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BOOK REVIEW

Law & Society REVIEW

The death penalty and sex murder in Canadian history. By Carolyn Strange. Toronto: University of Toronto Press, 2020. 381 pp. $60 hardcover

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Scholarship on the death penalty has often focused on executions, and what the "spectacle of the scaffold" reveals about the functions of the death penalty in terms of political authority and social control. The discretionary power to grant mercy may be a less dramatic topic, particularly when it is exercised by a group of politicians acting with the advice of civil servants. The focus of *The Death Penalty and Sex Murder in Canadian History* is on bureaucratic discretion, and how mere commoners, elected to Parliament, conducted file reviews and opted to spare a portion of condemned prisoners from death. The leading historian of Canada's criminal justice past, Carolyn Strange concedes that the Canadian administration of capital punishment is a "drab remnant of the customs followed in pre-modern times, when kings and queens exercised the prerogative of mercy personally" (p. 9). The executive's review was often "opaque and unspectacular," though it was just as consequential as in ancient times (p. 10).

In the history of post-Confederation Canada, over 1500 persons were sentenced to death before capital punishment was formally abolished in 1976. While the death penalty was automatic for murder during these years, 1873–1966, every condemned prisoner was granted automatic executive review. The power to grant mercy was formally wielded by the monarch's representative—the Governor General—but cabinet recommendations were invariably followed. Strange's central, fascinating contribution is to unveil the "invisible operatives in the machinery of capital justice" (p. 7). This is the first study to examine all 61 cases in which a capital sentence was imposed for "sex murder": homicides that involved rape or sodomy, as well as killings motivated, in the eyes of contemporaries, by perverted sexual desires or attempted assaults of a sexual nature (p. 6).

It follows that this is a book about the emotions of the elite as well as the emotions of the crowd. Strange takes us inside the cabinet chambers, as Ministers "gathered around a large table, puffing tobacco and shuffling through papers as they considered capital cases amidst their other agenda items" (p. 9). Sex murderers were the most likely (63.9%) to have their capital sentences carried out—higher than other male murders (48%) and higher than the armed robbers whose offenses were marked by the aggravating features of planning and the use of weapons (54.3%). The contents of the capital case files make clear that "the executive was not aloof from the public's disgust toward sex murderers" (p. 15). Judges, bureaucrats and cabinet Ministers would endeavor to publicly dissociate themselves from their vengeful fellow Canadians, but the shock, anger and revulsion triggered by the facts of these cases affected their analysis too.

This text adds nuance to work showing that Indigenous and Black Canadians, along with Francophones and immigrants from non-English backgrounds, were executed more frequently in the Canadian experience with capital punishment than white Anglo-Celtic persons (Avio, 1987 and Avio, 1988). Of the 39 men executed for sex murders, four were Indigenous, two Black and one Maritian. This is a small set of cases scattered over time, but a number of significant dynamics appear across cases. Much of the material shows how Anglo-Celtic convicts had the benefit of being approached by cabinet "on an individual basis." For others, "race-based notions of criminality prevailed" (p. 19). Members of religious groups were able to draw upon the resources of religious leaders to press for clemency. "Drifters" and the homeless lacked such options, but if an outsider killed another outsider that would not attract pressure to execute. In the case of Indigenous and

Black convicts, there was often little in the way of a campaign against clemency, but that was simply because it was assumed—rightly—that the law would be left to run its course.

Though often explicitly and brutally racist, decision-makers were not influenced by race alone. In the confluence of factors behind commutations, Ministers were sensitive to the types of killings at issue and by the status and vulnerability of victims. In case after case, Strange assembles the assumptions that went into the question of who deserved to have their sentence enforced. Decisions-makers were all white men, and they were overwhelmingly Protestant. The limits of their sympathy are revealed as they examine the actions of men drawn from outside of their privileged groups, particularly where such defendants have no respectable petitioner for mercy.

Strange has long been interested in how refined sensibilities about pain and suffering can coexist, albeit uneasily, with rationales for severe bodily punishment. She has tracked the jarring fact that Canada retained the death penalty well into the twentieth century, alongside the rise of more modern penal theories. Public hanging continued as elites expressed their "elevated sensibilities" repeatedly through disapproval of whipping women, inquiries about the degree of pain and suffering caused by corporal and capital punishment, and disgust at tales of incompetent hangmen (Strange, 2001). Strange has shown how discomfort does not necessarily or immediately produce legal change; the ways that we justify, challenge, evaluate and attribute meaning to modes of punishment can shift even as penal policy and practice remains unaltered. Here, Strange's narrative arrives at the 1960s movement to abolish capital punishment, tracing the forces in favor of abolition but also how the sex murders "tested politicians' resolve" to end the death penalty (p. 225). Many Canadians will have forgotten the intensity of the abolition debates, and that the outcome was far from assured.

One central theme in the book is the rise of psychiatric expertise in criminal trials, even as legal and political actors persist with a strict and narrow understanding of criminal responsibility. Over time, abolitionists focused more on the question of root causes and the ability to treat or cure sexual aggression, but disagreement over psychological diagnoses and the "gulf between legal and medical interpretations of criminal responsibility" remained (p. 231), as it does today. Cabinet ministers resisted the idea that the sex murderers might be mentally ill or incapable of resisting psychological impulses. They "carried the M'Naghten rule into deliberations," despite the unfettered nature of executive clemency (p. 18).

Wrongful convictions loom large, and on this topic, Strange is again interested in the lofty claims of elites, then and now, who extol the virtues of Canadian criminal justice. Certain things today do not resemble the appalling features of the historical cases: Canada has state-funded legal aid, appeals on matters of fact and law, the procedural protections of the *Charter of Rights and Freedoms*, and more fair-minded and representative judges and juries. But science has yet to provide definitive answers concerning the culpability of persons affected by alcohol, drugs, trauma or mental illness, and the legal system has shown limited appetite for the answers we do have. As for sex murders—they are still punished by the most severe sentence available in Canadian law, even where they lack the standard indicia of planning and deliberation that is otherwise required for first-degree murder. Some things have changed, some things are changing slowly, and some things remain the same.

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