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An examination of the erosion of criminal law

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I. Introduction

In 1764, Cesare Beccaria (1963) published his book *On Crimes and Punishments*, a work which transformed Europe's arbitrary ordeal-based approach to criminal law and effectively set it on a path on which it would remain for just under 300 years. From Beccaria's work sprung forth a plethora of ideas such as, that laws must be clear and known in advance by all citizens, that there must be proper evidence in order to convict someone of a crime, that the accused must have committed a physical action with intent in order for a crime to have been committed, which for many of us have become synonymous with criminal law itself. However, the last twenty years or so have seen many of these ideas diminished to such a degree that they have become all but absent from criminal law, in turn leading to the destruction of the Beccarian idea of criminal law to which we had become accustomed. In its place a new version of criminal law has emerged, one which leaves ordinary people and the accused vulnerable to unfair treatment at the hands of governmental powers, who in turn may use this newfound power to punish any who oppose them. This essay will demonstrate the ways in which criminal law, as it was known for hundreds of years, has been eroded. This will be done by first examining how aspects once necessary for a crime to have occurred, (social) harm, *actus reus* (the guilty action), and *mens rea* (the guilty mind), have been done away with. This will be followed

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by a discussion of how the key rights of knowing the law in advance and the necessity of evidence to be found guilty have too been destroyed.

II. Aspects of criminal law which have been eroded

II. 1. Erosion of the necessity for harm in criminal law

The need for harm to have been caused in order for a crime to have occurred in criminal law has practically disappeared. A tenant of the criminal law system as it had been known was that in order for a crime to have been committed, someone needed to have been harmed by the actions that occurred. Initially, this harm was restricted to only physical harm (e.g., a broken arm, a black eye, death), though it was later expanded to also include social harm (e.g., laws like those that criminalized homosexuality, in which nobody was actually being physically harmed but contained actions which were deemed detrimental to society and its values). This expansion of what constituted harm made it easier for governments to prosecute individuals and convict them even if the actions they were committing were not causing any physical harm to anybody. While this expansion was advantageous for governments and diminished the idea of harm being a necessity in criminal law, there were still protections against it being abused such as the deminimus principle, which protected people from being prosecuted when their actions caused minimal social harm. However, this protection has been done away with today, as even crimes with practically no harm of any kind may lead to a conviction. A prime example of this erosion can be seen in the recent case in the United States in which a 12-year-old girl was arrested and convicted by the Supreme Court for eating a single French fry on a subway platform, which violated a law prohibiting eating on subway platforms (Sullivan, 2003). This case contained absolutely no physical harm of any kind, and social harm so incredibly miniscule that the deminimis principle ought to have been applied. While some may argue that this expansion of what is considered harm may be a good thing in protecting society and societal values, and that strict enforcement of the law in cases like this one are only trying to enforce said protections, the protections it strips from ordinary people doing ordinary things and power it gives to governmental bodies far outweighs these potential positives.

II. 2. Erosion of the need for actus reus in criminal law

The idea of what constitutes the *actus reus* (guilty action) of a crime has also been expanded to the brink of its destruction. The *actus reus* is one of two main aspects that must have been present in an offender's behaviour in order for their actions to be considered a crime. As its English name, the guilty action, implies, the *actus reus* of a crime is the action of the crime. Naturally, this action had always been a physical one, like punching in assault or pulling the trigger of a gun in murder. However,

recently crimes have been adopted which broaden what is considered *actus reus* to such an extent that it is not truly an "action" at all. Crimes that demonstrate this perfectly are those of conspiracy[2] and placing a bet for another person[3], as the *actus reus* in both is merely speaking, which never could have constituted an action in our prior conception of criminal law. While it may be argued that this broadening of *actus reus* was necessary in order to accommodate crimes of this kind, which address issues were not or did not need to be considered in prior times, what we should be asking ourselves is whether we should be adopting laws and criminalizing behaviours which do not contain a physical action. As was the case with the aforementioned expansion of harm, the expansion of *actus reus* simply makes it easier for governments to convict or charge people for performing everyday behaviours like speaking with one another by diminishing the protection provided by this necessity for criminal behaviour.

