G.Arthur Martin and the Rise of the Respectable and Honourable Defence Lawyer

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Introduction

This vignette is based on preliminary research into the life of G.Arthur Martin. Martin remains revered and famous and especially so among the criminal defence bar. As will be seen, these lawyers owe Martin a special debt of gratitude.

In 1970, Martin observed that before Ontario's 1965 introduction of legal aid, "very few lawyers could survive economically if their practice was largely or substantially devoted to criminal law". Moreover, some of "the ablest younger lawyers" did not practice criminal law because they "feared the risk of identification in the public mind and, indeed, in the minds of their professional brethren, with the clients."[1] Martin was quick to add that he personally never had such fears.

Martin left a corporate and real estate firm that he articled with shortly after being called to the bar. He immediately started to practice criminal law with a few civil law cases.[2] He struggled a bit financially at first with his 1940 income tax returns showing a net income of $1650, but by 1946 his net income was $9000[3]. He became a KC at the age of 35. He was subsequently elected a bencher and eventually Treasurer of the Law Society of Upper Canada. He was widely regarded as Canada's leading defence lawyer before he was appointed to the Ontario Court of Appeal. Despite all this success, I will suggest in this vignette that Martin was driven, if not haunted, by a desire to ensure that being a defence lawyer was a respectable and honourable part of the legal profession.

Although he was characteristically polite and diplomatic, Martin was not impressed with the criminal defence bar when he started practicing in 1938. He

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[1] G. Arthur Martin "The Role and Responsibility of the Defence Advocate" (1970) 12 Crim.L.Q. 376 at 379.

[2] Gordon, Mortimer, Kennedy and Doherty. He later recalled that he spent much of his articles "in the Registry Office searching title or in the Master's Office foreclosing mortgages." P.31 Interview

[3] By 1960, Martin's net income was $118,000. LSUC CRA 357 202.

frequently told a story about a leading Canadian lawyer who had his bald client wear a hairpiece for a court room identification. He noted that the story was frequently told among lawyers without any concerns about the ethics of such a practice. Martin then would sternly tell his audience that a British lawyer who tried a similar stunt was convicted of attempting to pervert the course of justice. With his typical scrupulous attention to detail and fairness, however, Martin also added that the conviction was overturned on appeal.

Martin's life-long and largely successful project to make criminal defence work an honourable and respectable part of the bar had at least three elements that will be examined in this vignette. The first is Martin's consistent defence of the importance of the right to counsel in criminal cases. Today we tend to think of right to counsel in terms of the rights under s.10(b) of the Charter, but for Martin the right to counsel meant much more than the right to be informed that a person could retain counsel. Martin demonstrated his unwavering commitment to the right to counsel by his pro bono and often court-ordered representation of those who could not afford a lawyer, his critical role in the creation of Ontario's legal aid plan and his advocacy as part of the Ouimet commission for national legal aid plans.

The second strand in Martin's project to make being a defence lawyer respectable is his work to develop a set of professional ethics that would be relevant and apply to the work of defence lawyers. When he started practice, the scholarly Martin was appalled by the lack of writing and thought that had been devoted to criminal law in general but in particular to the ethics of criminal practice. As a lawyer, bencher, teacher and scholar, Martin worked hard to make up for this deficiency and his writings on the ethics of the criminal defence are still widely read and respected today. A defining feature of Martin's ethical teachings is the stress that he placed on the role of criminal lawyers as professionals with a separate identity from their client and obligations to place their professional duties before the client's wishes. There is a sound basis for this ethical principle, but it also responded to Martin's concerns that not only the public but also part of the legal profession associated defence lawyers with their often unsavoury clients.

The third pillar that I will examine is the notion that criminal law is a legitimate and demanding academic discipline and that criminal lawyers no less than the lawyers

who work in other areas are part of an international community that is learned in both the criminal law and cognate disciplines such as criminology. Martin was the gold medalist not only at Osgoode but in WPM Kennedy's innovative law undergraduate course at the University of Toronto. By inclination, he took a scholarly approach to the law and as a long time teacher of both criminal law and criminal procedure at the Law Society's Osgoode Hall, he developed from the ground up acclaimed courses in both subjects that combined attention to scholarly writings in England and the United States with scrupulous attention to the law as it was developed in Parliament and Canadian courts. Martin's scholarly approach to the criminal law reflected his talents and nature, but it also underlined that criminal law was a respected and learned part of both the academic and professional parts of the legal profession. This helped distance the criminal law from earlier days where Martin feared defence lawyers were better known for theatrical antics than erudition. Martin's scholarly interests also meant that he was something of a global lawyer long before that term became fashionable. He regularly lectured at American law schools, attended a UN conference on crime prevention in Sweden and counted figures such as United States Supreme Court Chief Justice Warren Burger among his friends.

The Importance of the Right to a Defence Counsel

The right to counsel was a matter of bedrock faith for Martin. The right to counsel, however, meant much more for him than the often illusory right of an accused without funds to retain and instruct counsel or to be told about that right. It meant the right actually to be represented by a lawyer who would visit clients in jail, investigate their cases and defend them in court, in the same diligent way that Martin represented his own clients. The right to counsel for Martin was an indispensible protection of the liberty of the individual and a protection of fair trials and against wrongful convictions. At the same time, recognition and respect for the right to counsel was also closely tied to the development of the criminal defence bar as a vital part of the profession.

