Book Review: Sentencing, by Clayton C. Ruby

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Dans la troisième partie, les professeurs Whyte et Lederman présentent le droit canadien des libertés publiques par le biais de textes bien choisis portant sur l'égalité devant la loi, les libertés de parole, d'association et de religion et certains droits collectifs en matière d'éducation et de langue. Le tout se termine sur un commentaire relatif à la validité de la Loi québécoise sur la langue officielle.10

Le recueil des professeurs Whyte et Lederman est assorti d'un index sélectif et succint, donc utile. En revanche, nulle bibliographie générale. S'agissant d'un ouvrage didactique, celle-ci n'avait pas à rechercher l'exhaustivité. Bien au contraire. De là à ce qu'elle n'existe pas du tout, il y a cependant une marge. Il nous semble que les étudiants auraient mérité d'être informés des principaux ouvrages généraux contemporains existant en la matière au Canada. D'ailleurs, la qualité des notes bibliographiques fournies tout au long du recueil semble fort inégale. Dans les chapitres historiques, par exemple, le choix semble même parfois friser l'anarchie.

Au total, le recueil de droit constitutionnel préparé par les professeurs Whyte et Lederman est de qualité. Malgré les circonstances de son avènement, dont nous avons indiqué le côté négatif, il méritait certes d'être publié. Il est fort utile de l'avoir sous la main. Il reste au Canada anglais à se donner le véritable traité contemporain de droit constitutionnel dont il ne dispose toujours pas.

H. Brun*


Imagine a system of criminal law without sanctions — not just the criminal law in the statutes, law reports and textbooks, but the whole vast enterprise of investigations, trials, and adjudications numbering in the tens of thousands every year. Imagine the spectacle of a system constructed exactly as it is, complete with elaborately garbed actors in elaborate surroundings, solemnly arguing about and deciding weighty issues of innocence and guilt and shades of guilt, without then doing anything about it — a system in which, after the verdict (whether guilty or not guilty)

10 L.Q., 1974, c. 6 (Bill 22).
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is pronounced, all the participants including the person charged go home, the worse only for wear.

What strikes one as strange, indeed ludicrous, about such an image, is its utter pointlessness. This is because it is the criminal sanction, the "sentence", which gives meaning to all that comes before it. Indeed, considering the number of guilty pleas and the number of trials whose only purpose is to determine whether the accused is guilty of the offence charged or merely of some lesser offence, it is a fair hypothesis that in most cases the only real question is what the sentence is to be. Yet sentencing is given less attention in legal education and scholarship than virtually any other aspect of criminal law and procedure. And the inevitable result of this is that lawyers and judges are ill-equipped to deal with an integral and crucial aspect of their work, one which has profound effects on the lives of the tens of thousands of individuals every year. This unpreparedness is painfully obvious to anyone if only from the change in tone effected by a conviction in a criminal trial: from "respectful submission" to helpful suggestion and from skilled legal reasoning to unskilled moral and social theorizing.

The neglect of sentencing in the law schools, journals and texts has been due in no small part to the fact that it is almost perverse to speak of a "law of sentencing" at all. Sentencing is still in the pre-rule stage of principles and policies. Judges are given a wide "discretion" among and within an increasingly wide option of penal measures. The only restraints on this discretion are the statutory maxima and (rarely) minima and the powers of courts of appeal to vary sentences which they consider "unfit". The only guidance that is given for the exercise of this discretion, apart from the purely nominal guidance of most of the statutory criteria for choosing between alternative measures, is what might be gleaned from elliptical appellate opinions which enunciate ball-park principles covering the whole panorama of possible justifications for criminal law. The matter has been further complicated by the reluctance of the Supreme

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1 The Criminal Code, R.S.C., 1970, c. C-34, s. 645 (1).
2 Ibid., s. 614.
3 For example, in order to "discharge" an accused, the court must consider such a measure to be "in the best interests of the accused and not contrary to the public interest", ibid., s. 662.1 (1); and the discretion to suspend the passing of sentence is to be exercised "having regard to the age and character of the accused, the nature of the offence and the circumstances surrounding its commission", s. 663 (1).
Court of Canada, prior to its decision in *Hill v. The Queen*, to intervene in sentencing matters, so that it was more proper to speak of ten sentencing systems than of one. It is still anybody’s guess as to how severe a limitation on its jurisdiction the Supreme Court meant to impose when it said that its instant decision “implies no departure from our rules of never entertaining an appeal concerning the fitness of a sentence”.

