

December 29, 2016

Easier to be Mad than to be Thoughtful

I read today about a professor in the United States that called the election of Donald Trump “an act of terrorism.” Now she has been inundated with threats, and feels scared to go outside. Many say Donald Trump’s ascendance has unearthed a huge angry mob that is now using their right to free speech to shame and intimidate his detractors. But there is no purely right or wrong side in this dilemma. That Trump has been elected is a fact we cannot now classify as wrong. Rather we must see it as a reflection of all that is going on in America. Like all crime is a symptom to some extent, rather than a cause, the election of Trump tells us things that matter. And as with crime, it is easier to vilify than to understand; easier to be mad than to be thoughtful.

The reality is that 9/11 changed things. It made fear a palpable constant. “Radical fundamentalism” became the villain, and all sides of the spectrum came together at that moment to promote an agenda of fear, and an agenda of surveillance. Muslim, Islam, middle-east – were the words attached to descriptions of fundamentalism, but fear and paranoia were projected by all sides, not just the future Trump supporters, but also the future Hillary supporters. Obama tried to change the tone, but he did not remove the deep-seated message: we *do need* to be scared, we *do need* to be vigilant, and we *do need* to accept a certain degree of “big brother” if we want to be safe.

At the same time, the towers of the economic system began to crumble, culminating in the crash of 2008, and the economic voodoo of “quantitative easing,” and bailouts that have come to rest as the third leg of the tripod: cynicism.

Fear, surveillance, cynicism; that’s the America of today, and those are the themes that have rippled around the world. It is now not wrong to voice some need to see terrorism as a characteristic of culture. That is free speech. It is also not wrong to say that Trump is dangerous. The voices that we hear sound scared; they sound paranoid, and; they sound jaded. That, it seems, is the message to be heeded; the characteristics of how things sound. I think we need to understand that, because I believe the content of what is being said is a function of that sound. For now, it is a cry in the dark. How can we reach out to soothe that cry?

Perhaps we should look to the emerging field of therapeutic jurisprudence; an observant field that has grasped that what we say cannot fail to have therapeutic or an anti-therapeutic effects. Whether we like it or not, how we say things vastly changes the substance of what is received by our listeners. I will begin to discuss this topic shortly. As it turns out, in my opinion, there is no better forum to study in that context, than the criminal justice system of today.



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Insights of a Former Crown & Why the Criminal System Remains an Incubator for Victimization/ or: How the Defence Lawyer Injects Realism into a Naïve System

The position of Assistant Crown Attorney must be about, before anything, the thoughtful use of discretion. The crown's discretion is one of the most widely protected and unfettered powers at play in the criminal justice system. That discretion affects thousands of accused people on a daily and weekly basis. Decisions made are responsible, in large part, for the composition and numbers of incarcerated people occupying our correctional institutions; far more determinative even, than decisions of judges or corrections officials.

Who gets released on bail; whose charges are dropped; who is charged summarily rather than by indictment? Which sentences are community based; which sentences result in jail? All of these decisions fundamentally originate with crown choices, crown discretion. Only after the crown exercises that discretion do the other decision makers like judges and corrections officials get to exercise their influence.

Yet for the most part, we invest this huge unfettered discretion into the hands of people that know very little about the criminal justice system outside of the four walls of the crown's office. They don't know what happens after a sentence is imposed. They don't know how an individual accumulates the records that trail after them as they come before the court system. No knowledge of the child protections system, group homes where removed children live. No dialogue with those that have been subject to the state's power of detention, nor with those that house, counsel, monitor or supervise incarcerated, paroled or community sentenced offenders.

Gladue, drug treatment, mental health – these are the names given to the so-called “problem” or “helping” courts; forums where the most marginalized and disenfranchised of society come, if they're lucky, to deal with their criminal charges. We would like to think that those in charge of these courts have special knowledge, derived from practical, lived experience that makes them more able to ply their craft. But this isn't so. No doubt, many judges and crowns who populate these courts have taken special interest in their subject matter, but it is highly unlikely that any of them have ever experienced the context of the drug culture, ever case managed emotionally disturbed individuals, or been to First Nation's communities.

