GETTING AWAY WITH MURDER: THE CANADIAN CRIMINAL JUSTICE SYSTEM by David M. Paciocco (Toronto: Irwin Law, 1999)

David M. Paciocco has been a professor of law at the University of Ottawa for well over a decade. Professor Paciocco is a former prosecutor and defence counsel and continues to be involved in criminal defence practice. His books include *Charter Principles and Proof in Criminal Cases*,[1] *The Law of Evidence* (2d ed.)[2] with Lee Stuesser, and *Jury Selection in Criminal Trials*[3] with David Tanovich and Steven Skurka.

Professor Paciocco has explained his reason for writing *Getting Away With Murder: The Canadian Criminal Justice System*:

> Many Canadians are losing faith in the criminal justice system. They believe that courts are letting too many people go and are being too soft on those who are punished. It is not too strong to suggest that some of these people are disgusted with what they see. This declining confidence in the Canadian justice system is worrisome because the stock in trade of any criminal justice system is public confidence. Without it, the system is disabled. It loses the ability to give comfort to the victims and to the public, and to maintain the respect for the law that is essential to the well-being of society. Public morale is damaged. People become dispirited, some even afraid. When the public demands that the system be made tougher, politicians respond, all too often making changes that undermine those basic principles that hold the system together. Declining confidence in a criminal justice system is dangerous for it can destroy it.[4]

While agreeing that there is a crisis of confidence in the Canadian criminal justice system, Professor Paciocco does not agree that there is a criminal justice crisis. In fact, he describes the system, with all its flaws, as "one of the best criminal justice systems in the world."[5] The book is his attempt to make a contribution in the fight against the criminal justice credibility crisis.

Our system is not perfect, and throughout his book, Professor Paciocco discusses those matters which justifiably concern ordinary Canadians. They can be broadly described as (1) the role and the effectiveness of punishment; (2) the need to replace inane and mindless defences and technicalities with rules which place a higher premium on discovering truth; and (3) the need to be more cautious about the criminal conduct that we choose to excuse. Only the first and, to a lesser extent, the third of these matters will be discussed in this review.

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

2 D.M. Paciocco & L. Stuesser, *The Law of Evidence*, 2d ed. (Toronto: Irwin Law, 1999).

3 D.M. Tanovich, D.M. Paciocco & S. Skurka, *Jury Selection in Criminal Trials: Skills, Science, and the Law* (Concord: Irwin Law, 1997).

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

5 *Ibid.* at 4.

While 88 percent of the Canadians polled by the Canadian Sentencing Commission in 1987 believed that the purpose of sentencing was to protect the public,[6] Professor Paciocco believes that these people were misled by the lawyers and judges within the system and by the media into believing that violent crime can be reduced by punishing offenders:

> No doubt people believe the same thing today. We in the criminal justice system feed that expectation. We claim that ours is a "reductivist" system -- in other words, a system designed to reduce the amount of crime. Without distinguishing between the various kinds of offences, we promise to reduce crime by the sentences we impose in a number of ways. Often we purport to rehabilitate offenders so they will lose the urge to engage in criminal conduct. We rely primarily, however, on "deterrence"-- the idea that by attaching negative consequences to criminal behaviour, we can make the price of crime too high for the offender and for other like-minded people. We also promise to reduce crime by removing criminals from society by locking them up. The truth is that, for most offences, and for violent offences in particular, we cannot make a serious dent in crime by sentencing offenders, since none of these techniques is effective. The real reason we sentence in many cases comes down to retribution. Often we simply punish for punishment's sake. In the interests of the administration of justice, we had best start admitting it, both to ourselves and to the public.[7]

Readers might question some or all of the statements in the above passage, but Professor Paciocco makes an effective case. If crime is linked to personality disorders or mental illness, can any system promise to rehabilitate? Can it or should it hospitalize, drug, or brainwash such offenders and for how long? Further, based on its 1987 study, the Canadian Sentencing Commission acknowledged that any claim that punishment is effective in reducing the tendency to reoffend is undermined by the undeniable fact that most offenders dealt with in the courts have been convicted of prior offences. What, then, of the theory of general deterrence that punishing offenders will intimidate others into being law-abiding? According to Professor Paciocco, that is also ineffective:

> A moment's reflection will demonstrate why general deterrence is so ineffective. Deterrence is based on theories of rational decision making. It presupposes that actors weigh to a nicety the pros and cons of their acts before acting. The most dangerous criminals do not fit that model. They are not people renowned for their good judgment and considered action. At the same time, the most horrendous crimes do not lend themselves to this kind of judgment. Sexual offenders give in to vile urges. Assailants strike out in anger. Homicide, in particular, is primarily a crime of passion. It is only rarely a contract hit or a neatly planned exercise. It is more often the worst result of the free reign of jealousy, rage, vindictiveness, hatred, and anger, the most powerful of human emotions.[8]

The real justification for sentencing violent offenders, in Professor Paciocco's opinion, is because they deserve punishment, and their punishment helps maintain respect for the law in others. In imposing appropriate sentences, we demonstrate to all

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[6] Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Ministry of Supply and Services, 1987) at 145.

[7] *Supra* note 4 at 22.

[8] *Ibid.* at 29-30.

people society's abhorrence of criminal acts and uphold the trust that enables all people to live together in peace.

