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RECENT BOOKS

CRIMINAL LAW AND CRIMINOLOGY: A SURVEY OF RECENT BOOKS

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ASSET SEIZURE

R. T. NAYLOR, WAGES OF CRIME: BLACK MARKETS, ILLEGAL FINANCE, AND THE UNDERWORLD ECONOMY (Ithaca, Cornell University Press, 2002) 336pp

The success of the policy of controlling crime by pursuing its proceeds remains unproven, the author argues. The author also finds several social harms of the policy, including a distortion of law enforcement priorities, the reduction of an individual's defense against arbitrary official action when the government is allowed to pursue punitive measures while satisfying only a civil burden of proof, and the corruption engendered by the use of "sting" operations. Notions of worldwide cartels controlling and manipulating vast sums of illegally gained sums do not reflect the evidence as examined by the author, and probably are the result of hyperbolic statements from government officials, widely repeated in the media, based on sensational but atypical examples. The alternative image, that most crime is committed by single or loosely-organized individuals who quickly dissipate the proceeds rather than hoarding them into large accumulations of capital, may be more realistic but does not capture the public imagination. Market based offenses differ significantly from predatory crime; the latter involves wealth taken from the victim through force or fraud, rather than a mutually agreed upon exchange of wealth for value. Market-based offenses are driven by demand; in a mutually agreed-upon transfer, wealth is exchanged for value. Investigation of predatory crime begins with the victim's complaint. Market-based offenses rarely if ever have such a victim complaint, so law enforcement must proceed on its own initiative. Selection of targets can become arbitrary, capricious or even abusive. Applying the predatory crime model, and the corresponding law enforcement mindset, to market-based offenses has resulted in the error of imposing a supply-side solution to demand driven problems. History has no example of a successful defeat of a black market by supply-side controls; the author argues the present policy is another such failure, and proposes, as

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an alternative, applying a reverse burden of proof in the tax law, whereby expenditures exceeding reported income are presumed to be unreported income. Even though the unreported income would be taxed only at the marginal rate, the accompanying fines for failure to report would dry up most of the criminal proceeds. This would remove the incentive for most market-based crime, while avoiding the problems of tracing proceeds to a particular crime.

BIAS MOTIVATED CRIME

JEANNINE BELL, POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME (New York, New York University Press, 2002) 227pp

Police construct the meaning of a particular incident or occurrence by the ways they investigate it. Police are constructing an incident as a hate crime if they investigate it as such. Conversely, they are constructing an incident as something other than a hate crime if they do not investigate it as such. While an incident investigated and charged as a hate crime may ultimately not be so constructed later in the criminal judicial system, an incident not originally constructed as a hate crime by the police investigation rarely is treated as one later in the system. (Especially violent or highly visible cases are an exception.) The police decision not to investigate or charge an incident as a hate crime usually is unreviewed, even when the incident is prosecuted as another kind of crime. Empirical data regarding police methods of collecting evidence regarding the motivation and other elements of a hate crime offense is important in determining whether the laws are having their intended regulatory effect. Evaluation of various kinds of theoretical objections to hate crime legislation (e.g., that it is unnecessary, that it is unenforceable, or that it is unconstitutional) needs empirical data on how the police enforce the legislation through investigation and arrest charge. Most hate crime, the author finds, is not an expression of opinion, but the attempt of the majority group in a neighborhood or community to retain hierarchical dominance as minorities begin to move in. Important barriers to investigating an incident as a hate crime include the view within police culture that hate crime is unimportant and unworthy of investigation, community attitudes, the ambiguities of hate crime law and the difficulty of connecting act and motivation, the unfavorable consequences to a city if arrest statistics give it a reputation for hate, and the alternative possibility of punishing the incident without defining it as a hate crime. The author worked with a hate crime investigation unit in a major city, and describes the process of deciding whether to apply hate legislation, the tactics in overcoming community resistance and the methods of collecting the necessary evidence. Establishment of such a special unit is an important first step in confronting the other barriers to investigating hate crime. The author also found that the officers appreciated the important First Amendment distinction between protected expression and unprotected behavior, and conducted their investigation accordingly. Hate crime legislation is needed, the author argues, not so much for highly publicized incidents, but for low level, obscure instances.

CAPITAL PUNISHMENT

RICHARD MORAN, EXECUTIONER'S CURRENT: THOMAS EDISON,

GEORGE WESTINGHOUSE, AND THE INVENTION OF THE ELECTRIC CHAIR (New York, Alfred A. Knopf, 2002) 271pp