There are of course isolated examples where this is not so. There are many more First Nation's lawyers these days; some people who reach these arenas have come from poverty; had family members involved in crime; some even have recovered from alcoholism and drug addiction. But the factual reality of how one gets to these positions makes it highly unlikely that these exceptions exist in any large number.

To get into these positions of power, people generally have to excel in high school, so that they can get into good universities. Then they have to study and advance as well as or better than the vast majority of their cohort. Law school then beckons, but the cost is prohibitive. The reality is that the numbers that even contemplate that next step have already been economically stratified in a self-selecting process of internal elitism. Johnny and Julie usually come from well-off homes to even get half way down the road to these decision points. But even then the pressure is enormous. Not every well off kid gets there. They still have to have achieved; have to have had an internal drive that far exceeds their more ordinary rich friends. The brightest and the best are shooting stars long before they get to wield power in the courtroom. A truly amazing group.

They've taken the university level courses, graduated early, finished off one degree by the age of twenty-one, then entered and graduated law school by the age of 23, 24, or 25. The competition doesn't end their though. Now the drive to article at 720 Bay, or one of the more prestigious crown offices, must turn itself up even higher. By the time they get their first job in a crown's office at age 26 or 27, they have had their noses in books, their summers in think tanks, and their bodies in professional garb for years. They have lived a driven, exceptional and sheltered life. Many may have had some experience abroad, working with environmental causes, or helping to solve the problems of the poor in third world countries. They are admirable, dedicated, rightly proud, and often fairly humble people. But few have lived or experienced the messy lives of those over whom they will wield power.

And guess what, they like it like that. This is the path that their predecessors took; the path that their predecessors naturally look for when scanning the list of potential future inductees to the crown system. Confirmation bias is rarely examined; there doesn't have to be overt elitism or even unthinking snobbery. Even when other words are mouthed by the system – words like diversity, collaboration, knowledge sharing – the reality of the invisible structural underpinnings of “the way it is” ensure that things don't really change at anything more than an incremental snail's pace.

Other models need to be created and nurtured – explicitly supported – as being purposefully counter culture avenues that open a pipeline for so much that “the other” can provide to satisfy the structural need to enhance proper discretionary decision making.

Let's look at how the crown system does its recruiting. Back when I was working as a crown and pursuing the effort to fully transition into that field, I didn't interview particularly well, *precisely because* I do not resemble the traditional candidate. When I was interviewed for positions, I was never asked questions that are relevant to how I had developed the wisdom the crown needs. The questions I was asked were suited to the traditionally routed candidate, not “the other”. If “the other” is to be valued, as it clearly ought to be, the model for recruitment must explicitly address these issues.

To illustrate, take some of my history, which I am very open about, and see how the system is currently incapable of assessing important biographical detail and experience. I was a victim of sexual abuse at age twelve. I mouthed off to every teacher I had. I scoffed at the nerds who got A's; I dropped out of university because I would have failed out anyway. I was an active alcoholic from age 14, and a serious drug user from shortly thereafter. I numbed my pain and partied the nights away. While my cohort was getting by, I was plowing myself under. Not only was I not part of the elite, I was failing so much more spectacularly than any of the slackers could dream of. They were just bored and unmotivated. I was self-destructing with great zeal. If I was going to find the path to lawyer and assistant crown attorney, it would have to be a come-back story, but everybody likes a come-back story right? Yes, and no. But I digress.

Along the way, I met the drug dealers who were going to jail. I drank with the men and women who were failing their children miserably; the CAS boys and girls all grown up. I laughed with them and lamented their realities as if I was one of them. I was living an undercover life amongst the pool of people that are the offenders the courts deal with.

The only difference is that I had come from the elite. I might have been one of the go-getters, but for the abuse I experienced. Not all abuse affects people the same way. Mine sent me into a twenty year tailspin. I was angry, easy to offend; had a chip on my shoulder if you like. I was bright. Too bright really. I could always produce a come backer. Always fix even the smartest with an icy stare and a sharp barb. I revelled in my dysfunction, and nobody would tell me who I was.