II. 3. Erosion of the need for mens rea in criminal law

Perhaps one of the most eroded aspects of criminal law, the need for a valid *mens rea* (guilty mind) to constitute a crime has been virtually removed from criminal law altogether. *Mens rea* is the second of the two aforementioned main aspects that must be present in an offender's behaviour in order for a crime to have been committed. Whereas the *actus reus* is concerned with what actions the offender committed, the *mens rea* instead focuses on their mental state regarding said actions. Initially, the main type of *mens rea* required was intent, meaning that a person would need to have intended to commit the guilty action in order for a crime to have occurred (e.g. want to hurt someone so you punch them in the face). It should be noted that while not as prevalent as intent, negligence too existed as a type of *mens rea* very far back. The number of these categories were later expanded to also include knowledge and recklessness as types of *mens rea*. Though this made it easier for individuals to have a mental state that would lead to a crime having been committed and made it easier for governments to convict people, they were not so far removed from the initial ideas of *mens rea*, with knowledge sharing similarities to intent and recklessness to negligence. However, *mens rea* was destroyed altogether with the recent introduction of victim impact being considered in place of *mens rea*. Victim impact essentially makes all other types of *mens rea* superfluous in the new criminal law system, as it no longer matters what the mental state of the offender was, but instead focuses on what the victim perceived their mental state to be. A great example of this being applied comes in the form of the recent case in which a frustrated man cursed at a police officer. The police officer then claimed to have felt threatened by the man's coarse language, which is a crime (threatening a police officer). In court the man explained that he in no way intended his words to be a threat. While the court accepted the man's explanation, agreeing that there was no intent in the man's behaviour, he was still convicted because the officer maintained that he felt threatened by the

[2] Criminal Code, R.S.C., 1985, c.C-46, s. 465.

[3] Criminal Code, R.S.C., 1985, c. C-46, s. 203.

man's words. While I do not deny that it is also important to protect the interests of victims in the criminal law system, said protections are not worth it if they strip away the protections of the accused to such an extreme degree that one of the basic tenants of our justice system has essentially been disposed of altogether. Victim impact provides not only victims, but also governments, the power to convict anyone they would like so long as they claim to have perceived a certain type of *mens rea* after experiencing one of the wide range of behaviours/actions that are connected with crimes today.

II. 4. Erosion of legal promulgation

An essential aspect of Beccaria (1963), and the world's conception of criminal law is that laws must be promulgated or known to people in advance. In order for a law to be valid and for a person to have violated it, said law must be made public and known to all citizens of that jurisdiction in advance. This is a key protection of citizens, as it stops them from being punished for behaviours that they had no way of knowing were criminal. However, two large developments in criminal law have been made which have largely eroded this protection.

II. 4. a) Blank laws

Blank laws are one of the largest contributors to the erosion of promulgation in criminal law. Blank laws are laws that do not specifically prescribe one behaviour that is criminal, but rather set out a certain criteria that must be followed and can include a wide range of unknown behaviours. This is illustrated by the quarantine act adopted during the Covid-19 pandemic. Per this act, a person must comply with any order of a government agent. This law does not specify what these orders may include and there is no way for a person to know what behaviours are prohibited or criminal until the order is issued to them. This to me is a seemingly indefensible practice, which destroys basic legal protections of citizens and places incredible power in the hands of governments.

II. 4. b) Ambiguously worded/Reinterpreted laws

Ambiguously worded laws are another one of the main ways in which promulgation has been eroded in criminal law today. One of the basic ideas of Beccaria's need for promulgation in criminal law is that those laws must also be clear. There is little point in making a law publicly known if those you are telling are still unsure of what behaviour is prohibited. Laws of this kind also allow governments to criminalize a behaviour if it fits under the broad umbrella provided by the law. Laws like this have recently been adopted with greater frequency. A law that exemplifies this is that of misrepresentation, which criminalizes the act of saying something untrue for your own personal gain. This crime is so broad and ambiguous that many people likely commit it every day, thus providing governments the opportunity to arrest and likely also convict anybody they want for violating this

law. Legal ambiguity may expand past wording and into the way in which laws are interpreted by courts. Even if a person thinks they know the behaviour that a law is prohibiting, they may still be convicted if the courts reinterpret the law in such a way that nobody would be able to anticipate, thus making a wide variety of unknown behaviours criminal. This can be seen in the current case involving the Freedom Convoy protests. The protesters are being charged with the crime of mischief, which is defined as destroying property or making it useless to others. However, all the protesters did was honk the horns of their trucks. The courts have reinterpreted the crime of mischief in such a way that they are claiming that the noise from the horns made the surrounding area useless to others. This is a preposterous claim and one that any familiar with the law would likely never anticipate after reading it. As such, it is as though the law was not promulgated at all, as no citizen could have known that this behaviour would be considered criminal. Though one may argue that laws must have some degree of ambiguity in order for them to apply to a wide enough range of behaviours to make them effective (if laws were too specific, we would need a ridiculous number of them to cover one behaviour), I think all can agree that ambiguity and reinterpretation of this degree have essentially rid criminal law of promulgation and allowed for governments to charge people for behaviours that they would have no way of anticipating the criminality of.