In the 1930's when he started practicing law, the right to counsel meant that lawyers would volunteer their time to represent impecunious clients at trial and on appeal. It would, however, be wrong to associate Martin's volunteering of his time exclusively with the altruism and public service that is today often claimed for the profession's pro-bono work. In a 1992 speech, Martin candidly noted that he did "want to

suggest that our motives were entirely noble. The object of the exercise was that we might get our name in the newspaper, or, if we did good work, a paying client might hear about it and retain our services." Martin started practice at the end of the Depression and pro-bono work was possible because "office overhead in those days were extremely low and we did not have much to do anyway, so we could do this sort of work."[4] Martin later recalled that his office rent in the Canadian Permanent Building at 320 Bay during the Depression was $25 a month, but that in order to make ends meet, he had to sublet the space to a salesperson and sometimes not pay his sister who worked as his secretary a salary.[5]

Martin's belief in the importance of the right to counsel was affirmed to him over the years by his many grateful and frequently desperate clients. In 1957 he received a letter from a man serving his third penitentiary term who implored him that "the entire success of an application depends on who is acting for a prisoner. How can I lose with a great man like Mr. Martin."[6] The prisoner added extra pressure in a subsequent letter reminding Martin that he suffered from diabetes and it "was now and never, Mr. Martin. Trust me."[7] The application for the Ticket of Leave was denied in part because the man's diabetes was under control by drugs. Martin broke the bad news to the client, reminding him to reapply should his condition get worse and concluding "I have done all that I can do at the present time."[8]

Martin's practice changed over the years as he took on a large amount of white collar criminal defence work and relied much more heavily on referrals from other lawyers for appeals. Nevertheless his belief in the importance of the representation of the run of the mill clientele of the criminal courts did not waver. In 1961, as a Bencher, Martin was brought into a controversy when a magistrate expressed outrage that some defence lawyers were openly soliciting clients in the cells of Old City Hall. In a letter to the Secretary of the Law Society, Martin deftly deflected concerns over the matter by shrewdly observing that "this objectionable practice could not exist without co-operation

[4] G.Arthur Martin "Bernard Cohn Memorial Lecture, January 1992" in G. Arthur Martin and Joseph W. Irving *G. Arthur Martin: Essays on Aspects of Criminal Practice* (Toronto: Carswell, 1997) At 7
[5] Interview at 99
[6] Stephen to Martin Feb 1 57 LSUC 162(1)
[7] Stephen to Martin Feb 28 57 LSUC 162 (2)
[8] Martin to Stephen July 8 1957 LUSC 162(2)

between certain police officers and the lawyers in question". He was politely skeptical that there was a solution that could be reconciled with the right to counsel when he concluded "Perhaps procedures could be worked out that would effectively prevent lawyers from going into the cells to solicit business without derogating from the right of an accused to retain counsel promptly."[9] Martin was not opposed to a more dignified criminal bar, but the first priority was to ensure that prisoners could have prompt access to defence counsel.

The advent of legal aid made it possible for more lawyers to represent accused persons. In 1969, Martin along with Charles Dubin, met with Minister of Corrections Allan Grossman who expressed concerns about an increase in lawyers visiting clients in jail "due in large measure to the extended legal aid system in Ontario."[10] Martin who two years earlier had served on a committee that had recommended the need for proper interview facilities in new regional detention centres being built in Ontario, [11]was firm in his interactions with the Minister about the importance of lawyers being able "to enter areas of penal institutions for the purpose of consulting clients" and being able to conduct private consultations "in order to protect solicitor client privilege."[12] Martin also made it clear that he was no stranger to prisons reporting that "it has been my experience that where the lawyer is known to the prison personnel they are extremely helpful in permitting interviews in the evening and on Sundays in connection with the preparation of cases. We should endeavour to preserve this relationship."[13]

The right to counsel also played a role when Martin acted as chairman of a five person Citizens Committee that helped to negotiate a peaceful end to a prison riot in Kingston Penitentiary in April 1971 that saw the 500 inmates take over the prison and hold guards hostage. The inmates murdered two sex offenders and destroyed parts of the Penitentiary. Martin understood and was even sympathetic to the federal government's

[9] Martin to W. Earl Smith Dec 14, 1961 LSUC Archives 2007050-14(1)
[10] Grossman to Howland Feb 6 1969 LSUC Archives 2007050-018
[11] A Report to the Minister of Reform Institutions from the Regional Detention Centre Planning Committee May 1967 at 7
CRA 350 -129. Martin had moved the resolution which had stressed the importance of access to defence counsel to the new facilities. Minutes of Proceedings Planning Committee Regional Detention and Classifications Centres April 29, 1965 CRA 350-128
[12] Martin to Howland May 14 1969 LSUC Archives 2007050-018
[13] ibid

decision not to grant the inmates an amnesty from subsequent criminal prosecution. Nevertheless, in a note scrawled on stationary from the Prison infirmary, he stressed that if any prisoner in the Riot is charged "before the Criminal courts, Legal Aid will ensure the payment of the expense…Under the Legal Act, any accused is entitled to counsel of his choice."[14] Ron Haggart a fellow member of the committee, later wrote how Martin had played a "notable role in bringing about the peaceful re-occupation of Kingston Penitentiary" when he "spent long hours with the inmate committee" convincing them that an amnesty was not necessary because there would be "no mass trials", those charged "would get the best lawyers in Ontario" and any sentences would probably not be "too severe."[15] The matter was dire. Thirty nine people were killed later in 1971 at a riot at Attica and troops with bayonets drawn surround Kingston Penitentiary during the riot.

Martin believed in the importance of counsel not only to defend criminal charges but to assist the prisoners help present their grievances to prison officials. He stressed in correspondence with the Solicitor General that the Citizen's Committee "was of the view that it was absolutely essential that the services of Counsel should be able to assist in sorting out and organizing the material to be presented, so that the presentation could be made in an orderly way and within a reasonable period of time."[16] When disputes arose over whether the government had agreed to such a promise, Martin stressed that "the Defence Bar will provide Counsel for this purpose whether or not Counsel is remunerated."[17] Martin also insisted without success that he and the rest of his committee be allowed to visit the newly open Millhaven after reports that prisoners being transferred from Kingston were being beaten and forced to run the gauntlet of guards beating them with riot sticks.