Thank God really. Not for my abuse; although He works in mysterious ways if I am to believe the religion that I only partly invoke; no, spirituality is what I believe in. But thank God I had that life. And thank God that I was graced one day with the opening of a window that would allow me to climb out of it, without losing the experience of it.

My abuser was arrested twenty-five years after he abused me and many others. The window opened for me to push the rubble off that twelve year old and pull him to safety. Counselling, psychiatry, therapy, medication; tears and fears and pounding my fists; mirrors looking back at me; kind men and women including me in their recovery circles. And so much more. All of it a revelation. All of it an impossible turn of the wheel; zooming out to 50 thousand feet, zooming back in. Seeing things from all different angles. And books: self-help, shared experience, parallel experience. All of it a wonder of education.

What emerged was a world weary, curious, loving and friendly man. The boy I used to be in the body of the man I had become. A new lust of life. And insight that I had to share. This emergent quality unfortunately is far more common in the defence bar, than the crown system. I was an exception to the rule until I decided to leave the crown system and contribute my knowledge and experience to improving the system from the outside. Inside was too restricting, too intolerant. That's a problem only the critic can bring to light unless the crown system specifically changes in substance and ethic. And crown attorneys don't have blogs, but perhaps they should! Wow, imagine that. Too radical I know.

To continue... Follow that with ten years of training and working with probationers and parolees, with fellow caregivers and case-managers. I learned a craft that I could overlay on top of lived experience and learning. When I spoke to the sufferer, I understood him. When I met the obnoxious know-it-all fuck-up, I met myself in my earlier life. I could understand them, and with what I had learned in my recovery and with my training, I could help them.

Then, and only then, came law school.

No, people with messy lives can't interview like prodigies, but the prodigies can't immediately know how to exercise the discretion they will be given; not without any experience of "the other." My history means I know the difference between one accused and another. Their records may be the same, but their identities are different. I know them, I've work with and been around them, I have grown from my understanding of "them." And the first thing that I must communicate is that we are all more alike than we are different. There really is no "us" and "them." Each one of us, if we had lived the lives, they live, would end up in roughly the same place as "them."

So, "they" are not simply to be managed. We all needed nurturing; they are to be nurtured. Justice demands it. Victims would demand it too – if they only knew why.

The criminal justice system must produce less risky, less criminal individuals at the end of their experience with it. If it doesn't, then it is worse than ineffective. No jail term is too long or too short; no sentence is worthwhile if we don't understand that fundamental equation. We take "them" in, and they are coming out. Our job is to see to it that when they do, they are better equipped to make moral decisions; better equipped to arm themselves with skills; better equipped to belong. We all must grow insight as we move through life. It is no different for any subset of us. Offender and lawyer alike; judge and teacher, coach and athlete. No difference.

Belonging, making better decisions, pursuing a vocation, these are the things that will justify the still-ongoing experiment that is the criminal justice system. Currently, it is the critic, the defence lawyer, the outsider that must bring these messages home, but as the government, yet again re-assesses their system in light of recent case-law that has shone a light on its woeful inefficiency, the criminal justice system could benefit, *would* benefit with some of these realities accounted for.

So, Criminal Justice System, ask your candidates how they can do that. Don't ask them what the state of mandatory minimums are right now. They can look that up any day of the week. Ask them what will inform their discretion. And if you want them to be able to answer those questions, or more importantly if you want to know how to judge their answers, go out and find people that can tell you what the experience of offenders is. The criminal justice system is not only courts; it is children's aid, it is group homes, it is probation and parole, it is the shelter system. Bring all those people in. Put them on the dais. Sit still and listen.

Ask candidates some questions that might open up that territory. See what they can share. And value it when you do your hiring. That way, it won't be only the occasional exception to the rule, like me, that helps to shape a new world of wise justice, it will be a whole host of diversity that shepherds real Justice forward.

