

The danger of legal positivism

A noticeable trend in western society is that a distinction between valid law and moral or ethical considerations is widening at an alarming rate. Legal positivism reflects a school of thought that advocates strict application of the written law notwithstanding its merit. In other words that we must apply the law as it stands ... it is not for us to ask whether or not any given law is good or bad.

Anecdotally, shutting down 10-year-olds selling lemonade in public or fining a homeowner for ministering to a sickly, neglected city-owned tree would be more benign examples of unthinking application of the law. Similarly, allowing a car displaying a *Disabled* permit to park illegally, but meting out a hefty penalty for another being a mere 12 inches over the same parking boundary limit would be a manifest example of unfair application of the law.

The matter becomes more serious when considering instances of statutory rape that have resulted in conviction because of a matter of weeks in age and/or parental interference that ignores the notion of a consensual relationship. Similarly, we have read about minors prosecuted for swapping raunchy photos of themselves under making/possession of child pornography legislation. The intent of the legislation is clearly overlooked.

The Martha Stewart and Conrad Black prosecutions were high profile events used to showcase the post Enron/Worldcom accountability legislation. Whatever we think of these individuals, did they do anything different from what thousands of people have done, are doing and will do on a daily basis? Yet, to the satisfaction of many, the law was applied to the letter.

Think of how accepting we are of technical convictions and acquittals. Does justice depend on agile navigation of legislation and regulation? Mike Holmes, of *Holmes on Homes* fame, in his weekly rants provides a simple illustration of this principle: Third-rate builders cannot be

prosecuted because their work meets minimum code requirements.

Just so, until the recent Braidwood recommendations, it was okay for law enforcers and business folk to aver that, despite people dropping like flies, there was no legal proof that Tasers were lethal.

The controversial G8/G20 arrests in Toronto showed how unfairness results in the innocent and guilty arrested with impunity because the law supposedly allowed this course of action. Summarized public reaction on mainstream media blogs seemed to be: "They knew the law ... they had no business being there!" Yet we found the Beijing anti-protest laws during the Olympic Games draconian and abhorrent.

Has our mindset become one that embraces *an end justifies the means approach*? Does our self interest give us the right to blindly accept any collateral damage? A country can be invaded on a false premise, at huge human and financial cost, without consequence to the decision-makers because no law was broken, yet millions of dollars can be spent unseating a politician who lies about his private sex life. Lying is, of course, a clear infraction of the law.

The illusion of certainty is an innate human craving. Looking to legislation to provide that certainty is dangerous. The myriad zero tolerance laws that have emerged in the last decade, if strictly applied, will result in unfairness and uneven justice.

Much like the danger in unthinkingly relying on technology, we forget that law is enacted, applied and processed by the imperfect human element. In our anger and fear, is the clinical treatment of a single child soldier as an international terrorist so different in essence from the barbaric machinations of legal systems we decry elsewhere.

Canada especially, as a thinking democracy, has enjoyed a hard-earned



international reputation for fairness and balance. Does public opinion shape our legal system? Is the law a dynamic guideline reflecting moral and ethical mores of the time, or is it a rigid inflexible resource that leaves no room for interpretation? What is our role, individually and collectively in shaping fair and just legislation?

Only an awareness of our own human imperfection and propensity for self-interested justice and political manipulation, will determine an ongoing commitment to a moral and just society. The media bears a critical responsibility in reflecting who we are, our aspirations and ultimately in shaping public opinion.

Hopefully we will not falter.

Rodger Harding is a business leadership and corporate intelligence awareness consultant. He may be reached at (416) 962-6700 or at staycool@web.ca.