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Criminal Law and Criminology: A Survey of Recent Books

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RECENT BOOKS

CRIMINAL LAW AND CRIMINOLOGY: A SURVEY OF RECENT BOOKS

BARD R. FERRALL*

FIREARM LEGISLATION

BERNARD E. HARCOURT, ED., *GUNS, CRIMES AND PUNISHMENT IN AMERICA* (New York, New York University Press, 2003) 436 pp.

While gun control is often treated as a simple yes/no issue, the debate has become highly polarized. The essays collected here examine nuances in the different types and possible degrees of gun control. Important developments over the past forty years include: development of academic research expertise in the historic and current empirics and statistics of gun ownership and use (including empirical research offered to support the position that gun ownership by law-abiding citizens reduces crime); debate about the meaning of and history behind the Second Amendment; required pre-purchase background checks; offender-targeted legislation, such as enhancement penalties; aggressive social control initiatives related to illegal gun ownership; and negligence and public nuisance suits against gun manufacturers.

Several contributors discuss the cultural symbolism of firearms and how this directs the public debate. One contributor argues that the cultural debate has been masked behind econometrics and consequentialism, and that such debate should be made explicit. Another contributor examines the view of the firearm as the "great equalizer" among individuals in frontier history, and presents an alternative view that the Nineteenth Century revolver's use was primarily not by one individual citizen against another, but rather a means by which a few could kill many. Under this view, the revolver became a method of control against the enslaved and Indian populations, and was later used to control the social upheavals caused by immigration, urbanization and industrialization. Through analysis of inmate remarks at a youth detention center, the current meaning of guns to today's youth is sought by another contributor. These remarks reveal a strong desire for guns as a means to independence and self-reliance.

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Policy interventions of different kinds are considered by several authors. A program was developed in the 1990s, where locally seized guns were submitted to the ATF to determine how that gun was obtained. According to one author, the development of trace data under this program produced important data which can help form strategies aimed at preventing gun acquisition by criminals, identify and target the sources of criminally used guns, and help evaluate gun control legislation. This author also describes the data analysis process and presents the important findings, in addition to discussing the most effective policies based on these findings and the argument that gun tracing is useless because of widespread firearm availability. Another author looks at the "order maintenance program" adopted in the mid-1980s, which included a policy of aggressive stop-and-frisk to seize illegal handguns. The author concludes from the data that the program stigmatized individuals of minority groups, especially African Americans—the data does not support the official police response that African Americans experience a higher rate of stops because of witness and victim descriptions and the statistically higher involvement in crime among minorities. More successful methods of crime control may result from police and citizen interactions to prevent and control crime. Another author considers whether aggressive action to seize illegal guns, despite their public safety value can lead to racial profiling, and proposes that the burden of privacy violations from such policies may be equitably distributed if police are required to articulate the factors leading to the stop and search and if traits such as race or ethnicity are used as points of description similar to age, weight and height.

Other authors discuss the effects of recent federal legislation. *Brady* legislation is seen to have limited effectiveness, primarily because of the gun show exception of other secondary firearm transactions. According to one author, whether enhanced penalties for gun use in a crime deter criminals from using guns is not clear. However, such legislation may be altering relations among the federal branches and between the federal government and the states. This legislation may flood the prosecutorial docket, and prosecutors who choose not to pursue many cases would frustrate the purpose of this legislation. As a result, Congress may consider legislative mandates to prosecute, which would further alter the relationship between the legislative and executive branches. Also discussed as a reaction to this federal legislation is the *Lopez* case.

Several contributions discuss the Second Amendment. One author states that historical research into the proposal and adoption of the Amendment is incomplete, and a consensus view does not exist. When interpreting this Amendment, what importance should be attached to the national conditions and the conditions among the states at the time of adoption, and to the conditions at the time of adoption of the Fourteenth Amendment? Research into these issues is far from complete, this author states, and opinions that any particular Second Amendment history is standard or indisputable should not yet be accepted. However, the view that a standard history can never be developed should also not be accepted. Another author considers whether the Second Amendment is a collective or an individual right. The argument that since a state has a right to a militia, the Amendment could never be violated if it were construed to protect only gun ownership within a militia is specifically examined and renders the Amendment empty. This author argues that the Amendment should be read to provide federal power to regulate state militias, but also to prevent the federal government from completely disarming state militias. He then considers three

case histories which raised Second Amendment issues over federal control of state militias: (1) prohibition of militias in the former confederate states in 1967; (2) federalization of the Arkansas National Guard in 1957; and (3) 1987 legislation allowing the federal government to order state militias to active federal duty for training. Another author argues that the debate should not be diverted to questions about the history and text of the Second Amendment because the real question is what is the right of gun ownership in a modern democratic society.