This book centers around the case of William Kemmler, the first person executed under New York's 1888 Electrical Execution Act. The search for an execution method more humane than hanging led to electrocution (the term is a conjunction of "electrical execution.") An organization known as the Medico-Legal Society was tasked with finding the quickest and most painless way to electrocute the condemned. Problems included how much electricity to use and where to apply it, but the first problem was between direct and alternating current. The Society decided that electrocution would be by alternating current from the dynamos of George Westinghouse applied through the newly invented electric chair. The author argues that the Society arrived at this decision through the prestige and manipulations of Thomas Edison. Edison was trying to sell direct current to cities, businesses and residences, but he was losing market share to his chief rival, Westinghouse, who was selling alternating current. Edison had been trying to create the impression in the public mind that alternating current was dangerous to users. If the "executioner's current" were the alternating form, Edison thought, the public's association of Westinghouse's electricity with death would discourage purchases from Westinghouse. After Kemmler's conviction, a leading attorney, W. Bourke Cockran, took his case. The author finds credible reports at the time that Cockran was secretly in the pay of Westinghouse, who was trying to prevent the use of his dynamos as instruments of death. The trial court, after an extensive evidentiary hearing, found that electrocution by alternating current was not unconstitutionally cruel. On appeal, Kemmler's attorney argued that, even if not cruel, electrocution violated the Cruel and Unusual clause of the New York constitution, because it was unusual. The New York Court of Appeals accepted the findings that electrocution was not unconstitutionally cruel and, after reading the clause as a whole, ruled that electrocution was not unconstitutional merely because it was unusual. In one of the first attempts to apply the Bill of Rights to the states through the 14th Amendment, Kemmler brought a *habeas corpus* petition to the Supreme Court. Citing its precedent that the Eighth Amendment did not apply to the states, the Court denied the petition, but commented favorably on the New York court's opinion, including its standard for unconstitutional cruelty; *Kemmler* thus became important precedent, and although the Eighth Amendment later was applied to the states, new methods of execution were not ruled unconstitutional merely on grounds of their unusual nature. Besides replacing hanging with electrocution, the 1888 Act established now familiar pre-execution procedures, such as post-sentencing solitary confinement up to execution. Some have argued that "death-row" confinement is itself an Eighth Amendment violation. Electrocution, (and later, asphyxiation, firing squad, or injection,) also changed the meaning in society of the death penalty, from a communal, public act in the vicinity of the crime, to a semi-secret administration by state technicians. Kemmler's execution took more than the quick jolt that was planned, and although modifications were made, an ongoing controversy developed over whether electrocution was painless. The author discusses how the use of science and technology to reduce the suffering of the executed tends to quiet the debate over the death penalty, and it is the proponents of the death who most argue for the search for more humane methods. The author finally argues that however humane the method, execution itself is inherently inhumane.

CRIME VICTIMS

MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS (New York, New York University Press, 2002) 399pp

English criminal law conceived crime as primarily an offense against the sovereign; after independence, the core concern of American criminal law, the author states, became the infliction of violence on one person by another, and the consequent violation of personal autonomy. Each person has the right, as a person, not to be subjected to interpersonal violence. The "victim's rights" movement began with the attempt to establish a system for compensating for the suffering caused by criminal acts. This notion, however, has been distorted with the development of the "war on crime," whose primary objective was increasingly punitive treatment of offenders. While the crime victim certainly feels an impulse to see the offender punished, the author notes, and a stable system of criminal law must take this impulse into account, the war on crime, with the real purpose of increasing punishment, advanced rhetoric of a victim's right to have the offender punished. Compensating the victim (the original concern of the victim's rights advocates and a chief concern of the criminal system on many other Western nations) is not the same as punishing the offender. A highly punitive system may actually interfere with victim compensation, as can be seen with systems in other countries which allow the offender to offer compensation in lieu of punishment. Despite the rhetoric, the real purpose of the current "war on crime," is not protection of the individual by the state, but the state protecting itself. Creation of a victim's right to see the offender punished becomes not a right of an autonomous person, but the right of the state to impose punishment. The crime victim becomes a means for the state to exercise this right, and actually receives poor treatment in the current administration of criminal law. The war on crime is primarily concerned with offenses that have no victims, especially possession offenses. The author analyzes how enforcing these offenses are an effective means of social control, rather than of protection of individuals. The importance in the criminal system of possession offenses can be seen from the enumerations within the criminal code proscribing, the portion of the prison population convicted of, and the number of Supreme Court cases concerned with, possession offenses. Possession offenses usually require no showing of criminal intent (enhanced offenses are created when such an intent is shown) nor an actual act. Possession offenses thus ignore important principles of common criminal law, and become similar to status offenses, such as vagrancy. The offender is seen as someone threatening the social order, rather than as someone who has violated the autonomy of another person. Recovering the protection of victim's rights for its own sake, and treating both victim and offender as persons, would limit but also legitimize the State's power to punish.

LAW ENFORCEMENT

RONALD KESSLER, THE BUREAU: THE SECRET HISTORY OF THE FBI (New York, St. Martin's Press, 2002) 488pp

The author briefly narrates many of the important FBI cases from its founding to its response to the World Trade Center and anthrax attacks. Missteps by the Bureau are discussed, although the author believes the successes outweigh the failures. Each

director is profiled, his affect on the agency is analyzed, and relations with the president and attorney general at the time are discussed. The author favorably comments on the reforms made by the current director, appointed in the summer of 2001, to improve the overall performance and image of the FBI, and to pursue anti-terror investigations while continuing other ongoing work.

PENOLOGY

NORVAL MORRIS, MACONOCHIE'S GENTLEMEN: THE STORY OF NORFOLK ISLAND AND THE ROOTS OF MODERN PRISON REFORM (New York, Oxford University Press, 2002) 213pp

Alexander Maconochie, who oversaw the English penal establishment Norfolk Island from 1840-1844, instituted several innovations, including: qualifiedly indeterminate sentences based on work and behavior rather than on fixed time, measured by a system of marks known to the prisoner; encouragement of group cooperation among the prisoners; supervised and graduated autonomy within and without the prison as the prisoner accumulated marks; and an assessment of the prisoner's fitness for the next stage of autonomy, and ultimately freedom. Similar reforms have been tried throughout the world since. Significant problems with modern implementation policies resembling Maconochie's include finding useful work for prisoners, the lack of opportunities for prisoners positively to engage in good behavior (beyond the negative of merely avoiding bad behavior), the question whether good time credit should "vest," community opposition to the early release of prisoners, and the political opportunities in calls for severer treatment of criminals. While Maconochie-type reforms are not always successful, the deterrent value of increasingly punitive treatment of criminals has not been empirically established. The author criticizes current trends in American penology, including the development of the "supermax" facility, mandatory sentencing, and the tendency to imprison aggressive, bizarre and acting-out mentally ill people without adequate treatment. The author considers why we should be concerned with prison conditions, and argues that it is the fact of imprisonment itself, rather than punitively harsh conditions within the prison, which discourages crime.