Out of all this confusion comes Clayton Ruby’s big, expensive book, which he has misleadingly entitled *Sentencing*. I say “misleadingly” because the book has little to do with the practice of sentencing and is mainly concerned with the law of sentencing as it appears in the reported opinions of courts of appeal on sentencing appeals. The two — practice and law — should not be confused. For while there is some warrant for assuming that the more or less precise rules of criminal law and procedure are applied as written, the legal imprecision and discretion which give wide scope to individual judicial inclination make such an assumption naive where sentencing is concerned. It surprised nobody when Hogarth demonstrated this empirically some years ago, though some of his findings were, no doubt, embarrassing to those who like to depict the practices of criminal law enforcement under the rubric of “criminal justice”, that is to say as fair and impartial. One notes, for example, Hogarth’s finding that the length of a sentence of imprisonment could be predicted five times more accurately by knowing a few things about the judge and nothing about the “legal” facts of the case than by knowing everything about the case and nothing about the judge.

Apart from the odd unsupported generalization from the narrow confines of his own Toronto practice, Ruby’s only

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5 *Ibid.*, at p. 336. In *Hill*, leave to appeal was granted on the question of whether an appellate court could *increase* sentence on an accused’s appeal in the absence of a cross-appeal by the Crown.


7 *Hill v. The Queen*, supra, footnote 4, at pp. 348-351.

8 For example, we are told confidently on p. 92 that “[i]n Canada there has *never* been any difficulty, as a matter of professional courtesy and of fairness to the accused, obtaining from the Crown or the police a copy of the criminal record of the accused”. Emphasis added. Yet a recent nationwide survey of the criminal bar conducted by the Law Reform Commission of Canada shows this to be somewhat of an overstatement: Discovery in Criminal Cases; Report on the Questionnaire-Survey (1975), p. 104.
gesture toward the actual practice of sentencing is the twenty-five page Appendix entitled "Criminal Statistics 1962-1971". However, the point of including all these figures is difficult to discern, unless they are meant to demonstrate by juxtaposition the meaninglessness of much of what is contained in the last chapter on the "Range of Sentence". This chapter diligently plots the parameters of the sentences for various offences as they appear in the reported cases. But what good is it, for example, to point out on page 448 that the "usual range in reported cases" of offences relating to currency "appears to be between six months and six years, or possibly longer" when the statistics on page 496 show that in 1971 almost sixty percent of those convicted of such offences received either suspended sentences, fines or terms of imprisonment of less than six months?

One does not suppose that Ruby merely intended to embarrass himself by the statistics in his Appendix. However, in their current form they cannot really be used for any other purpose. In the first place, they are fatally incomplete. Ruby has carelessly neglected to include in his distribution of sentences of imprisonment, any reference to the distribution of penitentiary sentences, not to mention indeterminate reformatory sentences, which, unfortunately for him, appear in separate tables in the publication on which he relies. The omission renders somewhat absurd his reproduction of the breakdown of determinate prison sentences of under two years. The reader is specifically cautioned against concluding from them that the longest sentence handed down in 1971 for such offences as manslaughter, rape, robbery, and so on was less than twenty-four months imprisonment.

In the second place, Ruby has left the statistics exactly as they appear in the Statistics Canada publication, namely in absolute figures with separate years on separate pages, making them unusable without the aid of a calculator. Would it have been so difficult for him to have calculated the percentages himself and to have presented the whole twenty-five page span of ten years of statistics in a couple of neat, simple and helpful tables?

So Sentencing will enhance no one's understanding of the practice of sentencing. Its only really serious concern is with the law of sentencing, mainly as laid down by the various courts of appeal. Of course, for those of us who do not have access to

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an up-to-date version of either Martin's or Carswell's edition of the Criminal Code, Ruby has also thoughtfully reproduced page after page (about eighty, all told) of the original. These provisions are usually presented to us unsullied by any sort of comment or analysis except where they have found their way into the reported cases. Many of these provisions are already out of date and this is not always indicated. Where it is, the indication comes in the form of a laconic note to the effect that the just extensively quoted sections have just been extensively amended. Naturally, it is not Ruby's fault that statutes tend to be amended, but it does reflect on the wisdom of reproducing instead of summarizing or merely referring to the provisions.

We do get a reasonably thorough and (so far as one can tell) accurate description of many of the reported sentencing cases, and this makes up most of the book. Unfortunately, Ruby's "analysis" is completely bereft of any form of synthesis or even coherent organization, let alone insight. Why, for example, he chose to divide up the sentencing "factors" mentioned by appellate courts into aggravating (Chapter 6: "Aggravating Factors"), mitigating (Chapter 7: "The Plea in Mitigation") and irrelevant (Chapter 8: "Matters that Are not Taken into Consideration on Sentencing") factors, with scattered chapters on the "Criminal Record" and the "Psychiatric Aspect of Sentencing" is beyond this reviewer's understanding. This fragmentation is especially puzzling in light of Ruby's apparent awareness of the more thoughtful formats used by Cross and Thomas to analyze English sentencing law. If Ruby had used Cross's elementary division of factors into those relating to the circumstances of the offence ("gravity"), the circumstances of the offender ("character") and other factors relating to neither ("the avoidance of a sense of injustice and the exercise of mercy"), his readers would not be forced to scurry between three or more chapters in order to discover the law regarding such unified matters as the relevance of the character and behaviour of the victim, the

10 See Ch. 16: "Sentence of Death".

11 The only significant omission is the rather inexplicable failure to even mention the "preventive detention" provisions of the Criminal Code, supra, footnote 1, Part XXI.