II. 5. Erosion of the necessity for evidence in criminal law

Finally, one of the most basic concepts in criminal law as it was known, the need for evidence to prove your guilt beyond a reasonable doubt, has too seen a great erosion in recent years. The need for evidence to convict someone was one of the main differentiators called for by Beccaria between his conception of criminal law and the pre-existing model popular in the Middle Ages. In the Middle Ages, guilt was decided by ordeals that had nothing to do with evidence pertaining as to whether the accused actually committed the crime in question. However, Beccaria called for a trial-based approach in which evidence must be presented that actually had relevance to whether or not the accused had committed the crime. This concept has protected accused individuals from being wrongfully accused or convicted of crimes that there is no proof that they committed. Though this has been a pillar of the criminal justice system as we knew it for centuries, it can be seen how two major developments have rendered the need for evidence practically non-existent in criminal law today.

II. 5. a) Victim statements

Victim statements have played a large part in eroding the need for evidence in criminal law. As mentioned above, victim statements allow for victims to express the way in which they perceived the accused's actions and the impact that said actions had on them. Though in the previous conception of criminal law, evidence would be needed to convict someone of a crime, now they can be convicted if the victim's perception of their actions matches the description of the crime. If we return to the prior example about victim statements regarding the man who was convicted of threatening a police

officer after cursing at one, we see that the prosecution did not have to collect any evidence that the man was intending to threaten the police officer aside from the officer's own victim statement claiming that he perceived the man's words as a threat. In fact, the accepted evidence of the man's own testimony that it was not his intent to threaten the officer was ignored in the face of the victim statement. As was expressed above, the idea of protecting and giving power to victims is not a bad one, though I do not feel it is worthy to pursue it at such a high cost to the rights and protections of the accused and citizens at large. Victim statements have superseded evidence and the need to prove the guilt of the accused beyond a reasonable doubt, instead giving governmental powers the authority to arrest or punish whoever they please in spite of evidence of their innocence.

II. 5. b) Propensity evidence

The use of propensity evidence has done significant damage to the need for evidence to prove one's guilt in criminal law. Though it holds the word "evidence" in its name, propensity evidence is anything but. Rather than examining and presenting facts of the criminal behaviour being tried in the case, propensity evidence instead delves into the past of the accused and makes the claim that if they were found guilty of a similar crime in the past, it is likely that they are also guilty of the crime for which they are being tried in the present. The very existence of propensity evidence is baffling, as it spits in the face of the criminal justice system by essentially punishing offenders a second time for crimes for which they have already paid their debt to society. It is making the judgement that the criminal justice system must not work, as it denies that any former criminal could have been rehabilitated and learned from the mistakes of their past through the punishment they faced. In addition, it creates a vicious cycle in which an innocent person may be convicted on the basis of a past crime, and then be convicted again on the basis of the conviction they just faced. Propensity evidence could be argued to be of some use for police officers as they are attempting to narrow a suspect pool, but is an unstable crutch even then and should never be used as the decider of a person's ultimate guilt. Propensity evidence gives more power to governments as well, as it essentially allows them to convict whomever they would like of a crime if they have committed a similar one in the past, and as we have seen with the other erosions of criminal law, said initial conviction should be relatively easy for them to obtain.

III. Conclusion

In conclusion, it can be seen how criminal law has been eroded from the state in which we once knew it. Protections individuals had in this prior state such as, the need for *mens rea*, *actus reus*, and harm to constitute a crime have all disappeared. In this vanishing, the need for evidence to prove an accused person's guilt beyond a reasonable doubt and the need for laws to be promulgated have gone as well. With all of these protections of individuals gone, it is easier than ever for governments to pick and choose who they would like to punish or imprison, as there are no longer impenetrable

legal barriers for them to overcome. It is as though criminal law has not evolved, but rather regressed back to a form more similar to the arbitrary ordeals of the Middle Ages than Beccaria's ideas. We must all hope for a return of the protections once offered by criminal law, for without them, we are all vulnerable to unfair treatment and punishment.

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