Martin had a genuine desire to help the prisoners and his focus on allowing lawyers to present legal grievances foreshadowed some of the recommendations that would be made by the MacGuigan Committee after a series of prison riots in 1976 and by the courts. At the same time, the interposition of counsel also could potentially take

[14] LSUC 2007050-123
[15] Ron Haggart "Amnesty: the killing issue in prison riots" Toronto Telegram Sep 18 1971
[16] Martin to Goyer May 27, 1971 LSUC 2007050-123
[17] Martin to Goyer July 5, 1971 ibid

away from allowing prisoners to express their own grievances. The public inquiry into the riot found that the inmates committee at Kingston Penitentiary had been dissolved for a number of years and recommended that it be revived as a means to allow "two way communication" between prisoners and guards "with a view to reducing the frustrations of which inmate witnesses constantly complained about during the course of giving evidence."[18] In 1973, an office of Correctional Investigator was also created as an alternative to litigation processes.[19]

The most important part of Martin's defence of the right to counsel was probably his critical role in the creation and early administration of the Ontario Legal Aid Plan. In 1951, the volunteer system that Martin had participated in since the Depression was placed on a statutory footing and administered by the Law Society.[20] In 1965, a joint committee established by the Ontario government and the Law Society of Upper Canada recommended that the volunteer system was no longer viable. Although it recommended a duty counsel system to provide temporary representation in court, the Joint Committee rejected a public defender model on the basis it was bad in principle to have defence work done by a state bureaucracy and that a public defender system would deprive clients of their choice of counsel.[21]

Martin was a believer in certificate-based legal aid in both criminal and civil matters as opposed to a model that would rely on salaried lawyers. While chairing a panel discussion on legal aid at the 1967 Mid-Winter Canadian Bar Association meetings in Ottawa. he noted that the tariff paid would be the same in criminal and civil work and "that we hope that the lawyers will rise to this challenge and to the responsibility that rests on them to make this plan work…almost everyone is capable of conducting legal aid if one or the other gives advice in civil or criminal work."[22] Some lawyers in the audience

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[18] J. W. Swackamer QC Chair *Report of the Commission of Inquiry into Certain Disturbances At Kingston Penitentiary During April 1971* (Ottawa: Solicitor General, 1973) at 61

[19] Michael Jackson *Justice Behind the Walls* (Vamcouver: Douglas and McIntrye, 2002) at 70

[20] *Law Society Amendment Act, 1951*

[21] The Committee which did not include Martin concluded that "If cheapness is to the only consideration for the defence of indigent accused, there is no doubt that the public defender system best fulfills this requirement." It stressed that legal aid would only be available in cases where the liberty or "economic status" of the accused was at stake and that these cases required the "classic devotion, attention and skill that is required of an advocate in a criminal trial of any significance." *Report of the Joint Committee on Legal Aid* March, 1965 At 108

[22] Panel Discussion Re Proposed Legal Aid Plan Feb 4, 1967 LSUC 2007050-119 at pp 38-39

were skeptical if not hostile because of concerns that the legal aid tariff might adversely affect the rates they charged private clients. They raised concerns that the tariff made no allowance for a lawyer's experience. Martin held his ground arguing that the tariff "is based on what you can charge a person of modest means" and that he did not think senior counsel would opt out "for fear of being deluged. They often limit themselves to certain kinds of work, more complex litigation, and they are entitled to apply the same standards when the legally-aided person comes to them."[23]

In a 1967 speech to Atlantic barristers, Martin elaborated on his reasons for rejecting a public defender model. He readily admitted that "undoubtedly the Public Defender system is cheaper and easier to administer". But he then argued that "if quality of service, not cheapness, is the proper criterion for legal services by the rich, it should be equally so for the poor. The other defects of the public defender system is that it announces to the world that the person represented by the public defender is in receipt of charity."[24] Martin's arguments from his 1967 speech appear almost verbatim in the chapter on representation of the accused in the delayed 1969 report of the Report on the Canadian Commission of Corrections often known as the Ouimet report. [25] Both Martin's speech and the chapter he drafted for the Ouimet Commission placed considerable emphasis on the idea that anything less than a judicare certificate system would discriminate against the poor. Although Martin cultivated a refined and almost patrician appearance and came from a relatively privileged background, he believed that the judicare system was necessary to ensure equal treatment to the poor. Although he travelled in esteemed circles, he was still familiar with the gritty reality of the criminal courts and the prisons.

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[23] Ibid at 43, 46-7

[24] Martin speech at CRA 348 2007050=092 (Ouimet Commission Archives, Ottawa).

[25] "Undoubtedly, a public defender system is more economical to operate that a comprehensive legal aid plan…The principal defects in the [public defender] system are that the defendant exercises no choice as to who will represent him. He gets the lawyer who is assigned to him. The defendant is, therefore, not placed in the same position with respect to legal representation as the person with means. Representation by the public defender informs the court and the public that the defendant is in receipt of charity. There is in addition the danger that because of the volume of cases that may be handled by an individual defender, the service may tend to be perfunctory and impersonal." *Report of the Canadian Committee on Corrections* (Queens Printer: Ottawa, 1969) at 158

Martin's defence of a certificate based legal aid system was based not only in his concern about discrimination against the poor, but also in his concern that a private criminal law bar must thrive. In his 1967 speech, Martin observed that:

> The greatest objection to the Public Defender system is one that has really not been articulated. It inevitably leads to the deterioration and virtual disappearance of an independent Defence Bar....An independent vigorous and responsible Defence Bar is necessary for the preservation of a healthy and free society.[26]

This particular objection to the Public Defender system was particular to Martin and did not appear in the 1969 Ouimet report. The press that reported on Martin's 1967 Atlantic speech also observed that Martin, who was at the time gaining national attention by representing Stephen Truscott in a special reference to the Supreme Court, observed that as a result of Ontario's legal aid plan "more lawyers will be attracted to the field of criminal lawyers; lawyers are more likely to become involved in the entire correctional process."[27]

