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Bard R. Ferrall

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RECENT BOOKS

CRIMINAL LAW AND CRIMINOLOGY: A SURVEY OF RECENT BOOKS

BARD R. FERRALL*

CRIMINAL JUSTICE ADMINISTRATION

LORAINE GELSTHORPE & NICOLA PADFIELD, EXERCISING DISCRETION: DECISION-MAKING IN THE CRIMINAL JUSTICE DECISION AND BEYOND (Devon, Willan Publishing, 2003) 228 pp.

Recent legislative enactments in England have sought to limit the exercise of discretion by decision-makers in the criminal justice system. The editors have concluded that empirical description of actual use of discretion is necessary to evaluate whether too much or too little discretion is allowed, or is otherwise misallocated. In order to examine the exercise of discretion by decision-makers, the editors have collected essays which study the exercise of discretion at several specific points in the system. These essays evaluate the following: whether to prosecute juveniles; what level sentence to impose, or whether to impose some type of sentence other than confinement; the competing penological theories motivating such decisions; whether to apply prison rules, or whether to refrain from applying the rules in order for prison officials to retain authority and security while negotiating cooperation from the confined population; board decisions in granting parole to life sentenced prisoners and the weighing of factors in calculating the risk to society of releasing the prisoner; the decision whether to send a convict to, and later whether to release a convict from, psychiatric care (where the decision is complicated not just by the calculation of risk, but also by practical concerns such as limited hospital space); and the decision whether to confine asylum seekers.

A concluding essay discusses the problems discovered by the other contributors in attempting to establish order and rationality in the criminal justice decision process by constraining the exercise of discretion through rules and enacted procedures. Though not formally recognized as such, discretion is exercised throughout the system. Decisions about a case are made at various stages; earlier decisions affect how discretion can be exercised in later stages. For example, the recommendations made

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

or the information to include in a report or record, significantly affects later dispositions. Rules cannot completely control these decisions. Moreover, persons not formally recognized as decision-makers often make these decisions. The process is not merely linear: earlier discretion may be exercised in anticipation of later decisions. For example, recommendations may be influenced by expectations of what will be adopted or rejected. The concept of a "serial" rather than a linear process of criminal justice decision-making has important implications. In a "serial" process of decision-making, power is dispersed throughout the system, and decisions made at one point can shape or severely restrict the choices available at a later point. The "case" is not discrete and unchanging, but is formed at various overlapping stages in the system. Criminal justice officials to whom formal discretionary authority is not allocated by the enacted procedures may in fact exercise important discretion. The decision, for example, whether to label an incident an "offense" or a "dispute," or even whether to bring the matter into the system at all, may profoundly affect the final outcome. Decisions made at the point where the rules formally allocate discretionary power may largely be the ratification of earlier decisions. Thus, discretion in the criminal justice system may be exercised in many places other than where enacted procedures and rules would seem to place it. Moreover, discretion is exercised in the context of many other surrounding concerns. The application of specific rules to the factors intrinsic to the specific case may only partially explain why a particular decision was reached. The frameworks within which individual decision-makers interpret information also affect the exercise of discretion. The same information framed differently can lead to different decisions. Researching the criminal justice decision process requires a better tuned method than correlating "factor" and result, because understanding the impact of the individual factor requires understanding how the decision-maker "framed" the factor. Formulating the rules that will provide consistent practice of criminal justice requires further understanding of how discretion is exercised.

JUVENILES

MARGARET K. ROSENHEIM, FRANKLIN E. ZIMRING, DAVID S. TANENHAUS, & BERNARDINE DOHRN EDS., A CENTURY OF JUVENILE JUSTICE (Chicago, University of Chicago Press, 2002) 554 pp.

Surveying the century after Illinois enacted legislation establishing the first court system devoted to juveniles, these essays examine topics of historical perspective, legal theory, social science as related to juvenile justice policy, other child welfare institutions and their links to the juvenile justice system, and comparative studies of juvenile systems around the world. Specific topics include: the changing and complicated attitudes toward children in the nineteenth and early twentieth centuries; the experiments that led to the transformation of the first juvenile court to the present system; the various methods and institutions developed over the century for confining juveniles; the emergence of legal conceptions of childhood; the reformulation of juvenile justice jurisprudence after *Gault*'s requirement of procedural regularity in the juvenile courts and the need to divert juveniles from the harms of adult criminal punishment; the development, in the last half of the century, of a juvenile "status offense" (i.e., actions normally legal but defined as offenses when the offender is juvenile); the relationship of social science research and juvenile justice

administration; interactions between public schools and the juvenile system, and the failure to bring the two institutions into a positive alliance; and studies of juvenile systems in Japan, England and Europe.