15 Dealt with in Ch. 6 under "Characteristics of the Victim", Ch. 7 under "The Victim" and Ch. 8 under "Character of the Victim".
circumstances surrounding the plea, and so on. Not only would such an approach have made the book more convenient to use (though certainly less convenient to write), it might also have contributed to the rational criticism and, perhaps, development of sentencing law.

In the insight department, the most Ruby seems to be able to muster is the inspiration that the "central test" of sentencing law is that "the sentence be appropriate to the offence and the offender". This utter banality does double duty for Ruby as at once the "central test" to be discerned beneath the welter of cases and as his main critical perspective on the sentencing system. He realizes neither that this is scant improvement on the statutory concept of "fitness" nor that the crucial question is *how* a given sentence is or can be justified as "appropriate" or "fit". Is it retribution that the courts are after, or is it utility? Is it general deterrence or special deterrence? Control or rehabilitation? Not only does Ruby not know the answer, he does not even know that he is supposed to be asking the question. In short, he has made the elementary error of mistaking conclusion for test.

This absence of any framework for a critical analysis of sentencing law is the book's most obvious defect. The first chapter ("General Principles of Sentencing") might have — should have — provided such a framework, but on Ruby's own admission he did not write this chapter but "[gave] it up as hopeless". Whoever did write it, it is mostly the gospel according to Herbert Packer, that is to say the conventional criminological and theoretical wisdom of liberal penology vintage 1968. Anyway, it reads more coherently and generally better in the original, and has moreover, been overtaken by a decade of intensive study of the penal system on all fronts.

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16 See section c. 7(b) of Ch. 3, sections P. and V. of Ch. 7 and section K. of Ch. 8.

There are also such curiosities as the discussion under "Procedure" of a case (McLean, at pp. 44-45) in which a court of appeal took oppressive cross-examination by the Crown counsel into account as a mitigating factor. Unless this is meant to teach Crown counsel the impropriety of oppressive cross-examination during trial, one would think the proper place for such a discussion would be under "The Plea in Mitigation".

17 P. 135 and *passim*.

18 P. viii.

So most of Ruby's criticism is of the popularistic, shoot-from-the-hip variety, much of which, when it is not contradicting itself, contradicts much of what can be found, ironically enough, in Chapter One. For example, on page 125 Ruby criticizes the retributivist view that imprisonment for offences in breach of trust "is simply by way of punishment for their wrongs committed" as being "perhaps outdated today". According to Ruby the "true rationale seems to be that it is important for society as a whole that one who acknowledges a trust should be held to it, and that deterrent penalties therefore become the means whereby the criminal law enforces that trust". Yet on page 131 we find the following opinion: "There can be no doubt that most crimes imply a weakening of the fabric of law and deserve punishment as such." This time, Ruby does not apparently think retributivism "outdated". And to cap it all off, if we compare the deterrent "rationale" with the (incorrect) statement on page one that "the history of the application of our present sentencing concepts discloses that nothing we do has any significant effect on the problem of crime in general", what do we get? Will the real Clayton C. Ruby please stand up!

Outstanding among the contradictions in this book is Ruby's defence of the sentencing status quo so devastatingly criticized by the only post-1970 work referred to in Chapter One, Struggle for Justice. The burning issue in sentencing is discretion. It is everywhere in retreat and for good reasons. Discretion, everybody agrees, inevitably results in unequal treatment; it is a mask for class and other prejudice (in the words of Struggle for Justice, it allows one "to do the publicly unmentionable" and "to protect one's own kind"); and it is based on faulty criminological premises about the possibility and justifiability of "individualization". Yet, oblivious to all this and with characteristic obscurity, Ruby gives us the following:


20 American Friends Service Committee (1971).
21 See the sentencing references in footnote 19.
23 P. 424.
It is submitted that though our system permits greater divergence in sentence, it retains the undoubted virtue of placing the particular offence and the particular offender first in priorities. This should help to keep sentencing human and minimize any tendency to devolve into a mechanical enterprise. It would be wrong, in our sentencing system, to make any single factor more important than the principle that the sentence be appropriate to the particular offence and the individual offender. Sensitivity and flexibility in sentencing requires that the approach to be taken should flow from the facts of the case and not from any single rule, however useful or certain that rule may be.

