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RECENT BOOKS

CRIMINAL LAW AND CRIMINOLOGY: A SURVEY OF RECENT BOOKS

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CAPITAL PUNISHMENT

HUGO BEDAU & PAUL CASSELL EDS., DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS FROM BOTH SIDES MAKE THEIR CASE (New York, Oxford University Press, 2004). 242 pp.

This book contains contributions from judges, attorneys, and academicians on both sides of the death penalty question. The grounds advanced for justification of capital punishment—including deterrence, retribution, and closure for victims' families—are considered. Whether life imprisonment is adequate to address these concerns is also debated. Other issues include whether racial minorities or indigent defendants are disproportionately executed, whether the penalty is otherwise arbitrarily applied, and what risks exist regarding the execution of an innocent person. How reliable is the evidence presented to support the answers to these questions? One opponent of the death penalty reviews the history of capital punishment in America and notes that it has recently been applied in very few cases. In response to the view that the penalty is now reserved only for—and should be retained for—the worst crimes, this contributor argues that retribution does not provide a coherent and consistent basis for imposing death, since the criteria for application are so vague that juries decide on non-statutory and arbitrary grounds. In some cases there is also doubt whether the offender should bear full responsibility for purposes of retribution. Incapacitation and deterrence also fail to provide consistent grounds for the death penalty, both because methods of predicting future dangerousness are not sufficiently reliable to justify execution, and because the data has not unequivocally established the deterrent effect of capital punishment over that of life imprisonment. Other opponents present statistical and individual case evidence that the death penalty is discriminatorily applied against racial minorities in two respects: 1) the population of those sentenced to death

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includes a significantly greater percentage of blacks than the general population; and, 2) regardless of the race of the defendant, the death penalty is more likely to be imposed when the victim is white. Other problems include the under-representation of blacks in the venire jury pool, peremptory challenges by prosecutors during jury selection, and the confluence of race and poverty. Contributions also include stories of both indigent capital defendants receiving egregiously inadequate representation at trial and on appeal and individuals sentenced to die but later exonerated. Governor George Ryan's statement of his reasons for declaring a moratorium on the death penalty in Illinois is included as well.

Death penalty proponents present specific cases where the death penalty is deserved, including murders committed by persons sentenced earlier but subsequently released. Arguing that abolitionists have been unable to respond to the argument that execution must be retained for such cases, these contributors also consider other issues raised by opponents. The question of the deterrent effect of capital punishment has not been conclusively answered; the many statistical variables may make a final conclusion impossible. Society must, therefore, risk a decision. (A decision from incomplete evidence that the penalty does not deter, if incorrect, would be a risk to future victims.) Since the weight of the data—along with psychological, anecdotal and "common sense" considerations—provides sufficient empirical confidence in a choice for deterrence, and since the alternative decision on this close question places risks on potential victims, society should prefer the risks of finding a deterrent value. "Life without parole" cannot adequately replace capital punishment because the present system is not sufficiently reliable. In considering problems in the administration and application of capital punishment, proponents note that these issues are not inherent in the death penalty, and that we should seek to improve its administration rather than abolish it. When the portion of capitally sentenced persons who are black is measured against the number of persons tried for murder, rather than against the general population, the punishment is not shown to be racially disproportionate. Moreover, claims of discriminatory sentencing on the basis of the victims' race are not supported when the statistical data are controlled for other variables that are considered aggravating factors in sentencing deliberations. Proponents also note that the presented cases of inadequate representation of the indigent are somewhat outdated and are from only a few jurisdictions. In recent years, many states have implemented stringent requirements in the qualifications of attorneys appointed to represent death penalty defendants, thereby causing the states to incur significant expenditure to pay for the defense. Extensive review of capital sentences is also common. Cases of persons exonerated shortly before execution are especially troubling. However, the answer is improvement in judicial procedure not complete abolition, which would present a greater risk to the innocent. A federal judge and a state prosecutor, both of whom support retention of the penalty, discuss the emotional difficulty in imposing the death sentence.

CRIMINAL TRIALS

JIM PHILLIPS AND ROSEMARY GARTNER, MURDERING HOLINESS: THE TRIALS OF FRANZ CREFFIELD AND GEORGE MITCHELL (Vancouver, UBC Press, 2003). 347 pp.