Martin's concerns about the need for a vibrant criminal defence bar were also related to a general concern about the status of the criminal justice system including those of the lower courts. In 1970, as Treasurer he wrote to Chief Justice Fauteaux of the Supreme Court who had solicited information for an upcoming speech in India that "the physical facilities in some of the Provincial Courts are not in keeping with the importance of these Courts, where ninety five percent of all Criminal Cases are tried. The public are likely to receive their impressions of the administration of Justice from what they see in these Courts. In addition, the case load of the Judges in the Provincial Court is often excessive which sometimes crease an impression that disposing of the list is more important than doing Justice."[28] Similarly in his 1967 speech on legal aid, Martin responded to wide-spread concerns that the introduction of the Ontario Legal Aid Plan was clogging the courts with lawyers and more trials with an argument that "if people have been pleading guilty because they did not have the financial resources to obtain legal representation then this is an unhealthy state of affairs. The remedy surely lies in providing more Courts and more Crown Prosecutors rather than in withholding Legal

[26] ibid
[27] "Legal Aid Should Show Far-Reaching Results" Saint John Telegraph Journal p.2
[28] Martin To cj Fauteux oct 5 1970 LSUC 2007050-279(1)

Aid." [29]The right to counsel for Martin was the cornerstone of a broader approach that would require legal aid, better courts and corrections and that would increase public respect for the criminal justice system.

As Treasurer of the Law Society, Martin frequently meet with the other governing bodies. In 1971, he along with Claude Gagnon from Quebec, approved a joint position paper of the law societies on legal aid. In recognition of the reality that not all provinces would follow the Ontario judicare model, the first recommendation of the report was that each province should be able to develop a legal aid system to fit its own needs. Nevertheless, the report called on the federal government to provide funding for criminal legal aid. In addition, it stated that "provision should be made in any system of legal aid to permit the widest freedom of choice possible" and warned that "a defendant is not likely to have the same confidence in a lawyer who is assigned to him as in one whom he has himself chosen to be his defender."[30]

It is interesting to compare the recommendations of the Ouimet commission on the right to counsel with subsequent developments. With respect to what has become the s.10(b) right to counsel, Martin's proposals for the Ouimet commission have been remarkably prescient.[31] The commission proposed that legislation be enacted so that "failure to afford a person under arrest a reasonable opportunity to consult with counsel, after a request for permission to do so has been made" [32]should make any statement provided by the accused inadmissible. The Commission also stressed the need to inform detainees about the right to counsel. The latter requirement is now explicit in the text of s.10(b) of the 1982 Charter of Rights and Freedoms and the former has been achieved through an interpretation of that right.

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[29] Martin speech at CRA 348 2007050=092 (Ouimet Commission Archives, Ottawa)

[30] Minutes of the Executive Committee of the Council of Law Societies Meeting Feb 27 and 28th, 1971 appendix A at 3-4 LSUC 2007050-121 (3)KP

[31] In 1985, Martin made this point noting that "one can speculate that the Ouimet Committee may have influenced the draftsmen of the Canadian Charter" with its recommendation that persons be advised of the right to counsel. He added "The hardened or sophisticated criminal was likely to know of his rights but since most people appearing before the criminal courts are poor, frightened, the very people who needed to be made aware of their rights were sadly disadvantaged." Interview at 47

[32] Ouimet at 151

What is striking, however, is how far short the present law falls on the Ouimet Commission's recommendations for recognition of "legal representation as a human right"[33]. The Commission proposed that the Criminal Code be amended to provide that everyone accused of an indictable offence would have the right to a publicly funded lawyer if they could not afford one and that trials without defence counsel and a valid waiver by the accused of the right to counsel would be invalid.[34] The Commission also recommended national funding for legal aid for trials and appeals where imprisonment could be imposed or where there was "a likelihood of the loss of means of a livelihood" as a result of a conviction, while pragmatically recognizing that such a system would require enhanced federal funding and with it "consultation between the Canadian government and the provincial governments".[35] Some reformers would have gone further. The American criminal process scholar Herbert Packer in an otherwise favourable review of the Ouimet report found it "timid to a fault in failing to recommend a uniform system of assistance in criminal cases in Canada." Packer who had written a much more critical review of the 1967 President's Commission on Crime, wrote that he could not understand "why 'federalism' should be a factor in a country which has the good fortune to have a unitary Criminal Code."[36] Federal funding for legal aid soon ended and there is neither a statutory or constitutional right to funded counsel that is nearly as generous as that recommended by the Ouimet Commission.

Martin as a judge dealt with quite a few cases involving the right to counsel. In 1973, he signed on to a judgment of Chief Justice Gale that ordered a new trial for an accused who had pled guilty to three counts of stolen property and been sentenced to 3.5 years in prison. The lawyer that the accused had retained on a legal aid certificate was not present at the guilty plea and the accused claimed a police officer had told him he would receive a penitentiary term if he pled guilty. Gale pointedly noted that: "It is true that duty counsel was there but he was not the person who had been selected by the accused to represent him."[37]

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[33] Ibid at p.137
[34] Ibid at 140
[35] Ibid at 160
[36] Packer Review (1970) 8 Osgoode Hall L.J. 411 at 413
[37] *R. v. Butler* (1973) 11 C.C.C.(2d) 381 at 382 (Ont.C.A.).

Martin's approach as a judge was more fact specific than his approach as a law reformer. In a 1978 case involving an unrepresented accused in a drug conspiracy case, he accepted "as self-evident, the proposition that a person charged with a serious offence is under a grave disadvantage if he is, for any reason, deprived of the assistance of competent counsel."[38] At the same time, however, he held that counsel cannot be forced on the accused and refused to reverse a conviction of an accused who represented himself.

