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The Nanny Visits the Birthplace of American Liberties

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The larger lesson of the nanny case is not about child abuse or sympathy for youthful offenders or TV in the courtroom. It is about the damaging effects of an archaic criminal code -- damaging not only to defendants and victims but to all of us. Yet several states and the federal system have codes at least as archaic as Massachusetts'.

This case first gained attention not because of the offense. Unfortunately this kind of baby death is all too common. We have large numbers of single, young, inexperienced mothers unhappy with their situation and with the little control over their lives, as was the case with this au pair. It is a situation that all too often leads to terrible frustration, which can boil over into a moment of anger.

While the case is common, the deranged response of Massachusetts law is not. It defines second degree murder so broadly as to include cases that few people would think merit the label 'murder'. To be liable for murder in Massachusetts, a person need not have an intention to kill -- a definition of murder common in other states. A person need not even be aware that her conduct creates a risk of causing death -- the typical definition of manslaughter in the U.S.. In Massachusetts, a person need only engage in conduct that a
reasonable person would think likely to cause death. In most states that is no more than the lesser offense of negligent homicide, a low grade felony.

Massachusetts law then compounds its error by attaching a 15 year term of parole ineligibility to all cases of second degree murder. Thus, what would be a low level offense in most states demands a minimum of 15 years in prison and the label of 'murderer' in Massachusetts. It is a statutory scheme just waiting to do injustice.

Now one might think that a criminal code so poorly constructed and so highly flawed would collapse under its own weight as the community is regularly offended by the injustices it wreaks. But enter Massachusetts' other wacky provision: a Massachusetts judge can substitute his or her own personal judgement of justice for that of a unanimous jury and the democratically elected legislature. The judge can reduce a jury verdict to a lesser offense on his on personal judgment. The judge need not think the jury did wrong in any way, or even that the jurors exercised poor judgment. The judge may simply disagree with them and decide, as here, that his view of justice suggests that a different offense is preferable. The judge simply may feel that the parole ineligibility term provided by the legislature is ill-advised, and circumvent it.

It is no accident that Massachusetts has both a misconceived criminal code and this bizarre right of judges to overrule legislature and jury, for it is only the wacky judge-as-god provision that keeps the pitiful criminal code from self-destructing. Vast judicial discretion is needed to save the system from its own bad law.
It does not take a rocket scientist to see a better way of doing business: get the
criminal code right, then oblige judges to follow it.

One might think of this case: no harm, no foul. In the end, Louise Woodward got
what she deserved (perhaps a bit less).

But, there is a very great harm in keeping alive such a jerry-rigged system. The
two wrongs canceled themselves in this case, but perhaps only because of the
international publicity. Is it so clear that every similarly situated defendant -- no matter
what race, class, or nationality -- would have gotten the same accommodation? Would a
similar charge against a poor, black, single mother from the local housing project have
gotten the same publicity? Without that publicity, would this judge have done the 180
degree turn on manslaughter? (Remember, it was this judge who withheld the
manslaughter option from the jury, although he now claims that this is just this offense
that justice demands. Were his jury instructions not intended to do justice?) [We know
that many Massachusetts judges think it improper to exercise this vast discretion they are
given to remake the law as they chose. What result if a defendant draws a judge with
these principles?]

Leaving a system to depend so much on the wide discretion of a single judge is to
lose the rule of law. We are a society that claims to be bound and judged by law, not
men. Yet in Massachusetts -- where they like to think of themselves as the birthplace of
liberty -- criminal justice lives by the rule of men, not law.
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