

BOOK REVIEWS

The Law of Criminal Correction. By SOL RUBIN, with HENRY WEIHOFEN, GEORGE EDWARDS and SIMON ROSENZWEIG. St. Paul: West Publishing Co., 1963. Pp. xxv, 694. \$12.50.

The winds of change blow fierce through the criminal law. The Supreme Court leads a revolution in investigative and trial practices, and the spirit of this reformist enterprise, if not always the constitutional rules prescribed, matches the heightened interest of judges throughout the country in their onerous task of sentencing convicted criminals. It likewise blends well both with a change in the lawyer's traditional contemptuous attitude to criminal law practice, and with the widespread appreciation by political forces in the community of the need for more rational and effective methods of preventing and treating crime. Even the teacher of criminal law is no longer regarded as confined to unseemly, unimportant and intellectually unsophisticated studies; he is grown almost academically respectable. One could, therefore, hardly select a more propitious time for the publication of what purports to be the definitive commentary on an emergent area of scholarship in the criminal law—the law of criminal correction, embracing therein the legal aspects of sentencing, correctional treatment, and release procedures for adult and youthful offenders. Expectations are high and the disappointment is the greater; though this is an important and useful source-book, it is an inadequate commentary.

Mr. Sol Rubin, Counsel of the National Council on Crime and Delinquency (NCCD), is the author of thirteen of the nineteen chapters which make up the seven hundred pages of text. Professor Henry Weihofen provides chapters on the disposition of the mentally ill, pardon and other forms of clemency, and "punishment and treatment." Judge George Edwards, Jr. of the Sixth Circuit, who when this book was published was Commissioner of the Michigan Police, wrote two chapters—one on cruel, unusual and excessive punishments, the other on parole. Mr. Simon Rosenzweig of the New York Bar is author of the chapter on the fine. The entire work, Chief Judge Alfred P. Murrah affirms in the foreword, "represents the thinking of the Advisory Council of Judges" of the NCCD.

There is a cleavage of method and style between the chief author and his three colleagues. All present a great deal of relevant information which, on the subjects they treat, will remain of continuing value as a

point of first reference; but whereas the latter seek to adumbrate and analyze the broad issues on each topic they discuss, Mr. Rubin rests content with presenting a hodge-podge of facts combined with aggressive, one-sided argument. This reviewer's difficulty is that whereas I share many of his opinions and prejudices, I regret their partial and overstated presentation. And it is like reviewing two books—one by Mr. Rubin, one by the other three contributors.

Comment on the chapters by Judge Edwards, Professor Weihofen and Mr. Rosenzweig can be brief. They are excellent studies in important areas of the law of criminal correction. In particular, chapter 14 by Professor Weihofen on the "Disposition of the Mentally Ill" is a model of legal analysis and well conceived advocacy of reform where reform is much needed—the treatment of the criminal insane, who are too frequently seen as doubly stigmatized and too frequently held in more rigorous and unseemly custodial conditions than those we accord either to the criminal or to the insane. It is not only in the underdeveloped countries that one can find better psychiatric facilities in some prisons than in nearby institutions or wards for the criminal insane.

Two themes pervade Mr. Rubin's chapters: too many criminals are imprisoned in the United States and for too long; the world is divided into the punishers and the treaters, the former to be resisted and the latter enthusiastically supported. By these touchstones he tests a wide variety of complex legal and social issues; they are insufficient for the purpose and lead him to frequent overstatement. With the broad general thrust of both, few would disagree; but as he manipulates them they have the quality of stereotypes and tend to impede scholarly analysis.

The first theme emerges in the historical introduction—American prisons are overcrowded and ineffective, probation and parole must be developed to cut into their population, and sentences of imprisonment must be shorter since "no treatment programs in the prison can be practical without markedly reducing their great populations, and this means curtailing the number of long-term prisoners."¹ By this touchstone he criticizes current sentencing practices,² the Model Penal Code sentencing provisions,³ the efficacy of appellate review of sentencing,⁴ the neglect of the suspended sentence,⁵ recidivist statutes,⁶ and supports "good-time"

¹ P. 41.

² P. 141.

³ P. 142.

⁴ P. 149.

⁵ Pp. 168-72.

⁶ P. 401.

laws,⁷ special treatment provisions for youthful offenders,⁸ and bargaining between prosecution and defense.⁹

The suspended sentence and probation receive more spacious and detailed consideration than is given to imprisonment; indeed, the important and continuing problem of devising more rational and effective prison programs is given scant attention. It is as if Mr. Rubin has despaired utterly of custodial correctional treatment. However, even concerning probation there are some surprising omissions—the topic of probation hostels is not discussed, nor is mention made of the important Second Report of the Departmental Committee on the Probation Service,¹⁰ with its broad plan for the unification and rationalization of probation and other correctional services.

The second pervading theme is Mr. Rubin's acceptance of the stereotype dichotomy between punishers and treaters, between the hard-nosed and the bleeding-hearted. His repudiation of the former leads him to excess. Thus his sweeping denunciation of reformatories which, he alleges, "have turned out to be a dismal failure"¹¹ is supported by a footnote which guides the reader to a paragraph¹² which is a series of statements concerning the duration, maximum and minimum, of the period of commitment to reformatories in various states but which contains not a word concerning the success or failure of this method of treatment of youthful offenders. Likewise, his reformist zeal leads him to intemperate criticism of the United States Supreme Court for not holding that capital punishment is a "cruel and unusual punishment" prohibited by the eighth amendment;¹³ though a convinced abolitionist, I regard such a criticism as unsophisticated and excessive.