In 1988, Martin was on a panel that decided the still leading case of *Rowbothham* on when appointed counsel is required under the Canadian Charter of Rights and Freedoms. The Court of Appeal concluded that while the Charter "does not in terms constitutionalize the right of an indigent accused to be provided with funded counsel"[39], that Charter provisions relating to a fair trial would be violated in cases where the accused would not be able to receive a fair trial without legal representation. The Court of Appeal found that a woman who had been unrepresented in a complex year long drug conspiracy case involving ten accused had been denied a fair trial. At the same time, the Court's approach was more pragmatic than the sweeping reform recommendations proposed almost twenty years earlier by the Ouimet Commission. Courts should normally defer to the judgments made by legal aid officials and it would not be necessary to have counsel present for the entire 12 month trial but only for critical parts of the trial such as jury selection and the hearing of evidence directly against the accused. Finally, the Court of Appeal held that the appropriate remedy was not an order that counsel be funded but a stay of proceedings until counsel was appointed and a fair trial was possible. *Rowbotham* sounded many of the same themes about the importance of counsel to fair trials, the illusory nature of legal representation if a person of modest means could not afford to pay a lawyer and the unfairness of an approach that depended on the charity and volunteerism of lawyers. At the same time, Martin recognized that his role as a judge interpreting the Charter was different from his previous roles as a law reformer.

The Importance of Defence Ethics

As suggested above, Martin was unimpressed with the ethical practices of some

[38] *R. v. Littlejohn* (1978) 41 C.C.C.(2d) 161 at 173 (Ont.C.A.).
[39] *R. v. Rowbotham* (1988) 41 C.C.C.(3d) 1 (Ont.C.A.)at para 153

defence counsel when he started practicing. Stories of lawyers disguising their clients for purposes of courtroom identifications were a source of humour for some, but for Martin they skirted the edges of the law and did nothing for the reputation of the defence bar in either the eye of the public or the profession.

A defining feature of Martin's approach to ethics was the need to maintain some ethical distance between the defence lawyer and his clients. Martin represented some quite unpopular clients early in his career including a number of German prisoners of war who were charged with crimes while they were detained in Canada[40] and a number of people accused of espionage and other violations of the Official Secrets Act in the aftermath of the Gouzenko affair and spy revelations. These and other experiences, as well as his initial perceptions of the questionable ethics used by some defence counsel, likely motivated Martin to make clear that defence lawyers were not the alter egos or extensions of their clients.

Martin took a particular interest in the ethics of the profession. In 1956, he commented that "it has long been my view that we have not given sufficient attention" to the subject of legal ethics and praised the organizers of a continuing legal education event for including an ethics panel.[41] He gave a panel presentation to the Mid-Winter meeting of the Canadian Bar Association in Windsor in February 1963 that featured 30 different ethical problems including problems relating to the payment of fees, contingency fees, conflicts of interests and dealings with the press. Only a few of the thirty questions addressed the situation of defence counsel. They posed questions such as whether the lawyer had a duty to reveal the identity of a client who skipped bail.[42] In 1963, Martin encouraged Judge Schroeder with comments on multiple drafts of a paper he was writing on legal ethics. In one of his letters he assured the judge that "I do not think this is a bit too much 'of the stuff that dreams are made of'. I believe we all need it from time to time." [43]Martin wanted to elevate the ethical standards of the whole profession but he

[40] Martin won at trial in *R. v. Krebs* (1943) 80 CCC 279 (Ont.Co.Ct.) on the basis that the POW did not owe allegiance to the Crown in trying to escape but lost a similar case in the Court of Appeal on the basis that POW's were not exempted from criminal law. *R. v. Brosig* (1945) 83 CCC 199.
[41] Martin to Stuart Ryan OC Dec 7 56 LSUC 161
[42] Law Society Archives 2007050-118
[43]Martin to Schroeder Feb 26, 1963 LSUC 173(1)

also recognized that in the eyes of much of the public and the profession that the criminal bar could especially benefit from such a project.

Martin combined a sense of ethics with his strong defence of the rights of the accused. As discussed above, his support for restrictions on lawyers soliciting clients was subordinated to his overriding concern that accused have access to legal representation. In a 1963 letter to Patrick Galligan, Martin readily agreed that a suspect had a right not to participate in a police line-up. At the same time he told Galligan that Martin "would also feel that I was not on firm ground ethically if I were to attack the identification as being unfair or valueless because the accused was first presented in an atmosphere of suspicion in the dock if I had instructed him not to appear in a line-up."[44] For Martin, the rights of the accused also implied some responsibilities on the part of defence counsel.

In June 1970, Martin, then Treasurer of the Law Society, gave an address to the Advocates' Society on the Role and Responsibility of the Defence Advocate. It is significant that Martin addressed the Advocates Society on this topic because it included many barristers who did not do defence work. Martin addressed this issue directly in his speech noting that some lawyers declined defence work because they "feared the risk of identification in the public mind *and, indeed, in the minds of their professional brethren, with their clients*"[45]. Martin, however, entirely rejected this idea and argued that "the defence counsel is not the alter ego of the client. The function of defence counsel is to provide professional assistance and advice. He must, accordingly, exercise his professional skill and judgment in the conduct of the case and not allow himself to be a mere mouthpiece for the client."[46]

Martin then demonstrated the independence of the lawyer by making it clear that defence lawyers should never conceal evidence given to them by their client and should ensure that the evidence is made available to the authorities while protecting solicitor client privilege.[47] The same issue had been discussed the previous year by Joseph Sedgwick at the Law Society's Special Lectures and Martin had expressed complete agreement with Sedgwick's approach to reconciling the defence lawyer's duty to the

[44] Martin to Galligan March 30, 1963 LSUC 173(1).
[45] G.A, Martin "The Role and Responsibility of the Defence Advocate: (1969-70) 12 CLQ 376 at 379
[46] Ibid at 382
[47] Ibid at 392

client and to the court. Unfortunately some years later this sage advice was lost on a lawyer who retained evidence in a case involving Paul Bernardo.

