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Book Review: Sentencing, by Clayton C. Ruby

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Book Reviews

SENTENCING, CLAYTON C. RUBY, Toronto: Butterworths, 1976. Pp. 537. ($55.00).

This text, to quote the author's preface at page vii, "attempts to canvass the law of sentencing, but not all cases have been included. The object has been, where possible, to set out and analyze principles, so that more effective submissions can be made with a view to assisting the sentencing judge."

It was, therefore, written for the practitioner who, we are informed at page vii, "keeps a few cases of note tucked away in the back of his mind" and generally deals with the sentencing aspect of a case more "inadequately . . . than any other recurring aspect of a criminal trial." Can anyone who spends a great deal of time in our busy criminal courts honestly disagree with Mr. Ruby's admittedly depressing assessment of the current state of the art? Something has to be done about sentencing and it is not just the practitioner who need feel shame in this connection. The law schools too, must assume their share of responsibility, for there are still very few specific courses offered in this area and any assumption that sentencing is covered in other more general courses such as "general principles of criminal law" or "criminal procedure" is not justified in most law schools. Thus, in the practice of law and in its teaching, there is a tendency to concentrate upon questions of substantive and procedural law which apply to ten percent of the activity — the contested trials — while sentencing, which affects most defendants the majority of the time, is largely ignored. Mr. Ruby's book will, therefore, be most useful to practitioners and should help to stimulate more Canadian academic activity in this field.

A criticism of this book could indeed be made of its failure to draw upon such relevant Canadian material as does exist.[1] To the small extent that this book uses text-book references or periodical literature, they are drawn entirely

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[1] E.g., Hogarth, *Sentencing As a Human Process* (Toronto: University of Toronto Press, 1971); Waller, *Men Released from Prison* (Toronto: University of Toronto Press, 1974); Report of the Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Ottawa: Queens Printer, 1969) — Ouimet Report; Law Reform Commission of Canada (Ottawa: Information Canada), *Studies on Sentencing* (1974), *Studies on Imprisonment* (1976), *Fear of Punishment* (1976), *The Principles of Sentencing and Dispositions* (Working Paper 3 — 1974), *Restitution and Compensation* (Working Paper 5 — 1974), *Fines* (Working Paper 6 — 1974), *Imprisonment and Release* (Working Paper 11 — 1975); Decore, *The Role of the Canadian Courts of Appeal and the Concept of Uniformity* (1964), 6 Crim. L.Q. 324.

from England or the U.S.A.[2] Had Mr. Ruby not been a Canadian, he might have been accused of the worst type of academic imperialism. As a Canadian, he has probably displayed, unwittingly and uncharacteristically, some evidence of colonialism.

The book can be analyzed as falling into five main parts. Chapters 1 and 2 deal with the general principles of sentencing and their application. Chapters 3 to 8 discuss various procedural topics including the use of the criminal record and the plea in mitigation. Chapters 9 to 16 cover the various dispositions which a court may make from absolute and conditional discharge to sentence of death. Chapters 17 to 21 comment upon an assortment of topics which appear to fall into the category of post-conviction matters, for example, parole and appeals, and issues which are ancillary to conviction, such as court orders for forfeiture and restitution. The final part, Chapter 22, deals with the topic of "range of sentence" and attempts to give some specific examples of the quantum of sentences being imposed in Canada. It may well be that this chapter is the most misguided part of the book, since Mr. Ruby, at page 424, is at pains to point out that the English "tariff" system does not operate in Canada, stating that, "[f]ortunately, no appellate court in Canada has chosen to adopt this system." Dr. John Hogarth's research would seem to suggest that range of sentence *as one factor only in the sentencing decision*, can best be handled by computers.[3] Because the human mind is very poor at handling a large number of variable factors when making a decision, one can only hope that the number of random samples selected by Mr. Ruby in this part of his book does not actively mislead sentencing judges.[4] In any event, the English "tariff," which implies that for each of the more common categories of crime, it is possible to identify a scale or range within which sentences (excluding individual measures) will normally fall, has been much modified in recent years.[5]

The part of the book dealing with general principles could be improved by taking account of modern Canadian scholarship in the field. For example, Mr. Ruby's revelation that the principal justifications for punishment cannot always be "wisely blended," *per* Mackay J.A., in *R.* v. *Willaert*,[6] and are often quite contradictory, has already been noted as commonplace.[7]

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[2] E.g., Thomas, *Principles of Sentencing* (London: Heinemann, 1970); Cross, *The English Sentencing System* (2d ed. London: Butterworths, 1975); Cross, *Punishment, Prison and the Public* (London: Stevens, 1971); Samuels, *The Fine: The Principles*, [1970] Crim. L.R. 201; Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968); American Friends Service Committee, *Struggle for Justice* (1st ed., New York: Hill and Wang, 1971).

