finally, as with so many emotionally-charged community problems, it is very important that the law be clear and consistent in its reinforcement of fundamental social values. In practical terms, the legislative process is the means by which the balance between personal safety and personal liberty gets addressed. Statute law and regulations which result from this process ought not to distort this balance for short-term political ends or for any other reason. Formal review of current initiatives to satisfy the public interest in personal safety guarantees will no doubt take place in the framework of the *Canadian Charter of Rights and Freedoms*. As this issue gets addressed in *Charter* cases, it will be interesting to see what limitations on rights and freedoms are considered by the courts to be justifiable in a free and democratic society, especially when citizens perceive themselves to be under significant personal threat.