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RECENT BOOKS

CRIMINAL LAW AND CRIMINOLOGY: A SURVEY OF RECENT BOOKS

BARD R. FERRALL*

DEFENSES

CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* (New York, New York University Press, 2003) 371pp.

Reasonableness is an important element of two established defenses to a charge of murder: provocation and self-defense. Using an historical analysis of the development of these two defenses, the author argues that the actual application of the reasonableness standard derives from societal constructs of race and gender, despite racial and gender neutrality in the legal language defining the defenses. Examining use of the provocation defense in cases of murder following discovery of spousal infidelity, the author finds the defense significantly more successful in cases where the husband murders the unfaithful wife, than when the wife murders the unfaithful husband. In the case of non-violent homosexual advances, the author finds that the actual application of the reasonableness standard derives from the social construction of male heterosexuality. The outcome of cases where the murderer and victim are of different races, and self-defense is pleaded, indicates that societal constructs and stereotypes of the Black or Latino male as dangerous form an important component in decisions as to whether the defendant reasonably perceived a threat. The extreme difficulty for abused wives who kill their abusers to assert self-defense against the murder charge by successfully claiming the reasonableness of their fear of their abusers, indicates that gender constructs figure significantly in the application of the reasonableness requirement. The author discusses general problems in the reasonableness standards, such as adequately describing the "reasonable man" to the jury. Should the standard be normative or descriptive? Should it be "objective" or "subjective"? To what extent should a jury be allowed to consider the particular facts of the defendant's background in determine the reasonableness of his or her action? Proposals for substituting a reasonable woman standard, where appropriate, are

* Reference Librarian, Northwestern University School of Law Library; M.A., University of Denver; J.D., Northwestern University School of Law.

examined. The author concludes with the proposal that the law consider the reasonableness of the defendant's emotions to be a separate question from the reasonableness of his or her actions.

PRISONS AND PRISONERS

PAULA C. JOHNSON, *INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON* (New York, New York University Press, 2003) 339pp.

The author presents narratives from African American women currently or formerly incarcerated. Included also are interviews with African American women involved with the criminal justice system in other ways. After reviewing studies on incarcerated women, and employing "life history" methodologies, the author developed several topics for the interviews, including: early years, adolescence, and adulthood; the onset of criminality; experiences with adjudication; imprisonment experiences and resistance; and release and reentry into the community. Recurring themes include dysfunctional family life, poor choices for companions, limited choices for life development, physical, emotional and sexual abuse, remorse over harm caused to others, and concern about family. After briefly surveying the disparate treatment of African Americans in the criminal justice system before the development of the prison as a societal institution, and the experiences of African American women as that institution ascended as the primary method of criminal punishment, the author considers possible reasons for the sharp demographic rise in female incarceration. According to authority presented by the author, the increase stems, not so much from an increase in the number and seriousness of crimes committed by women, but from changes in criminal justice policy—especially the war on drugs. While recognizing that responsibility and culpability are central questions in criminal adjudication, the author argues that the system must take greater account of the complicating issues of race and gender. Among the policy implications the author found in women's narratives are: the need for reduced reliance and development of alternatives to incarceration; greater concern for the particular mental, psychological and medical needs of women in general, and African American women in particular; attention to and support of incarcerated women's roles as caretakers to minor children; the development of protections of young females from physical and sexual abuse both inside and outside the home (especially important because of high correlation of African American female criminality and earlier abuse) and institutions which guide growth to adulthood.

TRIALS

LOUIS FISHER, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW* (Lawrence, University of Kansas Press, 2003) 193pp.

In June 1942, eight German agents, in two groups, landed in the United States to commit sabotage. All had spent time in the United States before the war; two were naturalized citizens. Although they had volunteered, they were not particularly committed to the German war effort or to the Nazi party. They were all quickly captured, largely because one of the leaders turned himself in to the FBI and assisted in rounding up the others. In deciding how to prosecute, the government faced two

