
A Review of David M. Paciocco, Getting Away With Murder: The Canadian Criminal Justice System

David M. Paciocco, *Getting Away With Murder: The Canadian Criminal Justice System*. Toronto: Irwin Law, 1999. Pp. 417.
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Reviewed by Don Stuart

Introduction

Professor Paciocco explains in his Preface that he was asked to write a book for the public on the Canadian criminal justice system which he saw as

an opportunity to help restore credibility to the criminal justice system by trying to persuade those who administer the system of justice to change things that anger the public but which are not indispensable to criminal justice, and by explaining to those who are not in the system why people get away with murder and other crimes.¹

David Paciocco succeeds admirably in meeting his aims. He has produced a sparkling book that has a number of thought-provoking ideas for reform of the criminal justice system. He also offers a host of insights to the hostile, sceptic, or just curious Canadian who would like to know how criminal lawyers justify the system in which they work. This book should be prescribed reading for politicians of all stripes, and Ministers of Justice and Attorneys-General in particular.

Paciocco is one of Canada's very best criminal law scholars and writers, and he has also gained respect in the courtroom both as Crown and as defence counsel. This book, although long, is lively and entertaining. His humour is evident from the very first page of the Preface.² He recounts telling his wife that he likely had a fine balance

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¹ D.M. Paciocco, *Getting Away With Murder: The Canadian Criminal Justice System* (Toronto: Irwin Law, 1999) at ix.

² *Ibid.*

to examine the system since he was considered too liberal by prosecutors and too conservative by his defence colleagues. He reports that his wife gently pointed out that this might simply indicate that no one agreed with him! He ends the introductory chapter by hoping that his book “may also help to move lawyers up a few notches on the favourite species list, perhaps even past the common ground slug.”³

His language is crisp and often robust—sometimes too robust. Consider these examples. In warning that “reconciliation” for serious crimes is a “rose-coloured fantasy”, he adds, “[p]atting the likes of Clifford Olson on the head and saying ‘Rejoin the community, Cliff,’ is like trying to pet a frothing dog.”⁴ In speaking of legislation that died on a tie vote in the Senate he writes that “[h]ad one senator forgotten to take his prunes that day, his cramps might have kept him from his vote and we might today have legislation.”⁵

I. The Crisis of Public Confidence

There are seventeen chapters loosely grouped around six major themes identified with overly jazzy titles such as “Getting Off On Technicalities: The Rule of Law.” His central thesis is introduced in the first chapter on “The Credibility Crisis”, to which he returns in the concluding Chapter 17. The main argument is that there is a pervasive lack of public confidence in the criminal justice system because of widespread perceptions that there are too many acquittals, that sentencing is too soft, and that the system is not protecting citizens from crime.

Paciocco blames the news media for concentrating on the sensational stories. However, he tempers his criticism based on the acknowledgement that the media are in the news business and are not agents of the administration of justice.⁶ He also singles out the police for some responsibility for the crisis in public confidence. While his experience is that most police officers are honest and committed professionals, he is of the view that there is a significant minority of officers whose lack of competence, bad judgment, or deliberate disrespect for *Charter*⁷ values results in acquittals.⁸ Much of the crisis in confidence is seen to rest with politicians who too readily turn law-and-order issues and public fear of crime to their own advantage or simply adopt the expediency of silence.⁹ Paciocco also identifies a major reason for the drop in confidence to be the failure of lawyers and judges responsible for administering the system to provide information to show that the system is not failing, and that it is one which Canadians should be proud of.

³ *Ibid.* at 15.

⁴ *Ibid.* at 39.

⁵ *Ibid.* at 101.

⁶ *Ibid.* at 6.

⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

⁸ *Supra* note 1 at 6-7.

⁹ *Ibid.* at 7-8.