[3] Hogarth, *supra*, note 1 at 392-93.

[4] See DeBono, *The Mechanism of Mind* (Penguin Books Ltd.: Harmondsworth, Middlesex, England, 1971) at 22.

[5] Thomas, *supra*, note 2 at 35 *et seq.*

[6] (1953), 105 C.C.C. 172 at 175 (Ont. C.A.).

[7] Weiler, "The Reform of Punishment" in *Studies on Sentencing, supra*, note 1 at 157: "Sometimes [the justifications for punishment] will conflict, in which case we must decide which is to be given greater weight in the concrete problem before us. All of this is terribly familiar within the sentencing process."

Further, reference to recent Canadian material would have eliminated the need to go as far back as the English jurist, Sir James Fitzjames Stephen, for a supporter of retributivism, at least in a limited sense.[8] In dealing with "individual deterrence," reference is made at pages 10 and 11 to "history and psychological factors" as a basis for scepticism of the success of this justification for punishment. Again, there is current Canadian research to fortify the position taken in the text.[9] Its use would have been much more effective than a vague reference to "history."

All in all, the general principles portion of the book amounts, at present, to no more than a brief outline of the vocabulary used in this area of penal philosophy. If the book is to have a solid future as a principle-based work on the sentencing system, it will have to be greatly expanded with full use made of available Canadian research and writing, and more editorial exposition of how the case law can be drawn together to support or refute our sometimes hypocritical penological aims.

In the procedural part of the book, there appears to be a glaring error at page 92 where, following a discussion of s. 500 of the *Criminal Code* (which deals with the record of a conviction or dismissal and proof thereof), we are asked whether this section can be applied to the trial of indictable offences with a jury or to summary conviction offences. This query is thoroughly superfluous since the Code makes specific reference to the proof of prior convictions in such cases at ss. 594 and 740 respectively; i.e., each relevant Part of the Code, *viz.* XVI, XVII and XXIV, has its own provisions in this respect. It might be that something could be made to turn on the argument of the applicability of s. 500 to Parts XVII and XXIV as the provisions in each Part of the Code are not identical, but since neither s. 594 nor s. 740 receives any mention elsewhere in the book, this could not have been the issue being pursued.

The vein of inaccuracy in the text continues when we read at page 220 that "a recognizance or an order of probation for a time in excess of the prescribed statutory period of two years is a nullity." The case cited for this proposition, *R.* v. *Fisher*,[10] accurately reflects the state of the law prior to the 1969 amendments to the Code, but since then it is clear that a probation order may extend for three years.[11] Thus, although the text accurately reports a

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[8] "[Retribution] is alive again, for reasons that go right to the heart of our conception of the criminal law." Weiler, *id.* at 96, and, at 205: "In its practical conclusions . . . I largely agree with the proponents of a purely negative theory of retribution, one which views the claims of justice as simply a restraint on crime control, not a value to be pursued for its own sake."
See also Walker, *Sentencing in a Rational Society* (London: Allen Lane, The Penguin Press, 1969) for a similar defence under the name of "distributive retributivism."

[9] Waller, *supra*, note 1 at 205: "Through the use of statistical techniques we have shown that neither prison [n]or parole, in part or in total, are correctionally effective." See also Law Reform Commission of Canada, *Fear of Punishment*, *supra*, note 1.

[10] [1964] 3 C.C.C. 37 (Man. C.A.).

[11] *Criminal Code*, R.S.C. 1970, c. C-34, s. 664(2)(b). The provision for a probation order to be attached to a term of imprisonment or a fine, s. 663(1)(b), no longer restricts the duration of such an order to 2 years as did its predecessor, s. 638(2) of the 1955 Code.

decision which was correct at the time it was delivered, subsequent changes to the *Criminal Code* have rendered the case, at best, irrelevant and, at worst, misleading, since one is clearly left with the impression that a probation order has a statutory life of only two years.