George Mitchell fatally shot Franz Creffield in Seattle in 1906. While Mitchell freely admitted and endorsed his action, and expressed no remorse, the trial jury acquitted him. To explain this outcome, the authors investigated the social structure in turn-of-the-century Seattle, including the belief in an "unwritten law" that justified some instances of murder, along with the interaction of these attitudes with the legally recognized insanity defense. In 1902 Oregon, Creffield—till then an obscure figure—initiated a religious cult whose beliefs developed from the 19th Century "holiness" movement. Creffield's cult attracted some twenty members, a majority of whom were women, including Mitchell's two sisters. Though initially tolerated by the community, the cult soon came under condemnation and attack. According to the authors, social attitudes in the Pacific Northwest at the time were based on male dominance and the relegation of women's role to home and church. Because Creffield's cult was antithetical to these views, while also both rejecting any sort of economic productiveness and pursuing what were believed to be promiscuous sexual practices, it soon came under physical attack by members of the community. These attacks connected with the vigilante tradition, which justified individual action where the established law failed to respond to an offense. (This was distinguished from lynching, where the established law would have been responsive but was circumvented.) Creffield was civilly judged insane and briefly institutionalized. Upon his release, the cult briefly began again, until Mitchell shot Creffield.

Mitchell justified his action on the grounds that Creffield had seduced his sisters into joining the cult. Mitchell drew on an "unwritten law" of some male dominated societies that a man was justified in killing the seducer of his wife or female family members. Mitchell immediately received strong support in the public press and, the authors infer, in the general community. The press explicitly argued Mitchell should not be tried because he was justified on the grounds that Creffield deserved to die. The authors find some legal cognizance of this defense in earlier law, but the defense was viewed disfavorably by courts at the end of the 19th Century. (Even when the defense was recognized, the authors point out, it was chauvinistic; when women murdered their seducer, or the seducer of their female family members, they were less successful in asserting the defense.) During Mitchell's bail hearing the level of offense under which Mitchell would be tried was an issue; the judge indicated he would not accept this "unwritten law" defense to be argued at trial, and would therefore admit no evidence only relevant to that defense. Mitchell's attorneys could not claim self-defense, defense of others (Mitchell's sisters were not actually endangered), nor sudden irresistible impulse (too much time had lapsed between Mitchell's learning about his sister and his shooting of Creffield).

Mitchell's attorneys decided to argue that he was insane. As a criminal defense, this required evidence showing that the defendant suffered a mental defect or disease that prevented him from appreciating the wrongfulness of his acts. The attorneys relied on legal authority positing that the defense was allowable when a person, while not generally insane, suffered from some delusion so far beyond reason as to cause a

mental defect (provided the delusion was related to the criminal act). The defense argued that, although Mitchell was not insane in other aspects of his life, the revelation to Mitchell of his sisters' cult membership created a delusion that Creffield was an "evil seducer," and that this delusion caused a limited insanity under which Mitchell committed the homicide. The trial judge allowed this defense, and thus admitted evidence of what Mitchell had been told about the practices of Creffield's cult. Mitchell permitted his attorneys to pursue this strategy, even though he consistently maintained he was not insane. The defense attorneys' real purpose, the authors state, was to permit the jury to hear about the cult and to render a verdict on the basis of community attitudes about gender relationships, and their belief in the right of a male to kill the seducer of his female family members. The local press, which supported Mitchell from the beginning on the "unwritten law" grounds, supported the use of the insanity defense at the trial. This fact further indicates that Mitchell's attorneys used the claim of insanity as a way of getting otherwise inadmissible facts about Creffield and his cult before the jury.

In giving jury instructions, the judge had rejected a defense request for instructions about the "unwritten law" permitting the murder of seducers, but did instruct on the insanity defense. After deliberating little more than an hour, the jury returned a simple "Not Guilty" verdict—rather than "Not Guilty by Reason of Insanity—indicating that the finding was not on the legal basis of the insanity defense. Moreover, Mitchell was immediately released, rather than confined as is the practice after a verdict is based on a finding of insanity. Shortly thereafter, Mitchell was murdered by his sister, with another member of the cult acting as an accomplice. Mitchell's sister claimed that Mitchell should have been punished for killing Creffield, and thus she was acting in the same vigilante tradition that had been used against Creffield. (Mitchell's sister also claimed she had been slandered when her brother said she had been seduced.)

It was speculated that the women might themselves use the insanity defense—though they, like Mitchell, consistently maintained that they were not insane—thus confounding the public that had supported its use in Mitchell's defense. However, public attitudes had suddenly changed. The murderer of a popular, respected Seattle judge, whom had been trying to protect his niece from the killer's unwanted attentions, indicated that he would claim insanity. The insanity defense, including its previously heralded use as in the Mitchell trial, was now condemned as a "dodge." It was argued that questions of criminal insanity should be decided by medical experts rather than untrained juries. (Within a few years, Washington would become the first state to prohibit the insanity defense.) Mitchell's murderers were never tried. The court selected a group of mental health doctors to determine if they could sufficiently comprehend the nature of the proceedings against them and participate in their own defense to be found competent to stand trial. The commission found them unfit. However, the authors point out that the text of the doctors' opinion suggests the mental health experts were really judging Mitchell's sister to have been insane at the time of his murder.