Although Paciocco sees misunderstanding as the major problem, he also finds a significant contributing cause to the crisis to be that those within the system have been making promises that cannot be kept. We need to be more honest about what can be achieved. David Paciocco advocates three major sets of change:

- (1) Criminals, particularly those committing crimes of violence, must be punished proportionate to the harm done. It is not enough to try and rehabilitate or reconcile with them. We also have to stop letting prisoners out on parole.¹⁰
- (2) We have to put a higher premium on rules of evidence that help discover the truth. Reliable evidence should only be excluded where absolutely necessary, in order to promote a higher public good.¹¹
- (3) We have to be cautious about the criminal conduct we choose to excuse. We have to resist the temptation to define more and more crimes as pathological, and be cautious, if not sceptical, about behavioural scientists wanting to explain away crime as beyond the offender's control. We have to be particularly cautious not to sacrifice accountability on the "altar of diversity, cultural sensitivity or sexual politics."¹²

I will now consider separately each set of ideas. In each case, I will provide further details of Paciocco's views as he develops them in subsequent chapters and will offer critical assessments of my own.

A. Proportionate Punishment

On the issue of punishment, the author comes out swinging in favour of the need to see the aim of punishment to be retribution. In Chapter 2, "In Defence of the Need to Punish," one of the significant causes of the lack of public credibility in the system is seen as our inability to admit that most crimes, particularly violent crimes, cannot be reduced by sentencing. Paciocco reviews the empirical data on general and specific deterrence and finds it wanting. The notion that sentencing can rehabilitate is seen as largely a myth. What is needed is less false claims about protecting society, and more honesty about the role of punishment as largely retribution for harm done:

We punish people who commit serious offences because they deserve it and because we, as a society, need to know that there are consequences for criminal behaviour. And we need the public to know that this punishment will be done in an impartial, balanced way, with the needs of retribution and denunciation being tempered, where appropriate, by pragmatism and compassion.¹³

¹⁰ *Ibid.* at 14, 390.

¹¹ *Ibid.*

¹² *Ibid.* at 390.

¹³ *Ibid.* at 46.

Paciocco points out that the focus on retribution is also now the approach asserted by the Supreme Court of Canada. What is striking about his position is that he is so utterly dismissive of any goal other than retribution. This is startlingly apparent in Chapter 4, "The Injustice of Parole." He mounts a scathing attack on early release through parole, as well as on statutory release. There is no real ability to predict dangerousness and no resources for, or practical knowledge about, the control of inmates once released. The public wants the sentence to mean what the judge says. According to Paciocco, it is simply wrong to blunt the denunciatory and retributive aspects of prison sentences, especially under the pretence of rehabilitation.¹⁴ His recommendation is to abolish both parole and statutory release, and impose shorter, real-time sentences.¹⁵

I agree with much of this perspective but have some concerns. Retribution and denunciation surely cannot entirely supplant other sentencing goals. It is not at all clear why moving to definite sentencing would shorten sentences. That has not been the experience in the United States. It may well be time to abolish the Parole Board for the reasons the author provides. However, to abandon attempts to gradually reintegrate inmates back to society seems counter-intuitive, potentially dangerous, and, in any event, lacks any humanity. Paciocco really needs to share the experience of what it is like for an inmate to be released cold turkey onto the street after years of isolation in prison. The false promise may well be that social workers can control inmates on release. Surely, though, there should be a variety of governmental and non-governmental services available to assist inmates in the hope that they will not return to crime.

When it comes to homicide, Paciocco's position on sentencing is complex. On the one hand, he is a hawk. With rare exceptions, intentional killers should be hit hard, and there should also be long sentences for those committing manslaughter or driving offences causing death.¹⁶ On the other hand, with powerful discussions of the high profile mercy-killing cases of *R. v. Latimer*¹⁷ and *R. v. Morrison*,¹⁸ he makes a strong case to abolish the minimum life imprisonment sentence for murder.¹⁹

Although much of the author's views are aimed at placating the public, it is hard to see how his principled arguments for abolishing the minimum sentence for murder will win over the public. The present sentence structure for murder, negotiated as the

¹⁴ *Ibid.* at 86.

¹⁵ *Ibid.* at 390.

¹⁶ *Ibid.* at 15.