Martin had been consulted by Sedgwick on a case involving the defence lawyer's possession of evidence and he very much valued the collegiality of the small criminal defence bar that was always prepared to offer free advice on another colleague's case and did not have the same concerns as their civil counterparts with respect to conflicts of interests and the need to justify time devoted to assisting colleagues in other firms. In his 1970 address, Martin argued that for many difficult ethical areas there was "little guidance" to be found "in the rulings of the governing bodies of the legal profession, the case law, or in other authoritative material."[48] As a criminal lawyer he was well aware of the limits of criminal law as a means of policing ethical behavior. In 1958, he successfully defended a law student who was charged with obstruction of justice on the basis that he had knowingly presented false evidence. Martin told the jury that if the law student "had had more experience he might have been more skeptical. But he should not be convicted of these charges because of an error in judgment." The jury acquitted the law student in 30 minutes.[49]

As a long standing member of the Law Society's discipline committee, Martin was also aware of the limits of disciplinary decisions. He believed that "the time has come for the governing bodies of the legal profession to establish a specific code of professional conduct with respect to the defence function."[50] As with the case with greater recognition of the right to counsel, such a development would for Martin benefit both the public interest in the administration of justice and would enhance the image and reputation of the defence bar.

By the time he made this proposal in 1970, Martin had already thought about the optimal ways to articulate ethical and professional standards. In 1963, he had corresponded with then Treasurer John Arnup about the ethical standards of the profession. Arnup expressed concerns about perceptions of declining ethical and professional standards. Martin was at first was both conservative and defensive about the

[48] Ibid at 392
[49] "Jury Rules Student Not Guilty" undated press clipping 166(2)
[50] Ibid at 392-3

work of the Discipline committee. He stressed that the Discipline Committee needed more resources such as an investigator while stating:

> I quite agree that professional standards have been lowered in recent years by lawyers assisting 'gouging moneylenders' or getting clients to put money in improper investments. I do not think, however, that this lowering of standards can be placed at the door of the Discipline Committee. It has many causes not the least of which is the tremendous shift in national values that has taken place in the last twenty years.[51]

If he had left the matter there, Martin would have been just another lawyer defending the record of his committee and lamenting about declining societal standards.

Four days later, however, Martin wrote a second letter. "I have been thinking about the problems of the Discipline Committee over the weekend and it has occurred to me that perhaps there should be a joint meeting of the Discipline Committee and the Professional Conduct Committee…The purpose of the meeting would be to consider the areas of activity in which we feel that Lawyers are acting improperly to the detriment of the Profession and the Public" with a view to issuing Notices designed to curb "the abuses".[52] Arnup heartily agreed with this suggestion adding that "we should intensify our efforts to track down and eradicate those aspects of unprofessional conduct falling short of theft of client's funds or other criminal activity."[53]

The Law Society had some success in providing proactive ethical standards. For example, Martin played a lead role in the development of a notice to the profession with respect to when it was permissible for a defence lawyer to withdraw from a case because of non-payment of fees. This area involved a conflict between the defence lawyer's legitimate and often neglected interest in getting paid and the interest of the client and the accused in ensuring that the client would not be deprived of a fair trial as a result of counsel's withdrawal. In other areas, including the issue of whether a lawyer should retain evidence, the Law Society had less success in providing proactive guidance. In addition, Martin's call for a specific ethical code for defence counsel has not materialized

[51] Martin to Arnup September 25, 1963 LSUC Archives 2007050-016(1)
[52] Martin to Arnup September 30, 1963 LSUC Archives 2007050-016(1)
[53] Arnup to Smith Oct 1, 1963 LSUC Archives 2007050-015(2)

with the Rules of Professional Conduct being written in a generic manner for all lawyers with only provision being made for the special ethical rules governing prosecutors.

Martin's belief in the importance of both the right to counsel and the ethics of defence counsel is also found in the 1993 report on Charge Screening, Disclosure and Resolutions Discussions which he chaired. The report stressed the ethical obligations of both the Crown and the defence as an integral part of a system that would allow the criminal justice system to dispose of most of its cases through plea agreements after full disclosure. The committee stressed that "counsel's responsibility as officers of the Court makes them more than simply representatives of a particular interest or set of interests. They are not merely agents. They are independent professionals and key participants in a system of administering justice"[54] who owed duties to the community and the Court as well as to their clients. This view of defence ethics was a constant in Martin's thought as indicated by the Committee's citation of Martin's famous 1969 article on the role and responsibility of defence advocate.

Criminal Justice as an Academic and International Discipline

In 1985, Martin recalled that when he "was a law student, although criminal law was not entirely overlooked, it was certainly not considered to be one of the more important subjects."[55] Martin's criminal law course at Osgoode was taught by a part-time lecturer and he would later recall that it was "not a very inspiring course."[56] This state of affairs no doubt reflected the lack of prestige of criminal law in the profession, but it also reflected the lack of serious scholarship on the criminal law.

Although he was never a full time teacher, Martin responded to these deficiencies both through his teaching of criminal law at Osgoode Hall and his frequent scholarship which was often prepared in conjunction with his continuing legal education activities. Martin lectured on criminal law at Osgoode Hall from 1943 to 1966. The $800 stipend he

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[54] *Report of the Attorney Geneal's Advisory Committee on Charge Screening, Disclosure and Resolutions* Discussions (Toronto: Ministry of the Attorney General, 1993) at 33. The Martin Committee went on to criticize defence counsel for "flagrant abuses of the right to disclosure" which had led to disclosure material being made public in prisons and schools and concluded that defence counsel "would not be acting responsibly as an office of the Court" by allowing disclosure materials to be made public. Ibid at 179. At the same time, the Committee also stressed that defence counsel should be allowed to discuss disclosure materials with their clients and did not recommend disclosure by the defence. Ibid at 172, 176

[55] G. Arthur Martin "Reminiscences, Criminal Justice and Liberty" (1986) 20(1) Law Society Gazette 39 at 45.