The presentation of the historical development of this area of law reveals the differences of methods in the authors of this book. Mr. Rubin's colleagues start their chapters by brief presentation of the historical antecedents to the contemporary problems they discuss; thus Mr. Rosenzweig's survey of the use of the fine in earlier and other societies is used to demonstrate the present lack of consistent rationale and stable practice in the imposition of fines in this country. Likewise, Mr. Rosenzweig offers an illuminating comparative study of the problem of

7 P. 313.

8 P. 445.

9 Pp. 68-69.

¹⁰ Departmental Committee on the Probation Service, *Second Report*, CMD. No. 1800 (1962).

¹¹ P. 433.

¹² Pp. 143-44.

¹³ P. 339.

imprisonment in default of fine, revealing the way this issue is handled in a diversity of cultures as a means of achieving defined social purposes. By contrast, in chapter 1, "Historical Development," Mr. Rubin aims to summarize in thirty-nine pages the entire history of the criminal law and criminal sanctions—it cannot but be the superficial encapsulation of dogmatic propositions that it is. The history of the death penalty is presented in five paragraphs, of imprisonment in three, of transportation in two. "The social world of ancient man was made up of separate, insulated groups, each held together by obedience to the male parent."¹⁴ O Malinowski! O Mead! What of the tribe, extended family systems, the clan and kinship groups? Mr. Rubin pursues his oversimplified theme and suggests that whereas in modern penal codes punishment is publicly administered by officials of the state, "in the ancient community the penal law is the law of wrongs—torts, injuries to individuals—to be compensated for, rather than punished."¹⁵ What of banishment, exclusion from the tribe or kinship group, on which life itself depended, by collective decision of the tribe or of its elders? The truth is that the modern classification of torts and crime, reasonably clear to us on procedural and jurisdictional grounds, is applicable only with difficulty to the circumstances of earlier ages.

There is an appendix to chapter 1 of six pages setting out the Laws of Aethelbert (A.D. 600), much of which is incomprehensible other than to the trained mediaevalist. For example, "Let the 'weg-reaef' of a 'theow' be 111 shillings"¹⁶ passes unexplained!

One annoying and manifest defect pervading Mr. Rubin's chapters is the cavalier, or rather the curmudgeonly, treatment accorded the American Law Institute's Model Penal Code. To this reviewer, that Code is the highpoint of American scholarship on the law of criminal corrections; one has to look back to the nineteenth-century codification efforts of Sir James Fitzjames Stephen and his colleagues to find a comparable effort to bring reason and symmetry to the criminal law, and Professor Herbert Wechsler and his team stood on the shoulders of those nineteenth-century codifiers and greatly improved on their work. The ALI Proposed Code should have been a focal point of analysis throughout; it is properly treated by the other three authors but curtly dismissed by Mr. Rubin. For example, Mr. Rubin offers this description of the Model Penal Code:

Although most of the Code is a recodification of the substantive law of crimes, it deals also with sentencing and organization of

¹⁴ P. 4.

¹⁵ *Ibid.*

¹⁶ P. 48.

correctional services. Unfortunately these provisions also seem to be a "recodification"—that is, they adopt as a model the essence of the punitive features commonly found in existing sentencing laws, particularly in the large industrial states, often as backward penologically as they are progressive industrially. If these provisions are enacted, those aspects of sentencing that make for longer terms will be retained and expanded.¹⁷

In a footnote thereto Mr. Rubin cites one of his own earlier articles in which he developed the argument that the Code provisions would extend the general duration of imprisonment, but he fails to cite Professor Wechsler's devastating reply.¹⁸ The same omission, which can hardly have been an oversight, is to be found on page 142. The Model Sentencing Act of the Advisory Council of Judges of the NCCD is given more generous treatment throughout; this is understandable in the light of the auspices under which *The Law of Criminal Correction* is published, but the neglect of the scholarship and creativity of the Model Penal Code remains a striking and disturbing defect.

The treatment of comparative material on prison programs is inadequate and occasionally misleading. Thus, it is said that "the United Nations Economic and Social Council has approved a statement of standard minimum rules for the treatment of prisoners."¹⁹ These rules are then discussed in one paragraph, though they are the product of protracted effort of the world's leading prison administrators deliberating at a series of international conferences stretching over forty years and influencing, through the political leverage that the Standard Minimum Rules give to prison administrators, improvements in correctional practice in many countries and states. Mr. Rubin then refers to "other UNESCO rules" which do not exist, UNESCO being, of course, a quite different organization.

How, then, can one fairly judge this book? It is easy to point to its defects of omission and prejudice; yet it remains a major and important effort to synthesize an emergent field of legal studies, the administrative law of corrections. It is a highly useful book of reference, but it would be dangerous to rely too heavily for balanced opinion on those chapters written by Mr. Rubin. It is a book to be frequently consulted, particularly by those whose reading and experience in the field will insulate them from too easy a conversion by Mr. Rubin's simplistic analysis.

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¹⁷ Pp. 684-85.

¹⁸ Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465 (1961).

¹⁹ P. 285.

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