Furthermore, the penalty for theft not exceeding $200.00 is quoted at page 445 as two years, whereas this now applies only to conviction on indictment; the penalty on summary conviction being six months imprisonment or a fine of $500.00, or both.[12] There are also some minor inaccuracies, for example, a constant reference to "theft under $200.00" instead of the more accurate "theft not exceeding $200.00," since the former wrongly excludes $200.00 from the category being discussed.[13]

There is considerable evidence that this manuscript was prepared in haste and edited less than scrupulously. Thus we read at page 135, "[c]ounsel may show that the actual part he [sic] played in the offence was less significant than that played by others." One would hope so indeed! On the next page there appears ". . . the court took into consideration 'the precarious financial and emotional state' of [the accused] at the time of the offence, information that came to them [sic] by way of a psychiatric outline." A little later, at page 182, we find, "[w]hile in custody awaiting sentence, a procedure which should never be followed, the accused was called as a Crown witness against Warren MacArthur, who was an accomplice in the crime with him." Now it is clear that the procedure which should never be followed is the calling of an unsentenced accused to give evidence against accomplices, since it might look as if there is an advantage to be obtained by that witness depending upon what evidence he gives. We know that Mr. Ruby is not railing against prisoners being in custody awaiting sentence since, at page 223, he outlines a case where such a practice could be justified. As a final example of evidence of hasty editorial work, I would cite the fact that the selfsame quotation from *R.* v. *Robinson*[14] appears at page 44, then again at page 56, all in the same chapter. Repetition for emphasis is one thing, but there is a general

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[12] S.C. 1974-75, c. 93, s. 25 and Code, s. 722(1).

[13] Text at 65, 223 and 445. This is just a small example, but inaccuracies abound in this work which will have to be put right in any subsequent edition. There are, for instance, citation errors at 166 where the well-known English cases of *Birtles* and *Macro* appear as *Birtless* and *Marco* respectively, at 161 "(Alta. Dist. Ct.)" appears as "(Man. Dist. Ct.)" in footnote 103, and at 143 where footnote 38 refers us, inexplicably, to page 193. There are also a host of typographical errors of which the following are merely representative: "liason" for "liaison", "eminance" for "eminence" (both at 5), "disaproportionate" for "disproportionate" (at 23), "injustifiably" for "unjustifiably" (at 29), "court" for "count" (at 50), "habeaus corpus" for "habeas corpus" (at 64), *"Juvenile Delinquency Act"* for *"Juvenile Delinquents Act"* (at 71), "not" for "nor" and the word "they" missing (at 98), "excepted" for "expected" (at 106), "substaining" for "sustaining" (at 129), "dependents" for "dependants" (at 179), "(B.C.S.A.)" for "(B.C.S.C.)" (at 220 in footnote 55), "pleased" for "pleaded" (at 237), "devided" for "decided" (at 424), "s. 249" for "s. 294" (at 445). This last error has the consequent effect of removing "theft" from the Table of *Criminal Code* Sections at 529 so that one of our commonest of offences is not represented there. There are many other similar inaccuracies which I shall refrain from identifying. The point, I feel, has been made.

[14] (1969), 53 Cr. App. R. 314.

absence of cross-reference throughout the book which, on some occasions, is irritating, but on others is actually misleading.

One of the clearest cases of a failure to cross-reference occurs when the author is dealing with the effect of an absolute discharge. Pages 186-87 leave the impression that a discharge does not result in a criminal record, whereas pages 198-99 make it perfectly clear that the advantage obtained by the accused is that he may have his record of discharge expunged more quickly under the pardoning procedures. It is, of course, unfortunate that Canada chose this rather self-defeating method of dealing with the discharge provision, but this book, by quoting *R.* v. *McInnis*[15] to the effect that the clear purpose of the legislation was to enable a court to avoid ascribing a criminal record to an accused, without at the same time mentioning the effect of the *Criminal Records Act*,[16] will mislead many who do not read on to pages 198-99 at the same sitting.