Sentencing is "human" all right, but this kind of humanity we can do without — unless "we" is restricted to judges, lawyers and others beyond the reach of legalized oppression.

There are several minor annoyances in this book which should not escape mention. Not least of these is Ruby's curious brand of sexism. Of course, he goes out of his way to use the de rigueur "Ms." whenever he encounters a female offender, but the point is that he does not afford the same courtesy to male offenders, whom he is quite comfortable in designating by their untitled surnames. So, on the same page that "Ms. Luther" does this, "Robinson" does that; and on a page which deals with sexual disparity in sentencing, we receive a gruff introduction to crooks "Crosby" and "Hayes" in the same paragraph where we meet the delicate "Ms. Potruff". Of course, wherever possible, Ruby indulges in the more conventional sort of sexism which uses "man" to mean person.

Stylistically, Sentencing is simply awful. The unbelievable number of typographical (spelling?) errors apart, we are treated to such bons mots as "[a] popular metaphor has it that 'ignorance of the law is no excuse'." The book is characterized by sheer sloppiness in writing as well as in thinking. As examples of the former, one notes the confusion engendered by the phrase "in that same case" on page 106 and the leap through time made

24 P. 107.
25 Pp. 35-36.
26 E.g., p. 181 ("poor man... man of means") and p. 356 ("the victim of crime has been the forgotten man in criminal law").
27 P. 160, emphasis added. "Metaphor" apart, "popular" is rather a strange way to characterize an ancient legal maxim enshrined in the Criminal Code. Note also this tortuous sojourn into etymology: "The term restoration has its origins in theology where it is a term equivalent to restitution; and both terms are used to indicate the process whereby something taken from another is returned or restored to him." P. 356.
28 "We have seen that 'in ordinary cases' the fact that someone is suffering from mental disorder should not influence the court to impose a higher sentence. In that same case an exception was noted for sexual crimes...."
by McClennan J.A., on page 309 ("He emphasized....He also accepts"). As examples of the latter, on page 88 there is Ruby's blithe acceptance of the distinction without a difference between increasing a sentence and refusing "to extend leniency" on the basis of the offender's criminal record and also, on page 29, his logic-defying attempt to deduce from the fact that Part II of the Narcotic Control Act (civil commitment of "narcotic addicts") has not been proclaimed in force, that the courts, in the exercise of their ordinary sentencing discretion, have no legal justification for incarcerating convicted drug-users at least partly for the purposes of cure.29

'Sentencing' is also rather offensive for a tone that varies between complacency and obsequiousness. For example, it seems to be Ruby's opinion that the now notorious abuses of the "plea bargaining" system30 are overwhelmed by the more usual "frank exchange of information between Crown counsel and defence counsel, in the best traditions of the Bar".31 And where most of the legal texts that I have come across are concerned at least partly with analysis for the sake of rational criticism, Ruby states his purpose to be "to set out and analyze principles so that more

29 Sloppy is also the best word for many of Ruby's excursions beyond the realm of sentencing and into penal measures. For instance, his claim that there is an essential dissimilarity between Canadian and British practice relating to the parole of offenders sentenced to life imprisonment (p. 109) is simply wrong. See D. J. West, Parole in England: an Introductory Explanation in West (ed.), The Future of Parole (1972), p. 18. Similarly false is the statement on p. 62 that "banishment...has never been part of the law of England nor of Canada". Ruby seems to have merely accepted without investigation an argument made by counsel, but by no means accepted by the court, in R. v. Fuller, [1969] 3 C.C.C. 348, at p. 350 which was based on a misinterpretation of a passage from Stephens' Commentaries (16th ed., 1914), vol. I, p. 91. For the correct view, see W. Holdsworth, A History of English Law (1938), vol. XI, p. 556 and J. Alex. Edmison, Some Aspects of Nineteenth-Century Canadian Prisons, in W. T. McGrath (ed.), Crime and Its Treatment in Canada (2nd ed., 1976), pp. 351-353.


31 P. 72.
effective submissions can be made with a view to assisting the sentencing judge".32

Admittedly, these are minor points. More important is what I conceive to be the overriding intellectual failure of this work. We are given a clue to it by the very first line of the preface:

This book contains everything about sentencing that I always wanted to know and never bothered to look up.

The point is that there is more to "knowing" than merely "looking up". And until Ruby learns this and abandons cutting and pasting for some hard scholarship, his work in this field will continue to be a waste of time and money.

MICHAEL MANDEL*

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32 P. vii.

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