¹⁷ (1995), 126 D.L.R. (4th) 203, 41 C.R. (4th) 1 (Sask. C.A.), rev'd [1997] 1 S.C.R. 217, 142 D.L.R. (4th) 577, re-trial (1997), 12 C.R. (5th) 112, 121 C.C.C. (3d) 326 (Sask. Q.B.). The subsequent case law developed after the time of writing: (1998), 131 C.C.C. (3d) 191 (Sask. C.A.), online QL (SJ), leave to appeal to S.C.C. granted [1999] S.C.C.A. No. 40, online: QL (SCCA).

¹⁸ [1998] N.S.J. No. 75 (Prov. Ct.), online: QL (NSJ).

¹⁹ *Supra* note 1 at 53-59.

price for the abolition of the death penalty, is highly unlikely to get softer in the foreseeable future.

Paciocco's views on sentencing appear to lack a broader context. He is specific on homicide but does not have a clear position on sentences of other violent offenders. What does he recommend, for example, in the case of sentences for sexual assault? What does he think of minimum sentences in general? It is one thing to focus on violent offenders and call for retribution. That is not really controversial. The real sentencing dilemmas occur in the sentencing of non-violent offenders. The author has little concrete to offer here.²⁰

B. The Search for Truth

On his second major theme that the criminal justice system should put a higher value on truth, Paciocco is particularly provocative. Large parts of his book are eloquent defences of the *status quo*. He provides a fine exploration of the history and justification of the rule of law²¹ and is at pains to justify the presumption of innocence and standard of proof beyond a reasonable doubt, especially in the emotive context of sexual assault.²²

He is, however, inconsistent on the issue of exclusion of relevant evidence. Chapter 9 justifies many common law rules of exclusion on the basis that there are sometimes more compelling reasons of policy than getting at the truth or because experience has shown that the particular kind of proof being offered is likely to stand in the way of accurate decisions.²³ This leads him to stout defences of the rule that involuntary confessions should be excluded as "garbage" in order to guard against unjust convictions. The same rule should apply with evidence of bad character and similar-fact evidence showing that the accused is the sort of person likely to have committed the crime charged.²⁴ However, when he comes to the exclusion of evidence under the *Charter* in Chapter 10, "Abandoning the Search for the Truth," Paciocco launches a blistering attack on the Supreme Court's interpretation of section 24(2) under which there is a virtually automatic case for the exclusion of evidence obtained by a *Charter* violation where the accused is conscripted against himself by the State.²⁵ He excoriates the Court for excluding such evidence in the high-profile murder investigations in *R. v. Feeney*²⁶ and *R. v. Burlingham*.²⁷ In *Burlingham*, where the police interrogation was a major violation of the accused's right to counsel, Paciocco supports the automatic exclusion of the induced confession at common law but not

²⁰ *Ibid.* at 60-65.

²¹ *Ibid.* at c. 5.

²² *Ibid.* at c. 8.

²³ *Ibid.* at 203.

²⁴ *Ibid.* at 203-204.

²⁵ *Ibid.* at 229-94.

²⁶ [1997] 2 S.C.R. 13, 146 D.L.R. (4th) 609. This case is discussed in c. 6.

²⁷ [1995] 2 S.C.R. 206, 124 D.L.R. (4th) 7 [hereinafter *Burlingham*].

the Court's further ruling that the confession that led to the finding of the gun by the accused had also to be excluded under the *Charter*.

It seems ironic that the very David Paciocco who wrote a book on expanding self-incriminating protections under the *Charter*²⁸ would here take such a strong position against such protections. Many writers—including this one—and many judges also oppose an automatic exclusion interpretation under section 24(2). However, it is surprising that Paciocco does not recognize the strength of the policy counter-argument that if *Charter* rights are to be taken seriously, there must be a real risk of exclusion of evidence obtained in violation of the *Charter*, even in serious cases and even at the cost of determining the truth. Nowhere in this powerful part of the book is there any comment on the strong trend toward the *inclusion* of non-conscripted evidence obtained in violation of the *Charter*. This is a trend which certainly risks reducing *Charter* standards to empty rhetoric, especially in drugs cases.²⁹