SENTENCING

GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (Stanford, Stanford University Press, 2003) 397 pp.

The American criminal justice system has become predominantly a plea bargaining institution. The author seeks to explain this phenomenon by using chronological studies of the rise of plea bargaining and by examining why plea bargaining operates in the interest of the relevant actors: prosecutors, defendants and sentencing judges. Other studies tracing the statistical rise of plea bargaining have explained it in terms of case load pressure, prosecutors' need for efficiency, the development of police science which, in some views, make a trial unnecessary, or in terms of other social factors. The author takes a court-centered approach and investigates the source of the power to plea bargain. The prosecutor and defendant may both have incentives to plea bargain, but the author argues that plea bargaining only becomes systematic with the participation of the sentencing judge. The author follows earlier studies indicating that plea bargaining began in the early nineteenth century with prosecutions for violations of liquor laws. Although the liquor laws assigned a fixed fine to each level of violation, the prosecutor could charge the defendant with an offense matching the facts or she could offer to bring a lower charge in exchange for a guilty plea. Plea bargaining also developed in capital cases where prosecutors offered to bring non-capital charges in exchange for a guilty plea. The incentive for defendants to plea bargain grew in the middle of the nineteenth century when changes in procedure permitted the defendant to testify to her own innocence at trial (previously the defendant was not permitted to testify at all). The Public Defender's Office further contributed to the rise of plea bargaining: public defenders, coping with heavy case loads, found it preferable to devote their scarce resources to a full trial only where the defendant was most likely innocent. Docket pressure also encouraged the judiciary to exercise its sentencing power in favor of plea bargaining. However, the author argues that it was the rise of personal injury suits later in the century that crowded the docket and made it in the interest of the judge to quickly dispose of criminal cases. The use of "on-file" sentencing (putting cases on file and staying sentences unless the defendant committed another crime), which eventually became known as probation, furthered the use of plea bargaining. The innovation of indeterminate sentencing may have undermined the dominance of plea bargaining by moving some of the sentencing power from the judiciary to the parole board. The author, however, finds that case load pressure has also forced parole boards to cooperate with the institution of plea bargaining. The rejection of virtually every innovation that might have reduced the power of plea bargaining demonstrates its dominance.. The Federal Sentencing Guidelines, and similar trends in the states that legislatively mandated sentencing levels for each offense, furthered plea bargaining's dominance in much the same manner as the liquor laws. However, by removing the sentencing power from the trial judiciary to the legislature, the Guidelines shifted the plea bargaining power from the judge to the prosecutor.

THEORY

STEPHEN SHUTE & A.P. SIMESTER, CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART (Oxford, Oxford University Press, 2002) 332 pp.

Although the distinction is not always clear, as the editors discuss, theories about the special part of criminal law are contingent on the elements of particular offenses, while theories about the general part of criminal law are concerned with the criminal law enterprise in general. Analysis of problems arising from particular offenses, such as whether justifications or excuses should be available to battered women who kill their abusers when not immediately or imminently threatened, may be assisted by reference to general theories of criminal law and its purpose. Contributors to this volume consider whether certain applications of criminal justice can be criticized on the basis of general criminal law theory. Issues discussed include: the development of an individualized objective standard; problems arising from the general requirements of voluntariness, intent, knowledge or belief; the growing number of defined offenses; the intensification of punishment and whether these developments exceed the purposes of and justifications for criminalization; the specific act requirement and the imposition of criminal liability for some instances of omission, failure to act, or recklessness; confinement of persons not on the basis of a specific act but on a determination of dangerousness; whether criminal law should be used to regulate behavior not morally blameworthy; and whether courts should accept actions which violate defined offenses (such as entrapment by law enforcement officers) but which may promote legal purposes. The authors also discuss the failure to define the interrelationship of the purposes of criminal law and the resulting conflict among the purposes and the exercise of undisclosed discretion by law enforcement officials.