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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*

E. CHRISTIAN BRUGGER, *CAPITAL PUNISHMENT AND ROMAN CATHOLIC MORAL TRADITION* (Notre Dame, IN: University of Notre Dame Press, 2003) 281 pp.

The author examines papal pronouncements and doctrinal writings over the history of the Catholic church, and finds a consensus that the death penalty is a justified use of state power. However, in the past three decades, statements from Catholic church officials have strongly criticized the use of the death penalty, to the point that, according to the author, the Catholic church may be the leading institution in the world today opposing capital punishment. The author argues that this is not a sudden discontinuity, but is consistent with the deeper meaning of the church's teaching on the justification for punishment and on the circumstances when killing is morally permissible. The author also examined arguments by other philosophers on the purposes of punishment. These include retribution, defense of society (either through disabling past offenders or deterring future ones), reformation of the offender, vindication of the social order, and expression of moral disapproval. In the church's position, the author states, punishment must be grounded in retribution (i.e., in the injury and especially the blameworthiness of the offender). Improvement of society, however, remains an important consideration in determining the manner and level of punishment. A punishment, even if justified on retributive grounds alone, might not be justified if it does not improve society. The author also considers the church's position on killing in self-defense, in war, and in policing. Killing of the innocent is justified if it is the unintended, albeit foreseeable, consequence of an otherwise justified use of force. Proportionality, however, is a condition of justification—the use of force must be no more than necessary to achieve the purpose. Similar considerations apply to the imposition of punishment, and execution has been found a justified use of force by traditional church writers. It is distinguished, however, from justified killing in defense, because death is specifically intended; church writers have wrestled with the question whether the dignity of human life is thereby violated. The

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central answer came from Thomas Aquinas, who stated that some individuals have, through the wrongfulness of their acts, given up their own dignity. Social movements to abolish the death penalty began in the modern era, but church writing continued to support it through the middle of the Twentieth Century. Possible reasons for the change in church position include the mass killings in the world wars and distrust in the state's ability to restrain its capital power within justified instances. However, the most important reason for the change in official church position, suggests the author, is the recent development of liberal legislation allowing killing of innocent, especially abortion and euthanasia. While the church has not stated capital punishment as inherently unjustified, the author argues this would be consistent with its other teachings on punishment, justified killing, and the dignity of human life. His reasons include availability of more proportionate means to achieve the purposes of the death penalty, the difficulty in determining when a person has forfeited his dignity by crossing Aquinas' line and doubt of the necessity of capital punishment in maintaining the common good.

SCOTT CHRISTIANSON, *INNOCENT: INSIDE WRONGFUL CONVICTION CASES* (New York, New York University Press, 2004) 196 pp.

The author briefly presents the facts of several dozen individuals convicted and later adjudicated to be unreliable, insufficient and sometimes even false. Positive innocence has been shown after conviction in other cases. Arguing that the "presumption of innocence" has little real force in the minds of most of the participants (including jurors) of the criminal justice system, the author finds the general belief that any person arrested must be guilty of something to be a fundamental reason for erroneous convictions. Many of the convictions examined here, however, came from guilty pleas rather jury trials. Although an implied admission of guilt is often regarded as conclusive, this may be misleading. Beyond the fact that some who did plead guilty are later shown to be innocent, the author presents reasons to doubt some guilty pleas. The prevalence of plea bargaining, as well as the case-load burdens which discourage prosecutors, judges and even public defenders from carefully examining the facts, pressure accused persons to plead guilty to lesser offenses. Those not so pleading may often be tried on the maximum charge, and a convict maintaining innocence often has an especially difficult time in prison society. Parole is often delayed for those who will not acknowledge their guilt and participate in prison rehabilitation. The cases here are grouped around the salient reason for the erroneous conviction: mistaken identification, ineffective counsel, false confessions, official misconduct, perjury and other fabricated evidence. While forensics have been misused, they have also been instrumental in establishing innocence. States do not maintain data bases of erroneous convictions, and media attention to the issue has diminished after the September 11 events.

JOHN D. BESSLER, *LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA* (Minneapolis, MN: University of Minnesota Press, 2003) 307 pp.

The author argues that the death penalty does not reduce the murder rate; rather, as Minnesota's historical experience presented in this book indicates, use contributes to

an atmosphere of violence. Under territorial law, execution was automatic for premeditated murder, and public hangings were well attended. Along with individual murders were a number of lynchings. Attempts to prosecute members of lynch mobs met with limited success. The state saw the largest mass execution in U.S. history when thirty-eight Dakota Sioux captured in an 1862 Indian uprising were treated as criminals, rather than prisoners of war, and sentenced under federal law after only brief consideration of individual cases. One of the few women executed in the United States was convicted in 1860 for the poisoning of her husband. (Debate continues to this day whether he died from murder, suicide or sickness.) The 19th Century movement to abolish the death penalty resulted in an 1867 Illinois law which provided life imprisonment as an alternative to execution, and an 1868 Minnesota law which made life-imprisonment the presumed penalty for first degree murder. An affirmative vote by the jury was thus required for a death penalty, and, although the law was frequently criticized, few executions occurred thereafter in Minnesota. The executions that were performed remained public, well attended and sometimes boisterous affairs, until 1888 when Minnesota joined a growing trend of requiring executions to be performed in private before a strictly limited number of observers. The Minnesota law, dubbed the "Midnight Execution Act" because it set midnight to dawn as the time for hanging, also made publication of the details of the execution, other than time and place, a misdemeanor. The last provision was criticized and often violated, but not actually tested until 1906. Ruling on a demur by three newspapers, indicted for publishing details of a botched execution, the Minnesota Supreme Court found a valid purpose for secrecy requirements, and that allowing newspapers to publish execution details would offset those benefits. The newspapers were tried and fined, but the facts of the botched execution had already been published, and the story contributed to the anti-death penalty movement of the progressive era. In 1911, the state eliminated the death penalty, as had several other states at the time. After World War One, the trend reversed, but Minnesota was remained one of the few states which had not re-instituted the penalty by the 1930's. Among the arguments advanced in favor of capital punishment, was claim that its absence would lead to extra-judicial executions, i.e., lynchings. However, the 1920 lynching of three African Americans in Duluth contributed to a national anti-lynching movement. By ending the death penalty, Minnesota has been able, in the author's view, to overcome its "legacy of violence," and this is an important reason for its relative low murder rate.