C. Excusing Certain Conduct

The author's third major theme, that we should be cautious about the criminal conduct we choose to excuse, emerges from Chapters 11 to 15. These include detailed explanations and discussions of the substantive defences of necessity, duress, provocation as a partial defence to murder, insanity, intoxication, and automatism. Although the detail and insights will be fascinating to writers on the positive law, lawyers, and first-year law students alike, I wonder whether there may be here too much to keep the attention of the general reader. Paciocco tends to take a rather conservative, pro-Crown stance on many of these issues. This may well be because much of his discussion occurs in the context of homicide. The reality of a death should and does make triers of fact and lawmakers wary of outright acquittal. However, defences such as necessity and automatism have roles to play in far less troubling contexts.

The most provocative theme to emerge from this lively account of defences is the author's strong pitch against what he sees as tendencies to allow pathological explanations and to rely on *pseudo*-scientific expertise. Nowhere is this more evident than in Chapter 14, "The Abuse Excuse, 'Psychobabble' and the Protection of Basic Values." He sets out to "trash" the Supreme Court's reliance on the "battered women's syndrome theory" in the context of self-defence claims advanced by women in abusive situations

because it is a prime illustration of what is known in the literature as "junk science."... In truth, it is little more than public interest advocacy dressed in the imposing garb of "study," experimentation, and psychobabble. It is a pious fraud, permitting "scientists" to come before courts as experts who claim the exclusive ability to divine what battered women who kill are really thinking. It is a theory

²⁸ D.M. Paciocco, *Charter Principles and Proof in Criminal Cases* (Scarborough: Carswell, 1987).

²⁹ See further D. Stuart, "Eight Plus Twenty-Four Two Equals Zero" (1998), 13 C.R. (5th) 50.

constructed on a flawed edifice, and continued resort to it in our courts is imperilling justice.³⁰

Paciocco sees the invocation of battered women's syndrome as nothing more than resort to an unreliable stereotype that may lead to defences where there was no true act of self-defence, deny proper defences to women who do not fit that model of battered women, and threaten the fairness of applying the law to men who kill their partners.³¹ Other writers, many of them women, have raised similar concerns about the reliance on "battered woman's syndrome", as have L'Heureux-Dubé and McLachlin JJ. in their recent comments in *R. v. Malott*.³² Few, if any, have been as trenchant or blunt as Paciocco.

II. Victim's Rights

Regrettably relegated to Chapter 16, "The Sad Truth about Victims' Rights" is one of the most important contributions in the book. There can be no doubt at all that a dominant theme of the 1990s in public discourse about our criminal justice system is that accused have too many rights at the expense of the rights of victims. Paciocco confronts this concern in an absorbing and careful analysis.³³ He provides a most careful assessment of the history of moving from a victim-based compensation system to one of a state-based system of justice, and expresses grave concerns about some of the claims for victims' rights that would return us to the earlier model. He warns that the role of the Crown Attorney must be kept separate from that of representing victims because prosecution powers must be exercised in the interests of justice rather than in the interests of trial tactics or the pleasing of victims. He sees no role for allowing victims to participate at the guilt phase of the trial or in plea bargaining, and he identifies risks in participation through written impact statements at sentencing. Moves to compensation and dispute settlement may reduce the impetus for just punishment. He worries about the uncertain move to constitutionalize rights for victims at the expense of fundamental trial rights for accused. Finally, he points out that a justice system cannot spare victims the indignity of being doubted since the reality is that not all those who claim to be victims are actually victims.

Conclusion

This is a most stimulating and informative book. I highly recommend it to anyone interested in the complex and controversial picture of the Canadian system of criminal justice.

³⁰ *Supra* note 1 at 306.

³¹ *Ibid.* at 308-10.

³² [1998] 1 S.C.R. 123 at 139-145, 155 D.L.R. (4th) 513.

³³ *Supra* note 1 at 353-82.