Three authors look at the recent development of civil suits against gun manufacturers. Recently, numerous municipalities have brought public nuisance suits, alleging that gun manufacturers, through their marketing and distribution policies, facilitate access by youths and criminals to guns. One author summarizes the history of tort and discusses how plaintiffs have applied its elements to gun manufacture. The question should not be whether the defendant created or caused the nuisance, but whether the defendant contributed to it. The success of the suits has been mixed; some resulted in settlement, while the dismissal of other suits has been appealed. The final outcome of this development has yet to be seen. Another author considers the theory of "enabling torts," where a plaintiff, injured by a third-party criminal, may bring a negligence suit against a defendant based on the special relationship of the defendant to the plaintiff or to the third-party criminal, as applied to gun manufacturers. Courts generally have dismissed these cases on the theory that the causal element is not established against the particular defendant, since the criminal could have obtained the gun elsewhere. Products liability cases, brought by plaintiffs injured by third-party criminals using non-defective guns, against manufactures have also failed, with the courts ruling that the plaintiff's injury was not caused by a defect in the gun. The author argues that these courts have failed to recognize the rationale of applying strict liability when a particular negligence regime, because of enforcement failures, would merely transfer the risk from the plaintiff to some other potential plaintiff, while leaving general risk levels unacceptably high. The author argues that three of the conditions in the Second Restatement for strict liability are met in the instance of firearm injury by third-party criminals. Thus, whether the social benefits of gun manufacture exceed the foreseeable costs of injury by criminal use is made relevant for strict liability analysis. Courts have avoided this important question, the author argues, by misapplying strict liability theory.

Another author argues that study of the general crime-reducing benefits of individual gun-ownership has only begun. The courts are not structured to pursue this study through case-by-case adjudication; rather, the legislatures should undertake it. Citing data that jurisdictions allowing law-abiding citizens to carry guns in public experienced reduced robbery rates, and evaluating other data indicating that the possible presence of a gun in a residence has reduced burglaries and is incentive for burglars to enter residences only when the occupants are usually gone (thereby reducing the social costs of violent confrontation), the author calls for: (1) research into the "free-rider" benefits to non-gun owners flowing from the crime deterrent effects of ownership by some; and (2) cost-benefit analysis of gun ownership compared to other anti-burglary devices. While the presence of the Second Amendment indicates society has determined, independent of any empirical study, that some individual gun ownership is desirable, legislation and other social policies should be adjusted to reflect criminological and econometrical findings regarding the general social value of the crime deterring effects of individual gun ownership.

PENOLOGY

JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (New York, Oxford University Press, 2003) 278 pp.

Society will face difficult problems presented by the large numbers of prisoners who will be reentering society in the coming years. The prison system has grown over the past two decades, primarily because of a turn towards a highly punitive approach to criminal correction. Introduction of mandatory sentencing for many crimes, especially drug offenses, has swelled the prison population. Discretionary parole has been eliminated or curtailed. Without discretionary parole systems, developed knowledge about the factors associated with recidivism and the identification of good parole candidates presenting little threat of future dangerousness cannot safely be used to reduce the prison population. Thus, the prison population has remained large, and many of these prisoners recently have, or soon will, reenter society as their sentences end. The problem goes beyond mere numbers. Prior to their imprisonment, many lacked the education, employment skills, and social and familial connections, which would have aided in readjustment. Many also had a history of substance abuse. Little was done in prison to correct these problems, and reentering prisoners have the added stigma of a criminal record. These factors all correlate strongly with recidivism, and recent crime statistics, the author states, indicate recidivism is contributing to a rising crime rate. Unable to find employment or housing, and faced with the fact that information about their criminal record is widely available, many released prisoners migrate towards the lower income inner city, and drift into crime, drugs and gang activity. Some commit new offenses, and will be returned to prison with others who have technical violations surrounding the conditions of their release.

A new type of problem is presented by this "churning" from prison to the community and back: imprisonment is becoming viewed in some communities as a normal part of coming of age, and criminal law enforcement may lose its deterrent effect. The author argues that these problems are not inevitable, and presents many proposals drawn from existing programs shown to help reduce recidivism, including some that can be implemented almost immediately. Failure of the current prison population to undertake the rehabilitation necessary for successful reentry is the central concern. Few programs are now offered in prison, because of public antipathy to rehabilitative programs, the belief that they have not worked, the overall popularity of punitive measures, and restricted prison budgets.

Curtailed discretionary parole means few prisoners now have incentive to demonstrate attempts at self-rehabilitation. The data indicates that even when undertaken with possible parole as the motivation, rehabilitative programs reduce recidivism. The parole system has become largely supervisory; it now offers few adjustment services, even during the early stages of reentry, when the risk of repeat is highest. Assistance in basic issues such as finding employment and housing may be a cost effective method to reduce recidivism. The supervisory parole system may not effectively protect society because the level of supervision usually is not calibrated to the individual's threat of future dangerousness. Mandatory sentencing, with the concomitant end of indeterminate sentencing and conditional parole, means many prisoners are released simply because their sentence is over, with no supervision or conditions. Eliminating discretionary parole allows little participation of the victim in

the release and reentry process, and provides less protection for the victim than if conditions, such as no-contact rules, were placed upon release.

The author discusses alternative programs that different jurisdictions are pursuing, and presents a number of proposals to prevent the dangers to society that may result from the impending reentry of a large imprisoned population. She considers whether the highly punitive approach will be productive and whether it stems more from ideology than from the data. She also considers an empirical criminologist's response to the claim that rehabilitation was tried and failed, such as possible flaws in the studies cited to support the claim of failure. The examples of ongoing programs presented in this book, the author argues, indicate that while rehabilitation fails in some instances, global statements are not useful, and recent successes of the on-going programs described indicate that in many cases it may be the more cost effective approach.