[56] Interview at 38

received was helpful, at least until he continued teaching on a voluntary basis after being elected a bencher. More importantly, however, Martin relished the challenge from scratch of creating a course that was both "realistic" and principled. He recalled that "preparing a set of lectures was somewhat difficult because of the almost complete absence of legal writing in the area of criminal law. Criminal law was given very little attention in the laws schools at the time."[57]

Martin's 13 page criminal law syllabus contained many references to academic writings from the United Kingdom and the United States and a selection of British and Canadian cases. [58]He examined general principles of criminal liability, but also devoted considerable time to specific crimes including not only homicide and assault but also bread and butter crimes such as drunk driving and careless driving and various property offences. In 1957, he gladly supplied the syllabus at the request of those who were teaching at the new law schools at Queen's and Ottawa. He also gave the new criminal law teachers many tips on teaching and concluded that "I am very glad that you are teaching this subject and look forward to having some interesting discussions about many problems that are not yet solved."[59] He was thrilled to receive a honourary doctorate in law from Queens in 1963.

Martin contributed to refresher courses being given by lawyers returning from World War II and was a frequent contributor to the Law Society's annual published Special Lectures and to the Criminal Law Quarterly. His scholarly activities were not, however, confined to continuing legal education or to Canada. In the 1960's, he published five lectures in the prestigious Journal of Criminal Law and Criminology based on lectures given at Northwestern Law School's annual course for defence lawyers. One of these arose out of an innovative 1960 conference at Northwestern which examined police practices, self-incrimination and the exclusionary rules and included as speakers Martin from Canada, Glanville Williams from England and speakers from France,

[57] Interview at 118

[58] Martin's criminal procedure syllabus was even longer at 28 pages covering jurisdiction, venue, procuring attendance, bail, preparation for trial, indictment, pleas, charges to the jury, verdict and appeals. CRA 357 197-198. Martin's approach was both academic and practical and as such avoided a dichotomy that seems more prevalent today.

[59] Martin to Stuart Ryan Aug 28 57 Martin to Roydon Hughes Aug 28 57 LSUC 162(2)

Germany, Israel, Japan and Norway.[60] Martin maintained correspondence with leading American criminal law academics such as Francis Allen and Fred Inbau. The transnational nature of Martin's academic interests would be common today, but they were relatively rare at the time.

Martin maintained close ties with academe. He considered both Caesar Wright who had taught him and Bora Laskin who was two years ahead of him at the University of Toronto to be friends and frequently sought their advice. He recalled that both Wright and Laskin had attended when the young Martin argued his first appeal in the Court of Appeal. Martin supported Wright and Laskin's decision to move from the Law Society's school at Osgoode Hall to start a faculty of law at the University of Toronto. He subsequently supported the advent of other university based law schools even though the move of Osgoode to the York campus made him give up teaching in 1966. [61]Martin also had friendships and corresponded with leading criminal law academics such as John Edwards, Martin Friedland and Desmond Morton. After his retirement from the Court of Appeal, Martin happily taught a course with John Edwards at the University of Toronto's Faculty of Law. Martin respected and used the work of legal academics, but his approach was practical and did not keep up with all the academic fashion. For example, his D.B. Goodman lectures at the University of Toronto were deemed not suitable for publication by the University of Toronto Press.[62]

Martin's legal opinions and factums often featured the available academic writings on a particular subject. As a judge, he frequently cited the available academic writings and believed that judges "are all greatly in the debt of law teachers" for the "invaluable assistance" [63]offered by their growing scholarship. To be sure, some of Martin's approach reflected his particularly scholarly bent, but his engagement with academe was also part of his overall project to raise the status and prestige of the criminal defence bar. The treatment of criminal law and related subjects as serious academic subjects, combined with the increased development of an ethics for criminal defence

[60] CRA 356 2007050-188
[61] Interview at 124-127
[62] M L Friedland *My Life in Criminal and other Academic Adventures* (Toronto: University of Toronto Press, 2007) at 68
[63] G. Arthur Martin "Reminiscences, Criminal Justice and Liberty" (1986) 20(1) Law Society Gazette 39 at 46

work and respect and funding for the right to counsel, all combined to help make criminal defence work a more respected part of the legal profession.

Although Martin was at home with academic lawyers, his work with expert witnesses made him increasingly familiar with a wide variety of other professors. In a 1957 article, Martin expressed concerns about the reluctance of medical doctors to testify in criminal cases in a manner that was for him was uncharacteristically personal and emotional. He explained how doctors that he knew were happy to talk to him, but not to appear as witnesses whereas doctors that he did not know "won't talk to me at all."[64] In terms that suggested that the defence bar was still somewhat marginalized in the late 1950's, Martin speculated that his reluctant doctors were concerned about "a loss of prestige in their professional and social life" if they were publicly identified "with the accused and against the forces of law and order."[65] Martin reminded his medical audience about the presumption of innocence and warned them that medical "evidence might result in saving an innocent's man's life."[66]

Martin stressed the need for expert witnesses to be objective for similar reasons as he stressed the need for defence lawyer to maintain some ethical distance from the clients. He argued that cross examination that focused on the fact that an expert was being paid or usually testified for the defence or the prosecution were "rarely effective".[67] In the end, both the defence lawyer and the expert witness owed duties to the court and the justice system. In addition, both would benefit by stressing these duties so as to counteract perceptions that they were simply the paid mouths of their often unsavoury clients.