problems. First, because the agents were caught so quickly, none had committed overt acts sufficient to have made them guilty of the defined offenses of sabotage or espionage, or even of statutorily defined attempt; at most they could be proved guilty of relatively minor offenses such as conspiracy or illegal entry into the country. Second, maintaining secrecy about the facts of their capture was thought necessary to discourage similar attempts by the enemy; the press had attributed the capture to excellent detection by the FBI, and if the enemy could be kept mystified about the reason for the quick capture, it may believe that further attempts to infiltrate saboteurs and spies would also fail. The author quotes from memoranda by the President, the Attorney General and other officials, which led to the conclusions against prosecution in the civil courts. Trial by courts-martial was also rejected. The President issued a proclamation to create a military tribunal to try the agents. Important ways in which the tribunal differed from statutorily created courts-martial included a provision that death could be imposed by two-thirds vote (the courts-martial required unanimity) and the tribunal's power to establish its own rules regarding procedure and the admission of evidence through the course of the trial. The President's proclamation also directed the record and judgment to be sent directly to him for disposition and gave the President final reviewing authority; appeal to civil courts was specifically excluded. Four charges were brought; three were under the legislatively enacted Articles of War—sabotage, espionage and conspiracy. The other charge contained similar specifications but was brought under the "law of war," which was not enacted by Congress, or any legislative body, but had developed from general concepts of international law. One of the defense attorneys challenged the jurisdiction of the tribunal, and filed a *habeas* petition with the Supreme Court during the trial. The Court agreed to meet during the summer, and allowed nine hours of oral argument, the highlights of which the author quotes. The Court ruled affirmatively on the legality of the tribunal in a *per curiam* opinion issued in advance of a full opinion (*In re Quirin*). The tribunal found all eight guilty and thought each should be given death; the President ordered six to be executed, and they were within a few days. The author presents material from the internal memos of the Court as it struggled to reach unanimity (thought to be especially important since the executions had already taken place) in explaining the *per curiam* opinion. Besides the sufficiency of some of the evidence, other important issues included the legality of the tribunal, the *ex post facto* character of the "laws of war" charge, to what extent the Civil War case *Milligan* should be followed, and the overriding question of whether the defendants were even entitled to *habeas* action. The author discusses criticisms of this and other court actions during the war. While noting the special pressure on the courts during wartime to avoid impeding the war effort, the author criticizes Roosevelt for creating an unnecessary confrontation with the courts. After the World Trade Center attacks, President Bush established military tribunals in a proclamation the author finds similar to Roosevelt's, including the denial of access to civil courts, "probative value" as the sole standard for admitting evidence, and the submission of the record to the President for final review. The author criticizes facile reliance on *In re Quirin* to justify current actions.

VICTIMS

HEATHER STRANG, *REPAIR OR REVENGE? VICTIMS AND RESTORATIVE JUSTICE* (Oxford, Clarendon Press, 2002) 298pp.

In the late medieval times the primary concern of criminal justice was atonement and restitution by the offender to the victim. When the emerging modern state assumed the administration of criminal justice, crime was conceived as an offense against the state and society; the place of victim in the criminal justice system became mostly as a source of evidence against the offender. In the past quarter century, victim rights movements and various sociological studies revealed significant victim dissatisfaction with the system. Surveys found that victims want: respectful treatment and a less formal system which takes into account their views; more participation in, and more information about the processing of their cases; material and emotional restoration; and an apology from the offender. The victim movement has taken two main courses: "rights focused" and "support focused." The latter model, developed in Europe, is mostly community-based and generally works outside the formal adjudication process. The former model was developed mostly in the United States, and has had its greatest effect in political demands for more severe punishments (although it is not clear that this is the primary concern of most victims). Neither model seems to bring the victim into the justice system in ways responsive to the needs listed above, especially because amends and apology from the offender to the victim are not elicited. A third alternative, "restorative justice," has developed in various parts of the world. It takes many forms, but common themes and concerns include: offender accountability; the repair of harm resulting from the crime; balancing the needs and rights of victims, offenders and community; and less formal procedures which emphasize citizens and civil institutions and which actively involve victims, offenders and other affected parties. The first requirement is the offender acknowledging the harm he caused, and then making positive efforts to restore the victim's injury, property, dignity and sense of security. Specific ways to achieve restoration are worked out through a series of conferences among the parties with a stake in the restoration. The movement also aims to restore the community loss. Criticisms and concerns about the process include the victim's fear of encountering the offender, failure to address power imbalances between the parties, especially in inter-gender crimes such as domestic abuse, and the potential use of the victim primarily to achieve rehabilitation of the offender. Other critics are concerned that the process may tend to impose punishment and retribution, when this should be the function solely of the state. Questions also arise as to whether restorative justice fulfills society's need to deter future crime. The author presents studies of victim satisfaction with restorative justice processes. Victims generally express satisfaction, and current data indicate that the restorative justice procedure is more responsive to the victims' needs than the court-centered system. Specific expressions of victim dissatisfaction may be tied to poorly-conducted conferences. The author believes the critics' concerns are answered in the research, and finds grounds for pursuing the restorative alternative.