PENOLOGY

MICHAEL TONRY ED., THE FUTURE OF PUNISHMENT (New York, Oxford University Press, 2004). 236 pp.

The contributors to this volume consider punishment trends over the past thirty years and suggest possible changes for the future. One contributor analyzes the reasons for the sharp rise in imprisonment rates. The approach to sentencing changed in the 1970's with the introduction of the theory that the individual criminal acts from a "cost-benefit" choice. Thus, reducing crime requires increasing the cost—i.e., imprisonment—of choosing to commit crimes. However, imprisonment rates grew beyond what correlated with crime reduction because punishing criminals became increasing popular and elected officials gained politically by enacting laws that led to a steep rise in the prison population. These officials did not consider the possibility that imprisonment may not be as life-disrupting for individuals most liable to pursue crime—and thus not as deterring—as it would be for the members of the main political constituency. Moreover, the offender categories representing much of the prison population (drug users, e.g.,) are not generally likely to pursue criminal careers. Political forces have driven the prison rate above what is related to crime reduction, but there are some indications this trend is changing. Prison conditions have grown increasingly harsh, observes another contributor, partially from deliberate intention and partially from declining infrastructure. Both prisoners and staff suffer from this situation. Although extreme *types* of punishment, such as torture, may be opposed by the citizenry as contrary to the values of democracy, political opposition to extreme *degrees* of conventional punishment (e.g., gratuitously punitive conditions, excessive deprivation of liberty) is less likely is because of public fear and resentment of the prisoner. Standards of decency are a restraint of government power in a democracy; lowering those standards in regard to the most disliked group, the convicted criminal, may mean lower standards of treatment of other groups and individuals.

Sentencing guideline systems—the central feature of which is the establishment of a commission to promulgate rules for applying determined sentences—in replacement of indeterminate sentencing, represent one of the most important developments of the past twenty-five years. The guideline system has been implemented at the federal level and in about half the states. Criminologists have not investigated why the other states have not followed this trend, notes a contributor, both because of the inherent difficulties in systematically studying indeterminate systems, and because of the need for a common terminology. Sentencing involves several goals—punishment, reformation, deterrence, denunciation, retribution, expiation, vindication of the law—and these purposes vary in the degree with which they apply to different offenders. Proposed sentencing information systems (SIS) would require courts to articulate how each of these purposes was applied in reaching a particular sentence. Maintaining statistics of the sentences imposed, as well as conducting follow-up studies and later histories of convicted offenders to assess effectiveness, would provide a basis for future sentencing that avoids the disparity and unpredictability for which indeterminate sentencing is criticized. The inflexibility and marginalization of the sentencing judge, for which the guidelines system is criticized, could also be prevented. Although the information technology exists for the maintenance of statistics, administrative set-up within the judiciary is a problem. Another question is how the sentencing judge should be bound by SIS. Suggestions include requirements

of a rationale when the sentence is one standard deviation from the mean for the offense. SIS may be seen not as a replacement of, but a supplement to, the guidelines system.

Two other contributors discuss application of the normative theory known as "limited retribution." This theory recognizes the various purposes of punishment, but sets an upper limit on the sentence imposed in the particular case on the principle that no punishment should be greater than that deserved for the last crime or series of crimes. One presents a proposal developed from the indeterminate systems of the states not following the federal model. This proposal modifies the state systems to satisfy the need for predictability, as well as flexibility in adaptation to different conditions. Another proposal considers whether enabling parole boards to determine the length of sentences serves the purposes of imprisonment. For some purposes—retribution, for example—there may be some advantage in viewing the offense with the distance of time. For other purposes, the parole board may not be useful. Studies have shown that general deterrence is best achieved through the certainty of punishment, rather than punishment severity; parole boards cannot achieve this. Rehabilitation and incapacitation, which are complementary purposes—since incapacitation is necessary to the extent that rehabilitation is not likely, and conversely, where rehabilitation is likely, incapacitation is not needed—may seem the best reasons for the parole board to determine the time of imprisonment. However, the board has little besides behavior in prison as a means to determine the likelihood of rehabilitation upon release, and this has shown to be a poor predictor. Another contributor looks at the promise of actuarial tables, rather than individual clinical assessment, as a method for predicting and managing future dangerousness. The editor presents twenty-five guidelines for future reform and policy.