Another example of the lack of cross-reference occurs at page 199 where the author deals with the question of the availability of discharges for provincial offences. Here Mr. Ruby throws doubt upon a Nova Scotia decision[17] which declined to make such an application and properly draws our attention to the "incorporation by reference" argument that provincial summary conviction legislation, if it applies Part XXIV of the *Criminal Code* to such summary conviction proceedings, might be said to have made s. 720 of the Code available (within which the definition of "sentence" includes the discharge provision). However, at page 221, we learn that under *The Probation Act*[18] of Ontario, for example, a person may be put on probation *without being convicted* [emphasis added]. Now surely, whatever the merits of the incorporation by reference argument may be, here is a method whereby if a judge is so minded, the "benefits" of the absolute discharge can be obtained within purely provincial legislative authority.[19] The failure to mention this expressly in the earlier section is bound to mislead those who are led to believe that the availability of an effective discharge without conviction can only be sustained, if at all, by applying s. 662.1 to provincial summary conviction offences.

Another matter for criticism is the fact that many of the chapters contain very long *verbatim* and unannotated quotations from the *Criminal Code* and other federal legislation. For instance, Chapter 12 on "Costs" contains three and one half pages of direct quotations and less than two pages of commentary, Chapters 10 and 11 have four and six and one quarter pages of legislative quotations respectively and Chapter 16, "Sentence of Death," is totally made up of such reproduced material. This is a very expensive way indeed, of buying a piece of legislation!

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[15] (1973), 13 C.C.C. (2d) 471 (Ont. C.A.).

[16] R.S.C. 1970 (1st Supp.), c. 12 as am. by S.C. 1972, c. 13, s. 72.

[17] *R.* v. *Gower* (1973), 10 C.C.C. (2d) 543 (N.S. Co. Ct.).

[18] R.S.O. 1970, c. 364, s. 5(1).

[19] Indeed, since there is no finding of guilt there would not even be a "record," an added advantage to an accused.

The index also leaves much to be desired, comprising a mere seven pages and containing none of the headings in the table of contents which itself comprises nine pages. Since the table of contents appears in the order in which the book is written, and not alphabetically, it would clearly have been better to have had all of the table of contents headings filed alphabetically in the index. If this had been done, some of the problems caused by the lack of cross-referencing in the book would have come immediately to the author's notice, and both the index and the content of the book might thereby have been improved.

On the positive side, the book offers a great deal. In a recent sentencing seminar at Osgoode Hall Law School,[20] seven students were asked to affix an appropriate sentence upon an accused in a given fact situation where the students were privy to the submissions for the Crown and the defence following a plea of guilty to theft exceeding $200.00. It was fully expected that the range of sentence which would be imposed would vary widely as between the seven student "judges," and this, in fact, was the case. What was surprising, however, was that four out of the seven students gave a disposition which was illegal; i.e., the mixture of definite and indefinite sentence and the combination of imprisonment, fine and probation were such that they would have been null and void. In short, sentencing involves not only the problem of *quantum*, but also the technical difficulty of complying with the various provisions of the *Criminal Code* and other relevant statutes.

Mr. Ruby's book does an excellent job of unravelling some of the difficulties involved in combining available dispositions, for example, the effect of s. 646(2) and differences in the consequences of making dispositions under s. 663(1)(a)(b) and (c). If it should be thought that the above example showing the difficulties which law students have in composing legal sentences would not apply to judges in the "real world," there is some recent Canadian scholarship which should disabuse any such belief.[21]

Sentencing law is difficult and technical. Mr. Ruby's book is one step towards clarifying some of the issues. This is the most onerous job which society gives to the judiciary. Any attempt to help improve the legality and propriety of dispositions should not be lightly scorned. This book is a modest beginning and Mr. Ruby and his collaborators are to be congratulated for their courage in making the first move. It behooves the rest of us to offer our assistance in improving it, to write a better one, or to maintain a modest silence. It is clear, however, that Canada's definitive book on "Sentencing" has not yet been written.

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[20] The Intensive Programme in Criminal Law at Osgoode Hall Law School, York University, is described in Grant, *New Trends in Canadian Legal Education* (1976), 24 Chitty's L. J. 172.

[21] Dombek, *Probation* (1974-75), 17 Crim. L. Q. 401 where the legality of conditions attached to probation orders is discussed and typical errors are analysed.

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