The Criminal Law Quarterly

Volume 60, Number 3 January 2014

Editorial

The Changed Nature of the Harm Debate

Whether criminal law should be restricted to addressing proven harms is a classic debate. John Stuart Mill and other liberals argued that the criminal law should only respond to proven harms in order to ensure restraint and avoid imposing society's view of the good life on individuals. Patrick Devlin and other conservatives argued that such an approach was too restrained and the criminal law could be used to express society's disapproval and even disgust at practices it deemed objectionable.

The Supreme Court in *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 179 C.C.C. (3d) 417, 16 C.R. (6th) 1 (S.C.C.) rejected arguments that the harm principle should be recognized as a principle of fundamental justice. The Court noted that the standard was not manageable because society's understanding of harm has expanded so much. The modern version of harm focuses not so much on physical harm in individual cases, but calculated risks of harm. For example, Chief Justice Bauman's conclusion in *Reference re: Section 293 of the Criminal Code of Canada* (2011), (*sub nom.* Reference re: Criminal Code (Can.), s. 293) 279 C.C.C. (3d) 1, [2012] 5 W.W.R. 477, 28 B.C.L.R. (5th) 96 (B.C. S.C.) at para. 8, that polygamy was harmful revolved around "an elevated risk of physical and psychological harm" as opposed to more certain harms. It did not grapple with the possibility that polygamy might in some cases be voluntary and not harmful.

In retrospect, the Supreme Court of Canada was wise to reject the harm principle as a principle of fundamental justice if harm would not have been a meaningful restraint on criminal law. In *Malmo-Levine*, for example, marijuana possession was thought to be harmful not because of its effects on the vast majority of users but on a small subset of vulnerable users.

Malmo-Levine, however, introduced a new way to debate harm: is the harm caused by a criminal law grossly disproportionate to the harms that the law avoids. This new debate recognizes that the criminal law itself causes harms. The Supreme Court in *PHS Community Services Society v. Canada (Attorney General)*, (*sub nom.* Canada (Attorney General) v. PHS

Community Services Society) [2011] 3 S.C.R. 134, 272 C.C.C. (3d) 428, 86 C.R. (6th) 223 (S.C.C.) recognized that drug laws cause harm by preventing officials facilitating injections in a manner safe from deadly diseases. Most recently, the Court in *Bedford v. Canada (Attorney General)*, 2013 SCC 72, 2013 CarswellOnt 17681, 2013 CarswellOnt 17682 (S.C.C.) held that bawdy house and, soliciting offences caused grossly disproportionate harms to street prostitutes by criminalizing safer practices for the selling of sex than the nuisances addressed by the law.

The recognition that the criminal law can cause more harm than it prevents is in some respects quite a radical concept. Critical criminologists have been making similar arguments for over half a century. Many groups may seek to employ this new harm debate to challenge a wide variety of laws. They should beware, however, that judges and not criminologists will make the ultimate determination of whether a criminal law is grossly disproportionate. The track record of the courts so far is quite mixed.

In *Malmo-Levine*, the Supreme Court in a 6:3 decision held that the marijuana possession offence was not grossly disproportionate simply because Parliament had not enacted a mandatory minimum sentence. This weak argument ignored the stigma that attaches to any criminal conviction. Nevertheless, it was repeated in the polygamy reference. *Reference re: Section 293 of the Criminal Code of Canada* (2011), (*sub nom.* Reference re: Criminal Code (Can.), s. 293) 279 C.C.C. (3d) 1, [2012] 5 W.W.R. 477, 28 B.C.L.R. (5th) 96 (B.C. S.C.), at para. 1215.

The Court in *Bedford* held that both the bawdy house and soliciting offences caused disproportionate harms given the evidence accepted by the trial judge of how they prevented sex workers from taking steps to protect themselves from the likes of serial killer Robert Pickton. The Court, however, balanced this harm only against the nuisance caused by street solicitation and brothels and rejected the government's argument that the laws had been enacted to deter prostitution. The Court clearly left open that Parliament could enact laws designed to criminalize and deter prostitution. If this is done, the harm of the new law to the safety of sex workers will be balanced against the harm of prostitution. It is possible that the courts will find the latter harms more weighty.

In addition, it appears that arguments that new laws are not likely to be successful in stopping the world's oldest profession are not likely to go far when balancing harms under s. 7. The Court clearly indicated that courts should balance "the negative effect on the individual against the purpose of the law, *not* against societal benefit that might flow from the law". *Bedford*, *ibid.*, at para. 121. This preserves some differences between s. 7 and s. 1, but it also means that the gross disproportionality balance might be much more deferential to the state when it pursues more important objectives than the prevention of nuisance.

The courts have also rejected arguments that Parliament's decision to criminalize some harms but not others was irrational. The facts that alcohol and tobacco causes more harm than marijuana was not relevant in *Malmo-Levine*. An attempt to compare the harms of polygamy with the harms caused by consensual group sex of the type held not to be harmful in *R. v. Labaye*, [2005] 3 S.C.R. 728, 203 C.C.C. (3d) 170, 34 C.R. (6th) 1 (S.C.C.) also failed. Moreover in both *R. v. Sharpe*, [2001] 1 S.C.R. 45, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72 (S.C.C.) and *Malmo-Levine*, the Court was not impressed with arguments that some of the harms targeted — sexual exploitation of children — were already criminal under other offences.

Gross disproportionality analysis places great evidential demands on litigants and courts. It risks degenerating into trial by social science experts. Social scientists understand that what we do not know about the operation of the criminal justice system greatly outweighs what we do know. Empirical research into criminal justice matters in Canada lags behind that in other countries including less populous countries such as Australia.

Evidence based analysis should be encouraged even if the evidence will often not be available. The courts are becoming more receptive to social science at precisely the time when Parliament seems less interested in it. Governments of all stripes have been attracted to penal populism that is often more about emotions and political messaging than evidence and effective prevention of harm.

It will be interesting to see how gross disproportionality analysis affects Parliamentary deliberation about the criminal laws. Parliamentarians should not abdicate their responsibilities of assessing the relative harms of criminal law. Hopefully the prospect of judicial review will make them more diligent in this regard. At the same time, they idea buried in *Bedford* that governments need not worry about the effectiveness of laws in targeting serious harms is troubling. It suggests that *Bedford* may give governments and legislatures an incentive to claim that laws are targeting serious harms even in the face of evidence that the laws will not be effective in preventing the serious harms. It is also possible that governmental claims that it is addressing serious harms such as human trafficking and the exploitation of women and children may blur with Devlin-like arguments about using the criminal law to uphold community standards.

It will be interesting to see how this new debate plays out in the years to come.

K.R.