There are consequences in accepting Professor Paciocco's views about the purpose of sentencing. If the primary purpose is to impose punishment on those who deserve it, how can any system of early release by parole or otherwise be justified? In his view, there should be no early releases:

> [T]he system of early release that we have is simply not a part of the criminal justice system that can be defended in rational, convincing terms. This is so for a number of reasons, not the least of which is that it makes the solemn ceremony of sentencing look like a pious fraud. It is as though every sentence comes with a ready-made asterisk above it. That asterisk leads to a footnote that says, "When we say 'ten,' we may really mean three and one-third, or we may mean six and two-thirds or some other number, but we only rarely mean ten."[9]

Consider one of Professor Paciocco's own experiences as a prosecutor. The accused was a young man. His lawyer asked the judge for a sentence of eighteen months that would keep his client in the provincial system. Paciocco asked for a sentence of twenty-six months. When the judge split the difference and imposed a sentence of twenty-two months, the young man intervened:

> "Your Highness," he said to the judge, trying to imitate the grovelling he had just seen from the two lawyers. "Please don't give me 22 months. Either give me the 18 my lawyer wanted, or I will take the 24, but don't give me 22 months."[10]

The judge obliged by imposing a sentence of 24 months in a federal penitentiary.

That young man was not a fool. Federal rules were more lenient. With a sentence of twenty-four months in a federal penitentiary, he would be released sooner than he would if he had received an eighteen or a twenty-two month sentence in a provincial institution. How does one view a system in which an accused may know more than the lawyers and the presiding judge and when the purposes behind a well-thought out sentence can be defeated by the granting of parole?

Earlier it was noted that Professor Paciocco was concerned with the need for the criminal justice system to be more cautious about the types of conduct that it chooses to excuse. He discusses several areas of concern, but the most interesting and controversial is what he considers to be the misuse of the battered woman syndrome. In both case law and in the literature about battered women, it is said that they tend to share the following characteristics: they develop the ability to predict the onset of extreme violence by the abusive partner and they suffer from a "learned helplessness" which renders them powerless to break away from those who dominate and abuse them.

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9 *Ibid.* at 72.

10 *Ibid.* at 73.

Cases involving battered women have led to some important changes in the law of self-defence. Traditionally, those who would rely on self-defence had to show that they were under an immediate threat of death or grievous bodily harm when they killed the other person. Self-defence was justified only when it was necessary. Given the fact that women may be easily overpowered by their male partners, a too rigid imminence requirement and a too rigidly applied concept of necessity could leave women in the unhappy position of being killed if they did not strike first or of being branded criminals if they did. Cases involving battered women led the Supreme Court of Canada to change the law of self defence so that, now, force can be used even if the attack is not imminent, in the strict sense, and even without relying on available avoidance strategies such as running away or calling the police. While acknowledging that the battered woman syndrome cases have resulted in valuable changes to the law, Professor Paciocco believes that the theory itself should be scrapped:

> Having paid the battered woman syndrome theory the high compliment of crediting it with generating sage changes in the law, I nonetheless feel impelled to trash it. I feel that need because it is a prime illustration of what is known in the literature as "junk science." Indeed, it flatters the theory to call it "science" at all, even with the appellation "junk" attached. 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 constructed on a flawed edifice, and continued resort to it in our courts is imperilling justice.[11]

Such a position will be unpopular, especially since, in cases involving the battered woman syndrome, the killer is often considered to be the real victim, but Paciocco presents his views in a clear and compelling way. Whatever position the reader decides to accept, he or she should enjoy the opportunity of reading Professor Paciocco's argument.

Professor Paciocco does more than condemn certain elements of the criminal justice system. He explains other valid and interesting points that may be of concern to members of the public. Consider, for example, why so many people charged with murder are allowed to plead guilty to manslaughter:

> The practice of treating murders as manslaughters reflects a serious problem. It is not a problem with the integrity of juries or prosecutors, or of judges who accept manslaughter pleas in what are evidently murder cases. Rather, it is a problem with the law of sentencing in murder cases. Murder is one of the few offences that bears a minimum penalty. Every murderer must be sentenced to life imprisonment, with lengthy periods of parole ineligibility.[12]

Not all murders are the same. Should a doctor who accedes to the request of a dying patient be found guilty of murder and be ineligible for parole for ten or twenty-five years? Should a Robert Latimer be convicted of first degree murder for deliberately killing his daughter whose life was truly a hell on earth when the sentence that has to

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[11] *Ibid.* at 306.

[12] *Ibid.* at 53.

be imposed is a minimum of twenty-five years? The rule of law requires that people like these be found guilty of murder. The law, however, should not require the judge to impose the same minimum sentence in every case.

There is so much else in the book. Professor Paciocco discusses the traditional defences and their relationship to each other and the so-called "technicalities" which result in acquittals but are essential to the safety of all who would be ruled by law, not people. He explains why victims have limited but important roles in the criminal justice system. He explains what needs to be done to improve public respect for the criminal justice system:

> In all honesty, in terms of changes that need to be made to salvage public respect, there is not much that needs to be done. All we lawyers need to be is honest and committed to the pursuit of truth. Before you laugh too heartily at that suggestion, bear in mind what we lawyers have accomplished, as the trustees of your criminal justice system. While we may not have explained well what we have been up to, we have accomplished a great deal. Indeed, if it is true that "the quality of a nation's civilization can largely be determined by the methods it uses in the enforcement of its criminal law," you can thank us for crafting, with the assistance of our English forebears, including a Pilgrim or two, a system that demonstrates a profound decency. It is a system that Canadians should truly be proud of.[13]

In *Getting Away With Murder: The Canadian Criminal Justice System*, the author was "honest and committed to the pursuit of truth." He said what had to be said in a well-written, interesting, and sometimes irreverent way. The reviewer found the book fascinating, and it should be an asset in the library of anyone interested in criminal law.

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[13] *Ibid.* at 391.