Martin was active in interdisciplinary and interprofessional education before the terms became fashionable. He participated in a 14 evening course to acquaint doctors with the law and the doctors returned the favour with a course on medicine for lawyers.[68] In 1964 Martin, along with Pat Hartt, John Edwards, Justice Edson Haines and others

[64] G. Arthur Martin "The Doctor and the Court" (1957) 11 University of Ottawa Medical Journal 6 at 11
[65] Ibid at 10-11
[66] Ibid at 11
[67] G. Arthur Martin "The Doctor and the Court" (1957) 11 University of Ottawa Medical Journal 6 at 7.
[68]CRA 356 2007050-187

taught a day and a half day postgraduate course in the University of Toronto's Faculty of Medicine on forensic psychiatry and addressed the topic of the defence of insanity.[69]

Martin's training in WPM's Kennedy's Honour Law programme would have given him a broad understanding of the law at a time in the 1930's when the program was a force to be reckoned with in terms of its realist and sociological approach to the study of the law.[70] This approach to the law would not have been immediately useful to Martin in his practice, though it did give him a deep knowledge of English constitutional history that for him re-affirmed the important role of defence counsel in defending individual's from the state. In the 1960's, however, Martin became more interested in the growing field of criminology in large through his work with the Ouimet Commission from 1965 to 1969. On June 1, 1965, Liberal Minister of Justice Guy Favreau appointed Martin whose politics were Conservative as the Vice-Chairman of a five person Committee on Corrections. The committee was chaired by Montreal criminal court judge Roger Ouimet and its Secretary was W.T. McGrath, a well-published expert in corrections. It was rounded out by J.R. Lemieux, a retired deputy Commissioner of the RCMP and Dorothy McArton, a social worker who was the Executive Director of a family welfare agency in Winnipeg.

The Committee's mandate reflected the optimistic and ambitious reformism of the 1960's. It was asked "to study the broad field of corrections, in its widest sense, from the initial investigation of an offence through to the final discharge of a prisoner from imprisonment or parole".[71] The order in council appointing the inquiry signaled its liberal and due process orientation by asking it to make recommendations "in order to better assure the protection of the individual and, where possible his rehabilitation, having in mind always adequate protection of the community." The Committee devoted a chapter of its final report to the basic principles and purposes of the criminal justice, stressing that the criminal law should not interfere with the freedoms of individuals more than is necessary to protect society.

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[69] LSUC 219

[70] See RCB Risk "The Many Minds of WPM Kennedy" (1998) 48 U.T.L.J. 353

[71] Order in Council PC 1965-998 quoted in Canadian Committee on Corrections *Towards Unity: Criminal Justice and Corrections* (Ottawa: Queens Printer, 1969).

Martin was comfortable with the Committee's liberal reformism. He took a rare opportunity in a 1968 letter to Bill McGrath to articulate his own understanding of the proper purposes and limits of the criminal law and it was consistent with the Committee's ultimate emphasis on restraint and causing no more than harm than is necessary. Martin in his letter spelled out the practical implications of this otherwise anodyne philosophy by stating that it meant that the accused should "not be arrested if a summons will suffice; he should not be detained prior to his Trial where his release on his solemn undertaking will suffice to ensure his appearance and a case has not been made out that he will endanger the public if released; He should be provided with counsel to the same extent that a person with means would be entitled to counsel so that he will not be disadvantaged by poverty; Even if he is guilty he should be granted an absolute discharge if that is appropriate" and he "should not be sentenced to imprisonment if placing him upon probation will adequately protect society". If imprisonment was necessary for the protection of society, the prisoner "should be treated in a humane matter; he should not be degraded beyond the degradation that all imprisonment involves" and "he should be released on parole at the earliest time that it is safe to do...." [72]This was a coherent philosophy of the criminal justice that was centred on the accused while making some room for the protection of society. It was consistent with what David Garland has described as "penal welfarism" an approach that flourished in the 1960's "combining the liberal legalism of due process and proportionate punishment with a correctionalist commitment to rehabilitation, welfare and criminological expertise." [73] As Garland and others have documented, this consensus has evaporated as a new emphasis on victims, punitiveness, populism and the expressive ability of criminal law to respond to perceived crisis has eclipsed the older emphasis on rehabilitation and deference to expertise.

During the nearly four years that it took for the Committee to complete its work, Martin maintained his busy court room schedule including his representation of Stephen Truscott during the 1967 reference before the Supreme Court. Martin's schedule meant that he frequently missed part of or all of the two day meetings that the Committee held sixty six times during its duration and most of its trips to every province, and many parts

[72] Martin to McGrath November 25, 1968 National Archives of Canada Canadian Committee of Corrections collection Vol. 20.
[73] David Garland *The Culture of Control* at 27

of the United States and Europe. Martin did, however, attend the Commission's visit to Washington to meet with those working on the Commission on Criminal Justice appointed by President Lyndon Johnson. He also attended the UN's Third Convention on the Prevention of Crime and the Treatment of Offenders held in Stockholm as part of the Canadian delegation. Moreover, Martin was an active presence in the Committee's work and took primary responsibility for drafting its chapters on police powers, arrest, bail and representation of the accused. The chapters that Martin drafted found their way into the final report with minimal changes as the other members of the Committee respected Martin's legal expertise. At Martin's urging, many of the chapters were confidentially conveyed to the government as interim reports in an attempt to "avoid us being continuously out guessed by the government in draft legislation."[74]

Conclusion

In 1985, Martin recalled that when he started practicing criminal law in the late 1930's, "criminal lawyers didn't have the same status as the outstanding lawyers in the civil field. They didn't make as much money, for one thing." He added that there was also a "perhaps natural tendency to identify the lawyer with the person whom he represents."[75]

Martin disclaimed any "conscious effort" to improve the image of criminal lawyers "other than that in defending cases I followed the same ethical principles that lawyers defending any other cases ought to follow."[76] Regardless of his motive, Martin was largely successful in proving to the public and especially the profession that being a defence lawyer could be honourable and respectable. As Edward Greenspan commented upon Martin's death in 2001 "criminal law wasn't a favourable part of law until Arthur Martin made it a respectable business. He made people proud to be criminal lawyers."[77]

[74] Minutes of the Meeting of the Canadian Committee on Corrections Jan 4 and 5, 1968 remarks attributed to Martin RG 36 24 vol 3.
[75] Interview at 96-97
[76] Ibid at 97-98
[77] Alan Barnes "Legal giant Arthur Martin dead at 97" Toronto Star Feb 28, 2001 p. A1.